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Regulatory transparency, developing countries and the WTO

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Abstract: The tension in the WTO between adaptation to globalization and integration of developing countries is illustrated by one of the central norms of the regime, transparency. Experts believe democratic governance and efficient markets are both enhanced when autonomous administrative agencies are open about what they doing. WTO requirements for regulatory transparency may prove to be more straightforward for OECD countries than developing countries. The future of the WTO as a legitimate and effective international organization depends on finding modes of regulation accessible to all its Members. A review of how Canada, Brazil, South Africa, Thailand, and Uganda implement the transparency requirements of the agreements on basic telecommunications, and sanitary and phytosantitary measures found that regulatory independence and transparency are increasingly prevalent in telecommunications, but much less so in food safety. Transparency between countries appears easier than transparency within countries, and economic regulation seems easier to adapt to international norms than social regulation.

The future of the World Trade Organization (WTO) hinges on its ability to reconcile two contrasting political imperatives. The WTO must adapt to rapid globalization with the demands that places on the most sophisticated sectors of the advanced economies, and it must integrate developing countries into the trading system. The GATT of 1947 was a political compromise at the border between the need to end the managed trade of the 1930s with the equal imperative to preserve the social innovations of the New Deal era (Ruggie, 1983). Global structural change now requires that the rules adapt, and the requisite policy changes go far behind the border, yet accommodating regulatory diversity is still important. We can see this tension in discussions of one of the central norms of the regime, transparency. Many conceptions of the rule of law as administrative law (often called 'good governance') stress the importance of regulatory autonomy and transparency. This norm is based on the principled belief that democratic

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governance and efficient markets are both enhanced when participants know what is going on, and when administrative agencies have a degree of autonomy, or independence from political interference. The one is effectively a constraint on the other: administrators must be free to get on with the job, but openness is a constraint on abuse of discretion.

These ideas are now central to the politics of the WTO in three ways. The first is external transparency, meaning how well citizens in general and civil society organizations can see into the work of the organization, and the second is internal transparency, meaning the ability of smaller and developing country members to participate in the organization. My principal concern in this paper is the third mode, regulatory transparency, meaning the incorporation of transparency and autonomy as important aspects of national administrative law. In this mode, transparency is now seen not just as an aspect of good governance, but as a regulatory tool in itself (Blanton, 2002). This form of regulation seems obvious to the developed countries, but may be non-obvious and difficult for developing countries still struggling to develop command-and-control regulatory agencies. Developing countries that cannot develop such regulatory systems will find it hard to integrate into the trading system. Such integration is surely the litmus test for the success of the Doha Development Agenda and of the future role of the WTO in global governance. The future of the WTO as a legitimate and effective international organization will depend, in short, on finding a mode of transparency accessible to all its Members.

The usual approach to the problems of developing countries in the trading system is to discuss whether or how to offer Special and Differential treatment, where the concern is about how developing countries can adapt to the trading system either through exemption from their obligations or through technical assistance in meeting them. (Pangestu, 2000 is an excellent treatment of the topic.) This approach takes the WTO rules as a given, but, in the case of regulatory concepts, the advanced economies may try to externalize models that imply governance relationships that do not exist or cannot be created in developing countries. The claim that IMF conditionality imposes policy models on developing countries that may be inappropriate is familiar (James, 1998; Pauly, 1999); less familiar is the argument that WTO agreements might have similar effects. I do not mean the generalized complaints that the WTO is biased against the poor (Oxfam, 2002); I do mean that few people have looked hard at the governance implications of WTO rules drafted on the basis of models familiar in developed countries. The analytic challenge is trying to understand the difference between elites that do not want to meet WTO obligations, and societies that cannot adapt alien models quickly. Finger and Schuler (2000) have shown that adopting new WTO rules, whether or not they are conceptually appropriate, can be fiscally irresponsible for a developing country. Stegemann (2000: 1246) found, for one example of such expense, that 'The [TRIPS] Agreement requires only minor changes in the intellectual property regimes of the United States and other Western developed countries, whereas the

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developing countries, newly industrialized countries and transitional countries had to make radical and costly concessions.' In this paper I use the transparency provisions to investigate the problems that may arise when all members are asked to implement rules that may not be universally appropriate.

My hypothesis is that since the regulatory requirements of the WTO mirror practice in OECD countries, they will be easy for those countries to implement, but that adoption will be hard for advanced developing countries, and very difficult for LDCs. In the next section I discuss transparency in the WTO in general before discussing how Canada, Brazil, South Africa, Thailand and Uganda implement the transparency requirements of the agreements on basic telecommunications, and sanitary and phytosantitary measures (SPS). The annex reports the results of my investigation. What I found in SPS tended to confirm my suspicions, but telecoms was surprising. In the third section I discuss the implications of the investigation, and Section 4 concludes.

1. Transparency in the WTO

Transparency is an essential requirement of western administrative law regimes, and, like non-discrimination, it is one of the fundamental norms of the trading system. In a contractualist approach to international regimes, one reason they are said to exist is to supply the demand for high-quality information about the parties to an international bargain. Regimes are said to collect information either to evaluate their own performance or to evaluate the performance of individual parties (Mitchell, 1998: 113). Transparency of this sort features in regimes for everything from arms control to climate change. As used in the WTO, transparency shares some features with this widespread usage, which is usually aimed at transparency *between* countries, but it has the additional dimension of promoting transparency *within* a country.

The transparency requirements found throughout the WTO agreements are aimed at both providing clarity for other WTO *Members* and predictability for *economic actors*. The principal ones are summarized in Table 1. (For a detailed discussion of transparency requirements in WTO agreements, see WTO, 2002i; see also Thompson and Iida, 2001, notably the summary of GATS provisions in Box 2; on how similar principles affect investment, see OECD, 2003.) The first form of transparency is the codification of Members' specific mutual obligations in the thousands of pages of 'schedules' attached to the general obligations of the WTO agreements. A second is the Trade Policy Review Mechanism (TPRM), which aims at 'achieving greater transparency in, and understanding of, the trade policies and practices of Members'. It is not meant to be part of the dispute settlement system. In the annex to the WTO Agreement that establishes the TPRM, Members also 'recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system, and agree to encourage and promote

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Table 1. Illustrative WTO transparency provisions

Principle	Examples
Publication of international obligations	Tariff schedules
General clarity in domestic trade policy	Trade policy review mechanism
Publication of laws and regulations	GATT Article X; GATS Article III; TRIPS Article 63
Notification of new measures to trading partners	Uruguay Round decision on notification procedures
Enquiry points for trading partners	SPS; TBT
Independent administration and adjudication	Telecoms reference paper
Internal transparency	'Geneva Week' for non-resident delegations
External transparency	Extensive website; public symposia

greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems'. A third and more formal type of transparency is the many provisions requiring publication of all legal requirements affecting trade, and publication in sufficient time for anyone affected by the rules to know about them before they come into force, both to allow time to comment and time to prepare to take advantage of the new opportunities created. The agreements also have dozens of provisions requiring Members to notify each other through the Secretariat of changes in their rules. Given the complexity of measures affecting trade, some agreements require the establishment of an Enquiry Point where other Members can obtain information on domestic regulations. The final form of regulatory transparency is independence from the executive. The WTO secretariat thinks that transparency can be especially important with respect to domestic regulations aimed at legitimate public policy objectives that might affect international competition, such as public health or protection of the environment. The task of balancing the need to defer to domestic policy objectives while ensuring that such policies are not a disguised restriction on trade may be facilitated by the transparency that allows other Members to know what is happening, with a right to comment before an administrative agency that itself has a high degree of autonomy from the executive (WTO, 1999).[1]

The texts of WTO agreements have much less to say about internal and external transparency. The importance of these principles was recognized in Paragraph 10 of the Doha declaration, but not as subjects for negotiation. The WTO is more open to the public than it used to be, and great efforts have been made to improve the participation of all Members in the organization's work, but whether the results are adequate is the subject of another paper.

1 The WTO agreements also embed the related idea familiar in administrative law that official discretion must be subject to review. Whether the dispute settlement system is the best or only means of such review is a separate question – (Wolfe, 2002b).

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These principles are found throughout the WTO agreements, but the most explicit general provisions are in Article X of the GATT 1994 on 'Publication and Administration of Trade Regulations', which requires that 'Laws, regulations, judicial decisions and administrative rulings of general application … shall be published promptly' and that they be administered 'in a uniform, impartial and reasonable manner' notably by independent administrative tribunals or procedures (WTO, 2002a). Similar requirements for independent as well as transparent regulators are found in the newer agreements on services and intellectual property. Some scholars (Ostry, 1998: 16) attribute Article X of GATT to the US *Administrative Procedures Act* of 1946, whose language it appears to replicate, but the GATT provisions, based on earlier international agreements, are traditional. Transparency and independent judicial review had been part of English administrative law since the seventeenth century. By the middle of the nineteenth century, English administrative law had all the features familiar to us today, including independent agencies, regulation-making, and sunset clauses (Arthurs, 1979; Arthurs, 1985). If the administrative law ideas in the WTO are traditional, at least in the Atlantic area, their scope is not. When Article X was drafted, it applied largely to the administration of customs rules at the border. Now these requirements for a certain form of due process most familiar in the advanced economies have been extended deep into domestic policy, and they apply to all WTO Members whatever their administrative law tradition.

The ability of developing countries to deploy western administrative law concepts matters not just for the implementation of existing rules, but for the evolution of the trading system. The most controversial issues on the Doha negotiating agenda are the so-called 'Singapore' issues. Working parties have had extensive discussions of transparency in *investment* and in *competition policy*, and transparency is the only aspect of *government procurement* under discussion. Transparency with respect to the fourth Singapore issue, *trade facilitation*, is especially interesting. Trade facilitation, the plumbing of the system, deals with 'expediting the movement, release and clearance of goods, including goods in transit'. In Paragraph 27 of the Doha declaration, the Council for Trade in Goods was directed to review Article X of the GATT 1994, a task that it began on the basis of proposals by several delegations covering 'various means to improve transparency such as the installation of enquiry points, the introduction of an advanced ruling system, the more systematic consultation between customs administrations and traders and the establishment of effective appeal procedures' (WTO, 2002e; for an overview of all proposals by delegations in the discussion on trade facilitation, see WTO, 2002f). The proposals came mostly from advanced economies – Canada, the United States, the EU, and Japan (the Quad), plus Korea. Members often describe their own transparency practices, and suggest that new information technologies allow for easy publication of regulatory information. The European proposal (G/C/W/363) for the amendment of Article X seems to be aimed at further embedding general administrative law principles in trade practice. The

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Canadian proposal (G/C/W/379) in effect suggests that its experience with regulatory reform (OECD, 2002) can be generalized. The United States (G/C/W/384) contributed an overview of mechanisms used by its own authorities in ensuring transparency. The ministerial declaration mentions the need for technical assistance with trade facilitation, and Quad countries express willingness to provide help with all aspects of transparency, from creating web sites to developing a legalized appeals system for administrative decisions. Other Members seem less enthusiastic about this ambitious trade facilitation agenda. Codification of ideas current in North America or Europe will not by itself change administrative law practice in countries where these ideas have yet to take root, and technical assistance may therefore be beside the point.

Whether or not the Singapore issues move towards full negotiations after Cancun, the transparency dimension of these and other domestic regulatory issues, notably in the GATS, will only grow in importance for WTO Members. We can learn more about their relevance for the future of the WTO by looking at how existing provisions work.

2. Investigating transparency in telecoms and food safety

The future of the WTO, I argue, depends on a resolution of the difficulties posed when agreements adapt regulatory modes that some Members find obvious but others find difficult. The importance of the transparency norm for new issues under negotiation makes an investigation of existing requirements a timely test of the governance implications of the WTO. I find, in brief, that transparency can be hard for developing countries, but the difference between countries and sectors is significant. In this section, I explain the method of my investigation and then report the results.

2.1 Method

In order to test my assumptions about WTO transparency, I decided to compare the experience of developed and developing countries, and to conduct the comparison in two sectors. I thought that in the domain of administrative law, Canada would be a reasonable surrogate for the other advanced economies in the Atlantic area. I know that Canadian officials played a major role in developing the concepts used in the two agreements I chose. It is a reasonable assumption, therefore, that the governance rules implied are ones that reflect Canadian administrative practice. For purposes of comparison, I wanted to choose countries in each of Asia, Africa and Latin America, and I wanted countries that were serious about their participation in the trading system. My first choices, therefore, were Thailand, South Africa, and Brazil, all countries who are active in the WTO and in the Cairns Group of major agricultural exporters. They are all middle-income countries, however; as a further point of comparison, therefore, I chose an LDC, Uganda, a country with reasonably good governance in African terms.

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When thinking of sectors for closer examination I looked at domains where technological and commercial change alters the legal and institutional setting. In the sectors chosen, new rules must be seen in the dual context of efforts by the trading system to accommodate domestic regulation, and efforts by society to accommodate the trading system. I decided to pick one advanced sector illustrating the new issue of trade in services, the GATS telecommunications agreement; and a sector illustrating trade in goods, the Agreement on Sanitary and Phytosanitary Standards (SPS). The telecoms agreement affects economic regulation, 'a specialized bureaucratic process that combines aspects of both courts and legislatures to control prices, output and/or the entry and exit of firms in an industry' (Salamon, 2002: 118). The SPS agreement affects social regulation, which is 'aimed at restricting behaviors that directly threaten public health, safety, welfare, or well-being' (Ibid.: 157). The distinction is artificial, but it does relate to how we see the world differently as a producer, a consumer, and a citizen. In the traditional GATT context, measures taken at the border concerned only the characteristics of the product itself, but these agreements legitimately encompass those aspects of the domestic regulatory framework that affect how the product or the service was produced. Both agreements, therefore, illustrate contemporary thinking about governance relationships, allowing me to consider whether new trade agreements that conform to governance concerns of developed countries impose governance demands that developing countries cannot meet.

The necessary empirical data are not easy to obtain. I was not able to conduct field work, and I was not able to investigate the extent to which what we found for a given country reflected aspects of its general administrative law regime. I know that in Canada, when Health Canada proposes new food regulations, the department must conform to an elaborate (and highly transparent) regulatory process that the Cabinet Office requires for all new regulations. I do not know about the comparable principles of public administration in the target countries. My research assistant searched the secondary literature in the two domains, the TPRM reports for our target countries, official documents of the SPS committee, and on-line newspaper databases, but the bulk of our national data comes from web sites of the authorities of the target countries.

It might be asked if the web is a fair representation of what is going on: might a difference say between Uganda and Canada be due to relative wealth not the nature of the rules? In some developing countries, very few people would have access to the internet or even, in Uganda, to a phone line. It may therefore not be in the best interests of Uganda to invest heavily in developing a website that explains telecommunications policy when so few of its citizens would have access to this information. These factors notwithstanding, use of the web is appropriate. The internet or web is often touted as a tool to increase the transparency of government in general, and in the WTO, it is often mentioned as a tool for making it easier for developing country officials to obtain information, especially when they are unable to come to Geneva. In particular, the web is seen as a tool for improving the

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operation of national Enquiry Points under the TBT and SPS agreements. And at least in the SPS case, Members are explicitly encouraged to use the internet to fulfill their publication obligations (WTO, 2002d: para. 47). The method used in this paper, then, is consistent with the transparency objectives of the WTO. If we are unable to find information about a country on the web, then other Members and their exporters might also have trouble.

The results of our investigation of transparency in food safety and telecoms are in the annex. The focus of the tables is primarily on regulatory transparency, or measures taken at home. Have countries been able to set up an independent regulator? To whom does the regulator report? How is it funded? Can citizens and producers inform themselves of new rules, and make comments? Are there more general obstacles to effective regulation? We also asked questions about internal transparency, notably whether all Members are effective participants in these domains. What we found was surprising with respect to telecommunications. It seems that administrative law travels fairly well. On SPS, however, regulatory convergence is much less evident.

2.2 *Governing phone calls*

Trade in telecommunications is one of the success stories of the effort to liberalize trade in services. In February 1997, Members of the WTO concluded a major negotiation on trade in basic telecommunications services by making additions to their Schedules under the GATS (Wolfe, 2002a). Negotiating *trade* in basic telecommunications services was of necessity a negotiation about *regulation* of telecommunications. Only common principles on domestic regulation could ensure that the new market access was genuine. Principles covering domestic regulation are included in a text called the Reference Paper that elaborates such GATS principles as transparency, independent domestic regulatory processes, and elimination of anti-competitive practices. The Reference Paper affects *regulatory institutions* (for example, whether the regulator is independent of the incumbent telecommunications operator and national industrial interests); and *regulatory processes* (for example, whether there are measures ensuring that the decision-making process is known, and is non-discriminatory). The text was shaped in part by proposals from the USA and Canada that effectively proposed that other Members adopt the practices of the Federal Communications Commission (FCC) and the Canadian Radio-television and Telecommunications Commission (CRTC). On the other hand, the text was drafted by regulators painfully aware that countries have different legal traditions – for example, Canada, USA, New Zealand and Japan all have different competition law traditions. The regulatory *principles* of the Reference Paper seem to allow enormous national latitude in *practice*. It states that using some policy technique, as opposed to some others, is the best way of meeting commonly shared objectives.

My supposition was that the Reference Paper would be hard for developing countries to implement, and that regulatory differences might be a subject of

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dispute. Evidence is hard to find. No transparency-related disputes have been launched with respect to the Reference Paper. Telecoms under the GATS has no analog of the SPS Committee (negotiators were reluctant to create a monitoring mechanism), and so observers have no sense of the sort of questions regulators might pose to each other if they had a chance to meet at WTO. That said, while we observed degrees of transparency and independence, it appears that all the target countries, with the exception of Thailand, which has yet to adopt the Reference Paper principles, have established an independent regulator, competitive safeguards, and made licensing requirements and decisions publicly available. South African implementation of the Reference Paper, for example, is generally good, if not perfect (Cohen, 2001). The difficulty with the agreement seems to lie in providing consumers and producers with the ability to comment on proposed regulations. In particular, enabling producers to appeal licensing decisions appears problematic. Questions also remain about the true independence of some of the regulatory agencies, notably in South Africa. Other problems, like the territorial size of a country like Canada, the various levels of government between the municipal, provincial and federal, or the ability to hire qualified staff in Brazil, hamper effective telecommunications administration. Overall, however, convergence in governance models seems easier and more prevalent than I expected.

2.3 *Governing food*

Food has been traded for millennia, but trade in food is now one of the most complex domains of international life because of the challenges of ensuring that food is safe to eat when production and consumption are widely separated in space and time. Plants and animals are as susceptible as people to novel pathogens that can spread rapidly around the globe. Rules adopted in one country are therefore consequential for producers and consumers somewhere else, yet the rules may not appear to serve commensurable ends. The basis of the SPS Agreement, as stated in its preamble, is that 'no Member should be prevented from adopting or enforcing measures necessary to protect human, animal, or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade' (WTO, 1998). A country that fully implements the SPS rules will have a food safety system that will ensure that all food produced for local or foreign consumption, and all food imported, meets or exceeds multilateral standards. Meeting this objective is manageable for Canada, with its sophisticated public administration, advanced administrative law, and an educated public able to implement the myriad details of a farm to fork food safety system. Does it work elsewhere? We know that developing countries face difficulties building an effective regulatory infrastructure (For a review of all WTO documents on SPS and developing countries, see WTO, 2002g). Investigating transparency is one way to find out more about those difficulties.

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Table 2. SPS transparency requirements

- Notify changes in SPS measures through the secretariat
- Publish regulations sufficiently in advance for traders to adapt
- Allow time and opportunity for other Members to make comments in writing; respond to 'specific trade concerns' in the Committee
- Establish an Enquiry Point to respond to requests from Members for information about existing or proposed regulations, administrative procedures, and risk assessment procedures
- Publish details of procedures for control, inspection and approvals, with provision for communicating with applicants and reviewing complaints

Source: SPS *Agreement*, Articles 7 and 8 and Annexes B and C; see also (WTO, 2003b; WTO, 2002d).

Obviously, safe food is good for development, but it is not necessarily the case that Canadian ideas about risk assessment and risk management, let alone risk communication, as transmitted through the WTO are the best means to assure safe food in Uganda. The question of compliance with SPS rules arises because of trade: staying aloof from the food safety concerns of the advanced economies is not an option for potential exporters. Nor is staying aloof practical for significant importers. Exporters have to understand and be able to comment on the rules of importing countries, and they have to be able prove their compliance with those rules. Importers have to be able assure exporters that their rules, however extensive or limited, are fair. All of these tasks require a regulatory infrastructure. For WTO Members, that infrastructure is shaped by the SPS agreement.

It is not easy to tell the difference between a necessary measure, and protectionism. The agreement seeks to square this circle in two ways. The first is by encouraging Members to rely on hitherto underutilized international standards, an inherently transparent approach, in principle if not in practice, because those standards have already passed international scrutiny. Since such standards will not always be appropriate, and since the way a measure is implemented is also important, the second device used is regulatory transparency. The Agreement requires that Members establish transparent mechanisms, summarized in Table 2, in order 'to achieve a greater degree of clarity, predictability and information about trade policies, rules and regulations of Members' (WTO, 2000).

'Transparency' here refers nor only to Members keeping each other informed about their sanitary and phytosanitary measures, but also to ensuring that other Members, citizens, and producers are able to query whether a given SPS measure is the most appropriate solution to a problem. Whether a measure is a science-based deviation from an international standard, or an appropriate precautionary measure in a given situation, is easier for other Members to determine in a fully transparent system. Transparency also matters for citizens and producers who want to understand how the system is evolving. Openness and public engagement are essential for building public trust in food safety institutions. Without full communication about risk, including public consultation on new regulations, all

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actors cannot play their role in a farm to fork food safety system (Chartier and Gabler, 2001).

Compliance with the form of WTO procedures is widespread. Each target country has established an SPS Enquiry Point, for example. We could not assess how well the Enquiry Points work, although we offer comments on the web sites. We know that in the case of the Enquiry Points under the related Technical Barriers to Trade Agreement (TBT), that developing countries can find it hard to respond if they get a large number of requests, and that language can be a barrier to understanding questions. As a document submitted by Malawi illustrates (WTO, 2002c), it can be a challenge for an LDC to create an effective Enquiry Point that can store thousands of documents on technical regulations, standards and conformity assessment procedures for the host as well as other Members.

The SPS agreement does not supplement its requirements for regulatory transparency with provisions for what at WTO is called internal transparency, but clearly transparency by others is no use if a country cannot participate effectively. The problems of developing countries in the international institutions are well known (Henson and Loader, 1999; Henson, Preibisch and Masakure, 2001; Jensen, 2002). Canada often sends a dozen capital-based officials to the WTO Committee on Sanitary and Phytosanitary Measures, which monitors the SPS Agreement, but many countries are rarely able to send anybody from the capital. Also important is the work of the three major standards bodies – the Codex Alimentarius Commission, the International Plant Protection Convention (IPPC), and the Organization Internationale des Epizooties (OIE). All our target countries belong to Codex and IPPC, and all but Uganda belong to OIE, but we were not able to assess their degree of participation in the committees and working parties of these organizations. We do know that middle- and lower-income countries in general tend to send fewer people to meetings. Those officials that do attend do not necessarily understand all that is said.[2] Developing countries in general also tend to make fewer WTO notifications than the advanced economies, and make less use of the challenge procedures. We were able to investigate this aspect of SPS transparency.

The point of notification and publication is first to ensure that exporters have time to adapt to new import rules, and to raise concerns in the committee, but second to use transparency as a constraint on abuse of discretion, and to deter hidden commercial or political pressures on regulators. Accountability and best practice are both enhanced when officials must justify their actions to their peers. The procedure for preparing a notification is clear, if complex, and the information required itself contributes to transparency beyond the simple notification of a new measure. Notifications must indicate not only the responsible agency and the

2 The problem is generic. Developing countries are not active participants in international scientific advisory institutions, whose advice therefore often seems to them to be less than germane. (Biermann, 2002).

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affected products, usually on a tariff line basis, but also the geographical regions or countries likely to be affected.[3] The summary of the proposed regulation must clearly indicate both its content and the health protection objective. To the extent possible, likely effects on trade should be described. If a relevant international standard, guideline, or recommendation exists, the notification should briefly describe how the proposed regulation deviates from it. (If an international standard does not exist, other provisions of the agreement will require a scientific justification for the national regulation.) The notification also describes regulatory transparency, listing the relevant documents, such as the publication where notice of the proposed regulation appears; and the text or other documents on which the proposal rests. The notification also includes the final date for comments and the agency or authority handling comments. Finally Members should indicate if the texts are available from the national Enquiry Point.

Countries with a fully developed regulatory infrastructure will find it easier to gather the information and conduct the analysis that such notifications require, making the number of notifications a broad indicator of a Member's ability to implement the SPS agreement. WTO members have submitted approximately 3,500 SPS notifications since 1995. The USA has submitted the largest number, as might be expected. Canada, a rich country with a sophisticated system of social regulations, has substantial engagement in the notifications process, as reported in the Annex. Thailand and Brazil, major exporters and importers of food are also engaged, but less so. South Africa is a weak participant, and Uganda seems marginal.

If countries do not understand or cannot make use of the information in a notification in good time, then notifications do not really serve transparency. When countries do understand a notification, they may wish to use the WTO challenge procedures. After an early surge, the WTO dispute settlement system is not much used for SPS; the 21 SPS matters that have been raised there have resulted in only three panel reports, the last some years ago. Much more use is made of procedures for Members to raise 'specific trade concerns' with each other under the provisions of Article 12.2 of the SPS Agreement, which provides for *ad hoc* consultations. The secretariat has compiled a list of such discussions and their known outcomes (WTO, 2003a). Members raised 154 specific trade concerns in the eight years from 1995 to the end of 2002. Developing country Members raised 77 trade concerns, compared with 110 raised by developed country Members and two raised by least-developed country Members. In 98 cases, the measure at issue was maintained by a developed country Member, and in 76 cases it was maintained by a developing country Member. Transparency is mentioned in these discussions, but usually as a factor in relations of Members with each other. Domestic regulatory transparency does not seem to be discussed in this forum. Canada raised 17 concerns, and

3 This paragraph is based on the wording of the sample notification form (WTO, 2002d).

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joined 12 raised by other countries. Thailand raised nine and Brazil raised seven, but South Africa and Uganda raised none.

The relatively weak use of some transparency measures may suggest deeper problems in the system. The premise of SPS is that a 'science-based' system is neutral, but countries that are major suppliers of scientific expertise will have disproportionate influence on the regulation of food safety in other countries. Without a scientific establishment at home able to understand the technical basis of another country's notification, it is hard to know whether it should be challenged in the committee, especially when hundreds of new notifications arrive every year. Some developing countries have suggested a mechanism whereby the notifying country would be required to specify which other Members might be affected along with an indication of whether Special and Differential treatment could be offered to help adaptation to the change (WTO, 2002b). Members using the standard notification form are already required to identify the 'geographical regions or countries likely to be affected by the notified regulation.' Many notifications identify 'all countries' as being affected, which does not address the problem, but it may be difficult to know *ex ante* which countries will have *ex post* difficulties with adaptation. In April 2003, the Committee adopted, in principle, a Canadian proposal (G/SPS/W/127) that a concerned exporting country should seek bilateral consultations with the importing country notifying a new measure on the grounds that the exporter has to be responsible for identifying its own export interests, but the importer must be open to discussion. The results of those consultations, including any Special and Differential treatment offered, would be notified to other Members in an addendum, ensuring transparency. This procedure seems sensible, but may not solve the problems associated with the assumption that science-based regulation is a universal language.

The SPS agreement requires a robust regulatory infrastructure, but the agreement is less explicit than the telecoms agreement about the nature of appropriate public administration in its domain, making it hard to assess the effectiveness of the regulators by agreed benchmarks, but some observations are possible. In Canada, the CFIA is a standalone regulatory agency. Thailand also seems to have an autonomous regulator, but in the other countries the regulator appears to be part of the ministry. A recent study of standards in Africa found that in South Africa, 'interaction between government departments to discuss issues of common interest limited, and industry is often unaware of draft regulations in other countries' (Wilson and Abiola, 2003). This weakness limits export opportunities; but limited awareness of food safety regulations, for example, by millions of street vendors, also poses serious regulatory problems. In response to a WTO questionnaire on needs for technical assistance, Thailand reported difficulty in improving an understanding of the SPS Agreement (both at the technical and policy levels). Developing adequate inspection, sampling, and investigative procedures remain difficult because of a shortage of expertise in analytical laboratory techniques and quality assurance (WTO, 2002h, Add. 9). Uganda reported limited awareness of

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Table 3(a). Summary of results, by sector

	Telecoms (economic regulation)	SPS (social regulation)
Regulatory transparency		
Between countries		
Compliance with WTO formal rules	Good	Good
Within countries		
Independent regulator	Good	Fair
Openness to citizens	Good	Fair
Ability to comment	Good	Fair
Transparent administrative procedures	Good	Not clear
Internal transparency		
Participation in WTO	Hard to see	Fair
Participation in other international organizations	Good	No data

Table 3(b). Summary of results, by country

	Canada	Brazil	SA	Thai	Uganda
Regulatory transparency					
Between countries					
Compliance with WTO formal rules	V. good	Good	Fair	Good	Weak
Within countries					
Independent regulator	V. good	Good	Fair	Weak	Fair
Openness to citizens	V. good	Fair	Good	Good	Fair
Ability to comment	V. good	Fair	Good	Weak	Weak
Transparent administrative procedures	V. good	Fair	Fair	Fair	Fair
Internal transparency					
Participation in WTO	V. good	Good	Fair	Good	Weak
Participation in other international organizations	V. good	No data	No data	No data	No data

the SPS agreement, a limited number of technical personnel, limited ability to organize awareness seminars, and inability to attend international conferences, although they can pass laws (WTO, 2002h, Add. 5).

My hypothesis at the outset was that since the regulatory requirements of the WTO mirror practice in OECD countries, they will be easy for those countries to implement, but that adoption will be hard for advanced developing countries, and very difficult for LDCs. The investigation reported in the Annex confirms this hypothesis, as suggested by the impressionistic summary in Tables 3(a) and 3(b). I discuss the implications of this result in the next section.

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3. Implications of the investigation

The general implication of this investigation is that general implications are hard to draw with respect to administrative law regimes. In telecoms where the numbers of players are few and the stakes large, regulatory independence and transparency are increasingly prevalent. In food safety, where there are millions of players, and the resources available for regulation can be limited, meeting WTO standards can be hard. It seems that transparency between countries is easier than transparency within countries, and that economic regulation may be easier to adapt to international norms than social regulation. Explaining the divergence would require more careful work on the nature of regulatory systems, but some speculation is possible.

In telecoms, two thirds of the Canadian economy is dependent on services, and there is nearly one phone line for every Canadian, so that country's capacity to regulate is not surprising. But the fact that services and telecoms are not as important to the much smaller economies of the other countries does not have the corresponding effect on their ability to implement at least the more formal aspects of WTO requirements. The reasons may lie outside the WTO. It is possible that these issues are discussed under the auspices of the International Telecommunications Union (ITU). The WTO has supplanted the ITU for many commercial issues, but the ITU remains the forum for technical matters, and for regulators. Regulatory cooperation through ITU is increasing, but not because of the Reference Paper (ITU, 2002).

The formal members of the ITU in many countries were the old PTTs – the state-owned monopoly providers – but now the holder of the membership is often the 'Ministry of Communications' and regulatory bodies are the designated participant – 51 regulatory bodies are now the recognized government representatives to the ITU. The ITU focus is increasingly on regulation because 104 Members have at least partially privatized the sector. Members need new ways to accomplish their regulatory objectives because they are no longer in the business of the direct provision of a service. Getting the framework right matters. If we look at the gap between the formal aid available, and the needs for investment to reach the minimal penetration levels called for in national telecommunication plans, then foreign investment is essential. Developing countries realize that their national interest requires competition and liberalization if they wish both to control their own former monopolies and the new entrants to their markets. The GATS telecoms negotiations may simply have reflected the reform process underway for other reasons. The driving force is a need to regulate, not a North American view of how to do it, which might explain the apparent ease of adoption of the Reference Paper.

It might be possible to distinguish SPS from telecoms on the basis of either the *actors* affected or the *problem* to be solved. With respect to who is affected or influenced by the policy, it is likely that the size and heterogeneity of actors matters

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as does their level of interest and information. Actors also probably differ if they are importers or exporters, producers or consumers. Similarly, compliance with WTO rules might be easier when power is concentrated and domestic influence is limited. In the telecoms domain, developing countries would have a small number of sophisticated producers and consumers, with a few members of the public having a general interest. In contrast, food safety rules directly affect huge numbers of producers and consumers, with no large player willing to pay the costs of transparency as a public good. With respect to the problem to be solved, where the telecoms agreement is about competition in home and export markets (thus affecting the rights of foreign firms in the domestic market), food safety is about a system that protects the health of citizens, that treats importers fairly, and whose standards will be recognized by importing Members abroad. Implementing WTO rules makes sense for a country trying to attract investment from abroad (telecoms), or trying to export (food, in some sectors of some countries). In a developing country, however, *de facto* food safety in daily life may be governed by informal (private, voluntary) standard setting bodies. Such entities may not exist in new domains like telecoms, leaving the terrain open to create regulatory bodies based on prevailing international models. In food safety, what a country may do already might be effective because consumers are close to producers, or at least distributors, and so do not depend on a regulator to decide if food is safe. Adapting to international models may be only a cost in such cases.

The focus in this paper is on the relative difficulty of the administrative law concepts at stake in the two domains. A factor not considered, therefore, is the diffusion process, and I do not discuss the optimal form of international governance (Abbott and Snidal, 2001) or even the content of the applicable standards. I assume that countries accept WTO rules in good faith, but then face more or less difficulty in living with the results. Do countries converge on WTO rules because of bilateral pressure from major donors or major trading partners? Is trade both a vector for learning and a motivation for change? If it is, looking at imports and exports might be relevant: where exports are high, international standards matter; when they are low, why bother? If imports are high, might a country need to use Codex standards to be fair to importers? Do countries respond to pressure from investors, or do they try to assimilate new international norms? Do developing countries have regulatory infrastructure appropriate to the size of their economy or their trade with the world? Yes, but a limited infrastructure even if it is appropriate today will constrain a country's ability to increase trade both because of problems complying with the rules but also in being able to challenge inappropriate rules used by their trading partners. In any event, this investigation does not challenge my initial assumption that developing countries cannot regulate in the Canadian way any time soon. This conclusion has implications both for continuing efforts to improve existing procedures and for new negotiations.

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4. Conclusion

The only way any country can be an effective participant in the WTO as it evolves in response to globalization is to have an open and transparent public administration based on a broad consultative process. Negotiators cannot find an appropriate rule if they do not engage the people who will have to live with it. People who do not understand or who were not engaged are unlikely to be able or willing to reproduce the rule in their daily life. This view of democratic global governance may be utopian; it may also be at odds with the views of influential practitioners. Pascal Lamy, the EU trade commissioner, has said (Lamy, 2002, emphasis added) that 'If I want to *impose* respect of my strict environmental, sanitary, or phytosanitary rules on developing countries (and I think I have every right and obligation to do so), I have to *offer* in return better effective *access* for their products to my markets – including through better and more focused *technical assistance* to help them meet my sophisticated domestic regulations.' He thinks it acceptable that countries can buy or coerce respect for their own governance model, and he thinks that technical assistance is sufficient to help developing countries live by EU rules. The results of my investigation of the telecoms and SPS agreements make me skeptical.

In the case of economic regulation (telecoms) developing countries are coping with the transparency provisions, but with difficulty. In the case of social regulation (SPS), moving towards northern governance models is harder still, and not just for LDCs. Market access does provide an incentive (not that the EU is prepared to offer much of that, in agriculture), but the impact of technical assistance is limited, because regulatory transparency engages the whole of a country's governance infrastructure, not just a small number of officials in the trade ministry. In the case of the Singapore issues, codification of transparency ideas current in the USA or Europe will not by itself change administrative law practice in countries where these ideas have yet to take root, and technical assistance may therefore be beside the point. A more appropriate objective for a universal trading system without a two tier structure might be to ensure that administrative law regimes meet certain norms for multilateral compatibility, not that they be the same. Investigation of transparency in telecoms and food safety shows that finding an accessible model of transparency, especially in social regulation, is not obvious, but I conclude that the future of the WTO depends on this search.

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Annexes

Part 1 Telecommunications

	CANADA	BRAZIL	SOUTH AFRICA	THAILAND	UGANDA
Telecoms Regulator	Canadian Radio-television and Telecommunications Commission (CRTC)	Agência Nacional de Telecomunicações (ANATEL)	Independent Communications Authority of South Africa (ICASA)	National Telecommunications Commission, Under Post and Telegraph Department, itself under Ministry of Transport and Communications[1]	Uganda Communications Commission (UCC)[2]
GNI per capita[3]	US$23,130.00	US$3,590.00	US$3,060.00	US$2,010.00	US$300.00
Services value added (% of GDP)	64.7 (1997)	54.8	65.9	49.5	38.4
Fixed and mobile lines (per 1000 people)	961.1	318	303.7	142.6	11.2
WTO 'Reference Paper'					
• Competitive safeguards	Yes	Yes	Yes	No	Yes
• Public availability of licensing criteria	Yes	Yes	Yes	No	Yes
• Independent regulators	Yes	Yes	Yes	No	Yes
• Universal service	Yes	Yes	Yes	No	Yes
Ability for the public to learn what the rules are	Extensive information on domestic telecoms regulations on the web.[4]	Information available on Anatel's website; monthly magazine available electronically.[5] Difficult for English speakers to learn domestic Brazilian telecoms policies.	Information is now available from ICASA's website,[6] or the Government Gazette – also available electronically.[7]	Basic information is available in English from their website.[8] English speakers can get a reasonable understanding of Telecoms regulation in Thailand.	Basic information available via the UCC's website. (As few Ugandans have access to the internet, the UCC might focus more on print publications.)[9]

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Ability for consumers to comment on proposed laws and current regulations	Comments can be made via their website or independently to either the Canadian Broadcasting Standards Council (CBSC), Cable Television Standards Council (CTSC) or Advertising Standards Canada (ACS). Extensive information on public participation on the website.[10]	Maintains a call center, manned by out-sourced staff, for consumers to air complaints and make comments, all of which can also be accessed via their web-page (ITU, 2002, p. 31). Can comment on proposed laws and regulations via Anatel's website.	Details of pending regulations are posted on the web, and comments can be made by mail.	Basic telephone contact details available from website. Nothing mentioned about commenting on proposed regulations.	Current consultation requests are posted on the main page; recent consultations are listed separately.[11]
Ability for industry to comment on regulations and proposed laws	Their website maintains an active page concerning public proceedings and discussions. Industry can also comment electronically on the same page.[12]	Private sector represented on Anatel's Advisory Council and Strategic Committees. Industry can also provide comments through public hearings, round table discussions, and the Website (ITU, 2002). It is also possible to comment from an English language page.[13]	The process is not evident.	Not mentioned anywhere on web-page.	As above.
Transparency and availability of information and decisions	All decisions are posted on the CRTC's website.[14]	All Anatel's decisions are posted on its website and it publishes all of its decisions in the Official Gazette (ITU, 2002, p. 42).[15]	All decision are published on ICASA's website.	Not mentioned anywhere on web-page.	Decisions are not posted on their website.

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Part 2 Sanitary and phytosanitary

	CANADA	BRAZIL	SOUTH AFRICA	THAILAND	UGANDA
SPS Regulator	Canadian Food Inspection Agency (CFIA reports through Minister of Agriculture and Agri-Food)	Ministry of Agriculture, Cattle and Supplying[16]	Directorate: Food Control. (Department of Health)[17]	Thai Food and Drug Administration (under the Ministry of Public Health)	Ministry of Agriculture
GNI for 2001[18]	US$681.6	US$528.9	US$121.9	US$118.5	US$5.9
GNI per capita[19]	US$23,130.00	US$3,590.00	US$3,060.00	US$2,010.00	US$300.00
Merchandise trade, 2001, US$ billion[20]	Imp: $227.2 Exp: $259.9	Imp: $58.3 Exp: $58.2	Imp: $28.4 Exp: $29.3	Imp: $62.1 Exp: $65.1	Imp: $1.517 Exp: $0.461
Agricultural trade, 2001, US$ billion[21]	Imp: $15.551 Exp: $33.574	Imp: $4.230 Exp: $18.431	Imp: $1.465 Exp: $3.109	Imp: $4.826 Exp: $12.057	Imp: $0.305 Exp: $0.415[22]
SPS notifications, 1995–2003 (July)	180	79	17	105	1
"Specific trade concerns" raised, 1995–2002[23]	17	7	0	9	0
Joined others' questions	12	9	4	4	0
Respondent to others' questions	4	6	2	0	0
"Links to members' SPS-related websites."[24]	3	0	0	2	0
Enquiry Point (regular mail address and phone number. Except for Uganda, fax number and email.)	Standards Council of Canada – Ministry of Industry[25]	Secretaria de Defesa Agropecuária (SDA) – Ministério da Agricultura e da Reforma Agrária Esplanada dos Ministérios[26]	The Director: International Trade[27]	Thai Industrial Standards Institute – Ministry of Industry[28]	Uganda National Bureau of Standards

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Observations on the Enquiry Point	Easy to find and fairly user-friendly. In addition to mandated roles, provides a list of notifications and proposed regulation changes; email subscriptions for updates; Disseminates foreign notifications for local exporters; Solicits feedback on new notifications, and forwards to foreign enquiry points.	Poorly advertised and difficult to find. Complicated, and not user-friendly.	Poorly advertised and difficult to find. Complicated, and not user-friendly. In addition to mandated roles, as for Canada.	Easy to find and fairly user-friendly.[29] In addition to mandated roles, as for Canada.	No information available over the web.
Ability for the public and economic actors in other countries to learn what the rules are	Food safety concerns, safety measures and regulations published on the CFIA's website.[30] Canadian consumers can obtain a fairly extensive understanding of domestic food safety regulations via their website.	Difficult for English speakers to learn about their Brazilian food safety standards and ANVISA services, but basic information on (pending) food safety regulations and legislation in English.	Food safety concerns, notifications and regulations published on their website, or in their *Food for Thought* weekly web newsletter.[31]	Food safety concerns, regulations and safety measures published on their website.[32] Awareness program aimed at increasing consumer knowledge about food labels and safety. Reasonable content in English.	Basic info available on website, but it is difficult to learn exactly what food safety regulations look like in Uganda based on their website.
Ability for consumers and industry to comment on proposed laws and current regulations	Comments can be made via website, or directly to provincial/regional officers.[33]	Comments possible on the web; English translation of the page available.[34]	Comments can be made via website, or directly through regional officers.[35] Also seminars on proposed regulations and legislation.	Comments possible from the website.[36] Producers can comment on Thai regulations from the Enquiry point.[37]	No mention of this on their website.[38] Limited ability to organize awareness seminars.[39]

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	CANADA	BRAZIL	SOUTH AFRICA	THAILAND	UGANDA
Availability of information on decisions	All decisions and prosecutions published via website. Canadian producers can comment directly from this page.[40]	Not clear.	No mention of this on their website.	None mentioned – although letters are sent to applicants informing them about decisions.[41]	No mention of this on their website.

[1]Asia Telecommunications Newsletter, 'Update on Telecommunications Reform', http://www.tiaonline.org/policy/regional/asia/atn/archive.cfm?ID=99 (accessed May 2002). The telecommunications Bill, drafted to abolish the state monopoly, passed the House of Representatives in August 2000.
[2]ITU, 'The Internet in An African LDC: Uganda Case Study' (January 2001), p. 4. http://www.itu.int/ITU-D/ict/cs/ugana/material/uganda.pdf (accessed July 2002).
[3]Gross National Income obtained from World Bank, 'Data By Country', at http://www.worldbank.org/data/countrydata/countrydata.html (accessed November 2002).
[4]http://www.crtc.gc.ca/
[5]http://www.anatel.gov.br. See also International Telecommunications Union, 'Effective Regulation Case Study: Brazil 2001', p. 31 http://www.itu.int/itudoc/itu-d/publicat/74954.pdf (accessed May 2002).
[6]See the publications section at http://www.icasa.org.za (accessed July 2002). ICASA's Library and Information Services in this section is also a valuable tool for the public to understand recent regulatory trends in telecommunications and broadcasting.
[7]http://www.icasa.org.za/?FromHome=1&Cmd=SiteMap&ContentID=235 (accessed August 2002).
[8]http://www.ptd.go.th/
[9]http://www.miniworks.go.ug (accessed July 2002).
[10]http://www.crtc.gc.ca/eng/publicpar.htm (last accessed in July 2003).
[11]http://www.ucc.co.ug/papers/consultative.html
[12]http://www.crtc.gc.ca/eng/publicpro.htm (last accessed in August 2002).
[13]http://216.239.39.104/translate_c?hl=en&u=http://sistemas.anatel.gov.br/SACP/&prev=/search%3Fq%3DAnatel%26hl%3Den%26lr%3D%26ie%3DUTF-8%26oe%3DUTF-8%26sa%3DG
[14]http://www.crtc.gc.ca/eng/dno.htm#Decisions (last accessed in August 2002).
[15]See also http://www.anatel.gov.br/telefonia_fixa/default.asp?CodArea=468&CodPrinc=1 (Accessed in August 2002).
[16]Ministério da Agricultura, Pecuária e Abastecimento.
[17]http://196.36.153.56/doh/department/index.html (accessed in July 2003).

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[18]All figures obtained from the World Bank, 'Data by Country', available from: http://www.worldbank.org/data/countrydata/countrydata.html (accessed November 2002). Unless specified all figures are from 2000 and in US Dollars.
[19]Gross National Income obtained from World Bank, 'Data By Country', at http://www.worldbank.org/data/countrydata/countrydata.html (accessed November 2002).
[20](WTO, 2002b).
[21](WTO, 2002b).
[22]Trade Policy Review, Uganda WT/TPR/S/93. Figures are for 2000.
[23](WTO, 2003).
[24](WTO, 2002c).
[25]http://www.scc.ca
[26]www.agricultura.gov.br OR www.anvisa.gov.br
[27]http://www.nda.agric.za or http://www.sabs.co.za – see the Commercial section.
[28]http://www.tisi.go.th
[29]for a discussion, see (WTO, 2002a).
[30]http://www.inspection.gc.ca/
[31]http://www.doh.gov.za/department/foodcontrol/docs.html (last accessed July 24, 2003).
[32]Thai FDA, http://www2.fda.moph.go.th/exporters/lawlink.asp?productcd=3&lawnm=FOOD&arg_language=e&historylink=/law&v_call=#ch3 (accessed July 2002).
[33]http://www.inspection.gc.ca/english/tools/feedback/commene.shtml (accessed August 2002).
[34]http://www.brasil.gov.br/fale_governo.htm (accessed July 2003).
[35]Detailed contact information for all the officials involved is at http://www.doh.gov.za/department/foodcontrol/contact.html (accessed July 2003).
[36]http://www.fda.moph.go.th/fda-net/html/product/other/kbs3/homepage1.htm#Central%20Officers (accessed August 2002).
[37]http://www.tisi.go.th (accessed March 2003).
[38]Their website http://www.agriculture.go.ug, has no mention of a newsletter, journal or webpage listing any food safety concerns for consumers and manufacturers, but there is a consumer awareness program. See Ministry of Agriculture, Achievements, http://www.agriculture.go.ug/achievements.htm (accessed July 2002). The 'Contacts' page was garbled in July 2003.
[39]The limited ability is mostly attributed to funding shortages (WTO, 2002d).
[40]The CFIA-AIRS website: http://www.inspection.gc.ca/english/reg/consultation/reginite.shtml (last accessed in August 2002).
[41]The Thai FDA http://www2.fda.moph.go.th/law/Law_Book_1.asp?productcd=3&lawid=300009_12&lawname=PROCEDURE%20IN%20APPROVAL%20REGISTRATION%20NO.%20AND%20LABEL%20APPROVAL%20NUMBER%20OF%20FOOD%20PRODUCT&language=e&Contents=1&v_call=lawlink&historylink=/law&arg_language=e (last accessed in August 2002).

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