

SYNTHESIS OF THE POLICY OPTIONS

No.

16

**REGULATORY COOPERATION:
LESSONS FROM THE WTO AND
THE WORLD TRADE REGIME**

Regulatory Cooperation: Lessons from the WTO and the World Trade Regime

Synthesis of the Policy Options*

January 2016

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NOTE

The policy options presented in this synthesis are the result of a collective process involving all members of the E15 Task Force on Regulatory Systems Coherence. It draws on the active engagement of these eminent experts in discussions over multiple meetings as well as an overview paper and think pieces commissioned by the E15Initiative and authored by group members. Petros C. Mavroidis was the author of the report. While a serious attempt has been made on the part of the author to take the perspectives of all group members into account, it has not been possible to do justice to the variety of views. The policy recommendations should therefore not be considered to represent full consensus and remain the responsibility of the author. The list of group members and E15 papers are referenced.

The full volume of policy options papers covering all topics examined by the E15Initiative, jointly published by ICTSD and the World Economic Forum, will be launched at the Forum's Annual Meeting at Davos-Klosters in 2016 with a monograph that consolidates the options into overarching recommendations for the international trade and investment system for the next decade.

E15 INITIATIVE

Jointly implemented by the International Centre for Trade and Sustainable Development (ICTSD) and the World Economic Forum, the E15Initiative was established to convene world-class experts and institutions to generate a credible and comprehensive set of policy options for the evolution of the global trade and investment system to 2025. In collaboration with 16 knowledge partners, the E15Initiative brought together more than 375 leading international experts in over 80 interactive dialogues grouped into 18 themes between 2012–2015. Over 130 overview papers and think pieces were commissioned and published in the process. In a fast-changing international environment in which the ability of the global trade and investment system to respond to new dynamics and emerging challenges is being tested, the E15Initiative was designed to stimulate a fresh and strategic look at the opportunities to improve its effectiveness and advance sustainable development. The second phase of the E15Initiative in 2016–17 will see direct engagement with policy-makers and other stakeholders to consider the implementation of E15 policy recommendations.

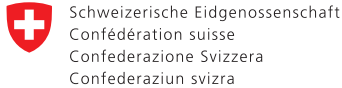
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OBJECTIVES AND OUTPUT

The E15 Task Force on Regulatory Systems Coherence had three objectives

- Examine the challenges arising from differing regulations, the duplication of regulatory regimes, and the resulting impact on trade and investment flows.
- Assess the adequacy of the trade system to facilitate regulatory convergence and upgrading.
- Propose options in terms of mechanisms and enforcement strategies for the trade system to support regulatory cooperation and reduce trade costs.

Overarching questions and issues the Task Force was tasked to consider

- Assess how countries pursue regulatory cooperation in the context of bilateral, regional, and multilateral initiatives.
- Evaluate the potential benefits of regulatory cooperation for key stakeholders in terms of compliance and enforcement costs and increased social value.
- Examine the need and role for key international institutions to do more on coherence consultation and cooperation in the area of regulation.
- Evaluate whether the WTO could play a role in leveraging bilateral and regional integration efforts, as well as global cooperation among regulatory bodies that are not necessarily tied to trade.
- Propose enforcement strategies for the various cooperation initiatives put forth.

Task Force analysis and policy proposals were submitted in two forms

1. Critical issues studied through an overview paper and think pieces commissioned for the E15Initiative. These papers are referenced on page 12 and can be accessed at <http://e15initiative.org/publications/>.
2. Policy options presented in this synthesis and compiled in the summary table. The options fall under two categories:
 - Institutional recommendations – participation
 - Substantive recommendations – obligations and mechanisms

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FOREWORD

The objective of the Task Force on Regulatory Systems Coherence was to advance concrete proposals aiming to bring together the trade and regulatory communities. A fundamental conclusion that arose from the expert dialogue process was that the WTO would not be in position to advance its market-integrating agenda, and indeed preserve its relevance, unless it manages to achieve this. A rapprochement of the two communities is the most appropriate means for the WTO to rise to the challenge posed by the emergence of regulatory measures as the most important source of impediments to international trade and investment. WTO members certainly are aware of the challenge but have taken only limited initiatives on this front. Insofar as existing agreements span regulatory instruments, “getting to yes” has proven elusive. Work on “good regulatory practice” in the Technical Barriers to Trade Committee and the long-standing effort to agree on greater specificity as regards disciplines on domestic regulation of services in the General Agreement on Trade in Services has yet to generate an outcome. Provisions encouraging the conclusion of mutual recognition agreements have not been effective.

Discussions on international regulatory cooperation are occurring outside the ambit of the WTO. Such cooperation occurs between small groups of countries with similar preferences and goals. The creation of the Canada-US Regulatory Cooperation Council is a recent illustration; a similar mechanism is called for in the Comprehensive Economic and Trade Agreement that has been negotiated between Canada

and the European Union. These initiatives demonstrate a willingness to bring together regulators and to consider the trade-impeding effects of differences in regulatory regimes. The challenge that trade officials, regulators, stakeholders, and academics face is to identify approaches that offer the prospect of improving regulatory outcomes while reducing the trade-impeding impacts of regulatory differences.

The policy options are deliberately limited in the sense that they centre on what could be done in the WTO, taking as given the institution as it exists today. The discussion and recommendations draw on analysis and suggestions that emerged from the deliberations of the Task Force. The aim is to advance realistic proposals that build on the current institutional framework. The key premise is that non-discrimination, the basic WTO norm that applies to trade policy, cannot address the cost-raising effects of differences in regulatory regimes. Non-discrimination equates conditions of competition between domestic and imported goods. This does not address the problem in that it is differences in regulatory standards that impede market access. When it comes to regulatory policies, deeper integration is needed. This can take the form of harmonization, mutual recognition, or agreement that regulatory regimes pursue the same goals and that enforcement mechanisms are equivalent, thus allowing goods and services to flow freely across the border of the participating jurisdictions. Deep integration instruments in practice are currently limited to agreements between like-minded countries (“clubs”) that have similar



levels of institutional capacity. Thus, in many policy areas international cooperation that is aimed at reducing the market-segmenting effects of differences in regulation can only occur among clubs.

This insight has a number of implications for the WTO. One is that an important role the WTO can play is to facilitate the flow of information between different clubs and the broader WTO membership. Currently, non-members of clubs have very little information about club-based regulatory cooperation. Providing such information is a public good that the WTO could help deliver. The policy options envisage going beyond this and encouraging WTO members to supply more “reasoned” transparency: a commitment by governments to spell out what they are seeking to achieve with a regulatory measure. Greater multilateral awareness of the reasoning behind specific instances of regulation, and the experience with implementation, might encourage countries to adopt similar approaches. More generally, greater willingness and effort to discuss instances of regulatory cooperation in club settings could help create an “osmosis” mechanism that will support a gradual multilateralization of initiatives that governments determine to be in their interest.

The policy options draw on deliberations by the E15 Task Force on Regulatory Systems Coherence, composed of leading experts and practitioners from around the world. Members were asked to provide think pieces focusing on the interface between trade and regulation from different perspectives. These papers formed the basis for discussion at two meetings

that helped to better understand the problems posed by regulatory differences, the scope that exists for improved regulatory cooperation, and alternative approaches that can be pursued by countries to cooperate in regulatory areas.

As co-conveners of this E15 Task Force, we are convinced of the need for greater deliberation on the interface between trade policy and domestic regulation. The discussions and papers that were generated by the Task Force are an initial contribution to what we believe will be a critical policy and governance debate on a topic that will be central to the continued relevance of the WTO in the years to come.

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REGULATORY COOPERATION: LESSONS FROM THE WTO AND THE WORLD TRADE REGIME

TRADE FRICTION TODAY IS LARGELY DUE TO REGULATORY DIVERSITY AS CONTEMPORARY MARKETS ARE CHIEFLY SEGMENTED THROUGH NON-TARIFF BARRIERS. THE FOCUS OF THE POLICY OPTIONS IS ON REGULATORY COOPERATION AND REGULATORY COHERENCE IN THE CONTEXT OF THE WORLD TRADING SYSTEM. WHEREAS THE FIRST TERM DENOTES THE PRESENCE OF AN INTERNATIONAL ELEMENT, THE SECOND IS TAKEN TO DESCRIBE THE QUALITY OF DOMESTIC REGULATORY PROCESSES.

The intensity of cooperation can vary: on one end of the continuum it could be an agreement to talk and on the other it could lead to the adoption of common standards or the recognition of regulatory processes as equivalent. Within this range, the extensive margin is understood as the number of players involved and the intensive margin as the intensity of cooperation between players. Diverse regulatory approaches across sovereignties are partly driven by political economy as well as distinct social preferences and priorities. The key questions are the following. Why promote either or both regulatory cooperation and coherence? And in follow-up, what are the instruments or mechanisms that can best help ease the tensions resulting from the expression of asymmetric policies?

To address these issues, ICTSD, in partnership with the World Economic Forum, convened a group of experts as part of the E15 Initiative. The European University Institute joined forces in this endeavour. The mandate was to propose solutions to improve the world trade regime. A bottom-up approach was privileged, since a top-down angle has innate limitations due to the countless variations cooperation can take. This approach sought to identify areas where problems have arisen due to a lack of cooperation and also enquire into existing mandates for cooperation in the WTO and in preferential trade agreements (PTAs). Armed with this knowledge, the Task Force assessed the distance between present and desired levels of cooperation. This assessment provides the basis on which the options presented herein are outlined.

Two aspects of the work deserve to be underlined. First, cooperation involves the gathering of the trade and regulatory communities, which operate insulated from each other in many domestic and international settings. A guiding principle has been to advance proposals that aim to bridge this gap. Second, the world comprises heterogeneous players of drastically different administrative capacities. Developing countries especially may find it difficult to implement some of the options. The need for capacity building is thus underscored, and existing WTO instruments, most prominently Aid for Trade, can facilitate this effort.

REGULATORY COOPERATION: WHERE ARE WE NOW?

The aim is to provide input to the WTO regarding the manner in which it could better serve its current and anticipated workload. This trade perspective, however, is not exhausted within the confines of the current WTO mandate or regime. Indeed, there are numerous initiatives focusing on regulatory cooperation that take place outside of the WTO, either formally within PTAs or informally. As can be expected, there is considerably more activity and intensity at the PTA level, especially when these agreements have been concluded between homogeneous players.

The baseline adopted by the Task Force on Regulatory Systems Coherence is cooperation in the context of two multilateral agreements: the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary (SPS) Measures. These are the most far-reaching examples of regulatory cooperation in the WTO. The issue of regulatory cooperation has also occupied negotiators within the framework of the General Agreement on Trade in Services (GATS) but the process is yet to produce tangible results.¹

REGULATORY COOPERATION IN THE GATT

In the GATT world, commitments on regulatory barriers were mainly intended to ensure that tariff reductions would not be circumvented through the substitution of policy instruments. Following the founding of the WTO and the declining role of tariffs, disciplines on regulatory barriers have a different function: they are market-integrating devices. The basic recipe under the GATT for addressing non-tariff barriers is non-discrimination, which conditions market access on the capacity to meet standards unilaterally decided by an importing state. It has nothing to say about the quality of the regulatory intervention or on regulatory diversity.

REGULATORY COOPERATION IN THE WTO

The WTO contract allows for new avenues to integrate beyond non-discrimination. The TBT and SPS Agreements provide a mix of disciplines that promote recognition of the (negative) impact that the unilateral exercise of regulatory authority may entail. The WTO, through the disciplines imposed by these two agreements, addresses the quality of regulatory intervention. Moreover, members are not free to adopt any measure they deem appropriate even if it is applied in a non-discriminatory manner.

The agreements — which cover a subset of regulatory activity dealing with important issues of public health, food safety, and consumer and environmental protection — do not require from WTO members that they adopt first best policies. Nonetheless, for policies coming under the purview of these agreements, when WTO members act unilaterally they must adopt the measure least restrictive on trade and base it on international standards (if relevant). They must ensure that transparency has been observed and allow intervals between the publication and entry into force of measures. WTO members are encouraged to rethink the merits of an intervention, assess its impact, and explore alternatives, all under a recent initiative entitled Good Regulatory Practice. They are also encouraged to sign mutual recognition agreements or harmonize their rules. However, recognition agreements are routinely signed between homogeneous players (often in the context of PTAs) and few participants prepare harmonized standards for the world. Non-discrimination thus largely

remains the baseline for integration at the multilateral level among the majority of members. The unilateral definition of policies continues to be the mainstream scenario, with cooperation relegated to best endeavours.

REGULATORY COOPERATION WITHIN PREFERENTIAL TRADE AGREEMENTS

While PTAs originally addressed classic trade barriers, they have evolved into mechanisms that seek to promote regulatory cooperation, which can be achieved with greater ease between a subset of the WTO membership. The most far-reaching examples of cooperation are between homogeneous players although they are not exclusively between such players. Homogeneity is a facilitating factor, not a *conditio sine qua non*.

Noteworthy examples of regulatory cooperation among homogenous partners include: the Canada-US Regulatory Cooperation Council, which is active in discussing standards and reducing friction resulting from regulatory divergence; and the Trans-Tasman Mutual Recognition Agreement, which includes, *inter alia*, cooperation between Australia and New Zealand in food standards upstream of national legislative processes. There are also examples of recent PTAs that mainly focus on regulatory cooperation, such as the Transatlantic Trade and Investment Partnership (TTIP). The parties engaged in the negotiations have a long history of regulatory cooperation — both along formal as well as informal channels, such as the Transatlantic Business Council (TABC) and the Transatlantic Consumer Dialogue.

Regulatory cooperation between heterogeneous players is often more targeted on specific product categories. Examples include: the EU-China Regulatory Cooperation Framework, an initiative that centres on non-food product safety; and a mutual recognition agreement signed between China and New Zealand, with a focus on accreditation and conformity assessment procedures for electronic products. There are also initiatives with wider content (i.e. not *a priori* limited to a narrow examination of products) between heterogeneous players. The EU has chapters on regulatory cooperation in the successor agreements to the Lomé Convention. They typically involve best endeavours clauses, however, with no binding obligations.

Cooperation involves the gathering of the trade and regulatory communities, which operate insulated from each other in many domestic and international settings.

BOX 1 | Options from the Task Force think pieces

The Task Force commissioned think pieces authored by group members on select issues that were considered to deserve additional in-depth discussion. These think pieces cover much of the emerging picture on initiatives focusing on regulatory cooperation taking place within and outside of the WTO. As is the case with the Task Force policy options, the authors advance options that could see the light of day in the current regime without any need to move to a new multilateral institutional framework.

- **Recommendation L is a proposal for model regulatory cooperation** developed by UNECE. The focal point is the concept of common regulatory objectives (CROs). CROs will be jointly drafted by regulators in a given sector and will address legitimate objectives such as public health and safety, environmental protection, etc. CROs will be defined with reference to international standards, when applicable, and will contain references on conformity assessment. They will also include surveillance mechanisms to ensure that agreements have been implemented. Recommendation L takes a bottom-up approach, which may make it easier to implement in environments with heterogeneous players such as the WTO (Arvius and Jachia 2015).
- **Variable geometry is the institutional setting that can best promote regulatory cooperation** within the WTO. Plurilateral and critical mass agreements can be issue-specific (which may be necessary on occasion to promote regulatory cooperation); they can promote transparency to a greater extent than PTAs; they may lead to less trade diversion; and, they maintain the link to dispute settlement under the WTO. The role of the WTO is to monitor progress in the clubs and upgrade where possible issues of cooperation to the multilateral level. Transparency in the short term may lead to legally binding agreements in the medium-to-long term. The WTO will become the facilitator of this process and eventually the depositary institution for agreements (Bollyky 2015).
- **Aid for Trade could be used as an instrument to promote regulatory cooperation** if a change in focus is agreed. Financing should privilege projects aiming to address, amongst others, competitiveness, investment, intellectual property, and the transfer of know-how. Regulatory cooperation is important because of the ongoing “servicification” of manufacturing, which is increasingly becoming global because of the emergence of global value chains. Services are quite regulated and unless some cooperation is guaranteed the process risks being heavily burdened (Cattaneo 2015).
- **The US has recently taken decisive initiatives to promote regulatory cooperation.** Mechanisms have been adopted that will enable the US to assess the impact of its measures on trade, and also to review measures that it deems unnecessary (excessively restrictive) in order to reach stated objectives. The US wishes to promote a similar approach across its (major) trading partners. It has moved towards establishing a framework for intensive regulatory cooperation with Canada and Mexico and is developing a comparable framework with its transatlantic partners (Charnovitz 2015).
- **The OECD has developed a typology of regulatory cooperation.**² Gains from cooperation include not only

CLUBS WITH OPEN DOORS

WTO plurilateral agreements are clubs with open doors. They can be formed by a subset of the WTO membership provided that the remaining members have acquiesced to a demand to this effect. There is thus some *ex ante* control on their subject matter. They constitute yet another club approach to integration. However, their practical relevance to date has been limited to the liberalization of the government procurement market. In addition, critical mass agreements constitute a negotiating technique to reduce the impact of free riding. Unlike plurilaterals, they have no institutional underpinning in the Agreement establishing the WTO.

POLICY OPTIONS: FROM CURRENT TO DESIRED COOPERATION

The policy options aim to cover as much as possible of the distance between the current level of cooperation at the WTO and an assessment on the part of the E15 Task Force of the desired level of regulatory cooperation. They concern transparency in the formulation of policies, the interaction between affected parties when preparing and adopting measures, and the establishment of fora where these discussions can take place.

Policy proposals can be helpful only when immunized with

economic gains but also mimicking better regulatory examples and capacity building. Countries willing to embark on this process will have to address domestic political economy concerns and be ready to face implementation costs. The choice of the intensity of cooperation will be function of a cost-benefit analysis (Kauffmann and Malyshev 2015).

- **The emergence of global value chains has contributed to the proliferation of private standards**, since they are an appropriate manner for the transnational corporations that dominate these value chains to discipline the supply of inputs. Developing countries in particular face an uphill struggle, as they are requested to comply with standards that they do not have to observe in the WTO. The organization should clarify the relevance of its own legal arsenal on private standards and move away from the current “fragmented” framework where discussions take place in parallel in different WTO committees (Thorstensen et al. 2015).
- **Three categories of trade costs stemming from a lack of cooperation can be identified**, which the international community should address and aim to reduce: information costs (obtaining information about regulations); specification costs (complying with regulatory standards in the export market); and, conformity assessment costs (relating to a demonstration of compliance with standards). Unilateral evaluation of the trade impact of regulations is the first, necessary step towards cooperation. Regulatory cooperation should be undertaken in circumstances that trigger a positive net benefit where the costs of maintaining domestic regulations are high (van Tongeren et al. 2015).

- **The TBT Committee is widely hailed as an example of successful cooperation at the WTO**. It is a forum where both the regulatory and the trade communities meet and communicate, as many of the issues debated are of a technical nature. Private sector engagement is essential to this work. Pragmatism is the driving force of the TBT Committee: it does not issue legally binding documents, and it does not have a specific mandate to resolve disputes. And yet it manages to agree on procedures and significantly contribute to the understanding of national policies (Wijkström 2015).
- **Substantial progress has been made at the WTO on transparency** but there is still much room for improvement in two areas. First, measurement of the trade effects of regulation is of revealed interest for WTO members yet the “culture” of measurement has not made much headway. There is sector-specific work that has been done outside the WTO, which could be of relevance in this regard (e.g. the OECD Services Trade Restrictiveness Index). Second, WTO members often lack the incentives to be transparent as they may be offering private and self-incriminating information. There could be more of a role for the WTO Secretariat as the “common agent.” This could be done through existing mechanisms (e.g. the Trade Policy Review Mechanism), but new initiatives could also be designed. An obvious starting point is transparency regarding regulatory activity within PTAs: there is at best uncertainty regarding what they should be reporting following multilateral review of notified PTAs by WTO bodies (Wolfe 2015).

a heavy dose of realism. There is often a trade-off between ambition and realism, and a guiding principle of the Task Force has been an attempt to maximize both values to the extent feasible. The options are thus as close as possible to a first best solution, having evaluated the pros and cons of alternatives. It should further be underscored that the objective is to design solutions that can find application across the board and not simply between a set of homogeneous players. A key challenge for the multilateral trading system will be to keep the WTO umbilical cord tight while introducing mechanisms that facilitate an eventual multilateralization of effective regulatory cooperation within clubs.

The recommendations are divided into institutional and substantive categories. The former are dedicated to issues

regarding who participates and under what conditions. The latter focus on a selection of issues that have captured the minds of the regulatory and trade communities. They concern the improvement of existing mechanisms and obligations.

INSTITUTIONAL RECOMMENDATIONS

CLUBS

To date, it has proven impossible to conclude multilateral agreements on “pure” regulatory issues. Meanwhile, agreements covering regulatory matters are routinely negotiated in the context of PTAs. Since it is regulatory barriers that

segment markets today, recourse to this type of arrangement is likely to continue. Moreover, intense regulatory cooperation is mainly observed among like-minded players for whom reaching consensus on preferences is easier to achieve. The promotion of plurilateral agreements (PAs) and critical mass agreements ahead of PTAs should thus figure high on the WTO agenda. Simultaneously, cooperation on matters of consultation and transparency, for example, should continue on a multilateral basis.

A key challenge for the multilateral trading system will be to keep the WTO umbilical cord tight while introducing mechanisms that facilitate an eventual multilateralization of effective regulatory cooperation within clubs.

The precedent set by the Government Procurement Agreement suggests that one function of the plurilateral approach could be as an instrument to allow WTO members to deal with issues that are not yet covered by the WTO — any disciplines that are agreed among a subset of countries will not undercut existing commitments as there are none. One could imagine, amongst others, plurilaterals in the fields of investment protection or the coordination of monetary policies. PAs could also be signed in areas already covered by the WTO mandate should a subset of members wish to further the agenda (e.g. services, trade facilitation). From a WTO perspective, there is a clear advantage to plurilaterals over PTAs: since clubs are necessary to dismantle regulatory barriers, it is in the interest of the WTO to monitor developments in this realm. The WTO should become some sort of osmosis mechanism that will select the issues or agreements at the plurilateral level that could be multilateralized.

POLICY OPTION 1 - Promote recourse to plurilateral agreements

- The WTO should actively promote regulatory cooperation within clubs and develop mechanisms that enable the multilateralization of clubs-only agreements. In this respect, the establishment of PAs should be sanctioned unless WTO members representing a combined threshold of world trade (e.g. 20%) are opposed. The WTO should particularly encourage PAs that deal with issues that do not come under the existing mandate, and it should also increase the flow of transparency from clubs to the organization.

EASIER ACCESS FOR BUSINESS

A consistent grievance expressed by business is that it does not have easy access to the various WTO committees. Its concerns are not heard and as a result policies that are supposed to regulate business behaviour are designed without any input from the most interested stakeholder. The WTO should take the initiative of inviting business interests to participate when regulatory issues of concern to their operations are being addressed. The easiest way to achieve this is through an extension of the observer status to business representatives.

POLICY OPTION 2 - Open the WTO to business interests

- Business interests should be in a position to continue voicing their concerns, especially in the TBT and SPS Committees. Their participation should be encouraged and requests for observer status should not be refused except for compelling reasons to be transparently communicated. In designing this status, the WTO could be inspired by the Industry Advisory Committee of the OECD or the Business Advisory Council of APEC. Business representation should not be confined to areas covered by the TBT and SPS Agreements.

SUBSTANTIVE RECOMMENDATIONS

TRANSPARENCY

Transparency obligations in the TBT and SPS Agreements are the most far-reaching in the WTO regime: one-stop shops, enquiry points, and intervals between the preparation and adoption of measures constitute important innovations. Regulation, however, extends to areas not covered by these agreements and the first substantive recommendation is to consolidate all such innovations in one new provision (or agreement) on transparency.

In addition, there are three areas where improvements to the transparency obligation can be achieved: what the membership should be transparent about; how much information should be provided; and, when the transparency obligation should kick in. WTO members should be required to provide *ex ante* evaluations of the trade impact of their regulations. They should also observe “reasoned” transparency, which demands that government officials offer explicit explanations for their actions and show why an alternative course of action may have been rejected. Both of the above will result in closer interaction between the regulatory and trade communities of the intervening WTO member. Finally, the business community and civil society should be implicated in the process at an early stage, as transparency should be all-inclusive. This obviously takes an internal and not a strictly international trade dimension.

POLICY OPTION 3 - Strengthen and consolidate transparency disciplines

- The current transparency obligation must be consolidated and further strengthened in five directions: (i) there should be a “mapping” of national mechanisms that are intended to provide transparency with respect to national regulatory processes; (ii) WTO members should notify all adopted measures, whether based on international standards or not; (iii) they should explain the rationale behind their measures (“reasoned transparency”); (iv) they should involve affected parties (business and other stakeholders) at an early stage in the process; and (v) they should use the reasonable interval between publication and entry into force of a measure to fine-tune the regulation so that it represents a balanced trade-off between genuine regulatory concerns and an effort to minimize the resulting trade impact.

ASSESSING THE TRADE IMPACT OF REGULATIONS

Ex ante assessments of the trade impact of regulation may overestimate or underestimate correlations with other factors that influence the trade outcome. It is thus useful to accompany these exercises with *ex post* evaluations. The initiative to conduct *ex post* assessments should not be entrusted (at least not exclusively) to the original regulator. The idea would be to produce credible evidence regarding the operation of a measure. This recommendation may prove difficult to implement for developing countries with limited administrative capacities. To overcome this hurdle, the more advanced bureaucracies should be prepared to share their experiences and engage in capacity building. This is where the Aid for Trade initiative can contribute towards enhancing the level of regulatory dialogue between WTO members.

POLICY OPTION 4 - Conduct *ex post* evaluations of the impact of adopted measures

- The original *ex ante* assessment of the trade impact of a regulation should be accompanied by an *ex post* assessment of the adopted measure. To the extent that discrepancies between the expected outcome and the observed impact exist, national administrations could revise their *a priori* assumptions so as to design more efficient regulations in the future.

IMPLEMENTATION OF INTERNATIONAL STANDARDS

Harmonization makes sense under a particular set of conditions — e.g. the presence of network externalities (when the value of a product or service is dependent on the number of persons using it). It would be far more preferable to strive for other integration instruments such

as recognition. Such instruments, however, require trust with regard to future activities, which is hard to imagine between unlike players. Harmonization, on the other hand, only calls for the implementation of agreed norms. TBT and SPS disciplines require recourse to international standards to the extent that they are appropriate in light of the objective pursued by WTO members. There is room for improvement in two respects. First, the notion of international standard should be clarified in the manner suggested below in order to limit discretion on the part of panels. Second, the current allocation of the burden of proof may act as an incentive to neglect international standards where they could have been appropriately used. The Appellate Body ruled in a landmark case (which has since been reproduced *verbatim*) that plaintiffs carry the burden to demonstrate that a national measure is consistent with an international standard, irrespective of whether the regulating WTO member has deviated from an international standard or not. A reversal of case law will contribute towards the increased use of international standards.

POLICY OPTION 5 - Encourage recourse to international standards

- Article 2.4 of TBT (and 3.1 of SPS) could be further strengthened. Besides encouraging the use of international standards in principle, it could make it clear that deviations from international standards should be justified by the deviating state. The same provision(s) should be enriched in two ways: through an explicit reference of the 2000 Decision and through the addition of an indicative list of standard-setting organizations.

The unilateral definition of policies continues to be the mainstream scenario, with regulatory cooperation often relegated to best endeavours.

PRIVATE STANDARDS

Private standards have mushroomed over recent years. For developing countries, which are typically “takers” of standards, this phenomenon has added to transaction costs and represents a hindrance to value chain integration. There is a high degree of uncertainty as to whether private standards are disciplined by the WTO or whether they lie outside its perimeter. Discussions have taken place in the TBT and SPS Committees, with members unable to bridge their differences. Those affected by the proliferation of private standards would like to see a harmonized solution, with the WTO emerging as a natural forum.

POLICY OPTION 6 - Clarify the relevance of the WTO on private standards

- The WTO should concentrate on private standards by dedicating a forum to address the issue. The institution could be inspired by prior endeavours, such as the 1971 Working Party on Border Tax Adjustments, which was established to clarify GATT law with respect to taxes that could lawfully be adjusted in a trade transaction. Instead of continuing along the current top-down approach, it would be more opportune to focus on sector-specific negotiations and try to extrapolate elements from prior successful experiences to the new sectors under discussion.

PRIORITIES AND NEXT STEPS

An appropriate way to rationalize the quality of regulatory interventions at home is by looking at the best examples elsewhere and mimic them. Increased transparency at the WTO, as presented *supra*, will be a decisive step in this direction. Reasoned transparency should become a priority. It is through this mechanism that the trade and the regulatory communities will be brought around the same table, which should become one of the pillars of the WTO as it strives towards integrating markets predominantly segmented through non-tariff barriers.

NEXT STEPS

All the policy options are armed with realism and their sequence would not matter: the objective is an institutional innovation that promotes regulatory cooperation across the WTO membership on a sustainable basis. Current initiatives undertaken in the context of the TBT and SPS Committees should be encouraged. Yet there is no reason to be restricted to issues covered only by these agreements; they should be reproduced elsewhere, and they should also be improved.

Alternatively, the WTO could envisage establishing a Working Group on Transparency where all the proposals put forward by the Task Force could find a home for debate and deliberation. For the world community to reap new gains from market integration, it needs to understand the reasons for intervention, evaluate the different attempts to regulate comparable or similar issues, and promote the most efficient solutions. Membership in this endeavour may vary depending on various factors. The WTO should provide the common roof. It should add a function akin to an Information Exchange regime covering all forms of regulatory cooperation, and it should develop criteria for selecting issues of cooperation that can move from the club to the multilateral level.

Endnotes

1. See the E15 Expert Group on Services policy options in which proposals that address the issue of regulatory cooperation in the services sector are put forward. These include the establishment of a work programme to develop country- and sector-specific recommendations on the appropriate sequencing of international regulatory cooperation and liberalization, as well as the importance of mitigating the risk of exclusion created by regulatory cooperation among small groups of countries.
2. OECD. 2013. *International Regulatory Cooperation: Addressing Global Challenges*. OECD Publishing: Paris. The paper classifies eleven forms of cooperation ranging from the most stringent to the most informal: supranational institutional integration (e.g. EU); specific negotiated agreements (e.g. international treaties); formal regulatory cooperation partnerships (e.g. Canada-US Regulatory Cooperation Council); joint standard-setting (OECD, WTO); trade agreements with regulatory provisions (e.g. modern PTAs); mutual recognition agreements; trans-governmental networks of regulators (e.g. International Laboratory Accreditation Corporation); unilateral convergence through good regulatory practices (e.g. TBT, Good Regulatory Practice); recognition and incorporation of international standards (e.g. ISO); soft law principles and codes of conduct; and, informal exchanges of information (e.g. TABC).

TABLE SUMMARY OF MAIN POLICY OPTIONS

POLICY OPTION	THE CURRENT SITUATION	WHAT NEEDS TO CHANGE
Institutional Recommendations		
<p>1. The WTO should promote recourse to pluri-lateral agreements, especially in areas of regulatory cooperation not covered by the current WTO mandate.</p> <p>It should increase the flow of transparency from clubs (PAs, PTAs) to the WTO.</p>	<p>Article X.9 of the Agreement establishing the WTO requires consensus voting by the WTO membership for a PA to be added to the WTO legal arsenal.</p>	<p>The provision needs to change in two respects:</p> <p>1) Instead of consensus, PAs should be added unless WTO members representing 20% of world trade opposes them.</p> <p>2) An encouragement should be added that PAs focus on areas not covered by the current WTO mandate, e.g. investment protection, trade facilitation for services, etc.</p>
<p>2. The WTO should open up to business interests, especially to transnational business that might find it hard to press its views through one WTO member.</p>	<p>Nothing in the current legal design stops WTO members from adding business representatives to their delegation. Nothing, however, guarantees that business interests will be represented either.</p>	<p>The Industry Advisory Committee of the OECD and the Business Advisory Council of APEC can provide the blueprint for a WTO opening to representation of business interests to the various WTO committees.</p> <p>Participation of business interests should not be confined to areas covered by the TBT and SPS Agreements.</p>
Substantive Recommendations		
<p>3. Transparency disciplines must be strengthened and consolidated.</p>	<p>Transparency is discussed in various agreements in a scattered manner. It requires publication of measures coming under the agreement at hand, an interval between adoption and entry into force of measures (under the aegis of the TBT and SPS), and enquiry points where explanations regarding national measures will be provided.</p>	<p>1) Transparency-related obligations should be consolidated in one agreement.</p> <p>2) WTO members should be required to provide <i>ex ante</i> evaluations of the trade impact of their regulation, and observe "reasoned transparency" - i.e. provide explanations about measures to be adopted.</p> <p>3) Both business interests and civil society at large should be implicated early on in the process, before final decisions have been taken.</p> <p>4) The aim of transparency should be to bring together the regulatory and the trade community.</p>
<p>4. WTO members should be required to perform <i>ex post</i> evaluations of the trade impact of measures adopted, and make the necessary adjustments when warranted.</p>	<p>There is nothing to this effect in the current agreements coming under the aegis of the WTO.</p>	<p>A new provision to this effect needs to be introduced.</p>
<p>5. Recourse to international standards should be encouraged.</p>	<p>Article 2.4 of TBT and Article 3.1 of SPS request from WTO members to base their measures on international standards, when appropriate.</p>	<p>The two provisions should be modified so as to:</p> <p>1) Oblige WTO members to also notify their measures based on international standards;</p> <p>2) In case of deviation from an international standard, it is the deviating WTO member that should carry the burden of proof for doing so;</p> <p>3) The 2000 Decision should be added to the two agreements and should be observed by WTO members;</p> <p>4) An indicative list of standard-setting organizations should be added.</p>
<p>6. The relevance of the WTO on private standards should be clarified.</p>	<p>There is an ongoing discussion regarding private standards, to date, that has led nowhere.</p>	<p>The WTO should establish a forum with immediate effect (such as the Working Party on Border Tax Adjustments) that will clarify the legal relevance of the WTO TBT/SPS Agreements on private standards. Ideally, private standards should come under the aegis of the two agreements.</p> <p>Instead of continuing along the current top-down approach, it would be more opportune to focus on sector-specific negotiations and try to extrapolate elements from prior successful experiences to the new sectors under discussion.</p>

TASK FORCE PAPERS AND THINK PIECES

The papers commissioned for the E15 Task Force on Regulatory Systems Coherence can be accessed at <http://e15initiative.org/publications/>.

Arvíus, Christer, and Lorenza Jachia. 2015. *Regulatory Cooperation: A Wikihow*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

Bollyky, Thomas. 2015. *A Role for the World Trade Organization on Regulatory Coherence*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

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Kauffmann, Céline, and Nikolai Malyshev. 2015. *International Regulatory Cooperation: The Menu of Approaches*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

Mavroidis, Petros C. 2016. *Regulatory Cooperation: Lessons from the WTO and the World Trade Regime*. E15 Task Force on Regulatory Systems Coherence – Policy Options Paper. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

Thorstensen, Vera, Reinhard Weissinger and Xinhua Sun. 2015. *Private Standards: Implications for Trade, Development and Governance*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

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Wijkström, Erik. 2015. *The Third Pillar: Behind the Scenes, WTO Committee Work Delivers*. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

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E15 INITIATIVE: EXPERT GROUPS AND TASK FORCES

In the quest for effective responses to the challenges faced by the global economy at this time, foremost experts were invited to contribute to 15 thematic groups as well as three task forces addressing horizontal issues. The groups met regularly between 2012 and 2015 with the goal of delivering a set of policy options on the occasion of the WTO's 20th anniversary. These options are intended to animate discussions and feed the present and future international trade and investment policy agenda for sustainable development. The full volume of policy options papers, jointly published by ICTSD and the World Economic Forum, and launched at the Forum's Annual Meeting in Davos-Klosters in 2016, is complemented with a monograph that consolidates the options into overarching recommendations for the international trade and investment system for the next decade. The second phase of the E15 Initiative in 2016–17 will see direct engagement with policy-makers and other stakeholders to consider the implementation of E15 policy recommendations.

E15 INITIATIVE THEMES

- 1 – Agriculture and Food Security
- 2 – Clean Energy Technologies
- 3 – Climate Change
- 4 – Competition Policy
- 5 – Digital Economy
- 6 – Extractive Industries
- 7 – Finance and Development
- 8 – Fisheries and Oceans
- 9 – Functioning of the WTO
- 10 – Global Trade and Investment Architecture*
- 11 – Global Value Chains
- 12 – Industrial Policy
- 13 – Innovation
- 14 – Investment Policy
- 15 – Regional Trade Agreements
- 16 – Regulatory Coherence
- 17 – Services
- 18 – Subsidies

* Policy options to be released in late 2016

Implemented jointly by ICTSD and the World Economic Forum, the E15 Initiative convenes world-class experts and institutions to generate strategic analysis and recommendations for government, business and civil society geared towards strengthening the global trade and investment system for sustainable development.



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