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STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM  
FOR SUSTAINABLE DEVELOPMENT



**How Can We Know (More) About  
the Trade Effects of Regulation?**

Robert Wolfe

September 2015

E15 Task Force on  
Regulatory Systems Coherence

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**Think Piece**

Co-convened with



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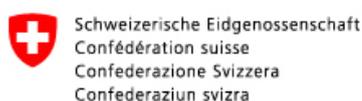
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# ABSTRACT

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Standards and regulations have externalities for other governments, citizens, and economic actors. The vector for those externalities is international trade, which is the reason that trade agreements usually contain obligations both on the substance of domestic regulations and on how standards are developed and implemented. Regulators, trade policy officials, and traders all need to understand the trade effects of regulation in order to make informed regulatory decisions, influence new regulations in other countries, and to make decisions about markets to enter. WTO transparency mechanisms are not designed for this purpose—the effect on trade is a factor triggering the need to notify, but the notification format does not require an indication of the potential effects on trade. Inadequate notifications by WTO Members can be partially mitigated by giving the Secretariat increased scope to act as the “common agent” of Members in assembling information that was or ought to have been notified. WTO committees provide an opportunity for deliberation on specific measures, although learning about the effects of one regulation is not the same as learning about the trade effects of regulations in general. If the system were more complicated, it would not work, but this paper shows how it can be improved.

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# LIST OF ABBREVIATIONS

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AfDB	African Development Bank
CGP	Code of Good Practice
CRTA	Committee on Regional Trade Agreements
EU	European Union
FAO	Food and Agriculture Organization
G-20	Group of Twenty
GATS	General Agreement on Trade in Services
GRP	good regulatory practice
IMS	Information Management System
IOs	international organizations
ISO	International Organization for Standardization
ITC	International Trade Centre
I-TIP	Integrated Trade Intelligence Portal
MFN	most-favored nation
NAMA	Non-Agricultural Market Access
NGOs	non-governmental organizations
NTMs	non-tariff measures
OECD	Organisation for Economic Co-operation and Development
PTAs	preferential trade agreements
RIA	regulatory impact analysis
RTAs	regional trade agreements
SPS	Sanitary and Phytosanitary
STC	specific trade concerns
STRI	Services Trade Restrictiveness Index
TBT	Technical Barriers to Trade
TNT	Transparency in Trade
TPR	Trade Policy Review
TPRB	Trade Policy Review Body
UNCTAD	United Nations Conference on Trade and Development
US	United States
WHO	World Health Organization
WPDR	Working Party on Domestic Regulation
WTO	World Trade Organization

# INTRODUCTION

Standards and regulations have externalities for other governments, citizens, and economic actors. The vector for those externalities is international trade, which is the only reason that trade agreements usually contain obligations both on the substance of domestic regulations and on how standards are developed and implemented. In the Preamble of the World Trade Organization (WTO) Agreement on Technical Barriers to Trade (TBT), one objective is “to ensure that technical regulations and standards ... do not create unnecessary obstacles to international trade.” The Preamble of the Agreement on Sanitary and Phytosanitary Measures (SPS) similarly refers to the objective of minimizing the negative effects on trade, and Article VI: 4 of the General Agreement on Trade in Services (GATS) calls for disciplines to be established that would ensure that domestic regulations do not constitute unnecessary barriers to trade in services. Since the possibility of effects on trade is the justification for the WTO to involve itself in domestic regulation, the purpose of this paper is to investigate how much we know, or can know, about the trade effects of regulation.

Here is the problem—transparency remains under-supplied, but the importance of regulatory matters has been increasing. Regulators, trade policy officials, and traders all need to understand the trade effects of regulation in order to make informed regulatory decisions, influence new regulations in other countries, and to make decisions about markets to enter. WTO transparency mechanisms are not designed for this purpose—transparency under SPS and TBT is set in motion by a possible effect on trade, but the trade effect then becomes incidental. And the system is not working as designed. Analytic difficulties make understanding the ambiguous trade effects of regulations difficult, but we can know more than we do.

After a brief overview of WTO transparency, in Section 2, I take up a series of questions posed by Hoekman and Mavroidis in their overview paper. In Section 3, I consider why the present system is insufficient for understanding the trade effects of regulation. Section 4 asks whether the WTO could generate better data, and Section 5 asks if WTO could do a better job as a forum for deliberation on regulatory matters. If not, I then consider in Section 6 where else such deliberation might happen. The penultimate section considers whether information could be better disseminated, and Section 8 concludes, with a set of recommendations for action.

# THE PROBLEM WITH WTO TRANSPARENCY

The WTO has an elaborate transparency system designed 1) to make information available, 2) to provide a forum for monitoring and surveillance, and 3) to disseminate the results (Wolfe 2013). The overall objective of transparency in the WTO is reducing information asymmetries horizontally, among governments, and vertically, between the state, economic actors, and citizens. The agreements have dozens of requirements for Members to notify each other about their implementation, and about new policies. Members have submitted tens of thousands of notifications to the WTO—25,000 to the TBT Committee alone. While the WTO is primarily thought of as a contract among governments, its rules are also meant to serve traders, as for example, with the obligation to establish inquiry points under the TBT and SPS agreements.

Some WTO notifications are effectively “tombstone” data because no discussion takes place, but some are linked to the possibility of review by a relevant WTO body before or after the measure takes effect. One of the ultimate purposes of transparency is to ensure accountability for commitments, in this case by governments holding each other to account (Wolfe 2015). The most formal monitoring and surveillance mechanism is now known as the “specific trade concerns” (STC) procedure in the SPS and TBT committees (Horn et al. 2013). In TBT, more than 400 such STCs have been discussed in the last 20 years, but only six matters have gone through the dispute settlement system.

Creating opportunities to discuss new measures in advance can reduce the potential for conflict between states as, for example, when the measure is modified to accommodate the interests of partners. Transparency in this sense is educational—when actors receive new information about themselves, become aware of alternatives, or perceive the social acceptability of particular norms, they may adopt new behaviors (Mitchell 2011: 1882, 4). Governments are then assumed to be likely to change their policies because they learn about the benefits of socially acceptable action. This system is designed both to improve policy and to promote compliance with obligations. In this view of the behavioral effects of sunshine, a) governments learn from what other countries do; b) weak policies are exposed; c) which helps everybody make better decisions; and d) if economic actors make trade and investment decisions based on this information, governments may be further encouraged to move in the right direction. Apparently autonomous decisions to change national policy could originate in discussions in Geneva.

That is the theory. Does it work? In general, not as well as it might. When the Secretariat conducted a survey on transparency under the SPS Agreement, they asked if Members think they have enough information on the SPS regulations of their trading partners. Only 19 of 108 respondents said they were dissatisfied, but most of them were developed countries, presumably the largest traders among them (WTO 2015d). Notification in most areas of WTO work is inadequate (Wolfe 2013); and available information on non-tariff measures (NTMs) in general is limited in coverage and of generally low quality (WTO 2012a: 206). Under the GATS, any changes to laws, regulations, or guidelines that significantly affect trade in scheduled sectors should be notified (Art III:3), but this obligation has been widely ignored (Adlung and Soprana 2012: 19), including by rich Members with sophisticated services regimes who ought to have a lot to notify, like the United States (US) and the European Union (EU). We have no way of knowing how much of the universe of regulation is trade-related and hence worthy of notification to the WTO, but clearly less is notified than ought to be. Notification is not intended as a source of data for research, but as a signal to other governments, providing them an opportunity for comment before a measure is implemented. The system provides both “fishbowl transparency,” which is about letting people know what is happening, and the transparency of reasons, which is about helping people understand the policy logic for the measure.<sup>1</sup> The TBT Committee does both, and the small number of dispute settlement cases suggests that the system is working, for governments. But more transparency and international dialogue would be useful in the pre-notification period because notification only comes after all the years of work that go into developing a regulation, a point at which modification is difficult.

Inquiry points do not work as well as they might—firms need to know something is under way to be prompted to ask a question. The STC process is actively used, but only by a relative handful of countries. Not surprisingly, 73% of all SPS STCs raised to date involve questions directed to ten of the Group of Twenty (G-20) countries (WTO 2014b: para 3.26) because their measures have the biggest impact on other traders. (The story is similar in the TBT—see G/TBT/ 36, p. 17.) They also pose the most questions in all committees, in part because they have better mechanisms for seeking the views of stakeholders. The STC system is gradually improving in the Import Licensing Committee, though with little discussion of trade impact. We do not know yet whether Members will use the new Trade Facilitation Committee in this way. The lack of a strong notification requirement and hence of a STC system is a defect of the GATS.

In short, everyone needs more information and they need efficient access to it, but their needs are being met unevenly by the current system. Trade policy information is a public good, especially for traders and for smaller Member states. Like all public goods, this information tends to be underprovided. In the next section, I begin to discuss what can be done.

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## SHOULD THERE BE GREATER EFFORT TO IMPROVE TRANSPARENCY AND KNOWLEDGE OF THE TRADE EFFECTS OF REGULATION?

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Any regulation will have some effect on trade. The question is how we can learn more about those effects, both in general and with respect to specific regulations. The general question confronts the methodological problems of how to assess the effects of any policy. The analytic complexities are daunting (WTO 2012a: Part D). Determining the trade effects of standards is difficult, requiring context-specific analysis (Swann 2010). The new Organisation for Economic Co-operation and Development (OECD) Services Trade Restrictiveness Index (STRI) can be used to estimate the impact of restrictive measures on trade (Nordås and Rouzet 2015), which will make it easier for Members to understand the trade effects of their measures. Creating the STRI was an analytic and definitional challenge—what does discrimination mean as opposed to just a difference in policy?

There is no single place to look for information on country-specific health and safety standards, nor is there any consistent way to make an estimate as to what the impact of such SPS measures is on trade (Josling and Roberts 2011). Regulatory constraints have an important and significant effect on services trade, but a clear identification of trade-restrictive effects has been impossible (Lim and De Meester: 2014a: 2). Many services studies look at the economic impact of different regulatory approaches and measures at the sector level, but they rarely look explicitly at trade effects (Lim and De Meester 2014a: 16). Notification on services may be weak because Members may worry about prejudging the legal interpretation of the term “significantly affect trade in services” (WTO 2013a). It could also be that they remain confused about which measures actually have such a significant effect (WTO 2009). Norway in commenting on its own notifications saw a need to explain why it had thought to notify—even if an obligation is clear, considerable interpretation is needed about whether other Members are affected, and what they might want to know about a new measure (WTO 2012e: para. 9–11).

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1 | These terms come from Cary Coglianese.

Why ask about transparency in this context? If actors potentially affected have enough information, they can make their own assessment. The potential effect on trade is the justification for the TBT and SPS agreements, and it is what sets the notification process in motion. Two factors are meant to motivate notification of regulations, and both are problematic. Under Article 2.9.2 of the TBT Agreement, Members are required to notify a proposed regulation “whenever a relevant *international standard* does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a *significant effect on trade* of other Members” (emphasis added).

First, the fact of an international standard ought not obviate the need for trading partners to know what a country proposes to do, and how. The SPS Committee recommends that Members also notify measures that are based on the relevant international standards (WTO 2008), as does the TBT Committee (WTO 2012f: para. 12). Of the 981 regular SPS notifications (excluding addenda) submitted from October 2013 through September 2014, 514 (around 52 percent of the total) indicated that at least one international standard, guideline, or recommendation was applicable to the notified measure. Of these, around 81 percent indicated that the proposed measure was in conformity with the existing international standard (WTO 2014d: para. 3.40). The presumption is that international standards are non-discriminatory, but the standardizing body may not consider the effects on trade and the implementing country may not use the whole standard, or use it in the least trade-restrictive way. More transparency would help, according to the OECD. If all measures are notified, with an indication of whether an international standard was used, that would allow some evaluation of the impact on trade (Fliess et al. 2010: 9). A case can be made that Members ought to notify all regulations, regardless of whether they are based on an international standard or have a significant effect on trade, as some Members have proposed.

Second, the TBT Committee guidance on when notification is necessary suggests that in assessing the significance of the effect on trade, both import-enhancing and import-reducing, Members should consider

- the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively;
- the potential growth of such imports; and
- difficulties for producers in other Members to comply with the proposed technical regulations. (WTO 2013b: 17)

Similar language is used in Article 5.4 and Annex B of the SPS Agreement, and in the SPS Committee's guidance (WTO 2008: para. 9). In 2014, it seems that 23 percent of regular SPS notifications were listed by Members as “trade facilitating” (see <http://spsims.wto.org>). Whether or not Members actually undertake this analysis, the notification

templates do not require them to specify the trade effects that prompt their notification. The SPS guidelines also suggest that Members indicate who is most likely to be affected by a proposed measure; the notification form allows Members either to select a tick box for “all trading partners” or to provide information on specific regions or countries likely to be affected. An assessment of notifications submitted in a recent year found that 82 percent of regular notifications selected the tick box for “all trading partners” (WTO 2014c: para. 3.15). And often instead of answering the question on the template about which provision a measure is notified under, they say “other,” adding that the notification is for transparency purposes and does not prejudice the applicability of the TBT Agreement (see, for example, G/TBT/N/EU/284). Such a notification is consistent with the committee advice in situations where it is difficult to establish or foresee whether a draft technical regulation may have a “significant effect on trade” (WTO 2012f).

One reason Members are cautious about trade effects is worry about the concept of “necessity.” A non-discriminatory measure (national treatment and most-favored nation [MFN]) that nevertheless affects trade might be protected from challenge in the dispute settlement system because it is necessary for the achievement of a legitimate objective. Necessity tests are found in many WTO agreements, and many chapters of preferential trade agreements (PTAs). The question of their utility has been especially controversial in the work of the GATS Working Party on Domestic Regulation (WPDR), set up to carry forward the work mandated in GATS Article VI: 4. That Article says that technical standards applying to the provider of a service should not constitute “unnecessary barriers to trade” in service. Disciplines to be developed are to ensure that such standards are “not more burdensome than necessary” to ensure the quality of the service. In each case, the objective is legitimate, so the VI: 4 question became defining the level of restriction necessary to achieve the policy purpose, which proved difficult *ex ante*.

An early success was the 1998 agreement on Disciplines on Domestic Regulation in the Accountancy Sector (WTO 1998). In paragraph 2,

Members shall ensure that measures not subject to scheduling under Articles XVI [market access] or XVII [national treatment] of the GATS, relating to licensing requirements and procedures, technical standards and qualification requirements and procedures are not prepared, adopted or applied *with a view to or with the effect of creating unnecessary barriers to trade* in accountancy services. For this purpose, Members shall ensure that such measures are *not more trade-restrictive than necessary* to fulfil a legitimate objective. (Emphasis added)

In reflecting on that success in creating a necessity test, Members saw merit in trying to fulfill the VI:4 mandate by negotiating horizontal disciplines rather than an endless replication of the sectoral approach (Lim and De Meester

2014a: 11). They have learned that a sectoral necessity test is much easier to get than a horizontal necessity test. In the last report on the Doha Round services negotiations, the Chair reported that Members have fundamental differences on whether a normative standard such as a necessity test is needed (WTO 2011g: para. 14). The reason seems to have more to do with “burdensome” than “barriers to trade” in VI: 4 since a burden on a supplier might not affect trade, but it also has to do with the uncertainty caused by the perception of varying interpretations in WTO jurisprudence of the necessity tests found in other agreements (WTO 2011f, 2011c; Lim and De Meester 2014b: 348).

As has been observed in other areas (for example, subsidies), fear of dispute settlement may have a chilling effect on notification of regulations. If unnecessary trade effects are the reason for a dispute, do we learn more about trade effects through this process? Under Article 2.2 of the TBT Agreement, Members are to ensure that regulations are not “more trade-restrictive than necessary to fulfil a legitimate objective.” Requests for consultations in the dispute settlement system and STCs in the committee usually place the emphasis on the second part of that section, on necessity and whether the objectives are legitimate. Both disputes and STCs may or may not arise because of an effect on trade (large countries sometimes wish to have an Appellate Body ruling on the legality of a type of measure, regardless of whether it had an effect on trade), but subsequent panels never rule on whether the measure actually had an effect on trade, not least because panels have adopted a “no effects” standard of review.<sup>2</sup> The most common reason for an STC is to request clarification of a measure, but the second most frequent STC raised in the TBT Committee are concerns relating to the avoidance of unnecessary barriers to trade (WTO 2015c: Chart 26). Similarly in SPS, many STCs concern trade effects and whether the measure is the least trade-restrictive possible, but Members rarely discuss the specifics of how much trade is actually affected. On the other hand, some STCs concern implemented measures that have not been notified, but should have been because of their effect on trade.

In any event, the dispute settlement system is poorly adapted for this problem. A panel can only assess whether a specific measure restricts trade in a way that is contrary to a Member’s obligations, but that only applies to the one measure as it affects the trade of the complaining party. It does not address broader issues about the effects of a measure, or a set of measures; and this route is most likely to be used in practice to adjudicate matters raised by large firms, especially in better-off countries (Bown 2009). The STC process has the same weakness as the dispute settlement system—it can only deal with measures covered by the agreements. Somebody has to notice the issue and draw it to the attention of the government, who must then raise it in a committee.

In sum, greater efforts are needed to improve transparency about the trade effects of regulations. The next section

suggests an enhanced role for the Secretariat, and the following one discusses what leverage the WTO has on issues not covered by its agreements.

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## CAN THE WTO SECRETARIAT HELP TO FILL THE HOLES?

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How can we generate more and better information and analysis, given the limits to notification by governments? Can the WTO act as the “common agent” of participants in the trading system?<sup>3</sup>

Countries that lack a large diplomatic network of officials gathering commercial information abroad profit considerably from transparency. Similarly, smaller traders lack in-house trade intelligence capacity, and cannot afford to procure it from big multinational law firms. The US can do it for itself—there is extensive coverage of SPS and TBT measures around the world that affect US trade in the annual trade estimates report (United States 2015). The data collected by government agencies and US embassies is supplemented with information provided in response to a notice published in the Federal Register, and by members of the private sector trade advisory committees. Nobody else has such a network. The information may well be useful to other governments and foreign firms, yet other information that might be useful to them, but not useful to the US, may not be collected. The WTO could help, but only with an expanded role for the Secretariat as a disinterested party to acquire and disseminate information. The WTO has multiple principals—161 Member governments, but also citizens, and hundreds of millions of traders. The Secretariat has some capacity to act as the “common agent” of those principals; this role should be enhanced, and the place to do that is the Trade Policy Review Body (TPRB).

The central objective of the TPRB is “to contribute to ... the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members.” The Secretariat generates three sorts of reports to the TPRB— (i) the periodic Trade Policy Review (TPR) of each Member (WTO 2011a: paras. 178 ff); (ii) the annual review of the state of the trading system; and (iii) the monitoring reports on

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2 | Petros C. Mavroidis, private communication.

3 | This section draws heavily on Mavroidis and Wolfe (2015).

measures taken in response to the financial crisis. In these reports issued on the authority of the Director-General, the Secretariat sometimes warns or expresses concerns on the basis of its analysis, but never comments on Members' rights and obligations under WTO agreements. Discussion in the TPRB therefore does not imply either that a measure is or is not actionable in the dispute settlement system. The Secretariat can be critical in its reports—in most trade policy reviews of individual countries it was noted that the SPS and TBT regimes remained overly restrictive or lacked transparency (WTO 2014d: para. 3.151). Written questions from other countries frequently ask about the TBT and SPS aspects of the Secretariat report (WTO 2011b). The TPR report on China, for example, can be a good source of information on food safety regulations (Snyder 2014).

What needs to be done? First, the inadequate notifications by WTO Members and the limited scope of what must be notified can be partially mitigated by giving the Secretariat increased scope and resources to assemble information. The core of each country TPR report is based on official notifications and a questionnaire to the Member under review. The questionnaire could ask the Member to provide more information on its regulations. For example, the agreements do not require Members to notify when TBT and SPS measures enter into force, but knowing the ensemble of a country's regulatory framework is essential for assessing its overall effect on trade; such information is also useful for economic actors. The Secretariat could include a request for such information in its questionnaire to Members. Each report also builds on a far wider range of information. The Secretariat collects data from official sources, and non-official sources, including other international organizations, media reports, and non-governmental organizations (NGOs). To ensure accuracy, the Secretariat seeks to verify data that comes from non-official sources when discussing the draft of its report with Members (WTO 2011d: para. 180). More is possible, as demonstrated with efforts to improve the Integrated Data Base by assigning an active role to the Secretariat to collect data (WTO 2014d: para. 4.28).

Second, could the TPR look systematically at regulatory process issues? Section 2 of the TPR is on the Member's institutional framework. The Secretariat questionnaire could ask if the country follows TBT and SPS guidelines, including regulatory impact analyses (RIAs) for new regulations, and if trade effects are considered.

Third, as the common agent, the Secretariat needs to pay special attention to collecting ongoing information about the operation of regional trade agreements (RTAs) or PTAs. The WTO is not the only game in town, as more than 500 regional trade schemes have been established and some mega-regional schemes are in the works. We know little, if anything, about the workings of those schemes till after their review by the Committee on Regional Trade Agreements (CRTA) has been completed. Yet these agreements are full of TBT+ and SPS+ disciplines, and often include domestic services regulations, which at least potentially affect each

and every WTO Member and trader. A bridge must be built to ensure a steady flow of information about the operation of PTAs. Such an exercise of transparency and dissemination matters for PTA participants themselves as well, because most such agreements have weak institutional structures, no strong notification obligations (which if actually used could be a huge burden for regulators), and no Secretariat to process notifications in any case.

Fourth, in addition to these efforts to improve knowledge of specific measures, the TPRM could be used to generate more information about the trade effects of regulation more generally, given that its mandate includes contributing to the greater understanding of the trade policies and practices of Members. The annual reports on the trading system should allow for systematic analysis—for example, it pulls together questions about TBT and SPS measures raised both in those committees and in other WTO bodies (WTO 2014d: para. 3.54ff). A forthcoming report will look at the impact of local content requirements. The CRTA is unlikely to have a horizontal discussion of regulatory cooperation in PTAs, but that could be a focus for the annual monitoring report. But many Members are slow to respond to the Director-General's requests for information and/or verification (WTO 2014d: para. 1.4). In the TPRB discussion of the 2014 annual monitoring report, the US observed that it essentially lists the number of SPS and TBT notifications made by Members, but does not assess the impact of such measures on trade, which would be an important area for further work. The Secretariat responded that more analysis needs more information, which requires efforts by the Members (WTO 2015b: 100, 95). If the Secretariat as the "common agent" is able to improve the information available, it might create an opportunity for better STCs from a wider group of countries in the committees enhancing the WTO as a forum for deliberation on the trade effects of regulation.

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# CAN THE WTO BE A FORUM WHERE DELIBERATION OCCURS ON REGULATORY MATTERS IN AREAS NOT SUBJECT TO MULTILATERAL DISCIPLINES?

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The WTO can consider issues not now subject to multilateral disciplines in at least four ways—new negotiations; conceptual discussions in committees; efforts to create better understanding of private standards; and so-called “thematic sessions.”

First, the Doha Round negotiating group on Non-Agricultural Market Access (NAMA) devoted a great deal of effort to regulatory matters (WTO 2011e), including a proposal for a so-called “horizontal mechanism” that would sit between regular procedures in committees and the dispute settlement system, using a facilitator to help Members reach a positive outcome when conflict arises (WTO 2011e; Fraser 2012). While many Members supported the proposal (especially the EU), among the remaining worries of opponents (including Japan and the US) is whether it would undermine existing provisions in committees for the discussion of STCs (WTO 2012d). Some Members wanted more on transparency, including requiring notification of all new measures and an obligation to notify all implemented measures. The proposed improvements to transparency in the TBT remain on hold, in part because of worries about how to use information from non-governmental stakeholders. The WPDR has not gone as far as requiring improved notification or creating a database for notifications, and a proposal simply to publish all domestic regulation (WTO 2011b: para. 13) created controversy over what to do with comments prior to adoption of a measure.

Second, prior to formal negotiations, Members of the WTO discuss new issues in the committees, often based on Secretariat reports on such things such as technical standards in services (WTO 2012c). A Secretariat report for WPDR analyzed regulatory issues that may arise in individual sectors and modes of supply, but avoided discussion of their trade impact. The Secretariat recommended, however, that Members should consider whether the regulatory issues

reviewed in the report “would have an impact on trade in services and if so, to what extent any adverse effects might be addressed through disciplines to be negotiated under Article VI:4 and/or should other potentially relevant avenues such as Article XVIII additional commitments be pursued” (WTO 2012b). It remains a good suggestion.

Third, the SPS Committee has had extensive but inconclusive discussions of the trade effects of private standards (Mavroidis and Wolfe 2014). The TBT Committee has frequently held “thematic sessions” to discuss new issues. As part of the Seventh Triennial Review of the agreement, Switzerland proposed that the committee continue holding thematic discussions on topical areas allowing Members to reflect on ways to implement new regulatory objectives while avoiding unnecessary barriers to trade (WTO 2015a). Leaving aside the specifics of the Swiss proposal, the idea of making more use of thematic sessions is a good one, especially if it allows Members to talk about emerging regulatory issues before the problem begins to crystallize in new regulations.

Fourth, deliberation also matters on regulatory process. The ultimate purpose of TBT and SPS rules is not to interfere in domestic regulation, but to limit its effects on trade. Rather than even greater efforts to complete the WTO contract, it can be useful to discuss guidelines on good regulatory process, which if followed will limit trade restrictions. Wijkström in his E15 paper calls this the “normative” work of the TBT Committee. The Code of Good Practice for the Preparation, Adoption and Application of Standards (CGP) is Annex 3 of the TBT Agreement. Members have discussed various additional aspects of good practice since the beginning of the WTO.<sup>4</sup> In the TBT Sixth Triennial Review they agreed to identify a non-exhaustive list of voluntary mechanisms and related principles of good regulatory practice (GRP) to guide Members in the efficient and effective implementation of the TBT Agreement across the regulatory lifecycle (WTO 2012f). GATS disciplines on domestic regulation could be said to share similar objectives to those espoused by good regulatory practices but how to transform such principles into disciplines on domestic regulation has been far from obvious (Lim and De Meester 2014a: 9, 10).

One virtue of GRP is that it encourages countries to use a common, predictable framework for regulatory interventions, which can lead to them speaking the same “regulatory language” (WTO 2012a: 177). Among other things, the GRP guidelines would encourage countries to use RIA. The tool is widely used by OECD governments, less so in developing countries, although few countries appear to require consideration of the impact on international trade in the conduct of impact assessment. The TBT Committee therefore encourages Members to provide a link in the notification to any such assessment that may have been conducted. Encouraging all Members to consider trade effects in their

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4 | For a list of all the decisions adopted, see WTO (2013b).

RIAs would be worthwhile (Shortall 2007).<sup>5</sup> Having done so, the RIA template might ask the agency whether they have considered the need for a notification to the WTO.

After many drafts, adoption of the GRP proposal (WTO 2014a) has been held up for a number of meetings of the TBT Committee. As of February 2015, the chair reported (JOB/TBT/125) that the remaining stumbling block concerned the possible wording of a legal disclaimer. The problem was created by the Appellate Body ruling in *Tuna II* where it held that the 2000 TBT decision on the Six Principles could be counted as a “subsequent agreement” under the Vienna Convention on the Law of Treaties (Wijkström and McDaniels 2013: 1029). Whether or not this reading is correct (some might argue that under Article IX of the WTO Agreement, only the Ministerial Conference or the General Council can adopt new interpretations of the covered agreements), it is the reason why some Members may resist further decisions on domestic practices in the committee, outside negotiations on revisions to the treaty.

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## WHAT OTHER FORA COULD BE CONSIDERED FOR IMPROVING TRANSPARENCY AND DELIBERATION OF REGULATORY ISSUES?

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If the problem of discussing new aspects of regulatory cooperation at the WTO is fear of dispute settlement, are less formal discussions elsewhere possible? (For a discussion along similar lines, see Shaffer et al. 2015) I see three dimensions of thinking about other fora. First, consider international standardizing bodies. The development of the standards on which many regulations are based takes place in these bodies, which range from international organizations (the Codex Alimentarius Commission, formally recognized in SPS Article 4, is a joint venture of the Food and Agriculture Organization [FAO] and the World Health Organization [WHO]) to obscure private bodies. Thinking about the trade effects of their standards is not part of their mandate, nor are they encouraged to do so by the CGP or the Six Principles. But it could be done.

Second, consider places that encourage international regulatory cooperation, but not the substance of regulations, as discussed in other papers in this E15 Task Force. Many international organizations (IOs) develop GRP principles, and some IOs monitor regulatory practice as the basis for deliberation or peer review. For example, an OECD review of China’s regulatory practices found that efforts to reduce unnecessary trade restrictiveness in domestic regulation have been advancing and recommended the adoption of RIAs that include market openness considerations (OECD 2009: 168). We know surprisingly little about how international regulatory cooperation works in practice within IOs, including who participates, and how IOs interact with private or hybrid transnational regulatory organizations (OECD 2014: 35). Many PTAs mandate discussion of regulatory issues. Can they advance analysis of the trade effects of regulatory differences? Given their weak institutional structures, and lack of provisions going beyond GATS Article VI:4 (Latrille and Lee 2012), I am skeptical.

Third, monitoring is not the same as developing a systematic database of regulations and standards in use, and doing analysis of their trade effects, which leads to a consideration of places that try to build a database of NTMs. The OECD STRI is a promising tool. The Transparency in Trade initiative (TNT) is a joint venture launched by the African Development Bank (AfDB), the International Trade Centre (ITC), the United Nations Conference on Trade and Development (UNCTAD), and the World Bank, to cooperate in the trade data collection effort and to combine forces in providing users with free tools that can be used to access and analyze trade policy and market information. The initiative does not seem to have created a single portal, but it does provide access to a set of portals. It is a useful framework for avoiding gaps in the coverage of trade data, including NTMs. TNT offers many opportunities for policy analysis (Malouche et al. 2013), although expanding to complete coverage of regulation might be difficult.

The WTO Secretariat has cooperated with other agencies to revamp the existing international classification to facilitate the integration of all available sources of non-tariff measure information, which facilitates the TNT work (WTO 2012a: 207–8). It could be the basis for an integrated repository of data on all NTMs. The WTO in its role as the common agent should actively coordinate this collection and lead the analysis of trade effects.

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5 For one example, see the Canadian RIA rules in the Cabinet Directive on Regulatory Management (<http://www.tbs-sct.gc.ca/rtrap-parfa/cdrm-dcgr/cdrm-dcgrtb-eng.asp>), which requires regulators to consider the effects on trade and investment. The involvement of the trade policy community in the domestic regulatory process is essentially ad hoc. Regulators are therefore left to work out how to craft a regulation in trade friendly terms (OECD 2002). For another example, see the EU RIA guidelines where verifying regulatory fitness includes considering “Any potential negative impacts on international trade, developing countries etc.” See [http://ec.europa.eu/smart-regulation/guidelines/ug\\_chap3\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm).

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# CAN KNOWLEDGE ABOUT THE TRADE EFFECTS OF REGULATION BE BETTER DISSEMINATED?

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The logic of the transparency discussion in Section 2 is that information changes behavior. The question here is who needs that information about the trade effects of regulation, and how can they get it? This information problem is an example of vertical asymmetry, where the solution is not providing more information for governments, but for economic actors, analysts, and citizens.

WTO Members are committed to making information available in Geneva, but that information is largely a by-product of information otherwise generated by the WTO transparency mechanisms that serve Member governments. The exception is the *World Trade Report*, an annual book-length analysis of important issues in the trading system. Two recent reports looked directly at regulatory issues (WTO 2005, 2012a). These reports aim to provide a periodic snapshot of conditions in the trading system. Would it be possible to go further in providing regular analysis of the effects of regulation on trade?

Members whose capitals do not work in one of the official WTO languages, especially Asian Members (even Japan), face particular difficulties—they all have to translate WTO documents so that officials in capitals can understand them, and then translate them back. This difficulty can be more acute for the private sector in developing countries. In the TBT Committee, more and more Members submit notifications in an official WTO language with a hyperlink to the regulation itself in the original language. Avoiding the cost of translation in this way can be a huge saving, but having the summary alone might disadvantage Members who cannot read the texts in the original language.

The Secretariat continues to improve the collection, management, and dissemination of data by strengthening existing databases, by building new ones (for example, for policies affecting trade in services), and by developing a comprehensive “umbrella database” that brings all data together in one place, known as the Integrated Trade Intelligence Portal (I-TIP) with separate sections for goods, and for services (a collaboration with the World Bank). The separate TBT and SPS Information Management Systems (TBT-IMS and SPS-IMS) have a more detailed front end for searching notifications and STCs. The databases are a wonderful resource, but their use requires considerable

expertise, which is hardly surprising. Even experts in one domain at the WTO, such as trade in services, would have trouble following debates on “regionalization” of SPS measures.

The information flow is largely one way—very little consultation takes place in Geneva. With the exception of *amicus curiae* briefs in the dispute settlement system, non-government representatives have no ability to speak directly in any WTO meeting. In many environmental agreements, in contrast to WTO, NGOs are directly engaged in the work of organizations, notably the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), where NGOs like TRAFFIC help gather additional information the organization’s transparency mechanisms may miss, while providing on the ground support and resources within states (Wolfe and Baddeley 2012).

We know that a handful of Members make the most active use of STCs. How do those governments know to ask a question? Often the information comes from firms, who know more than governments about the trade effects of a measure. Countries with sophisticated systems for alerting their firms or industry associations to new notifications receive more comments from industry and, in turn, are able to raise more STCs (Karttunen 2015). In the TBT Seventh Triennial Review, Canada proposed that the WTO create an alert system to systematically send out new notifications using filters set by the users in all Member countries (WTO 2015e). Some national governments, notably the US, do this now for their stakeholders using an XML feed provided by the Secretariat, but the proposed system would let any trader benefit from such data, regardless of the resources or capabilities of its own government. Indeed some industry associations assign staff to writing STCs for governments who lack the capacity to do it for themselves. Wijkström reports in his E15 paper based on work by Marianna Karttunen that over the two most recent years (2013–2014), in 57 of the 89 new trade concerns brought to the TBT Committee, delegations explicitly mention the private sector in connection with raising the matter.

The Canadian proposal was well received, notably because it would be particularly beneficial to small developing and least developed countries that do not have resources to construct their own national systems (JOB/TBT/125). Such a system would allow more economic actors to be aware of proposed regulations in real time. They would then be in a position to alert their governments to potential concerns, increasing the dialogue among industry, regulators, and trade policy officials. Wider availability of notifications in real time might therefore lead to more and better STCs from a wider range of Members than the relative handful of current active users. This role for the private sector underscores the importance of the requirement for a comment period after a notification and before a new measure is in force because it takes time to transmit the information to firms and to receive their comments.

# CONCLUSION

How can we know (more) about the trade effects of regulation? It begins with better data. SPS and TBT notifications serve a particular purpose under the agreements, notably allowing trading partners and economic actors an opportunity to comment on a proposed measure before it comes into effect. The effect on trade is a factor triggering the need to notify, but the notification format does not require an indication of the potential effects on trade. While those notifications are inadequate, if the system were more complicated, it would not work. Mavroidis and Wolfe (2015) suggest that the inadequate notifications by WTO Members can be partially mitigated by giving the Secretariat increased scope, and resources, to act as the “common agent” of Members in assembling information that was or ought to have been notified, adding data from all the other international organizations and NGOs to create a better picture of standards and regulations in a sector or a market, with an opportunity for the Member concerned to verify the information.

The WTO can structure the normative framework within which standards bodies operate—what some authors call orchestration (Abbott and Snidal 2010) and others call transnational legal ordering (Shaffer 2015). And it works—the International Organization for Standardization (ISO) already references the Six Principles explicitly in its work, for example, and does it well (Delimatsis 2014a). The TBT and SPS committees are now encouraging notification even when an international standard is used; this should be strengthened. Economic actors are helped by knowing more about which countries use a particular international standard so that they can better judge the potential benefits of incurring the switching costs of adapting to a new standard. And since standards bodies will not have considered the trade effects of their new rules, deliberation in the trade setting of the WTO can be helpful, especially if it takes place before a measure enters into force.

The effect on trade is first an ex ante analytic judgment, trying to work through the circumstances under which standards or regulations may serve to increase or decrease trade. Understanding the effects of all NTBs on trade is analytically complex, and beset by gaps in data. Use of harmonized standards may increase trade, for example, but some regulations may restrict trade as an incidental effect of a measure essential for the protection of human health (Cadot and Malouche 2012). The conclusion of an OECD study was that without better data, analysts cannot test the assumption that using international standards supports trade (Fliess et al. 2010: 36).

The effect on trade could also be an ex post empirical evaluation of the actual effects of measures. Such analysis is also not straightforward. It could be based on analysis by the country maintaining the measure, or countries affected by the measure, or by firms who think they have been affected—for many firms it is only when the measure is in force that they can see the effects on their trade. It could also be based on the work of international organizations able to engage in systematic collection of data on NTBs. But as with ex ante analysis, one still faces methodological challenges in deciding what to do with the data.

WTO committees must be concerned with present and future obligations. The participants in other bodies collect data without being limited to WTO obligations, and they can more easily collect information for analytic purposes, but these bodies lack the WTO's ability to facilitate deliberation because of its broad membership (unlike the OECD) and committee structure (unlike the World Bank). The STC process is an opportunity for deliberation on specific measures, but it proves poorly suited to consider the effects on trade of a regulation. Those effects are ambiguous, which is why it is important to find ways for regulators to learn about how to achieve their policy objectives in the least trade-restrictive way possible, ex ante, rather than trying to adjudicate breaches, ex post.

Learning about the trade effects of regulations in general is not the same as learning about the effects of a specific regulation. Requiring the non-trade government officials who prepare most notifications to conduct such an analysis might not improve the quality of notifications, but could easily delay notification, or even discourage it. But more information is needed, and the WTO can help.

Here is a brief list of possibilities that have been discussed in this paper.

1. Encourage better notification, even when a measure is based on an international standard.
2. Give the Secretariat acting as the common agent resources to fill in gaps in notification, including about implemented measures; the TPR questionnaire to Members could include a request for such information, along with questions about regulatory process.
3. Create an alert system for new notifications.
4. Develop more thematic workshops in committees.
5. Encourage standards bodies to consider trade effects in their work.
6. Encourage Members to ensure that RIAs make more explicit reference to trade effects, and then include a link to that analysis in their subsequent notification.
7. Use the annual TPR monitoring report for analysis of the regulatory activities of PTAs.
8. Conclude GATS Article VI:4 negotiations, including improved notification, and analysis of impact of regulatory issues on trade.
9. Include regular analysis of the effects of regulation on trade in the *World Trade Report*.

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