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World Trade Organization  
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**ADDRESSING TENSIONS AND AVOIDING DISPUTES:  
SPECIFIC TRADE CONCERNS IN THE TBT COMMITTEE**

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\* The paper is the outcome of research done by the author during her time as a visiting scholar at the WTO. It was presented on the occasion of the TBT Committee meeting, held on 21 June 2018. The author is grateful to Aik Hoe Lim, Erik Wijkström and Lauro Locks from the WTO's Trade and Environment Division for enlightening discussions and critical comments, trade delegates and WTO secretariat staff for insightful interviews and Lisa White, attorney-at-law called to the Jamaican bar, for skilful editing. The paper reflects solely the author's research and personal views.

# Addressing Tensions and Avoiding Disputes: Specific Trade Concerns in the TBT Committee

KATERYNA HOLZER\*

## Abstract

*Most specific trade concerns (STCs), which are raised before the WTO Committee on Technical Barriers to Trade (TBT Committee), disappear from the TBT Committee's meeting agendas without escalating into formal disputes. At the same time, a relatively small number of TBT-related disputes have been subject to the WTO dispute settlement procedures. By examining the practice of raising STCs and the relationship between STCs and disputes, the paper emphasises the role of STCs as a trade tension resolution mechanism. It argues that the STC mechanism is a viable alternative to the currently overburdened WTO dispute settlement system. The paper also suggests ways to strengthen the STC mechanism of the TBT Committee through dividing TBT Committee meetings into thematic sessions, adopting mediation procedures and reporting on STC resolutions. Further, it underscores the importance of increasing transparency and promoting good regulatory practice in avoiding disputes.*

**Keywords:** specific trade concerns, technical barriers to trade, TBT Agreement, TBT Committee, trade disputes

**JEL Classifications:** F13, F53, F55, K33, L15

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## I. Introduction

The WTO dispute settlement (DS) system is faced with the problem of lack of resources to handle increasingly complex disputes awaiting resolution by panels and the Appellate Body (AB). Many composed panels cannot commence proceedings due to the unavailability of staff from the WTO secretariat. The number of disputes brought to the DS system since its creation in 1995 exceeded 500 and the number of requests to convene panels reached an average of 30 per month.<sup>1</sup> An appeal rate of two thirds of all panel reports presents a further challenge, especially in the current delay in appointing new AB members.<sup>2</sup> Apart from the lack of resources, the nature of disputes is also problematic. Currently, a dispute involves on average 28 measures and 180 claims, and 13 issues on appeal, with 10,000 words per issue appealed<sup>3</sup>. Moreover, panels are overburdened with demanding information concerning the facts of the cases, including an increased number of exhibits.

At the end of 2015, the WTO secretariat started a process of consultations with delegations concerning how to improve the DS, considering the budget and personnel constraints set by WTO members (members). This was not the first attempt of the secretariat to find ways to increase the DS's efficiency.<sup>4</sup> Within the currently resumed consultation process, increased attention is paid to the idea of a more active use of alternative dispute resolution mechanisms, such as mediation, as well as various committee practices aimed to address trade tensions through informal consultations among members.

Litigation is indeed not the only means of tackling issues arising from trade relations. A considerable part of trade governance is done through diplomatic means and transparency mechanisms, such as monitoring, surveillance and related discussions among members in various committees and other WTO bodies.<sup>5</sup> Committee work contributes to the ease of trade tensions and prevents their escalation into trade disputes or, when tensions do escalate into disputes, it may still help litigants reach mutually agreeable solutions. Besides easing the dispute overload for the DS bodies and the secretariat, discussions among members at committee meetings might offer less costly solutions to trade conflicts.

The paper explores the practice of raising STCs in the TBT Committee. It examines in particular, how the STC practice contributes to the resolution of trade tensions, thereby serving both as an alternative mechanism of trade conflict resolution and as a preventive mechanism against the initiation of formal disputes under the Dispute Settlement Understanding (DSU). In light of the present overload of the DS, the STC practice is particularly useful to avoid disputes. It should therefore be strengthened and possibly extended to other WTO bodies.

The paper draws on interviews with trade delegates from various WTO member countries, the dispute settlement and TBT STC databases, case studies and the author's observance of the STC practice at the

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<sup>1</sup> Annex to the Director-General's (DG) statement on the current dispute settlement activity at the meeting of the Dispute Settlement Body of 28 October 2015 (room document).

<sup>2</sup> If the process of appointing new AB members remains impeded, by September 2018 the number of judges available to hear appeal cases in the WTO will be reduced to 3 out of 7. After December 2019, the DS could be paralysed completely. See Tetyana Payosova, Garry C. Hufbauer and Jeffrey Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures', PIIE Policy Brief, March 2018.

<sup>3</sup> Annex to the DG statement, above n 1.

<sup>4</sup> Between 2010 and 2013, WTO members and experts sought solutions to the DS overload through consultations under the direction of the former Deputy WTO DG Alejandro Jara. It should be noted that these consultations are informal and separate from the ongoing DSU review process. See 'Secretariat's informal consultations concerning the panel process', [https://www.wto.org/english/tratop\\_e/dispu\\_e/informal\\_consultations\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/informal_consultations_e.htm), accessed on 11 April 2018.

<sup>5</sup> Other forms of non-judicial governance in the WTO include efforts of working groups concerning trade negotiations and various review processes (including the trade policy review mechanism). For more on WTO non-judicial governance, see Andrew Lang and Joanne Scott, 'The Hidden World of WTO Governance', 20(3) *EJIL* (2009): 575-614.

TBT Committee meetings from 2017 to 2018. Apart from the TBT Committee, STCs are raised, on a regular basis, before the Committee on Sanitary and Phytosanitary Measures (SPS Committee) and also, at meetings of other WTO bodies albeit in a less formal manner.<sup>6</sup> While not directly addressing SPS-related STCs, the paper refers to the STC practice in the SPS Committee and, based on the comparison, suggests ways in which the STC mechanism in the TBT Committee could be strengthened. The paper does not deal with discussions of specific trade measures held in other WTO bodies.

The paper begins with the description of STC practice in section II. In section III, it identifies factors that influence the settlement of STCs. Section IV examines STCs that grew into formal disputes and explores the linkages between STC practice and dispute settlement. Section V summarises the main findings and suggests ways to strengthen the STC practice as a means of resolving trade tensions.

## **II. Practice of raising STCs in the TBT Committee**

Meetings taking place in various formats at the WTO are indispensable for the implementation of WTO agreements. At committee meetings, delegations discuss issues pertinent to the operation of a particular agreement. In some cases, delegations are also given the opportunity to settle issues arising from the use of measures hindering trade. Committee work helps resolve trade tensions by diplomatic means and achieves same in a less costly manner than the DS does through litigation.

### **A. Procedure**

While not directly prescribed by the TBT Agreement, STC discussions emerged on the initiative of members, based on Article 13.1 TBT. This provision establishes a committee that shall meet regularly,

“for the purpose of affording Members *the opportunity of consulting* on any matters relating to the operation of this Agreement or the furtherance of its objectives, and shall carry out such responsibilities as assigned to it under this Agreement or *by the Members*” (emphasis added).

The history of STC discussions can be traced to the GATT era. Parties to the GATT Agreement on Technical Barriers to Trade of 1979 (also known as the Standards Code) raised various issues concerning the application of specific TBT measures by other parties. These discussions took place at meetings of the GATT TBT Committee.<sup>7</sup> Subsequent to the establishment of the WTO, members continue to raise concerns over specific TBT measures of other members in what is now the WTO TBT Committee.<sup>8</sup>

The process of submitting questions and receiving answers has evolved over the years into a formal procedure, which was officially established by a decision of the TBT Committee under the fifth triennial review pursuant to Article 15.4 TBT<sup>9</sup>, which sought,

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<sup>6</sup> The Goods Council, the Committee on Import Licensing, the Committee on Agriculture, the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) etc.

<sup>7</sup> The earliest example of such discussions dates back to 19 June 1980, when the USA raised concerns over the UK's new health and veterinary requirements on poultry. The USA considered these requirements to be discriminatory treatment against US-produced poultry, as UK poultry plants enjoyed a 2-year transitional period while the US plants did not. The USA requested the TBT Committee to investigate the matter with the aim of obtaining from the UK an agreement to apply its poultry regulations in a non-discriminatory manner and called on other parties to take a position on this issue. See Minutes of the TBT Committee meeting held on 19 June 1980, TBT/M/3, Agenda item I. For other examples of early discussions see TBT/M/17 (19 December 1984, agenda item I), TBT/M/19 (1 August 1985, agenda item K), and TBT/M/24 (10 March 1987, agenda items J and K).

<sup>8</sup> The term ‘specific trade concerns’ was officially first used in 2004: see Minutes of the TBT Committee meeting of 23 March 2004, G/TBT/M/32, with ‘Specific Trade Concerns’ as a separate sub-item under an agenda item ‘Implementation and Administration of the Agreement’.

<sup>9</sup> G/TBT/26, 13 November 2009.

“to streamline the organization of the Committee’s discussion in order to allow for:

- (a) Adequate preparation of the discussion of concerns and improved follow-up on those discussions, including through domestic consultation processes and mechanisms as well as consultations between Members, and
- (b) More efficiency both when supporting the arguments of other Members on the same concern, as well as when reiterating concerns raised and recorded in the minutes of prior TBT Committee meetings”.

Pursuant to the procedure, a member wishing to raise an STC (concerned member), must directly inform both the committee secretariat and the member, whose technical regulation is the subject of concern (the subject member), of its intention to do so, no later than two weeks before the next TBT Committee meeting. The STCs should then be listed in the draft agenda for the upcoming meeting, where new STCs are distinguished from those, which were previously raised. The secretariat must send the draft agenda to members at least ten days before the meeting.<sup>10</sup> In the interim, the concerned member can enter into informal bilateral discussions with the subject member. These informal bilateral discussions usually occur on the eve of the TBT Committee meeting and can ease the tension straightaway, by resolving the issue without transforming it into a formal STC raised at the TBT Committee meeting. If the issue is settled through informal discussions, before the meeting starts, the concerned member will request, at short notice that the committee secretariat withdraws the issue from the list of STCs.

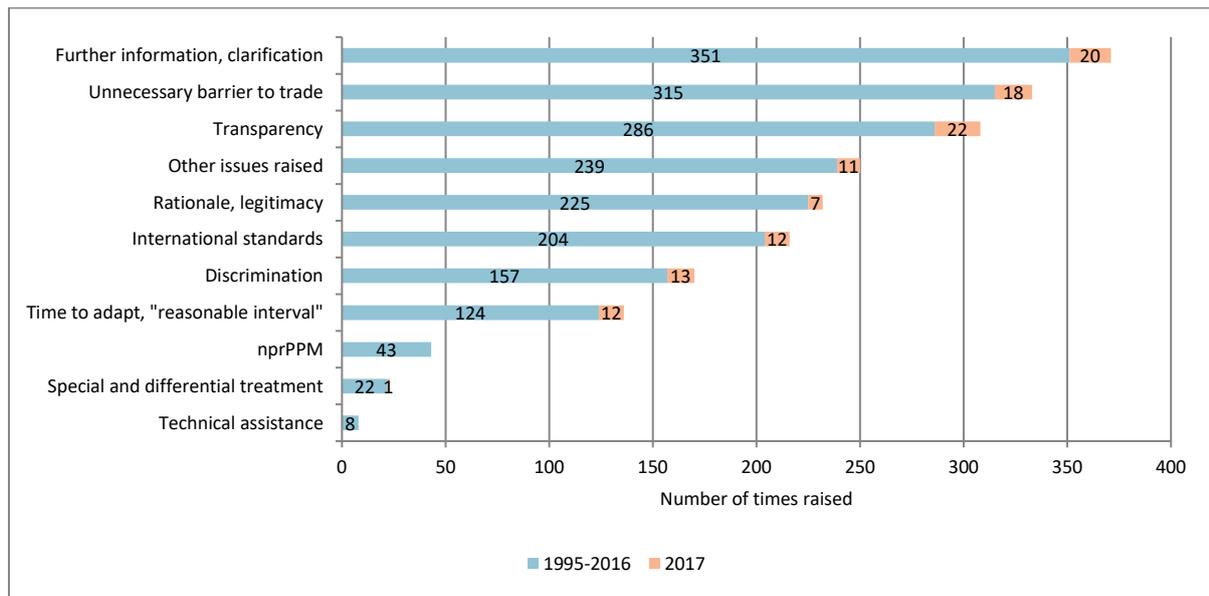
The committee meetings are quite formal. The procedure consists of delegates representing the concerned member reading their prepared statements containing the STC claims, on the one hand, and delegates representing the subject member reading their prepared texts responding to the STC claims, on the other. An STC raised by a concerned member may be supported by other members, which share similar market access concerns associated with the measure. If an STC is raised by a group of members, the pressure on the subject member increases, which also increases the chances for accommodation of the STC.

The nature of STC claims varies considerably (Figure 1). In some cases, the concerned members simply seek further information and clarification of draft measures or require their notification. In other cases, the claims might be about violations of the rules of the TBT Agreement, including the inconsistency of measures with existing international standards; the absence of scientific justification; the discriminatory character of the measure; or an unnecessary level of trade-restrictiveness.

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<sup>10</sup> It should be noted that the procedure still allows concerned members to bring STCs to the TBT Committee’s discussion after the two-week deadline has passed, provided the concerned members informed the subject member(s) of this intention. Such ‘short-notice’ STCs are discussed at the end of TBT Committee meetings.

*Figure 1. Types of concerns raised, 1997-2017*



*Source: TBT Committee, Twenty-third Annual Review of the TBT Agreement, G/TBT/40, 12 March 2018.*

The ability to raise STCs is heavily dependent on members fulfilling their transparency commitments to the TBT Committee under the TBT Agreement. Subject to certain conditions, members must notify the initiation of, or changes to, their domestic TBT measures, i.e. technical regulations, and conformity assessment procedures.<sup>11</sup> This obligation to notify enables other members to comment on draft TBT measures to seek clarifications and/or amendments. Consequently, members may discuss other members' measures by raising STCs at committee meetings.

Prior to raising the STC, the concerned member often forwards comments on notifications to the subject member's TBT enquiry point responsible for preparing the regulation.<sup>12</sup> The concerned member may also request clarification regarding the proposed regulation. Claims are therefore usually made with respect to draft measures, i.e. at the stage of their preparation, and STCs can be viewed, in such cases, as 'reverse' notifications. Concerned members can attempt to delay the entry into force of a measure, demanding that its trading partner provides more time for its producers to adjust to the prospective requirements in the export market. Moreover, concerned members may influence the final design of their trading partners' TBT measure or the details of its implementation.<sup>13</sup>

Concerned members may also raise STCs regarding unnotified measures, where a measure is not subject to notification because it is based on an international standard, or where a member fails to observe its

<sup>11</sup> This obligation covers proposed technical regulations and conformity assessment procedures that are not in accordance with international standards and that may have a significant effect on trade (Art. 2.9 and 5.6 TBT). For emergency measures, WTO members are obliged to notify measures upon their adoption, and not at the stage of drafting (Art. 2.10 and 5.7 TBT). Similar obligations also exist in the SPS area (Art. 7 and Annex B SPS).

<sup>12</sup> According to Art. 10.1 TBT, all WTO Members are required to have contact points for questions related to domestic technical regulations, standards and conformity assessment procedures. These enquiry points are also responsible for the multi-stakeholder consultation regarding the formulation of STCs.

<sup>13</sup> In November 2016, the WTO, jointly with the United Nations Department of Economic and Social Affairs (DESA) and the International Trade Centre (ITC), launched an online information system, ePing, which enables exporters, government agencies, sector associations and other stakeholders to receive daily or weekly alerts about TBT and SPS notifications. Due to ePing, stakeholders receive alerts of any changes that occur in TBT and SPS requirements to products in export markets of their interest and can contact enquiry points for further information, comment on measures and discuss them in ePing fora. See <http://www.epingalert.org/en>.

notification obligation.<sup>14</sup> In the latter case, STCs often focus on the failure to notify.<sup>15</sup> STCs can also be raised with respect to TBT measures that are already in force. This happens, when the subject member failed to observe its notification obligation and the concerned member(s) claimed violations of TBT rules *post factum*, or when a measure was not required to be notified because it was in accordance with a relevant international standard. It can also occur for other reasons. An STC may be raised initially when a regulation is under preparation and thereafter, may continue to be raised after the regulation enters into force.<sup>16</sup> Moreover, an STC may be raised in situations, where a technical regulations or a conformity assessment procedure was enacted immediately as a matter of urgency (TBT Article 2.10 and Article 5.7).

## **B. Members' participation**

The ability to make fruitful use of STC practice depends on the effectiveness of the domestic TBT consultation process that ensures communication, cooperation and coordination among different state agencies and private stakeholders. The participation of the private sector is of particular importance. Exporters are directly exposed to new technical requirements in export markets and they seek to address potential barriers to their exports. Consequently, delegates often raise STCs based on the information received from their domestic producers.<sup>17</sup>

Between January 1995 and December 2017, members raised 548 STCs. Ten to 15 STCs were discussed per TBT committee meeting between 1995 and 2005. The number increased to between 50 and 60, from 2011 onwards.<sup>18</sup> Notwithstanding, members are not equally active in using the STC mechanism. The USA and the EU are by far the most active users. For instance, at the TBT Committee meeting held during 8-9 November 2017, 57 STCs were discussed. The EU raised 35 and responded to 8 STCs; the US took the floor 28 times to raise STCs.<sup>19</sup>

Seventy-three WTO members have never raised an STC. Further, 61 of these members have never been subject to one.<sup>20</sup> All of them<sup>21</sup> are low-income developing countries, least developed countries (LDCs) and countries in transition. Possible reasons for their non-participation in STC discussions are lack of technical expertise in the TBT area and/or low or completely absent trade volumes that might be affected by TBT measures of other members. In fact, the author's comparison of the participation of these countries in raising STCs and their participation in dispute settlement shows a correlation between the two. The prevailing

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<sup>14</sup> In 2017, 56% of STCs raised for the first time concerned unnotified measures. See Note by the Secretariat, 'Twenty-Third Annual Review of the Implementation and Operation of the Agreement', G/TBT/40, at 24.

<sup>15</sup> While the annual number of notified technical regulations and conformity assessment procedures is steadily rising and reached 2585 notifications in 2017, 28 WTO Members, have never notified any regulatory proposals. See Note by the Secretariat, 'Twenty-Third Annual Review of the Implementation and Operation of the Agreement', G/TBT/40, at 5.

<sup>16</sup> See *e.g.* the case of STC on the EU chemicals regulation REACH discussed in Section III.

<sup>17</sup> For a good example of a national mechanism of multi-stakeholder cooperation on TBT and SPS measures, see *Trade and Food Standards* (FAO and WTO, 2017), at 29.

<sup>18</sup> Note by the Secretariat, 'Twenty-Third Annual Review of the Implementation and Operation of the Agreement', G/TBT/40, at 16.

<sup>19</sup> An STC can be raised by more than one country at a time. In other words, countries can join each other in raising an STC. All EU Member States are counted as one WTO Member, the EU, given that the EU usually raises STCs on behalf of one, some or all of its Member States.

<sup>20</sup> The latter include Afghanistan, Albania, Angola, Antigua and Barbuda, Armenia, Bangladesh, Belize, Benin, Brunei, Burkina Faso, Cabo Verde, Cambodia, Cameroon, Central African Republic, Chad, Cote d'Ivoire, Congo, Democratic Republic of the Congo, Djibouti, Dominica, Gabon, the Gambia, Fiji, Georgia, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Laos, Liberia, Lesotho, Liechtenstein, Macao China, Madagascar, Maldives, Mali, Mauritania, Mongolia, Montenegro, Morocco, Myanmar, Namibia, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Senegal, Seychelles, Sierra Leone, Solomon Islands, Sri Lanka, Suriname, Swaziland, Tajikistan, Togo, Tonga, Vanuatu.

<sup>21</sup> Save Liechtenstein, which forms a custom union with Switzerland.

majority of members, which are inactive in STC discussions, have never participated in DS, neither as a complainant nor as a respondent.<sup>22</sup> As follows from the interviews of trade delegates given to the author, many of these members resolve issues with their trading partners under preferential trade arrangements, including those established under generalized schemes of preferences. Thus, it might be inferred that the STC practice has little relevance for almost one third of members. That is not quite true however. As discussed below, the STC practice can still be useful for these members for a number of reasons.

Notwithstanding that 60 developing countries have never taken the floor in STC discussions, and all developed countries have either raised STCs or been subject to STCs, there is no indication that developing countries are excluded from STC practice.<sup>23</sup> On the contrary, developing countries, other than those indicated in the preceding paragraph, increasingly raise STCs. In 2017, they raised 14 new STCs, three times more than that which was raised by developed country members, while 9 new STCs were raised jointly by developing and developed members (Figure 2).<sup>24</sup> Developing countries such as China, India, Brazil, Indonesia, Chile, Peru, Thailand and South Korea, are active users of the mechanism, although China, India, Indonesia, as well as the Russian Federation and the United Arab Emirates find themselves more often in the role of subject member rather than concerned member. The participation can also be traced among low-income developing countries (Honduras, Nicaragua, Guatemala, Kenya and Zimbabwe) and LDCs (Uganda, Tanzania and Zambia), which have increasingly taken the floor to raise STCs.<sup>25</sup> In total, 53 developing countries (including economies in transition) raised STCs at least once.<sup>26</sup>

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<sup>22</sup> The most likely reason for that is that the insignificant trade volumes of these countries, which are affected by possibly WTO-incompatible measures taken by other countries, might not justify the considerable investment of time and significant financial and human resources required by DS procedures. Moreover, low-income developing countries and LDCs would have no trade power to enforce the decision of the panel/AB by trade sanctions, should the responding country, which lost the case, refuse to comply with the decision. See *e.g.* Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed', Minnesota Legal Studies Research Paper No. 08-50, December 23, 2008.

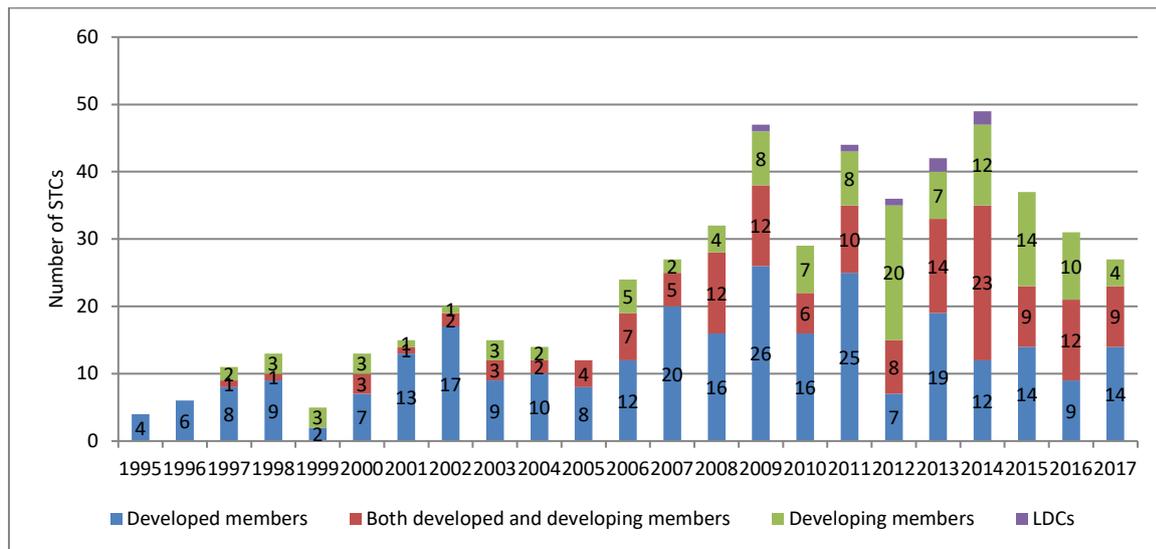
<sup>23</sup> The term 'developing country' is used here in relation to those WTO members, which declare themselves to be developing countries in the WTO.

<sup>24</sup> Note by the Secretariat, 'Twenty-Third Annual Review of the Implementation and Operation of the Agreement', G/TBT/40, at 21.

<sup>25</sup> In this respect, a series of STCs, which were raised concerning tobacco control measures, provide an interesting example. Zambia, which is an LDC, has raised five tobacco regulation-related STCs, and Zimbabwe, which is a low-income developing country, has raised 10 STCs related to tobacco control regulations in other countries.

<sup>26</sup> Barbados, Bolivia, Botswana, Brazil, Burundi, Chile, China, Hong Kong China, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Egypt, El Salvador, Guatemala, Honduras, India, Indonesia, Jamaica, Jordan, Kenya, Korea, Kuwait, Malawi, Malaysia, Mauritius, Mexico, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Paraguay, Peru, Philippines, Qatar, Russian Federation, Saudi Arabia, Singapore, South Africa, Chinese Taipei, Tanzania, Thailand, Republic of Macedonia, Trinidad and Tobago, Turkey, Uganda, Ukraine, Uruguay, Venezuela, Zambia and Zimbabwe.

**Figure 2. New STCs raised by development status, 1995-2017**



Source: TBT Committee, *Twenty-third Annual Review of the TBT Agreement*, G/TBT/40, 12 March 2018.

In fact, some developed countries, such as Switzerland, New Zealand and Norway, have a lower participation in STC discussions than some developing countries, such as Brazil, India and China. Apart from economic power, other possible factors determinative of the extent of participation in the STC discussions could be the importance of international trade, legal and scientific capacities, past experience in the WTO, protectionist patterns and dependence on other members, including their preferential trade relations.<sup>27</sup>

### C. Usefulness of STC discussions

The fact that members continue to raise 30 - 40 new STCs per year, in the last ten years (Figure 3) at TBT Committee meetings strongly indicates that members perceive the STC practice as meaningful.<sup>28</sup>

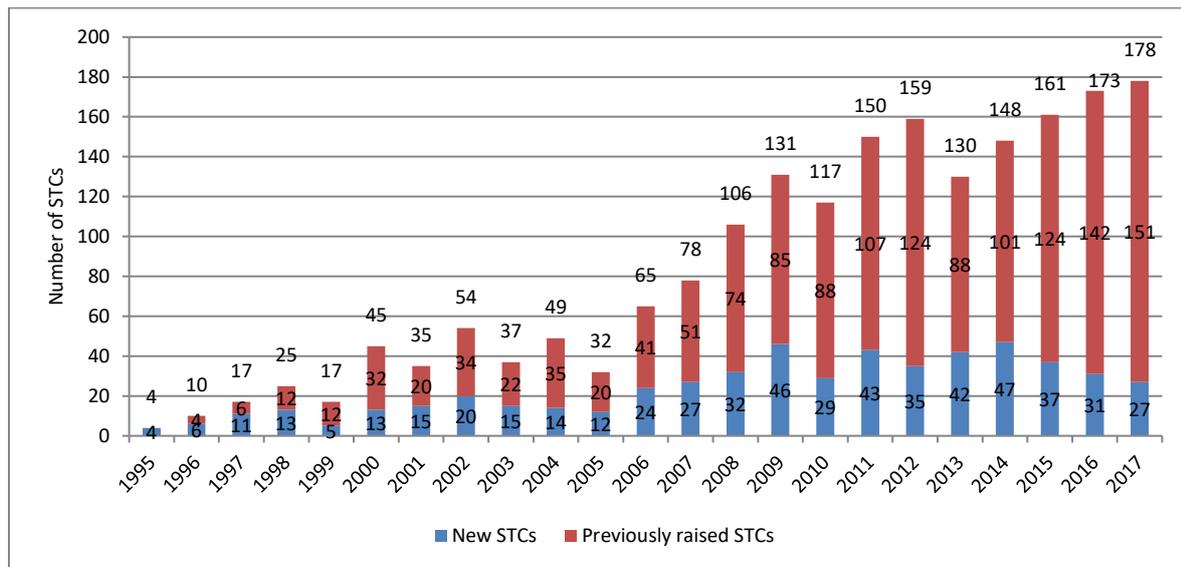
Different reasons explain this:

#### - Clarification of technical regulations

Often, concerned members raise STCs to request that based on the domestic situation the TBT measure is designed to address, subject members provide clarification or justification for proposed measures, taking into account international standards or scientific findings. This information may help exporters of concerned members clarify the application of the new regulation to their products, while simultaneously checking its compliance with the TBT Agreement. In some cases, members raise STCs in response to the absence of due notification to urge the subject member to notify their draft or already enacted measure and thereby fulfil the notification obligations.

<sup>27</sup> Sofia Boza and Filipe Fernandez, 'Development level and WTO member participation in Specific Trade Concerns (STCs) and Disputes on SPS/TBT', ECO / WTI Academic Cooperation Project Working Paper Series 2014/17, at 25.

<sup>28</sup> This was also acknowledged by trade officials interviewed by the author.

**Figure 3. STC raised, 1997-2017**

Source: TBT Committee, *Twenty-third Annual Review of the TBT Agreement*, G/TBT/40, 12 March 2018.

*- Improvement of technical regulations*

The STC practice allows for the improvement of measures, particularly during the pre-enactment stage, before they become trade barriers. STCs can arise out of unintentional deficiencies of regulations. In such cases, the STC discussions help subject members to improve their TBT measures by minimizing the creation of trade barriers and increasing compliance with TBT rules. By discussing each other's TBT measures, seeking further information on measures and trying to improve them through mutual dialogue, members have the opportunity to avoid discrimination and unnecessary barriers to trade, while at the same time ensuring the proper domestic level of health, environment and consumer protection.

*- Sharing experiences and best practices*

Through STC discussions, members also share experiences on how they design TBT measures. The exchange of questions and responses serve to ensure that TBT measures are best fit for the purposes of providing information to consumers and protecting health and the environment, while not creating unnecessary barriers to trade. STC discussions also create an opportunity to improve regulatory cooperation and provide testing ground for new areas of regulatory activities, such as cyber security and non-communicable diseases. Sometimes, they also result in a subject member providing technical assistance to concerned members whose exporters are unable to meet the new requirements. Moreover, for some members the participation in STC discussions is a learning process, similar to the participation of third parties in disputes under the DSU, as the participation informs how 'to prosecute trade conflicts'.<sup>29</sup>

*- Addressing overlaps with issues under other WTO agreements*

STC discussions sometimes reveal issues under other WTO agreements that require subject members to notify their regulations in the relevant WTO body. As a result, legislation covering different regulatory areas may be discussed in parallel, in different WTO bodies. This was the case of plain packaging regulations from a number of countries, concerns about which were raised not only as STCs in the TBT Committee but also discussed in the Goods Council, the Committee on Import Licensing and the TRIPS

<sup>29</sup> Mark Busch and Krzysztof Pelc, 'Dispute Settlement in the WTO', in Lisa L. Martin (ed.), *The Oxford Handbook of the Political Economy of International Trade* (OUP, 2015), at 407.

Council.<sup>30</sup> Similarly, STCs raised in connection with notifications concerning food products may eventually result in discussions in the SPS Committee.<sup>31</sup> Importantly, the accommodation of STCs through discussions in the TBT Committee can mitigate tension over a measure and decrease or eliminate the likelihood of it being raised as an issue under other WTO agreements. Therefore, STC discussions in the TBT Committee can be useful for other WTO bodies in the sense that they decompress trade frictions that could arise in the latter.<sup>32</sup>

*- Low-cost settlement of trade frictions*

While not acknowledged as a means of dispute resolution in WTO agreements, STC discussions help resolve trade conflicts before they become disputes under the DSU. BUSCH AND PELC compare the role of STC practice in resolving trade tensions with the function foreseen under Article 5 DSU that concerns ‘Good Offices, Conciliation and Mediation’. They note that “given the technical subject of TBT and SPS, and since STCs are not a part of formal dispute settlement per se, perhaps they fill in where DSU Article 5 has fallen short”.<sup>33</sup> STCs have indeed some similarities with good offices. Both of them provide logistic support to help the parties negotiate in a productive atmosphere, which, in the case of STCs, is created in the TBT and SPS Committees, and in the case of good offices, in what is facilitated by the Director General.<sup>34</sup> This way of addressing trade tensions is less costly than the DS and, in many cases, also more expedient.<sup>35</sup> Resolving a dispute through the DS might take a long time, including the time for the respondent to comply. But even if the complainant wins the dispute, it might not have the necessary trade power to effectively retaliate.<sup>36</sup> By contrast, STCs provide an opportunity to find a solution to trade tensions in a low-cost, expedient and effective way.

### III. Accommodation of STCs

It is possible to identify three categories of TBT-related trade frictions subject to WTO disciplines.<sup>37</sup> The first category includes 35 trade conflicts with TBT components that since 1995 were filed as disputes under the DS, having not been previously discussed as STCs in the TBT Committee.<sup>38</sup> One of them, *EC-Sardines*,

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<sup>30</sup> *WTO Annual Report 2016*, at 54, 69 and 79.

<sup>31</sup> SPS-related STCs can also be raised in the TBT Committee as the line between SPS and TBT measures are sometimes blurred. In the case of food safety regulations, the TBT Agreement deals with compositional requirements related to food quality and nutrition values affecting non-communicable diseases (*e.g.* obesity), as well as all kinds of labels, whereas the SPS Agreement deals with food safety requirements in relation to prevention of human, animal and plant communicable diseases.

<sup>32</sup> For instance, when members discussed Turkey’s regulation placing a warning message ‘alcohol is not your friend’ on alcohol products, they pointed to a possible violation of intellectual property obligations, thus helping to avoid trade frictions in the TRIPS area. See ID 407 Turkey - Draft Communiqué on Warning Messages Placed on Containers of Alcoholic Beverages, G/TBT/M/61 and G/TBT/M/62.

<sup>33</sup> Busch and Pelc, above n 29, at 408.

<sup>34</sup> The only case of mediation so far concerned Thailand and Philippines, on the one side, and the EU, on the other side, in a trade tension over the preferential access to the EU market for canned tuna. Following the advisory opinion of the mediator, the EU expanded its tariff quota to tuna from the complaining countries. See Communication from the Director-General, Request for Mediation by the Philippines, Thailand and the European Communities, WT/GC/66, 16 October 2002.

<sup>35</sup> According to some estimates, to initiate a dispute in the WTO costs USD 500,000 on average, whereas legal fees can easily reach USD 10,000,000. See post by Mauritius Nagelmueller on dispute finance at IELP Blog on 13.09.2017.

<sup>36</sup> A case in point is the limited ability of Antigua and Barbuda to retaliate with effective trade sanctions corresponding to trade volumes in the sum of up to USD 21 million to the US for non-compliance with the panel and AB rulings in *US-Gambling* (DS285). To realize its right to retaliate was still difficult even after Antigua had been allowed to proceed with cross-retaliation by suspending its TRIPS commitments in relation to the US film and music industry in response to US violations of GATS obligations. See ‘WTO Authorises Antigua to Move Forward on Retaliation in US Gambling Dispute’, 17 (3) *Bridges* (2013).

<sup>37</sup> TBT issues can also be decided outside the WTO, *e.g.* through bilateral relations or other international or regional fora.

<sup>38</sup> The total number of TBT-related disputes filed under the DSU in 1995-2017 reached 54.

became an STC after the case had been adjudicated.<sup>39</sup> The second category includes 15 STCs that failed to be settled through STC discussions and were eventually brought to the DS. Finally, the third, and by far the largest, category comprises over 500 STCs that have never been transferred to the DS. This category is examined first.

### A. STCs not flowing into formal disputes

STCs that belong to the third category either continue to be raised at TBT Committee meetings or disappear from the agenda for various reasons, including their possible settlement. This category includes STCs, which have been discussed for many years but have never been brought to the DS. Among these STCs, 16 were discussed for more than 5 years,<sup>40</sup> 5 were discussed for more than 7 years<sup>41</sup> and another 5 were discussed for more than 10 years<sup>42</sup>.

The following case studies are aimed to shed light on some of the longest and most intensive STC discussions. Each STC has never been transformed into a formal dispute, but instead turned into a sort of 'eternal' STC.

#### - EU-REACH

This STC concerns the EU chemicals regulation that governs registration, evaluation, authorisation and restriction of chemicals (REACH). It is one of the most remarkable STCs raised in the TBT Committee due to both the length of discussions (discussed for 14 years; at 37 meetings from 2003 to 2017) and the number of participants involved (raised by 34 members).<sup>43</sup> The STC was first raised in 2003 in relation to the lack of transparency, as the measure was not previously notified. Once notified, members began to focus on more substantive issues. Over time, this STC has evolved into a deep and complex one with claims made under the TBT Agreement. Moreover, the STC discussions influenced the final design of the regulation while the regulation was still being drafted between 2004 and 2006.<sup>44</sup>

The STC discussions continued after the REACH entered into force in 2007. At the implementation stage between 2007 and 2017, the EU responded to the continuous concerns of its trading partners through the adoption of additional measures, to assist small and medium-sized enterprises to comply with REACH

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<sup>39</sup> It was brought to the STC discussions in the TBT Committee, when some contested issues arose at the stage of compliance with the decision of adjudicative bodies in the dispute. This special case will be discussed in the next section.

<sup>40</sup> They include ID294 China-Info Security –ongoing from 2011; ID296 China-Cosmetics Acceptance –ongoing from 2011; ID305 Korea-Chemicals Regulation –ongoing from 2011; ID328 Indonesia-Toy Safety –ongoing from 2011; ID332 Russia-Alcohol Safety –ongoing from 2012; ID345 EU-Wine Geographical Indications –ongoing from 2012; ID367 India-Electronics Registration –ongoing from 2013; ID383 Peru-Healthy Eating –ongoing from 2013; ID393 EU-Endocrine Disruptors – ongoing from 2013; ID298 India-Food Safety – 2011-2016; ID162 Canada-Cheese – 2007-2012; ID178 Norway-Consumer Products – 2007-2012; ID123 EC-Ecodesign Requirements – 2005-2010; ID116 Peru-Footwear Label – 2004-2009; ID96 Korea-Fish Heads – 2003-2008; ID31 Netherlands-Wood Products – 1998-2004.

<sup>41</sup> ID45 New Zealand-Ban on Trout – 2000-2007; ID122 China-Electronic Information Products – 2005-2012; ID274 India-Telecommunications –ongoing from 2010; ID143 China-Medical Devices – 2006-2014; ID167 India-Drugs and Cosmetics – 2007-2015.

<sup>42</sup> ID36 EC-Ban on the Use of Nickel Cadmium in Batteries – 1999-2009; ID35 EC-Electrical and Electronic Equipment – 1999-2012; ID39 EC-Wine – 1999-2012; ID88 EC-Chemicals Regulation (REACH) – 2003-2017; ID133 India-Tyres –ongoing from 2006.

<sup>43</sup> ID88 EC-Chemicals Regulation (REACH).

<sup>44</sup> Minutes G/TBT/M/38 of the TBT Committee meeting on 15 and 17 March 2006.

requirements and the provision of technical assistance and advice to developing countries. So far, escalation into a dispute has been avoided.<sup>45</sup>

*- India-Tyres*

This ongoing STC has prompted the longest uninterrupted STC discussion.<sup>46</sup> It has repeatedly been raised at 33 TBT Committee meetings since 2006. The STC concerns India's certification system for tyres, which does not recognise existing international certification schemes on the grounds that there are special road and temperature conditions in India. Concerns include alleged discrimination, as the scheme prescribes different methodologies for the calculation of license fees for national and foreign tyre manufacturers. The concerned members have been repeating their claims at every meeting over the years. As a result, the scheme has undergone a number of modifications. Moreover, its entry into force has been postponed a number of times. Both the concerned members and India acknowledged that the bilateral discussions, which preceded the committee meetings, played an important role in arriving at a compromise.<sup>47</sup> Twelve years after the STC was raised for the first time, the concerned members continue to insist on further modifications.

*- Chile-Nutrition Label*

Raised by 12 members at 11 consecutive meetings between 2013 and 2016, this STC belongs to the most intensive STC discussions and is particularly interesting due to its impact on the evolution of the relevant Chilean draft regulation.<sup>48</sup> The draft regulation established a mandatory food label, with nutritional warnings about high sugar, sodium, saturated fat content and calories. The draft regulation is meant to address the problem of obesity in the Chilean population. The concerned members are focused on the trade restrictiveness of the measure, its inconsistency with international standards and the lack of scientific basis for threshold values of sugar, sodium and fat. Large food producers and associations used the STC to put significant pressure on Chilean regulators. They also threatened to take legal action.<sup>49</sup> The STC discussions influenced the final design of the label and helped extend the implementation period to several years.

## **B. Factors influencing STC settlement**

What are the likely determinants of successful STC discussions that prevent escalation of trade tensions into disputes? First of all, one should acknowledge the existence of some technical features of STC practice that enable it to function as a trade conflict resolution mechanism. Similar to disputes under the DSU, a typical STC involves a concerned member raising the STC and often making claims of violations of certain TBT provisions (like a complainant in a dispute) and a subject member, which is expected to provide a response to the expressed concerns (like a respondent to a dispute). The language used in the formulation of STCs is also similar to the language used in the parties' submissions in disputes. Moreover, as was noted by BUSCH AND PELC, the TBT and SPS Committee secretariats manage the data on STCs so that it is "organized just as in a dispute settlement case", with all the information on the members involved, the measure at issue and sometimes the status of the 'case' recorded.<sup>50</sup>

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<sup>45</sup> The last time the REACH STC was raised was at the spring TBT Committee meeting of 2017. It was not raised at the summer and fall meetings of 2017. However, it does not mean that it is now a closed issue, as the REACH discussions were dormant for two years (2014-2016) but resumed after some amendments to the regulation had been made and new negative trade effects linked to the implementation of the regulation had been revealed.

<sup>46</sup> ID133 India-Pneumatic tyres and tubes for automotive vehicles.

<sup>47</sup> See *e.g.* Minutes G/TBT/M/54 of the TBT Committee meeting on 15-16 June 2011.

<sup>48</sup> ID370 Chile-Proposed amendment to the Food Health Regulations, Supreme Decree No. 977/96.

<sup>49</sup> See 'Chile Seeks to Fight Obesity with New Food Labeling Law', *Associated Press*, 28 June 2016.

<sup>50</sup> Busch and Pelc, above n 29, at 406.

Secondly, concerning the three above-mentioned STCs that were raised for many years and never brought to DS, the subject members were open for dialogue with their trading partners. Informal bilateral meetings between concerned and subject members that preceded official committee meetings played a crucial role in the search for compromise. In these cases, subject members made a number of modifications to their regulations in response to the raised STCs and engaged in the regulatory cooperation with concerned members, providing them with technical assistance and advice. This openness for dialogue and cooperation is one of the factors of success of STC discussions.<sup>51</sup>

Another factor that may influence the outcome of STCs is the genuine purpose of a contested regulation to promote public health and consumer safety. In some cases, the legitimacy of regulations, as well as the right of WTO members to set a level of protection as they deem fit, can make the TBT Committee a more appropriate place to settle trade concerns than the DS. STC discussions provide the opportunity to negotiate changes to a measure without resorting to legal claims. This is often achieved through technical assistance and peer pressure exerted by the continuous raising of STCs. With legitimate public policy objectives in the background, the settlement of issues follows a more pragmatic approach.

Moreover, an important factor of STC accommodation is the degree of complexity of issues raised i.e. whether the STC is procedural or substantial. Procedural STCs are raised simply because of the failure of subject members to notify regulations or as a request for clarification based on notifications. Once a subject member notifies its regulation or provides an explanation to the concerned member(s), the discussions usually end. In such cases, it can be argued that the contribution of STC practice to preventing disputes is limited, given that such STCs are ‘simple’, as they merely present requests for clarification or additional information on particular regulations. Yet, even then, the role of STC discussions may be crucial, as providing information helps avoid misunderstanding that could otherwise lead to a formal dispute.

The question of the contribution of STC discussions to the settlement of trade tensions relates to the fate of those STCs, which after being raised at many TBT Committee meetings stopped being discussed at subsequent meetings. What was the reason for not discussing them any longer? Were they settled between concerned and subject members, after the subject member accommodated the concerns by clarifying, amending or withdrawing its regulation? Did the concerned members stop raising the STC because their exporters could gradually adjust to the new regulation? Was a settlement reached in another forum? Did the STC discussions end after a dispute was filed?

It is difficult to provide informed answers to these questions, given that members do not report on the STC status in the TBT Committee.<sup>52</sup> The rate of resolution of STCs can only be estimated based on the number of STCs disappearing from the TBT Committee’s meeting agenda. Based on that observation, roughly half of all ‘serious’ STCs, i.e. those raised in three or more meetings, may be assumed to have been resolved.<sup>53</sup> However, making a judgment about the resolution of STCs based on their disappearance from the agenda of meetings cannot provide an accurate conclusion about the resolution of STCs. It is possible that the STC discussed in the TBT Committee were finally resolved in other fora, including free trade agreements, international organizations other than the WTO, or a measure that triggered an STC was the subject of a

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<sup>51</sup> It should be noted that bilateral consultations and talks are held both on the margins of the TBT Committee and outside the TBT Committee. WTO members may use other fora, including bilateral cooperation platforms and regional meetings, to address pending TBT issues. Therefore, bilateral consultations are not confined to the TBT Committee framework.

<sup>52</sup> By way of contrast, in the SPS Committee, members report on STC resolutions. Based on the reporting, the rate of resolution of SPS STCs constitutes about 40%. See *WTO Annual Report 2016*, at 61.

<sup>53</sup> Henrik Horn, Petros C. Mavroidis and Erik N. Wijkström, ‘In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees’, 47 (4) *Journal of World Trade* (2013), at 753.

long domestic legal dispute.<sup>54</sup> Moreover, some STCs can unexpectedly be raised again in the TBT Committee after a long interruption of the discussions.

When assessing the level of success of STC discussions in relation to ‘serious’ STCs, HORN, MAVROIDIS AND WIJKSTRÖM assumed that if an STC was not raised at six consecutive meetings, during two years, the STC had likely been dropped from the agenda and would never be raised again.<sup>55</sup> This assumption holds true in most STC cases, with some exceptions. The STC over China-Testing and certification requirements for medical devices (ID143) was not discussed for six years after it was initially raised in 2006. However, it was discussed again between 2012 and 2014. Another example is the STC over India-Prevention of food adulteration (ID225), which was raised three times in 2009, and raised again in 2012. Similarly, the STC concerning European Communities-Ecodesign requirements for energy-using products (ID123) was raised in five consecutive meetings from 2005 to 2007 and again in 2010. Also, the STC about Peru-Labeling of footwear (ID116) was discussed four times between 2004 and 2005 and again, from 2008 to 2009.

In sum, there is no guarantee that a dormant STC will not be raised again in the future. It is even more difficult to determine the reason for the settlement of each individual STC. However, considering that the prevailing majority of STCs never become subjects of formal disputes, it can be concluded that STC discussions are an effective mechanism of resolving trade tensions and preventing disputes under the DSU.

#### IV. The STC-DS nexus

The large number of STCs raised in the TBT Committee from 1995 to 2017 may be contrasted with the relatively small number of disputes involving TBT issues in the same period (548 STCs as opposed to 54 requests for consultations, as at 1 January 2018).<sup>56</sup> Not all TBT issues in disputes have previously been discussed as STCs in the TBT Committee. Only 20 requests for consultations filed under the DSU contain TBT issues that were first raised as STCs.<sup>57</sup> These requests for consultations are linked to 15 STCs<sup>58</sup> comprising less than 3% of all STCs raised between 1995 and 2017.<sup>59</sup> Moreover, one DSU case is linked

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<sup>54</sup> This was particularly the case of the Brazilian ban on flavoured cigarettes, which was discussed at five TBT Committee meetings between 2011 and 2012. See ID 288 Brazil - Draft Resolution No. 112, 29 November 2010; maximum levels of tar, nicotine and carbon monoxide permitted on tobacco products and prohibition of additives. The STC discussions were interrupted when the ban was temporarily suspended by an injunction issued by Brazil’s Supreme Court, which remained in force for years. However, in February 2018, Brazil’s Supreme Court upheld the ban, thereby making live once more the issues that led to the STC being raised in the TBT Committee. Notwithstanding, the STC has not yet been raised again before the TBT Committee.

<sup>55</sup> Horn, Mavroidis and Wijkström, above n 53, at 746.

<sup>56</sup> In the SPS area, the proportion is approximately the same: 421 STCs vs 46 requests for consultations.

<sup>57</sup> They include DS135 EC-Asbestos (a request for consultations by Canada in 1998); DS291, DS292, DS293 EC-Biotech (three requests for consultations in 2003 - by US, Canada and Argentina); DS369 EC-Seal Products II (a request for consultations by Canada in 2007); DS381 US-Tuna II (a request for consultations by Mexico in 2008); DS384, DS386 US-COOL (two requests for consultations in 2008 – by Canada and Mexico); DS400, DS401 EC-Seal Products (two requests for consultations in 2009 – by Canada and Norway); DS406 US-Clove Cigarettes (a request for consultations by Indonesia in 2010); DS434, DS435, DS441, DS458, DS467 Australia-Plain Packaging (three requests for consultations in 2012 – by Ukraine, Honduras and Dominican Republic, and two requests for consultations in 2013 – by Cuba and Indonesia); DS459 EU-Biodiesel (a request for consultations by Argentina in 2013); DS499 Russia-Railway Equipment (a request for consultations by Ukraine in 2015); DS506 Indonesia-Bovine Meat (a request for consultations by Brazil in 2016); and DS532 Russia-Measures Concerning the Importation and Transit of Certain Ukrainian Products (a request for consultations by Ukraine in 2017).

<sup>58</sup> The fact that 20 requests for consultations contain traces of only 16 STCs is due to the nature of filing disputes under the DSU. WTO members file disputes individually and if there are several complaining members, the same dispute is filed more than once.

<sup>59</sup> These STCs include: ID12 France-Regulation on Asbestos; ID58 EC-Traceability and Labelling of Biotech Food and Feed Products; ID112 Belgium and the Netherlands-Seal products; ID42 US-Dolphin-Safe Tuna Labelling Requirement; ID91 US-Country of Origin Labelling; ID257 US-Ban on Clove Cigarettes; ID304 Australia-Tobacco Plain Packaging Bill 2011; ID307 EU-Directive 2009/28/CE, Renewable Energy Directive; ID460 Russian Federation-Technical Regulations on Safety of Railway Transport; ID461 Indonesia-Regulation of the Minister of

to STC discussions at the implementation stage of the measure, thereby not following the usual STC-dispute chronological sequence.<sup>60</sup>

### A. STCs ending up in disputes

The examination of STCs with links to the DS sheds light on why a small number of STC discussions are not able to prevent formal disputes. The reasons vary from case to case but it is possible to identify four groups of cases. The first group is comprised of cases involving radical measures, such as sales bans, which were prepared in the process of thorough consultations with stakeholders and strongly backed by the public of the subject member. In such cases, STC discussions fail to prevent trade disputes, as subject members are not willing to abolish or modify their measures. A primary example from this category is the case of *EC-Asbestos*, which is the earliest STC linked to the DS.<sup>61</sup> High awareness of health risks associated with asbestos excluded the possibility that the subject member would have conceded to the requests of concerned members about a less restrictive measure.<sup>62</sup> In *EC-Seal Products*, the escalation into a dispute happened when concerned members' expectations for the withdrawal of the regulation prohibiting sales of seal products on the EU market were shattered by the extension of the ban from the national level of some EU member states to the regional level, throughout the EU.<sup>63</sup> Similarly, in *EC-Biotech*, the tension grew as the regulation of genetically modified organisms (GMO) evolved into a moratorium on the approval of GMO products.<sup>64</sup> In *US-Clove Cigarettes*, a dispute was filed just after two rounds of STC discussions,<sup>65</sup> as it became clear very soon from the response of the subject member that the ban on flavoured cigarettes would not be lifted or adjusted at the request of the concerned member.<sup>66</sup>

The second group of cases includes those in which the trade dialogue between concerned and subject members is hampered by political factors. One example is the dispute over *Bans on Specific Products*, which is linked to five STCs.<sup>67</sup> In that case, the ban on confections from a single producer grew into a series of bans on products of other exporting industries of the concerned member. The extension of the bans coincided with the general deterioration of trade relations between the subject and concerned members due to the crisis in their political relations. Finding a solution through STC discussions in this situation proved

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Agriculture No. 139/Permentan/PD.4; ID399 Russian Federation-Measure affecting import of Ukrainian confectionary products; ID439 Russian Federation-Measure affecting imports of Ukrainian juice products; ID440 Russian Federation-Measure affecting imports of Ukrainian beer products; ID476 Russian Federation-Measure affecting the import of Ukrainian wallpaper; and ID 504 Russian Federation-Measures affecting imports of Ukrainian products.

<sup>60</sup> DS231 European Communities–Trade Description of Sardines (a request for consultations by Peru in 2001); ID87 European Communities-Amendment to Regulation on Sardines.

<sup>61</sup> ID12 France-Regulation on Asbestos; DS135 European Communities-Measures Affecting Asbestos and Products Containing Asbestos.

<sup>62</sup> Minutes G/TBT/M/8 of the TBT Committee meeting on 20 June 1997.

<sup>63</sup> ID112 Belgium and the Netherlands-Seal products; DS369 European Communities-Certain Measures Prohibiting the Importation and Marketing of Seal Products.

<sup>64</sup> ID58 European Communities-Traceability and Labelling of Biotech Food and Feed Products; DS291 European Communities-Measures Affecting the Approval and Marketing of Biotech Products (complaint of the US); DS292 (complaint of Canada) and DS293 (complaint of Argentina).

<sup>65</sup> ID257 United States-Ban on Clove Cigarettes; DS406 United States-Measures Affecting the Production and Sale of Clove Cigarettes.

<sup>66</sup> The representative of the USA indicated that the USA was not going to reverse the ban on clove cigarettes given the high priority the Obama Administration placed on protecting the health of Americans, especially youth. See Minutes G/TBT/M/49 of the TBT Committee meeting on 5-6 November 2009.

<sup>67</sup> ID399 Russian Federation-Measure affecting import of Ukrainian confectionary products; ID439 Russian Federation-Measure affecting imports of Ukrainian juice products; ID440 Russian Federation-Measure affecting imports of Ukrainian beer products; ID476 Russian Federation-Measure affecting the import of Ukrainian wallpaper; ID504 Russian Federation-Measures affecting imports of Ukrainian products; DS532 Russian Federation-Measures Concerning the Importation and Transit of Certain Ukrainian Products.

impossible. STC discussions were unhelpful for the same reason in the earlier case of *Russia-Railway Equipment* that involved the same members.<sup>68</sup>

The third group includes cases where the potential of STC discussions to resolve contested issues was not fully exploited. One example is *US-Tuna II*,<sup>69</sup> where STC discussions were inert and superficial.<sup>70</sup> There was a long break of eight years between the STC discussions and the initiation of the dispute. The TBT Committee forum was not used at the time when the issue grew in importance for the concerned member, and the subject member missed the chance to avoid the dispute.

The fourth group consists of cases, where the possibility of settling a trade conflict through STC discussions was fully exploited but divergences in the concerned and subject members' positions were insurmountable for reasons other than those prevailing in the first and the second groups. In *US-COOL*, the country of origin labelling requirements were intensively discussed as an STC for 7 years without reaching a mutually acceptable solution.<sup>71</sup> Practically all the issues raised in the TBT Committee were later formulated as the TBT-related claims in the requests for consultations.<sup>72</sup> In the more recent case of *Indonesia-Bovine Meat*, halal certification requirements and other import restrictions on beef were discussed as an STC,<sup>73</sup> simultaneously with other STCs raised concerning halal regulations of the subject member.<sup>74</sup> In 2016, one of the concerned members, which is a world's leading exporter of certified halal meat, filed a complaint to the DS, having at that time another ongoing dispute with the subject member on similar issues but in relation to chicken imports.<sup>75</sup> While having no objection to what concerned the international standard for halal products as such, the complainant claimed origin-based discrimination.<sup>76</sup>

There are also situations where measures trigger legal issues under several WTO agreements. In such cases, the fact that STCs end up in the DS is not necessarily a sign of failure of STC discussions. Discussions over certain measures can be held in parallel in different WTO bodies and the TBT part of the measure is not the essential or only reason for bringing the claim to the DS. *Australia-Tobacco Plain Packaging* is the case in point.<sup>77</sup> A major claim in the dispute over a regulation prescribing plain packaging for tobacco products was made in relation to violations of intellectual property rights.<sup>78</sup>

In sum, there is no uniformity in cases where links between STCs and disputes are found. Reasons leading to the escalation of trade tension into a dispute are not always clear; they can also be multiple. However,

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<sup>68</sup> ID460 Russian Federation-Technical Regulations on Safety of Railway Transport; DS499 Russia-Measures Affecting the Importation of Railway Equipment and Parts thereof.

<sup>69</sup> ID42 United States-Dolphin-Safe Tuna Labelling Requirement; DS381 United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products.

<sup>70</sup> See e.g. Minutes G/TBT/M/18 of the TBT Committee meeting on 25 February 2000.

<sup>71</sup> ID91 United States - Country of Origin Labelling.

<sup>72</sup> DS384 United States-Certain Country of Origin Labelling (COOL) Requirements (complaint of Canada) and DS386 (complaint of Mexico).

<sup>73</sup> ID461 Indonesia-Regulation of the Minister of Agriculture No. 139/Permentan/PD.4; DS506 Indonesia-Measures Concerning the Importation of Bovine Meat.

<sup>74</sup> See e.g. ID397 Indonesia – Regulation no. 84/Permentan/PD.140/2013 on halal food; and ID502 Indonesia - Halal Product Assurance Law no. 33 of 2014.

<sup>75</sup> However, in that dispute, the complainant (Brazil) decided not to pursue the TBT claims with respect to the halal labeling and instead raised a claim under Art. III:4 GATT. See WT/DS484/R, *Indonesia-Measures Concerning the Importation of Chicken Meat and Chicken Products*, adopted 22 November 2017, paras. 7.573-7.579.

<sup>76</sup> See The Request for Consultations of Brazil, WT/DS506/1, G/L/1145, G/SPS/GEN/1486, G/LIC/D/50, G/TBT/D/49, G/AG/GEN/130 of 7 April 2016.

<sup>77</sup> ID304 *Australia-Tobacco Plain Packaging Bill 2011*; DS434 *Australia-Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (complaint of Ukraine), DS435 (complaint of Honduras), DS441 (complaint of Dominican Republic), DS458 (complaint of Cuba) and DS467 (complaint of Indonesia).

<sup>78</sup> See e.g. The Request for Consultations of Indonesia, WT/DS467/1, G/TBT/D/46 IP/D/34, G/L/1041 of 25 September 2013.

all STCs that grew into disputes concerned measures that raised issues of compliance with TBT rules and created barriers to trade.<sup>79</sup> STCs raised as mere requests for notification usually are not candidates for disputes. Moreover, the length of STC discussions does not seem to play a role, as there are disputes that emanate from both short discussions (for *e.g.* *Asbestos, Clove Cigarettes*) and long discussions (for *e.g.* *Biotech, COOL, Tobacco Plain Packaging*).

### B. Interaction between STC discussions and disputes

Some cases illustrate the repercussions that STC discussions can have on DS procedure. The above-mentioned *Australia-Tobacco Plain Packaging* case provides perhaps the most notable example of the correlation between STCs and disputes. The STC discussions of the plain packaging regulation for tobacco products led to the formation of two coalitions among members with opposite positions on tobacco control measures.<sup>80</sup> Quite unusual for STCs, some countries took the floor not to join other concerned members but to support the subject member.<sup>81</sup> The STC discussions were underway, when requests for consultations under the DSU were made. Some concerned members also tried to use the STC discussion to give updates about the dispute.<sup>82</sup> The STC discussions continued even at a later stage of the dispute, as STCs were raised in relation to plain packaging regulations of other WTO members, which were not involved in the ongoing dispute.<sup>83</sup> A positive attitude towards tobacco plain packaging regulations that dominated the STC discussions and the approving comments of members about the regulations could not remain unnoticed during dispute proceedings.

Also noteworthy in this respect is the *EC-Sardines* case, discussed as an STC at the compliance stage of the dispute.<sup>84</sup> The STC discussions, which addressed an amended regulation on labelling requirements for sardines, were important to finding a prompt solution for compliance with the AB decision. The STC was discussed in the TBT Committee at the same time as the parties to the dispute held their formal consultations regarding compliance. The STC discussions conducted by the extended number of participants and the bilateral consultations between the parties to the dispute had a mutual positive impact on the final settlement of the issue.<sup>85</sup>

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<sup>79</sup> This is confirmed by an econometrics analysis of the linkages between DS cases citing the TBT Agreement and the STC data. See Mahdi Ghodsi and Jan Jakub Michalek 'Technical Barriers to Trade Notifications and Dispute Settlement within the WTO', 11(2) *Equilibrium. Quarterly Journal of Economics and Economic Policy* (2016), at 219-249.

<sup>80</sup> A total 24 countries participated in the discussion in the period of 2011-2014.

<sup>81</sup> While the Dominican Republic, Honduras, Ukraine and some other tobacco-producing countries vehemently opposed the Australian regulation, the EU, Uruguay, New Zealand, Norway, Canada and Brazil supported the Australian measure and mentioned that they themselves intended to take similar measures of tobacco control. Also the representative of the World Health Organization backed the measure. See *e.g.* Minutes G/TBT/M/54 of the TBT Committee meeting on 15-16 June 2011.

<sup>82</sup> At the TBT Committee meeting in June 2012, the Dominican Republic announced its intention to request formal consultations with Australia under the DSU. Australia was not pleased that the announcement was made during the STC discussions, "especially given the bilateral nature of dispute settlement consultations". See Minutes G/TBT/M/57 of the TBT Committee meeting on 13-15 June 2012. Two years later, Ukraine used the TBT Committee meeting to discuss the Australian measure in parallel with the DS proceedings, as 'a matter of courtesy and transparency' and as a useful update for all members on the 'developments in respect of the concerns that Ukraine previously raised'. See Minutes G/TBT/M/64 of the TBT Committee meeting on 5-6 November 2014.

<sup>83</sup> ID380 Ireland-Proposal to Introduce standardized/plain packaging of tobacco products in Ireland; ID424 United Kingdom-Proposal to introduce plain packaging of tobacco products (or United Kingdom-Generic Tobacco Labeling); ID441 France-Proposal to introduce plain packaging of tobacco products).

<sup>84</sup> DS231 European Communities-Trade Description of Sardines; ID87 European Communities-Amendment to Regulation on Sardines.

<sup>85</sup> At the last STC discussion on the matter, the EU representative referred to the formal consultations with Peru stating that the EU was working closely with Peru to reach a settlement and confirmed that the ruling of the AB would be fully implemented. See Minutes G/TBT/M/30 of the TBT Committee meeting on 2 July 2003.

*EC-Sardines*, in which the STC discussions did not precede the dispute but followed it at the compliance stage, also shows that the links between STCs and disputes can be very complex. This is true also for the cases, in which a measure became the subject of STC discussions many years after a dispute pertinent to the same measure had been brought to the DS. A pharmaceutical imports regulation, which was first the subject of formal consultations under the DSU with one member,<sup>86</sup> was raised six years later as an STC by other members.<sup>87</sup> There are also cases, where issues in disputes and issues in STCs are peculiarly intertwined, so that although there seems to be no direct link between the dispute and the previously discussed STC, the measure at issue could be mentioned in the context of other issues raised as STCs. The halal legislation that became an issue of the *Indonesia-Chicken* dispute was dealt with in several STCs but in a different context.<sup>88</sup>

One final observation should be made regarding the formulation of claims. It could be assumed that the complainant in a dispute may learn from the responses of the subject member in STC discussions and adjust its claims in the request for consultations accordingly.<sup>89</sup> In most cases, however, claims that were initially made in STC discussions were later repeated as TBT-related claims in requests for consultations but as their extended versions. Requests for consultations are formulated in more legalistic language and are more thoroughly substantiated by references to relevant provisions of the TBT Agreement.

## V. Conclusions and suggestions for improvement

The foregoing examination demonstrates that out of more than 540 STCs discussed in the TBT Committee from 1995 to 2017, only 15 STCs ended up in formal WTO disputes. Other STCs either disappeared from the agenda of the TBT Committee meetings and presumably were settled, or continued to be raised for years, often resulting in modification of measures at the request of members raising STCs. Openness for dialogue and regulatory cooperation between subject and concerned members, including technical assistance, are major factors contributing to the success of STC discussions. Informal bilateral meetings held prior to official TBT Committee meetings play a crucial role in finding mutual understanding and compromise.

STCs' escalation into formal disputes is not necessarily a sign of failure of STC discussions. Usually, STC discussions are unable to resolve a tension in cases where measures raise issues under several WTO agreements. The STC settlement can also be precluded by political factors. Reaching a compromise is also difficult in cases where regulations are strongly supported by the public in countries adopting them. In the author's view, the STC practice serves as a trade conflict resolution and dispute prevention mechanism. It addresses trade tensions through diplomatic means, including informal bilateral talks among delegations and peer pressure, established procedures and a codification system. Resolving trade tensions through STC discussions presents a viable alternative to the currently overburdened DS system. In this respect, other WTO bodies could learn from the experience of STCs in the TBT Committee.

There is room for improvement though. A number of ways to strengthen STC practice in the TBT Committee are suggested below.

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<sup>86</sup> DS233 Argentina-Measures Affecting the Import of Pharmaceutical Products. The request for consultations was filed by India on 25 May 2001. This dispute remained at the consultation stage. It has not been adjudicated. No mutually agreed solution has been notified.

<sup>87</sup> ID174 Argentina-Measures affecting market access for pharmaceutical products. Similar to India in its request for consultations, Chile, Colombia and Paraguay, when raising the STC, complained about the classification of countries under the Argentinian pharmaceuticals regulation and the resulting application of conformity assessment procedures.

<sup>88</sup> See *e.g.* ID253 Indonesia-Decree relating to halal certification; ID254 Indonesia-Regulation relating to distribution license requirements for certain drug products, cosmetics, food supplements and food; ID461 Indonesia-Permentan.

<sup>89</sup> Busch and Pelc, above n 29, at 407.

*- Changing the format of TBT Committee meetings to allow the deepening of STC discussions*

Typical STC discussion consists of reading texts of claims and responses prepared in advance for a TBT Committee meeting by delegates from concerned and subject members. From one meeting to the other, the texts often remain unchanged or undergo only minor changes. The order of an STC discussion is always the same: the series of readings from concerned members are followed by a reading from the subject member. After this flow of readings, the STC ‘discussion’ ends and there is hardly possibility for concerned members to react to responses of the subject member at the meeting itself. Such a flow lacks an important aspect of real discussion, *i.e.* interaction between parties. Consecutive monologues are not conducive to bridging differences in members’ positions during the meeting. The large number of STCs placed on the TBT Committee meeting agenda further precludes in-depth discussions. During a meeting of two or three days, three times a year, delegations are called to discuss 40 or 50 STCs together with other issues pertinent to the implementation of the TBT Agreement. The resulting lack of time turns STC discussions into a mere execution of the agenda, which receives little attention by the majority of delegations present in the room who themselves are not involved in the particular STC being discussed.

To address the problem of shallow STC discussions and thereby increase their effectiveness in resolving trade tensions, members could consider the extension of the length of TBT Committee meetings from a couple of days to one or two weeks. The additional time would provide more possibilities for delegations to engage in informal bilateral talks seeking to find a solution before the meeting ends. In addition, members might consider splitting STCs into thematic groups and dedicating different parts of the TBT Committee meeting to the discussion of specific groups of STCs at a time. This would allow delegations to allocate their expert resources according to their needs. Such intensification and concentration of STC discussions might also encourage members to make better use of the secretariat’s expertise.

*- Establishing a mediation procedure*

In 2014, the SPS Committee adopted a mediation procedure for STCs.<sup>90</sup> The first step consists of a written request for consultations from the concerned member and a written response by the subject member accepting or rejecting the request for consultations within 30 days. Copies of the request and the response are to be sent simultaneously to the chairperson of the SPS Committee and the SPS Committee secretariat. At the subsequent SPS Committee meeting, the chairperson informs the committee of any request and the corresponding answer as well as ongoing consultations. If the responding member accepts the request for consultations, as a second step, the consulting members would agree on a facilitator (normally the committee chair), who would assist in reaching a mutually agreed solution within 180 days.<sup>91</sup>

To assist in resolving STCs in the TBT Committee, members could establish a similar mediation mechanism. The facilitator would not make judgments of consistency of the measure at issue with WTO rules but would assist in resolving the matter through proposing a solution for members’ consideration, consulting with relevant experts and stakeholders and providing any other support requested by members.

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<sup>90</sup> See decision adopted by the SPS Committee on 9 July 2014, G/SPS/61. Attempts to introduce mediation procedures outside the DSU context were earlier made in the context of non-market access negotiations. See draft ministerial decision prepared by the Negotiating Group on Market Access on procedures for the facilitation of solutions to non-tariff barriers, TN/MA/W/106/Rev.1 of 3 February 2010.

<sup>91</sup> Although adopted, the mediation procedure has not yet been used in the SPS Committee. In 2015, referring to the STC over Mexico’s measures on imports of hibiscus flowers, Nigeria noted that ‘it was prepared to utilize the procedures for good offices of the Chairperson as contained in G/SPS/61 should its concerns remain unaddressed’. See Minutes G/SPS/R/81 of the SPS Committee meeting on 14-16 October 2015. At the next meeting, however, it informed the SPS Committee that it consulted with the responding member and that the issue was settled. See Minutes G/SPS/R/82 of the SPS Committee meeting on 16-17 March 2016.

*- Improving STC classification*

Reporting on the status of STCs is another technique that could be replicated from the SPS area to strengthen the STC practice in the TBT Committee as a mechanism to resolve trade tensions. Reporting on resolutions has become an established practice in the SPS Committee thanks to the efforts of its secretariat, which at some point forwarded a list of all STCs to members asking them to clarify the status of their STCs.<sup>92</sup> After sending responses to the general list of STCs, members began to report on resolutions under a standing agenda item at each SPS Committee meeting. As of 2015, a resolution has been reported for 146 of 403 SPS STCs raised since 1995. A partial resolution has been reported for a further 31 STCs, which implies that not all countries raising STCs accept the solution or that a solution was found for only some of the products at issue.<sup>93</sup>

By contrast, in the TBT Committee, there is only one case of reported resolution. In March 2017, a partial resolution was reported in an STC about vehicle safety regulations.<sup>94</sup> One of the concerned members informed the committee that its producers confirmed that their issues regarding the technical regulation had been addressed.<sup>95</sup> This announcement gave the TBT Committee secretariat an opportunity to include an item on reported resolutions in the meeting agenda. From then, no other resolutions have been reported. Although giving no guarantee against raising the STC another time, especially in cases of partial resolution, or against bringing a dispute to the DS, the reporting on resolutions could serve as a deterrent against the renewal of a conflict.

*- Enhancing transparency*

STCs strongly depend on the transparency requirements regarding notifications, enquiry points and publications.<sup>96</sup> The transparency requirements provide stakeholders with information about TBT measures introduced. This information is the basis for the formulation of STCs. The transparency system under the TBT Agreement is therefore the key to tackling TBTs, and not only through STCs. It is on its own valuable for preventing disputes. Transparency provides an opportunity to prevent tensions through clarification by reading a notification or by contacting an enquiry point before the issue becomes an STC.

A closer look at the relationship between new notifications and new STCs seems to suggest that as notifications become more frequent, the number of new STCs decreases.<sup>97</sup> Clarity about a measure due to the availability of information increases the chances to avoid misunderstandings that may lead to tensions. In this respect, it is remarkable that only 44% of new STCs in 2017 were raised with respect to notified measures.<sup>98</sup> Transparency thereby serves as an initial filter for TBT measures that might cause trade tensions, as it allows for STCs to be addressed at the level of domestic consultation before they are brought to the WTO as STCs or formal disputes.

In light of the foregoing, STCs as a trade tension preventive tool would benefit from the improvement in the TBT notification system. The notification requirement under the TBT Agreement is not absolute. It applies only to technical regulations and conformity assessment procedures if they are not based on relevant

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<sup>92</sup> Informing the SPS Committee of all STCs resolved was one of the recommendations for improvement of STC practice made in the framework of the second review of the operation and implementation of the SPS Agreement in 2005. See G/SPS/36 of 11 July 2005.

<sup>93</sup> *WTO Annual Report 2016*, at 61. About 43% of STCs raised in the SPS Committee in 1995-2015 were completely or partially resolved. For the remaining 57%, WTO members did not report that they arrived at a settlement.

<sup>94</sup> ID409 Ecuador-Proposed Motor Vehicle Safety Regulatory Requirements.

<sup>95</sup> Minutes TBT/G/TBT/71 of the TBT Committee meeting on 29-30 March 2017.

<sup>96</sup> See TBT Articles 2.9, 2.10, 2.11, 2.12, 5.6, 5.7, 5.8, 5.9 and 10.

<sup>97</sup> Note by the Secretariat, 'Twenty-Third Annual Review of the Implementation and Operation of the Agreement', G/TBT/40, chart 28, at 24.

<sup>98</sup> *Ibid.*, at 24.

international standards and may have a significant effect on trade of other members. Measures that are based on international standards can be adopted without notifications. Leniency in the notification requirements makes a considerable number of TBT measures hidden from exporters and deprives them of the opportunity to comment at the preparation stage for regulations and avoid unnecessary TBTs that lead to trade tensions and disputes upon adoption of the measures.

While changes in the provisions are not feasible, the TBT Committee could address the situation by adopting a decision encouraging members to notify in all cases, whether or not measures are in accordance with international standards. Moreover, the proposal inviting members to submit an addendum to the original notification after a measure enters into force deserves consideration.<sup>99</sup> This would help exporters to better adjust to market access conditions created by measures in their final design, avoiding confusion.

*- Promoting good regulatory practices*

Avoidance of trade tensions and disputes could be supported more generally by efforts directed at the improvement of the quality of TBT measures, based on ‘Good Regulatory Practices’ (GRP).<sup>100</sup> Transparency is essential but is not the only element of GRP. Other elements include easing the regulatory burden on businesses by reducing the number of TBT measures to the necessary minimum; holding public consultations with the possibility for stakeholders to provide feedback; implementing mutual recognition agreements; using international standards; harmonizing regulations; providing technical assistance and regulatory cooperation between members.<sup>101</sup> The incorporation of these elements in domestic regulatory frameworks would help avoid unnecessary TBT measures and thus provide fewer grounds for conflict. As members are not equally advanced in the application of GRP, it is important that the TBT Committee continues to support members in applying GRP. A positive influence on the dissemination of GRP would result in the adoption of a non-exhaustive list of voluntary mechanisms and related principles of GRP.<sup>102</sup> GRP examples contained in the list would serve as a useful reference for members that seek to improve their regulations.

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<sup>99</sup> The proposal was submitted by the USA for the eighth triennial review of the implementation of the TBT Agreement. See G/TBT/W/464, 16 March 2018.

<sup>100</sup> GRPs are internationally recognized tools and methods aimed at enhancing regulatory quality.

<sup>101</sup> Moderator’s Report ‘Thematic Session on Good Regulatory Practice’, G/TBT/GEN/214, 5 April 2017.

<sup>102</sup> The list was prepared on the mandate of the sixth triennial review. Members could not reach consensus on the adoption of the list, as some of them feared that the list would have an interpretative value in the DS. See ‘Good regulatory practice (GRP) voluntary mechanisms and related principles’, G/TBT/GEN/168, 24 June 2014.