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Reform of WTO Working Practices

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Reform of WTO working practices has three parts: how Members keep each other informed, review existing obligations, and use informal opportunities for dialogue. Achieving those objectives is not a trilemma. It is possible, indeed desirable, to simultaneously enhance transparency, improve the effectiveness and efficiency of WTO bodies, and increase the participation of all Members in the work of the WTO. Valuable reforms need the leadership of the General Council. They do not need action by ministers.

Notifications are a central issue for WTO reform

Everyone knows that compliance with the notification requirements of the various WTO Agreements remains very uneven. But there is no consensus on why. If the reason for a poor notification record is bad faith, then penalties may be appropriate. If the problem is a lack of capacity, then technical assistance may be needed. If the real difficulty is outdated and overly complex notification requirements, then a thorough review would be warranted. Better diagnosis might help: where is the information available to Members objectively inadequate for surveillance of legal obligations?

¹ This note draws on three working papers by the author, 'Is World Trade Organization Information Good Enough?', 'Informal Learning and WTO Renewal: Using Thematic Sessions to Create More Opportunities for Dialogue,' and 'Reforming WTO Conflict Management: Why and How to Improve the Use of "Specific Trade Concerns"'. All are available at <https://ged-project.de/research/studies/3-suggestions-to-make-work-at-the-wto-more-forward-looking-and-efficient/>

The first step mandated by the General Council should be a horizontal review of notifications to identify the gaps. Section 6 of the Director-General's monitoring reports could compare notification compliance by categories of Members, types of notifications (one time, ad hoc, regular, TPRD questionnaire) and specific agreements.

The second step should be a General Council requirement that every WTO body review what information it needs, and whether it now gets it. WTO bodies should ask, Are notification obligations realistic? Does anybody read the notifications, or use them? Are the notification requirements aligned with Members' objectives? Each body should also ask how Members can provide the information in a way that lessens the burden. Is the notification format the best one? Do some Members need more assistance in preparing the notification? This work intersects with our ideas on industrial subsidies, where existing transparency is inadequate, and simple exhortations to do better will not suffice.²

WTO deliberative bodies can be better used

WTO committees and councils are first deliberative bodies for discussing emerging issues and addressing trade concerns without recourse to the dispute settlement system. Or at least they should be. Procedural improvements are needed.

The most effective WTO bodies in addressing trade concerns are the Technical Barriers to Trade Committee and the Sanitary and Phytosanitary Measures Committee. Three stylized facts should be stressed. First, only a small fraction of thousands of SPS and TBT notifications ever become a source of conflict leading to a dispute. Second, the opportunity to discuss "specific trade concerns" (STCs) is clearly valuable. Members raise such concerns to seek clarification, including of already adopted measures, and discussion can lead to modification or even withdrawal of a measure that has adverse consequences for trading

partners. Third, formal disputes are not the universe of WTO conflict management. From the beginning of the WTO until March 2019 there had been 586 TBT STCs and 6 Appellate Body reports.

What happens in other WTO bodies? Discussion of trade concerns is increasing and widespread. About 230 trade concerns were raised in WTO bodies other than the SPS and TBT committees during the year ending in October 2019, a number that dwarfs the 29 dispute settlement panels that began work during this period. Agreements have different types of notifications and committee processes. A small number of notifications in one committee could be as significant as a large number in another. Some committees can be expected to have more discussion of trade concerns than others. But the procedures could be more extensively used, and participation could be enhanced.

On participation, we know more about the SPS and TBT committees and to some extent the Committee on Agriculture because they have excellent databases. But it seems that the patterns observed in those committees, and in the dispute settlement system, are replicated in other bodies. A handful of large traders make most frequent use of procedures to raise trade concerns, notably the U.S. and the EU, but also to a lesser extent a group of advanced and large emerging economies.

While there are many more STCs than disputes, many of the same constraints might apply, including the glass house syndrome and a lack of the administrative capacity needed to identify and formulate a concern. Usage may also be related to committee representation. In some bodies Members are represented by experts from capitals, but other bodies are dominated by generalists from (often small) Geneva delegations.

In our analysis of scenarios for reform we focus on the proposal for guidelines for all WTO bodies led by the EU supported by 19 other Members

² See the papers by Hoekman and Nelson, and Wolfe at <https://ged-project.de/allgemein-en/wto-reform-industrial-subsidies/>.

(WT/GC/W/777/Rev.5), which we refer to as 777. We use two lenses for evaluating reform proposals:

- Will they increase use of the trade concerns process?
- Will they make the trade concerns process more effective for all Members?

The 777 proposal begins with clarifying timelines for convening documents and other meeting arrangements, which are important for making efficient use of committee time. Such improvements would facilitate the work of small Geneva delegations who need to consult capitals. The proposal might go farther to include a requirement for annotated agendas which would help capital-based officials to prepare by explaining why an issue was on the agenda and whether it had been discussed previously in this or other bodies. By ensuring that all elements of a concern are seen together, identifying horizontal linkages can avoid escalation to dispute settlement only for that purpose.

The proposal encourages submission of written questions and answers, which would enhance transparency for other Members, or firms, having same the concern. If questions and answers are online ahead of a meeting, officials in capitals can interact through WTO without having to come to Geneva, which could be especially helpful for officials in developing country capitals, or those responsible for committees where capital-based participation is infrequent.

Perhaps the most important idea in 777 is the creation of an integrated database on trade concerns in which all WTO documents pertaining to trade concerns are recorded, with a search facility. Even when a committee has detailed minutes, and written questions and answers, there is often no way to easily search for all aspects of a concern. Creating such a database will take funding, and effort—for example it will need common criteria for data entry and searching while recognizing that committees have different needs and practices. Such a database will be especially useful for anyone (for example small delegations) who must follow more than one area of WTO work.

The 777 proposal would encourage informal resolution of trade concerns—akin to mediation. The suggestion to use video conferencing to allow capital-based participation with little expense is a good idea, but if this mechanism simply displaces conflict from one forum to another while increasing the number of meetings that small delegations would have to cover, it would not be worth the bother.

Some developing countries resist the 777 proposal because it might place a bigger burden on them to respond to concerns on short timelines. The proposal would encourage a developing country Member encountering difficulty to respond to a trade concern to request assistance from the WTO Secretariat. This idea locates the problem with a small delegation in Geneva, and not with the capital, and it sees the problem as being able to respond. But developing countries also need help to know they have a concern worth raising themselves with their neighbours as well as with large trading partners. It is capitals that need help to formulate a concern, and to respond to the concerns of others. The technical assistance and training group at WTO could have 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.

Enhanced opportunities for dialogue

The WTO has held over 100 “thematic sessions” in the past three years, meaning meetings that are sponsored by or associated with a WTO body in some way, but that are not part of its formal meetings. Examples include:

- 2017 *Workshop* on Investment Facilitation for Development
- 2018 *Symposium* on the Agriculture Policy Landscape
- 2019 *Experience-Sharing Workshop* on Implementation of the Customs Valuation Agreement.

Policy dialogue in WTO bodies is important to consider what works well under agreements, what is not working, and what is next on the agenda. Committees also need to hear from stakeholders who use their agreements,

including regulators, other international organisations and the private sector. In our research on what happens now we observed that some WTO bodies are active, but many did not hold any thematic sessions, and we found variation in how meetings are organized, how themes are chosen, who speaks, the degree of transparency, and funding.

Over 40% of speakers in these 105 events are either Geneva-based delegates or WTO officials, or come from other international organizations. Barely a third of capital-based speakers came from non-G20 Members, and only half the sessions had speakers from non-G20 countries. The reason for this over-emphasis on Geneva-based speakers and relative lack of representation of developing country speakers, which obviously limits the range of experience being shared, is funding.

What can be done to improve the use of thematic sessions? First, we identified some gaps in topics. Every committee could organize thematic discussion of the systemic issues posed by the operation of regional trade agreements in their respective policy areas, which would mitigate the absence of horizontal discussion of systemic issues in the Committee on Regional Trade Agreements. Second, any committee could decide that the consequences of recent dispute settlement decisions have raised issues for its Agreement that it might wish to discuss informally.

Third, and here is another intersection with our work on subsidies, the Subsidies and Countervailing Measures Committee did not hold thematic sessions in the period we examined. We see three possibilities. To begin, the work program on industrial subsidies that we recommend might best begin in a series of informal meetings held adjacent to the SCM committee. Next, the Director-General's annual monitoring report no longer provides data on "general economic support". Questions for informal discussion among subsidies experts could include whether and why such general economic support should be tracked in WTO, and the appropriate definition of such support. Finally, implementing a new agreement on fisheries subsidies will require regular thematic

sessions to promote understanding of fisheries regimes. Such sessions could draw on data from the Food and Agriculture Organization, regional fisheries managements organizations, and the OECD Fisheries Support Estimate.

What else can be done to improve the use of thematic sessions? We make four procedural recommendations for General Council action. First, to increase confidence the General Council could decide that the dispute settlement system may not make use of any record of discussion in a thematic session as evidence of "subsequent agreement" in the sense of Article 31 of the Vienna Convention on the Law of Treaties.

Second, one obstacle to enhanced developing country participation is cost. The current technical assistance model apparently favours workshops and training seminars in WTO members, which frustrates Secretariat attempts to find money from the ITTC to fund travel costs to the WTO for academic experts, NGOs and capital-based officials to participate in events with committees in the WTO. When a thematic session is held back to back with a committee, it offers a great training opportunity if officials are able to come to the committee and participate in a thematic session. The General Council should create a central budget with appropriate criteria to assess committee applications for funding.

Third, and an idea we developed before the current crisis made it blindingly obvious, video conferencing technology can lessen the cost of participation. The Secretariat should make it possible for officials to make presentations and to follow thematic sessions from capitals, and to ask questions.

Finally, engagement with people who have on the ground experience is essential, but outsider participation in thematic sessions can be sensitive if it creates the impression of giving business more of a voice than other stakeholders. But the annual Public Forum is designed to allow stakeholders to organize sessions. Each committee could consider organizing a Public Forum session, or issuing a call for proposals, to ensure discussion of direct relevance to its work. WTO Directors could have

a role in evaluating proposed sessions in light of needs of their committees.

Summary of recommendations

The following General Council decisions are needed and appropriate, because they imply central action:

1. Horizontal analysis of notifications in section 6 of the annual monitoring report
2. Every committee to review notification obligations
3. Integrated database
4. Central budget to fund increased capital-based participation in committees including thematic sessions and STCs
5. More support for technology to allow virtual meetings
6. New ways to organize the Public Forum
7. Appellate Body not to use discussions in thematic sessions

The following General Council guidelines would require each body to consider its own practices:

1. Advance documentation and agendas
2. Annotated agendas
3. Written questions and answers
4. Virtual participation
5. Encouragement to report resolution of trade concerns
6. Thematic sessions on the systemic impact of RTAs

Finally, WTO reform is not a one-shot deal. Every WTO body must submit an Annual Report. The General Council should require three topics to be addressed every year:

1. How and why the committee has chosen to implement General Council guidelines on improving its working practices, or not, as the case may be
2. Detailed plans for thematic sessions including possible themes
3. Schedule of meetings for the year ahead, which facilitates planning in both Geneva and capitals

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