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

Policy Options Paper



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

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on behalf of the E15 Task Force on Regulatory Systems Coherence

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Note

The policy options paper is 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, is complemented with a monograph that consolidates the options into overarching recommendations for the international trade and investment system for the next decade.

The E15Initiative is managed by Marie Chamay, E15 Senior Manager at ICTSD, in collaboration with Sean Doherty, Head, International Trade & Investment at the World Economic Forum. The E15 Editor is Fabrice Lehmann.

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Abstract

Trade friction today is largely due to regulatory diversity as contemporary markets are chiefly segmented through non-tariff barriers. The purpose of the paper is to enquire into regulatory cooperation and coherence in the context of the world trade regime. It examines the challenges arising from regulatory diversity and considers mechanisms and approaches that could be taken to reduce regulatory barriers and costs to trade. Following an assessment of how countries are currently pursuing regulatory cooperation in the context of preferential, plurilateral and multilateral initiatives, with the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures under the aegis of the WTO adopted as the baseline, a set of options for policies and international trade rules that will enhance regulatory cooperation are put forward. The main recommendations concern transparency in the formulation of policies, the interaction between affected parties when

preparing and adopting regulatory measures that could impact on trade, and the establishment of fora where these discussions and commitments may take place. The options are divided into two categories: institutional and substantive. The former is dedicated to issues attendant to participation, while the latter is concerned with improving existing obligations and developing new mechanisms for cooperation. The paper acknowledges that developing countries with a limited administrative apparatus may find some of the options difficult to implement, and thus underscores the need for capacity building. It concludes that a mechanism of “reasoned transparency” will bring the trade and regulatory communities together, which should become one of the pillars of the WTO. The organization should add a function akin to an Information Exchange regime covering all forms of regulatory cooperation.

Contents

6	Executive Summary
8	1. Introductory Remarks
8	1.1 Mandate
8	1.2 Scope
9	1.3 Recommendations
11	2. Regulatory Cooperation: Where Are We Now?
11	2.1 Regulatory Cooperation in the GATT
11	2.2 Regulatory Cooperation in the WTO
12	2.3 Regulatory Cooperation within Preferential Trade Agreements
13	2.4 Clubs with Open Doors
13	2.5 Task Force Focus
17	3. Policy Options: From Current to Desired Cooperation
17	3.1 Institutional Recommendations
19	3.2 Substantive Recommendations
22	4. Final Remarks and Next Steps
23	References and E15 Papers
24	Annex 1: Summary Table of Main Policy Options
26	Annex 2: Members of the E15 Expert Group

List of Boxes

13	Box 1: Overview of E15 Think Pieces on Regulatory Systems Coherence
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Abbreviations	
AfT	Aid for Trade
ANZCERTA	Australia-New Zealand Closer Economic Relations Trade Agreement
APEC	Asia-Pacific Economic Cooperation
CCC	China Compulsory Certification
CMA	critical mass agreement
CRO	common regulatory objectives
CUSFTA	Canada-United States Free Trade Agreement
DSU	Dispute Settlement Understanding
EU	European Union
FSANZ	Food Standards Australia New Zealand
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Government Procurement Agreement
GRP	Good Regulatory Practice
GVC	global value chain
ILAC	International Laboratory Accreditation Corporation
ISO	International Organization for Standardization
ITA	Information Technology Agreement
MRA	mutual recognition agreement
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
NTB	non-tariff barrier
OECD	Organisation for Economic Cooperation and Development
PA	plurilateral agreement
PTA	preferential trade agreement
RAPEX	Rapid Alert System for non-food dangerous products
RCC	Canada-United States Regulatory Cooperation Council
SPS	sanitary and phytosanitary
SSO	standard-setting organization
STC	specific trade concern
TABC	Transatlantic Business Council
TABD	Transatlantic Business Dialogue
TACD	Transatlantic Consumer Dialogue
TBT	technical barriers to trade
TNC	transnational corporation
TTIP	Transatlantic Trade and Investment Partnership
TTMRA	Trans-Tasman Mutual Recognition Agreement
UNECE	United Nations Economic Commission for Europe
US	United States
WTO	World Trade Organization

Executive Summary

The focus of the paper is on regulatory cooperation and regulatory coherence in the context of the world trading system. 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 recognition of regulatory processes as equivalent. The key questions are: why promote either or both regulatory cooperation and coherence, and what are the mechanisms that can best help ease the tensions resulting from the expression of asymmetric domestic 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 to identify specific areas where problems have arisen due to a lack of cooperation and also evaluate existing mandates on regulatory cooperation in the WTO and in preferential trade agreements (PTAs). The resulting assessment of the distance between present and desired levels of cooperation provides the basis on which the policy options are outlined. Two aspects of this work deserve to be underlined. First, cooperation involves the gathering of two communities that have rarely communicated with each other in the past: the trade and the regulatory community. A guiding principle has been to advance proposals that aim to bridge this gap. Second, developing countries may find some of the options difficult to implement. The need for capacity building is thus underscored, most prominently under the Aid for Trade (AfT) initiative.

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 is not exhausted within the confines of the WTO regime. There are many initiatives focusing on regulatory cooperation that take place outside of the WTO, either formally within PTAs or informally. As can be expected, there is much more activity and intensity at the PTA level. The baseline adopted in the paper 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.

Regulatory cooperation in the GATT

In the GATT world, disciplines 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, commitments 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. Non-discrimination conditions market access on the capacity of products to meet standards unilaterally decided by an importing state. It has nothing to say about the quality of the regulatory intervention, nor 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 impact that the unilateral exercise of regulatory authority may entail. The WTO, through the disciplines imposed by these agreements, addresses the quality of regulatory intervention. Moreover, members are not free to adopt any measure they deem appropriate as long as it is applied non-discriminatorily. The TBT and SPS Agreements, which cover a subset of regulatory activity dealing with issues of public health, consumer protection, environmental protection, etc., do not require from WTO members that they adopt first best policies. They do oblige them, nonetheless, to adopt measures that have the least impact on trade, that are non-discriminatory, and where transparency has been observed. They have not resulted in eliminating trade costs. The unilateral definition of policies continues to be the mainstream scenario—cooperation being 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. They are not exclusively between such players however: homogeneity is a facilitating factor. Regulatory cooperation between heterogeneous players is often more targeted on specific product categories.

Clubs with open doors

WTO plurilateral agreements constitute another club approach to integration. Plurilaterals can be formed by a subset of the WTO membership, provided that the remaining WTO members have acquiesced to a demand to this effect. There is thus some *ex ante* control on their

subject matter. Their practical relevance so far 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 options concern transparency in the formulation of policies, the interaction between affected parties when preparing and adopting measures, and the establishment of fora for discussion. When proposing policies, there is often a trade-off between ambition and realism, and a guiding principle has been to maximize both values to the extent feasible. The options are as close as possible to a first best solution having evaluated alternatives. They are divided into institutional and substantive categories. The former are dedicated to issues of participation. The latter concern the improvement of existing obligations and mechanisms for cooperation.

Institutional recommendations

Clubs – 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. The establishment of plurilateral agreements should be sanctioned unless WTO members representing a combined threshold of world trade (e.g. 20%) are opposed. The WTO should particularly encourage plurilaterals that deal with issues that do not come under the existing mandate.

Business Access – The WTO should open to business interests

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

Substantive recommendations

Transparency – Strengthen and consolidate transparency disciplines

The current transparency obligation must be consolidated and 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 at an early stage in the process; (v) they should use the reasonable interval between publication and entry into force of a measure to fine-tune regulation.

Impact assessment – Conduct ex post evaluations of the impact of adopted measures

The original *ex ante* assessment of the impact of a proposed regulation should be accompanied by an *ex post* assessment of the trade impact of adopted measures. 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.

International standards – Recourse to international standards should be encouraged

Article 2.4 of TBT 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 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.

Private Standards – Clarify the relevance of the WTO on private standards

The WTO should dedicate a forum to the issue. It could be inspired by prior endeavours such as the 1971 Working Party on Border Tax Adjustments. Instead of continuing along the current top-down approach, it would be more opportune to dedicate to sector-specific negotiations.

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. 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. All the proposals seek to further an institutional innovation that would promote regulatory cooperation across the WTO membership on a sustainable basis. The paper encourages the current initiatives undertaken in the context of the TBT and SPS Committees. They should be improved and also reproduced in other areas. Alternatively, the WTO could envisage establishing a Working Group on Transparency where all the options could find a home for deliberation. The organization should add a function akin to an Information Exchange regime for all forms of regulatory cooperation.

1. Introduction Remarks

1.1. Mandate

The focus of this paper is on “regulatory cooperation” and “regulatory coherence.” Neither of these two terms is prone to a very precise definition, and the contexts in which they are, or have been, used matters. During the ongoing Transatlantic Trade and Investment Partnership (TTIP) negotiations between the European Union and the United States, for example, the two terms have been defined as follows (US Chamber of Commerce 2015).

‘Regulatory cooperation’ is the process of interaction between U.S. and EU regulators, founded on the benefits regulators can achieve through closer partnership and greater regulatory interoperability. ‘Regulatory coherence’ is about good regulatory practices, transparency, and stakeholder engagement in a domestic regulatory process.

Thus, whereas the first term would denote the presence of an international element, the second term describes the quality of a domestic regulatory process. Of course, domestic regulatory processes are influenced by the quantity and quality of regulatory cooperation.

We understand the number of players involved as the “extensive margin” of regulatory cooperation, and the intensity of cooperation as the “intensive margin.” WTO 2.0 should be some sort of information exchange regime about all forms of regulatory cooperation happening between clubs (and the whole membership, whenever feasible). It should further develop criteria for selecting issues of cooperation that can move from the club to the multilateral level.

The intensity of cooperation can obviously 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 and/or recognition of each other’s regulatory processes as equivalent. And then there are variations of these forms as well. OECD (2013), to which we refer in more detail *infra*, provides an inventory of various types of cooperation and distinguishes between eleven categories of different intensity.

The key question is why promote either or both regulatory cooperation and coherence? In response, these are instruments that can help ease the tensions resulting from the expression of asymmetric policies (Hoekman (2015) offers a comprehensive discussion). The objective matters though. It is one thing to promote regulatory cooperation in order to address an environmental hazard. It is a different thing to do so in order to integrate markets.

The E15 Task Force was mandated to enquire into regulatory cooperation/coherence in the context of the world trade regime. The primary focus was to enquire into the problems in integrating markets posed by the current state of cooperation, and propose solutions to improve the regime. An attempt has nonetheless been made to expand the scope of the paper in such a way that (some of) the lessons learned from the study of the world trade regime can be extrapolated in other areas where regulatory cooperation/coherence can help achieve gains for global welfare.

1.2. Scope

The issues this policy options paper seeks to address focus on the world trade regime (i.e. the WTO and the various preferential trade agreements or PTAs). How is market integration impeded (or, alternatively, how can it further be aided) through the current state of regulatory cooperation across trading nations? What are, in other words, the costs resulting from the existing level of cooperation on the regulatory front? The paper seeks to identify the most appropriate existing mechanisms for addressing them, as well as preferred approaches to do so.

Contemporary markets are segmented essentially through regulatory, non-tariff barriers (NTBs), following the GATT’s success in dismantling tariff barriers. Trade friction is largely due to regulatory diversity. Indeed, the very high number of specific trade concerns (STCs) raised so far before the Technical Barriers to Trade (TBT) Committee is probably the best evidence to this effect: 460 had been raised by July 2015.¹ Some might argue then, why cooperate? Indeed, would it not be more efficient to simply litigate instead of delving into the intricacies, often byzantine, of regulatory cooperation with players the internal politics of which are often impossible to influence? Litigation is costly and sometimes inaccessible too. STCs do promise fast

¹ See, <http://tbtims.wto.org>. Five of them became “formal disputes” that were raised under the Dispute Settlement Understanding (DSU). Five might seem too low. Claims under the TBT Agreement have been raised in 50 disputes so far, but in only five cases the main concern was a TBT concern. Related numbers for the SPS Agreement are comparable (275/43/10).

relief, but if stakes are high, the defendant might stall and oblige plaintiffs to submit formal disputes to Panels and the Appellate Body. The average length of the formal process is bordering on 5 years. Moreover, only WTO members can access a WTO Panel. This means that business will have to persuade a government to litigate. Governments, however, are sums of interests and might on occasion find it profitable to thwart such requests. Recourse to litigation before domestic courts is also improbable, since WTO members typically do not allow private parties to invoke WTO law before domestic courts except for customs-related issues (WTO law is not “self executing” in US parlance; has no “direct effect” in EU parlance).²

The baseline is regulatory cooperation in the context of two WTO agreements: the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures (SPS). These are the most far-reaching examples of cooperation in the WTO. The issue of regulatory cooperation has also occupied the minds of trade negotiators in the context of the General Agreement on Trade in Services (GATS); Article VI of GATS deals with disciplines on domestic regulation regarding qualification, technical specifications, etc. for services and service suppliers. There is an ongoing discussion regarding regulatory cooperation in this context in order to reduce costs stemming from unilateral regulation. At the time of writing, this process was far from producing sufficiently tangible results that could inspire the present study or recommendations.³ Our final recommendations though, are not limited to trade in goods, or to the future design of the TBT Agreement for that matter. The policy options that we advance in this paper could find application in other areas of regulatory cooperation. Adjustments might be warranted, but the gist of our proposals is in principle applicable in areas beyond trade in goods.

1.3. Recommendations

TBT and SPS evidently cover a subset of regulatory activity, albeit an important one, since they deal with issues of public health, environmental protection, food safety, consumer protection, the fight against fraudulent practices, etc. These agreements do not require from WTO members that they adopt first best policies when aiming to achieve one of the objectives mentioned above. By first best, we understand optimal policies that are targeted and eliminate distortions. The second best theory suggests that when one optimality condition is not met, a (second best) policy that introduces some new market distortion might still be efficient if it removes in part the original distortion. The TBT and SPS Agreements do oblige WTO members, nonetheless, to adopt policies that have the least impact on international trade, that are non-discriminatory and that, on occasion, are consistent and based on science. Alas, they have not

resulted in eliminating trade costs, in part because they are not always faithfully implemented, and in part because the unilateral definition of policies continues to be the mainstream scenario in the WTO world—cooperation being relegated to best endeavours.

A question that occupied the Task Force concerned the degree of ambition when tackling the issue of regulatory cooperation/coherence. One could think of various options here: cooperation could aim at persuading every WTO member to adopt first best policies; it could be restricted to mimicking the most promising example between trading partners in place, even if it has been agreed by a subset of the WTO membership only; and it could also be some sort of incremental improvement on current WTO practices. If, for example, environmental labelling is proven to adequately inform consumers about potential environmental hazards (under assumptions, of course), why have recourse to other more drastic (and probably less efficient) instruments such as import embargoes or other measures?

Policy proposals can be helpful only when immunized with a heavy dose of realism. There is, of course, a trade-off between ambition and realism, and a guiding principle of this paper and the process behind it has been to attempt to maximize both values to the extent feasible.

The policies that are thus proposed are as close as possible to a first best solution, having evaluated the pros and cons of alternatives in case a proposal could be deemed too ambitious.

Four different sources have inspired the Task Force in preparing a recipe for forward momentum and the design of cooperation for the trading community: The current state of affairs in the WTO and PTAs, paying particular attention to the most ambitious forms of cooperation embedded therein; the concerns and sources of discontent of the export-oriented business community; the analysis and experience of organizations and non-governmental organizations (NGOs) dealing with trade as well as regulatory cooperation; and academic writings, both on the policy side as well as theoretical enquiries.

One aspect of this work deserves to be underlined. In today’s world, cooperation involves the gathering of two communities that rarely communicated with each other in the past: the trade and the regulatory community. The issue is as much of international as it is of domestic scope. A guiding principle throughout has been to advance proposals that aim to bridge the gap between these communities that operate insulated from each other in many domestic settings.

² This has been the case for some time now. An early contribution on this subject concerning EU practice is offered by Vermulst and Waer (1997).

³ Negotiators have agreed to elaborate new disciplines, see WTO Docs. S/C/W/96, and S/WPDR/W/45. Mattoo (2015) has also studied the role of regulatory cooperation in services agreements. He argues that current regulatory disciplines in the GATS point in the right direction but are insufficient.

It is impossible to provide a generic estimation of the potential gains from regulatory cooperation. It all depends on the product market and the form cooperation will take. Some markets are heavily regulated, with no cooperation at all, and some are the exact opposite. There are various studies that have focused on this issue and sought to provide evaluations of the gains. The OECD has been a pioneer in this endeavour.⁴

With all of this in mind, the recommendations presented in this paper aim to address both the unilateral expression of regulatory concerns as well as cooperation on this front. One might criticize the inclusion of the former in a study aiming to address regulatory “cooperation.” And yet, such criticism is unwarranted. Imposing disciplines on the unilateral exercise of regulatory sovereignty can lead to cooperative outcomes, as shall be shown.

The main recommendations 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.

Finally, an issue that is crucial for many of the recommendations should be noted. The world comprises heterogeneous players of drastically different administrative capacities. Developing countries especially might find it difficult to implement some of the policy options, such as, for example, the measurement of the trade impact of regulations or the use of some international standards. For this reason, it is important to underscore upfront the need for capacity building and the ensuing supply of technical expertise by those who possess it to those who do not. Existing WTO regimes scattered in various agreements, most prominently the Aid for Trade initiative, can facilitate this effort.

⁴ The OECD webpage (www.oecd.org) includes various studies on the gains from regulatory cooperation

2. Regulatory Cooperation: Where Are We Now?

Regulatory cooperation is being pursued both at the multilateral and preferential level. PTAs increasingly include chapters that cover aspects of the issue. As can be expected, there is much more activity and intensity at the PTA level, especially when PTAs have been concluded between homogeneous players.

2.1. Regulatory Cooperation in the GATT

Regulatory cooperation was not much of a concern for the framers of the GATT, who had other, bigger fish to fry. In the GATT world, commitments on regulatory barriers were intended to provide an insurance policy that tariff reductions would not be circumvented through the substitution of policy instruments.⁵ In a world where tariffs become increasingly marginal, commitments on regulatory barriers have a different function: they are market-integrating devices. The most dramatic reduction in tariff levels coincided with the advent of the WTO. It is thus after 1995 that the focus shifted towards regulatory cooperation. Some discussion on regulatory cooperation had already started during the GATT Tokyo Round (1973-1979), with the advent of the first TBT Agreement. It is there that the first, shy steps in this direction were taken. This effort, though, was confined to the OECD membership, since the Tokyo Round agreements were a “code” in the sense that participation was voluntary. Only OECD members joined.

How did the GATT address regulatory barriers in general, that is, those that did not come under the Tokyo Round TBT Agreement? The basic recipe under the GATT for addressing NTBs is non-discrimination. Non-discrimination conditions market access upon the capacity of products to meet standards unilaterally decided by the importing state. If not, they will be excluded from that market. Non-discrimination has nothing to say about the “quality” of the regulatory intervention: trading regulations can be “excessive,” that is they might go beyond what is required to achieve the aim pursued, and thus, they can impose huge costs on trading nations. They will still comply with the basic GATT rule, however. Furthermore, non-discrimination condones regulatory diversity and is an insurance policy for those with high levels of protection: they can thwart imports that do not meet their standards.

2.2. Regulatory Cooperation in the WTO

Beyond non-discrimination, the WTO contract allows for other more “promising” ways to integrate. The so-called “new generation” agreements, the TBT and the SPS, provide a mix of disciplines that promote recognition of the (negative) impact that the unilateral exercise of regulatory authority might entail.⁶ With the advent of the WTO, the TBT Agreement was multilateralized and the first SPS Agreement was signed. Unlike the GATT, the WTO, through the disciplines imposed by these two agreements, addresses the quality of regulatory intervention, and, also unlike the GATT, it does not leave it to its members to decide and adopt whatever measure they deem appropriate as long as they apply it in non-discriminatory manner.

For measures coming under the purview of these two agreements, when WTO members act unilaterally they must adopt the measure least restrictive on international trade, and must base it on international standards if the latter are relevant and appropriate. They must ensure that transparency has been observed. They must also allow intervals between the publication of measures and their entry into force, during which they can accommodate questions regarding the policy rationale and objectives. WTO members can also unilaterally recognize other members’ measures as equivalent to their own. They are further encouraged to rethink the merits of their intervention, assess the impact, and explore alternatives before deciding on the final measure, all of this under a recent initiative entitled Good Regulatory Practice (GRP).⁷ With respect to SPS measures only, WTO procedures must further guarantee that interventions are based on available scientific evidence and are consistent when addressing similar risks. WTO members are encouraged to sign mutual recognition agreements (MRAs) and/or harmonize their rules.

The fact is, though, that recognition agreements are routinely signed between like-minded, homogeneous players (often in the context of PTAs), and few participants prepare harmonized standards for the world. Non-discrimination remains largely the baseline for integration at the WTO-level among the majority of WTO members.

⁵ A customs duty can be expressed as the sum of a production subsidy and a consumption tax. A discipline on customs duties with no corresponding discipline on the other two instruments could thus prove meaningless.

⁶ TBT covers measures relating to the obligation of producers to indicate the composition and/or production process of their goods, whether they revert to the form of labelling/packaging or not. SPS covers measures aimed to protect human, animal health, and/or the environment from pests and diseases.

⁷ This is an initiative that has been adopted recently and urges WTO members to adopt policies that best address perceived distortions. The WTO has been investing resources to increase technical capacity in this respect. See

https://www.wto.org/english/tratop_e/tbt_e/wkshop_march08_e/wkshop_march08_e.htm

2.3. Regulatory Cooperation within Preferential Trade Agreements

If we exclude cooperation in the EU, all intra-PTA cooperation takes place within free trade agreements (FTAs), which occasionally include chapters to this effect. FTAs are closed clubs—i.e. conditions for accession for outsiders are not spelt out *ex ante*. Accession depends on agreement with the incumbents.

The most far-reaching examples for regulatory cooperation are between homogeneous players. This is not to say that they are exclusively between such players. Homogeneity is a facilitating factor, not a *conditio sine qua non*.

Originally, PTAs addressed classic trade barriers, e.g. tariffs and quantitative restrictions. Eventually, they evolved into mechanisms that promote regulatory cooperation, which can be achieved with greater ease between a subset of the WTO membership.

The US and Canada have been partners in the North American Free Trade Agreement (NAFTA) for over twenty years, and bilateral partners for even longer (the Canada-United States Free Trade Agreement, or CUSFTA, predates NAFTA). Besides cooperation under NAFTA, they have established their own Canada-United States Regulatory Cooperation Council (RCC). The accounts regarding its overall record are consistently positive, and there is ample evidence to the effect that the RCC is quite active in discussing standards, but also in reducing or eliminating friction resulting from regulatory divergence (Wolfe 2014).

New Zealand and Australia first signed the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), and then entered into a wide MRA, the Trans-Tasman Mutual Recognition Agreement (TTMRA). As illustration, it is worth mentioning a notable output of this initiative, the Food Standards Australia New Zealand (FSANZ). It focuses on cooperation in the preparation of food at an early stage (i.e. not subsequent to the adoption of national laws), and in measuring the trade impact of proposed measures. It is acknowledged that the initiative has largely contributed to the strengthening of economic relations between the two countries.⁸

Then there are examples of more recent PTAs that have mainly focused on regulatory cooperation. Take the case of transatlantic relations. The transatlantic partners, who are currently engaged in the TTIP negotiations, have a long history of regulatory cooperation: the Transatlantic Economic Partnership (1998); the EU/US Positive Economic Agenda (2002); the EU/US Economic Initiative (2005);

and the Framework for Enhancing Transatlantic Economic Integration (2007). In parallel, there is an informal business dialogue, the Transatlantic Business Dialogue (TABD),⁹ and the Transatlantic Consumer Dialogue (TACD). There is consensus that these initiatives, formal and informal, have led to few changes on the regulatory front on either side of the Atlantic, but have substantially contributed in reducing trade friction.¹⁰ Moreover, they may have contributed towards the initiation of the TTIP negotiation, the formal “roof” to host and further promote all of these initiatives.

Regulatory cooperation also exists between heterogeneous players. However, it is often more targeted. Negotiators discuss specific product categories and aim to reach solutions and build on prior success. A good example is the EU-China Regulatory Cooperation Framework. It is an initiative between government entities focusing on product safety. The Rapid Alert System for non-food dangerous products (RAPEX) is the mechanism instituted to investigate specific products (product categories). By 2010, 4,885 cases had been identified and investigation had been initiated in 1,678 cases.¹¹

China signed its first MRA with New Zealand, which has a very narrow scope as it concerns electric and electronic equipment and components, and works to the benefit of New Zealand producers. Before the agreement, New Zealand exporters had to test compliance with electrical safety and electromagnetic compatibility regulatory requirements on Chinese soil. There was uncertainty since no one could assure *ex ante* (before export) that products were indeed compatible with Chinese standards. Following signature of the MRA, New Zealand producers can affix the China Compulsory Certification (CCC) label on their goods before export from New Zealand. They can do so following accreditation and conformity assessment procedures carried out by New Zealand agencies formally accepted in China. One can easily see that uncertainty is eliminated in this way.

There are also initiatives with wider content (i.e. that are not *a priori* limited to the examination of specific products) between heterogeneous players. The EU has chapters on regulatory cooperation in the successor agreements to the Lomé Convention with many of its African ex-colonies. They typically involve best endeavours clauses, however, with no binding obligations included therein (Horn et al. 2010).

⁸ See, Australian Government and New Zealand Government Productivity Commissions. 2012. Strengthening Trans-Tasman Economic Relations, www.pc.gov.au/inquiries/completed/australia-new-zealand/report

⁹ Recently consolidated and formalized under the auspices of the Transatlantic Business Council (TABC).

¹⁰ WTO Doc. G/TBT/W/348 of February 14, 2012. On TABD, see Quick (2008) who discusses the process in detail and shares this conclusion.

¹¹ WTO Doc. G/TBT/W/348 of February 14, 2012.

2.4. Clubs with Open Doors

And then there are clubs with open doors: WTO plurilateral agreements (PAs). Plurilateral agreements can be formed by a subset of the WTO membership, provided that the remaining WTO members have acquiesced to a demand to this effect. There is thus some *ex ante* control on their subject matter, and their subjection to voting by the membership is the means to ensure that any such arrangement is Pareto-sanctioned.¹² 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.

Critical mass agreements (CMAs) constitute a negotiating technique to reduce the impact of free riding.¹³ Unlike plurilaterals, they have no institutional underpinning in the Agreement establishing the WTO. In the negotiations that led to the advent of the Information Technology Agreement (ITA), for example, trading partners agreed that the eventual agreement would not enter into force unless a certain percentage of world production had first been covered. However, characterizing these initiatives as clubs is probably an exaggeration. CMAs have so far exhausted their usefulness in the negotiation of tariff reductions that have been multilateralized without non-participants being obliged to pay consideration.

2.5. Task Force Focus

To honour its mandate, the Task Force proceeded in two steps. Two meetings were organized with a select group of experts where regulatory cooperation/coherence was discussed in a horizontal manner. The Task Force also commissioned think pieces authored by group members on select issues that were considered to deserve additional in-depth discussion. The main arguments of the think pieces are presented in Box 1 below.

It was stated *supra* that the concepts of regulatory cooperation and coherence are amorphous. The Task Force privileged a bottom-up approach, since a top-down approach has innate limitations. Indeed, there is only so much one can do trying to define terms such as “regulatory cooperation,” precisely because its forms and variations can, in practice, be countless. Indeed, the OECD (2013) study referred to above, acknowledging this fact, refers to basic types of cooperation. Consequently, some aggregation is necessary for the discussion to be meaningful. Furthermore, top-down approaches are usually oblivious to the realist’s concerns. Realism is very much an issue in a policy-oriented endeavour.

The bottom-up approach had two legs. First, the business community and representatives of NGOs and international organizations were asked to come up with evidence where problems have arisen due to a lack of regulatory cooperation/coherence. This enquiry helped to better understand the problems posed by a lack of transparency, untimely cooperation, inadequate implementation and private standards. Second, representatives of the WTO and PTAs were invited to outline the current mandate for regulatory cooperation. Armed with this knowledge, a first shot was taken at the distance between the current and the desired level of cooperation. A select number of academics were then invited from various realms of expertise. This interaction allowed for a better feel regarding the original estimate of the distance, as well as a preliminary attempt at outlining recommendations.

Box 1: Overview of E15 Think Pieces on Regulatory Systems Coherence

The selection of topics and authors responded to the need to blend into the process as much experience from ongoing regulatory cooperation as possible. The perspective is on trade, since the aim is to provide some 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 (some of which are referred to above) focusing on regulatory cooperation that take place outside of the WTO, either formally within PTAs, or informally like the TACD. The think pieces cover a lot of this emerging picture.

It was also important to avoid “hothouse” analysis that might sound intellectually plausible but would stand no chance of implementation. The authors thus advanced options that could see the light of day without any need to move to a new multilateral institutional framework. All recommendations can take place within the current regime. With this in mind, we turn to a brief presentation of the think pieces.¹⁴

A. Arvius and Jachia: *Regulatory Cooperation: A Wikihow*

The authors provide a comprehensive presentation of different forms of regulatory cooperation and explain against this background the UN Economic Commission for Europe (UNECE) Recommendation L, which is a proposal for model regulatory cooperation. They also offer a case study to this effect.

¹² Hoekman and Mavroidis (2015), and Lawrence (2006) discuss the relevance of plurilateral agreements in negotiating arrangements aiming to discipline NTBs. By “Pareto-sanctioned” we understand that at least one party is better off as a result of the advent of the new agreement while no one’s situation has deteriorated.

¹³ The free rider problem does not arise only in trade agreements. In 1931, seventeen nations signed the Convention for the Regulation of Whaling, which entered into force in 1935 (United States Treaties Series, 880). Seven more states adhered subsequently. Big whaling nations, like Germany and Japan, refused to sign the agreement. As a result, 43,000 whales were killed the year of the signature, with Germany and Japan able to profit from the lack of competition in this market. Today, the International Whaling Commission (IWC) has been in place since 1989 and counts 89 members. The free riding problem has substantially been reduced as a result.

¹⁴ The think pieces are cited in the references and can be accessed at <http://e15initiative.org/publications/>.

The focal point in Recommendation L 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 also contain references on conformity assessment. Finally, CROs will include surveillance mechanisms to ensure that agreements have been implemented.

EU experts will unavoidably see similarities between the EU “new approach” to harmonization and Recommendation L. There is one crucial difference, however, that makes Recommendation L easier to implement in environments with heterogeneous players like the WTO: it is bottom-up and not top-down like the EU.

B. Bolyky: *A Role for the World Trade Organization on Regulatory Coherence*

Bolyky focuses on the institutional arrangements that can best promote regulatory cooperation within the WTO. He outlines the case for variable geometry, arguing that there is a role for the WTO, even though (in the short run at least) most of the activity will take place within clubs.¹⁵

He then assesses the pros and cons of the three clubs that are possible within the WTO, namely critical mass agreements, plurilateral agreements and preferential trade agreements. He argues that plurilateral agreements and CMAs are preferable over PTAs, if we want, while promoting regulatory cooperation, to sustain a tight umbilical cord between clubs and the WTO. Plurilaterals and CMAs 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 might lead to less trade diversion; and they maintain the link to dispute settlement under the WTO. Nevertheless, those who engage in regulatory cooperation within PTAs can probably achieve more by continuing down this path.

What is the role for the WTO in all of this? The WTO will monitor progress made in the clubs and will upgrade to the multilateral level the issues of cooperation that can be multilateralized. Thus, transparency in the short term might lead to legally binding agreements in the medium-to-long term, and the WTO will become the facilitator of the process and eventually the depositary institution for agreements.

C. Cattaneo: *Promoting Greater Regulatory Coherence and Cooperation through Aid for Trade*

Cattaneo discusses Aid for Trade (Aft) and contemplates the manners in which this instrument can be used to promote regulatory cooperation.

The Aft initiative demonstrates a willingness to integrate laggards but a switch in focus may be warranted. In the author’s view, regulatory cooperation is important because of the ongoing “servicification” of manufacturing. Manufacturing is increasingly becoming global because of the emergence of global value chains (GVCs). Unavoidably, services inputs to manufacturing are becoming global as well. Services, however, are quite regulated and unless some cooperation is guaranteed the whole process risks being heavily burdened.

In order to facilitate cooperation, the distance between the “avant-garde” and laggards needs to be shortened. It is precisely in this context that Aft can be of help, were a change in focus agreed. Cattaneo suggests that Aft financing should privilege projects aiming to address, amongst others, competitiveness concerns within GVCs, investment, intellectual property, and the transfer of know-how.

D. Charnovitz: *US Efforts to Ensure that Regulation Does Not Present Trade Barriers*

Charnovitz looks closely at the manner in which the US has promoted regulatory cooperation over the years. The most decisive initiatives are those that have been undertaken in the second term of the Obama administration. Mechanisms have been adopted that will enable the US to assess the impact of its measures on trade, and also to review (and hopefully, eliminate) measures that it deems unnecessary (e.g. excessively restrictive) in order to reach stated objectives. The US wishes to promote a similar culture/approach across its (major) trading partners.

The US has moved towards establishing a framework for intensive regulatory cooperation with Canada and Mexico, which is unsurprising as the neighbouring countries are NAFTA partners. The US is developing a comparable framework with its transatlantic partners. Some *de facto* business-to-business cooperation has been consolidated in the Transatlantic Business Council. Ties have been developed between civil societies in the framework of the Transatlantic Consumer Dialogue. And this is all happening while the TTIP has yet to see the light of day.

¹⁵ This term variable geometry refers to an institutional setting where differentiated membership can participate in different agreements coming under the same roof. The EU offers a good example, where both the monetary union, as well as the enhanced cooperation, allows for a subset of the EU membership to go ahead and integrate in areas where other members might find it unwarranted.

E. Kauffmann and Malyshev: *International Regulatory Cooperation: The Menu of Approaches*

This is the first of two papers prepared by members of the OECD Secretariat (the second, being the paper authored by van Tongeren et al. discussed below). This paper focuses on a typology of regulatory cooperation that has been developed by the OECD (2013), as well as a discussion of the expected benefits (whereas the paper by van Tongeren et al. focuses on trade costs stemming from a lack of cooperation).

The paper classifies eleven forms of cooperation ranging from the most stringent (integration/harmonization through supranational institutions, citing the EU) to informal exchanges of information (such as the Transatlantic Dialogue discussed above). Between these two extremes, they categorize the following: 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 or ILAC, a forum that manages conformity assessment agreements signed by various accreditation bodies); unilateral convergence through good regulatory practices (e.g. TBT, Good Regulatory Practice); recognition and incorporation of international standards (e.g. ISO); and soft law principles and codes of conduct.

Gains from regulatory cooperation include not only 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.

F. Thorstensen, Weissinger and Sun: *Private Standards: Implications for Trade, Development and Governance*

The paper discusses the problems posed by the emergence of private standards. Its focus is on warning about the dangers entailed in a lack of cooperation, as private standards are developed by few players, without much negotiation within the WTO. The emergence of global value chains has contributed to the proliferation of private standards, since they are an appropriate manner for the transnational corporations (TNCs) that dominate GVCs to discipline the supply of inputs.

Developing countries in particular face an uphill battle, as they are requested to comply with TNC standards that they do not have to observe in the WTO framework, which, in their view, provides some guarantees that their interests will be safeguarded. The authors thus see a role for the WTO in this realm. Specifically, they would like discussions on private standards to move away from the current “fragmented” framework (where discussions

take place in parallel in different WTO committees), and would further like the WTO to clarify the relevance of its own legal arsenal on private standards. They propose an elaborate five-step process that will enable stakeholders to reach a functional regulation of the issue. What matters is that participation in this process should not be solely reserved to the WTO, but opened to other institutions (such as the ISO) that have been active in the elaboration and adoption of standards.

G. van Tongeren, Bastien and von Lampe: *International Regulatory Cooperation, a Trade-Facilitating Mechanism*

The authors approach the subject of regulatory cooperation as a sort of trade facilitation mechanism. In their view, the most promising type of cooperation should balance regulatory objectives with the means to achieve them and the impact on trade, with a combined positive net gain to society.

They identify three categories of trade costs that 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).

They cite numerous empirical studies showing how cooperation mechanisms such as harmonization and/or recognition can increase trade and facilitate allocative efficiency. Nevertheless, unilateral evaluation of the trade impact of regulations is the first, necessary step. Regulatory cooperation should be undertaken in circumstances that trigger a positive net benefit where the costs of maintaining domestic regulations are high.

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

The TBT Committee is widely hailed as an example of successful cooperation at the WTO. Wijkström lays out the terms of regulatory cooperation between WTO members in the TBT. The committee is a forum where both the regulatory and the trade communities meet and communicate. Many of the issues debated are of a technical nature and as a result it is quite often the case that both communities are simultaneously present in the room. They thus have the opportunity to understand each other's concerns. The regulatory community is sensitized to the trade impact of regulations, whereas the trade community has the opportunity to be exposed to the rationale for trade-impacting regulations. Private sector engagement is essential to this work.

Domestic coordination procedures (if effective) will ensure that the private sector—along with other stakeholders—exerts influence on positions taken at the WTO. Sometimes, because the composition of national delegations is the exclusive privilege of WTO members, it may be that the private sector (or other stakeholders)

is present through the delegation. The TBT Committee emerges as a genuine multilateral forum with 127 out of 161 WTO members having already notified and debated regulation under the aegis of the TBT Agreement. 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 with the WTO *imprimatur*. And yet it manages to agree on procedures and to significantly contribute to the understanding of national policies (and thus, set aside potential disputes). Currently, WTO members continue to work on guidance aimed at avoiding unnecessary obstacles to trade; referred to as Good Regulatory Practice (see above).

I. **Wolfe:** *How Can We Know (More) About the Trade Effects of Regulation?*

Wolfe insists on the role that transparency is called to play. He does not deny that substantial progress has been made at the WTO on this score, but argues that there is still much room for improvement. He prioritizes improvements in two areas:

- He underscores that the measurement of trade effects of regulation is an area of revealed interest for WTO members. Otherwise, why include the legal discipline on necessity? And yet, the “culture” of measurement has not made much headway. Panels for a start, by understanding the obligations assumed as guarantee for equality of competitive conditions in the future, have stopped short from using “trade effects” as a proxy to decide whether non-discrimination (the basic GATT/WTO discipline) has been adhered to. Wolfe points to sector-specific work that has been done outside the WTO, which could be of relevance. He cites, for example, the OECD Services Trade Restrictiveness Index, which estimates the effects of regulation on trade in services.
- He revisits previous work on transparency, which led many to conclude that WTO members often lack the incentives to be transparent as they may be offering private and self-incriminating information. He thus sees more of a role for the WTO Secretariat, the “common agent.” This could be done through several 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. A lot is happening, as discussed *supra*, and there is at best uncertainty regarding what they should be reporting following multilateral review of notified PTAs by WTO bodies.

3. Policy Options: From Current to Desired Cooperation

The policy options recommended in this paper aim to cover (as much as possible of) the distance between the current level of cooperation at the WTO-level and at the PTA-level, and the desired level of regulatory cooperation.

As can be seen from the discussion so far, the paper (and the process behind its deliberations and conclusions) aims to bring together two communities that (alas) are not in close communication—namely, the trade and regulatory communities. In principle, the former cares about addressing trade barriers, whereas the latter does not have trade in mind when evaluating appropriate responses to address distortions. And yet, the distinction between “domestic” and “trade” concerns seems increasingly artificial. The liberalization of investment, cross-border vertical integration, and the emergence of global value chains have contributed towards shortening the distance between the two communities. Some noteworthy initiatives by the US Obama administration are evidence of this trend, and we will return to this issue in what follows.

It should be underscored upfront that the objective is to design solutions that can find application across the board, and not simply between a set of homogeneous players. Ideally, the WTO should try to accommodate both multilateral and plurilateral deals among a subset of its membership. However, the old “battle of –isms” should not be renewed, where multilateralism was idolized and regionalism was demonized. Over 500 FTAs later, those who fought this battle should be conceding defeat, at least as far as pragmatic trade cooperation is concerned.

This is not to say that PTAs (and clubs in general) do not give rise to (new) issues to tackle. In a world where tariffs are becoming irrelevant, and it is regulatory barriers that segment markets, the problems are of a different, milder order. After all, regulation must observe the TBT and SPS disciplines discussed above, and among them non-discrimination. Clubs are facilitating deals between those willing to commit. Outsiders (who are WTO members) can live in the safety (to the extent that it is state behaviour that is being disciplined) that they can access clubs on conditions that are identical to those the original insiders had to observe.

Homogeneity of participants is a contributing factor towards ensuring regulatory cooperation. This is why the most far-reaching schemes of regulatory cooperation that we observe—either formal (e.g. RCC) or informal (e.g. TABD)—are between homogeneous players. A key challenge for the multilateral trading system will be to ensure that

such schemes keep the WTO umbilical cord intact while introducing mechanisms that will facilitate an eventual multilateralization of effective regulatory cooperation within clubs. We will return to this issue *infra*.

As stated, since this is a policy exercise, proposals must exhibit a substantial dose of realism. There is often a trade-off between selection of the first best instrument and realism, in that first best instruments could be costly or simply politically undesirable. The recommendations seek to walk along this tightrope without sacrificing too much in either direction.

With this in mind, the recommendations are divided into “institutional” and “substantive” categories. The former are dedicated to issues regarding who participates in the discussion, under what conditions, etc. The latter focus on a selection of issues that have captured the minds and attention of the trade and regulatory communities. They concern the improvement of existing obligations and mechanisms for regulatory cooperation.

3.1. Institutional Recommendations

3.1.1. Clubs

The single undertaking framework has been applied with considerable success during the Uruguay Round but not so during the Doha Round. Clubs are becoming inevitable.

The GATT was successful in dismantling tariff barriers, with a number of exceptions still in place. The WTO has since managed to complete one additional tariff agreement (the ITA, the second version of which was reached in July 2015). It has also concluded two agreements: one dealing with deadweight loss (the Trade Facilitation Agreement) and the other with trade and development (Aid for Trade). However, it has so far proven impossible to conclude multilateral agreements on “pure” regulatory issues. Meanwhile, agreements covering regulatory matters are routinely negotiated between subgroups of the WTO membership, overwhelmingly in the context of PTAs. Since it is regulatory barriers that segment markets today, recourse to this type of arrangement will, in all likelihood, not diminish.

As noted, we observe at an empirical level intense regulatory cooperation mainly among like-minded players. This should not come as surprise. WTO membership resembles the United Nations; it is composed of different players with different social preferences drawn from different cultural backgrounds and different levels of development. This amalgamation of participants who do not share the same concerns or priorities makes consensus difficult to achieve.

The WTO should rethink its attitude towards variable geometry. The promotion of PAs and CMAs (ahead of PTAs) should figure high on the agenda. At the same time, some form of cooperation (in terms of consultation and transparency for example) should continue to take place on a multilateral basis.

The contribution of PAs could be meaningful in the regulatory arena. It would appear that fewer concerns are raised by PAs dealing with new issues than subjects that are already covered by the WTO. The Government Procurement Agreement (GPA) remained a PA after the Uruguay Round because procurement is explicitly excluded from the reach of Article III of GATT (national treatment) and Article XIII.1 of GATS—although, in contrast to the GATT, GATS calls for negotiations on the procurement of services to be launched two years after entry into force of the agreement (i.e. 1997).

The GPA precedent suggests that one rationale or function of PAs 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. Article III.8 of GATT explicitly excludes government procurement from the obligation to observe national treatment. By signing the GPA and agreeing to national treatment between them, a few WTO members moved into an area not covered by the WTO mandate. In a similar vein, one could imagine PAs in the area of investment protection, coordination of monetary policies, etc. PAs could of course also be signed in areas already covered by the WTO mandate should a few members wish to move further and faster. An example is the recent suggestion by some countries to negotiate PAs on services or on trade facilitation.

The possibilities on the regulatory front are endless. The WTO is a negative integration regime, where domestic policies are designed unilaterally and must be applied in a non-discriminatory manner. There is thus the potential for cooperation among like-minded countries in various areas, while keeping the door open to future accessions.

One more issue is worth mentioning here. From a WTO (multilateral) perspective, there is an obvious advantage when recourse is made to PAs as opposed to PTAs. Hoekman and Mavroidis (2015) advance a series of arguments explaining why PAs keep the umbilical cord to the multilateral system tight. Since, for the reasons outlined above, recourse to clubs is necessary in order to dismantle regulatory barriers, it is in the interest of the WTO to monitor what is happening within this realm. Monitoring will be facilitated if PAs are preferred over PTAs.

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: 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%) block it. The WTO should particularly encourage PAs that deal with issues that do not come under the existing mandate.

3.1.2. 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 access of business to the WTO is of course a function of the persuasive power of lobbies, since lobbies must convince their national governments about the legitimacy of their concerns. They can participate in WTO deliberations only through them, as the WTO is a state-to-state contract. For some business interests of a transnational nature and they might find it even harder to persuade one specific government.

In EC-Bananas III, the Appellate Body held that WTO members could choose the composition of their delegation. Thus, in principle it is up to individual WTO members to decide whether they want to give voice to business concerns. This has proven to be manifestly inadequate. The WTO should take the initiative of inviting business interests to participate when regulatory issues of concern to their operations are being addressed. Transnational business interests can prove to be an ally to the WTO in its quest to combat unnecessary, excessive regulation. The easiest way to achieve this is through an extension of the observer status to business representatives.

It is true that business participation is asymmetric across the various WTO committees. This is a function of various factors ranging from business interest in the work of a particular committee to government (un)willingness to reveal its preferences. It is also true that the TBT and SPS Committees rank among the WTO committees with the most intense participation of business representatives. The efforts of these two committees should be commended and improved. The continued relevance of the WTO in trade matters also hinges on its relevance to business interests.

Policy Option 2: Business interests should be in a position to continue voicing their concerns, especially in the TBT and SPS Committees, where they should participate as observers. Their participation should be encouraged and requests for observer status should not be refused except for compelling reasons to be agreed and transparently communicated. In designing this observer status, the WTO could be inspired by the “Industry Advisory Committee” of the OECD or the “Business Advisory Council” of APEC. Participation of business interests should not be confined to areas covered by the TBT and SPS Agreements. It should occur in all areas coming under the aegis of the WTO, with priority given to services trade. A “Business Advisory Council” in the WTO could usefully see the light of day in this context.

3.2. Substantive Recommendations

3.2.1. Transparency

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

The TBT Information Management System informs that 19,723 notifications of measures had been recorded at the time of writing. The number is impressive, and yet the discussions and think pieces behind this paper lead to the conclusion that improvements are still possible.

Transparency alone is a factor that decisively contributes to reducing the magnitude of trade friction. Take for example the case of specific trade concerns mentioned in introduction. According to the official WTO website, 460 STCs had been raised by July 2015. A healthy percentage (more than one-fifth of the total) concerned requests for clarifications regarding national measures. The fact that a very small percentage of STCs have become formal disputes (five cases can qualify as quintessentially TBT disputes) suggests that additional transparency has helped remove concerns regarding the function of national TBT measures.

There are three areas where improvements to the current transparency obligation can be achieved. First, what should the membership be transparent about? Second, when should the transparency obligation kick in? Third, how much information should be provided?

Transparency should cover projects of laws, final measures and amended measures. Information should also be provided on alternatives that could usefully help regulators reach the stated outcome, as well as on the trade impact of the adopted measure. Regulators should explain alternatives that they have (eventually) dismissed, but they should also be prepared to hear about the efficacy of alternative measures that they had not contemplated and explain why they might consider them inappropriate for use in their country.

There is a very important first step here. Often we do not know where the problems lie. Hence, a natural preliminary stage would be for regulation to be transparent. And, of course, part of this discussion concerns a mapping of the current situation. There is sometimes a lack of knowledge regarding the regulatory process of even the most advanced democracies that are WTO members. There are often unused opportunities and a lack of information regarding national transparency mechanisms.

This is an area where work could usefully be done working from both sides of the equation: the supply and demand of information. The idea would be to map the overlap and assess what can be done with respect to whatever is left out.

Business consistently complains about “unhelpful” transparency—e.g. the notification of measures that have already entered into force. Coglianese (2009) usefully distinguishes between “fishbowl” and “reasoned” transparency. The first term focuses on the release of information that can document how government officials actually behave, such as by disclosing meetings. But there is another type of transparency, reasoned transparency, which demands that government officials offer explicit explanations for their actions. Sound explanations will be based on the application of normative principles to the facts and evidence accumulated by decision-makers, and will show why an alternative course of action may have been rejected. It is the latter form of transparency that could be helpful to address business industry concerns.

There is an additional element to consider: the outcome is (largely) influenced by political economy, especially in democracies. Absent internationalized investment, lobbies represent domestic players only. If transparency comes at a stage when everything has been decided, then foreign interests will simply not be taken into account.

The involvement of affected parties at an early stage, coupled with an obligation to explain national measures, are important improvements to a mere obligation to sterile transparency, which is usually exhausted in the requirement to publish laws and/or notify them at the WTO.

There is a very important twist here. “Affected parties” should not be understood as only the business community. It is important to recall that two communities need to come together in the process: the trade and regulatory communities. Regulation affects citizens at large. Its spokesperson is civil society in its various shapes and forms. Transparency should be all-inclusive; it should aim to implicate all interested stakeholders in the process. This obviously takes, properly speaking, an internal and not an international trade dimension. It is nonetheless a step that we recommend since it is by all means appropriate and it will have a positive effect on discussions related to trade. The trade dimension of regulations will be de-mystified and trade sceptics will understand that the influence the WTO regime exercises on domestic regulatory processes is both measured and heading in the right direction.

To some extent, the current regime does address these concerns. First, according to the existing TBT Agreement, all WTO members must guarantee an interval between publication and entry into force. There are complaints, nonetheless, that this is not fully observed. Second, the TBT Committee has been quite active in proposing initiatives such as the guidelines for Good Regulatory Practice aiming to improve the quality of regulatory interventions among WTO members. Similar initiatives should be encouraged. More specifically, to ensure that sufficient time is allocated to foreign interests to adjust to new realities, the use of one-stop shops should be encouraged. Traders should not spend time gathering information about the place where information will be provided. Furthermore, the interval between publication and entry into force should not be unduly restrictive.

Another way to improve the current system is to oblige regulators to follow certain procedural steps before measures enter into force. Specifically, these would include the obligation to provide: the rationale for intervention (reasoned as opposed to fishbowl transparency); a preliminary assessment of the expected trade impact of proposed measures (this will result in closer interaction between the regulatory and trade communities of the intervening WTO member—US practice in this area could serve as benchmark); written explanation as to how alternative measures were taken into consideration before selecting the proposed method; and responses to questions raised by interested parties (while allowing civil society, the business community and WTO members to act as observers with the possibility to enquire).

Policy Option 3: 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 at an early stage in the process; (v) they should use the reasonable interval between publication and entry into force of a measure to fine-tune regulation so that it represents a balanced trade-off between genuine regulatory concerns and an effort to minimize the resulting trade impact. It bears repetition that this proposal is not limited to trade in goods.

3.2.2. Assessing the trade impact of regulations

Ex ante assessment of the trade impact of regulation is a helpful, and very noteworthy, accomplishment of the Obama administration. It is not unheard of, however, that such assessments may overestimate or underestimate certain correlations with other factors that also influence the trade outcome. It is thus always useful to accompany these exercises with an *ex post* assessment of the trade impact of a measure.

The initiative to conduct *ex post* assessments should not be entrusted (at least not exclusively) to the original regulator (the same could also be said for the *ex ante* assessment). The idea would be to produce credible evidence regarding the operation of the measure that is being assessed. Stakeholders could then compare original expectations with actual practice. This type of information could provide a

useful input not only to redesign (if needed) the concerned measure, it could also be valuable for similar future measures, as stakeholders would be in better position to evaluate their operation.

This recommendation might prove to be an uphill battle 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 training and capacity building. This is where existing WTO mechanisms such as the Aft initiative can contribute towards enhancing the level of regulatory dialogue between WTO members.

Policy Option 4: The original *ex ante* assessment of the impact of a proposed regulation should be accompanied by an *ex post* assessment of the trade impact of adopted measures. 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.

3.2.3. Encourage the implementation of international standards

The preceding discussion has established that transparency emerges as a key issue. Notwithstanding the high number of notifications, WTO members might not always have an incentive to be transparent about their policies. Standard-setting organizations (SSOs) have the opposite incentive, i.e. to be transparent. Indeed, by construct, the credibility of institutions in setting “world” standards heavily relies on their “inclusivity” and the power of persuasion that they indeed design standards for the world. Moreover, from a purely legal perspective, unless they are all-inclusive their output will not be recognized by the WTO.¹⁶ The adoption of international standards will thus contribute to transparency.

Transparency is obviously not the only reason why the use of international standards should be encouraged. As mentioned, regulatory diversity is in and of itself a market segmentation factor. This paper evidently does not argue for a totally deregulated world in order to promote trade liberalization. Regulation solves problems; and the manner in which various problems are solved not only differs, but may also need to differ in light of the differentiated conditions that exist around the world. A country with a well-funded and professional regulatory apparatus may be in a position to tackle problems that another country simply cannot remedy. Furthermore, societies have distinct values, preferences and

¹⁶ In 2000, the TBT Committee adopted a decision to this effect (G/TBT/9, of 13 November 2000). The Appellate Body has recognized in its report on US-Tuna II (Mexico) the legal relevance of this decision, holding that it is a subsequent agreement in the Vienna Convention sense of the term, which practically means that judges must refer to it when deciding whether a standard is “international,” and hence recourse to it is in principle compulsory as per Art. 2.4 TBT (§372). The Decision’s §7 is entitled “Openness” and reads:

Any interested member of the international standardizing body, including especially developing country members, with an interest in a specific standardization activity should be provided with meaningful opportunities to participate at all stages of standard development. It is noted that with respect to standardizing bodies within the territory of a WTO Member that have accepted the Code of Good Practice for the Preparation, Adoption and Application of Standards by Standardizing Bodies (Annex 3 of the TBT Agreement) participation in a particular international standardization activity takes place, wherever possible, through one delegation representing all standardizing bodies in the territory that have adopted, or expected to adopt, standards for the subject-matter to which the international standardization activity relates. This is illustrative of the importance of participation in the international standardizing process accommodating all relevant interests.

fears, all of which can lead to diverse regulatory approaches to address similar concerns. It is thus not only political economy but also the public interest that drives regulation across sovereignties in different parts of the world.

International standards offer a process where the influence of (domestic) political economy, while respecting different values, can be tamed. Thus, transaction costs are reduced between those subscribing to the same standard.¹⁷

Current TBT and SPS disciplines require recourse to 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. The TBT Agreement mentions only in passing the ISO (one of the SSOs). Even the SPS Agreement—which does mention three SSOs whose output can be equated to “international standards”—contains an indicative list of SSOs, leaving it to the panels to decide on this issue. The 2000 Decision is a step in the right direction, but probably not a sufficient one, since it leaves a lot of room for discretion on the part of panels to decide whether a standard is international. Were one to take into account the institutional design of these panels (in the majority of cases composed of non-experts in this specific area), it becomes obvious that there is a strong argument in favour of limiting discretion upfront. To this effect, an indicative list of SSOs would be helpful.

Second, the allocation of the burden (production) of proof as decided by the Appellate Body in EC-Sardines might act as an incentive to neglect international standards where they could have been appropriately used. In this case, the WTO organ decided 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.¹⁸ This case law has been reproduced *verbatim* in all subsequent cases. Various authors have criticized this approach on different grounds. Of interest to the present discussion is the following: a reversal of case law will contribute towards the increased use of international standards, since those willing to deviate will have to be prepared to carry the associated burden of proof.

Finally, this point should not be understood as the endorsement of a race for the full harmonization of all preferences, far from it. 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 of course be far more preferable to strive for other integration instruments such as recognition. Recommendation L that we have detailed *supra* could be of relevance in this context and could enable cooperation at larger scale. As

stated, however, such instruments require trust with regards future activities, which is hard to imagine between unlike players. Harmonization, on the other hand, requires the implementation of agreed norms, nothing more.

Further, harmonization should be expected to occur where gains from cooperation are clear and present. After all, it is private operators that drive much of the process behind the best known and established SSOs.

Policy Option 5: Article 2.4 of TBT (and article 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 SSOs.

3.2.4. Private standards

Private standards have mushroomed over recent years. We live in a world full of standards but not in a standardized world. For developing countries, which are typically “takers” of standards, this phenomenon has added to existing transaction costs. Furthermore, they represent an increasingly important hindrance for those willing to jump on the bandwagon of GVCs.

As things stand, there is a very high degree of uncertainty as to whether private standards are disciplined by the WTO. And the fact that (complaints notwithstanding) no one has yet to initiate a dispute on this score is the best proof that the common view is that they lie outside the perimeters of the organization. A series of discussions have taken place in the TBT and SPS Committees, with members unable to bridge their differences.

Those who pay the price regarding the proliferation of private standards would like to see some harmonized solution to the issue, with the WTO emerging as a natural forum. Otherwise, it is asymmetric national laws that apply, which could (or could not) provide for transparency, effective consumer protection, antitrust liability, and so on.

Policy Option 6: The WTO should concentrate on private standards by dedicating one forum to address the issue. The WTO 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 (i.e. what is a private standard?), which has so far led nowhere, it would probably be more opportune to dedicate to sector-specific negotiations and try to extrapolate elements from prior successful experience to the new sectors under discussion.

¹⁷ National regulations must be *based* on international standards. In its very recent report on India-Agricultural Products, the Appellate Body held that this wording allows for some discretion by implementing national authorities, which, nevertheless, cannot put into question the quintessential elements of international standards.

¹⁸ In presence of an international standard, the European Union (defendant) had decided to adopt its own measure, which was not consistent with the international standard. The question that arose was who should justify the deviation? Against all odds, the Appellate Body decided that it should be Peru, the complaining party, and not the defendant. The Appellate Body did not even pay lip service to the fact that it could be for reasons of private information that the defendant had decided to deviate. It held that the various transparency requirements embedded in the TBT Agreement allowed Peru to have a good idea about the reasons for deviation, and allocated the burden of proof accordingly.

4. Final Remarks and Next Steps

A very 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 in the manner presented in this paper will be a decisive step in this direction. Reasoned transparency, as described above, should become a priority for the WTO. It is through this mechanism that the trade and the regulatory community will be brought around the same table. Bringing these two communities under one roof should become one of the WTO pillars as the organization continues to strive towards integrating markets predominantly segmented through non-tariff barriers.

What should be the next steps in this endeavour? We have stated early on in this study that all our proposals are armed with a heavy dose of realism. Viewed from this perspective, it would not matter if we started from Policy Option 2 or 6. What we would not like to see, though, is the forest sacrificed for the tree. To be clear, we would like to see an institutional innovation that would promote regulatory cooperation across the WTO membership on a sustainable basis. “Functionalist” approaches have worked well in various fora, and it is for this reason that we encourage the current initiatives undertaken in the context of the TBT and SPS Committees. There is no reason, nevertheless, to restrict such initiatives to issues covered only by the TBT and SPS 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 our proposals could find a home for debate and deliberation. Every once in a while, economists point to new gains from market integration. For the world community to reap these gains it needs to understand the reasons for intervention in the first place, evaluate the different attempts to regulate comparable or even 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 before designing new disciplines on non-tariff barriers.

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

Annex 1: Summary Table of Main Policy Options

Policy Option	The Current Situation	What Needs to Change
Institutional Recommendations		
<p>1. The WTO should promote recourse to plurilateral 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> <ol style="list-style-type: none"> 1) Instead of consensus, PAs should be added unless WTO members representing 20% of world trade opposes them 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>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, 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>	<ol style="list-style-type: none"> 1) Transparency-related obligations should be consolidated in one agreement. 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. 3) Both business interests and civil society at large should be implicated early on in the process, before final decisions have been taken. 4) The aim of transparency should be to bring together the regulatory and the trade community.
<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>

Policy Option	The Current Situation	What Needs to Change
5. Recourse to international standards should be encouraged.	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>The two provisions should be modified so as to:</p> <ol style="list-style-type: none"> 1) Oblige WTO members to also notify their measures based on international standards; 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; 3) The 2000 Decision should be added to the two agreements and should be observed by WTO members; 4) An indicative list of SSOs should be added.
6. The relevance of the WTO on private standards should be clarified.	There is an ongoing discussion regarding private standards that has led nowhere.	<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>

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