



The **E15** Initiative

STRENGTHENING THE GLOBAL TRADE AND INVESTMENT  
SYSTEM FOR SUSTAINABLE DEVELOPMENT



**The Third Pillar: Behind the Scenes,  
WTO Committee Work Delivers**

Erik N. Wijkström

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E15 Task Force on  
Regulatory Systems Coherence

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7 Chemin de Balexert, 1219 Geneva, Switzerland  
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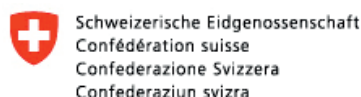
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# ABSTRACT

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Discussions about the World Trade Organization (WTO) tend to revolve around negotiations or dispute settlement. These are, without a doubt, two central pillars of WTO work. This think-piece considers a less prominent one, one that relates to the regular work of established WTO Committees. It is argued that the work of WTO Committee on Technical Barriers to Trade (the "TBT Committee") is an example of "third pillar work" that facilitates trade in the area of standards and regulations, an area of growing importance in international trade. It does this through a focus on conflict avoidance and the gradual evolution of new consensual understandings that help Members better implement the Agreement. The paper suggests that this regular work in the WTO is more effective and efficient than many observers realize and describes the case for this by looking at the Committee's track record both in terms of specific measures discussed and normative guidance developed. It suggests how this work could be further promoted. For example, it could be fruitful to encourage dialogue where regulation is nascent, before drafting commences; also, draft regulatory texts could be better tracked after notification has been made to the WTO; and, standards, although voluntary, need to be kept from flying under the radar because they, too, affect trade.

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# LIST OF ABBREVIATIONS

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EU	European Union
GRP	Good Regulatory Practices
IEC	International Electrotechnical Commission
IEEE	Institute of Electrical and Electronics Engineers
ISO	International Organization for Standardization
SPS	Sanitary and Phytosanitary
STCs	specific trade concerns
TBT	Technical Barriers to Trade
US	United States
WTO	World Trade Organization

# LIST OF FIGURES

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Figure 1: Specific Trade Concerns in TBT Committee (1995–2014)

# GOVERNMENTS REGULATE —MANY OTHERS DEVELOP STANDARDS

It is useful to begin by considering what is meant by regulation and standards, to make the terms a bit more tangible and to distinguish between the two.

Regulation affects trade as a matter of course. If a government is concerned about avoiding the presence of a chemical in a toy (TBT) or a toxin in food (SPS), a measure may be enacted to restrict the circulation of a product carrying the hazard in excess of a certain level. This is normal. So the mere existence of a law, decree or act (or whatever the designation is) that may result in an obstacle to trade cannot automatically be assumed to be unnecessary. Even though global trade may be reduced, the measure may be welfare-enhancing for society as a whole.

Moreover, a regulation may have different impacts in different countries. A regulation that stipulates that a pre-packaged poultry product cannot be labelled “fresh” if it has been frozen may affect overseas producers more than domestic producers—and this does not necessarily fall foul of trade rules. Countries produce different things, they are geographically close or far; so there may be many factors unrelated to origin (without any protectionist intent) that distort the cost of complying with a particular regulation across the globe. The cost of doing business in an inter-connected world will as a matter of fact be different from country to country. In brief, regulation will normally affect trade and impacts may be disparate for legitimate reasons.

In an ideal world governments regulate for specific reasons—safety, health, environmental protection, or national security. It may not be our place here—in this group—to question the appropriateness of government intervention. It is probably more useful to assume legitimate rationale for the purposes of this exercise and to focus, instead, on those divergences between regulations that have the greatest potential to disrupt trade unnecessarily.

Standards are a different matter. The activity of standard-setting needs to be kept separate from the activity of regulating. The actors are (in most cases) different. Regulating is, at least through the eyes and terminology of the World Trade Organization (WTO), an exercise of government authority. This does not necessarily hold true for standards developers. At the risk of oversimplifying, a standard is a set of instructions on how to achieve a certain objective, a recipe for doing something again and again in a defined sequence of steps so as to achieve the

same result every time. It is typically specialized in nature. The objective that is sought may, for example, be a certain level of public health protection (ascertaining a threshold limit for a toxin) or ensuring that a product has a certain intangible characteristic (sustainable production), or that it “fits” seamlessly with another piece of equipment (inter-operability). From a functional perspective it does not matter who develops the standard, what is of value is the “recipe.” Indeed many standards organizations sell their standards; they have value because they incorporate know-how, scientific and technical. A standard can be set by a large number of entities, governmental (for example, Codex) and non-governmental (for example, International Organization for Standardization [ISO], International Electrotechnical Commission [IEC], ASTM, Institute of Electrical and Electronics Engineers [IEEE]) in nature, and be national, regional, or international in scope.

There is, of course, a link between standards and regulations. And this is where things start getting complicated. While a standard-setter is not necessarily a regulator, a standard can be used in support of regulation. What the WTO disciplines do is encourage the use of relevant international standards as a basis for regulation. This can be seen as one tool that promotes regulatory coherence—a practice at the national level.

The title of the E15 Group is Regulatory Systems Coherence. This would seem to imply a focus on regulation, that is, state action, and finding approaches to encourage coherence among governments. In other words, the focus here is neither finding ways to promote better regulation at the national level (good regulatory practices) nor better development of standards in general. I see the task before the E15 as narrower—it is one of finding ways and means of promoting efforts at dialogue between governments. This being said, having your house in order (a good institutional set-up) behind borders also helps when cooperating across them. In this vein, the WTO has identified “regulatory cooperation between Members” as one component of national Good Regulatory Practices (GRP). The rest of this paper focuses on how the WTO promotes regulatory cooperation between governments.

- 1 | TBT and SPS refer to the WTO Agreement on Technical Barriers to Trade and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.
- 2 | The “right” to regulate is stipulated in the preamble of the TBT Agreement which recognizes that “no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate” (6th recital).
- 3 | The two agreements do so differently but for the purposes of this paper this is not important.

# REGULATORY COOPERATION IS THE THIRD PILLAR

Cooperation between countries on matters of regulation and standards comes in many guises. It may be formal or informal in nature; bilateral, regional, or multilateral; sector-specific or horizontal. Levels of ambition may vary. Between two major trading partners with a long history of trade, similar institutional structures, and strong economic ties, achieving a high level of convergence—even harmonization of certain regulations—may be the objective. In contrast, economies with more limited trade flows and perhaps different levels of development (and possibly no initial trade ties at all), may simply seek dialogue and confidence building—perhaps through work on specific products aimed at facilitating recognition of conformity assessment results towards a commonly accepted level of protection. Timing is also a factor. The later in the day, the more likely that regulation becomes entrenched in separate tracks in different countries and the more difficult it is to take on board the concerns of trading partners.

The WTO Technical Barriers to Trade (TBT) Committee work is essentially a catalyst for dialogue at the multilateral level.<sup>4</sup> It is a technical, expert-driven setting with two tracks—the Committee is a forum for (i) the development of guidance (soft law, informal, best-endeavour in nature) and (ii) peer review of trade measures. The former is referred to as “normative work” and the latter as “specific work.” But first a word on the setting.

## THE SETTING

TBT Committee work has the following four characteristics, in brief (and in no particular order).

- a. **Specialized:** Work is technical, substantive and expert-driven—as opposed to generic, procedural, and political. Delegations are mainly capital-based experts. Meetings are chaired by second-level officials from the local missions in Geneva, normally not ambassadors. Statements are often technical and detailed (the summary reports are lengthy, 60-plus pages).
- b. **Pragmatic:** At the Committee level, delegations engage with their functional counterparts in a hands-on manner. Discussions are pragmatic, and business oriented. A heated exchange might arise as to whether lawnmowers need “skirts” (standards between the United States [US]

and the European Union [EU] differ); what the load level of lithium batteries transported by air should be (and the relevance of existing international standards in this regard); and the appropriateness of human odour tests for children’s shoes—to name a few. Not the stuff of ambassadors. While differences can be sharp, there is that underlying constructive engagement borne by a debate among peers.<sup>5</sup>

- c. **Multilateral:** Committee meetings are open to all Members. In practice this means that work on a text, for example, is open to input and comment from everyone. Drafts, comments, textual suggestions are circulated to the membership as a whole. Informal consultations are held by the Chairman or open to interested Members and reported to formal meetings. For example, work is now taking place on GRP; this has involved 33 separate written submissions from 16 Members and seven successive textual revisions. The latest revision before the membership, a “Chairman’s text,” contains only two sets of square brackets.
- d. **Private sector engagement:** Trade representatives need specialized knowledge to be credible and effective when raising or responding to trade concerns in the TBT Committee. This type of knowledge is not endemic to trade ministries. It has to come from the firms (small or big) and/or producers (whether agricultural or industrial) whose livelihood is at stake. Private sector involvement is therefore central in the run-up to Committee meetings (at “home”)—without such engagement Committee proceedings would be stripped of meaning. For example, at which point should a certain level of caffeine, expressed as mg/l, in energy drinks translate into a warning label or advisory statement for children and pregnant women?<sup>6</sup> Or, and staying with drinks, is there a maximum alcohol limit above which a particular drink cannot be named as “spirit”? (Whiskey was the issue).<sup>7</sup> These are but two of 461 distinct issues raised since 1995.

4 | For simplicity and convenience, I focus mainly on the TBT Committee. Much of what is said here may be equally applicable to the work of the SPS Committee.

5 | For more details, search the WTO TBT information management system (TBT IMS) for *France – Unique Requirements for Ride on Lawn Mowers (ID223)*; *United States – Hazardous Materials: Transportation of Lithium Batteries (ID262)*; and *China – National Standard of the P.R.C., Safety Technical Specifications for Children’s Footwear (IMS ID444)*.

6 | For more details, see the discussion of Kingdom of Saudi Arabia – Decree of the Saudi Arabian Ministerial Council on the sale and marketing of energy drinks of 4 March 2014 (notified in G/TBT/N/SAU/669), recorded in G/TBT/M/64/Rev. 1 (concerns raised by Switzerland and the EU).

7 | For more details, see the discussion of Mexico – Draft Mexican Official Standard PROY NOM 142 SSA1/SCFI 2013 on Alcoholic beverages, notified in G/TBT/N/MEX/254 and recorded in G/TBT/M/64/Rev. 1 (concerns raised inter alia by US and EU).

## NORMATIVE WORK

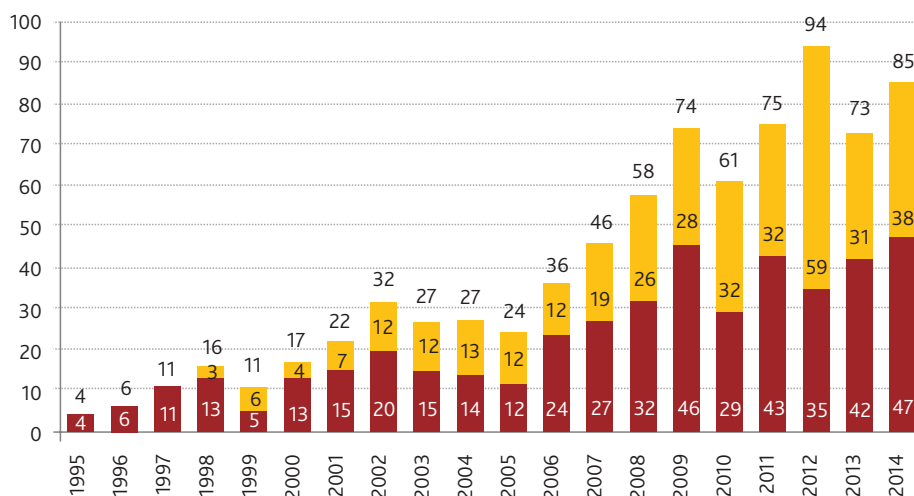
Over the last 20 years, both the TBT and the Committee on Sanitary and Phytosanitary Measures (SPS) Committees have developed, through the gradual, step-by-step Committee setting described above, a wide range of recommendations, decisions, and principles that are essentially aimed at facilitating Members' implementation of the TBT Agreement. This guidance can be specific or general. For example, on specifics, the SPS and TBT Committees have agreed that the time for comments on draft regulations should be at least 60 days.<sup>8</sup> An example of more general guidance is the 2000 TBT Committee on principles for international standards,<sup>9</sup> or, more recently, in the SPS context, the development of a mechanism on mediating food safety, and animal-plant health friction in trade.<sup>10</sup> These texts are agreed by consensus by all WTO Members and form part of the WTO *acquis* on non-tariff measures (NTMs).

It is important to stress that these are not agreed amendments or changes to the treaty texts, they are the additional building blocks that, taken together, form "best practices." They serve no other purpose than that of facilitating implementation. To date, much of the focus of this normative work—in both the SPS and TBT areas—has been on refining procedures in the area of transparency. The nature of this work is iterative. In other words, while the TBT or SPS Agreements may be "carved in stone"<sup>12</sup> and are not (currently) being renegotiated, the foundation is being built on.<sup>13</sup>

The fact that this is not treaty negotiation (the first pillar of WTO work) is not necessarily a drawback. The contrary

may be true. For, in one sense, by delving into the nitty-gritty of implementation, delegations have turned the Committee into a laboratory for multilateral regulatory cooperation that is quite effectively (up to now) generating material that is both relevant and of practical use. This has lent dynamism to the treaty texts, which this year have come out of their teens. Even work that has not advanced to final stages (where there is no agreement or consensus but where texts are advanced) remains, potentially, in incubation for later use—or for use in other contexts such as regional agreements.<sup>14</sup>

- 8 | For TBT, G/TBT/1/Rev. 12, p. 23 and, for SPS, see publication on the Major Decisions and Recommendations, p.13.
- 9 | See the 200 TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the TBT Agreement contained in Annex 2 of G/TBT/1/Rev. 12.
- 10 | For more details on this, see [https://www.wto.org/english/news\\_e/news14\\_e/sps\\_10sep14\\_e.htm](https://www.wto.org/english/news_e/news14_e/sps_10sep14_e.htm).
- 11 | The guidance developed by the Committee since 1995 is collected in one document and available in G/TBT/1/Rev. 12.
- 12 | I am borrowing a metaphor used by Christer Arvius at the Group's last meeting.
- 13 | There was some effort under non-agricultural market access (NAMA) but much of the wind went out of the process in 2011 and since then these negotiations have not resumed. The latest report from the Chairperson is available in TN/MA/W/103/Rev. 3/Add. 1 and Corr. 1 dated 21 April 2011.
- 14 | Indeed, some of this is being, and has been, used in the context of regional trade negotiations where chapters on TBT formalize this guidance and expand further on it.



**FIGURE 1:**  
Specific Trade Concerns in TBT Committee (1995–2014)

**LEGEND:**  
■ New STCs  
■ Previous STCs

## SPECIFIC WORK

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Nevertheless, despite underlying treaty texts and an abundance of guidance, trade friction does arise. The second function of the Committee, and the one that takes up most of its time, is to provide a forum to discuss "specific trade concerns" (STCs) that arise between Members. This function of the Committee enables Members, again, I stress, to engage in discussions among regulatory counterparts on very specific matters that cause trade friction or could potentially do so at the technical, pragmatic level. The graph below summarizes the development of these trade concerns in the TBT Committee since 1995.

It is important to stress that the use of the Committee as a forum to discuss trade concerns has emerged gradually. While it is not written into the TBT Agreement,<sup>15</sup> the TBT and SPS agreements set a legal framework for regulatory cooperation through their transparency obligations. More specifically, in areas that are characterized by a lack of harmonization (the absence of an international standard may be a sign of this), Members have an obligation not only to notify draft texts in time to allow for comments, but also to take other Members' comments into account. These obligations promote regulatory cooperation on specific draft measures in a very concrete way. The possibility of becoming acquainted with draft regulations (through early publication of notices and notifications) and exchanging comments on notifications opens an avenue for dialogue between counterparts across borders. And this dialogue is a vehicle for confidence and trust. Comments on notifications allow regulators to gain valuable inputs and lend other Members a tool to exert influence on regulators in other countries to promote alignment. Therefore, while STCs address ongoing and potential matters of concern that arise between Members (a few have led to disputes), the transparency obligations foster cooperation.

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## IS IT EFFECTIVE AND EFFICIENT?

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Discussions in both TBT and SPS Committees are not without obstacles. Far from it. On the normative side of its work, in the TBT Committee delegations are now debating how to word a few sentences in a disclaimer text that is otherwise agreed.<sup>16</sup> In the SPS area, disagreement on how to define "private standards" is holding up progress.<sup>17</sup> The question in the sub-title above has two sides—whether the Committee work, specialized and normative, actually achieves a result/

outcome (efficacy), and/or whether it could be done better (efficiency).

The Committee's specific work (described above), which has evolved largely from practice (and in parallel in both Committees), has provided a platform to address a broad range of non-tariff measures that cause friction between countries—not in a formal, legal sense but in a practical, pre-emptive one. Research has shown that the TBT and SPS Committees have, to a significant extent, resolved specific trade concerns raised by delegations (Horn et al. 2013). More than one-third of these have been reported as resolved in the SPS Committee and estimations made for the TBT Committee also show a significant rate of settlements.<sup>18</sup>

The question whether the process is efficient is harder to answer. We do not really have the counterfactual. While we know that trade friction exists with or without the Committee, we do not know how much of this friction might have otherwise been settled, perhaps in a better manner in another venue. Conversely, matters might have been worse. Certainly, the Committee could be more efficient—much time is currently being spent rehashing old arguments; statements are sometimes lengthy; and some trade concerns appear to "get stuck" with little progress made despite repeated discussions in the Committee. One particular trade concern was raised at every meeting of the Committee for ten years.

Nevertheless, other factors would seem to indicate that the process is not wasteful, and I mention three that come to mind.

- a. **Private sector buy-in:** Preliminary research provides three telling points. One, 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. Two, it would appear that large companies tend to know about draft measures before their governments and try to resolve the matter themselves first. If unsuccessful, they ask for government support, encouraging them therefore to get in contact with the other Member, either through

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<sup>15</sup> The actual mandate for the Committee is a model of simplicity; it states that the Committee shall meet for "the purpose of affording Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives" (Article 13.1).

<sup>16</sup> See the TBT gateway page for more news on this.

<sup>17</sup> A "time-out" was agreed in [https://www.wto.org/english/news\\_e/news15\\_e/spis\\_26mar15\\_e.htm](https://www.wto.org/english/news_e/news15_e/spis_26mar15_e.htm).

<sup>18</sup> The number of reported resolutions probably understates the real number as many may be solved without formally being reported as such. In the SPS Committee, a mechanism exists for reporting on resolutions, however in the TBT Committee, no such mechanism exists and it is therefore not possible to know how many STCs are actually resolved. It is unlikely, however, that the figure would very different from the case in the SPS context (where about 30 percent are reported as resolved).



comments to the notification, or by raising the matter in the TBT Committee. Three, smaller companies find out about trade restricting measures mainly after they have already entered into force, because they face difficulties when trying to export. It is only at that point that they turn to their government (where internal coordination mechanisms function) for help.<sup>19</sup>

- b. **Upward trend:** There is a strong upward trend in both the number of notifications made per year to the TBT Committee and the number of specific trade concerns being raised.<sup>20</sup> The busiest year on record for the TBT Committee has been 2014, with the most notifications submitted (2,239) and new specific trade concerns raised (47) after any year since 1995.
- c. **Broad engagement:** Of 161 Members, 127 have made notifications to the TBT Committee. There has been a marked growth in notifications from developing country Members. In 2014, 80 percent of all TBT notifications were submitted by developing countries (developed countries, in particular the US and the EU, remain the biggest users). About half of all WTO Members have used the TBT Committee to raise trade concerns, and, again, engagement by developing countries is growing.

In sum, the Committee's function for serving as a platform for addressing trade tension on specific measures has shown concrete results and is increasingly being used. On the normative side, the Committee has, to date, been able to develop a significant volume of guidance aimed at helping countries implement the TBT Agreement, or clarify certain provisions (for example, timeframes).<sup>21</sup>

## LOOKING AHEAD

As a complement to efforts on the first and second pillars of WTO work, it may be useful to find ways and means of further enhancing work on the third pillar and making it more efficient. The following thoughts are not exhaustive.

- a. **Earlier cooperation:** It would be particularly useful to find ways and means of promoting early cooperation on regulatory matters between countries. That is, even earlier than the point at which a notification to the WTO is made. While notifications serve their purpose (notification of a draft regulation), it may be useful to encourage dialogue where regulation is nascent before drafting commences. Governments could be encouraged to share information on the intention to regulate. There is a "hook" for this in the TBT Agreement, but it has been little used.<sup>22</sup>

- b. **More follow-up:** There is room for better tracking of changes that are made to draft regulatory texts after notification. Were changes introduced to reflect comments made by trading partners? When was the final text adopted—and was it different from the originally notified version? The Committee adopted a recommendation in 2014 to streamline this process; this may go some way in facilitating follow-up.<sup>23</sup>
- c. **Standards flying under the radar:** While the transparency obligations function well for government regulation, standards may sometimes escape scrutiny and this is not without consequences on international trade. If a "finalized" standard is incorporated into regulation, it may be too late for comments to be taken into account. More cooperation could be sought in the development of standards that affect international trade, in whatever context they might be developed.
- d. **Private sector:** The efficacy of the third pillar relies, significantly, on the engagement of the private sector. In many countries, the lines of communication between trade officials and companies that may be affected by other governments' measures could be improved. Finding ways of strengthening internal domestic coordination will help efforts to cooperate on regulatory matters at the international level as well.

19 | This is, of course, only an indication of industry involvement. If anything this number is probably low as delegations do not necessarily have to mention the private sector as the instigator. This information is based on research done by Marianna Karttunen (EUI and former intern at the WTO).

20 | For more details, facts and numbers, see G/TBT/36.

21 | See notes 12 and 13.

22 | Article 2.9.1 of the TBT Agreement (for technical regulations).

23 | For instance, Members have been encouraged to use a revision of a notification to indicate that the notified measure has been substantially redrafted prior to adoption or entry into force. For more details, see Coherent Use of Notification Formats, recommendation adopted by the TBT Committee in June 2014, in G/TBT/35.



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