

This draft October 12, 2020. Forthcoming in Journal of International Economic Law Volume 23, issue 4, to be issued in December 2020

# Reforming WTO conflict management: Why and How to Improve the Use of ‘Specific Trade Concerns’

Robert Wolfe\*

Running title: Reforming WTO conflict management

\* Professor Emeritus, School of Policy Studies, Queen’s University, Kingston Ontario. robert.wolfe@queensu.ca This paper is part of a research project on WTO reform supported by the Bertelsmann Stiftung. An earlier version of this paper was prepared for the World Trade Forum, University of Bern, Switzerland 25–26 October 2019. I am grateful for the research assistance of Damien Macedo and Nick Leeson, for many conversations with Bernard Hoekman, Marianna Karttunen and Petros Mavroidis, for confidential interviews with officials in Geneva, and for the helpful comments of two anonymous reviewers.

With its dispute settlement system in peril, the role of the World Trade Organization (WTO) in mitigating commercial conflict is more important than ever, but its working practices need reform. The Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) committees have developed a mechanism for members to raise ‘specific trade concerns’ (STCs) about the laws, regulations, and practices of their trading partners, both proposed and already implemented. These STCs can mitigate sources of friction and help avoid recourse to formal dispute settlement. This article assesses experience with STCs and analyzes suggestions for reform of the process and its extension to all WTO committees. The important WTO reform question is whether procedural changes in Geneva can make STCs more effective for all members while facilitating enhanced participation by members who do not now make full use of the possibilities that such procedures offer.

## **Introduction**

Its adjudicatory system may be in peril, but the role of the World Trade Organization (WTO) in mitigating commercial conflict is more important than ever. WTO committees and councils are deliberative bodies for discussing emerging issues without recourse to dispute settlement. Or at least they should be. Necessary reforms will require taking a hard look at the technical detail of WTO working practices, notably procedures for discussing trade concerns.

The real effect of WTO law in reducing trade uncertainty is seen in the actions of the millions of traders and thousands of government officials whose work is shaped in part by their understanding of the rules set by WTO. Officials need to keep each other informed about implementation of those rules, and they do in thousands of so-called notifications through the WTO every year.

Those officials also need to be able to talk to each other about the implementation and interpretation of the rules, which they do in dozens of committee meetings every year on everything from customs valuation through farm trade to intellectual property. In those meetings they often raise 'specific trade concerns' (STCs) on behalf of their firms. STCs are most closely associated with the Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) committees, but concerns are raised in all WTO bodies. Most often those concerns about laws, regulations, or practices are addressed by their trading partners, without resort to dispute settlement. The rule of law in trade does not only mean rule by adjudication.

The system works, so why is reform needed? First, because some bodies are more effective than others in dealing with trade concerns: commercial conflicts could be better managed in many domains than they are now. Not surprisingly, those same bodies moved online more smoothly than others when COVID-19 closed down the WTO building. Second, because participation especially by developing countries is uneven: all members ought to be able to ensure that their trading partners are fulfilling their obligations.

In the first section of this paper I present evidence based on the work of other scholars demonstrating how STCs mitigate trade conflict using SPS and TBT as a benchmark for the great pyramid of the WTO legal order. In the second section I present new evidence about other WTO bodies. In the third section I show which members now make use of the STC process. In section 4 I consider how structural impediments to enhanced participation can be mitigated while making the STC process more effective for the whole membership. The fifth section concludes with a speculation on the prospects for reform of WTO working practices.

### **The place of SPS and TBT STCs in the great pyramid of WTO legal order**

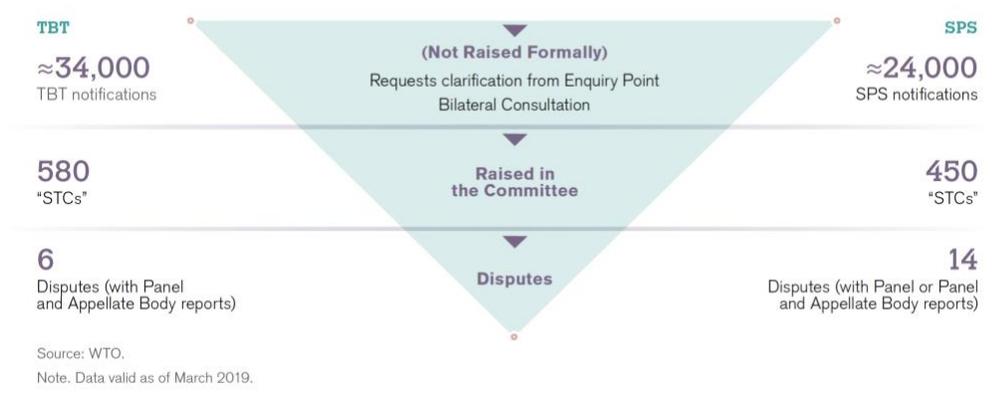
The dispute settlement system receives more attention than other aspects of WTO monitoring and surveillance but we should not think that all law, and all law-governed behavior, is found only in adjudication.<sup>1</sup> As shown in Figure 1, the Appellate Body is merely the small tip of a substantial pyramid of WTO activity, one that includes notifications and trade concerns raised in

---

<sup>1</sup> Robert Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System,' *European Journal of International Relations* 11:3 (September 2005), 339-65.

committees, part of a sophisticated system of dispute avoidance. The metaphor comes from the ‘Legal Process School’ where courts are seen as part of a larger institutional structure that might be imagined as ‘The Great Pyramid of Legal Order’. Most things in life just happen, Hart and Sacks argued, usually in accord with some understanding of appropriate action, with no subsequent questions asked. When conflict arises, the process is usually private, as in commercial arbitration. Close to the tip of this pyramid is where we find the relatively tiny number of litigated cases. At the very tip, the farthest from the great mass of actions that consciously or unconsciously follow legal arrangements, are the few cases that come before some sort of reviewing tribunal.<sup>2</sup>

**Figure 1: The inverted pyramid: review of STCs in the SPS and TBT committees**



Source: WTO and OECD, Facilitating Trade through Regulatory Cooperation: The Case of the WTO’s TBT/SPS Agreements and Committees (Geneva: World Trade Organization, 2019), Figure 4.1.

The pyramid in Figure 1 does not show everything.<sup>3</sup> The TBT and SPS Agreements require that members have an ‘enquiry point’ able to answer reasonable questions from other members. (The General Agreement on Trade in Services—GATS—and the Trade Facilitation Agreement are the only other agreements with such a provision.) The possibility to comment on a draft measure through a member’s national enquiry point before raising an STC is an important first step in the process, but an STC is public while little is known about comments a country received: the EU is the only member that makes such data available. Karttunen found that between 2005 and 2014, the EU raised 161 STCs, but made 818 comments on notifications through other members’

<sup>2</sup> Henry Melvin Hart and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law prepared for publication from the 1958 tentative edition by William N. Eskridge, Jr. and Philip P. Frickey (Westbury, N.Y.: Foundation Press), 286-7.

<sup>3</sup> For a more detailed version of this pyramid that includes all disputes that have some form of SPS or TBT claim see Marianna B. Karttunen, Transparency in the WTO SPS and TBT Agreements: The Real Jewel in the Crown (Cambridge: Cambridge University Press).

enquiry points. Other members used the EU enquiry point to make 438 comments on EU measures.<sup>4</sup> And there are many other tools available to members.<sup>5</sup>

Questions of the sort that later came to be called STCs were raised in the first SPS and TBT meetings in 1995 based on practices inherited from the GATT.<sup>6</sup> The issues covered by STCs and presumably the more numerous comments through enquiry points include concerns about how a member is implementing its obligations (e.g. is a measure an unnecessary barrier to trade?), and requests to clarify a measure that has been notified. The STCs raised in the committees combine procedural issues with substantive concerns, as shown in Figure 2.

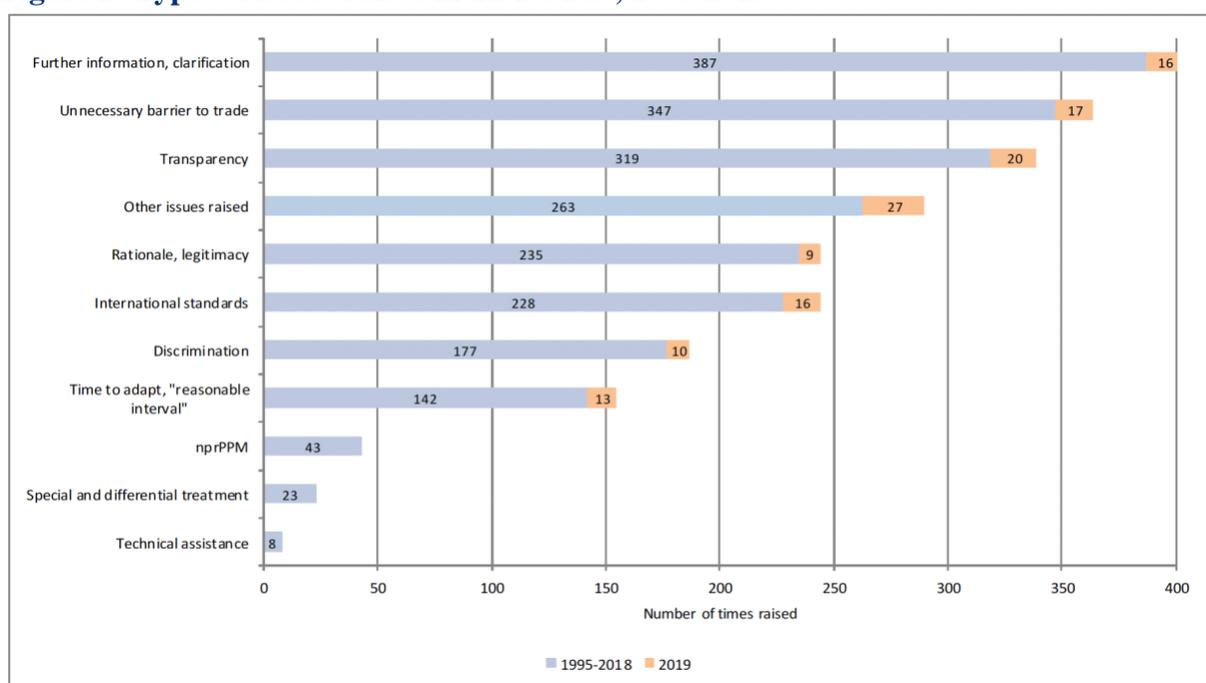
---

<sup>4</sup> Ibid at 163.

<sup>5</sup> 'Catalogue of Instruments Available to WTO members to Manage SPS Issues,' G/SPS/63, 26 March 2018.

<sup>6</sup> On the evolution of the procedure in the TBT committee, see Karttunen, above n 3, and Kateryna Holzer, 'Addressing Tensions and Avoiding Disputes: Specific Trade Concerns in the TBT Committee,' World Trade Organization, Staff Working Paper ERSD-2018-11, 31 October 2018. Karttunen's book offers a detailed discussion of STCs in SPS and TBT, including the rationale for STCs as both an alternative and a complement to dispute settlement. The book also offers a valuable discussion of the role of transparency in SPS and TBT disciplines.

**Figure 2: Types of issues raised in TBT STCs, 1995-2019**



Source: 'Twenty-Fifth Annual Review of the Implementation and Operation of the TBT Agreement,' G/TBT/44, 19 February 2020. Chart 29

In TBT the process is highly structured. For example:

1. A December 2018 notification by the EU (G/TBT/N/EU/625) concerned the non-renewal of the approval of chlorothalonil used by some agricultural producers as a fungicide.
2. In February 2019, 6 members commented on the measure through the EU enquiry point. Of the 6 comments, 4 were from developing countries.<sup>7</sup>
3. The concern was included on the agenda of the March 2019 meeting of the TBT committee; 3 delegations posed questions in writing and 7 posed oral questions, including 4 developing countries that had not previously commented through the EU enquiry point.
4. The EU response was later made available in writing.
5. The same issue was raised in two subsequent meetings.
6. The STC is recorded in the minutes of the meetings (G/TBT/M/77, /78 and /79)
7. The thread can be followed easily under ID 579 in the TBT Information Management System (IMS).<sup>8</sup>

<sup>7</sup> [https://ec.europa.eu/growth/tools-databases/tbt/en/search/?tbtaction=search.detail&Country\\_ID=EU&num=625&dspLang=en&basdatedeb=&basdatefin=&baspays=&basnotifnum=&basnotifnum2=&bastypepays=ANY&baskey words=chlorothalonil](https://ec.europa.eu/growth/tools-databases/tbt/en/search/?tbtaction=search.detail&Country_ID=EU&num=625&dspLang=en&basdatedeb=&basdatefin=&baspays=&basnotifnum=&basnotifnum2=&bastypepays=ANY&baskey words=chlorothalonil)

<sup>8</sup> <http://tbtims.wto.org/en/SpecificTradeConcerns/View/576>

SPS and TBT have no provisions for reverse notification (a notification submitted by one member about another's measures), but the agreements provide openings to enquire about any measure. Karttunen found that a significant number of STCs in both committees concern non-notified measures.<sup>9</sup> The eventual outcome of an STC is sometimes recorded, although many simply disappear from the agenda, quite possibly because they have been resolved. (There is no indication yet if the answers provided by the EU about chlorothalonil resolved the concerns expressed by other members.) Some concerns are raised just once, by one member; but others come up at many meetings, with many members expressing a concern about the same matter. Sometimes an issue comes up repeatedly because a government is signaling its support of an aggrieved domestic interest.

When an issue appears on an agenda, that can provoke bilateral discussion leading to a resolution before the meeting. Issues are resolved when the member that raised it has enough information, or when the member maintaining the measure modifies it in some way, perhaps because it sees the merit of the concerns raised by trading partners, or because discussion in the committee helped it to learn about alternative solutions to its regulatory problem.<sup>10</sup> Whether an STC leads to change in the measure is not germane to whether raising the concern can lead to reduced uncertainty for other members and firms. Nevertheless the prospect of embarrassing questions might be just as effective as the threat of a dispute in encouraging domestic officials to draft WTO-compliant measures. And countries might learn from questions asked by their peers.<sup>11</sup> But members are reluctant to report back when they have reached what is de facto a mutually agreed solution (in the language of the Dispute Settlement Understanding), especially if the resolution itself is discriminatory. Apparent 'resolution' of an issue might in reality be due to shifting interests in domestic lobbies and side-payments brokered on other issues. Big players having found a way around a non-tariff measure themselves might not want to let others know how it was done. The lack of transparency might be helpful if the parties to a conflict can resolve an issue to their satisfaction without having to reveal to everyone else how the solution accords with general principle.

While up to two thirds of the small number of SPS and TBT matters that do end up in formal dispute settlement cases were first raised as STCs<sup>12</sup> only a small fraction of STCs were subsequently raised in a dispute settlement request for consultations,<sup>13</sup> and STCs raised at the

---

<sup>9</sup> Karttunen, above n 3, Figures 4.7 and 4.8.

<sup>10</sup> Andrew Lang and Joanne Scott, 'The Hidden World of WTO Governance,' European Journal of International Law 20:3 (August 2009), 575-614, at 593

<sup>11</sup> For an analogous argument about the disciplinary effects of information, see Matthew S. Johnson, 'Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws,' American Economic Review (2020) 110:6 1866-904.

<sup>12</sup> Karttunen, above n 3.

<sup>13</sup> Holzer above n 6 at 14

draft stage of a new domestic regulatory measure are less likely to end up as disputes.<sup>14</sup> In her analysis of SPS and TBT STCs Holzer identified a number of factors that explain when a STC has helped to prevent a trade conflict escalating to a dispute, and when it has not. STCs fail to resolve cases that are inherently political in the domestic affairs of either or both countries involved, or in their bilateral relations. Sometimes disagreements are too great to be resolved through committee discussion, and other times an issue involves multiple agreements.<sup>15</sup> On the other hand, sometimes the only reason for an STC may have been to learn about potential third parties to the dispute, which ultimately helps complainants build their case.<sup>16</sup>

I draw three implications from the inverted pyramid in SPS and TBT:

First, only a small fraction of the huge number of SPS and TBT notifications ever become a source of conflict leading to a dispute. There are probably many more enquiry point comments than STCs, and there are certainly many more STCs than disputes.

Second, one reason for this effective dispute avoidance is that the clarification sought by many STCs can mitigate some sources of friction or lead to modification or withdrawal of a measure. STCs can also signal support of an aggrieved domestic interest without a dispute. And through ongoing engagement over time, officials learn what sort of actions might lead to conflict.

Third, disputes are not the universe of WTO conflict management. The SPS and TBT committees do not enforce the agreements or settle formal disputes, but they have demonstrably served to diffuse trade conflict in their respective areas.<sup>17</sup>

Are other committees as effective?

---

<sup>14</sup> Kian Cassehgari Posada, Emmanuelle Ganne and Roberta Piermartini, 'The Role of WTO Committees through the Lens of Specific Trade Concerns Raised in the TBT Committee ' December 2019, unpublished ms, on file with the author.

<sup>15</sup> Holzer above n 6 at 12, 15, 16

<sup>16</sup> Inveer Manak, 'Enforcing International Trade Law in the World Trade Organization's Committees: Courting Third Party Opinion,' Georgetown University, PhD dissertation November 24, 2019.

<sup>17</sup> Henrik Horn, Petros C. Mavroidis and Erik N. Wijkstrom, 'In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees,' Journal of World Trade 47:4 (2013), 729–60 at 754.

## **What do we know about trade concerns in other committees?**

The pyramid metaphor is a theoretically informed description that should apply to all WTO bodies. All agreements have permissive language similar to TBT Article 13.1:

The Committee shall afford members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives...

Even a casual glance at WTO news items shows that something like STCs is widespread. The minutes of WTO bodies show common terms like ‘questions’, ‘consultations’, ‘issues’, as well as ‘concerns’ but practice is uneven in comparison to the SPS and TBT committees, as shown in Table 1.

Trade concerns are systematically placed on the agenda of nearly all committees at the request of a member, and such proposed agenda items cannot be blocked by other members—although sometimes a committee cannot meet because one of the members blocks the adoption of the agenda. Most committees have a basic review of notification compliance, but some provide opportunities for questions about notifications, or requests for information about measures that ought to have been notified, amounting to an implicit or explicit reverse notification of another member’s measures. I use ‘STC’ as a shorthand for all such concerns raised in a WTO body whether or not formally identified as an STC.

**Table 1: Comparison of practices for dealing with trade concerns in WTO bodies**

Committee	Review of notification	Extensive detail on 'concerns' in Minutes or Summary Reports	Q&A Document Series	Database of STCs or Q&A
SPS	detailed	√	-	√
TBT	detailed	√	-	√
CoA	detailed	√	-	√
ILP	detailed	√	√	√
CMA	varies	varies	√	X
TRIPS	basic	X	√	Pending
TRIMs	detailed	√	√	X
ADP	detailed	√	√	X
SFG	detailed	√	√	X
ITA	X	X	√	X
SCM	basic	√	√	X
ROO	basic	X	X	X
TFA	detailed	√	X	X
Customs	basic	X	X	X
CTS	Very basic	√	X	X
GPA	Very basic	[some in Ann. report]	X	X
CTG	-	√	-	Pending

The tools used by different committees have developed organically to respond to the type of information examined in each meeting and the nature of the exchanges amongst members. For example, written questions and answers may be used when members prefer to have capital-based officials dealing directly with the issue. The Committee on Agriculture (CoA) recently began to distinguish between 'specific implementation matters' (SIMs) under Article 18.6 and other

questions raised as part of the review process, notably on notifications. The Secretariat now lists questions to which an answer has not been received going back to 2013.<sup>18</sup>

Every committee has minutes of its meetings, but some are more detailed than others, notably with respect to how questions and answers are recorded. The committee minutes are not usually a detailed account of discussion, though they usually track at least the basic topics covered. Occasionally the minutes will merely record which member(s) spoke and leave out what they said. Some committees have one or more document series separate from the minutes to record questions and answers. Other committees have a searchable database that allows a skilled user to track the numbers of STCs, countries involved, and issues raised, but most do not, hence there is no consolidated information on all the STCs raised across the WTO.

Many specific trade concerns are now raised in the Council for Trade in Goods (CTG) at a rate that seems to have increased over the last few years. Most concerns originate in the subsidiary technical committees and only move up to CTG when a member is not satisfied with an outcome, although sometimes the concern is raised first in the CTG. The CTG is more political and attracts more senior delegates, even sometimes ambassadors, but it may not be a good use of its time when political concerns are raised that cannot be resolved there, or when concerns are repeated at every meeting without an outcome, unless raising the matter in this way in CTG helps avoid escalation to dispute settlement.

The Committee on Market Access (CMA) has an agenda item for discussion of Quantitative Restrictions notifications. Some notifications generate no discussion, but others draw questions, sometimes in writing, that can span several meetings. Sometimes problems with specific measures are assigned a separate agenda item, and some concerns do not arise from notifications. Occasionally a member reports the withdrawal of a quantitative restriction that was the cause of a concern. In both the CMA and the CTG, many concerns that members request to include in the agenda are not provoked by a notification or the lack thereof. These STCs typically include allegations of discriminatory internal taxation and other violations of the national treatment principle, the introduction of unjustified prohibitions and other restrictions, as well as import duties that are levied in excess of the bound duties. Variation in the level of detail in the minutes (Table 1) can be a function of how detailed the member wanted to be at the meeting

The Agreement on Import Licensing Procedures (ILP) rarely figures in disputes, but there have been dozens of written and oral questions in the ILP committee about notifications under the agreement, questions that are now identified as specific trade concerns.<sup>19</sup> There are also STCs that are included on the agenda of formal meetings, sometimes repeatedly, where the questions

---

<sup>18</sup> 'List of Outstanding Responses to Questions Raised under the Review Process of the Committee on Agriculture Meetings During 2013-2019,' G/AG/W/204, 13 March 2020.

<sup>19</sup> 'Consolidated Paper of Written Questions and Replies Submitted to the Committee on Import Licensing since 1995: Revision,' G/LIC/W/51/Rev.2, 1 October 2019.

and responses are oral.<sup>20</sup> All the written questions and answers are circulated and synthesized in the committee minutes and are now included in a new database.

The Subsidies and Countervailing Measures (SCM) committee reviews notifications in ‘special sessions’ with its own minutes. Many concerns are also raised in the committee as part of its monitoring responsibilities and recorded in the regular minutes. The committee has more than one document series for questions and answers, but these series are not easily searchable so data is hard to find. The U.S. has been proposing clarifications to how the Committee handles notifications since 2011. ASCM Article 25.8 allows any member to make a written request for information about any subsidy including asking for ‘an explanation of the reasons for which a specific measure has been considered as not subject to the requirement of notification.’ Article 25.9 obliges members to respond to such requests. In its proposal the U.S. says such responses should be in writing, and suggests timelines.<sup>21</sup> At every meeting, most recently in November 2019, a number of countries supported the proposal, but China observes that nothing in the Agreement requires written responses (although most SCM responses are in writing). Perhaps internal political reasons explain China’s preference to respond orally in the Committee, but it leads to complicated statements in the minutes that are said to be hard to follow. This is also a committee where some delegations insist that they should only be questioned about formal notifications.

Notification of legislation, or of changes to laws, is reviewed by the anti-dumping committee (ADP), but the written questions and answers are not included in a database. Similarly, questions raised concerning the required semi-annual reports can be found in the minutes of the meeting and in a document series but are not in a database.

In the safeguards committee, (SFG) members pose questions and receive answers in writing about the notifications; separate sections of the agenda of each meeting for the two types of notification provide for further discussion. Comments and questions are made orally, and the review of safeguard actions is as robust as in the anti-dumping and SCM committees. It appears that many more matters are raised in the committee each year than ever surface as formal disputes.

The Council for Trade in Services (CTS) has a different culture from the one that has evolved in CTG bodies. The variety and complexity of services measures, and the lack of clarity regarding notification obligations under the GATS has resulted in a weak notification record. Notifications that exist are often opaque, and they are ex post not ex ante as in SPS and TBT. The level of discussion and consultation between members regarding notifications is insubstantial. The data

---

<sup>20</sup> 'Twelfth Biennial Review of the Implementation and Operation of the Agreement on Import Licensing Procedures,' G/LIC/W/49, 12 October 2018.

<sup>21</sup> 'Proposed Procedure for Submission of Questions and Answers under Articles 25.8 and 25.9: Proposal from the United States,' G/SCM/W/557/Rev.3, 26 October 2018.

on services measures in section 4 of the Director-General's monitoring reports<sup>22</sup> might usefully be discussed in CTS, but members are resistant. While only a handful of trade concerns have been discussed in CTS (two in October 2019 and three more in July 2020) they involved big political issues, notably Ukraine/Russia gas distribution, and China and Vietnam cybersecurity. It may be that such issues cannot be resolved in CTS, but the discussion is a learning experience for delegates, one that may help in managing the conflicts.

The TRIPS Council spends a day reviewing national implementing legislation once the provisions have come into force for a given member. By the end of 2010, the Council had completed 117 such reviews. The questions and answers from the review meetings are available online.<sup>23</sup>

The Committee on Trade and the Environment (CTE) does not discuss trade concerns, but it could. When a recent EU decision to phase out palm oil in biofuel was notified to TBT, India and Malaysia immediately raised STCs, and subsequently launched a dispute (DS593). The palm oil issue was so political on both sides (the EU action, required by legislation in the European Parliament, affects a huge developing country industry) that a STC could never have resolved it. Later in CTE the same issues came up and India and Malaysia were careful not to repeat their TBT arguments while trying to explain the sustainability dimension of palm oil. Many notifications in other bodies have an environmental dimension, captured in the annual updates to the environmental database,<sup>24</sup> but they are not discussed in CTE.

#### *Two caveats*

Every committee has elements of the pyramid in varying degree, if more or less well developed, but there are two caveats to this comparison. The first concerns the content of STCs and the nature of the discussion. In the CTS, for example, the delegates are not from capitals unlike SPS, where the delegates could be the regulators who prepared the measure in question allowing other members to have a reasonable expectation that discussion might result in modification of the measure, especially when the measure is still in draft. In contrast nobody expects that a large country will change an already implemented services regulation because of discussion in CTS.

Still, this idea that SPS and TBT are a special case because they deal with ex ante notifications of draft measures while other committees deal with ex post notification of implemented measures is common, correct, but misleading. On the one hand, the standards committees do discuss implemented measures. In Figure 2 above the most frequent reason for a TBT STC is to request

---

<sup>22</sup> 'Overview of Developments in the International Trading Environment: Annual Report by the Director-General (Mid-October 2018 to Mid-October 2019),' WT/TPR/OV/22, 29 November 2019.

<sup>23</sup> Antony Taubman, Hannu Wager and Jayashree Watal, eds, A Handbook on the WTO TRIPS Agreement (Cambridge ; New York: Cambridge University Press, 2012).

<sup>24</sup> 'Environmental Database for 2018: Note by the Secretariat,' Committee on Trade and Environment, WT/CTE/EDB/18, 12 November 2019.

information—also a frequent reason in other committees—and many of those requests concern implemented measures.

On the other hand, Jackson et al observe many questions about prospective policies in the CoA.<sup>25</sup> In the most recent meeting, for example, Brazil asked the UK about preparations for the end of the Brexit transition period (see AGIMS 95002). There was also a question from China to the EU on the U.S.-EU intended agreement to reduce tariffs on certain products (AGIMS 95048). In the CMA, in late 2015 the EU posted a written question (G/MA/W/116) requesting an update on a review process initiated in 2013 by the U.S. Fish and Wildlife Service that might lead to a prohibition of the import and export of 10 sturgeon species. The question was then posed orally in the next 8 meetings of the CMA, from 2016 through 2019 where the U.S. delegate essentially repeated that interested Members were invited to provide comments and information to the regulators (G/MA/M/63 though 71). In 2018 China on separate occasions brought up prospective measures by Australia and the U.S. that would restrict access by Chinese suppliers to the market for 5G telecommunications equipment (G/MA/M/67 and 68).<sup>26</sup> Some concerns are raised for the first time in CTG, and there too members can and sometimes do raise draft measures. For example, Japan, supported by the EU and Korea, raised a draft Chinese export control law in April 2019 (G/C/M/13).

The second caveat concerns quantitative comparison. In the case of SPS and TBT, formal procedures and good databases with a well-developed protocol for coding and tracking STCs mean we know about these committees. The data have been available for some time in a searchable database, which means statistics on consultations among members are available for these committees, but not for others, although Jackson et al have laboriously constructed a database for agriculture.<sup>27</sup>

Estimating the size of the other pyramids is further complicated by the different ways in which committees work. Each agreement and hence committee has different types of notification obligations and different committee processes. As just mentioned, notifications of thousands of draft regulations will generate different interactions in SPS and TBT than a relatively smaller number of implemented measures in another committee. Committees with a small number of notifications may then have a small number of concerns expressed. The number of STCs can also be related to whether members are represented in the committee by experts from capitals or generalists from (often small) Geneva delegations.

Accordingly, I have not attempted to quantify the pyramid in other committees for comparative purposes. The Director-General's annual monitoring report contains detailed data on STCs in TBT and SPS, and it now has more detail on questions in the CoA. In addition, the Secretariat is trying to prepare a more detailed picture of other committees. What they find is that the use of

---

<sup>25</sup> Lee Ann Jackson, Federica Maggi, Roberta Piermartini and Stela Rubínová, 'The Value of the Committee on Agriculture: Mapping Q&As to Trade Flows,' WTO, draft working paper 7 September 2020, on file with the author.

<sup>26</sup> I am grateful to Roy Santana for pointing out these examples.

<sup>27</sup> Jackson et al above n 25.

such procedures is increasing and widespread, with about 230 trade concerns raised in some 28 formal meetings of WTO bodies other than the SPS, TBT and Agriculture Committees from mid-October 2018 to mid-October 2019, a number that dwarfs the 29 dispute settlement panels that began work during the period.<sup>28</sup> And the number likely represents a continuing pattern: preliminary estimates by the Secretariat suggest that more than a thousand trade concerns were raised over the last five years in formal Committee meetings in addition to those raised in SPS, TBT and Agriculture.

### **Who participates in STCs? And why are there so few frequent flyers?**

An implicit assumption about improving STCs as a means of managing conflict is that the procedure is more accessible to a wider group of countries than dispute settlement. That assumption may not be well-founded. Understanding who now uses the STC process, and factors that might explain the pattern, is an essential background for thinking about reform.

Different committees seem to have different cultures when it comes to submitting STCs. In some cases, it is highly unusual for a single member to bring one; in others, it is the norm. That is why tracking participation leads to such strange results: a single committee may only have 5 STCs in a year, but 25 members participating in them. Conversely, a committee might have 20 STCs, with only the usual suspects taking part. But no committee has significant participation by all members.

The most active participants in TBT STCs are the EU and the U.S. as shown in Figure 3, with 518 STCs raised since 1995, almost as many as the next 8 members combined. Agriculture is often the most important trade issue for developing countries, and the CoA is the central forum for surveillance of members' commitments, but the vast majority of questions in that committee are asked by developed countries.<sup>29</sup> The Subsidies committee is similar. The 880 questions asked in the SCM committee from 2008 to 2012 were asked by only 16 members, all but two of whom are G-20 countries, but the questions were posed to 58 members (counting the EU as one).<sup>30</sup> I have not tried to update that count, but officials familiar with the work of that committee think that the pattern has not changed.

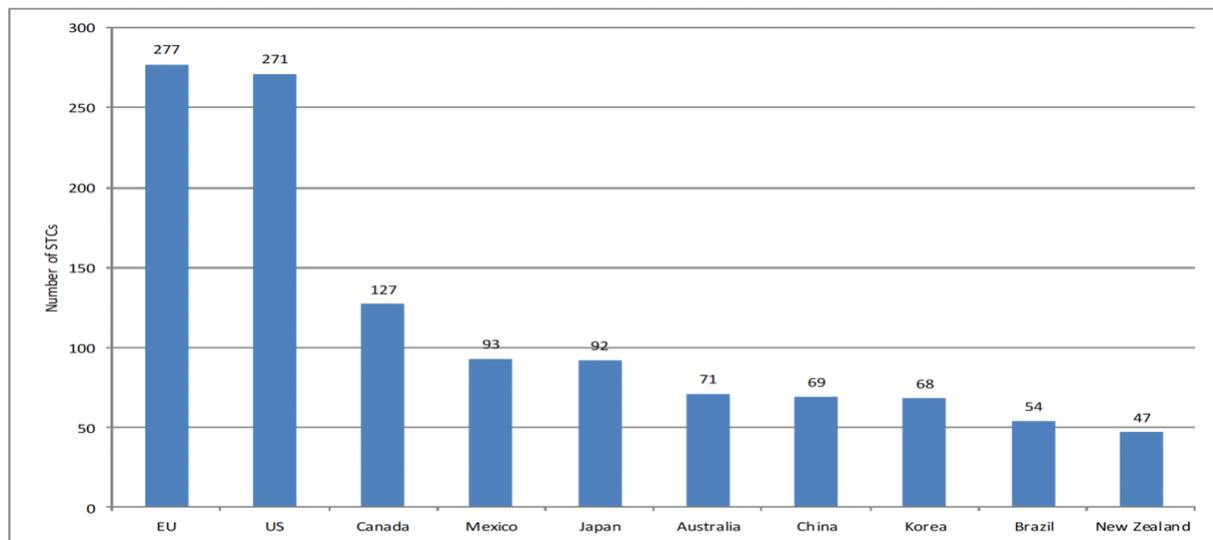
---

<sup>28</sup> WT/TPR/OV/22, above n 22.

<sup>29</sup> 'Overview of Developments in the International Trading Environment: Annual Report by the Director-General (Mid-October 2017 to Mid-October 2018),' WT/TPR/OV/21, 27 November 2018. Chart 6.2, and see Jackson et al above n 25

<sup>30</sup> Gregory Shaffer, Robert Wolfe and Vinhcent Le, 'Can Informal Law Discipline Subsidies?,' Journal of International Economic Law 18:4 (2015), 711-41 at 719

**Figure 3: Ten members that raised the most new TBT STCs 1995-2019**



Source WTO, 'Twenty-Fifth Annual Review of the Implementation and Operation of the TBT Agreement,' G/TBT/44, 19 February 2020, Chart 23.

Why are there so few frequent flyers? One common response is the glass house syndrome. Many developing countries do not like being questioned, not least because the Geneva delegates do not know the answers and may have difficulty getting a response from the responsible authorities in capitals, and so they do not question their peers. But that is too simplistic, because the dispute settlement pattern is similar.

In related work on the Appellate Body we studied participation in dispute settlement proceedings.<sup>31</sup> In the period from the beginning of 2017 until mid 2019 only 25 members acted as complainants, and 111 did not. Those 25 members, counting the EU28 as one, account for 80% of world exports. We also looked at participation in discussions about dispute settlement reform, Appellate Body appointments and related policy issues. We found 854 interventions in the Dispute Settlement Body during this period. Of those interventions, 34 members, accounting for 85% of world exports, intervened 6 or more times; 82 members (60% of the members) never spoke.<sup>32</sup>

---

<sup>31</sup> Matteo Fiorini, Bernard Hoekman, Petros Mavroidis, Maarja Saluste and Robert Wolfe, 'WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences,' *Journal of World Trade* 54:5 (2020) 667–98.

<sup>32</sup> This result was not unexpected given the work of other scholars. See Cosette D. Creamer and Zuzanna Godzimirska, '(De)Legitimation at the WTO Dispute Settlement Mechanism,' *Vanderbilt Journal of Transnational Law* 49: (2016), 275-321; Diana Panke, 'Speech Is Silver, Silence Is Golden? Examining State Activity in International Negotiations,' *The Review of International Organizations* 12:1 (2017), 121-46.

While there are many more STCs than disputes, many of the same constraints might apply. In a review of factors that may affect the propensity to use the dispute settlement system Horn and Mavroidis reference legal capacity and power theories, membership in PTAs, and the nature of domestic political processes.<sup>33</sup> Under indirect effects they consider whether free riding on disputes of others obviates the need for a dispute of one's own, which would also affect the propensity to raise STCs. The most salient factor: bigger markets are the most frequent targets, and act as defendants more frequently than they act as complainants themselves.<sup>34</sup> It is also possible that countries with a more diversified set of trading partners are also more frequent participants in disputes.

Do developing countries not use dispute settlement or raise STCs because they lack sufficient information even to know that they have a WTO problem? Bown shows that the costs of acquiring information needed for WTO litigation are high for developing country firms.<sup>35</sup> How does a small developing country firm learn that its problems at the intensive margin of trade let alone obstacles at the extensive margin are due to foreign government policies that may be inconsistent with WTO obligations? Are those policies more significant than normal economic forces such that the cost of challenging them would be worth the reward? And would those benefits be sufficiently concentrated that individual action is worth the bother? The same possibility of free riding affects the probability to raise an STC—let other countries seek more transparency or ask for a change in policy. But if the members that do participate only raise issues that matter for larger countries, or if any outcome is not MFN, then the differential rate of participation in STCs is a legitimate cause for worry.

Countries with sophisticated alert systems and good internal coordination receive more comments from industry and other ministries hence launch more disputes, and raise more STCs than other members. That is, STCs and dispute settlement in WTO respond to the concerns of business but do not represent a systematic and costly search for violations by the authorities. In interviews with Geneva delegates, Karttunen found that half of them considered that the private sector plays an important role in raising awareness about the trade effect of measures by other WTO members, and a large majority of those interviewed said that the STCs they raised originated most often in private sector concerns. Indeed, large numbers of TBT STCs make

---

<sup>33</sup> Henrick Horn and Petros C. Mavroidis, 'International Trade: Dispute Settlements,' in Andrew T. Guzman and A. O. Sykes, eds, Research Handbook in International Economic Law (Cheltenham: Edward Elgar, 2007), 177-210.

<sup>34</sup> Hoekman, Bernard M., Petros C. Mavroidis and Maarja Saluste, 'Informing WTO Reform: Dispute Settlement Performance, 1995-2020,' European University Institute, Working Paper RSCAS 2020/59, September 2020 at 6.

<sup>35</sup> Chad P. Bown, Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement (Washington: Brookings Institution Press, 2009), chapter 8, and Chad P. Bown, 'Developing Countries and Monitoring WTO Commitments in Response to the Global Economic Crisis,' in Thomas Cottier and Manfred Elsig, eds, Governing the World Trade Organization: Past, Present and Beyond Doha (Cambridge, UK:: Cambridge University Press, 2011), 157-87 at 170

reference to consultations with firms.<sup>36</sup> The disparity in access to information may be mitigated by the ePing service that generates alerts about new notifications with an indication of where to send comments.<sup>37</sup> It now has thousands of private sector subscribers.

In our Appellate Body survey a majority of business respondents believe their governments do not analyze other countries' trade policies with a view to raising a question in a WTO body.<sup>38</sup> We also asked whether respondents thought that their businesses are well-informed about foreign market access barriers. Respondents in high income countries largely said yes; those in low and middle-income countries were more likely to say no, although both groups mostly said that their businesses do indeed complain about foreign market access barriers. Respondents in poor countries prefer bilateral consultations over WTO dispute settlement and were more inclined to agree that their country tends to free ride, wherever and whenever it is possible to do so.

American firms expend considerable resources ensuring that USTR is aware of their concerns,<sup>39</sup> which is rational because their interests may be large enough that they need not worry about others free riding on the results of an STC or dispute case. But the incentives facing the private sector in developing countries and especially their law firms may limit their investment in such resources.<sup>40</sup>

A factor that influences STCs as much as dispute settlement is the domestic legal capacity of the complaining country, and the likelihood of a remedy.<sup>41</sup> I assume that the nebulous concept of legal capacity is related to administrative capacity, or effectiveness, which can influence the submission of notifications<sup>42</sup> hence can be expected to influence the more difficult task of

---

<sup>36</sup> Karttunen, above n 3, at 166.

<sup>37</sup> <https://www.epingalert.org/en>

<sup>38</sup> Fiorini et al, above n 31.

<sup>39</sup> Jeheung Ryu and Randall W. Stone, 'Plaintiffs by Proxy: A Firm-Level Approach to WTO Dispute Resolution,' The Review of International Organizations 13:2 (2018), 273-308; Aydin B. Yildirim, Arlo Poletti, J. Tyson Chatagnier and Dirk De Bièvre, 'The Globalization of Production and the Politics of Dispute Initiation at the World Trade Organization,' Global Policy 9:S2 (2018) 38-48.

<sup>40</sup> Bown, above n 35.

<sup>41</sup> Antoine Bouët and Jeanne Metivier, 'Is the WTO Dispute Settlement Procedure Fair to Developing Countries?,' IFPRI, Discussion Paper 1652, June 16, 2017.

<sup>42</sup> Robert Wolfe, 'Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life,' Staff Working Paper ERSD-2013-03, March 2013 at 18; Jan Karlas and Michal Parížek, 'Supply of Policy Information in the World Trade Organization: Cross-National Compliance with One-Time and Regular Notification Obligations, 1995–2014,' World Trade Review 19:1 (2020) 30-50, at 47

preparing an STC or a dispute settlement complaint. That is indeed what the CoA Secretariat found when it surveyed developing country members, who said they lacked the institutional capacity to undertake the necessary analysis, and they lacked the resources to send more capital-based officials to attend meetings in Geneva to learn how to ask questions.<sup>43</sup> Legal capacity can also help countries avoid trade conflicts in the first place.<sup>44</sup>

In sum, participation in STCs is broader than dispute settlement, but still does not fully engage the whole membership. Some of the reasons in this section clearly relate to the particular circumstances of each member. The important WTO reform question is whether procedural changes in Geneva can make STCs more effective for all members while facilitating enhanced participation by members who do not now make full use of the possibilities that such procedures offer.

## Scenarios for reform

The story so far is that reforming the STC process is warranted. Improving WTO working practices and deliberative functions is a major focus for the Ottawa Group.<sup>45</sup> I am aware of at least five proposals that were in play before the WTO shut down in March 2020:

1. A proposal from Singapore on emulating best practices in the TBT committee.
2. A proposal from Brazil on procedural improvements that should help members make more efficient use of time and foster better dialogue in the SPS committee.
3. A proposal being developed by Switzerland and others to establish a new tool at the WTO to support members in finding mutually agreeable solutions to their trade concerns.
4. A Hong Kong, China proposal on better functioning of the CTG and its subsidiary bodies
5. A proposal for guidelines for all WTO bodies led by EU supported by 19 other members.<sup>46</sup>

---

<sup>43</sup> 'Results of the Survey on the Improvement of Timeliness and Completeness of Notifications under Existing Procedures: Note by the Secretariat,' G/AG/GEN/85, 15 June 2009 at para 42

<sup>44</sup> Marc L. Busch, Eric Reinhardt and Gregory C. Shaffer, 'Does Legal Capacity Matter? A Survey of WTO members,' World Trade Review 8:4 (2009), 559-77.

<sup>45</sup> Joint Communiqué of the Ottawa Ministerial on WTO Reform group meeting in Davos, January 2019. [https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/wto-omc/2019-01-24-davos.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/2019-01-24-davos.aspx?lang=eng)

<sup>46</sup> 'Procedural Guidelines for WTO Councils and Committees Addressing Trade Concerns: Draft General Council Decision ' Communication from Albania; Australia; Canada; China; European Union; Hong Kong, China; Iceland; Republic of Korea; Republic of Moldova; New Zealand; North Macedonia; Norway; Panama; Qatar; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; Turkey; and Ukraine WT/GC/W/777/Rev.5, 20 February 2020.

I use the EU proposal (WT/GC/W/777 hereafter ‘777’) as a focus for analysis of scenarios for reform because it picks up many elements of the other four. The objective of 777 is to make better use of the possibility offered by Council and committee meetings to discuss and resolve concerns with trade-related measures by equipping them with horizontal procedural guidelines, but the co-sponsors are clear on the underlying objective. At the July 2019 meeting of the General Council they said that the point of improving the discussion of STCs is to avoid escalation to the dispute settlement system. China shared that objective in its remarks.

Rather than starting fresh with my own proposal, I use 777 as a foil because it is comprehensive, public, and can be presumed to reflect some degree of shared views on what is needed and acceptable. I use two lenses for evaluating the proposal:

- Will it increase use of the trade concerns process?
- Will it make the trade concerns process more effective for all members?

I will suggest areas where 777 succeeds and areas where members should be more ambitious.

#### *Meeting arrangements*

The first part of the 777 proposal concerns timelines for raising STCs and other meeting arrangements (paragraphs 1-4). It calls for convening documents to be available to members and the public 15 calendar days in advance of a formal meeting with an indication of trade concerns raised for the first time as well those raised previously. The call for rapid production of minutes might be unrealistic for some bodies but is less important if the key participants pose their questions and answers in writing; even better if it is possible for them to upload those documents to the database themselves using an eAgenda system.

These measures would make more efficient use of committee time. They would also provide more transparency for other members, or firms, having the same concern. Such procedures can facilitate the work of small Geneva delegations that cannot cover all meetings, and it makes it easier to consult capitals, which in turn helps capitals learn and might lead to more detailed instructions for delegates along with more engagement.

Missing from 777 is a requirement for an annotated agenda, as is now provided in the TBT committee<sup>47</sup> and some other bodies. Even better, the TBT eAgenda is online: it can be populated automatically without a flood of last-minute documents. And all members get a notice that STCs are coming up, which allows them to collaborate on joining an STC, to do the necessary research, and to ensure coordination in the capital. The eAgenda system is now used in SPS and is under consideration in other bodies. In presenting its ideas at a CTG meeting in June 2019 Hong Kong, China added that for reoccurring items, especially for those discussed in other

---

<sup>47</sup> 'Procedures for the Inclusion of Specific Trade Concerns in the Annotated Draft Agenda of the Committee: Decision,' G/TBT/43, 19 September 2019.

committees, an annotated agenda could enable members to be updated on how issues had developed since the Council's previous meeting.<sup>48</sup>

### *Consideration of trade concerns*

The 777 proposal encourages submission of a substantive description of a new concern at least 20 days before the meeting, and written questions and answers (paragraphs 6-7), which would enhance transparency for other members, or firms, having the same concern. If questions and answers are online ahead of a meeting, officials in capitals can interact through WTO without having to come to Geneva, which could be especially helpful for officials in developing country capitals, or those responsible for committees where capital-based participation is infrequent.

Perhaps the most important proposal in 777 is for a better database (paragraph 8):

The Secretariat will establish and manage a database on trade concerns in which all WTO documents pertaining to trade concerns are recorded, including written questions and replies, relevant minutes of meetings and relevant notifications. The database will contain a search facility to make all documents related to a particular trade concern easily accessible.

This reform is vital, and indeed aspects of the work are already underway with the internal Open Data Initiative. Searching minutes and written questions and answers would be very much easier with a database, particularly if it avoided using the same or similar terms to refer to entirely different things. An integrated database would be especially useful for anyone (for example small delegations) who must follow more than one area of WTO work.<sup>49</sup> Even when a committee has detailed minutes, and written questions and answers, there is often no way to easily search for all aspects of a concern.

Reverse notification in the GATT era was an important tool that was used among other things for the creation of the GATT inventory of non-tariff measures. Santana and Jackson suggest that STCs have in effect replaced reverse notifications (the provisions are now rarely used), and discussions in individual committees have replaced the previous review of problems identified by the GATT inventory.<sup>50</sup> Hence they recommend that an effort should be made to systematically compile and classify STCs raised in the various WTO bodies as an analytic tool for understanding emerging problems in the trading system that might be the subject for new

---

<sup>48</sup> 'Minutes of the Meeting of the Council for Trade in Goods, 8 and 9 July 2019,' G/C/M/135, 30 October 2019.

<sup>49</sup> The list of WTO online systems includes 35 databases. Some are open, others restricted to members. Some serve administrative or news purposes, but many would be candidates for an integrated database. See [https://www.wto.org/english/res\\_e/wtoapps\\_e.htm](https://www.wto.org/english/res_e/wtoapps_e.htm)

<sup>50</sup> Roy Santana and Lee Ann Jackson, 'Identifying Non-Tariff Barriers: Evolution of Multilateral Instruments and Evidence from the Disputes (1948-2011),' *World Trade Review* 11:03 (2012) 462-78.

negotiations. Such a task would be much easier with an integrated database of all STCs, one whose design is sensitive to the kinds of classification issues they identified.

The process of creating the database must start committee by committee because they have different needs and practices, but for a database to be easily searchable, the Secretariat would need to develop common ways of entering the members raising and responding to a concern, the issues, along with HS codes where applicable and possible. The database might be improved by emulating the Integrated Data Base (IDB), which encourages members to connect their sites directly to WTO for updating tariff data.

A better database would allow researchers to undertake more sophisticated investigations on the effects of trade measures on diverse firms. Researchers have been able to accomplish some important analyses with the existing SPS and TBT databases,<sup>51</sup> and governments have exploited the existing agriculture database, despite its limitations.<sup>52</sup> But more is possible. Jackson et al in pioneering work with the agriculture database match questions with their relevant HS code allowing them to go beyond counting the number of questions to get a sense of the economic value of the issues discussed in the Committee. For example, questions in the CoA covered \$772 billion of agricultural trade over the period 1996-2016, which represents 5.7 per cent of total trade in the agricultural sector on average per year.<sup>53</sup>

The public facing elements of WTO databases also need improvement: firms looking for information search by markets and products not by committee let alone STCs. The way you would search a dairy issue now depends on knowing that many questions in CoA were addressed to Canada, which New Zealand officials would know but firms might not. Consultations with firms might be needed to understand what it is that users are looking for, and how much knowledge it takes them to find it. WTO already makes available APIs that information providers can use to design specialized search interfaces for a particular industry or country, which could be applied to an STC database.<sup>54</sup>

The 777 proposal suggests (paragraph 9) that attention should be drawn by the chairperson when the same measure is raised in different WTO bodies, something that could most easily be done with an integrated database. Ensuring that all elements of a concern are seen together can avoid escalation to dispute settlement only for that purpose, it could make horizontal linkages visible, and it could help alleviate problems with some issues being raised in a subsidiary body, then

---

<sup>51</sup> For one of many examples, see Pramila Crivelli and Jasmin Groeschl, 'The Impact of Sanitary and Phytosanitary Measures on Market Entry and Trade Flows,' The World Economy 39:3 (2016) 444-73.

<sup>52</sup> 'Notification of Select Domestic Support Variables in the WTO: Submission by the United States,' JOB/AG/181 19 February 2020.

<sup>53</sup> Jackson et al above n 25.

<sup>54</sup> <https://apiportal.wto.org>

CTG, and again in the General Council. I think that the proposed overview of discussions in other WTO bodies ought to be part of the annotated agenda for a meeting.

While the 777 proposal encourages informal consultations between meetings and reporting the outcome of those consultations at the next meeting, members should also be encouraged to report the ultimate outcome of a concern whatever it may be. Lack of information on resolution of concerns is in itself a lack of transparency.

#### *Informal resolution of trade concerns*

The proposed encouragement of informal resolution of trade concerns (paragraphs 12-14) sounds like mediation. (The Swiss proposal, item 3 in the list above, may be similar, but it is not public.) In the Doha Round NAMA negotiations members had extensive discussions of a *Ministerial Decision on Procedures for the Facilitation of Solutions to Non-Tariff Barriers*. This so-called 'horizontal mechanism' would sit between regular procedures in committees and the dispute settlement system, using a facilitator to help members reach a positive outcome when conflict arises.<sup>55</sup> While many members supported the proposal (especially the EU), among the remaining worries of opponents (including Japan, and the USA) was whether it would undermine existing provisions in committees for the discussion of STCs,<sup>56</sup> and whether any documents generated might later be used in a dispute case. Discussions on a mediation role for the chair of the SPS committee, in contrast, were not part of the Doha Round negotiations, and reached a successful conclusion when members adopted a new procedure for ad hoc consultations.<sup>57</sup>

The 777 proposal is not as formal as the SPS mechanism, which is not used much, but it would still depend on whether members concerned trust the current committee chair. If the issue remains unresolved because of a lack of opportunity for discussion, mediation might be useful, given that dispute settlement is overburdened, if a trusted person could be selected as facilitator. SPS and TBT have side meetings for bilaterals because people come from capitals and use the opportunity to talk directly. In many committees delegates are Geneva-based hence always have chances to meet but they tend to come from foreign ministries and may not be experts. Mediation might be more likely to help if video conferencing were feasible to allow capital-based

---

<sup>55</sup> 'Textual Report by the Chairman, Ambassador Luzius Wasescha, on the State of Play of the NAMA Negotiations: Addendum,' TN/MA/W/103/Rev.3/Add.1, 21 April 2011, Véronique Fraser, 'Horizontal Mechanism Proposal for the Resolution of Non-Tariff Barrier Disputes at the WTO: An Analysis,' *Journal of International Economic Law* 15:4 (2012), 1033-73.

<sup>56</sup> 'Negotiating Group on Market Access: Report by the Chairman, Ambassador Luzius Wasescha,' TN/MA/23, 18 July 2012.

<sup>57</sup> 'Procedure to Encourage and Facilitate the Resolution of Specific Sanitary or Phytosanitary Issues among members in Accordance with Article 12.2,' G/SPS/61, 8 September 2014.

participation with little expense. But if it simply displaces conflict from one forum to another, it would not be worth the bother.

### *Learning from the response to the pandemic*

The 777 proposal was drafted before anybody had heard of COVID-19. As members worked through how to resume their work after the initial shutdown, they were reforming their working practices on the fly.<sup>58</sup> The co-sponsors of the 777 proposal should be thinking of how to institutionalize some of the COVID-19 innovations.

Some committees were better prepared than others to move online. As noted above, the SPS and TBT committees had already been developing an eAgenda system that encourages meeting documents, including questions and answers to be posted in advance, and allows statements to be posted for a period of time after the meeting for inclusion in the minutes.

If questions and answers are online ahead of a meeting, it allows for a de facto virtual meeting in the sense of officials interacting through the WTO without having to come to Geneva. The TBT committee held its May 2020 meeting through a written procedure, allowing WTO members to exchange views on 72 STCs using the eAgenda system. At the July 2020 CoA meeting, members posed 308 questions. Written responses received in advance of the meeting were compiled in a document for members' reference allowing discussion to focus on a Secretariat document compiling 146 unanswered questions.

Busy bodies that have many STCs, including CTG, SPS, TBT and CoA, could even consider effectively doubling the number of meetings they have each year by holding virtual intersessional meetings using eAgenda to pose questions and post answers. Such a procedure might allow fast resolution of STCs while leaving more committee time for in person discussion of STCs, which some delegations told the General Council is essential even when repetitive. Along with greater use of the eAgenda system it could improve the effectiveness of STCs, notably in comparison to dispute settlement cases that can drag on for years.

While it is reasonable to assume that greater inclusion through involvement from capitals would help to reduce contrasts in the capacity of different members to participate fully in the WTO's regular business, inadequate connectivity could be a problem, and some countries might need training for operating in a more virtual environment. For developing countries with scarce administrative resources, involvement from capitals allows a more streamlined approach to engagement with the WTO, facilitates inter-agency cooperation within governments, and links trade policy more organically to wider national policy frameworks. Capital-based officials involved directly in WTO meetings are also better able to understand the implications of a national stance for the wider WTO community.

---

<sup>58</sup> Patrick Low and Robert Wolfe 'How the WTO kept talking: Lessons from the COVID-19 Crisis', in Richard Baldwin and Simon J. Evenett, eds, Turning the Corner: A Pandemic-Era Work Programme for WTO members (working title), (London: A CEPR Press VoxEU.org eBook, forthcoming in 2020).

## *Assistance*

Some developing countries resist the 777 proposal because it might place a bigger burden on them to respond to concerns raised in a committee on timelines that seem too short. My concern is more that developing countries are not making as much use as one might like of STCs. So, the 777 proposal (paragraph 15) that a developing country member encountering difficulties to respond to a trade concern could request assistance from the WTO Secretariat does not go far enough. This idea locates the problem with a small delegation in Geneva, and not with the capital, hence implies largely mechanical help for Geneva delegations. Giving the Advisory Centre on WTO Law a mandate and staff to help draft an STC would be a start, but developing countries also need help to know they have a concern worth raising themselves with their neighbours as well as with large trading partners.

It is capitals that need help to formulate a concern, and to respond to the concerns of others. First, the Secretariat could play a role, for example with mirror committees at the national level, to ensure better institutional knowledge, and it can encourage UNCTAD support for think tanks that support capacity building.<sup>59</sup> Second, WTO can and should do more to draw in expertise and resources from specialized organizations, both in the development field, like the World Bank, but also the sectoral agencies. Third, WTO's technical assistance and training plans could be rethought with an expanded budget and mandate to bring many more capital-based officials to Geneva to attend committee meetings in order to learn about the STC process. Finally, and perhaps most important, innovations for virtual participation should be explored, as discussed above.

## *Legal form*

The 777 proposal is formulated as a General Council decision. Is that necessary? A formal decision would force every committee to consider improvements, even if none of them need permission to use the authorities they already have. True, WTO bodies differ. The proposal is overkill for CTS, which has few trade concerns. The Government Procurement committee has no occasion for STCs in its current practices, although integrating its e-GPA in a common database might be useful. Some aspects are perhaps better framed as guidelines for amendment of committee procedures, therefore, with a requirement for the committee to explain in its annual report to the General Council why they have chosen to implement the guidelines, or not.

On the other hand, some matters are effectively an instruction to the Secretariat, which is an appropriate action for the General Council, as is changing WTO rules on documents to enable new procedures. The integrated database and more funds for technical assistance, and new direction on how to use those funds, may also require a central decision.

---

<sup>59</sup> Discussed in Gregory C. Shaffer, James J. Nedumpara, Aseema Sinha and Amrita Bahri, 'Indian Trade Lawyers and the Building of State Trade-Related Legal Capacity,' Minnesota Legal Studies Research Paper, (2016) <http://dx.doi.org/10.2139/ssrn.2390673>.

## Prospects for reform of WTO working practices

Reform of WTO working practices is needed and feasible. Will it happen? My answer is necessarily tentative, even speculative given the disruption to WTO work during the pandemic but the prospects are gloomy—and yet members showed that reform on the fly is possible.

Governments are broadly supportive, in principle, of STC reform. In our survey of the trade community, we asked a set of questions about the daily operations of the WTO.<sup>60</sup> We found that government officials in Geneva rank action to diffuse potential disputes through deliberations in WTO committees through mechanisms such as STCs more highly than engaging in discussion of dispute settlement reform, which usually comes first on the list of priorities for WTO reform. While the Ottawa Group remains interested in broad reform issues, their June 2020 statement focussed on action on COVID-19.<sup>61</sup> And in our survey, participants from Ottawa Group countries did not assign a higher priority than other respondents to WTO reform issues identified by the group. Similarly, we found that participants in the survey from the co-sponsors of the 777 proposal did not differ from all other respondents in the priority they attached to making use of STCs.

Discussion of these issue at periodic meetings of the General Council and the CTG show considerable resistance. Many delegations want to improve WTO working practices, but others always insist on limiting discussion to the text of agreements or existing mandates, even if a proposal (e.g. for posing and answering questions online) is only for a guideline not a new requirement. Some say that the horizontal approach would disregard the specificities of each committee: each of them is best placed to assess what rules they need. Others worry about the allegedly increased role given to committee chairs and to the Secretariat. Developing countries fret about burdensome, additional obligations at a time where their resources are under increased strain. The proposal they think might inundate developing members with more inquiries rather than address their trade concerns.

One point of resistance is that STCs can be questions about non-notified measures, or ones found in a TPR report, but some members in some committees resist discussion of anything that has not been formally notified. Yet as shown above in the case of SPS and TBT, and as is probably the case for other agreements, discussion in a WTO body of non-notified measures can help to avoid dispute settlement cases. While a government may not want the exposure provided by public discussion of a measure it had chosen not to notify, if the concern arises from market access problems faced by a foreign firm, the exposure in some form is coming anyway, and such transparency about their own policy is good for their own firms. If a measure was not notified because the government found the notification hard to prepare, responding to a question in a committee might be equally hard for national authorities. But the question has a virtue of

---

<sup>60</sup> Matteo Fiorini, Bernard Hoekman, Petros C. Mavroidis, Douglas Nelson and Robert Wolfe, 'Stakeholder Preferences and Priorities for the Next WTO Director General,' European University Institute, Working Paper RSCAS 2020/43, July 2020.

<sup>61</sup> 'June 2020 Statement of the Ottawa Group: Focusing Action on COVID-19,' WT/GC/217, 16 June 2020.

signalling what it is that another country wants to know and provides an occasion for seeking targeted technical assistance to help with the answer.

Another frequent point of resistance comes from three Latin American countries who stress the political value in repeatedly raising the same trade concern, even if there is nothing new to say. Above I observed that it can be helpful back home to say that you raised the matter, again, in WTO—but could doing it in writing for the record have the same effect? More surprising if equally ill-founded, the U.S. often complained that many STCs about EU policy stay on the agenda and go unanswered for years. Even if that were true, the 777 proposals could not make the situation worse. The point is about making sure that the procedures are more effective for everybody.

While I think the 777 ideas are sensible, if less ambitious than I would like, the EU may be the wrong lead proponent. The ideas are intended to make the process easier and more widely used but would not limit anybody's ability to ask pointed questions of the EU in any WTO body; it should be seen instead as a way for developing country members to ask better questions of each other. The beneficiaries would be smaller countries, and large countries would not be harmed. But some members are more responsive to procedural proposals from the Secretariat than from big members. And a true 'café au lait' group might inspire more confidence in proposals for reform of working practices.<sup>62</sup> Even the U.S. in the July 2019 General Council meeting read the proposal as an attempt to divert scrutiny away from EU measures.<sup>63</sup>

STCs are often over-looked in the excitement of the Appellate Body crisis, but the possibility to discuss a measure, whether in draft or already implemented, can serve as a form of peer review and a mechanism for managing actual or potential conflict. To conclude,

1. Is a more sophisticated process possible in all WTO bodies, including more questions on prospective measures beyond SPS and TBT? Yes, even though committees differ. As suggested in Table 1, more bodies need to develop a database, and all the databases should be integrated. More substantive discussion is likely if reform makes it easier for capitals to prepare instructions for committees where delegates are often Geneva-based, or even to post and answer questions online.
2. Will existing proposals increase participation? Yes, but more is needed to build a better pipeline between Geneva and capitals ensuring that the process benefits all members.
3. Will improving the use of STCs improve WTO conflict management? Yes, especially when the dispute settlement system is under stress.

---

<sup>62</sup> On the Uruguay Round Café au Lait group, see Amrita Narlikar, 'Box 47.1 Café Au Lait Diplomacy,' in Bernard M. Hoekman, Philip English and Aaditya Mattoo, eds, Development, Trade and the WTO: A Handbook (Washington: World Bank, 2002), 489-90..

<sup>63</sup> <https://geneva.usmission.gov/2019/07/23/statements-delivered-by-ambassador-dennis-shea-wto-general-council-meeting-july-23-2019/>