ENFORCING INTERNATIONAL TRADE LAW IN THE WORLD TRADE ORGANIZATION'S COMMITTEES: COURTING THIRD PARTY OPINION

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ABSTRACT

Why would states discuss a trade dispute through a non-judicial treaty mechanism, when a more formal process is readily available? Specifically, in the context of the World Trade Organization (WTO), why would states use the WTO’s committees to address disputes, instead of requesting consultations to get the other side to the bargaining table? Contrary to the current literature, which describes the committees as a forum for dispute resolution, and suggests that states do not prefer to place disputes in a delay holding pattern, this dissertation presents a theory that challenges these assumptions. Instead, it argues that states use the committees primarily to learn about potential third parties to the dispute, which ultimately helps complainants build their case. Thus, this dissertation not only fills an important gap in the literature on WTO dispute settlement, which does not treat the committees as part of the dispute settlement process, but also offers a novel theoretical explanation for why states would use this non-judicial mechanism in the first place. In doing so, this research reveals that recourse to the committees tell us less about their success in resolving disputes, but rather is reflective of the shortcomings of formal dispute settlement instead.
ACKNOWLEDGEMENTS

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INTRODUCTION

International institutions have both formal and informal mechanisms for resolving conflicts. The World Trade Organization (WTO) is heterogenous in this regard, and employs both methods. The advent of automaticity in the dispute process made the WTO both more legalized and more litigious (Jackson 2000). This change, however, raised concerns about the binding nature of rulings and the precedents they may create, as well as growing uneasiness surrounding access to trade justice, which some feared would be limited to those with the capacity to litigate lengthy cases. It is perhaps unsurprising, therefore, that the United States has recently called for a return to GATT-style dispute settlement, with greater focus on diplomacy (Bacchus 2018). While informal dispute settlement has never left the halls of the WTO, studies have focused on the actions around the formal dispute settlement system, such as consultations, to illuminate this process. But another institutional feature of the WTO – its committees—where states can raise concerns about another state’s trade actions, remains an overlooked aspect of this phenomenon.

The committees play an important role in monitoring the implementation of the various agreements that make up the WTO treaties. While there is some variation in how each individual committee operates, they all have two main functions—normative and specific.\(^1\) The normative work of the committees focuses on establishing best practices to improve implementation. For example, through thematic sessions on good regulatory practices, members can share their experiences on how best to maintain regulatory transparency and

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\(^1\)See, Erik N. Wijkström, “The Third Pillar: Behind the Scenes, WTO Committee Work Delivers,” International Centre for Trade and Sustainable Development (2015), where he puts forward this concept in describing the work of the TBT and SPS committees, though it can be generalized to all.
how to conduct impact assessments. The specific work, on the other hand, functions like a peer-review of measures that countries take that may have an impact on trade, such as laws, regulations, or product requirements, for instance. In each meeting, countries can raise “specific trade concerns” (STCs) against another member’s measure that is thought to be in violation of the rules. The former acts as a complement to the specific work, in that it aims to reduce divergence in overall regulatory practices. However, the specific discussions reveal how the committees play a role in the broader dispute settlement system. This is the focus of this paper.

Specific trade concerns (STCs) allow states to publicly declare their skepticism and concerns regarding a domestic measure another member is taking. The member being complained against must respond to the concern, either orally, or in writing. Members notify the WTO Secretariat, committee and the member the concern is being raised against at least two weeks prior to scheduled meetings, which occur three times a year. These STCs have generated a lot of interest in recent years, even receiving praise from the United States Trade Representative as a means to resolve disputes. States bring many diverse concerns to the committees. Some become formal disputes, while others do not. What is

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2 The Eighth Triennial Review of the TBT Committee included a detailed discussion on Good Regulatory Practices. See, “Eighth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade Under Article 15.4,” G/TBT/41 (November 19, 2018).

3 While members have been raising STCs since 1995, the process that currently exists was not formalized until the Fifth Triennial Review in 2009. For more details on the committee procedure, see Kateryna Holzer “Addressing tensions and avoiding disputes: Specific trade concerns in the TBT Committee,” Global Trade and Customs Journal 14, no. 3 (2019): 102-116.

not expressly evident, however, is why states would take a dispute to the committees first, instead of pursuing a formal complaint?

The existing literature provides no answer to this question. Lang & Scott (2009) describe the committees as serving a non-judicial governance function through the dissemination of knowledge, and the development of new norms. Wijkström & McDaniels (2013) explain that the committees monitor the implementation of the WTO agreements, provide states with technical assistance and expertise, and serve as a forum to raise concerns on an individual state’s practices to achieve clarification or resolution to the matter. Horn, Mavroidis and Wijkström (2013) show that the committees can be used as a forum to resolve disputes as well. They, and other scholars emphasize that this is mainly due to the technocratic nature of the discussions (Karttunen 2016; Holzer 2019). While all of these studies provide invaluable insight into the mechanics of the committees, they do not fully explain why states would choose to use the committees in the first place, and no current study identifies a pattern for concerns that become formal disputes. Furthermore, in emphasizing the technical aspects of the committee discussion, they pay scant attention to the fact that the majority of individuals sitting in committee meetings are diplomats. This necessarily raises the question of how purely technocratic these committees are.

I suggest that the committees can be better understood if we focus on why states use them, as opposed to the outcomes they create. From this vantage point, the actor of interest is the complainant, or state raising the STC, and other potential interested or affected parties. The actions of the respondent, who is the potential defendant, are of
limited concern at this stage. So why would a state bring a dispute to the committees instead of pursuing a formal dispute?

First, it is useful to lay out how a dispute unfolds in what I term the “formal track.” The formal process for dispute settlement begins when a state submits what is known as a request for consultations with the respondent over the matter at issue. This written request from the complainant precisely identifies the alleged violation. The respondent then has 10 days to respond to that request, and consultations must begin within 30 days. This creates parameters and expectations for how states will respond to an alleged violation. The parties are given 60 days to reach a settlement, though in some instances they can extend their discussions beyond this timeframe. If these negotiations fail, the complainant can request the formation of a panel of arbiters to hear the dispute. After a ruling is issued, the defendant has the choice to appeal the decision to the Appellate Body, the WTO’s higher court.

The stage at which a dispute is initiated, the request for consultations, is the primary interest of this study, because it starts the process of a dispute. This process is well documented and has been examined in many fields of study to explain why states may or may not file disputes, such as due to the economic stakes (Bown and Reynolds 2014; Allee 2004), costs (Guzman and Simmons 2002; Sevilla 1998), capacity and economic size (Bown and Hoekman 2005; Ahn et al. 2013; Conti 2010), the probability of winning, or the strength of the legal case (Busch and Reinhardt 2002; Johns and Pelc 2014), the impact of election-years on filing (Chaudoin 2014), the level of industry interest in pushing for a
dispute (Hudec 1990; Shaffer 2003; Brutger 2014, 2017), or whether the policy is concentrated or diffuse (Johns and Pelc 2018).

As the goal of dispute settlement is to avoid litigation and instead arrive at a mutually agreed solution (MAS), there has also been significant attention paid to the consultation process as well. Busch and Reinhardt (2000) argue that the closed nature of consultations facilitates settlement. However, the trend has moved towards a reduction in settlements (Pauwelyn, 2003), which may suggest that this mechanism is inefficient. Guzman and Simmons (2002) argue that settlements are more difficult when the subject matter of a dispute is discontinuous, such as health and safety regulations as opposed to tariffs or subsidies. But if opaque measures are harder to settle, it is puzzling that the committees which address regulatory barriers to trade are often cited as the most successful in generating dialogue on these challenging topics. In fact, given the assumptions in the literature about the efficiency of dispute settlement, it seems odd that states would discuss potential disputes in committee at all, given that it delays filing a dispute in addition to revealing the complainant’s hand—that is, raising a STC in committee could reveal the specific claims of violation a complainant may bring in a formal dispute, giving the respondent more time to build their defensive case.

I argue that states use the committees both strategically and politically. They bring disputes through the committee track not because they are interested in the reaction from the respondent, but rather because they want to gauge the reaction of their peers. Essentially, states use the committees to learn about potential third parties to a dispute. Why? It helps the complainant understand the scope of the dispute, not the direction. As
Busch and Reinhardt (2006) argue, third parties reduce the chances of settlement, and increase the chances of a dispute ending in a ruling by expanding the scope of claims. This leads the respondent to dig in its heels, and take a principled stand against any negotiated solution. The critical role of third parties thus makes it essential to identify these states in advance of filing a request for consultations.

A product of engaging with potential third parties also has the effect of loose coalition building, and this can sometimes generate limited resolutions to disputes by concentrating pressure on the state maintaining the measure to adjust its rule. The committees thus operate as an alternative forum for consultations, where states can bargain and apply peer pressure to avoid disputes. However, it is important to note that this does not amount to settlement as understood in the consultation process, as the interactions are purely informal, and the resulting resolutions are often minor adjustments, or a delay in implementation of a measure. There is no mutually agreed solution. Instead, the STC simply disappears from the agenda after a back and forth dialogue, or can be reported as resolved. Sometimes, these issues can return back to the agenda if the adjustment is not satisfactory.

States thus bring disputes through committee to strategically map out a formal dispute and learn about its scope as well as to identify political allies. To the author’s knowledge, this is the first study to characterize the committees in this way.

Why does this matter? If this argument is correct, it teaches us about selection bias in WTO disputes writ large. By identifying early stage disputes that proceed through the committees, I am able to identify a subset of cases that help to explain what information is
critical for a state to escalate a dispute, and why they might delay this decision. In addition, this helps us think about the role of the committees in WTO reform efforts and about the role of non-judicial dispute settlement more broadly. In fact, it raises an interesting question about whether states use the committees because they are effective, or whether recourse to the committees is reflective of the ineffectiveness of dispute settlement. While the recent literature on the committees has described them as a process that is parallel to dispute settlement, they could instead be filling an important gap in the sequence of dispute escalation. I show that they help solve important informational and coordination problems that can often impede settlements.

This study looks at two committees in the WTO, the Technical Barriers to Trade (TBT) and the Sanitary and Phytosanitary (SPS) committees, to reveal how states bring disputes to these forums in order to learn about other potential third parties to a dispute. Through an examination of the minutes of committee meetings, select government documents and records of deliberations in international organizations, 25 elite interviews with current and former government officials representing their state in Geneva and capital liaisons, WTO counselors and secretariat staff, as well as the attorneys in the disputes, I show that the committees serve an important function in WTO dispute settlement by revealing the scope of early stage disputes, and giving states the opportunity to build their case.

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5 Thank you to Joost Pauwelyn for suggesting this.
While most people generally know about the WTO’s dispute settlement mechanism, there is much less awareness of the broader institutional structure of the organization. In total, the WTO has 35 standing bodies and 30 ad hoc bodies with various roles. At the top of the organizational structure is the Ministerial Conference (minister-level representatives from each country that meet at least every two years), which can take binding decisions on all WTO matters. Next is the General Council (ambassador-level diplomats that meet every two months, with the same authority as the Ministerial Conference when it is not in session) that manages the day to day operations of the WTO, and whose representatives also sit on the Dispute Settlement Body (which meets every month), and the Trade Policy Review Body (TPRB), albeit with a different chair.

One layer down from the political bodies are the numerous specialized councils, committees, working groups and working parties that assist the Ministerial Conference and General Council, and carry out the functions enumerated to them by the various WTO Agreements. While each of these bodies reports up to the higher political bodies, the committees in particular “tend to be relatively independent, arguably due to the technical nature of their work” (Van den Bossche and Zdouc 2017, 135).

The committees play an important role in monitoring the implementation of the various agreements that make up the WTO treaty. There are 15 committees that oversee specific WTO obligations, which report to the Council for Trade in Goods and the Council for Trade in Services. Figure 1 shows the organizational structure of the WTO.
This dissertation focuses on two committees in particular, the Technical Barriers to Trade (TBT) committee and Sanitary and Phytosanitary Measures (SPS) committee, which are responsible for monitoring and implementing their namesake agreements. The TBT Agreement deals explicitly with regulations, standards, and testing and certification procedures, and the SPS Agreement covers measures whose purpose is to protect human, animal or plant life and health (though of course, there is some overlap).
What motivates the selection of these committees over the others? First, these committees have the most accessible and comprehensive data on their work. Data is available online through the WTO website, and each committee’s information management system, which allows for bulk and specific queries on specific trade concerns (STCs), notifications, and other items relevant to the committee work.\(^6\) This is due, in part, to the leadership of these committees over the years, which have developed clear procedures for participation through regular reviews of the committee functions. The TBT committee conducts an annual review and a triennial review, and the SPS committee conducts reviews as the need arises, and has done so on four occasions.\(^7\) These committees have also consistently recorded the most detailed minutes of any committee meetings, which are all available for download. This high level of transparency and consistency in the data allows for the committees to be studied in detail, all the way back to the WTO’s founding.

Second, the TBT and SPS committees cover the WTO agreements whose dispute settlement rulings tend to generate a lot of interest from both scholars and practitioners. Why? Because they often deal with domestic regulatory measures that states have taken to address concerns over public health or environmental protection, for instance. The contentious battles over *EC—Hormones* and the “Dolphin-safe” tuna saga between the United States and Mexico are cases in point. These cases where hotly contested and raised broader questions about the sovereign right of states to regulate certain product

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\(^7\) For the latest reviews see Twenty-Fourth Annual Review of the Implementation and Operation of the TBT Agreement, G/TBT/42 (February 25, 2019); Eighth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade Under Article 15.4, G/TBT41 (November 19 2018); Review of the Operation and Implementation of the SPS Agreement, Report Adopted by the Committee, G/SPS/62 (July 25 2017).
markets, and the extent to which discrimination against foreign products could be justified. As a result, these are areas where regular diplomacy may not be able to provide an easy trade-off to resolve the dispute (Guzman and Simmons 2002). Given the often sensitive nature of these issues, it also is plausible that states would much prefer to settle these issues through consultations to avoid exacerbating tensions (Busch and Howse 2003) or to avert the risk of a precedent that may restrict domestic regulatory action in the future. In fact, as Howse and Tuerk (2001) caution:

> While there have been few cases where domestic regulations on health, safety or the environment have been directly challenged and found in violation of WTO law, the WTO rules may already be having a chilling effect on the strengthening or development of such domestic regulatory schemes in other WTO members, thereby constraining or impeding democratic choices (284).

Essentially, states are mindful of the international impact of their regulatory actions, and often craft rules accordingly. They also pay attention to any hint of a WTO dispute over regulatory measures on these issues and follow outlier regulations carefully because of the significant constraints that can be placed on their own regulatory action if these measures are successfully challenged.

> Furthermore, the relatively low number of cases, combined with Appellate Body reversals of panel rulings, have left enough ambiguity about the interpretation of the text of the agreements so as to make it challenging to determine how a case will play out (Mavroidis 2019). That is, TBT and SPS issues are often not as straightforward as claims
under GATT Article III, because for many claims under these agreements, they require more than a finding of violation of national treatment, and often entail additional “tests” that are harder to clear in determining whether there is a violation. For example, in Japan—Alcohol II, the case hinged on a finding of violation of GATT Article III :2 because the complainants alleged that Japan was taxing “shochu,” its domestic spirit, less than whisky, cognac and white spirits, which mainly came from foreign imports.

In contrast, the U.S.—COOL case, which dealt with the labelling of beef and pork products in the United States, centered on TBT Articles 2.1 and 2.2. On the Article 2.1 claim, the Appellate Body upheld that the measure afforded less favorable treatment to domestic versus foreign imported livestock, but on Article 2.2, the Appellate Body reversed the Panel’s finding that the measure was more trade restrictive than necessary to fulfil a legitimate objective, because the measure made some contribution to its stated objective of improving consumer information. In fact, the Appellate Body has never found a state to be in violation of TBT Article 2.2, and has often exercised judicial economy to avoid making a judgment on what a state determines is a legitimate objective, and what is necessary to fulfil it. Ultimately, this uncertainty over interpretation makes litigation of these more complex regulatory measures risky, and settlements on these issues preferable.

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Fourth, WTO members have increasingly voiced support for these committees as an important forum for states to discuss trade frictions. In March 2019, U.S. Trade Representative Robert Lighthizer suggested that the WTO’s committees are a way to “resolve other Members’ trade actions that do not comply with their WTO obligations.”\textsuperscript{11} This sentiment is broadly reflected in a recent joint report by the WTO and the Organization for Economic Cooperation and Development (OECD), which states that the TBT and SPS committees “promote opportunities for regulatory cooperation between governments easing trade frictions.”\textsuperscript{12}

The importance of these committees to WTO members is further evidenced by the fact that these are the only two committees where delegates are regularly sent from the capitals, not just the missions in Geneva, to attend the meetings.\textsuperscript{13} The smaller missions are not able to include domestic expertise at the same frequency as the larger missions, but they maintain a strong dialogue with their trade ministries and regulatory agencies. This shows that these committees are not only highly valued by WTO members, but that their diplomatic efforts are bolstered by direct technocratic and legal support from high levels within the trade ministries of each state. This also suggests that there is a significant amount of strategic thinking that goes into committee participation if states are not willing to just let these issues be handled by their local Geneva missions, which often have many other

\textsuperscript{11} Robert Lighthizer, U.S. Trade Representative, Questions for the Record, United States Senate Committee on Finance, Hearing on “Approaching 25: The Road Ahead for the World Trade Organization,” (March 12, 2019).
\textsuperscript{13} This fact has been verified through several interviews conducted by the author, among a number of anonymous interviewees who have sat in on the committee meetings.
portfolios to manage. In fact, WTO members have visibly elevated the work of these committees based on the resources and expertise they commit to them.

In the next section, I explain the data that informs the puzzle that motivates this project by taking a closer look at one aspect of the committee’s work, specific trade concerns.

**Specific Trade Concerns**

While there is some variation in how each individual committee operates, they all have two main functions—normative and specific (Wijkström 2015). The normative work of the committees focuses on establishing best practices that may help foster long-term cooperation. The specific work functions like a peer-review of other countries’ trade measures. The former acts as a complement to the specific work, in that it aims to prevent disputes from arising at all. However, the specific discussions reveal how the committees are used to complement dispute settlement. The latter is the focus of this paper.

Peer review takes the form of specific trade concerns (STCs) that are raised in the committee meetings.¹⁴ These are issues that are raised from one (or more) WTO member to another on a particular measure a state has taken (or is intending to take).¹⁵ Concerns are submitted in advance to be included on the meeting agenda, which is circulated ten days

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¹⁴ Specific trade concerns are raised in all committees, though there may be slight variation in what they are called. The function is, however, essentially the same.

¹⁵ Governments must notify measures that “may have a significant effect on trade of other Members” to the WTO Secretariat and publish a notice of the proposed rule “at an early appropriate stage.” For details see, Technical Barriers to Trade Agreement, Articles 2.9-2.91.
prior to the meetings. Parties therefore arrive knowing what concerns will be brought up in each meeting, who is raising them, and who it is directed towards. The length and content of STCs often varies, though descriptions have improved over time; still, basic information is always known in advance, and states often try to figure out more details before the meeting date.\textsuperscript{16}

From 1995-2018 a total of 570 unique STCs have been raised in the technical barriers to trade (TBT) committee. Many STCs are raised more than once, however. In this same time period, there have been 550 recurring STCs. In the Sanitary and Phytosanitary (SPS) committee, 437 STCs have been raised between 1995-2018, with 393 recurring.\textsuperscript{17} Essentially, many of the same issues are repeatedly raised, with the number of new issues remaining fairly stable over time. On average, 23 new issues are raised every year in the TBT committee and 18 new issues are raised every year in the SPS committee. Figures 2 and 3 show these trends.

\textsuperscript{16} This is due to the fact that while concerns raised on notified measures should include “reference to the symbol of the notification,” and when not notified, “a brief description of the measure, including relevant references,” members vary in the level of detail they provide. See, Note by Secretariat, Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995, G/TBT/1/Rev.10 (June 1, 2011). In addition, members can submit a STC for inclusion on the agenda after the deadline for submission only if the member that is maintaining the measure is notified in advance of this action.

\textsuperscript{17} While the total number of SPS STCs is 452, 15 of these are not directed to any specific country, and are therefore not relevant to this analysis. These STCs can be identified by their information management system identification number (IMSID), as listed in the SPS Information Management Database. The 15 STCs are as follows: 26, 63, 103, 124, 183, 190, 193, 204, 235, 250, 258, 313, 333, 384, 385.
Notably, participation in this mechanism is diverse. While developing countries in particular have used the judicial arm of the WTO less than their developed country peers (Bown and Hoekman 2005), in the committees, developing countries are quite active. In
fact, they have participated as the party concerned 48% of the time. This means that a developing country either raised the STC itself, or that it supported the concern being raised by another member. A developing country is here defined as countries that are identified as developing, transition or as least developed countries by the United Nations (and those that self-declare as developing at the WTO). Figure 4 shows participation in STCs by level of development. It is encouraging that over time developing country participation has grown. This is to say that STCs are not a mechanism solely used by developed countries to target regulatory measures in the developing world, or to promote a race to the bottom in regulatory standards. In fact, both developed and developing countries almost equally use the committees to raise STCs.

Figure 4. Specific Trade Concern Participation by Development Status 1995-2017

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Certainly, however, some countries do use the mechanism more than others. In total, 99 of the 164 WTO members have raised concerns in the TBT and SPS committees, and 84 members have been the target of those concerns. The most targeted WTO members are the European Union, the United States and China, whose measures are subject to 41% of all STCs raised in both committees (241 STCs in the TBT committee and 172 STCs in the SPS committee, as of December 2018). Among developing countries, six account for the bulk of all participation in raising or supporting concerns, making up 42% of all interactions in which developing countries participated in the SPS committee and 44% in the TBT committee. These countries include Argentina, Brazil, Chile, China, South Korea, and Mexico. Among developed countries, the United States and the European Union participate in 30% of all STCs raised. This is unsurprising, as the markets with the largest volume of trade should be more active in both monitoring the trade practices of their export destinations, as well as finding themselves under greater scrutiny by their trading partners for actions they take to restrict imports.

But how do countries know when another WTO member is taking a measure that may be trade restrictive? In addition to finding out on their own, or by the issue being flagged by industry, the WTO manages a system of notifications for these measures. WTO members are required to notify all TBT and SPS measures prepared, adopted or implemented by central or local governments and non-governmental bodies that may have an impact on trade. TBT measures consist of mandatory technical regulations, voluntary standards and conformity assessment procedures on any product. These might, for example, include a ban on the importation of a material due to public health concerns, or a requirement that certain products must include information on the packaging that goes
beyond international standards. SPS measures are all laws, decrees, regulations, requirements, and procedures applied to protect human, animal, plant life or health. This could include, for instance, additional testing requirements for apples from a country or region that has a particular pest.

All notifications from WTO members can be accessed online, and governments and interested stakeholders can sign up to receive alerts on notifications that may be of interest to them. These alerts can be refined to specify the regions affected, the product, and the country notifying the measure. For example, if you’re a producer or seller of papaya seeds in Mexico, you would want to know if any of the markets you export those seeds to has any sanitary requirements that may interrupt your trade, such as concerns over the introduction of Papaya meleira virus. The online notification system not only allows anyone to see such proposed rules, but also allows for comments to those rules before they are adopted. Governments can then take these comments into account as they draft up their final measures, in order to ensure that such measures do not place an unnecessary burden on trade.

Figures 5 and 6 show TBT and SPS notifications from 1995-2018, and total STCs raised, by year, in each committee. Since 1995, notifications have been on the rise with 364 and 189 TBT and SPS notifications in 1995, respectively, to 2085 and 1202 notifications in 2018. The growth of notifications over time is unsurprising. Many countries, particularly the United States, have strongly encouraged countries to increase transparency in their regulatory practices through notifications, and to improve the content

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of those notifications as well in order to prevent regulatory barriers from arising in the first place.\textsuperscript{20}

In the TBT committee, STCs have trended upwards with notifications. It is important to note, however, as depicted in Figure 7, that new STCs have declined since 2015, even as notifications have grown. One reason for this may be due to the fact that the growth of notifications may have reduced the number of STCs. This is because notifications can often pre-empt the need for a STC if enough clarity is provided in the notification itself, and if governments are responsive to the comments raised by other states.

This highlights the fact that the committee is not seen as the first resort to address potential trade frictions, and it also does not function like a clearinghouse for technical concerns. In fact, the drop in new STCs is reflective of states using the committees strategically, and not for an open discussion of every possible trade friction. A similar trend is visible in the SPS committee, depicted in Figure 8.

Figure 5. Technical Barriers to Trade Notifications and Total Specific Trade Concerns, 1995-2018

Figure 6. Sanitary and Phytosanitary Notifications and Total Specific Trade Concerns, 1995-2018
Figure 7. Technical Barriers to Trade Notifications and New Specific Trade Concerns, 1995-2018

Figure 8. Sanitary and Phytosanitary Notifications and New Specific Trade Concerns, 1995-2018

Now that we have addressed the broader picture of STCs, it is worth examining them in more detail. All STCs are not created equal. In fact, there are important distinctions
that emerge when one goes beyond looking at the general trends. One revealing feature is the number of times STCs are raised, that is, the number of times a particular STC recurs on the meeting agenda. Why does the number of times a STC is iterated matter? Because it helps us to get a better sense of the various ways states may be using the committees.

By reading the meeting minutes, it is qualitatively clear that there is a difference between STCs that are raised only once, and all the rest. In fact, there is a distinction to be made between one-off STCs, that is STCs that are raised only once with the express intention of simply clarifying something specific about a measure that may not have been apparent from the notification (or lack thereof, ie. “failure to notify”), and substantive STCs, that is STCs that launch a back and forth dialogue over more than one meeting. This dialogue is important because it reflects negotiation between the parties, with a discussion of various potential claims of violation, similar to what one might expect in formal consultations.

One-off STCs are plentiful, and make up a large portion of all STCs raised. Overwhelmingly, these STCs address “as such” cases, where a violation is possible, but not in effect. The exercise of a STC in these instances can therefore be thought of as a procedural function the committees provide to allow states to get the attention of another member well before a violation may materialize. Why would states do this? Sometimes states will do this to “flag” a measure, hoping that bringing it up in committee encourages the target country to discuss the issue privately on the margins of the committee meetings, or between the capitals. States also pursue one-off STCs to name and shame a country for its failure to notify a measure to the Secretariat. Frequently, failure to notify is unintentional
(i.e. lack of capacity or interagency communication issues), and such STCs are considered friendly reminders. When lack of notification is intentional, however, this gives the respondent an opportunity to clarify why it did not submit a notification.

For example, in 2014, Canada raised a STC against Russia on a regulation on alcoholic beverage imports, stating that “The representative of Canada expressed disappointment that this measure, as required by Articles 2.9 of the TBT Agreement, had not been notified to the TBT Committee. Moreover, as required by Article 2.12 of the TBT Agreement, Russia had not allowed for a proper entry into force period for these regulations.”

Russia provided clarification that it did not notify the rule because it was not a new regulation, but rather a clarification of “grey zones” on a law that had come into force the previous year. Essentially, there was nothing to notify, and the action Russia took was a misunderstanding of the matter. The issue was not raised again. This pattern of STC is frequent in one-off cases.

Figures 9 and 10 show the distribution of TBT and SPS STCs by the number of times they are iterated. The first bar represents STCs like the one described above. These STCs are not pertinent to the current analysis because they do not establish a sufficient back and forth dialogue similar to what would be experienced during formal consultations. As a result, the universe of cases in the committees that are the relevant comparators to formal consultations are STCs that are raised more than once.

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21 TBT Committee, Minutes of the Meeting (19-20 March 2014), G/TBT/M/62, paras. 2.17-2.18.
There are two exceptions to this. First are STCs that become formal disputes, some of which are raised only once. These are what I call “originating” disputes, which will be
elaborated below. An example of this is the STC raised by Indonesia against the United States on a measure to ban the sale of clove cigarettes.\textsuperscript{22} There are six such cases, which are detailed in Appendix A.

Second are STCs raised in the SPS committee which are formally notified by the parties as resolved. These are cases where it can be verified that dialogue continued to resolve the issue outside of the committee. There is no such indication made in the TBT committee, so all of these one-off cases, except for the two instances of originating disputes, are treated as outside the universe of cases for this analysis.

Finally, a distinction is also apparent in the strategic nature of how one-off STCs versus substantive STCs are used. Table 1 shows the rate at which STCs involve third parties, that is, whether more than one country is listed as the member \textit{concerned}.\textsuperscript{23} It is evident that compared to one-off STCs, substantive STCs witness far greater third-party participation. One-off STCs, in contrast, are far more bilateral, further suggesting that their purpose is to address far more limited issues, often of a procedural nature. The fact that more states engage on each individual STC if they are raised more than once suggests that these substantive STCs generate more dialogue in committee. Given these assumptions, I treat one-off STCs as dropped cases, as they are not pursued beyond one iteration, and do not include them in the analysis.

\begin{table}
\centering
\caption{Detailed STCs

\begin{footnotesize}
\textsuperscript{22} United States Ban on Clove Cigarettes (ID 257), TBT Information Management System, http://tbtims.wto.org/en/SpecificTradeConcerns/View/255.
\textsuperscript{23} In the SPS committee this would be indicated by a country being listed as a “member supporting the concern.”
\end{footnotesize}
So what is the remaining universe of cases? What we are left with are cases that could all potentially become formal disputes. There are three main categories of these STCs: resolved, originating, and ongoing. I describe each in turn.

The first category are cases that are resolved. These are the cases that have been the overwhelming focus of the existing literature on STCs, and have led to claims that the committees serve as a forum for the resolution of trade frictions.

How do you identify if an issue has been resolved? In the SPS committee, states notify the Secretariat when a STC has been resolved, or partially resolved. Therefore, these STCs can be counted as resolved by checking whether they are identified as such in the SPS information management system. But while in the SPS committee parties are encouraged to notify when a STC is resolved, there is no equivalent in TBT. A former U.S. official explained that this is intentional, given the more complex nature of TBT issues, where it is harder to come to a concrete resolution.24

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usually more than a market access problem that can be corrected by just lifting a single measure. For example, one could imagine an SPS measure where a country places a ban on Christmas tree imports from Canada due to a pest infestation. Once the infestation is over, and appropriate assessments made, however, imports can resume. TBT is not as straightforward.

To address the issue of coding resolved cases, when TBT issues are not notified as such, I expand upon the methodology used by Horn et al. (2013) which code all cases as resolved if they have not appeared on the meeting agenda for at least three subsequent meetings. I extend this to five subsequent meetings for a conservative estimate of resolution. The choice of five meetings is informed by the fact that STCs can disappear from the agenda, only to reappear later. There are 202 STCs that exhibit this trend. Sometimes they disappear for well over three meetings. In fact, there are some originating cases that disappear and come back after four to five meetings. As a result, I consider cases as resolved if they have not been raised in the next five meetings.

This coding choice results in a larger number of resolved cases in the SPS committee than are actually notified as resolved. Discussions with delegates on their notifications of resolutions supports this coding choice, as a number of delegates stated they do not like to formally notify resolution, even in SPS, where it is encouraged,
especially in cases where the resolution may not be satisfactory. At the same time, they are still considered “resolved for now.”

The second category of cases are those STCs that escalate to formal disputes, what I term “originating” cases. These are STCs that are raised prior to a formal request for consultations is made on the matter. There are 12 unique TBT STCs that turn into 17 individual consultations, and there are 24 SPS STCs that turn into 25 unique requests for consultations. In addition, there are three STCs (two raised in the SPS committee, and one in TBT) that resulted in another request for consultations. In total, there are 43 individual requests for consultations that originate in committee first.

These cases were identified in two ways. In some instances, the STC database includes “related documents” that provide links to dispute documents if that STC becomes a dispute. In other cases, I worked backwards from all TBT and SPS disputes, and searched all 1007 STCs to see if the dispute was discussed before the date the request for consultations was filed. This required reading every STC, comparing the concerned and maintaining parties listed to the parties to formal disputes, as well as the subject matter of that dispute to the STC. Only when there was a match between one of the parties concerned and the party maintaining the measure was the dispute coded as originating. Each of these originating disputes is listed in Appendix A.

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The third and final category of cases are ongoing STCs. These are STCs that cannot be considered resolved as of December 2018, and are not originating cases. Some of these may be resolved at some point in time, whereas others may turn into formal disputes. But they still comprise the broader category of substantive STCs given the fact that they are discussed in committee in at least more than one meeting.

The breakdown of these cases is shown in Table 2, in addition to official notifications of resolution (including partial resolution) to the SPS committee.

<table>
<thead>
<tr>
<th>Outcome</th>
<th>TBT</th>
<th>SPS</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dropped</td>
<td>199</td>
<td>111</td>
<td>310</td>
</tr>
<tr>
<td>Originating</td>
<td>12</td>
<td>24</td>
<td>36</td>
</tr>
<tr>
<td>Resolved</td>
<td>274</td>
<td>270</td>
<td>544</td>
</tr>
<tr>
<td>Ongoing</td>
<td>85</td>
<td>32</td>
<td>117</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>570</strong></td>
<td><strong>437</strong></td>
<td><strong>1007</strong></td>
</tr>
<tr>
<td>Resolved (notified)</td>
<td></td>
<td></td>
<td>162</td>
</tr>
<tr>
<td>Partially resolved (notified)</td>
<td></td>
<td></td>
<td>28</td>
</tr>
</tbody>
</table>

The existing literature that focuses on the outcomes of STCs generally treats these four categories as dichotomous, either as resolved or unresolved. In fact, they view all STCs as opportunities for cooperation and resolution. This is informed by the argument put forward by Horn et al. (2013) that the committees operate in parallel to formal dispute settlement. If this is true, then looking at STCs in isolation of the formal dispute settlement system makes sense, because the committees would only address early stage disputes that have the potential to be resolved. STCs would focus on things that could be changed, like draft laws or regulations, because it wouldn’t make sense to raise a STC against a rule that has been
adopted, or is clearly on its way to being adopted. States should only bring “technical” and “easy” cases—basically, ones that stand a chance at dialogue. There should also be evidence of successful resolutions to encourage states to use the committees to this end. But this is not what happens.

This is informed by two observations. First, is by examining what it means for something to be resolved. For instance, of the 162 STCs raised in the SPS committee that are notified as resolved, 89 are one-off STCs. This means that 55% of STCs raised in the SPS committee that are notified as resolved are likely due to issues of clarification or failure to notify, not a clearly identified trade friction.

In fact, this points to the existence of a qualitative difference in how resolution should be considered, which is not accounted for in the current literature. Even if we ignore this, and treat these as resolved, there is still an interesting gap between the 162 STCs notified as resolved, compared to my estimate of 270. While we can say with confidence that 37% of SPS concerns are resolved to some extent, what do we make of these other 108 that disappear? What is the purpose of bringing these issues to committee if not to secure a resolution?

The rate of resolution is particularly relevant to this discussion, and a critical aspect of the data. If states choose to bring issues to the committee because of the hope for some sort of resolution, then we should expect to see a steady rate of resolution that would incentivize states to use committees in this way. Figure 11 shows total SPS concerns and all reported resolutions, per year.
Interestingly, there are no resolutions in the first three years of the committee, and on average there are roughly 7.5 resolutions a year. However, as Figure 11 shows, the year 2013 stands out as a major outlier in the number of total resolutions, inflating the average number of resolutions. Controlling for this outlier drops average resolutions to 5.9 a year. Given the fact that there are roughly 19 new STCs raised every year, this suggests that only one-third of all STCs are resolved, per year, in line with the findings of Horn et al. (2013). However, if you treat STCs like a dialogue and consider the number of times an issue must be raised to achieve resolution, the picture looks less positive. From 1995-2018 there are 845 STCs, new and recurrent, raised in the SPS committee. That averages to 35 STCs heard in committee, each year. If 5.9 are resolved a year, that leads to a 17% success rate for all STCs raised.
Is this a high enough success rate to entice states to address their trade frictions here? Or could they be bringing them here for another reason? This is not to suggest that resolution is not important, but rather, that it only captures one outcome of STCs, and does not fully explain state behavior in committee.

The second observation is that states bring some cases to committee that turn into formal disputes. The dispute settlement literature tells us that states only file disputes for issues that cannot be resolved through diplomacy. Dispute escalation is often thought of as a last resort. These cases tend to be “hard” cases to resolve, which makes it even more odd that they would ever be brought to committee because it would be plausible to assume that states do not see much chance of resolution on these issues. So why are they bringing them here?

In the next section I elaborate on why the originating cases are the most interesting feature of STCs. While they are small in number, they reveal a broader pattern of interaction among states in all substantive STCs that better captures why states are using the committees. This further illuminates why STCs cannot be thought of in dichotomous terms, as resolved and unresolved. These cases raise a compelling puzzle that the literature has no answer for.

The Puzzle in the Data: The Originating Cases

To illuminate the puzzle in the data on STCs in the TBT and SPS committee, we first have to look at all TBT and SPS disputes and situate the originating cases within them. Looking
at all request for consultations that make reference to the TBT or SPS agreements, there are a total of 78 such requests made from 1995-2018. However, all of these cases cannot be treated as the complete universe of SPS and TBT disputes because they often include a number of other claims. Therefore, 64 individual requests can be considered as true TBT and SPS cases. These are cases where the TBT and SPS agreements are central to the total claims made. The centrality of the claim is determined by how important the TBT and SPS aspects of the request are in relation to the other claims made, as well as the measure at issue itself. Of these 64, there are 53 unique disputes, since there can be multiple requests for consultations by different WTO members with regard to a single measure.

Of these 53 unique disputes, there are 43 individual requests for consultations that originate in the committee, these make up 35 separate disputes, since many countries file requests for consultations against the same country on the same issue. As a result, at the level of disputes, 66% of all TBT and SPS disputes can be considered as originating in the committees. Table 3 provides a summary of this data. A full list of the originating disputes can be found in Appendix A. This is puzzling. Why would a supermajority of disputes start in the committee, instead of going straight to consultations? As will be explained in the next chapter, the literature on dispute settlement cannot explain why this happens, because states generally do not want to reveal their hand before filing a dispute, nor dilute their arguments by opening up the issue to comments from the broader membership.
Furthermore, if such a large portion of disputes originate in committee, what does this tell us about the committees more generally? The distinction between originating STCs and all other substantive STCs cannot be understood, as the existing literature has done, by comparing outcomes of STCs within the committees. Instead, the committees have to be examined in the broader context of the dispute settlement mechanism. The relevant comparator to originating disputes is not, therefore, other substantive STCs, but rather, disputes that do not originate within the committees at all.

It is important to also note that for the purpose of this analysis it is not relevant whether or not a request for consultation is later litigated. While some may be interested in whether or not these cases result in a ruling by a panel, such an analysis is beyond the scope of this study, which focuses on non-judicial treaty mechanisms to resolve disputes (Appendix A provides this data, regardless). The question, rather, is why states use the committees instead of requesting consultations?

As will be elaborated in the next chapter, the literature on dispute settlement tells us that disputes are usually not discussed openly, as they are in committee, and that settlement is only possible under the threat of litigation. So with litigation not hanging
overhead, it is puzzling that *any* dispute would originate in committee. This is the puzzle at the center of this dissertation. Why would states discuss a potential trade dispute in the committees, when they could request consultations instead?

The observations in the data presented above lead to the following hypothesis:

**Hypothesis:** If a state faces ambiguity about third party input to a dispute, then it will bring the dispute to committee, in the form of a STC, instead of requesting consultations.

In the next chapter, I elaborate on the puzzle and situate it within the literature on the committees and WTO dispute settlement. I then outline my theory and argument, followed by a discussion of competing explanations.
CHAPTER II: THEORY

This dissertation is motivated by the following question: Why would states discuss a trade dispute through a non-judicial treaty mechanism, when a more formal process is readily available? Specifically, in the context of the WTO, why would states use the committees to address disputes, instead of requesting consultations to get the other side to the bargaining table? This is puzzling because theories of dispute settlement and bargaining tell us that states (and individuals) are more willing to compromise in the shadow of the law, where the threat of litigation looms overhead (Busch and Reinhardt 2000; Mnookin and Kornhauser 1979; Cooter, Marks & Mnookin 1982). Therefore, it is odd that a state would not apply maximal pressure to achieve an adjustment of another state’s behavior. What incentive is there to compromise absent a real threat of litigation?

Theories that examine the role of diplomacy in international affairs may not find this surprising at all, arguing instead that states may actually prefer more informal means of settlement because incentives to “avoid sunlight” generate a preference towards striking a deal away from public view (Stasavage 2004; Hafner-Burton, Puig & Victor, 2017). This line of reasoning posits that the value of formal mechanisms to resolve disputes is actually overstated, and that state to state relations are still largely governed by power politics. Still others have noted the importance of exacting side-payments and issue linkages in negotiations (Guzman & Simmons 2002; Davis 2004, 2009). This literature suggests that states only pursue formal mechanisms when the ability to exact side-payments is hindered, or where no acceptable compensation can be offered.
But there is a crucial missing element to all these theories of dispute settlement and bargaining, in that they only focus on a dispute as unfolding between two key players, the complainant, and the respondent. But third parties also figure widely in WTO disputes. What is a third party? In addition to the complainant and respondent of a WTO dispute, states can participate in a dispute as third parties, which entitles them to make written and oral submissions for consideration in the case. The right of third parties to participate in panel and appellate proceedings are laid out in DSU Articles 10 and 17.4, respectively. However, Article 4.11 also allows “other” parties to participate in consultations if they have a “substantial trade interest” in the matter. Busch and Reinhardt (2006) refer to these states as “informal” third parties, because they play a similar role to third parties in a dispute brought before a panel.

Why do third parties matter? Busch and Reinhardt (2006) and Johns and Pelc (2014) have shown that third parties can play a pivotal role in the scope and outcome of disputes through providing input on claims brought by the complainant, which often impacts how the claims are eventually evaluated by panels and the Appellate Body. Third parties do not make their own claims, but their commentary on claims brought by the complainant are not trivial. For example, in the Canada—Patents dispute, the panel referred to an “unresolved political debate,” in reference to comments from third parties, to justify its exercise of judicial economy on a question of law (Busch and Reinhardt 2006, 455).

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Participating as a third party also affords states access to all submissions made by the complainant and respondent up to the point of formation of the panel,\textsuperscript{28} which gives them private information about the dispute that other members do not have. This information facilitates their participation, particularly for countries that may not have the capacity to do the same research. As Bown (2005) suggests, this allows other WTO members to free ride on disputes. Since past experience in litigation can impact whether or not states file disputes in the future (Davis and Blodgett-Bermeo 2009) it is clear that some type of learning happens through the process of this participation, which provides countries with better information on how to pursue disputes in the future. I posit that learning does not only happen in the formal litigation process, however, but more widely throughout the institution itself, through repeat interactions in the committees.\textsuperscript{29}

So who decides whether third parties can participate? In order to participate in consultations, that is, at the stage prior to litigation, the respondent to the dispute must agree to each third party’s participation. It is incredibly rare, however, that a third party is ever denied participation, because what is considered a “substantial trade interest” has been liberally interpreted (Carmody 1997). Third parties can also join consultations if they support the respondent, therefore, it is also useful to know arguments that could be made in support of maintaining a measure that is alleged to be in violation of WTO rules.


\textsuperscript{29} For more on repeat interactions see Joseph Conti, “Learning to Dispute: Repeat Participation, Expertise and Contribution at the WTO.” \textit{Law and Social Inquiry} 35 (2010): 623-662.
In particular, this matters because third parties in consultations often join the dispute as formal third parties once it goes to panel, and also on appeal. Here they can exert an important impact. For example, Bartels (2001) notes that third parties can influence what a panel and the Appellate Body can consider as “other” sources of law in making a ruling. He notes that in *Guatemala-Anti-Dumping Investigation Regarding Portland Cement from Mexico*, “Guatemala argued that a NAFTA Panel decision constituted a source of law as a resolution under a convention, as custom, as a demonstration of a ‘general principle of law recognized by civilized nations’ and as a judicial decision (at paras 4.214-4.215)”\(^\text{30}\) with which the United States, acting as a third party in the case, agreed. Even though the Panel did not take up this point, it is something Mexico would still have needed to prepare a rebuttal to.

I argue that states bring disputes through the WTO committees to learn about potential third party participation. They do this when there is ambiguity about third party input, which can impact the scope of claims when a dispute is brought, and ultimately, the final ruling. Therefore, contrary to the conventional wisdom in the current literature on the WTO committees, which will be elaborated below, states do not use the committees primarily to resolve disputes. Instead, they use the committees both strategically and politically to learn about the other potential parties to a case. Consequently, this means that states are not necessarily as concerned about the respondent. This dissertation therefore provides an answer to the puzzle of why states would utilize a non-judicial treaty mechanism over a more formal means of settlement, and shows that by raising specific

trade concerns (STCs), states use the committees for their probing value in gaining an insight into third party participation.

But why would the respondent not be of primary interest? Because the state raising the concern almost always knows everything it needs to about a measure before it is brought to committee, and this includes the respondent’s position on the matter. The process by which STCs develop helps shed light on this. For example, in the European Union, the Market Access Committee in Brussels provides a forum for direct industry input into regulatory barriers and other market access issues, and the Commission regularly engages with Member State regulatory concerns as well. In the United States, industry regularly flags foreign regulatory barriers to the Office of the United States Trade Representative, which itself has committees that review these requests. Much of the fact-finding of a measure is thus done well in advance of a committee meeting.

Furthermore, since a lot of the information on the issue comes straight from industry, it is incredibly detailed, particularly on TBT and SPS issues, where the measure is usually known about by both industry before it is even notified by the member maintaining the measure to the WTO, and at many times before the industry’s government is made aware of the matter.31 Discussions with a number of officials has emphasized this point. One European Commission official noted that sometimes the Commission does not learn about a regulatory action a Member State has taken until it is brought to their attention.

by a foreign government, which then starts a dialogue between the Commission and the Member State.\textsuperscript{32}

Furthermore, as one U.S. official noted, so much effort is expended on trying to resolve the issue before it ever comes to committee in the first place, that it is only when these efforts fail that a STC is even considered.\textsuperscript{33} That a STC is itself a signal that bilateral negotiations have failed is an important factor in understanding what purpose STCs serve. Absent further escalation of the trade friction, the chances of swaying a state to adjust its regulatory actions at this stage may be slim. The failure of diplomatic negotiations on the margins of the WTO and between capitals is the point at which a dispute generally starts to be considered. But in choosing to take that dispute through committee instead of requesting consultations indicates that states are utilizing the committees in some way to help them with potential disputes.

This link between originating STCs and formal disputes is a critical one, and serves as the foundation for my analysis. The relevant comparison for originating cases, that is, STCs that later become formal disputes, are instances where a request for consultation is made absent a STC being raised in committee first. Both occupy a similar space in dispute settlement, signaling the start of the dispute process. Also, since STCs are a discussion based mechanism, it is fair to compare them to formal consultations where states try to come to an agreement over how to avoid a dispute. While the literature has described the


\textsuperscript{33} Official from Agricultural Affairs, the Office of the United States Trade Representative, anonymous interview with author, Washington DC, June 4, 2018.
committees as a process that works in parallel to formal dispute settlement, I suggest that this way of conceptualizing the committees overlooks how states actually use the committees. In fact, I argue that the committees serve as a pre-consultation stage of the broader dispute settlement system, and act as an important forum to gain specific information that aids in the decision to file a dispute.

By zeroing in on this particular use of the committees, we will first get a better sense of the selection effects of disputes writ large, since the previous literature has not examined formal disputes arising in the WTO’s non-judicial treaty mechanisms. Second, the fact that states feel comfortable bringing cases that will eventually become disputes through the committees raises questions about what value is derived by raising concerns there, if not to resolve a dispute. This in turn raises questions about the effectiveness of the formal dispute settlement process, if states look elsewhere to address disputes are their early stages.

I argue that states bring disputes through the committee track as opposed to the formal track for one main reason—to learn about third parties and gauge their positions. States are interested in finding out not only who potential third parties are, but whether they would consider participating in a dispute, and if so, what specific claims and issues they would raise against the measure the potential respondent has adopted. The only way to fairly test this is to compare a similar process that happens outside of the committee, a formal request for consultations that is made without prior discussion in committee. Essentially, while comparing STCs to each other may be useful for understanding how states may use the committees, it doesn’t explain why they use them. I fill this gap.
In this dissertation I will show that states use the WTO committees to learn about third parties to a dispute. I do this by exploring how uncertainty about third party input and participation leads states to bring a dispute to committee instead of directly filing a request for consultations. Before elaborating on the argument and alternative explanations, I will first take a more in-depth look at what the literature says on this topic to show where this puzzle is situated, how the current literature would answer this puzzle, and why these theories provide an incomplete picture of this phenomenon.

**Literature**

The WTO’s dispute settlement mechanism has seen 581 disputes since 1995.\(^{34}\) In the first ten years of the organization, 32 disputes were filed per year, on average. In the last ten years, that figure has dropped to 16 disputes per year, on average (though there is a notable, and yet unexplained spike in 2018).\(^{35}\) Even if the number of disputes has gone down, however, some of the most contentious trade issues continue to be brought before the WTO. While some have argued that the expansion of its membership, and the diversity of interest this brings has kept the cases coming (Busch & Reinhardt 2002, 464), others have suggested that countries choose to use the WTO to litigate disputes due to the confidence members place in the system to deliver justice (Hudec et al. 1993; Petersmann 1994; Jackson 1998; Moore 2000). In fact, recent criticism from the Trump administration of the

\(^{34}\) Disputes as of March 2019.

\(^{35}\) This spike may, in part, be due to a response to U.S. unilateral actions since President Donald Trump took office. Most surprising is the first time cases have been brought under Article XXI, which many thought to be non-justiciable.
dispute settlement mechanism has led many WTO members to rally around the institution, highlighting its centrality to the world trading system.

The stability and predictability the WTO has brought to the international trade regime is largely due to the general effectiveness of dispute settlement. This is explained, in part, by the growth of legalization\(^{36}\) of the WTO’s dispute settlement mechanism. While the WTO can be considered moderately to highly legalized depending on the factors you focus on, for example, the centrality of states, or the role of industry in the initiation and litigation stage (Keohane, Moravcsik & Slaughter, 2000), it is without doubt that its rulings are taken seriously by states. Goldstein and Martin (2000) argue that the post-WWII reforms of the international trading system, in particular, the creation of the DSU and the WTO, fundamentally strengthened the nature of obligation by making the rules more binding. In fact, studies have shown a high degree of compliance with rulings among both small and large countries, regardless of the level of development, and even when rulings are adverse (Nottage 2010).

The majority of literature on dispute settlement, however, only examines disputes once they have actualized, that is, once a request for consultations has been made. But just

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\(^{36}\) Goldstein, Kahler, Keohane and Slaughter (2000) offer a definition based on three separate criteria in evaluating the degree of legalization of an international institution: the degree to which rules are obligatory, the precision of those rules, and the delegation of some functions of interpretation, monitoring, and implementation to a third party. Fully legalized institutions bind states through law: their behavior is subject to scrutiny under the general rules, procedures, and discourse of international law and, often, domestic law. Legalized institutions also demonstrate a high degree of precision, meaning that their rules unambiguously define the conduct they require, authorize, or proscribe. Finally, legal agreements delegate broad authority to a neutral entity for implementation of the agreed rules, including their interpretation, dispute settlement, and (possibly) further rule making (387). See, Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, "Introduction: Legalization and world politics," \textit{International organization} 54, no. 3 (2000): 385-399.
as the formal process of dispute settlement has evolved over time, other parts of the WTO have grown as well. In addition to this formal process of addressing disputes, the institution also provides non-judicial means to address barriers to trade. The discipline has generally examined this as the persistence of diplomacy at the WTO by either comparing it to its domestic equivalent of bilateral negotiations more broadly (Guzman & Simmons 2002; Davis 2004), pre-trial bargaining through looking at formal consultations (Busch & Reinhardt 2000; Johns & Pelc 2014), or by focusing on the use of alternative dispute resolution at the WTO (Schoenbaum 1998; Malkawi 2007; Jackyk 2008), such as good offices, mediation or conciliation, and arbitration. In fact, even within the toolkit of alternative dispute resolution, scholars most often focus on arbitration (DSU Article 25) even though it has only been invoked once since the WTO was founded.

But looking at only the formal processes for resolving disputes and those institutional mechanisms that are directly tied to dispute settlement limits our understanding of the evolution of disputes more broadly. In addition, the approach by the current literature forces us into a litigation mindset, and deemphasizes the political and strategic actions that occur in other parts of the institution that can inform us about disputes. Other institutional tools of the WTO, such as the committees, remain an underexamined aspect of dispute settlement.

Thus, when examining the role of the WTO’s committees on dispute settlement, the literature has fairly little to say. Part of the reason for this is because research on this topic has only generated interest in recent years, as the work of the committees became
more regularly featured in discussions of the WTO. Therefore, in addition to the scholarship that directly studies this institution, the activity taking place in the committees can also be situated more broadly in the literature that looks at the use of institutionalized non-judicial treaty mechanisms to address disputes between states. I now turn to a discussion of this literature.

Institutionalized Non-Judicial Dispute Settlement

Since the General Agreement on Tariffs and Trade (GATT), dispute settlement has primarily been understood not as a system to ensure compliance with the law, but rather “to arrive at understandings and mutually acceptable settlements between disputing parties” (Klaiman 1990, 660). As Jackson (1969) points out, the GATT contained “no single, sharply defined dispute-settlement procedure” (164). The reason for this is because dispute settlement provisions were included in the charter of the International Trade Organization (ITO), which many countries thought would eventually be adopted. Therefore, there was no need to clarify dispute procedures in the GATT. When the ITO failed, however, what we were left with were Article XXII, entitled “Consultation” and Article XXIII, entitled “Nullification or Impairment,” which became the basis of dispute settlement in the GATT.

However, Davey (1987) argues that:

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37 WTO Counsellor, Division on Trade and Environment, anonymous interview with author, Geneva, Switzerland, June 8, 2017.
The text of Article XXIII does not clearly mandate adoption of either the legalist or antilegalist position, although the authorization to the contracting parties to make rulings and to permit retaliation certainly suggests that GATT was intended to do more than simply provide conciliation services. That GATT was to encompass a legalistic role is also borne out by the early history of the dispute settlement system (67).

Essentially, he explains that while judicial settlement of disputes was neither explicit or the central focus of the GATT, the way it was used implied that many states wanted a more legalistic system, as recourse to panels made evident. Despite the fact that there was a slowdown in invocations of Article XXIII in the 1960s and early 1970s over concerns of the system’s effectiveness, by the late 1970s it “gained renewed favor” (Klaiman 1990, 664). Therefore, it should not be hard to see why, that over time, judicial means for settlement of trade disputes became central to the world trading system, even though negotiated settlements were still available, and in some instances, preferred (Lester, Mercurio & Davies 2012).

Therefore, arguments that the WTO has preserved some of the diplomatic ethos of the GATT (Weiler 2001) perhaps overstates just how much more recourse to diplomacy existed in the pre-WTO system, or to what extent states wanted to privilege the diplomatic settlement of disputes, especially given the disappointment over the failed ratification of the ITO Charter.
Regardless, the Dispute Settlement Understanding (DSU) marked the formal transition towards a more judicial mechanism to resolve trade disputes.\textsuperscript{38} At the same time, the DSU preserved non-judicial mechanisms for dispute settlement. For instance, consultations offer one way to resolve disputes, with Article 4.5 stating that “In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.” This places a clear emphasis on dispute resolution, urging members to try and avoid litigation.

Article 5 of the DSU also provides for “good offices, conciliation and mediation,” which gives the parties the ability to have a neutral arbitrator to help them find a mutually acceptable solution in a confidential setting. However, mediation has been invoked only once. There is also Article 25 which provides for binding arbitration and “shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed.”\textsuperscript{39} Only one arbitration has ever taken place under Article 25, the \textit{US-Copyright} dispute.\textsuperscript{40} In future, there may, however, be more recourse to Article 25 if a solution cannot be reached to the impasse of appointing new members to the Appellate Body, which the United States has blocked (Hillman 2019).

But non-judicial means of dispute resolution are not limited just to these mechanisms, and is also widely practiced outside of the WTO. One of the most obvious

\textsuperscript{38} This was evident in two major changes—the creation of the Appellate Body to review the decisions of a panel’s legal decisions, and the automatic adoption of panel reports by the Dispute Settlement Body (DSB), unless there was consensus to not adopt the report. This eliminated the power of states to effectively veto the adoption of reports they did not agree with.

\textsuperscript{39} Dispute Settlement Understanding, Article 25(2).

\textsuperscript{40} Award of the Arbitrators, \textit{US-Copyright}, Recourse to Arbitration under DSU Art 25, WT/DS/160/ARB25/1, 9 November 2001.
places this is practiced is in the domestic context. States use non-judicial tribunals, administrative boards, commissions, conciliation, and mediation to address a wide range of disputes (Ukai 1970) in order to correct undesirable actions, or to come to a compromise solution. This is also evidenced in the domestic context of pre-trial bargaining. Mnookin and Kornhauser (1979) and Cooter, Marks & Mnookin (1982) suggest that bargaining happens in the shadow of the law, where the greatest obstacle is the strategic nature of bargaining. Looking at pre-trial bargaining in the context of divorce proceedings, these authors argue that settlement is more likely when transaction costs are high, and less likely when there is increased variation in bargaining strategies.

But ultimately, all these forms of non-judicial bargaining serve one major purpose—reaching a settlement. At the same time, they can also be useful in revealing the preferences of the other party, though of course, there are incentives to misrepresent. So, in a way, a party can learn about its opponent through the bargaining process, and then decide whether litigation would produce a better result. This is most similar to the way consultations are framed in the WTO context, where it is the last chance to secure a bargain before litigation. This process is also often described as being a non-transparent negotiation (Guzman & Simmons 2002) between two parties. However, as Busch and Reinhardt (2006) have noted, there are other actors, mainly, third parties, and the impact of their presence also needs to be taken into consideration.

Going back to the international level, Scheffer (1990), reflecting on inter-state disputes at the Permanent Court of International Justice (PCIJ), states:
[in] the vast majority of international disputes, states have employed non-judicial remedies such as diplomatic negotiation, good offices, enquiry, mediation, conciliation, arbitration, and administrative appeals to achieve a peaceful settlement without electing to resort to adjudication. The dispute-settlement provisions of treaties often reflect a seemingly rational progression of steps—beginning with negotiations and ending with the Court—which might lead some to conclude that disputing states must exhaust each successive non-judicial remedy before the Court can be seised with the case (85).

However, he goes on to say that in many areas of international law, it is not entirely clear to what extent states need to exhaust non-judicial remedies before pursuing adjudication. The exhaustion of non-judicial remedies is also often dependent on the compromissory clause of treaties, which provides for the submission of a matter or matters to arbitration. These clauses can include language that requires the exhaustion of other remedies before adjudication, or the exhaustion of local remedies, such is the case in some international investment treaties. A number of bilateral U.S. treaties of friendship, commerce and navigation (FCN treaties), which were negotiated after the Second World War, include language that requires recourse to diplomacy before adjudication. An example of language included is as follows:

‘[a]ny dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be
submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means’ (Scheffer 1990, 93-94).

Of course, such language is still vague and open to many interpretations as to what a satisfactory adjustment by diplomacy actually entails.

The important thing to note, however, is that non-judicial mechanisms are almost always seen as the first resort in international disputes, and a means to achieve settlement. But there can be a number of parallel processes for non-judicial settlement that may exist, and it is not immediately obvious why states might prefer one over the other.

In fact, all non-judicial treaty mechanisms are not created equal. In fact, looking at the WTO committees, it becomes clear that there is more to them than meets the eye. I next turn to the literature on the WTO committees to show how it has complemented this broader literature on non-judicial settlements, and in doing so painted a picture of the committees as but another mechanism by which to achieve settlements.

What Do We Know About the Committees?

Why would states bring a dispute through committee instead of filing a formal complaint? The literature has said surprisingly little about this puzzle. But what we do know can help guide an inquiry into the answer. The literature is a combination of descriptive explanations of how the committees are used as well as cuts at why states would use this institution in the first place. The vast majority of the literature on this topic treats the committees as a
forum to resolve trade frictions before they become disputes, or as a means to achieve regulatory convergence.

Despite uncertainty over what may constitute a resolution to a dispute, the literature tends to agree that trying to achieve some sort of compromise solution is one of the primary reasons why states bring disputes to the committee. The characterization of the committees first put forward by Horn, Mavoridis and Wijkström (2013) as a highly technocratic, apolitical means of settlement has been further elaborated on by Holzer (2019), Wijkström (2015) and Wolfe (2013). Wijkström (2015) points out that the normative work of the committees, which focuses on establishing best practices that may help foster long-term cooperation, tends to be more technocratic than the specific work (STCs), which functions like a peer-review of other countries’ trade measures. This is an important distinction in the committee work, as norms of behavior and regulatory practice can be established in these normative interactions.

Wijkström (2015) notes that committee discussions of STCs, the specific function, can also become technical, particularly because of the presence of many capital-level experts from specialized agencies. For instance, it is quite normal for the United States to bring in experts from the Department of Agriculture or Food and Drug Administration to sit in on SPS committee meetings. Other delegations have also been known to invite agency expertise to meetings, in addition to inviting other outside observers with specific expertise. Notably, there is no public record of who each delegation brings to the committee meetings. But there are also a number of other observers from international organizations that attend committee meetings, and whose presence is well documented. The World Health
Organization, for example, has observer status in the SPS and TBT committee. Both committees regularly update lists of organizations with observer status.41

But aside from the major economies that can more easily afford to fly in experts from the capitals three times a year, the majority of delegates often staff the committees with diplomats from their missions in Geneva. Furthermore, many of these countries have very small missions with officials that have to wear many hats. These officials tend to cover a wide variety of issue areas, and are not even limited to the WTO since there are many international institutions in Geneva they also represent. As a result, technical expertise in committees is often a luxury many countries can’t afford.

That is not to say that technical discussions are not an integral part of the committee work, because they are. For example, Lang & Scott (2009), pick up on the normative aspects of the committees and describe them as serving a non-judicial governance function through the dissemination of knowledge, and the development of new norms. Wijkström & McDaniels (2013) elaborate on these functions in detail and explain how the committees provide states with technical assistance and expertise so that they can avoid regulatory divergences that may pose barriers to trade in the first place. For example, through thematic sessions on good regulatory practices, members can share their experiences on how best to maintain regulatory transparency and how to conduct impact assessments. While this process complements dispute avoidance, it does not include the use of STCs, which are the

41 International Intergovernmental Organizations, Requests for Observer Status in the Committee on Sanitary and Phytosanitary Measures, G/SPS/W/78/Rev.14 (October 31, 2016); International Intergovernmental Organizations, Requests for Observer Status in the Committee on Technical Barriers to Trade, G/TBT/GEN/2/Rev.14 (February 19, 2018).
primary means through the committee by which states raise complaints against each other. The normative discussions, on the other hand, serve more as a way to share best practices.

Karttunen (2016), Holzer (2019) and Manak (2019) were the first to make a direct link between the committees and dispute settlement. Karttunen (2016) explains how the transparency provisions in the TBT and SPS agreements facilitate non-judicial settlements and regulatory cooperation through both the normative and specific functions. She describes the committees as both complementing and substituting dispute settlement through the transparency mechanisms that give equal access to justice and provide a forum for regulatory cooperation. She does not, however, address how political and strategic factors may impact why states use the committees, and she treats all state interactions as generally equal. Again, this frames STCs as being a problem of coordination among two or more actors with the complaining states treated as a monolithic category.

Holzer’s (2019) work is in a similar vein and argues that the TBT committee serves “both as an alternative mechanism of trade conflict resolution and as a preventive mechanism against the initiation of formal disputes” (103). Manak (2019) shows how the committees facilitate regulatory cooperation by giving stakeholders the ability to have their voice heard, and through the decision-making rules that favor greater commitments among states to respond to foreign concerns. In particular, she highlights the role of industry stakeholders in achieving regulatory adjustments from states through the committees. Dorlach and Mertenskötter (forthcoming) offer support for this argument by noting the role of transnational industry stakeholders in framing the issues surrounding the measure.
Each of these studies builds on Horn et al. (2013) and focus primarily on cases where there is some sort of resolution of the matter at issue. While Holzer (2019) does note that there are some cases that become formal disputes, she is not able to explain why this may be the case, saying that there is no identifiable pattern in the types of cases that escalate. In fact, even the seminal paper on the committees by Horn et al. (2013) does not specifically address why disputes that are later formalized are brought there.

Finally, others have pointed to the diplomatic aspects of non-judicial settlement through the committees. For example, Echandi (2013) notes that for developing countries in particular, the WTO committees are useful for building alliances and testing the level of support among other WTO members. In deciding whether or not a dispute should escalate to adjudication, however, Echandi emphasizes the interplay between the offensive and defensive interests of the complainant and the defendant, which also receives significant treatment in the WTO dispute settlement literature. In addition, the existing literature does not explain under what conditions these alliances form, nor whether coalitions of states are able to generate more settlements. It is simply assumed that states will use the committees to look for allies, without explaining what motivates this.

Overall, the literature on the committees overwhelmingly focuses on instances of dispute resolution or regulatory adjustment as an explanation for why states raise STCs. Their answer to the puzzle, therefore, would be that states are using the committees as a forum to resolve trade frictions and to avoid a dispute altogether. But what this does not explain is why there is a subset of cases that escalate to formal disputes. Are these simply the cases where bargaining failed, and a resolution was not possible? Or is something else
at work here? This is the gap the literature on the committees has not yet been able to fill. If the committees are used for resolution, why would states bring cases there that they are going to litigate later anyways? Does that not signal that a compromise is already seen as difficult?

The reason why the literature has not been able to fully answer the puzzle of why states would bring a dispute to committee instead of filing a formal complaint lies in the fact that these studies frame STCs as a separate process from formal dispute settlement. And while some authors do posit a link, it is framed in terms of a pre-dispute early warning mechanism, or as an alternative forum for bargaining over technical issues. To the extent that STCs are seen as a probing exercise to learn about other states, the literature on the committees borrows from the logic of the broader scholarship on dispute settlement and argues that states raise STCs to learn about their opponents. But as I develop further below, the respondent is not the primary concern.

So where does this leave us? The literature generally suggests that non-judicial treaty mechanisms to settle disputes can be best thought of as a complementary or alternative process to formal dispute settlement, where the goal is ultimately to avoid litigation. At the very least, they serve as less-politicized pathway for dispute escalation, and are thus on the lower end of the scale in terms of how serious the dispute has become. I argue that the existing literature misses the mark in explaining the role of the committees in dispute settlement. In fact, by ignoring the impact of third parties in committees, the literature has not only overlooked an important set of actors, but in doing so, has also been
unable to fully explain the motivation for why states choose to bring disputes to committee in some cases but not in others.

**Argument**

Theories of non-judicial treaty mechanisms to address disputes between states have made clear that the overriding purpose of these institutional mechanisms is to avoid litigation and come to a settlement. This suggests that institutional channels that provide the possibility for alternative means of settlement are an important factor in the overall dispute settlement system. In contrast to theories that prioritize the formalization of a dispute through the initiation of adjudication, theories of non-judicial settlement emphasize the informality of the bargaining process. Even the consultations stage of dispute settlement can be seen as non-judicial settlement as it is the final stage in which the parties can come to a negotiated solution, and avoid litigation.

In fact, the literature on dispute settlement describes this as “bargaining in the shadow of the law,” where states try to reach settlements under the threat of future litigation. Busch and Reinhardt (2000) explain that in the shadow of weak law, states should be more likely to settle, with outcomes being more uncertain in these instances. They argue that since “the WTO remains a ‘court with no bailiff,’ its rulings at best can have a modest direct influence on dispute outcomes” (159). This is particularly true in the realm of TBT and SPS disputes, for which there have not only been few rulings, but also, inconsistent interpretations of the agreements (Staiger and Sykes, 2011; Mavroidis 2019).
This still raises the question as to why states would bring any disputes through the WTO’s committees instead of requesting consultations? According to the literature, requesting consultations would signal a greater resolve to litigate, therefore enhancing chances of a settlement. If a state is interested in striking a bargain, it would make sense to find the most expedient way of getting the other party to the bargaining table. However, there is another consideration that states must keep in mind before deciding to signal their potential willingness to litigate.

That consideration is the potential for third parties to join the dispute. And it is as relevant in the committees as it is in consultations.

Busch and Reinhardt (2006) argue that third parties both reduce the chances of early settlement (before a ruling), and increase the chances of a dispute ending in a ruling by expanding the scope of claims. Third parties thus bring their own interpretation to a potential violation which may or may not be at odds with the complainant’s views on the matter at issue. Where there is discordance among third parties, and too many of them, there is also the possibility that this can lead the defendant to dig in its heels and take a principled stand against any negotiated solution (Stasavage 2004). Without a clear indication of what action a state can take to satisfy all parties, it is sometimes better to avoid attempting to satisfy any party, and instead allow the process to play out through litigation. Looking at the consultations process, Pauwelyn (2003) and Bown (2005) both agree that third parties reduce the chances of settlement by adding too many voices to the discussion.
Pelc and Johns (2014) suggest that third parties also offer “insurance” to the complainant when the case may be weak through dampening the costs of failure “by introducing ambiguity into the normative force of the panel ruling” (665). Thus, third parties can signal a broader interest among the WTO membership on the matter at issue. Third parties are also important in a dispute because as Rosas (2000) and Smith (2003) argue, the testimony of third parties is given careful consideration in panel proceedings. This finding is not limited to the WTO, and in fact, a number of authors have argued that third parties in disputes can influence verdicts because they can serve as a signal of broader preferences (Bailey, Kamoie & Maltzman 2005; Johnson, Wahlbeck & Spriggs 2006; Carrubba, Gable & Hankla 2006). This critical role of third parties thus makes it essential to identify these states in advance of filing a request for consultations, because they can significantly influence the scope of negotiations and the possibility for a settlement.

While the current literature substantively covers the importance of third parties to dispute settlement, they have largely focused on when they matter in the context of consultations and adjudication. But the growth in interest in other institutional aspects of WTO governance reveals a relatively “hidden world” of interactions within the institution (Lang & Scott 2009). Expanding our concept of dispute settlement as existing beyond the mechanisms outlined in the DSU and the diplomatic settlement of disputes through private bargains, which cannot be observed, we are left to grapple with the institution as a whole and to consider how countries behave within the same institution, in different capacities.

Some might claim that this is diplomacy by another name. But one has to ask what added benefit the committees provide that traditional diplomacy does not? In fact, it seems
almost counterintuitive that states would use the committees to conduct diplomacy since, as Karttunen (2016) mentions, the discussions happen in transparent fashion, with much of the WTO membership in attendance. Theories of bargaining would likewise disagree that this is an optimal bargaining strategy, as revealing one’s hand could lead your opponent to offer less than they otherwise might have in a more closed diplomatic setting.

It is important to note, however, that one feature of the committee that is not transparent are the many meetings that are scheduled on the margins, which are often prompted by a STC being placed on the agenda. These are informal meetings between delegates at the WTO coffee shop, cafeteria, or any number of private rooms that can be booked by WTO members for meetings. Delegates are mixed on the value of these meetings, particularly smaller delegations, which often do not have the time to schedule such additional interactions to their already tightly packed schedules. But for some delegations, these interactions are highly valued precisely because they allow them to veer away from the scripted and legally vetted remarks they air in the committees. The overall efficacy of these meetings cannot be evaluated empirically, however, because so much of it rests on anecdotal evidence from the largest delegations.

But regardless of whether it would be fair to characterize the committees as another form of diplomacy, why do states need the committees to figure out who potential third parties to a dispute would be? Surely, this would be easier through diplomacy on the margins, even outside of the WTO entirely? What prevents a complainant from figuring this out absent the committees? As many officials will candidly admit, most of the pre-dispute stage is spent trying to do exactly this. In fact, significant resources are spent before
an issue ever makes it to the WTO to get an accurate picture of the dispute, beyond just the
domestic impact, because it often helps to build strategic allies to pressure states to adjust
their trade barriers.42

But states may not coordinate outside the halls of the WTO for various reasons. For
instance, as Shaffer (2003) explains, the United States and the EU rarely coordinate on
disputes because of differences in legal strategies, organizational culture and institutions.
Others may simply want to “free-ride on enforcement” and not bear the cost of preparing
a dispute, and instead wait for another state to make the first move (Johns and Pelc 2014).
Given the high cost of fact-finding and dispute preparation, it is not surprising that most
states may not want to get involved in a potential dispute until someone else has done the
preliminary analysis on the measure already. In fact, free-riding in this way is strategically
sound for countries that may lack the capacity to mount their own disputes, and even to
raise their own STCs.

Furthermore, states may also face a problem of credible commitments. While, as
Schelling (1956) notes, that through binding oneself to a specific choice, “weakness is often
strength,” in that it makes it harder to back down from a threat, states still have an incentive
to misrepresent their motives. States may do this to either deceive about the facts, or for
tactical reasons (Schelling 1956), both of which can be employed to avoid revealing’s ones
hand, and perhaps leading to a less optimal bargain. There could be instances, for example,
where a state is on the fence about a measure another state has taken because it is also
considering a similar measure in the future, or it simply hasn’t decided whether a dispute

42 Official from Agricultural Affairs, the Office of the United States Trade Representative, anonymous
would be worthwhile, particularly if it doesn’t believe enough other states will support the challenge. In such cases, it may be better to keep mum to avoid the attention and pressure from a state itching to pursue an alleged violation.

But there are also instances where states may be initially supportive of a challenge, but later abandon future coalition efforts after securing limited compromises that assuage their primary concerns. For example, before a STC was raised over an amendment to the European Union’s Renewable Energy Directive,43 which would exclude palm oil from the list of biofuels that can be counted towards the EU’s renewable energy targets, while other raw materials, such as rapeseed oil would be allowed until 2030, a group of countries raised the issue in private talks with the European Commission. As one official involved in the talks recounted, Brazil took part in the negotiations, and many of the smaller countries were hopeful to have such a large country as part of their coalition.44 Through negotiations, Brazil had managed to get some sectors excluded, including ethanol (its main export interest), sugar cane and soybeans.45 However, countries that were concerned with other products, mainly palm oil, did not succeed in exempting their product. The palm oil exporting countries were not sure that Brazil and others would still support them in their

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effort to pressure further changes to the EU regulation. A46 Their instincts were right. When the issue was raised in the TBT committee in March 2018, Brazil was silent. 47

It is this uncertainty in negotiations that occur in the margins, where states have an incentive to misrepresent their motives in order to secure a bargain, that states must assess who their potential allies may be, and who may throw a wrench in future negotiations.

This anecdote helps to provide a glimpse into why states may choose to raise a potential dispute in committee, as opposed to going straight to consultations. There can be remaining ambiguities in information that states may need to mount a successful challenge to a trade action. I argue that states use the committee to learn about third parties because it helps them to understand the scope of a dispute if filed, and to identify potential allies and opponents. This is crucial to the overall success of a dispute, because as the anecdote above shows, states may be more prone to think twice about mounting a challenge particularly when key players waffle on their commitment to challenge measures through to litigation, or when they remain silent on their intentions, either because they have their own interest in the measure being upheld, or they are able to strike bilateral bargains that exempt their industries from being affected by the measure. In the case of the Renewable Energy Directive, Brazil’s bilateral interests outweighed any systemic concerns it may have had.

47 TBT Committee, Minutes of the Meeting (21-22 March 2018), G/TBT/M/74, paras. 2.24-2.37.
In some cases, building these coalitions in committee can also generate significant pressure on the state maintaining the measure to adjust or delay its rule, but any adjustment is usually marginal, and the states that raise the measure always keep an eye on the issue even after it drops from the committee meetings. So while the conventional wisdom would have it that states would not put a dispute in a delay holding pattern by bringing it through committee, I show that the exact opposite can be true. States are not trying to delay a dispute. They are trying to get a better sense of how a dispute will play out.

Dependent Variable

The dependent variable is whether or not a state takes a dispute through consultations, what I call the “formal track” or through committee, the “committee track.” The latter means that the dispute originates in the committee, which is to say that the dispute is discussed in committee as a specific trade concern before a request for consultations is made. I operationalize this by tracing back formal disputes that originate in the committees, and comparing them to cases that do not originate in committee. This is done by examining the 78 requests for consultations between 1995-2018 which make reference to the TBT or SPS agreements.

While there is a broader subset of STCs that can be considered “potential disputes” I focus only on those cases where we know that a dispute was formalized to offer a more fair comparison to consultations. I discuss the broader universe of cases in the previous chapter, and in the conclusion.
Taking these 78 requests for consultations, I then reviewed each dispute and determined whether the SPS or TBT claims were central to the total number of claims made. This means that TBT or SPS claims were a central component of the complainant’s case, and that the measure at issue was a TBT or SPS issue.\textsuperscript{48} This leaves us with 64 individual requests that can be considered as true TBT and SPS cases. Of these 64 cases, there are 53 unique disputes, since there can be multiple requests for consultations (by various members) with regard to a single measure. Of this sample, 35 individual disputes originate in committee.

As a result, at the level of disputes, 66\% of all TBT and SPS disputes can be considered as going through the committee track. This is not an inconsequential number. That a majority of cases proceed through the committee track provides a compelling reason to examine why so many disputes would go through this route.

The existing literature on the committees would likely disagree that the dependent variable of interest is a choice between the formal track and the committee track. Instead, the majority of the literature treats the committees as the independent variable and focuses on the outcomes of STCs as the main dependent variable of interest. Holzer (2019) subsets STCs in the following categories: clarification of measures; improvement of measures due to unintentional deficiencies; sharing experiences; addressing overlaps with issues in other WTO bodies; and the low-cost settlement of trade frictions. As I show in the data chapter, the first two can be separated out empirically, and do not capture the breadth of the committees’ work. The third issue is better thought of as a normative function of the

\textsuperscript{48} Thank you to Simon Lester for reviewing each of these coding choices, and offering helpful explanations for why certain cases had to be eliminated from the sample.
committee, which is separate from STCs, and thus does not figure into my analysis. The distinction between the fourth and fifth outcomes is perhaps reading too much nuance into what is happening, and does not consider the fact that states may actually bring a STC to multiple committees not to address overlaps, but instead to get a better sense of the scope of all claims in the event of a formal dispute.

This idea that the committees help to settle disputes is the most common dependent variable currently explored in the literature. Horn, Mavroidis and Wijkström (2013) were the first to suggest the use of the WTO’s committees as a forum to resolve disputes, pointing out the large number of issues that are resolved through committee discussions. The authors show that over one-third of all concerns on trade measures raised in the SPS committee are resolved. They define resolution as either a STC that has been reported as “resolved” by the parties, or one that has dropped from the agenda in three subsequent meetings.

This finding has been a central motivation for much of the literature that has followed. It has also contributed to the belief that that committees are an “effective” means of resolving disputes.49 It is important to note, however, that resolution in committee is not so clear cut, a fact that is made evident in the previous chapter. In fact, almost every WTO delegate interviewed for this study said that their countries do not see anything as ever resolved. But the fact that an issue does not arise after a long period of time is, however, a general indication that some compromise has been reached, even if not entirely satisfactory to the complaining party. At the same time, an item dropping from the agenda in three

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49 Official from the Agriculture and Commodities Division, WTO, anonymous interview with author, Geneva Switzerland, June 26, 2018.
subsequent meetings cannot always confidently be considered resolved. For example, a STC that would become the precursor to the U.S.—COOL dispute was first raised in the TBT committee in June 2002 through July 2003.\textsuperscript{50} Then, it disappeared from the agenda for 3 years before returning. Essentially, just because states are not discussing an issue that was previously raised in committee does not mean they no longer have an interest in the issue, or that it has been sufficiently addressed.

The literature that builds upon the findings of Horn et al. (2013) likewise treat STCs as a means to resolve disputes (Karttunen 2016; Holzer 2019; Manak 2019). However, in a forthcoming paper by Dorlach and Mertenskötter, they problematize the degree to which STCs can be considered satisfactorily resolved when very little adjustment is often made. In fact, their research raises questions about the content of resolutions, and reveals they may not be as desirable as a mutually acceptable solution through consultations, consequently raising questions about value of resolution altogether.

The broader literature on non-judicial treaty mechanisms would agree that these channels can best be thought of as a complementary process to formal dispute settlement, where the goal is ultimately to avoid litigation. For example, states may prefer to settle issues outside of the formal dispute settlement process altogether, through diplomatic means. For instance, Scheffer (1990) explains that in some treaties between the United States and the Soviet Union, as well as the International Convention on the Prevention and Punishment of Genocide and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the ability to appeal to the International Court of

Justice (ICJ) is either restricted or eliminated altogether. He argues that this is likely due to either a confidence in non-judicial remedies, a fear that such remedies will be abandoned for litigation instead, or a desire to not subject certain state interests to the court.

But if the ultimate goal of STCs is to avoid litigation, we would expect see all issues brought before the committee, particularly if there is confidence in this mechanism. However, there are disputes that never go through committee. So clearly, in some cases, states prefer judicial remedies. In addition to the extent that states may not want to subject certain interests to a court, discussing a measure in committee will not necessarily prevent that. Once an issue is raised, every member can seize upon it, so it is hard to see how the committees in particular could be useful in this regard. The work of the committees is thus not comparable to private diplomatic bargains because so much of what the committees do is recorded. And even though delegates still have meetings in the margins, this does not eliminate the importance of the act of raising a STC because the grievance is permanently public. What states do with that information is entirely up to them.

Furthermore, if states want to avoid the sunlight, they would not bring an issue to committee in the first place. As one Ukrainian official noted, their delegation does not join in or raise STCs against the European Union, and instead raise concerns with the Commission directly. This seems to suggest that for issues that states do not want to ever be subject to litigation, they would not bring them to the committees at all.

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Therefore, the current literature does not provide an alternative dependent variable that fully explains the STC phenomenon. Instead, they overwhelmingly focus on the outcome of STCs without providing a theoretical explanation for why states choose to use the committees in some cases, but not in others.

Independent Variable
The independent variable of interest is whether there is ambiguity in third party input. Ambiguity is here defined as uncertainty on the part of the complainant regarding: a) what other states have a stake in the dispute; b) whether other states would consider participating in the dispute and if so; c) what specific issues would those states raise against or in favor of the measure the respondent has adopted. This is operationalized by examining whether there is a broad scope of claims in the early stages of the dispute. That is, is there general convergence or a cacophony of competing claims regarding the measure another member has taken?

There could be variation, for instance, in whether states see the measure as having a trade impact that is worth litigating, in addition to differences in opinion over whether a measure indeed constitutes a violation of WTO rules. If states do see the measure as a violation of WTO rules, it is critical to determine exactly what rules they think have been violated. States interpret violations differently, and this can have consequences for how a dispute is ultimately litigated. So the specific claims states identify are important.
Where the scope of claims is broad, a complainant will pursue the committee track in order to learn more about each state’s position, in order to build its own case. Where the scope of claims is narrow, the complainant will pursue the formal track, with greater confidence in the positions to be staked out in negotiations. Part of the reason to bring the dispute to committee is to try to build a consensus among divergent claims, in the hopes of generating a settlement. However, this is pursued outside of formal consultations, because the added pressure of potentially impending litigation would not be as effective when claims are diffuse. Not only will the respondent have little to offer in order to satisfy all parties, but too many distinct claims complicates the complainant’s efforts to mount a parsimonious dispute. Given the affinity of panels to exercise judicial economy, too many diverse claims also risks potentially key claims being overlooked.

To measure the independent variable, I look at the discussions in the early stages of the dispute. In the committee track, I examine the minutes of the committee meetings in the Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) committees, which are available online, and produced three times a year. Here states lay out their concerns regarding a measure. By reading the minutes, one can build a clear picture of the distance between two or more states’ positions on a matter, and also the scope of various claims. To understand the choice of pursuing the formal track, I focus on government documents and discussions at other international organizations where the matter was discussed to understand the position of various actors in the early stages of the dispute. I also look at third party submissions in a dispute.
A strand of literature that might agree with the characterization of the dependent variable outlined in the previous section as a choice of pursuing a dispute through the committee track vs. the formal track, would suggest that this is simply another way of thinking about forum shopping, where states weigh institutional alternatives that will generate a more useful precedent (Busch 2007). Theories of forum shopping might therefore argue that the independent variable of interest would not be ambiguity about how a case will play out, but rather a strategic choice of forum based on an expectation of a better outcome in one pathway over another.

But does taking a dispute through committee result in a more ideal outcome for the complainant? First, this would assume that some sort of useful resolution can be attained in committee that would be better than any outcome in litigation. However, as noted earlier, there is little evidence to suggest that states fully resolve disputes in committee. As the data chapter has shown, resolutions in the SPS committee have been small in number relative to the quantity of STCs raised. Furthermore, in the SPS committee, states can report that an issue has been “resolved” or “partially resolved” but there is no definition for these terms, nor consensus among states that even if reported as such, an issue is ever really resolved. The fact that many STCs disappear from the agenda and reappear is reflective of this. But even in cases where there is some sort of compromise, there is no concrete evidence that this leads to a better outcome than if litigation were pursued instead.

Second, this literature argues that states are most concerned about precedent. Therefore, it is the ruling that motivates choice of forum. But this assumes that states have a priori knowledge about how a dispute would play out, which is not always the case. So
before we can even start thinking about the ruling, we should first be concerned about the information that states have, which would impact their decision about whether or not to bring a case in the first place. The specific legal claims that states outline in their requests for consultations are of particular importance here. It is generally accepted that states will not bring a case if they do not think their legal claims are strong enough to win a dispute. This is why the probability of winning plays an important role in the decision to bring a dispute, though it is difficult to measure empirically (Allee 2004). But as the literature on third parties explains, there is the possibility for claims to be diluted, so it seems that looking at the strength of a case simply through the complainant’s interpretation of the claims does not suffice as an explanation of dispute outcomes.

In fact, Busch and Reinhardt (2006) and Johns and Pelc (2014) expressly point out that third parties can impact rulings. Again, I posit that states start thinking about third parties at the earliest stages of a dispute, when they are not yet sure about whether or not they should go through with it. Importantly, states rely on the information they gather in this early stage of dispute formation to help them fashion their claims, should it eventually go to consultations, and ultimately, to a panel. Furthermore, while states are undoubtedly concerned about precedent, the absence of any definitive resolution in committee does not explain why states would bring disputes here. In fact, it could be possible that raising an issue in committee could potentially weaken the type of precedent a complainant is trying to set by openly discussing the issue before a formal request for consultations has been filed. In effect, since no one has yet seized upon the dispute, it could open the door to many diverse requests for consultations, or even horse trading among other states that may not
have the appetite to litigate, but that are still affected by the measure. Potential coalitions could therefore be disbanded before they even have a chance to form.

Finally, I would suggest that a theory of forum shopping is not the correct framework for understanding what is at work here because this is not a choice of forum as has previously been conceived, since they are two pathways within the same institution, not a choice between, for example, a trade agreement’s dispute settlement mechanism, or the WTO’s. This is a fascinating aspect of the role of the committees in particular, in that the WTO has managed to create space within the institution to expand the discussion of disputes outside the purview of its formal dispute settlement mechanism.

Still others might suggest that the primary motivation for using the committees is to send an early warning to the respondent that a dispute is on its way. Ghodsi and Michalek (2016), for instance, look at STCs raised in the TBT committee as serving as an early warning system for disputes, arguing that raising a concern can predict disputes at the product level. However, this does not explain why states bring some issues to committee and not others. If raising a STC serves as a warning, why not issue one at every instance? This raises broader questions about the effectiveness of the committees as a means to curtail regulatory actions that states may be concerned about, but also suggests that states are selective about the issues they raise there. While anecdotally a number of officials have mentioned that they use STCs to “flag” issues, I do not think this is simply to suggest to another WTO member that they are on watch, because as noted above, they should then flag every potential violation, which they do not.
Instead, I argue that raising a STC is a strategic and targeted act by states to test the receptivity of a concern among the broader membership. As a former U.S. official noted, states are usually well aware of their defensive liabilities, and don’t need reminding of this in committee; instead, the STC signals that the complainant is building its offensive case.\textsuperscript{52}

Ultimately, the literature has tried to explain why states use the WTO’s committees in general, but has failed to explain why states use them for some issues and not others. Why, in fact, is this non-judicial mechanism not used in every instance? This leads to the following hypothesis:

\textit{Hypothesis:} If a state faces ambiguity about third party input to a dispute, then it will bring the dispute to committee, in the form of a STC, instead of requesting consultations.

Why does this matter? The literature on dispute settlement at the WTO has looked at the role of third parties in consultations, and in panel and appellate proceedings. However, scant attention is paid to the process prior to a formal request for a dispute. By looking at the role of third parties in other aspects of the WTO, and in particular, the committees, we can gain a better understanding of the selection effects of disputes writ large.

Busch and Reinhardt (2006) are absolutely correct that third parties can alter both the scope of claims, and the chances of a dispute receiving a ruling. However, what they

\textsuperscript{52}Former counsel from the Office of the United States Trade Representative, and advisor at the Mission of the United States to the WTO in Geneva, anonymous interview with author, Washington DC, March 23, 2018.
overlook is the sequence in which third parties come into play and begin shaping the behavior of the complainant. Therefore, by focusing only on the formal mechanism for dispute settlement, the current literature largely ignores other institutional processes where the same actors engage, on a regular basis. The theory presented here extends the literature on dispute settlement to help explain processes that happen prior to dispute formation, that is, at the earliest stages of a dispute. This research thus reveals that dispute settlement needs to be understood in the broader context of state to state interactions at the WTO. This has implications for international institutions generally speaking, particularly when there are attempts to replicate the WTO’s dispute settlement system, as is currently being considered in the reform of the international investment regime. These implications will be more fully pursued in the concluding chapter.

**Competing Explanations**

The previously literature is right to point out the importance of third parties in dispute settlement. However, most of this literature was written at a time that law professor Joost Pauwelyn has recently described as “peak legalization.” Essentially, the literature on dispute settlement since the WTO was founded has been primarily concerned with binding dispute settlement, and discounted many other forms of resolving conflict. This has come to the fore more recently as the United States threatens the very existence of the Appellate Body, the so-called “jewel in the crown” of the dispute settlement system. This is all to say that the literature’s central focus on dispute settlement as it is presented in the DSU, has

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53 Joost Pauwelyn, speaking at “Bretton Woods at 75 and the Future of Multilateralism,” Georgetown University Law Center (October 21, 2019).
constrained scholarship in thinking within this litigation mindset in a number of ways. This is even evident in the literature on the committees, which frames the actions there as a means to avoid litigation. But if this is true, we should expect to see two things: resolution of disputes, and an increasing recourse to committees due to the effectiveness of resolutions. There is scant evidence for either.

There are two competing explanations for why states might bring disputes through the committees, the learning hypothesis, and the efficiency hypothesis. The learning hypothesis is closely linked to the existing literature on STCs, as highlighted above. The argument is that all STCs provide a way for states to learn about the respondent (the state maintaining the measure), in order to gauge the ability for a compromise solution. This hypothesis undergirds the majority of the literature on the committees, which primarily focuses on the committees as a forum where states gather information about a measure. Essentially, all STCs are about learning the intentions of the respondent, and the information gathered informs states about whether or not to pursue a dispute. However, if states value the additional information the committees provide about the respondent, it does not explain why every potential dispute does not go through the committees. Is there not always some extra information states can gather that may help in filing a dispute?

The efficiency hypothesis speaks to the literature on dispute settlement more generally, which suggests that states will try to get the most expedient resolution out of a dispute, and that the shadow of the law, which hangs over consultations, is the conventional mechanism by which to achieve that. Therefore, it would not make sense to bring a dispute through committee, because it could potentially put the case in a delay holding pattern,
whereby back and forth discussions unfold over a number of months and years, impeding resolution to a dispute. In cases where something is brought to committee, this line of reasoning would contend that STCs are simply used for the resolution of less complicated disputes.

As noted earlier, some authors have described the committees as technocratic, where discussions focus on detailed back and forth dialogue on the technical aspects of a measure, where politics is secondary. The efficiency hypothesis would agree with this characterization, and conclude that it is these apolitical, technical issues that are brought, which get resolved. However, this conflates one-off STCs with substantive concerns, which are far from “easy” issues to achieve a solution on.

This distinction was elaborated in more detail in the previous data chapter, which shows that one-off STCs often concern issues of failure to notify or clarification, which immediately are resolved. However, ignoring the distinction between these one-off STCs and more substantive STCs does not allow us to see how STCs are not, in fact, a unique alternative to the WTO’s dispute settlement process, but, instead, complementary to that process. I argue, that the committees, far from being technocratic, are inherently political, and the choice of whether to use them is based on the strategic use of existing information.

For evidence of why both these theories miss mark, one only need to look at how states responded to the creation of a voluntary mediation procedure created by the SPS committee in 2014. This procedure would allow the concerned member and the member maintaining a measure to discuss a STC in the presence of a third party mediator, the SPS
committee’s chairperson. As one WTO official recounted, this was motivated by the belief that states brought STCs to find a resolution, and was thought of as offering a more efficient means of producing an outcome than a STC, which can go on for many meetings.

This mediation mechanism would therefore satisfy both the learning and efficiency hypothesis by offering a) the opportunity to learn about the respondent, and b) the possibility for a fast-tracked settlement. What happened to this mechanism? It has never been used. Not once. One WTO official noted that the mediation procedure might not have been used because the bilateral discussions states have with each other may not require facilitation. But I argue that the lack of engagement with the mediation mechanism provides further evidence that states do not want STCs or the work of the committee to be similarly structured to the formal consultation process, because its current form provides different value added to dispute settlement.

Furthermore, it worth noting that the mediation procedure is structured to be private, though the respondent can circulate the request to mediate to the rest of the committee. This works opposite to STCs where the complainant has the ability to air its concern publicly. The failure of this mediation mechanism provides further support for my argument that states use the committees for something other than resolution.

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54 SPS Committee, “Procedures to Encourage and Facilitate the Resolution of Specific Sanitary or Phytosanitary Issues Among Members in Accordance with Article 12.2,” G/SPS/61 (September 8, 2014).
55 Official from the Agriculture and Commodities Division, WTO, anonymous interview with author, Geneva Switzerland, June 26, 2018.
56 These meetings could be made public, or kept confidential, and the parties could decide who to bring into the room.
As such, the learning hypothesis and the efficiency hypothesis present two extremes in making sense of the committees. On the one hand, states just need more information, of any kind, to help them achieve a resolution. On the other hand, states would be hesitant to delay a dispute for the purpose of gathering more information, since this could be gained through diplomacy, or even consultations. In fact, while consultations do have a time limit, in practice, states have often extended this. Supporters of the efficiency hypothesis would suggest that states would not bring a dispute that will be litigated to the committee at all. But if it does, they would posit that it somehow is able to generate a more efficient outcome than consultations.

The theory and argument outlined in this chapter bridges the gap between these two extremes. On the one hand, I argue that that while states use the committees to learn, they are learning primarily about third parties, not the respondent. On the other hand, I also show that while the committee track may appear inefficient on its face because it delays a dispute, it provides for greater efficiency once a dispute goes to consultations or to panel because the complainant now knows more about how its claims will be strengthened or diluted through third party participation. Therefore, states may be willing to forego efficiency at the outset in order to maximize efficiency later in the dispute process.

In the next chapter, I explain the methodology used to test my hypothesis and present evidence to support my theory.
This chapter examines three case studies to test the hypothesis laid out in this dissertation. It begins with a case that proceeds through the formal track, showing that in bringing the dispute, Peru was well aware of the scope and content of potential third party input, which prompted it to avoid taking the issue to committee. The second case looks at a dispute that originated in committee, where on the contentious issue of genetically modified foods and other biotechnology products, Argentina, Canada, and the United States tried to make sense of opposition arguments to better prepare for the eventual dispute. Finally, this chapter wraps up with a case study that serves as a robustness check, by looking at a STC in the TBT committee, which was “resolved.” Looking at this case brings into question what the meaning of resolution actually is, in addition to shedding further light on the way states see the committee functions. Ultimately, this chapter shows strong support for the hypothesis that states use the WTO’s committees to learn about potential third parties.

Before examining the evidence, I first describe the methodology and provide an explanation of the case selection.

Methodology and Case Selection

Why would states bring a dispute through the WTO committees instead of directly pursuing consultations? I argue that states use the committees primarily to learn about potential third party participation. They do this when there is ambiguity about third party input, which can impact the scope of claims when a dispute is brought, and ultimately, the final ruling.
Therefore, contrary to the conventional wisdom in the current literature on the WTO committees, states do not use the committees primarily to resolve disputes. Instead, they use the committees both strategically and politically to learn about the other potential parties to a case. Consequently, this means that states are not necessarily as concerned about the respondent. This dissertation therefore provides an answer to the puzzle of why states would utilize a non-judicial treaty mechanism over a more formal means of settlement, and shows that by raising specific trade concerns (STCs), states use the committees for their probing value in gaining an insight into third party participation.

I hypothesize that if a state faces ambiguity about third party input to a dispute, it will bring the dispute to committee, in the form of a STC, instead of requesting consultations. I test this hypothesis through three case studies. The universe of cases from which the cases are selected are the 53 unique disputes of which TBT and SPS issues are central to the claims made by the complainant. As noted earlier, 35 of these disputes originate in the committees. Following King, Keohane and Verba (1994) these observations most accurately represent the entire population of cases by only focusing on those requests for consultations in which TBT and SPS issues are central. This is done to eliminate the possibility for measurement error, because requests for consultations for which TBT and SPS claims are not central would not be as likely to appear in committee, and therefore would generate a biased sample. Therefore, case selection begins by selecting a range of values of the dependent variable on disputes which all had the possibility of originating in committee.
I select one case from the population that did not originate in committee, and instead went through the formal track for dispute settlement. I then select one case from the population that originated in the SPS committee, which also included a number of potential TBT issues. In line with King, Keohane and Verba (1994) I leave the values of the independent variable, ambiguity about third parties, to be determined by the research situation. This also follows Mills Method of Difference “most similar” cases by allowing for the cases to vary on both the independent and dependent variable, but that are similar in all other ways. We would expect trade frictions for which filing a dispute is already being considered to proceed through the formal track in order to increase the chances of reaching a settlement.

To address the possibility of equifinality, I utilize the process tracing method, which Bennett and Checkel (2015) argue “can address this by affirming particular paths as viable explanations in individual cases, even if the paths differ from one case to another” (19). As is the case with the particular puzzle being examined in this study, “on which there is little prior knowledge and for cases that are not well explained by extant theories,” Bennett and Checkel contend that, “process tracing proceeds primarily through inductive study…[and] often involve[s] analyzing events backward through time from the outcome of interest to the potential antecedent causes” (17).

Thus, I began studying this puzzle through three months of cumulative “soaking and poking” in Geneva, which began in the summer of 2016. From initial background discussions with individuals in the WTO Secretariat, I began going through the 1007 STCs, and later focused in on the originating cases. From there, I built a list of interview questions
that I would ask to committee delegates, officials from trade ministries in capital, counsel and litigators of individual disputes, and academics in order to make sense of the puzzle. These interview questions can be found in Appendix B.

I undertook 25 elite interviews, and countless background discussions which informed this research. I conducted a mix of structured and unstructured interviews, with most follow-ups being unstructured. The choice to conduct unstructured interviews was intentional, and motivated by the methodological approach, to be open to every possible explanation for what I was observing. This allowed me to understand the possible alternative explanations to my hypothesis.

All interviews cited in this research were conducted anonymously, at the request of the individuals interviewed, particularly for direct quotes. The country or region the delegate is from, the date of the interview, and location, are, however, indicated. Interviews were conducted anonymously to protect the identity of delegates and other officials, many of which spoke frankly about both past and ongoing trade frictions. Given the sensitive and political nature of the discussions, many interviews are used as background and not cited.

Process-tracing is also informed by official government and international organization documents, in the form of reports, submissions to the WTO (including STCs, requests for consultations, for example), and minutes from meetings. The minutes are instructive as they allow us to engage in discourse analysis, which is the study of the use of language and communication, which Black (2002) suggest is particularly instructive for the study of regulatory conversations because it can help us understand the “relationship of language, thought and knowledge,” which is critical for evaluating the presence of the
independent variable of interest. Essentially, it helps us know if states believe there is ambiguity in third party participation through the language employed in the course of addressing the trade friction at issue.

Meeting minutes for the TBT and SPS committees are publicly available online, and span three meetings per year. From 1995-2018 the TBT committee had a total of 75 meetings. In that same time period, the SPS committee held 95 meetings, 17 of which were special sessions in which STCs are not discussed. The minutes are not a transcript of the meeting, but instead a summary of the issues raised by members. Sometimes, the summary of a STC is simply the prepared text that a member has provided in advance and agreed to its verbatim recording. Minutes include a number of important details: the member raising an issue, who they are raised against, and the members supporting (in favor of) the concern. In cases where there are multiple countries concerned about the same issue, they each are allowed to speak about their particular concerns with no time limit, even if there is repetition of previous read-outs. Thus the minutes preserve a record of member positions on STCs over time.

I have also gathered documents from the Codex Committee on Fish and Fishery Products from 1966-2002, which were reported to the UN Food and Agriculture Organization and the World Health Organization’s Joint Committee at the Codex Alimentarius Commission, in addition to reports by the European Commission from 1987, 1989, and 1995 to trace the case that begins in the formal track. The discussions at Codex shed light on the positions of various states when the sardine labelling standard was being developed. Reference to these documents helps to open up the black box of the pre-
consultation stage of formal track disputes, which is often very difficult to study (Busch and Reinhardt 2002).

For the formal track case I selected the *EC-Sardines* dispute. For the originating case I selected the *EC-Biotech* dispute. The selection of these cases is informed by a number of factors. First, I selected cases where the respondent is the same, and also the biggest target for STCs in both committees, the European Union. That is, this is the member that is on the receiving end of the largest portion of all STCs. This allows me to minimize selection bias, due to the large number of possible cases to choose from, which reduces the possibility that these cases are outliers.

Second, I selected cases where the respondent is one of the largest users of the dispute settlement mechanism, and one of the largest markets in the system. This choice is informed by the logic that since this is one of the biggest players, and least likely to compromise absent the threat of litigation, we would expect these cases to proceed directly to consultations. But they do not always do so.

Third, I picked these two cases in particular due to data availability. This included access to people who worked on the cases, gave counsel, were delegates to the committees at the time these disputes were discussed, or government officials with knowledge of the case. This was a critical factor, because it allowed me to fill important gaps in information that the public documents simply did not have.

As a robustness check, I include a third case study, which examines a STC that comes from the TBT committee and which can be considered as resolved using both my coding
methodology and that employed by Horn et al. (2013). This is to examine the common argument found in the literature that the committees are used primarily to resolve disputes. By looking at a case of resolution, I aim to show that current studies that focus on STC outcomes oversimplify the process of resolution by failing to examine these STCs qualitatively, which problematizes our understanding of what may count as a true resolution to begin with. In fact, what tends to result is a limited resolution of a bigger dispute, and therefore does not effectively serve as a substitute to the consultations process. In addition, through this case, I also aim to show that even in cases where a matter is resolved, states still use STCs for the same purpose as the originating cases—to learn about third parties.

For this case I selected Chile – Proposed amendment to the Food Health Regulations, Supreme Decree No. 977/96, which looks at a food health labelling regulation Chile was going to adopt. This case was selected for a few reasons. First, I intentionally chose a developing country respondent, because we might expect that a lack of capacity favors the complainant having their demands met. This is important not only because this case shows how even small countries are able to defend their interests, but also that the committees are not perpetuating a race to the bottom in regulatory standards. Second, I chose this case because it offers another example of a dispute over labelling, a growing issue in regulatory politics, which exhibits many similarities to both the Sardines case, and others like it, such as US—Country of Origin Labeling. Third, I was able to attain detailed information from both primary and secondary sources, including information from people involved in the STC.
The greatest value in this final case is in unveiling the complexity of STCs, and in doing so, revealing the potential for measurement error in the existing literature which treats STCs with varying levels of resolution in the same way. Furthermore, a deep dive into this case study provides further support for examining STCs qualitatively, and shows that a full understanding of STCs is only possible after reading the minutes of the meetings and putting the various claims made in the context of a broader concerns around dispute settlement.

In each of these cases, the reader will learn that ambiguity about third party input is the most important factor in explaining why states take disputes through the committee track instead of the formal track.

I now turn to the case studies, and an examination of the evidence.

The Formal Track: European Communities—Sardines

European Communities—Trade Description of Sardines is a dispute that proceeded through the formal dispute settlement process. This case exemplifies the universe of cases that proceed through the formal track. Through an analysis of this case, I will show that the lack of ambiguity about third party input was instrumental in steering Peru towards pursuing consultations. Peru knew exactly the arguments that would be made in favor and in opposition to its claims, and furthermore, it was expressly clear which states fell on either side. In fact, what this case reveals is that there are instances where there is no need

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for states to go through the committees if they can establish a clear picture of the scope and degree of third party input through exchanges outside of the WTO. Thus, the committees will provide no additional value added, and states can proceed straight to consultations.

*EC—Sardines* involves a developing country complainant, Peru, against the European Communities (EC) on its regulation of marketing standards for preserved sardines. This case is notable for a number of reasons. It was not only the first time a developing country had prevailed in a dispute against a developed market, but it was also the first time a WTO panel made a ruling on a TBT claim, which would later be upheld by the Appellate Body (though under modified reasoning).  

This case is also a hard test case of the hypothesis put forward in this dissertation. It was the first case litigated by the Advisory Centre on WTO Law (ACWL), which was established to fill the legal capacity gap between developed and developing countries. ACWL practice is to encourage countries to seek out all possible venues to resolve trade frictions, short of filing a dispute. The use of the WTO committees, particularly the TBT and SPS committees, are seen as a useful, and often first step. Therefore, it is especially striking here that this dispute did not go through the committee track, when the ACWL itself regularly encourages such action.

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58 *EC-Asbestos* was the first dispute where a ruling was made on the TBT Agreement, where the Appellate Body reversed the panel’s finding and ruled that the TBT Agreement applied to the case. However, the Appellate Body did not complete the analysis on Canada’s TBT claims. See, Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243.

59 Counsellor, Advisory Centre for WTO Law, anonymous email exchange with author, August 6, 2019.
Tracing the discussions of Sardines back to the Codex Committee on Fish and Fishery Products meetings from 1966-2002, which reported to the Codex Alimentarius Commission’s Joint Food and Agriculture Organization (FAO) and World Health Organization (WHO) Food Standards Program, and the lead-up to the request for consultations reveals that Peru and the ACWL had a clear picture of third party interest in the dispute prior to filing. The ACWL was also confident that the claims Peru would bring would generate significant support from others who had been following this issue. For these reasons, the ACWL did not in this instance encourage the use of the TBT committee, because they had already assembled the pertinent information about third parties to the case.

First, I provide some background to the dispute, to provide some context for the facts of the case. Then I show how the independent variable, ambiguity about third party input, played out in this case. Next, I show how this variable impacted the choice of pursuing the formal track versus the committee track, the dependent variable. I conclude with a discussion of competing explanations.

Background

Council Regulation (EEC) No. 2136/89 (hereafter EC regulation), provided that only products of the species Sardina pilchardus Walbaum could use the word “sardines” on its packaging. The problem, however, is that there are many other species of sardines, and

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60 The type of sardines commonly found in the Eastern Pacific along the coasts of Peru and Chile are Sardinops sagax sagax, whereas Sardina pilchardus is mostly found off the coast of the Eastern North Atlantic, in the Mediterranean Sea and the Black Sea.
they were labelled as such, even within the EC market. For example, “Pacific sardines” from Peru (Sardinops sagax sagax) were sold in Germany until the European Commission challenged this practice in 1999 (even though the regulation went into effect in 1990). Perhaps not coincidentally, this was around the same time that Ecuador and Peru were increasing their share of this product market.\textsuperscript{61}

Peru brought five\textsuperscript{62} separate claims against the EC, the most central issue revolving around the use of international standards. Peru claimed that the Codex Alimentarius standards (STAN 94-181 Rev. 1995) includes Sardinops sagax, among others, as a species that may be described as sardines. The Codex Stan 94 read:

6.1 NAME OF THE FOOD

The name of the products shall be:

6.1.1 (i) “Sardines” (to be reserved exclusively for Sardina pilchardus (Walbaum)): or

(ii) “X sardines” of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

The EC argued that while the standard was not adopted by consensus, the EC regulation was based on it because para. 6.1.1 (ii) stated that the product could be “X sardines” or “the


\textsuperscript{62} General Agreements on Tariffs and Trade (GATT) 1994 Article I, III, XI:1; TBT Article 2, 12.
common name of the species in accordance with the law…in which the product is sold.” Therefore, since sardines were considered to be from the species Sardina philcardus in the European market, only such products could qualify to be marketed as such.

The EC’s interpretation was based on a compromise proposal, put forward by Canada and the United States in 1973 in the Codex Committee on Fish and Fishery Products, which read:

Fish species covered by this standard shall be designated either:

(i) as “sardines” (to be reserved exclusively for Sardina Pilchardus Walbaum); or
(ii) as “X sardines” where “X” is the name of a country, a geographical area or the species; or
(iii) by the common name of the species laid down for the species.63

There was only unanimous agreement on the first part. The separation of (ii) and (iii) by the qualifier “or” suggested that one or the other term could be used for sardine-type products. The EC read this as meaning that it could choose to regulate sardine-type products by requiring “the common name of the species,” which if not Sardina pilchardus, could not have the common name sardines. In 1976, the last sentence was amended to read:

(iii) the common name of the species;

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63 Codex Committee on Fish and Fishery Products, Eighth Session, 1-5 October, 1973, Bergen, Norway, para. 123.
in accordance with the law and custom of the country in which the product is sold, and in a manner so as not to mislead the consumer.

In addition, if required by the country in which the product is sold, the common name shall be accompanied either by the common name of the species or by one of the terms "sardine style" or "sardine type" or by both descriptions.  

By the twelfth session in May 1977 the Committee had endorsed this standard. The EC would later argue that its regulation was “based on” its interpretation of the original draft language put forward in 1973.

Independent Variable: Lack of Ambiguity in Third Party Input

To understand why the ACWL was so confident in the case, it is instructive to look at the history of the development of the standard that was central to this case. The sequence of information about third parties that was revealed in the context of discussions at the Codex committee provides strong support for my hypothesis. The debate over the use of the name “sardines” was not a new one. In fact, the international standard at issue had been debated for decades at the FAO in the Codex Committee on Fish and Fishery Products. It is these meetings, spanning from 1966-2002, whose minutes show how Peru and the ACWL

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64 Codex Committee on Fish and Fishery Products, Eighth Session, 1-5 October, 1973, Bergen, Norway, para. 123.
65 Codex Committee on Fish and Fishery Products, Twelfth Session, 16-20 May 1977, Ottawa, Canada, para. 47.
66 Former counsel for the European Communities in the EC—Sardines dispute, anonymous email correspondence with author, August 2019.
identified the states that had a stake in the dispute, as well as the arguments they would make against the EC, which would help in constructing the case.

In its first session, the Committee discussed four separate draft provisional standards for canned sardines, slid, brisling, and herring, which has been prepared by the Organization for Economic Cooperation and Development (OECD). The Committee asked for comments on the draft standards to address “two problems concerning the designation by common name of the species.”

At its second session in 1967, the Committee noted divergence among delegates on the issue of imposing a single standard on different species. The document notes that, “[t]hese delegations further stated as a matter of fact that the Pilcharus Walbaum species had the weight of a very lengthy tradition to support the claim that this species should only be entitled to be designated as sardines.”

During the third session in 1968, a number of countries, including Argentina, Canada, Denmark, France, Iceland, Japan, Mexico, Norway, Portugal, South Africa, Spain, Sweden, the United Kingdom and the United States submitted data to the committee on their national production of the product and current labelling practice. It became clear that there was significant disagreement over the “common name of the species” with some delegations noting “that traditionally in their countries canned products of various species of the Culpea family were called ‘Sardines’ and that this name had become a common

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67 Codex Committee on Fish and Fishery Products, First Session, August 29-September 2, 1966, Bergen, Norway, para. 10.

68 Codex Committee on Fish and Fishery Products, Second Session, 9-13 October, 1967, Bergen, Norway, para. 10.
name,” and others stating that only Sardina pilchardus Walbaum “could be marketed as sardines.”\footnote{Codex Committee on Fish and Fishery Products, Third Session, 7 -11 October, 1968, Bergen, Norway, para. 22.} The states with an interest in the issue, and the dividing line between them was just beginning to emerge.

In 1969, the Committee had put forward a list of sardines and sardine-type products, but noted that “it was not possible at this time to agree on whether there should be one standard or more than one standard” to cover these products.\footnote{Codex Committee on Fish and Fishery Products, Fourth Session, 29 September – 8 October, 1969, para. 45.} Instead, the Committee asked delegates to respond to a questionnaire in order to provide information regarding under what names and descriptions the fourteen products they had listed were sold both in their own country, and by their exporters.

By the fifth session in 1970, the results of the questionnaire were presented, and the delegates had staked out their positions. On the one hand, Australia, France, the Federal Republic of Germany, Morocco, Portugal, Spain, and the U.K. argued that only Sardina pilchardus Walbaum could be labelled as sardines without a qualifying term so as to avoid consumer confusion. France added that “sardine” had been misapplied to non-sardine products, and that “only the species recognized as sufficiently near to Sardina pilchardus might be designated as ‘sardine’ followed or preceded by a qualifying term.”\footnote{Codex Committee on Fish and Fishery Products, Fifth Session, 5-10 October, 1970, Bergen, Norway, Appendix VII.} The problem, of course, was that no one could agree what was sufficiently near, with France and Spain in particular taking a hardline stance that the genus and species must be the same.
But nine countries (Argentina, Australia, Denmark, Iceland, Norway, South Africa, Sweden, the United Kingdom, and the United States) showed support for designating any sardine-type fish as a “sardines,” with an appropriate qualifying phrase, as this had been the practice for many countries for a century. The United States pointed out that as “[t]he largest importer in the world of sardine-type products...[it] has accepted and used this designation for the imported products” and Norway added that “another practice would not facilitate, but on the contrary severely restrict international trade and be contrary to the purpose of the Codex.” Both Canada and Japan added their support but argued that such designation could work with any clupeoid fish (the same family, not genus and species), even without a qualifying phrase.

These arguments would later undergird Peru’s complaint. While Peru did not say anything at this meeting, they did have a delegate present. This is not uncommon to have some developing countries not actively participate, given the capacity constraints of providing the necessary information. However, they were certainly paying attention, as were others.

In 1984 Portugal asks for a revision to the standard, which included editorial changes from the 1977 version that everyone had agreed to. This action was supported by Spain, France, and Switzerland. Portugal argued that “the amendments proposed were not of substance but of form, and would avoid misinterpretation, only Sardina pilchardus (Walbaum) was the true sardine, and the standard amended as proposed by Portugal would avoid processing of the true sardine mixed with other species of fish.” However, the

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72 Codex Committee on Fish and Fishery Products, Fifth Session, 5-10 October, 1970, Bergen, Norway, Appendix VII.
Committee noted that the matter had already been discussed at length since the proposal was made, and that “the existing standard provided adequate protection to the consumer,” and therefore, “[t]he Committee agreed not to take further action on the matter.” The dissenting voices were essentially in the minority. The EC and a number of European countries continued raise this issue in subsequent meetings, as more species were being added to the list of sardine-type products in the standard.

Then in June 2000, a discussion over the inclusion of a new species, Clupea bentincki, came to a head, which Morocco, Portugal, Spain, Italy, Tunisia, France and Switzerland strongly opposed. Peru spoke up at this meeting, “referring to Sardinops sagax, which was currently included in the standard as a sardine-type species, indicated that when the regulations of some countries differed from the Codex Standard, this created barriers to international trade.”73 Chile, which would later be a third party in consultations and when the case went to panel, “pointed out that Codex standards were intended for international trade and should include relevant species of commercial importance; they should not be limited to species from a specific region, in order to avoid discrimination and unjustified barriers to trade.”74 This was one year before the request for consultations was filed.

While the arguments put forward by Canada and the United States would play an important role in shaping the claims brought in the dispute, similar arguments, as well as general support for the position was put forward by other countries that would go on to

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73 Codex Committee on Fish and Fishery Products, Twenty-Fourth Session, 5-9 June 2000, para. 6.
74 Codex Committee on Fish and Fishery Products, Twenty-Fourth Session, 5-9 June 2000, para. 5.
become third parties in the case.\textsuperscript{75} The important takeaway is that on the side of those supporting the international standard (which formed the majority of states on the Codex fisheries committee), there was consensus that it achieved the objective of consumer protection, and that the EC’s opposition was based on a misreading of the initial draft. The fact that there was so much consensus on this was the main reason Peru did not have to take the issue to the TBT committee. There was no ambiguity as to who would be affected, and what issues they would raise if they were to participate in the dispute.

Dependent Variable: Proceedings in the Formal Track

The choice to take the dispute through the formal track was heavily informed by the discussions that took place in the Codex Committee for decades. In fact, a former lawyer for the ACWL that was involved in the case noted that when Peru had reached out to them, they were well aware of the history of the standard in the Codex committee, and studied the claims.\textsuperscript{76} He also noted that there was a lot of agreement among the states interested in the case regarding the interpretation of the standard, adding that the EC’s position on interpretation was not shared by others.

When Peru requested consultations with the EC in March 2001, Chile, Ecuador, the United States and Venezuela all requested to join. Once the dispute was empaneled, Canada, Chile, Colombia, Ecuador, Venezuela and the United States participated as third

\textsuperscript{75} In 1972 Venezuela requested the addition of two more fish to the species list. It does not appear that Colombia and Ecuador, who would later become third parties, participated in the Codex FFP meetings during these discussions.

\textsuperscript{76} Former counsel involved in the \textit{EC—Sardines} case from the Advisory Centre for WTO Law, anonymous interview with author, October 10, 2019.
parties. The arguments put forward by the third parties to this case are striking for their consistency and strong agreement with Peru’s claims. The Codex standard was the focus, and Canada was quick to point out that, “[w]ith regard to the development and adoption of Codex Stan 94, Canada notes that member States of the European Communities were actively involved in this process and that the European Communities acted as an observer.”

The fact that Canada explicitly raised the EC’s participation in the discussion of the standard before it was adopted provides support for the argument laid out earlier, that these interactions paved the way for considering the facts and claims that would be made in this case.

Venezuela also put forward an argument that was repeated frequently in the Codex Committee:

given the similarities between the species, all that would need to be done in order to distinguish one product from another from the standpoint of the objectives of the EC Regulation would be to use the common name "sardines", accompanied by a reference to its geographical area of origin – in other words, to use the name "X sardines", as provided for in the Codex Stan 94. Consumers purchasing products prepared from X sardines would thus know that these were made from sardines of a species other than the type found in European waters.

Similar arguments were put forward in October 1973 when “[a] number of delegations…pointed out that the products to be covered by a standard had become familiar

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77 EC—Sardines, WT/DS231/R, para. 5.10.
78 EC—Sardines, WT/DS231/R, para. 5.80.
to certain consumers under the name ‘X-sardines’” and it was “vital that any standard should be sufficiently flexible to enable consumers in different countries to obtain the products they could recognize.”79 Each of the third parties referenced the meetings at Codex, and emphasized Peru’s interpretation of the standard, as well as supporting its secondary claims. But this is simply because there was already a strong consensus on the issue among these states well before Peru filed the request for consultations.

As a result, Peru, and the ACWL legal team supporting the dispute knew exactly how consultations would play out, in particular, the arguments to be put forward by third parties. This lack of ambiguity on third party participants not only made the choice to pursue the formal track a logical one, but the fact that there was consensus among those supporting the complainant gave the ACWL confidence in prevailing in the dispute. With so many countries on Peru’s side in the dispute, there was a general sense that this would signal to the Panel that the overall consensus among members was in favor of Peru’s claims. With this overwhelming amount of support, and more specifically, a full understanding of the claims third parties would make, there was no value added in going through the committee. Thus, the dispute proceeded through the formal track.

Competing Explanations
As noted earlier, while the literature has posited various reasons for why states would pursue the committee track, they cannot explain why states would choose not to use it, other than, perhaps, a lack of capacity. But the fact that the ACWL was called upon to

79 Codex Committee on Fish and Fishery Products, Eighth Session, 1-5 October 1973, para. 125.
assist Peru in this dispute, capacity really was not a factor. What about the broader literature on dispute settlement? How would it explain this? Some might say that Peru brought the case straight to consultations because it knew it had a “strong” case, and that it could win.

Did Peru have a strong case? There was and continues to be ample debate over the way the Panel and Appellate Body ruled on the TBT claims in this dispute (Horn and Weiler 2005; Howse 2002; Mathis 2002). Since this was the first time a ruling would need to be made on a TBT claim, there was no existing precedent that could have helped Peru’s legal counsel to predict how the dispute would unfold. The absence of any prior interpretation of the TBT Agreement undoubtedly left a great deal of uncertainty about the strength of the case. As one lawyer involved with the case for Peru recalled, they had a good sense that the EC’s actions were protectionist, but the central claim hinged on TBT Article 2.4 (on the use of international standards) for which it was unclear what position the Panel would take.80

There was ample evidence for the protectionist nature of the measure, most of it provided by the European Commission itself. A number of European Commission reports on the market for sardines reveals anxiety over growing competition from Latin America, and what that would mean for European producers, which primarily served the Community market. A 1987 report noted that “[s]ardine production is an important factor in the balance of the economy of the coastal regions of Mediterranean and Atlantic Member States and,

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80 Former counsel involved in the EC—Sardines case from the Advisory Centre for WTO Law, anonymous interview with author, October 10, 2019.
in particular, the two new Member States of the Community” (Portugal and Spain).\textsuperscript{81} It went on to say that:

In addition to the economic and social problems which it would immediately create, any disturbance of this activity could lead ultimately to a shift in fishing from sardines to other species….Possibilities of converting or diversifying the fleets engaged in such fishing are limited and their dependence on this product is therefore very considerable.\textsuperscript{82}

This, and the price support measures put in place for Mediterranean fisherman in France, Greece and Italy made clear that there were concentrated domestic interests in the EC market on this issue, which appeared to be about more than just a label. In fact, that same report also noted that:

World production of tinned sardines from the species “Sardina pilchardus” is estimated by the FAO to amount to 170 000 tonnes per year. World production of other species in tins is approximately 260 000 tonnes per year and represents a potential source of competition. While the latter products are not direct substitutes for European tinned sardines…the potential threat which they represent to the market should not be minimized.\textsuperscript{83}

It was this report that became the basis of regulation that was the focus of the dispute. But again, the dispute relied on the fact the EC regulation was not based on an accepted international standard, as the intent of a rule does not figure into a ruling because intent can hardly be known. Which is all to say, there really was not any degree of certainty the case would be an easy win for Peru.

In fact, a lawyer who represented the EC in this case described that he was taken aback by the outcome of the case. In particular, he noted disappointment with the superficial way that the Appellate Body and Panel dealt with the interpretation of the Codex standard. At issue was the fact that the Codex standard was written in multiple languages, but only the English version was considered in the dispute. The EC argued that this not only ran afoul of the rules of interpretation, but it ultimately cost them the case. In its written submission to the Appellate Body in 2002, the EC questioned why the Panel had not considered the drafting history of the Codex standard:

Contrary to the Panel’s assertion in para.7.109 of the Report, neither the French nor the Spanish version confirm the Panel’s interpretation of Codex Stan 94. If anything, the French and the Spanish versions add to the ambiguity of the standard. The Spanish version, for instance, would seem to suggest that it is not enough to label canned sardine-type products as “sardines” of a country or a geographical area, as indication of the name of the species or the common name would also be required. However, the European Communities contends that no linguistic version should be
considered in isolation, and it is furthermore necessary to consider the
drafting history of Codex Stan 94.  

The Spanish version, in particular, was a bone of contention, because it suggested that the indication of the species is not a separate option, but must always accompany the geographical name. While we may never know why the other versions were not considered, the fact that the EC legal counsel was so baffled with the lack of analysis on the issue points to further evidence that this case was not a clear cut win for Peru at the outset.

Given all this uncertainty, one might think that Peru would have been motivated to take the issue to committee instead of risking a potential loss in a dispute. But again, this raises questions about why the committees are used in the first place. Did Peru just think it could not get a resolution? As one of the negotiator’s that helped craft the eventual mutually agreed solution noted, Peru had no real domestic force behind the dispute, which made reaching an agreement fairly straightforward—it only took a few hours to reach a deal.  

Again, if a resolution was possible, why not take the issue to committee, particularly when there was not even a strong domestic constituency fighting for the dispute?

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85 The relevant part of the Spanish version of the standard read: ii) “Sardinas X”, donde “X” es el nombre de un país o una zona geográfica, con indicación de la especie o el nombre común de la misma, en conformidad con la legislación y la costumbre del país en que se venda el producto, expresado de una manera que no induzca a engaño al consumidor. With much thanks to the former EC counsel on the EC—Sardines dispute for providing this.

86 Former counsel for the European Communities in the EC—Sardines dispute, anonymous email correspondence with author, August 2019.
For theories that suggest the committees are primarily used to resolve disputes to be true, cases where so much uncertainty exists over the ruling, in addition to a chance for settlement, would surely proceed through the committee track. But this did not. And as I have outlined above, it proceeded through the formal track not for lack of a possible resolution, but because Peru could predict the claims that would be brought, and had the confidence that it would have the support of key third parties that would solidify the case against the EC.

**The Committee Track: European Communities—Biotech**

This section now turns to a dispute that originated in committee, European Communities — Measures Affecting the Approval and Marketing of Biotech Products. This case exemplifies the universe of cases that proceed through the committee track. Through an analysis of this case, I will show that ambiguity about third party input was instrumental in steering the co-complainants towards raising the dispute in committee first. The co-complainants were uncertain about how other states would react to a dispute over such a sensitive regulatory topic, particularly as interest groups in Europe became increasingly vocal against the introduction of genetically modified products on their market. In fact, opinions on this issue were just developing, which added to the general uncertainty the co-complainants faced, as most states remained publicly silent on their respective positions.

What this case study reveals is that in cases where states do not have vital information about third party input, requesting consultations may catch them off-guard in mounting an effective offensive claim. Therefore, the best way to prepare for a dispute
would be to bring the issue to the committee first to court third parties in order to get a better sense of the scope and degree of third party input, which will ultimately help in crafting the request for consultations. Thus, in these cases, the committees provide critical value added, assisting states in preparing for a dispute when channels external to the WTO have produced limited information.

The United States, Canada, and Argentina were co-complainants in the case, and the world’s leading biotech export markets. The dispute began on the committee track in late 2001, and spent over a year in committee, being raised on four separate meetings before the request for consultations were made.

Taking this issue through committee, on its face, is rather puzzling. First, at issue is a de facto moratorium on biotech products, which had been in effect since 1998. It is odd that the complainants would delay bringing a formal dispute, when it appeared the EC was not making an expedient effort to address the problem. So why put the dispute in a delay holding pattern?

Second, the topic of biotechnology and GM food was gaining lots of public attention, and a ruling would necessarily require more than just a narrow interpretation of the SPS Agreement. As Horn and Howse (2009) argue, the “dispute relates to the place of the SPS Agreement in judging food regulations that respond to public feelings that combine somehow concerns with health risks in the narrow sense with more ethical, religious or spiritual misgivings” (3). The discussions would undoubtedly be heated, so why would the co-complainants reveal their arguments in front of their peers? The co-complainants were
aware of the stake each of them had in the dispute, but why couldn’t they work together to reach a settlement with the EU?

Third, it is well known among committee delegates that the European Union rarely, if ever, adjusts its regulations as a result of committee discussions. So what would have been the value of bringing this issue to committee? The literature tells us that states use the committee primarily to resolve disputes, but what’s interesting about this case, given the issues noted above, is that it did not at all appear to be a case conducive to a resolution in committee. In fact, this is representative of the universe of cases that originate, and a key motivating observation of the puzzle.

Below I show that there were serious concerns about third party input in this case, and ambiguity about what that input would look like favored the committee track over the formal track. Though the parties undoubtedly wanted the dispute to be resolved quickly, they brought it through the committee in order to develop a case, which would generate substantial interest from WTO members, not just on the case itself, but the systemic implications of the final ruling. It is under this high degree of ambiguity of how others would act that the co-complainants proceeded through the committee track.

First, I provide some background to the dispute, to provide some context for the facts of the case. Then I show how the independent variable, ambiguity about third party input, played out in this case. Next, I show how this lack of ambiguity impacted the choice of pursuing the committee track versus the formal track, the dependent variable. I conclude with a discussion of competing explanations.
Background

In May 2003, the United States, Canada and Argentina filed a request for consultations with the European Communities on measures affecting the approval and marketing of biotech products. Biotech products are “plants and products thereof that have been developed through recombinant deoxyribonucleic acid (“recombinant DNA”) technology,” which can also be referred to as genetically modified organisms (GMOs), genetically modified (GM) plants, GM crops, or GM products. The complainants alleged that the EC maintained a de facto moratorium on the approval of biotech products for its market since 1998, that there were a number of product-specific measures that affected the approval of specific biotech products, and that individual EC Member States put safeguard measures in place that prohibited the import and/or marketing of specific biotech products. On the latter point, the complainants argued that the safeguard measures allowed Member States to prevent the marketing and placement of biotech products on their markets even if the product had been approved earlier.

The EC approval process was the main focus of the case. The Panel stated that the objective of the regime is “to protect human health and the environment” and that “[t]o achieve these objectives, the applicable legislation requires the European Communities to conduct a case-by case evaluation of the potential risks biotech products might pose to

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human health and the environment.” For a biotech product to be placed on the market, the manufacturer or importer had to submit a notification and dossier to the competent authority of the Member State where the product would be on the market for the first time, after which the authority has 90 days to submit an assessment report on whether the product should be placed on the market or not. If approved, the process then moves to the Community level, which, if no reasoned objection is made from other Member States, or within 60 days of the circulation of the assessment report, consent is granted for the product to be placed on the market by the lead competent authority.

The process is more complicated in the event of a reasoned objection, which then requires the European Commission to prepare a draft measure, in consultation with the relevant scientific committees, which then goes to a vote by a committee that is comprised of representatives of the Member States, and chaired by a representative of the Commission. But even if the product is approved at this stage, Member States may provisionally adopt safeguard measures to restrict the trade of these products on their markets “as a result of new or additional information made available” on the risk assessment of the product where a Member State has “detailed grounds for considering that a GMO...constitutes a risk to human health or the environment.”

The big divide between the parties to the dispute relates to the “new or additional information made available.” Whereas the co-complainants would argue that such approvals should be driven by science-based risk assessment, the EC would posit that a precaution-based approach would be more fitting. The EC argued that while scientific

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90 European Communities – Measures Affecting the Approval and Marketing of Biotech Products, para. 2.4.
91 Directive 90/220/EEC.
evaluations had deemed the products at issue safe, there were still legitimate questions that current scientific assessments could not evaluate all the risks they were concerned about. In fact, the EC argued that the Cartagena Biosafety Protocol was relevant, particularly Annex III, which states, “Lack of scientific knowledge or scientific consensus should not necessarily be interpreted as indicating a particular level of risk, an absence of risk, or an acceptable risk.”\(^92\) As Horn and Howse (2009) argue, this supported “the EC’s position that member states need not act on the assumption that a product is safe when the scientific adequacy and comprehensiveness of the risk assessment had subsequently been credibly challenged” (7).

These are important distinctions in approach to risk assessments, which not only affected this case, but would also return in past and future disputes. As the EC—Hormones dispute had shown, these issues were not only sensitive because of the emotions they bring out, but because it underlined a fundamental divergence in approaches to food safety around the world. These issues were just beginning to gain greater attention. The protracted litigation on Hormones, a case which started in 1996, resulted in requests for retaliation, which were granted in 1999.\(^93\) This is around the same time the de facto moratorium on biotech products takes effect. It is in this environment that the co-complainants had to navigate. And there was a lot of uncertainty.

\(^92\) The Cartagena Protocol on Biosafety, Annex III (4).
\(^93\) The case would finally be resolved in 2014.
Independent Variable: Ambiguity about Third Party Input

Part of that uncertainty lied in the mixed messages from the EU Commission and EC member states, and a lack of clarity on how others would respond to this. It has been argued that the tightening of the market for GM foods in Europe was brought about by strong opposition from environmental NGOs, consumer groups, as well as small and traditional organic farmers that successfully applied pressure at the European and Member State level to institute a de facto moratorium on biotech products (Kurzer & Cooper, 2007). This is despite the fact that the Commission, in addition to a number of European leaders, was generally supportive of the expansion of biotechnology in the EU (Bernauer & Carduff, 2004). In fact, even as the dispute was unfolding, European Commissioner for Enterprise and Industry, Günter Verheugen gave a speech in Lyon noting that Europe was lagging behind in biotech innovation to the U.S. and Japan in particular. He stated, “it is clearly high time to reverse this trend and unlock Europe’s potential. I am convinced that the biotech sector can play a significant role in the economic development of Europe, and I do not want to see it falling further behind in global competitiveness.”

While some have argued that the anti-GMO movement is reflective of the subjective preferences of countries like the EU Member States that are generally more skeptical to the introduction of novel products (Howse & Horn 2009), and that the dispute was really about fundamentally different approaches to regulation and risk assessment

(Peel et al. 2004), there was no consensus among EC members on the issue. In fact, Kurzer and Cooper (2007) argue that there was substantial variation among the EU Member States on attitudes towards biotech, and that the most anti-GMO states were those where environmental and consumer protection NGOs forged an alliance with niche family farmers—a so-called “green-green bloc” (p. 1037). The asymmetry of approaches at the Member State level therefore led to growing disparities between individual state actions on approvals and the EC-wide approach, with some taking a more precautionary and restrictive approach.

It is important to emphasize that the discrepancies in the EC member approaches did not impact how the co-complainants viewed the timing of the dispute. That is, there was no motivation to delay because of the variation in approaches across member states. In fact, as one U.S. official noted, whether one or many member states took the action did not matter. The problem was a broader “failure of the EU political system to be able to defend science based regulation.”\(^{95}\) Bringing the dispute was not the question. But the uncertainty in the EU approach did have an impact the co-complainants were watching—how other countries would react to the cacophony of positions among the EC’s Members.

The regulatory actions the EU takes have consequences far beyond its market, and a number of scholars have noted the transnational nature of EU governance, reaching far beyond its borders (Sabel and Zeitlin 2011; Newman & Posner 2011). The U.S. in particular was concerned about the spread of the precaution-based approach EU regulatory

\(^{95}\) Official from Agricultural Affairs, the Office of the United States Trade Representative, anonymous interview with author, Washington DC, March 21, 2018.
actions would promote, as other states followed their lead. These fears were not unfounded, as the debate over GM foods and biotech products more generally was beginning to heat up. Of particular interest was the fact that one of the biggest markets, China, showed signs of skepticism toward science-based assessments of risk on these products. As Gupta and Falkner (2009) detail:

The shift in China’s domestic biosafety debate came to be felt for the first time in 1999, when a de facto moratorium on new GMO releases was imposed. The timing of this move—shortly after the introduction of the European Union’s moratorium in October 1998 and shortly before the adoption of the Cartagena Protocol in January 2000—is highly significant. It signaled the growing impact that the international GMO debate and the biosafety negotiations were having on regulatory developments in China. For the first time, Chinese authorities implicitly acknowledged shortcomings in the existing regulatory framework and quickly moved to create new domestic regulations (40).

The co-complainants also faced uncertainty regarding other trading partners in their region, which became clear as discussions progressed on the Cartagena Protocol, which began in 1996. The biggest exporters of GMOs (Argentina, Australia, Canada, Chile, the United States and Uruguay) made up the Miami Group, who insisted that national decisions about GMOs should be based on a sound scientific risk assessment and should also be compatible with the WTO. Another group of countries, from the EU, agreed that national decisions about GMO transfers should be informed by a scientific risk assessment, but based on the

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96 Official from Agricultural Affairs, the Office of the United States Trade Representative, anonymous interview with author, Washington DC, March 21, 2018.
precautionary principle; the EU also argued that there should be no deference to the WTO on these matters. A third group, the Like-Minded group, was made up of a range of developing countries with a lot of variation in opinion. South Africa, for instance, was the first country in Africa to grow commercial transgenic crops and saw biotechnology as a strong economic opportunity (Gupta and Falkner 2009). There clearly was no easy consensus on this issue.

There were even signs of skepticism toward science-based assessments (mainly GM maize) in Mexico, a key trading partner for many in the Miami Group. In 1998 Mexico implemented a moratorium on the release of GM maize into the environment, which put it directly at odds with the situation north of its border, because GM maize had already been rapidly commercialized in the U.S. and Canada (Quist and Chapela 2001). While this moratorium was to be temporary, it still increased the level of ambiguity over whether a key trading partner would take a stance on the issue if raised to a dispute.

One U.S. official recounted how the opposition that began to grow increased the perceived importance of the issue in terms of its global context, particularly in countries other than the United States.\(^7\) This was precisely why the reactions of other states was important to tease out, as viewpoints were both starting to form and rapidly changing as the debate unfolded. The dispute was going to brought eventually, the co-complainants just did not know who would support the EC, and the arguments they might make in doing so. So they took the dispute to the SPS committee in the hopes of finding out.

\(^7\) Official from Agricultural Affairs, the Office of the United States Trade Representative, anonymous interview with author, Washington DC, March 21, 2018.
Dependent Variable: Proceeding Through the Committee Track

Before EC—Biotech became a formal dispute, it was first brought up in the SPS committee in the fall of 2001. The United States led the charge, arguing that the EC had a de facto moratorium in place on the approval of biotech products since 1998 “and urged the Commission to restart the process as soon as possible.” Canada provided comments in support of the U.S. concern, stating “that the EC regulations were not commensurate with the risks entailed and lacked scientific basis” making reference “to a report from a group of 400 pre-eminent EC scientists, sponsored by the Research Directorate of the European Commission, which had concluded that using biotechnology did not contain any more risks than using traditional plant breeding techniques,” and adding that “a report issued by a food standards agency of an EC member State had concluded that the regulation was unworkable, unscientific and costly.”

The co-complainants were thus quick to lay out their arguments, and not shy about pointing out the discrepancies within the EC itself. No other states added to the STC, and the representative from the EC responded by noting that a “recent meeting of the European Environment Council had started a very important discussion on proposals presented by the Commission to restart the authorization procedure.”

In the second meeting the issue was raised, it was reported that Commission officials had provided information to suggest that the approval process would be restarted

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98 Agricultural Biotechnology Approval Process (ID 110), Sanitary and Phytosanitary Information Management System.
100 SPS Committee, Minutes of the Meeting (31 October-1 November 2001) G/SPS/R/25, para. 104.
in late 2002. While the U.S. welcomed this news, and the establishment of the European Food Safety Authority to serve as a central authority for risk assessment and risk communication, the U.S. representative noted that “it did not address the fundamental problem of individual EC member States holding the approval process hostage to political concerns, with disregard for science and sound regulatory decision-making” and that “[f]rustration in US commercial and political circles continued to increase.”102 At that same meeting, Argentina, another large biotech export market, added to the charge. Other than the EC response, no other members spoke on this issue.

Irritation began to increase on the part of the co-complainants. In June 2002, Canada gave a hint about how the case would be litigated, saying “Canada considered the EC moratorium to be inconsistent with the SPS Agreement and the GATT, and requested the European Communities to put in place a science-based approval process, as well as to consider alternative measures.”103 This was a clear provocation, challenging the use of the precaution-based approach. The U.S. representative emphasized the urgency in the matter, saying “[h]is country was becoming frustrated with the situation and was considering what steps to pursue.”104 This statement was important in that it not only showed the issue was a priority, but that a dispute was potentially on the horizon. If others needed motivation to speak up, they were clearly running out of time.

By this point, the STC had been on three consecutive meeting agendas, for a period of eight months. The EC representative, however, noted “that the matter was following

102 SPS Committee, Minutes of the Meeting (19-21 March 2002) G/SPS/R/26, para. 33.
103 SPS Committee, Minutes of the Meeting (25-26 June 2002) G/SPS/R/27, para. 56.
104 SPS Committee, Minutes of the Meeting (25-26 June 2002) G/SPS/R/27, para. 56.
political procedures.”\textsuperscript{105} The co-complainants, however, did not seem interested in internal EU processes, or promises to get the approval process back on track.

But potential third parties remained incredibly tight-lipped, and the co-complainant’s frustration with the lack of engagement by other WTO members was noticeable, as the parties tried to engage on the margins of the meetings to understand country positions as well, to little avail. By the end of 2002, however, Australia and the Philippines spoke up, and were generally in support of the U.S. position. The Australian delegate remarked that research undertaken to assess the risk of biotech products “had not shown any new risk to human health or the environment, beyond the usual uncertainties of conventional plant breeding, or risks that were likely to put in danger the chosen level of health or environmental protection in the European Communities.”\textsuperscript{106}

The co-complainants knew they had some support going into the dispute, so they continued to chide the Commission for its failure to act, and to rein in Member States. The United States, noting that the moratorium had resulted in a $1 billion loss in exports to the EC, pointed out “that senior European Commission officials had publicly stated that the moratorium was illegal” and “that the Commission had the authority and the power to act” but had failed to do so.\textsuperscript{107} Canada echoed this sentiment, with its representative stating that he “regretted the inability of the European authorities to take steps to ensure that EC member States met their SPS obligations. Canada called upon the European Communities to lift the moratorium as soon as possible.”

\textsuperscript{105} SPS Committee, Minutes of the Meeting (25-26 June 2002) G/SPS/R/27, para. 57.
\textsuperscript{106} SPS Committee, Minutes of the Meeting (7-8 November 2002) G/SPS/R/28, para. 70.
\textsuperscript{107} SPS Committee, Minutes of the Meeting (7-8 November 2002) G/SPS/R/28, para. 69.
It was clear at the outset that the economic stakes in this dispute would be high, particularly for the top GM food producers, the United States, Canada and Argentina. In addition, the political stakes were also high, as the EC’s approach could set a new standard that other countries may adopt, thus threatening the market for GM products altogether. Therefore, it is curious, given the economic and political stakes involved, that the complaining parties did not initiate a dispute earlier. But the co-complainants knew this dispute would be contentious, and they needed to prepare for opposition, particularly from potential third parties.

However, the issue was just too hot, and U.S. threats to litigate made it fairly clear that a dispute was on its way. So others stayed nearly silent. As one U.S. official noted, this is likely due to the fact that states do not want to prejudice their position on certain sensitive issues before a dispute is formalized.108 In November 2002, the EC representative acknowledged “that he understood the frustration of other Members” and “[h]e requested patience and understanding on this very sensitive dossier.”109 It was so sensitive, in fact, that the co-complainants delayed litigation in order to better understand the offensive positions they would have to take, and how they might be challenged. The issue is not brought up again in the SPS committee after this exchange, and a request for consultations is made in the following year.110

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108 Official from Agricultural Affairs, the Office of the United States Trade Representative, anonymous interview with author, Washington DC, June 4, 2018.
110 The next time this STC is discussed is in June 2016, but has to do with ongoing implementation/delays in the approval process for soybean products in particular. See, SPS Committee, Minutes of the Meeting (30 June-1 July 2016) G/SPS/R/83, paras. 4.44-4.46.
Concerns about Third Parties Bear Fruit

While other members were virtually silent during the committee meetings, the co-complainants’ fears of third party interreference were well founded. This was based on the years of discussions prior to and during the moratorium, where a growing divide on the issue was becoming evident. Once the dispute went to panel, Argentina, Canada, and the United States were met with no less than fifteen third parties, many of which provided submissions for consideration in the dispute.111 Looking at some of the submissions of the third parties reveals why the co-complainants were right to be concerned about their input.

Australia, which had supported the concerns raised in the committee, urged caution in addressing the written submissions of the principal parties, as they “have raised a wide range of complex factual, scientific and legal issues, which may, or may not, be pertinent to the Panel's resolution of the dispute.”112 Given the complex issues that were being raised, “Australia is of the view that the Panel should adopt a measured approach and limit its rulings and recommendations accordingly. Australia notes that the Panel has considerable discretion to exercise 'judicial economy' in making an objective assessment of the matter before it, and in making its recommendations and ruling.”113 It was clear from Australia’s submission that it was particularly concerned with the potentially broad framing of legal claims, and the interpretation of the term “like products” under both the GATT and TBT provisions as concerning biotech products.

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111 The fifteen third parties were: Australia; Brazil; Chile; China; Chinese Taipei; Colombia; El Salvador; Honduras; Mexico; New Zealand; Norway; Paraguay; Peru; Thailand; Uruguay.
112 EC—Biotech, para. 5.3.
113 EC—Biotech, para. 5.5.
Australia’s comments revealed why many countries may have remained silent during the committee, as Australia certainly saw the issue is being far more nuanced than what the co-complainant’s had alleged. In addition, Australia also hinted at a broader anxiety of what a ruling on this issue would mean for WTO jurisprudence. For example, Australia urged the Panel to resolve the issue solely by reference to the WTO Agreements, even though the EC claimed that the Cartagena Biosafety Protocol was relevant. However, Australia also pointed out that the three co-complainants were not party to the Biosafety Protocol.\textsuperscript{114}

Chile supported the co-complainants, arguing that for developing countries in particular, “modern biotechnology would help to improve competitiveness by fostering the protection and preservation of genetic material while at the same time paving the way to involvement in areas such as biomedicine.”\textsuperscript{115} At the same time, Chile also noted a sentiment that was broadly shared by many countries, that:

All of this calls for an appropriate regulatory framework, one that would consolidate the role of public institutions with legal authority in the biotech area. At the same time, there is a need for coordination among these agencies and proper consultation with civil society, for adequate entrepreneurial institutions, and for scientific and technological capabilities and the capacity to train human resources.\textsuperscript{116}

\textsuperscript{114} EC—Biotech, para. 5.12.  
\textsuperscript{115} EC—Biotech, para. 5.19.  
\textsuperscript{116} EC—Biotech, para. 5.20.
This offers support for the argument put forward by Horn and Howse (2009) that there were broader societal concerns on GM products that many countries, even beyond the EC, were concerned about. Oddly enough, Chile opposed the “unsolicited submissions received by the Panel from third parties that are not party to this dispute,” and “stress[ed] that there is no provision under the DSU that enables panels to accept unsolicited and unwanted information.” These unsolicited submissions were in reference to amicus briefs submitted by civil society groups and academics on the issue, which was considered controversial given the sensitivity of the topic (Eckersley 2007).

China also weighed in, and came out in full support of the EC approach. China focused on Article 5.7 (the precautionary principle) of the SPS Agreement, and stated:

Article 5.7 requires the measure to be adopted "on the basis of available pertinent information". In China's view, "available pertinent information" includes not only scientific information, but also all information having logical relevance to this matter. The words "including" in Article 5.7 indicates that information "from the relevant international organizations" and "from SPS measures applied by other members" is not exhaustive in nature. Thus, in this case, the panel may consider background of so-called product-specific delay and the EC member State safeguard measures as a

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117 The sentence continues: “The Appellate Body has ruled on this issue in the past, but that does not constitute a precedent. On the contrary, most WTO Members expressed their opposition to this kind of submission at a special meeting of the General Council at the end of 2000.” EC—Biotech, paras. 5.22 – 5.33.
whole to determine whether European Communities or the EC member State adopted it on the basis of available pertinent information.  

This was in direct opposition to the science-based approach the co-complainants had argued in support of in both the committee, and in their panel submissions. China essentially argued that additional information “may not be narrowly interpreted as scientific information only. In this case, the European Communities’ legislation process on biotech products could be considered as one aspect of the information collection.” This seemed to argue that the process of crafting the regulation itself, and the deliberative discussions in doing so, were directly relevant information. This line of reasoning reflects a general understanding of the precaution-based approach as an inclusive and deliberative decision-making process (Jasanoff 2005).

Furthermore, China was more explicit than Australia in saying that “biotech products are not like products of non-biotech products” citing to their “anti-natural character,” and defended the need for longer time-periods to assess their safety, if a member state chose to do so. Furthermore, China indicated a need for consideration of consumers tastes and preferences, arguing that in Europe these are unfavorable, and therefore should be taken into consideration in determining the likeness of bio-tech and non-biotech products.

But it was not just China that raised questions about the safety of biotech products. Norway was also skeptical in its submission, arguing that due to the newness of these

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118 EC—Biotech, para. 5.31.
119 EC—Biotech, para. 5.32.
120 EC—Biotech, paras. 5.35 – 5.36.
products on the market, “[l]ittle is known about long-term effects of foods from transgenic crops. Moreover, little scientific agreement exists regarding their environmental impacts. New scientific evidence concerning environmental and health impacts is constantly emerging.” 121 Furthermore, Norway argued that the EC regulation was indeed a provisional measure, and should thus be considered under Article 5.7, the precautionary principle, arguing “that the four cumulative requirements set out in Article 5.7 are satisfied and accordingly that there is legal basis for adopting and maintaining the provisional phytosanitary measures.”122

What the diversity of these submissions shows is that the co-complainants were right to be concerned about third party input on such an important case. They were right to delay filing a dispute by taking the issue to committee first to try and tease out some of these positions, so that they could prepare their response. However, the sensitivity of the issue had grown to such heights that members kept their cards close to their chest. While they did not glean much information in committee, the silence itself was telling. The complainants knew that opposition would be strong. The opposition to the arguments made by the complainants in the third party submissions to the Panel shows that they were right in this assessment.

121 EC—Biotech, para. 5.85.
122 EC—Biotech, para. 5.102.
Competing Explanations

The existing literature on the committees would suggest that Argentina, Canada, and the United States brought the dispute through committee because they were trying to secure a resolution to the issue. The argument would focus on the sensitivity of the issue as further motivation for a depoliticized settlement in committee as opposed to filing a formal dispute. However, for this to be true, we would have to see two things: a willingness on the part of the EC to strike a deal; and evidence that the complainants were uncertain as to whether they would bring a dispute. However, there is evidence for neither.

Those who argue that the EC may have been willing to strike a deal would undoubtedly point to the divide between the Commission and the Member States on the issue. In fact, some would argue that the EC was not opposed to GM products in general, but just wanted a rigorous safety assessment. As David Byrne, the EU Commissioner for Health and Consumer Protection stated in July 2003, “I am very pleased that the European legislative framework for GMOs is now complete. European consumers can now have confidence that any GM food or feed marketed in Europe has been subject to the most rigorous pre-marketing assessment in the world.”

Echoing concerns of Europe being left out of the competition in the biotech industry noted earlier by the European Commissioner for Enterprise and Industry, Günter Verheugen, a 2007 Commission report that stated “[t]he zero tolerance that is in operation in the EU for the low level presence of EU- unapproved GM plant materials found in imported commodities - which have been approved by other Regulatory Agencies - is

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disproportionate to any potential risk.” So there were voices in favor of biotech products on the EC market, but there are two important things to note about this. First, the majority of these favorable views were being expressed either during the EC—Biotech dispute, or after the Panel had issued its ruling. Why is this important? A lot of these comments could have been conceived as strategic, trying to lessen the potential damage from the dispute. The Commission had an incentive to make the regulation appear provisional, as this was one of its arguments in the dispute. Furthermore, after the ruling was made and the EC was found to be in violation of WTO rules, it was easier for those who supported a more liberal biotech regime to talk about the problems with the EU approach, even though they may not be able to change it.

But did this mean the EC did not want to find a compromise? Not exactly. There was tension between the Commission and the Member States, but there was no doubt that the Member States would win out in the debate. As one European official from the Commission’s directorate-general on trade recounted, “Member States can take measures that may be more restrictive, which the Commission may not think is necessary, and the Commission will often ask for an update on science to see if the measure is justified. But in the end, the Commission must support the Member States, even if we don’t agree.”

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Furthermore, responses by the EC in the SPS committee continually suggested that there was not much room for compromise on what the EC representative even described as a very sensitive dossier. Even promises that the EC was working towards a regulatory framework that would allow GM products on the market was not good enough. Technically, those products were already allowed on the market, but the issue was the de facto ban due to significant delays in the approval of those products. Therefore, even if a regulatory framework would be put in place to assuage some of the complainant’s concerns, it was not clear that such a framework could be applied without political interference from Member States.

In addition, as one former USTR official noted, that while the EU can get away with delays due to the nature of its regulatory system, which the Commission does not control, at the end of the day “the EU doesn’t change anything” as a result of discussions in the committees.\footnote{Former counsel from the Office of the United States Trade Representative, and advisor at the Mission of the United States to the WTO in Geneva, anonymous interview with author, Washington DC, March 23, 2018.} Was a resolution possible? Certainly not in committee.

Finally, was there any evidence that the complainants were hesitant about bringing the dispute? Again, there is little to suggest this was the case. In looking at the committee discussions, and the tack taken by Canada and the United States in particular, it was clear that they were prepping for a dispute they already had mapped out. In fact, this is precisely why the committees are more political and strategic than the current literature gives them credit for. As one U.S. official noted, the USTR has a process for developing the legal
theory to find out whether they have a formal case, even before a STC is raised.\textsuperscript{127} Therefore, the STC is not a fishing exercise for new information to decide whether or not a dispute is warranted, but rather a tool to gather specific information that will assist in building the case when it is already certain a dispute is likely.

In the case of the Biotech dispute, the U.S. not only had a systemic interest in preventing the replication of the EC approach, but also a significant economic stake in the issue. With the U.S. determined to file, it was not difficult to get Argentina and Canada on board as well, and the three coordinated to this end. Ultimately, the co-complainants knew this issue would eventually become a formal dispute, but they needed to go through the committee first to see who would be on their side.

\textbf{The Committee Track: What Does a Resolution Look Like?}

This section now turns to a STC that did not result in a request for consultations later. This case exemplifies the universe of cases that are “resolved” through the committee track. I show that even in cases where a matter is resolved, states still use STCs for the same purpose as the originating cases—to learn about third parties. Through an analysis of this case, I will show that this trade friction was brought to the committee precisely because there was ambiguity about third party input on a regulatory topic that was sure to generate heated debate—public health. While the final result of the dispute was a limited resolution through committee, this case reveals that the same concerns that animate all disputes that

\textsuperscript{127} Official from Agricultural Affairs, the Office of the United States Trade Representative, anonymous interview with author, Washington DC, June 4, 2018.
come through the committee track—ambiguity about third party input—are also evident here.

This case thus serves as a robustness check on my findings. Chile—Proposed amendment to the Food Health Regulations, Supreme Decree No. 977/96, hereafter the Chile case, is a prime example of what resolutions in committee look like. It can be considered a “resolved” case in the context of the methodology described by Horn et al. (2013), and what is elaborated upon in the data chapter of this dissertation. I choose a case from the TBT committee in order to ensure I represent the full universe of cases from both committees. What is so interesting about this case is that it involved a number of very large markets raising the issue against a small developing country, which ultimately held its ground. In fact, what is striking in this case is that it is one where we might expect to see the smaller country fold to the pressure of other, much larger markets. But, ultimately, the result is a very limited resolution that is far from being seen as a victory by some of the largest parties concerned, including the United States and the European Union.

Furthermore, even if the case was “resolved” it shows that the substance of resolutions are limited, and as such, of secondary importance when thinking about why states use the committees in the first place. Thus, this case sheds light on what is meant by resolution in committee, and how this helps us put the committee functions in perspective in relation to dispute settlement in general.

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Ultimately, this case supports my critique of the current research on STC outcomes, which, I argue, oversimplifies the process of resolution by failing to examine these STCs qualitatively. In fact, what tends to result is a limited resolution of a bigger dispute. This problematizes our understanding of what may count as a true resolution to begin with. Therefore claims that STCs can substitute for dispute settlement (Karttunen 2016) are overstated.

First, I provide some background to the dispute, to provide some context for the facts of the case. Then I proceed to analyze the case through the lens of the current literature by examining how this case could be used to support the arguments in favor of the committees being used primarily to resolve disputes, an alternative independent variable. Next, I explain why my independent variable, ambiguity about third party input, better explains the choice of whether to take this issue to committee. In doing so, I provide an assessment of whether the result could be thought of as a resolution, and how this problematizes characterizing the committees primarily as a forum for the resolution of disputes. This chapter then concludes with a summary of findings from the three case studies.

Background

Chile’s Food Health Regulations, Supreme Decree No. 977/96 (hereafter, Chile’s food labelling regulation) was first notified to the WTO in January 2013. The subject of the

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draft regulation, to implement Law No. 20,606, was on the nutrition and composition of food and its advertising. The proposed rule sought to put informational warning labels on food that was deemed to be “excess in” (later to be changed to “high in”) calories, fat, salt, and sugar. In addition, there were marketing restrictions on the use of cartoon images on products bearing the label, as well as a prohibition on these products in schools. The stated purpose of the law was to address the growing obesity epidemic in Chile. In March 2013, the representative for Chile at the TBT committee stated that:

Her country was experiencing an obesity epidemic, especially amongst young people who consume a large amount of these food elements. She explained the amendment would communicate specific health information and provide a warning that would be easily understandable for consumers, and guide them to the best consumption choices based on available information.130

While WTO members did not take issue with Chile’s right to address its public health problem, they strongly disagreed on the means to do so. Other countries had pursued nutritional labelling programs for similar objectives, but Chile’s was by far the most stringent. Consequently, twelve countries,131 including major agri-food exporters such as the United States, the EU, and Brazil, argued in the TBT committee that the regulation deviated from accepted international standards, was not based on science, and was likely to be more trade restrictive than necessary, and thus in violation of the TBT Agreement.

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130 TBT Committee, Minutes of the Meeting (6-7 March 2013) G/TBT/M/59, para. 2.42.
131 Argentina, Australia, Brazil, Canada, Colombia, Costa Rica, European Union, Guatemala, Mexico, Peru, Switzerland, United States of America.
For example, a number of countries pointed to the ongoing work by the Codex Alimentarius committee on health claims and the use of nutrition labelling, which included voluntary standards for “‘low’, ‘free’, or ‘no added’ claims in tandem with mandatory nutrition labelling.” In particular, the Codex guidelines indicated that “‘The use of supplementary nutrition information on food labels should be optional and should only be given in addition to, and not in place of, the nutrient declaration.’”

Furthermore, Chile’s approach also deviated from international standards and a science-based approach because it required the labelling of products based on nutrient content per 100g or 100ml for solids or liquids, not as a percentage of overall daily intake of nutrients. Chile argued that this allowed for easier comparisons across the board for consumers, but other countries noted that Chile’s labelling guidelines would “risk demonizing some foods whose consumption in moderation can be part of a healthy diet.”

Finally, one of the most contentious issues was that the label had to appear on the front of the product (front-of-pack (FOP) label), and be in the form of an octagon, resembling a stop sign. Several members warned that such labels “risked arousing fear” among consumers, not least because they would take up a significant portion of the package.

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132 Statement by the representative of the United States, Technical Barriers to Trade Committee, Minutes of the Meeting (6-7 March 2013) G/TBT/M/59, para. 2.28, in reference to the Codex Guidelines for Use of Nutrition and Health Claims (CAC/GL 23-1997) and the Codex Guidelines on Nutrition Labelling (CAC/GL2-1985). Codex was working on updating nutrition labelling standards based on the WHO Global Strategy on Diet, Physical Activity, and Health.

133 Statement by the representative of the United States, TBT Committee, Minutes of the Meeting (6-7 March 2013) G/TBT/M/59, para. 2.30, in reference to Codex Guidelines on Nutrition Labelling (CAC/GL2-1985).

134 Statement by the representative of the European Union, TBT Committee, Minutes of the Meeting (6-7 March 2013) G/TBT/M/59, para 2.34.

135 Statement by the representative of the European Union, Technical Barriers to Trade Committee, Minutes of the Meeting (5-6 November 2014) G/TBT/M/64, para 2.13.1.

136 An early proposal required the octagon to occupy not less than 20% of the package, and have at least the size of 4 square centimeters, which some members stated would be problematic for small packages in particular.
An example of the packaging is presented in Figure 12 which shows cereals before and after the law went into effect, and Figure 13, which provides a close-up of the “stop-sign” label.

![Cereal Boxes](image)

**Figure 12. Chile Food Labelling on Cereal Boxes**

![Stop-Sign Label](image)

**Figure 13. “Stop-Sign” Label Requirement**
Source: Committee on Technical Barriers to Trade, Notification,G/TBT/N/CHL/282/Add.1.
An Alternative Independent Variable: The Committees as a Forum for Resolution

From March 2013 to November 2016, twelve states raised a STC against Chile in the TBT committee on its labelling law. One of the key problems from the members concerned was the fact that the rule was scheduled to be implemented only six months after it was notified, in July of 2013. They argued that this would not give industry enough time to comply, not least because specific details of how the rule would be implemented were unclear. As a result, members asked Chile to delay implementation so that comments could be considered from all stakeholders, and a proper assessment of the rule completed.

It was apparent from the very first meeting that Chile was willing to hear out the concerns of its trading partners, where the Chilean representative explained that:

the amendment would communicate specific health information and provide a warning that would be easily understandable for consumers, and guide them to the best consumption choices based on available information. Her delegation was holding meetings with public and private sector bodies on this matter, and she said that concerns of Members, especially regarding the time-frame for entry into force, would be communicated to her capital based authorities.137

In fact, before the next TBT meeting, Chile notified its promised amendment. A total of eight members raised the initial concern (the United States, Mexico, European Union, Argentina, Colombia, Guatemala, Canada, and Peru).

137 TBT Committee, Minutes of the Meeting (6-7 March 2013) G/TBT/M/59, para. 2.42.
But the effort to pressure Chile to address these concerns did not primarily take place in the committee. In fact, there was a significant effort, not only on the sidelines of the meetings, but also between the capitals to try to persuade Chile to back down from the measure. As Dorlach and Mertenskötter (forthcoming) show, industry interests, including the U.S. Grocery Manufacturer’s Association, FoodDrinkEurope (the food industry’s European trade association), and ConMexico (association for the consumer goods industry) formed a transnational lobbying effort to this end. This is further evidenced by the fact that reference to bilateral discussions is made in committee on sixteen separate occasions.

In the first year that the STC was raised, the members concerned appeared confident that a resolution could be achieved on the issue. This is evidenced in the positive responses to Chile’s statement in the October 2013 committee meeting, where Chile offered up early amendments, stating:

that the final version signed by the President contained the following: (i) a timeframe for entering into force at least 6 months from the final date of publication; (ii) the fact that only a small number of products would be affected (24% of products); (iii) the warning label would no longer take the form of an octagonal "STOP sign" but rather a coloured hexagon and its size would be established in relation into the size of total area of the products (7.5%); and (iv) that it would provide for the possibility of using stickers for the warning label.¹³⁸

Chile seemed to have addressed a large portion of the concerns raised by the concerned parties. In the May 2014 meeting of the committee, for example, the U.S. representative

¹³⁸ TBT Committee, Minutes of the Meeting (30-31 October 2013) G/TBT/61, para. 2.131.
stated that “[t]he US appreciated the changes Chile made to its draft technical regulation,” and the Canadian representative “had been assured that Chile was reconsidering its regulations with a view to make them WTO compliant.”\textsuperscript{139} While there were still notable reservations by members on the final rule, the parties involved seemed pleased with the level of cooperation Chile afforded them, with the representative from Switzerland, “commend[ing] the openness of the Chilean legislative process, which allowed the bill to be improved and the reaching of a final version of the regulation containing warnings that were more neutral and that allowed the use of stickers.”\textsuperscript{140}

But all of this goodwill would soon fall apart, when in March 2014 a new government formed in Chile, under the leadership of Michelle Bachelet. With her election win, she brought in changes to the bureaucracy, and gave greater voice to supporters of the labelling law, including the influential Senator Guido Girardi, who is also a physician.\textsuperscript{141} The change in government thus resulted in shift in approach by Chile, which largely abandoned the amendments that were the outcome of discussions with trading partners. In August 2014, the government of Chile notified the WTO of an amendment to the food regulations, and established a new deadline for comments until October 2014. This new rule was more stringent than previous drafts, and immediately elicited comments in committee.

This sudden shift touches on a broader point about the committees which is often repeated among the literature—that because the work of the committees is so technical in

\textsuperscript{139} TBT Committee, Minutes of the Meeting (19-20 March 2014) G/TBT/M/62, para. 2.148 and 2.153.
\textsuperscript{140} TBT Committee, Minutes of the Meeting (18-19 June 2014) G/TBT/M/63, para. 3.127.
\textsuperscript{141} The role of Guido Girardi in the labelling law is outlined in detail by Dorlach & Mertenskötter (forthcoming).
nature, it verges on apolitical. However, this case exemplifies the exact opposite of this claim. The new government in Chile was quick to dispense with any compromises made on the technical issues, and instead reaffirmed its support for a stringent labelling requirement on the basis of public health concerns.

The next committee meeting took place in February 2015, and it was clear that the concerned members were less than enthused about recent developments. The representative for the EU stated:

She regretted that significant time had been spent in the TBT Committee and at a local level to deal with issues in the first notification only to have Chile reopen the measure just a few weeks prior to its entry into force. Although the EU welcomed this new opportunity to provide comments, and hoped for a more positive outcome, she emphasized concerns regarding legal uncertainty created by these successive modifications.\(^{142}\)

The United States was also concerned that the amended rule seemed to apply to a broader range of products and “asked Chile to explain why the decision was made to strengthen the warning elements of the regulation, and whether an analysis was performed on the additional benefits of the new draft approach as opposed to the December 2013 regulation.”\(^{143}\)

Notably, Chile had revived the stop sign logo. Chile faced significant pressure from both WTO members and industry on the revised rule, but continued to hold firm. One of

\(^{142}\) TBT Committee, Minutes of the Meeting (5-6 November 2014) G/TBT/64/Rev.1, para. 2.130.
\(^{143}\) TBT Committee, Minutes of the Meeting (5-6 November 2014) G/TBT/64/Rev.1, para. 2.133-2.134.
the reasons for this was due to the fact that the decree was largely motivated by government concerns surrounding the rise of childhood obesity, and its strongest proponent, Senator Guido Girardi, drew substantial public support; this, even despite opposition from domestic industry, such as Chilealimentos, which called the labels “invasive.”

Chile was well aware of how stringent its regulation was, and the opposition to it reflected that reality. This awareness became acutely clear over the course of three years of discussions both in committee, and the bilateral discussions outside of the WTO. The concerted pressure on Chile did not make it fold to demands. To assuage concerns, Chile continued to engage with others and launched public consultations, which were held between August and October 2014 that yielded over 350 individual comments from industry, governments and academia. The level of interest on this measure was significant. But Chile held firm.

The resulting regulation was little changed from the original version, and as one journalist described it, Chile had slayed Tony the Tiger. Notably, Chile allowed the use of stickers for the labels, introduced less burdensome placement requirements and a less restrictive size for additional warnings in addition to agreeing to an implementation review. But this was a far cry from the amendments the members concerned had pushed for.

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Problematizing the Dependent Variable: Resolution or Something Else?

What does it mean for a STC to be resolved? In the Chile case, WTO members used the TBT committee to pressure Chile into making marginal adjustments on its food labelling regulations. The outcome was certainly at odds with what industry wanted, and with what the members raising the concern in committee may have believed was possible. But it appeared that the minor adjustments to the rule were largely accepted. In fact, the last time the issue was raised in committee only three of the original twelve countries participated in the STC (Mexico, Guatemala, and Costa Rica). The issue never returned back on the meeting agenda, and the rule has been in force since June 2016.

However, silence in committee does not necessarily indicate agreement. As the EC—Biotech case showed, states often hold back their opinions for fear of prejudicing themselves in future proceedings. As the measure was not yet implemented, it might have been too early to bring a formal dispute. The measure was also in flux, and it was not entirely clear what the final version would look like until the issue had already been discussed in committee for several meetings. So what was going on here?

The literature would suggest that this is a STC ripe for resolution, as it’s a draft measure that can still be changed. However, delegate experience in the committees tells another story. Draft or not, it is incredibly difficult to get a state to change its regulatory measure. Furthermore, to call anything resolved may be overstating what is actually being achieved. As one delegate from Canada remarked “Canada has never really made adjustments to regulations due to the discussions in committee, though of course they listen
to the concerns raised.” A delegate for Colombia also shared similar observations, noting that “the lack of resolution is a problem that is not a failure of the committee but rather a problem of the member to make adjustments and take comments into account.” And as the delegate from Mexico stated, “resolution is not as clear because a regulation changing does not necessarily mean that the impact is gone.”

This provides further reason for skepticism that states use the committees primarily to resolve disputes. One of the delegates from Mexico also noted that there are cases that members know will not be resolved, even marginally, but they still go through committee, such as US—Tuna II, which was brought by Mexico against the United States over its voluntary dolphin-safe labelling standard. Another delegate suggested that a similar reasoning informed raising the EU’s palm oil directive as a STC, which at the time of writing, was being raised in the TBT committee. As of October, Indonesia indicated that it was planning to file a dispute against the EU. So if not to resolve, what are states using the committees for?

While STCs are generally thought of in bilateral terms, the fact that so many involve coalitions of countries is telling. Even in the Chile case, twelve countries participated in

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the STC. And this is not just about peer pressure, it’s about learning one another’s positions. The United States was certainly a central player in this case, and U.S. officials interviewed for this study have stated on more than one occasion that they give significant thought to what other countries might say in committee. So much thought, in fact, that it has actually annoyed other members. A delegate for the EU noted that the U.S. is particularly adept at figuring out a potential coalition, by often raising an issue first, then seeing who follows, from which point they can proceed to coordinate future claims made on that STC, which is why the statements often sound repetitive after the first time it is raised.151

The Chile case was no exception. In fact, when the concern was first raised a wide set of WTO obligations were cited in the TBT committee, including reference to the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, and TBT Article 2.9, on notification. The breadth of these concerns was reason enough to raise the issue in committee to discover just what types of claims other countries would raise, as a TRIPS dispute would look quite different from a TBT dispute. States were thus listening attentively to the type of potential legal claims that other countries were coming up with.152 And while initial discussion of the STC, particularly in the first meeting, is varied, the members raising the concern have less distance in their positions over time, generally focusing on TBT Articles 2.2 and 2.4. But again, general discord over what this case is

152 Paul Mertenskötter, email exchange with author, July 18, 2019.
about prompts a more limited solution and lack of confidence in bringing this case to a formal dispute for the time being.

Furthermore, bringing the issue to committee may have been a more efficient outcome for the concerned parties because of a general awareness of the discord this measure would cause. Therefore, a STC would allow the concerned parties to gauge the reactions of other parties more effectively than reaching out bilaterally to build a coalition when so many countries had their eyes on this measure. As one academic studying this case noted, there was little evidence of coordination among the concerned members.

Ultimately, what the Chile case shows are the limits of thinking of the committees as a forum for resolution. Instead, the committees form one part of a broader dispute settlement mechanism, where states actively pursue information about each other’s positions in order to build and refine their claims should the issue proceed to a dispute. While marginal adjustments might delay a dispute, they do not eliminate the possibility for a dispute entirely. Thus the great majority of STCs remain constantly in play, with little indication that resolution features heavily in the decision to bring an issue to the committees in the first place.

**Summary of Evidence**

The case studies presented above set out to test whether if a state faces ambiguity about third party input to a dispute, they will bring a dispute to committee, in the form of a STC, instead of requesting consultations. The first case examined _EC—Sardines_ is a hard test
case of the hypothesis, because not only did it feature a developing country complainant, which are generally adverse to filing a dispute, but it was litigated with assistance from the ACWL, which always encourages the use of the committees before requesting consultations. Therefore, it is especially striking here that this dispute did not go through the committee track. Tracing the dispute back to earlier discussions on the sardine standard at the Codex Commission’s Food and Agriculture Organization’s (FAO) meetings from 1966-2002, shows that Peru and the ACWL had a clear picture of third party interest in the dispute prior to filing. The ACWL was also confident that the claims Peru would bring would generate significant support from others who had been following this issue. For these reasons, the ACWL did not in this instance encourage the use of the TBT committee, because they had already assembled the pertinent information about third parties to the case.

The second case examined the EC—Biotech dispute, where Argentina, Canada, and the United States acted as co-complainants. Taking this issue through committee, on its face, is rather puzzling. The complainants had delayed bringing the dispute, even though the de facto moratorium had been in effect since 1998. Given the contentious issue that was the subject of the dispute, genetically modified foods and other biotechnology products, it was also odd that the co-complainants would risk revealing their hand in committee, giving their opponents a leg up. Finally, there was little doubt that the EC would not compromise on the issue, so the value of bringing the issue to committee to resolve the dispute was not evident.
Through this case study I show that there were serious concerns about third party input in this case. Ambiguity about what that input would look like favored the committee track over the formal track. Though the parties undoubtedly wanted the dispute to be resolved quickly, they brought it through the committee in order to develop a case, which would generate substantial interest from WTO members, not just on the case itself, but the systemic implications of the final ruling. It is under this high degree of ambiguity of how others would react that the co-complainants proceeded through the committee track.

The chapter concludes with an examination of a case that might be considered resolved, which was discussed in the TBT committee. The *Chile* case, which focused on a new labelling law that Chile had drafted on the use of warning labels on certain products that were deemed high in sugar, salt and fat to tackle the epidemic of childhood obesity. While previous studies have alluded to the benefits of resolving disputes in committee, very few concrete examples of resolution have actually been detailed. I take a look at the *Chile* case, which is representative of the universe of cases that are often referred to as the “resolved” STCs.

What is so interesting about this case is that it involved a number of very large markets raising the issue against a small developing country, which ultimately held its ground. In fact, the final resolution could hardly be called a resolution as such, as Chile made marginal adjustments to the measure, leaving it nearly identical to the original draft. This case is included as a robustness check on the hypothesis to show that current research, which primarily focuses on STC outcomes oversimplifies the process of resolution by failing to examine these STCs qualitatively. This further problematizes our understanding.
of what may count as a true resolution to begin with. In addition, even in cases where a matter is resolved, states still use STCs for the same purpose as the originating cases—to learn about third parties.
CHAPTER IV: CONCLUSION

This dissertation set out to explain why some disputes originate in the WTO’s committees, while others do not. The existing literature cannot provide an explanation for this. While a number of recent studies provide invaluable insight into the mechanics of the committees, they do not fully explain why states would choose to use the committees in the first place, and, in particular, no current study identifies a pattern for concerns that become formal disputes. That states choose to take disputes through a non-judicial treaty mechanism instead of formal dispute settlement has been explained in the context of states seeking mediation, conciliation, or consultations. But the broader literature on dispute settlement has overlooked the committees as part of the toolkit of non-judicial forums within the WTO, which plays an important role in understanding WTO disputes writ large.

Through an analysis of the specific trade concerns raised in the committee, and three detailed case studies, I show that states use the committees to learn about third parties, and bring cases that will eventually become formal disputes through committee when there is ambiguity about third party input. They also do this when a formal dispute is uncertain, but the possibility for escalation exists. Third party participation is consequential, in that it can reduce the chances of a dispute reaching a settlement, and also raise the likelihood that a dispute will receive a ruling. There is ample evidence in the literature that third parties not only impact disputes, but that states are mindful about the role of third parties in shaping the scope of the claims made, and their interpretation.

What do we learn from an exploration into the WTO’s committees and the role of third parties in shaping state behavior? First, we have a better understanding of selection
bias in WTO disputes. States delay escalating trade frictions until they have a good grasp of how other members will react to the dispute. In particular, states are interested in knowing not just whether others have an economic stake in a dispute, but also how any interest, economic or systemic, translates into specific reasoned arguments for or against the complainant’s potential claims. Therefore, when making sense of why some disputes escalate faster than others, we should look to the level of ambiguity in third party input, in addition to other factors already addressed in the literature.

Second, while the willingness to delay a dispute seems counterintuitive, because states generally want issues to be resolved as quickly as possible, and prefer to avoid disputes, it gives us additional insight into state strategy in dispute settlement. This is because disputes that originate in committee show precisely when and for what reasons states might prefer to delay a dispute in order to secure a potentially better outcome. As the EC—Biotech case shows, the co-complainants showed reluctance to file because there was a high degree of uncertainty over the viewpoints of other WTO members on the increasingly contentious issue of GM foods and biotechnology. While they did not manage to get all the opposing views on the record, it became readily apparent after several committee meetings that the opposing side was saving its arguments in what would turn out to be a protracted dispute. This shows that states are not only sensitive to, but particularly conscious of gauging the reactions of the broader membership before filing. This could potentially help explain why so many STCs never escalate to formal disputes as well.
Third, the theory presented in this dissertation adds to the body of literature on the WTO committees in particular by challenging the current framework for how STCs are understood. Whereas the existing literature overwhelmingly argues that the committees are used to resolve trade frictions, the theory and evidence presented in this research problematizes this finding. As the Chile case shows, resolutions are not so clear cut, and it would be a stretch to call the outcome of this STC a victory for the parties raising the concern given the fact that the final adjustment to the measure was marginal at best.

In addition, this also reveals that the current literature has treated the committees as a technocratic, apolitical process, but the evidence presented in this research challenges that assumption. Not only do states view every act in the committees as a political intervention, but they think of their participation strategically. The committees are not a cold call, and not an exercise in general learning about a measure—they are primarily targeted at learning about the responses of the broader membership. This helps states gauge their readiness for disputes and provides a forum to test out their claims.

Fourth, this research has implications for thinking about the institutional design of dispute settlement mechanisms more broadly, and non-judicial treaty mechanisms that support this function in particular. While the literature has focused on specific non-judicial treaty mechanism that are often considered as options for alternative dispute settlement, the committees have largely been ignored in this regard because of where they are situated in the WTO’s organizational chart. However, this research shows that states see a lot of fluidity between the different parts of a single institution, not least because many of the same delegates participate in multiple roles. This has implications beyond WTO dispute
settlement, because it suggests that states do not necessarily distinguish the work of one part of an institution as separate from other parts. In fact, it suggests that states conceptualize the utility of an institution by looking not at its constituent parts, but seeing it as a continuum of actions that is mutually supportive. Thus coordination and learning within institutions must be understood within the broader context of institutional exchanges and the network of interactions this creates.

Finally, what does this research tell us about the future of the WTO and international institutions generally if the argument is correct? The penultimate conclusion may be disappointing for champions of the committee as an alternative mechanism to resolve trade frictions. Instead, if the argument presented in this paper is correct, the committees serve a limited function in the pre-dispute stage, and do not offer the possibility for substituting the formal dispute mechanism. Therefore, the fact that U.S. Trade Representative Robert Lighthizer, who is known to dislike binding dispute settlement, recently endorsed the committees as an alternative means to resolve disputes, should not worry those concerned about preserving the system. The committees will not take us back to an informal, diplomatic, and non-binding process of settling disputes.

Furthermore, this means that the committees do not operate in parallel to formal dispute settlement, but act as a step prior to this process. What this tells us is that they solve for a very specific problem that is more reflective of the shortcomings of formal dispute settlement than of the effectiveness of the committees. As formal settlements have declined, consultations have been seen as an unhelpful part of the dispute settlement process. In fact, in the context of WTO reform, two prominent voices on international
economic law (one, a former Appellate Body judge) even suggested that consultations should be abandoned altogether.\textsuperscript{153} But what the committees reveal is that states can lack important information that might assist them in consultations, and ultimately in the dispute if it goes to panel. Consultations may therefore be improved if they are instead thought of as a two-step process, one of fact-finding about other parties and how they individually interpret claims of violation, and second, the negotiation of a solution based on the complaint.

Finally, what is telling about the utility of the committees as currently structured is the extent to which developing countries in particular have praised the committees and responded strongly against a proposal drafted by the European Union to limit the use of STCs. In particular, the EU proposal suggests that states should limit how much they say in a STC if the issue has been raised before, and instead just refer back to previous comments.\textsuperscript{154} I posit that the reason this faced so much opposition is precisely because the repetition of arguments, and statements of position are integral to why states use the committees in the first place. Any limitation on how much states can say in these meetings detracts from their vital purpose, of giving states space to share their opinions on a matter. While some statements may sounds repetitive, there is still variation meeting


\textsuperscript{154} Procedural Guidelines for WTO Councils and Committees Addressing Trade Concerns, Draft General Council Decision, WT/GC/W/777/Rev.3, para. 11 (3 October 2019). An earlier draft from the summer of 2019, which was privately shared with the author by a negotiator working on WTO reform efforts suggested stricter wording, which was later toned down in the final version presented at the WTO. The original draft urged members to refrain from repeating arguments altogether.
to meeting, which is important if you care about making sense of other members’ reasoning on an issue.

Developing countries were quick to raise the alarm on this because for them the committees hold even greater value because a lack of capacity and resources makes it difficult for these countries in particular to expend time and resources engaging in diplomatic bilaterals to build their cases. Instead, what the committees offer is a regular, open forum for interaction between WTO members to gauge their reactions to potential disputes and build their case. The committees thus also serve to level the capacity playing field in this regard, and provide equal access to trade justice.

In the end, what the committees reveal is the necessity of non-judicial treaty mechanisms to complement dispute settlement mechanisms where those formal procedures fall short. The importance of third parties in dispute settlement and the ambiguity of their positions on the regulatory actions of their trading partners highlights why states use the committees in particular to court third party opinion before escalating a dispute. Thus, while the committees will never replace binding dispute settlement, they can certainly help states craft stronger cases, and ultimately, improve their outcomes.
## APPENDIX A

### ORIGINATING DISPUTES

**Table A1. Disputes Originating from the Committee Track**

<table>
<thead>
<tr>
<th>Committee</th>
<th>DS No.</th>
<th>Dispute Title</th>
<th>Times Raised</th>
</tr>
</thead>
<tbody>
<tr>
<td>SPS</td>
<td>41</td>
<td>Korea - Measures Concerning Inspection of Agricultural Products</td>
<td>7</td>
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<tr>
<td>SPS</td>
<td>76</td>
<td>Japan - Measures Affecting Agricultural Products</td>
<td>3</td>
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<tr>
<td>TBT</td>
<td>135</td>
<td>European Communities - Measures Affecting Asbestos and Products Containing Asbestos</td>
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<td>SPS</td>
<td>205</td>
<td>Egypt - Import Prohibition on Canned Tuna with Soybean Oil</td>
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<td>SPS</td>
<td>237</td>
<td>Turkey - Certain Import Procedures for Fresh Fruit</td>
<td>3</td>
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<tr>
<td>SPS</td>
<td>245</td>
<td>Japan - Measures Affecting the Importation of Apples</td>
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<td>SPS</td>
<td>256</td>
<td>Turkey - Import Ban on Pet Food from Hungary</td>
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<td>SPS</td>
<td>270</td>
<td>Australia - Certain Measures Affecting the Importation of Fresh Fruit and Vegetables</td>
<td>2</td>
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<td>SPS</td>
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<td>Australia - Certain Measures Affecting the Importation of Fresh Pineapple</td>
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<tr>
<td>SPS</td>
<td>287</td>
<td>Australia - Quarantine Regime for Imports</td>
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<tr>
<td>TBT</td>
<td>290</td>
<td>European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs</td>
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<td>291</td>
<td>European Communities - Measures Affecting the Approval and Marketing of Biotech Products</td>
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<td>SPS</td>
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<tr>
<td>SPS</td>
<td>293</td>
<td></td>
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<tr>
<td>SPS</td>
<td>297</td>
<td>Croatia - Measure Affecting Imports of Live Animals and Meat Products</td>
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<tr>
<td>SPS</td>
<td>367</td>
<td>Australia - Measures Affecting the Importation of Apples from New Zealand</td>
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<tr>
<td>TBT</td>
<td>369</td>
<td>European Communities - Certain Measures Prohibiting the Importation and Marketing of Seal Products</td>
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<tr>
<td>TBT</td>
<td>381</td>
<td>United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</td>
<td>5</td>
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<tr>
<td>TBT</td>
<td>384</td>
<td>United States - Certain Country of Origin Labelling (COOL) Requirements</td>
<td>9</td>
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<tr>
<td>TBT</td>
<td>386</td>
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<tr>
<td>SPS</td>
<td>389</td>
<td>European Communities - Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States</td>
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<td>SPS</td>
<td>391</td>
<td>Korea - Measures Affecting the Importation of Bovine Meat and Meat Products from Canada</td>
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<td>DS No.</td>
<td>Dispute Title</td>
<td>Times Raised</td>
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<td>United States - Certain Measures Affecting Imports of Poultry from China</td>
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<td>TBT</td>
<td>400</td>
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<td>6</td>
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<td>TBT</td>
<td>406</td>
<td>United States - Measures Affecting the Production and Sale of Clove Cigarettes</td>
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<td>SPS</td>
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<td>India - Measures Concerning the Importation of Certain Agricultural Products</td>
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<td>Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</td>
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<td>SPS</td>
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<td>United States - Measures Affecting the Importation of Fresh Lemons</td>
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<tr>
<td>TBT</td>
<td>448</td>
<td></td>
<td>1</td>
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<tr>
<td>SPS</td>
<td>459</td>
<td>European Union and Certain Member States - Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry</td>
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<td>475</td>
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<tr>
<td>SPS</td>
<td>495</td>
<td>Korea - Import Bans, and Testing and Certification Requirements for Radionuclides</td>
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<td>TBT</td>
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<td>Russia - Measures Affecting the Importation of Railway Equipment and Parts Thereof</td>
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<td>TBT</td>
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<td>SPS</td>
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<td>Costa Rica - Measures Concerning the Importation of Fresh Avocados from Mexico</td>
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<td>TBT &amp; SPS</td>
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<td>United States - Certain Measures Concerning Pangasius Seafood Products from Viet Nam</td>
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<td>Committee Track Disputes</td>
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<td>Authority for panel lapsed</td>
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<td>Implementation notified by respondent</td>
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<td>Settled or terminated</td>
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APPENDIX B

SELECT INTERVIEW QUESTIONS

In conducting interviews with delegates, I asked a number of general questions, in addition to questions surrounding a particular specific trade concern that had been raised by the delegation interviewed. The ten questions detailed below were asked to all delegations interviewed. These questions were not necessarily asked (or relevant) to discussions with other officials and former litigators, for which I used an unstructured interview format.

1. How do you view the role of the technical barriers (TBT) to trade and sanitary and phytosanitary (SPS) committees at the World Trade Organization (WTO) in relation to the dispute settlement mechanism?
2. Why do you raise specific trade concerns?
3. What’s the process by which you decide whether or not to raise a specific trade concern?
4. Would it be fair to characterize the TBT and SPS committees as a forum for discussing disputes as they develop? Why or why not?
5. Why would a country bother to raise a specific trade concern instead of addressing the problem privately with the other party? Or by requesting consultations (if it is going to become a dispute)?
6. Why do some specific trade concerns get resolved? Why do others linger for so long?
7. What are the challenges to resolving a concern in the committees?
8. Why do some concerns involve more than two countries? Is there a benefit to raising a concern as a coalition?
9. In your opinion, what is the level of detail countries bring to the committees when raising a specific trade concern?
10. In raising a specific trade concern, does it matter what type of language countries use to do so? For instance, is there a difference if countries use very specific language (citing potential agreements that may be in violation), or whether the concern raised is more general?


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