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Working Paper

Reforming WTO Conflict Management

Why and How to Improve the Use of “Specific Trade Concerns”

BertelsmannStiftung

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Bertelsmann Stiftung and WTO Reform

If international trade is not governed by rules, mere might dictates what is right. The World Trade Organization (WTO) serves as a place where trade policy issues are addressed, disputes arbitrated, legal frameworks derived and enforced. Through these functions, the WTO ensures that the rules of trade policy are inspired by fairness and reciprocity rather than national interest. It is more important than ever to vitalise the global public good that it represents against various threats that have been undermining it.

The Global Economic Dynamics project of Bertelsmann Stiftung is a firm believer in rules-based international trade and the WTO. In 2018, we published an extensive report with propositions on how to revitalise the WTO, based on the deliberations of our High-Level Board of Experts on the Future of Global Trade Governance. In 2019 and 2020, we follow up on this report with a series of policy contributions, providing fresh ideas and elaborating on concepts already introduced in the report. These contributions cover the areas of the Appellate Body crisis, dealing with the competitive distortions caused by industrial subsidies, enabling Open Plurilateral Agreements within the WTO while providing reassurance to concerns of the membership at large with such forms of flexible cooperation and, finally, improving working practices in WTO Committees.

We are grateful to Professor Robert Wolfe for his expertise and advice which have been a strong support for our WTO activities in general and for this paper specifically.

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Executive Summary

The World Trade Organization (WTO) needs reform to strengthen its vital role in mitigating commercial conflict, notably its procedures for discussing trade concerns. As Committees do not need permission to improve their own procedures this might be a logical starting point, but General Council guidance and a central decision on additional funding can help

Officials need to keep each other informed about implementation of WTO rules, and they do in thousands of so-called notifications through the WTO every year. Knowing what is going on is the first step in managing conflict.

Officials also need to be able to talk to each other about implementation, which they do in dozens of committee meetings every year. In those meetings they often raise "specific trade concerns" (STCs) on behalf of their firms. Most often those concerns about laws, regulations, or practices are addressed by their trading partners. A relative handful cannot be resolved this way and are raised as formal disputes.

The Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) committees are a benchmark showing the place of STCs in the great pyramid of the WTO legal order. I draw three implications from the pyramid in SPS and TBT:

1. Only a small fraction of the huge number of SPS and TBT notifications ever become a source of conflict leading to a dispute. From 1995 until early 2019, there were 34,000 TBT notifications, 580 STCs and only 6 disputes with Appellate Body reports.
2. One reason is that discussion of STCs can mitigate some sources of friction, sometimes by modification or withdrawal of a measure.
3. Dispute settlement is at the tip of the pyramid. There are probably many more enquiry point comments than STCs, and there are certainly many more STCs than disputes. The committees do not settle formal disputes, but they have demonstrably served to diffuse trade conflict in their respective areas.

While we lack comparable data on the pyramids in other committees, from mid-October 2018 to mid-October 2019, 230 trade concerns were raised in bodies other than SPS and TBT, and only 29 dispute settlement panels began work.

The system works, so why is reform needed?

- Some WTO bodies are more effective than others in dealing with trade concerns: commercial conflicts could be better managed in many domains than they are now.
- Participation especially by developing countries is uneven: all Members ought to be able to ensure that their trading partners are fulfilling their obligations.
- Participation in STCs is broader than dispute settlement, but still does not fully engage the whole membership.
- Some of the reasons reflect limited resources of people and money to come to Geneva, which compounds capacity constraints, in itself debilitating if officials have limited information and a short time to prepare for meetings.
- 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.
- The double challenge for WTO reform is to ensure that procedural changes in Geneva 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.

Building a stronger pipeline between Geneva and capitals will require funding for more people to come to meetings along with support for virtual meetings, ensuring everyone has a longer time to prepare, creating a systematic process in all WTO bodies, and developing an integrated database. More specifically, below is a checklist of helpful ideas in current proposals from Members to improve WTO working practices:

- Scheduling of meetings for a year ahead
- Advance documentation and agendas
- Written questions and answers
- Virtual participation
- Integrated database

- Better services for delegates to facilitate their work

However, the following items could be stronger in current proposals

- Encouragement to report resolution of concerns
- Annotated agendas
- Detailed record of all interventions on trade concerns in Committee Minutes
- Progress on improving STCs to be addressed in Annual Reports of all WTO bodies, including a report of periodic reviews of Committee working practices in general
- Funding for more developing country delegates to attend thematic sessions adjacent to committee meetings

Introduction

The World Trade Organization (WTO) needs reform to strengthen its vital role in mitigating commercial conflict. That means taking a hard look at the detail of its working practices and deliberative functions, notably its procedures for discussing trade concerns.

In its 2018 discussion paper on the need for WTO reform Canada observed that (WTO, 2018a):

> Some WTO bodies have developed mechanisms to discuss "specific trade concerns" (STCs), which can lead to clarification and even resolution of trade irritants before recourse to the procedures of the Dispute Settlement Body (DSB) need be considered. Not all bodies provide for such opportunities, and the procedures that do exist are not always robust enough to facilitate an adequate exchange of views and potential for resolution.

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. Knowing what is going on is the first step in managing conflict. Through transparency weak policies are exposed to the public, and to investors. In WTO that means both publication at home of all measures affecting trade (GATT Article X) and notifying other Members through the WTO of changes in such measures. It follows that efforts to improve notification, still the first source of information on measures that may require discussion, are a crucial part of WTO reform (Wolfe, 2018). Notification in itself can head off conflict.

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. Most often those concerns about laws, regulations, or practices are addressed by their trading partners. 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 are addressed by a country's trading partners.

A relative handful of trade concerns cannot be resolved this way and are raised as formal disputes. And of those, a smaller number still are appealed. The second instance appeal body is an important feature of the WTO system, but it is the small tip of a large pyramid. The rule of law in trade does not only mean rule by adjudication. WTO monitoring and peer review allows verification that differences in national law, policy, and implementation are consistent with the rules. Members hold each other to account for meeting their mutual obligations—a form of horizontal accountability (Wolfe, 2015).

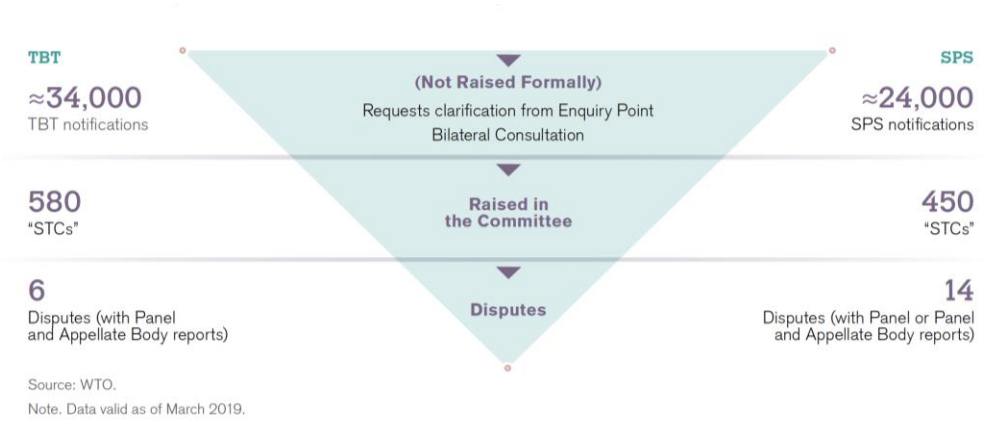
The system works, so why is reform needed? First, because some bodies are more effective than others in dealing with trade concerns: commercial conflicts could be better managed in many domains than they are now. Second, because participation especially by developing countries is uneven: all Members ought to be able to ensure that their trading partners are fulfilling their obligations. And third because the WTO ought to be the world's repository of trade intelligence for governments and firms alike, but it desperately needs an integrated database of all trade concerns across all committees, including all concerns raised and answers provided.

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 final section speculates on the prospects for reform of WTO working practices.

1 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 (Wolfe, 2005). 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 committees.[1]

Figure 1: The inverted pyramid: review of STCs in the SPS and TBT committees[2]



Source: (WTO and OECD, 2019, Figure 4.1)

The pyramid in Figure 1 does not show everything. The TBT and SPS agreements require that Members have an "enquiry point" able to answer reasonable questions from other Members. (The GATS and the TFA 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 (Cassehgari Posada, et al., 2019), and deserves to be shown on the pyramid, 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 (2020) found that between 2005 and 2014, the EU raised 161 STCs, but made 818 comments on notifications through other Members' enquiry points. Other Members used the EU enquiry point to make 438 comments on EU measures, and only 65 STCs were raised against EU or EU member state measures. (Examination of the whole period since 1995 would change these numbers, but the pattern would likely be similar.) And there are many other tools available to Members.[3]

[1] The pyramid metaphor in the 'Legal Process School' is used American public law scholarship. It There courts are part of a larger institutional structure that might be imagined as 'The Great Pyramid of Legal Order' (Hart and Sacks, 1994, 286-7). 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—examples include commercial arbitration, and the internal processes of associations. 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.

[2] For a more detailed version of this pyramid that includes all disputes that have some form of SPS or TBT claim see (Karttunen, 2020).

[3] For a description of all the tools available to help Members address and manage SPS issues including relevant legal provisions, Committee procedures, and other resources see (WTO, 2018b).

Questions of the sort that later came to be called STCs were raised in the first SPS and TBT meetings in 1995.[4] In this paper I use "STC" as shorthand for a question or concern raised in a WTO body. 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.[5]
3. At 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).[6]

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.

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 (Figures 4.7 and 4.8) that a significant number of STCs in both committees concern non-notified measures. Whether such a query leads to change in the measure is not germane to whether raising the concern can lead to reduced uncertainty for other Members and firms. Indeed, having been questioned in a committee, with the implication that a dispute could be next, might help officials in capitals to explain to colleagues why a measure should be brought into consistency with the rules. 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.

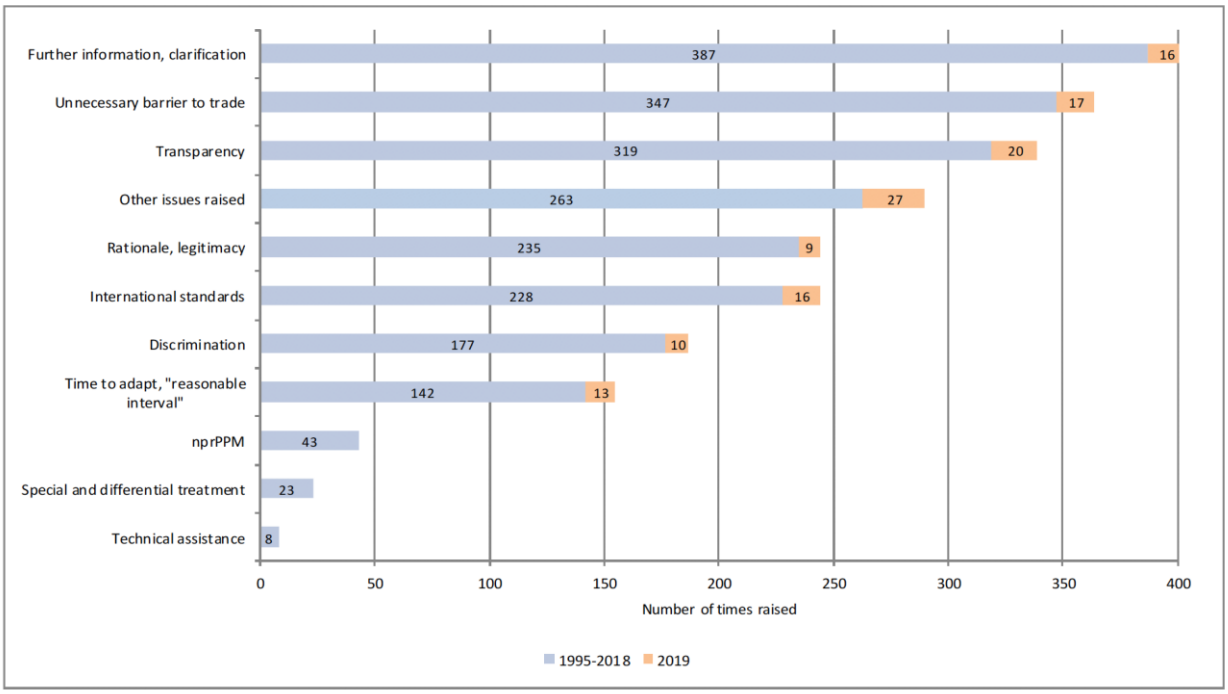
The eventual outcome of an STC is sometimes recorded, although many simply disappear from the agenda, quite possibly because they have been resolved. (There is no indication yet if the answers provided by the EU about chlorothalonil resolved the concerns expressed by other Members.) Some concerns are 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.

[4] On the evolution of the procedure in the TBT committee, see (Karttunen, 2020; Holzer, 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.

[5] 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&baskeywords=chlorothalonil

[6] http://tbtims.wto.org/en/SpecificTradeConcerns/View/576

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



Source: (WTO, 2020, Chart 29)

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 (Lang and Scott, 2006). 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 it 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 (Karttunen, 2020) only a small fraction of STCs were subsequently raised in a dispute settlement request for consultations (Holzer, 2018, 14), and STCs raised at the draft stage of a new domestic regulatory measure are less likely to end up as disputes (Cassehgari Posada, Ganne and Piermartini, 2019). In her analysis of SPS and TBT STCs Holzer (2018, 12) 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 (Holzer, 2018, 15). Sometimes disagreements are too great to be resolved through committee discussion, and other times an issue involves multiple agreements (Holzer, 2018, 16). 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 (Manak, 2019).

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

1. Only a small fraction of the huge number of SPS and TBT notifications ever become a source of conflict leading to a dispute.

2. One reason is that STCs by seeking clarification can mitigate some sources of friction, sometimes by 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.
3. Dispute settlement is at the tip of the pyramid. There are probably many more enquiry point comments than STCs, and there are certainly many more STCs than disputes. Disputes are not the universe of WTO conflict management. The committees do not enforce the agreements or settle formal disputes but they have demonstrably served to diffuse trade conflict in their respective areas (Horn, et al., 2013, 754).

2 What do we know about trade concerns in other committees?

The pyramid metaphor is a theoretically informed description that should apply across WTO. Even a casual glance at WTO news items shows that something like STCs is widespread: In May 2019 WTO members discussed Brexit and Huawei's ban at the Market Access Committee (CMA) meeting; in June at the Trade-related Investment Measures (TRIMs) committee, Mexico and the EU asked Argentina to provide more details about a scheme by which fiscal advantages are granted to private companies that favour local auto parts; and, at the June meeting of the Committee on Agriculture (CoA) there were said to be heated debates on over 200 questions, a record number in agriculture policy review.

All agreements have permissive language similar to TBT Art. 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…

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 have 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, and some have STCs.

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. 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. Some 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.

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

Committee	Review of notification	Extensive detail on "concerns" in minutes	Q&A Document Series	Database of STCs or Q&A
SPS	detailed	√	-	√
TBT	detailed	√	-	√
AoA	basic	√	-	√
CMA	varies	varies	√	X
TRIPS	basic	X	√	Pending
TRIMs	detailed	√	√	X
ADP	detailed	√	√	X
SFG	detailed	√	√	X
ILP	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

Turning now to specific bodies, 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 are first raised in the subsidiary technical committees then move up to CTG when a Member is not satisfied with an outcome, but 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.

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 QR that was the cause of a concern. In both the CMA and the CTG, many concerns that Members request to include in the agenda make no reference to a notification. 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 (WTO, 2019f). There are also STCs that are included on the agenda of formal meetings, sometimes repeatedly, where the questions and responses are oral (WTO, 2018c). All the written questions and answers are circulated and synthesized in the committee minutes but are not included in a 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 (WTO, 2018d) the U.S. says such responses should be in writing, and suggests timelines. 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. 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, 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, which affects the ability of Members to influence policy change. The level of discussion and consultation between Members regarding notifications is insubstantial. The data on services measures in the Director-General’s monitoring reports (WTO, 2019c) might usefully be discussed in CTS, but Members are resistant. Two big concerns have been discussed in CTS: Ukraine/Russia gas distribution, and China cybersecurity (most recently in October 2019). Both were political issues that could not be resolved in CTS, but the discussion in both cases was a learning experience for delegates, one that may have helped 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 (Taubman, et al., 2012).

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). 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 (WTO, 2019b). CTE could hold a thematic workshop (Wolfe, 2020) where the EDB could be the factual basis for an assessment of the incidence of particular types of issues, as was the case with the recent circular economy meeting, or it could build a theme on what has been reported in WTO notifications on energy efficiency.

Two caveats

Every committee has elements of the pyramid in varying degree, if more or less well developed, but I heard two frequent objections to this comparison in interviews. 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.

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. In Figure 2 above the most frequent reason for an TBT STC is to request information—also a frequent reason in other committees—and many of those requests concern implemented measures. In either case the broad point holds: 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.

The second objection 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.

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 in a committee where the issues concern a relatively smaller number of implemented measures. A small number of notifications in one committee could be as significant as a large number in another. 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 (WTO, 2019c) contains detailed data on STCs in TBT and SPS, and it now has more detail on questions in the Agriculture committee. In addition, the Secretariat is trying to prepare a more detailed picture of other committees. What they find is that the use of such procedures is increasing and widespread, with about 230 trade concerns raised in some 28 formal meetings of WTO bodies other than the SPS and TBT Committees during the last monitoring period. The most important point is that that number that dwarfs the 29 dispute settlement panels that began work during the period.

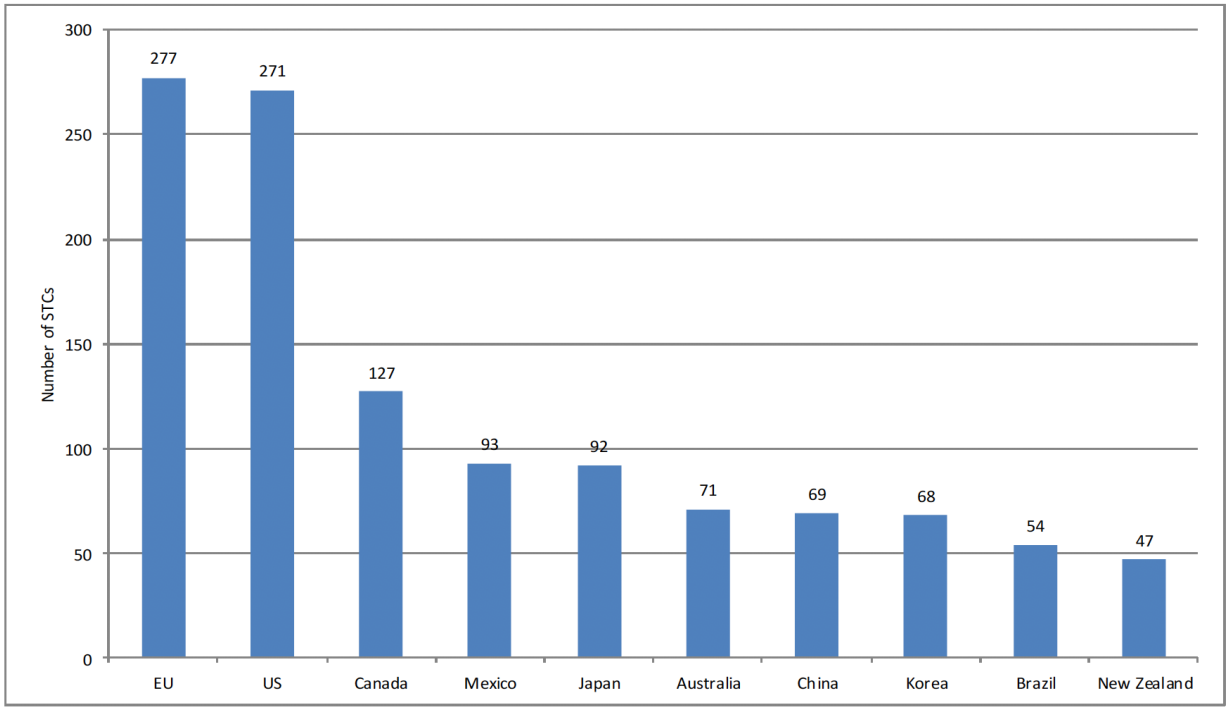
3 Who participates in STCs? And why are there so few frequent flyers?

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.[7] 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.

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



Source: (WTO, 2020, Chart 23)

[7] In each review of a Trade Policy Review report, Members ask dozens even hundreds of questions orally and in writing in the Trade Policy Review Body with wide participation especially when neighbors are under review (Karlas and Parízek, 2019). The process allows everybody, even developed countries, to pose questions based on the Secretariat synthesis report, which might be especially useful for complex issues such as industrial subsidies. But the given the different mandate of the TPR process, these questions are not trade "concerns" in the context of this paper.

Participation in SPS is also dominated by a small number of Members, although there developing countries raise slightly more STCs than developed countries (WTO and OECD, 2019, 74-5). Overall 73 Members have been involved in SPS, with one or more STCs directed toward 48 members and 67 members having raised one or more concerns (Cororaton and Orden, 2019, 49). The database issue makes counts harder in other bodies.

Agriculture is often the most important trade issue for developing countries, and the Committee on Agriculture is the central forum for surveillance of Members' commitments, but the vast majority of questions in that committee are asked by developed countries (WTO, 2018e, Chart 6.2). 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) (Shaffer, et al., 2015, 719). I have not tried to update that count, but officials familiar with the work of that committee think that the pattern has not changed.

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 (Fiorini, et al., 2019) we studied participation in dispute settlement proceedings. 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.[8]

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 (2007) reference legal capacity and power theories, membership in PTAs, and the nature of domestic political processes. 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 (Johannesson and Mavroidis, 2017). 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 (Bown, 2009, Chapter 8; see also Bown, 2011b, 170). How does a small developing country firm learn that its problems at the intensive margin 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 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, raise more STCs and ask more questions than other Members

[8] This result was not unexpected given the work of other scholars (Creamer and Godzimirska, 2015; Creamer and Godzimirska, 2016; Panke, 2017).

(Karttunen, 2020). That is, STCs and dispute settlement in WTO are usually a response to fire alarms not police patrols—they respond to the concerns of business but do not represent a systematic and costly search for violations by the authorities (Mccubbins and Schwartz, 1984; Betz and Koremenos, 2016; Raustiala, 2004). In interviews with Geneva delegates, Karttunen (2020) 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 reference to consultations with firms. The disparity in access to information may be mitigated by the ePing service (https://www.epingalert.org/en) that generates alerts about new notifications with an indication of where to send comments. It now has thousands of private sector subscribers.

In our Appellate Body survey (Fiorini, et al., 2019) 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. 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 (Ryu and Stone, 2018; Yildirim, et al., 2018), 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 may work against the developing country private sector and especially their law firms from investing such resources (Bown, 2011a).

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 (Bouët and Metivier, 2017; Busch, et al., 2009). I assume that the nebulous concept of legal capacity is related to administrative capacity, or effectiveness, which can influence the submission of notifications (Wolfe, 2013, 18; Karlas and Parízek, forthcoming, 18), hence can be expected to influence the more difficult task of preparing an STC or a dispute settlement complaint. That is indeed what the Secretariat of the agriculture committee found when it surveyed developing country Members a decade ago. The Members who responded said they lacked the institutional capacity to undertake the necessary analysis, and they lacked the resources send more capital-based officials to attend meetings in Geneva to learn how to ask questions (WTO, 2009, para 42).

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.

4 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.[9] I am aware of at least five proposals in play as of February 2020:

1. A proposal from Singapore (RD/CTG/8) on emulating best practices in the TBT committee

[9] 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

2. A proposal from Brazil (WTO, 2019g) 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 (WTO, 2019e) and others to establish a new tool at the WTO to support Members in finding mutually agreeable solutions to their trade concerns, in particular those trade concerns that had been raised repeatedly in the committees.
4. A Hong Kong, China proposal (RD/CTG/9) on better functioning of the CTG and its subsidiary bodies
5. A proposal for guidelines for all WTO bodies led by EU supported by 17 other Members (WTO, 2019d).[10]

I use the EU proposal (WT/GC/W/777 hereafter "777") as a focus for analysis of scenarios for reform based on the considerations above because it is picks up many elements of the other four. It is comprehensive, public, and can be presumed to reflect some degree of shared views on of what is needed and acceptable. Much of the proposal is very good, even if it might place new burdens on the Secretariat, but other parts could be strengthened.

4.1.1 Meeting arrangements

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. The first part of the 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. A yearly indicative schedule of meetings should be straightforward for the Secretariat to prepare.

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 who need 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 (WTO, 2019a) 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. In presenting its ideas (RD/CTG/9) at a CTG meeting in June 2019 (WTO, 2019e) Hong Kong, China added that for reoccurring items, especially for those discussed in other committees, an annotated agenda could enable Members to be updated on how issues had developed since the Council's previous meeting, which would be particularly helpful to small delegations that might not be able to cover the meetings of all subsidiary bodies. I understand that informal discussions are continuing about whether CTG should adopt this practice.

[10] Albania; Australia; 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

4.1.2 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). Some Members might say that there is no legal basis for such a requirement, but it is only a guideline. And it would make the work of all capitals easier.

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, especially if it avoided using the same or similar terms to refer to entirely different things.[11] An integrated database would be especially useful for anyone (for example small delegations) who must follow more than one area of WTO work. 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, or TBT where the e-Agenda system encourages Members to upload STCs themselves, along with their questions and answers.

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 is it 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.[12]

A better database would also allow researchers to undertake more sophisticated investigations on the effects of trade measures on diverse firms. For examples of what researchers have been able to accomplish with the existing SPS and TBT databases, see (Fontagné, et al., 2015; Crivelli and Groeschl, 2016; McDaniels and Karttunen, 2016; Fontagne, et al., 2005; Iodice, 2019; Navaretti, et al., 2019).

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 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.

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[11] Written questions and answers now greatly outnumber oral questions in TPR reviews, so clearly posing questions in writing is feasible for all Members. Those TPR questions and answers should also be in an integrated database, of course.

[12] https://apiportal.wto.org

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.

4.1.3 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 (WTO, 2011; Fraser, 2012). 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 (WTO, 2012), 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 (WTO, 2014).

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

4.1.4 Assistance

Some developing countries might resist the 777 proposal because it might place a bigger burden on them to respond to concerns raised in a committee on timelines that might be 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 part of the proposal deserves fleshing out. As drafted, it implies largely mechanical help for Geneva delegations. Developing countries also need help to know they have a concern worth raising. It is capitals that need help to formulate a concern, and to respond to the concerns of others. New thinking is needed on how to provide that help.

First, the Secretariat could play a role in capacity building, for example with mirror committees at the national level, to ensure better institutional knowledge. Second, 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. Aid For Trade funds could also be used to this end. Third, 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.

There is a risk that increasing the requirements might actually limit rather than increase developing country participation. But taken together, efforts to make more information available in writing and in advance ought to facilitate preparation for a meeting. Such efforts might even lead to virtual meetings, if questions and answers are online ahead of a meeting, in the sense of officials in different countries interacting through the WTO without having to come to Geneva. WTO could also consider allowing remote participation in meetings by some sort of video link, if

security issues could be resolved. Virtual meetings might lead to better notification compliance if officials in capitals begin to understand the benefits for their own work.

4.1.5 Legal form

The 777 proposal is formulated as a General Council decision. Is that necessary? Probably. 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. It could be that only the integrated database and more funds for technical assistance, and new direction on how to use those funds, require a central decision. 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. Other aspects are perhaps better framed as guidelines for amendment of committee procedures, with a requirement for them to explain in the committee's annual report why they have chosen to implement the guidelines, or not.

5 Prospects for reform of WTO working practices

Reform of WTO working practices for the discussion of trade concerns is needed and feasible. Among the benefits of reform would be:

- Enhanced participation
- More substantive discussion, if it makes it easier for capitals to prepare instructions for committees where delegates are often Geneva-based
- More timely discussion of time-bound measures (e.g. contingent protection) might help to manage conflict or at least reduce recourse to dispute settlement if it proved possible to provoke discussion quickly in the relevant committee.

Will it happen? My answer is necessarily tentative, even speculative in February 2020 as delegations consider what might be possible before the 12th Ministerial Conference in June, but the prospects are gloomy. The discussion of these ideas in the July 2019 meeting of the CTG (WTO, 2019e) and again in November showed how hard it is to agree even on changes in procedure—many delegations want to improve WTO working practices, but others always insist on limiting discussion to the text of agreements or existing mandates.

While I think the 777 ideas are sensible, if less ambitious than I would like, the EU may be the wrong lead proponent for such proposals. 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. 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. Even the U.S. in the July 2019 General Council meeting read the proposal as an attempt to divert scrutiny away from EU measures.[13]

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

[13] https://geneva.usmission.gov/2019/07/23/statements-delivered-by-ambassador-dennis-shea-wto-general-council-meeting-july-23-2019/

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

Raising an STC can be more valuable if the Member raising the measures has some expectation of being able to influence its implementation. That requires being able to intervene at an early stage in the policy process. If all SPS and TBT STCs concerned notifications of draft measures, more limited expectations for other committees where notifications are after the fact might be justified. But I think we should not be so pessimistic about STCs, for two reasons. First, many STCs in SPS and TBT concern non-notified and implemented measures, not merely notifications of draft measures.

Second, a Member need not wait for the notification. The general GATT Article X publication requirement applies to all agreements. A great many government measures, even subsidies, are published by governments in some form either in an official Gazette or in Budget documents. Often that information refers to prospective measures. Members could ask questions in a committee about published but not (yet) notified measures. The Global Trade Alert tracks draft (unimplemented) measures, so Members could use the online searchable database to look for measures, such as subsidies, before the measures were notified to the WTO, and hence could ask a question about the measure, for example in the SCM Committee.

To conclude,

1. Is a more sophisticated process possible in all bodies? Yes, even though committees differ.
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.

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