

# Private Standards in the WTO: A Multiple Streams Analysis of Resisting Forces in Multilateral Trade Negotiations

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**Abstract:** The international trade system has been facing a relative decrease in the relevance of tariffs in favour of non-tariff, regulatory requirements (technical, sanitary and phytosanitary standards). The proliferation of these measures, which essentially consist of rules on product labelling and on production processes and methods, may be explained by the growing influence of private agents, such as corporations and business associations. Although these players are willing to develop and enforce a competing regulatory framework such as this on a broader range of topics, this may also generate more fragmented trade rules at both geographic and substantive levels, thus leading to a significant resistance among governments to integrate private standards into the multilateral trade system. Therefore, a mounting debate emerges on the ways in which private standards have been stonewalled in the current negotiation processes of the World Trade Organization (WTO). By relying on Kingdon's Multiple Streams Framework (MSF), we address this question with a particular focus on the current efforts and struggles within the WTO to incorporate private regulations into the international trade agenda.

**Keywords:** private standards; international trade; WTO; multiple streams; governmental agenda; interest groups.

## Introduction

The pillars of the current international trade system, which have notably persisted since its establishment by the end of the post-war period, were essentially based on the adoption of progressive tariff concessions under the General Agreement on Tariffs and Trade (GATT 1947). However, this order has also become progressively subject to structural

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adaptations as a result of continuous interactions among GATT member states through successive rounds of negotiations and cemented with supplementary trade agreements, eventually leading to a far more complex and comprehensive configuration embodied in the WTO system since 1995 (Adlung and Mamdouh 2018). Therefore, the international trade regime currently dominated by the WTO is no longer restricted to the regulation of tariff barriers to trade, but has also included comprehensive rules on non-tariff barriers such as sanitary, phytosanitary and technical measures, as well as other aspects directly related to trade (such as intellectual property rights and investment measures) (Bossche and Zdouc 2013).

Despite such changes in the dynamics and organisation of international trade relations, the main principles of the multilateral trade system have been preserved since its inception. Namely, the WTO has continuously acknowledged the leading role of governmental bodies in the design and development of policies oriented towards trade integration goals, thus maintaining their authority to impose customs and border controls, as well as to determine higher or lower degrees of trade openness of their domestic markets for the access and competition of foreign goods and services (Marx et al 2012).

Nevertheless, a new *modus operandi* of global trade has been increasingly distinguished by the presence of non-state actors who seek to act independently from the limits imposed by governments. Though initially guided and constrained by an agenda set by states, these players have created a plethora of rules and procedures in spheres where the authority of public regulators cannot or are not willing to exist (Cutler 1999). In this sense, such dynamics of trade regulation differ from the normative model that has originally driven the initiatives of liberalisation undertaken by the contracting parties who founded the WTO.

The traditional public and centralised decision-making model is characterised by the existence of clear and well-defined cores in terms of preferences and coordination of regulatory processes. On the other hand, the current dynamics of international trade have challenged that model and seen the emergence of multiple stakeholders with diffuse and partially disconnected interests. Consequently, the centrality-based model of the multilateral trade regulatory system has progressively given room to a partial delegation, concession or transfer of the power to non-state actors (Cutler 1999). In other words, market and non-governmental players have become articulators of a rising model of private-based governance of international trade.

In this context, the so-called 'private standards' have been a key instance of how such non-state forms of trade regulation overlap with state-based forms of decision-making. Private standards are generally understood as non-state voluntary rules that govern the means and processes used to produce, supply, pack and transport goods and services, as well as the management of other aspects pertaining to the local, regional and global levels of production chains (Marx et al 2012). Although not mandatory, they enjoy a significant degree of influence and enforceability among producers and exporters, since complying with those standards will signal to consumers that their products are in conformity with acceptable levels of safety and quality, according to criteria legitimised by strategic actors

such as industry and consumer associations. Therefore, private standards most frequently refer to specific technical, sanitary and phytosanitary requirements in a given national market that, even if created by non-state entities and not binding, become *de facto* rules that must be met by most competitors in that same market.

In principle, private standards might contribute to reducing asymmetries between trading partners, so as to reduce transaction costs and facilitate trade (Jaffee and Masakure 2005), a purpose that can prove particularly legitimate for exports from developing to industrialised countries, where information asymmetries might be larger (Hammoudi et al 2016). However, precisely because of their effective influence over exports, private standards can also impact the production processes of many industries and ultimately constrain the capacity of producers to access certain foreign markets, due to the technical, administrative and financial costs incurred to meet their particular requirements (Maskus et al 2005). Most importantly, private standards can be unfairly designed by certain domestic industries with the only goal of preventing foreign competitors from accessing their markets, with no clear justification of safety or quality. Thus, private standards can display similar effects to those of non-tariff barriers to trade, mainly in the form of reputation costs to foreign goods generated by an overprotective local industry (Maertens and Swinnen 2007).

Due to the possible distortive effects caused by local production standards, states have long had the exclusive authority to design such rules under domestic laws, which would then become progressively harmonised through multilateral negotiations in the WTO. However, industry and consumer associations have gradually taken steps to override that authority by imposing additional requirements which, by enjoying *de facto* enforceability, also create the opportunity for unfair trade barriers. As a consequence, the emergence of private standards has notably become a process of growing competition and conflict with mandatory rules negotiated by states in the WTO, with controversial effects over the dynamics of the international trade flows. While some studies have suggested that trade has been facilitated by the proliferation of private standards (Andersson 2018), others have rather argued that they may have resulted in legal fragmentation and trade distortions (Cafaggi 2012; Thorstensen et al 2015).

In other words, the longstanding efforts to regulate production standards through the WTO (mainly through the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade) had strongly assumed that these issues could be exclusively driven by states, so as to reinforce the legitimacy of the current multilateral trade system.<sup>1</sup> This assumption has now been challenged by the rise of private standards as a parallel regulatory system that the WTO neither clearly prohibits (because private standards are not mandatory) nor endorses (because they are effectively capable of creating distortions). Therefore, an apparent contradiction arises: while industry and market players have increasingly argued for self-regulation as an important process for promoting global trade with safety and quality, WTO members remain in absolute disagreement on whether non-state actors should be definitively allowed to define and enforce product standards, and if so, what the limits of their powers would be.

Despite the increasing significance of the problem, the inclusion of private standards in the agenda of the multilateral negotiations of the WTO has seen little if no progress at all. One might point out that the key reason for the limited engagement of the WTO with private standards is that such a topic was simply not included in the current mandate of negotiating rounds, thus legally limiting the authority of member states to address this issue. Private standards, and their impact, only emerged as a key issue after the WTO regime was established, so that the relevant agreements under the Marrakesh system do not allow private standards to be covered by any particular commitment.

It is true that the rationale behind private standards had been mostly alien to WTO officials, since they are regarded as informal institutions beyond the scope of governments and, therefore, not subject to WTO rules and principles (Mavroidis and Wolfe 2017). However, precisely for that reason, there is now a mounting perception that, given the growing role that private standards have been effectively taking in the governance of the global trading system, they should no longer remain excluded from further regulation within the WTO (Mavroidis and Wolfe 2017; Wolff 2008; Amaral 2015). Accordingly, regardless of the legal aspects that do not cover private standards under the current WTO mandate, a question arises as to why and how political pressures within the ongoing multilateral trade system have effectively maintained private standards on the sidelines of that organisation, and how they will continue to do so in future negotiations.

This article seeks to contribute to this question from a multiple streams framework (MSF) perspective, as introduced by Kingdon (2010). We argue that the increasing participation of non-state actors in international and national fora has truly broadened the perception of states about the impacts of market standards and technical requirements. Nevertheless, due to the pressure of organised political forces, domestic governments tend to resist a deeper discussion of inputs given by those non-state agents. This can be eventually translated into Kingdon's concept of *national mood* (i.e. a breeding ground for new ideas to emerge), which seems to be pervasively lacking among WTO member states with regard to the incorporation of private standards. Coupled with the absence of ruptures among domestic governmental structures that could introduce this matter as a priority in the WTO negotiating agenda, this eventually shows states eventually becoming discouraged from effectively engaging in new forms of trade regulation.

The article is divided into four parts. In the first section, we review the institutional and historical processes that defined state-driven negotiations as the basis of the current WTO system, together with the rising importance of non-state actors and private standards. In the second section, we review Kingdon's theoretical framework and discuss how the concepts of *problems-policy-politics* streams relate to the current stalemate of private standards in the WTO agenda. In the third section, the article analyses the possible roadmaps and stumbling blocks for coupling the streams of private standard negotiations described in the previous section, eventually leading to our concluding remarks in the fourth section.

## State-driven regulation under the WTO system, the rise of private standards and current regulatory resistance

The creation of the WTO through the signature of the Marrakesh Agreement in 1994 became the pinnacle of the negotiations conducted within the scope of the so-called Uruguay Round between 1986 and 1993 (Bossche 2016). Since it came into force on 1 January 1995, the WTO has represented a historical and decisive cornerstone of the collective state efforts towards trade liberalisation. In particular, the Marrakesh Agreement made a breakthrough in including rules on trade of services and intellectual property as an essential part of the WTO framework, while also introducing a common understanding about the application of non-tariff measures – i.e. regulatory technical, sanitary and phytosanitary requirements.

Even before the creation of the WTO, the GATT alone had historically contributed to the achievement of tariff reductions, especially on industrialised products. In legal terms, the GATT had an important role in this objective by consolidating a set of decisions, procedures and customary practices to be permanently followed by its members and constituted bodies. For this reason, the WTO incorporated and provided more consistency to the rules of GATT 1947 – including GATT 1947 decisions, procedures and customary practices, according to Article XVI(1) of the WTO Agreement – while also introducing breakthrough changes in the multilateral system by establishing new norms of interstate governance and dispute settlement. Such were the advances promoted by the Uruguay Round that, under Article XVI(1) of the WTO Agreement, this framework still functions as a reference for the WTO in the course of all its activities (Ford 2002).

Perhaps as importantly, the Uruguay Round dramatically reinforced the legitimacy of the multilateral system by improving many of the longstanding issues on non-tariff barriers to trade. In this context, the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) became integrally part of the WTO Agreement as a result of excruciating negotiations during that round. The TBT and the SPS Agreements were drawn up in consonance with the principles and goals of the rising WTO framework, namely: non-discrimination, predictability of market access and special treatment for developing countries. Those elements have pervaded all specific rules on regulatory matters that eventually formed those two agreements, including the drafting and adoption of norms, regulations and conformity assessment procedures.<sup>2</sup>

The TBT Agreement improved and clarified rules previously negotiated within the Tokyo Round in 1979. At that time, the Standards Code resulted from a plurilateral negotiation that involved the 32 contracting parties of the first GATT in 1947. In particular, the Code laid the foundations for the process of drafting and applying norms and technical regulations<sup>3</sup> by recognising that technical barriers represent a legitimate concern and a right of the international community while also establishing new principles and international control procedures for their adoption. The Code encourages, for instance, the use of international standards (harmonisation) and the creation of a notification procedure

concerning the proposal of technical regulations that were not drafted according to international standards (Middleton 1980).

Moreover, both TBT and SPS agreements aim to ensure that their members enjoy the right to implement public policies to protect human, animal and plant life health.<sup>4</sup> On the other hand, due to the obligation to respect the rules of the multilateral trade system, the two agreements also attempt to provide new instruments to identify and fight measures that are only aimed at hindering trade. Therefore, members should not protect domestic producers by harming international competitors or creating restrictions disproportionate to the goals of public interest. For this matter, the TBT and SPS agreements instead propose the adoption of certain international standards as the basis for creating domestic technical, sanitary and phytosanitary regulations.<sup>5</sup> It is assumed that requirements based on international standards are lawful and should be encouraged, since such measures would attain public interest while also not creating unnecessary restrictions to trade.<sup>6</sup>

In this context, drawing up guidelines in accordance with international standards became a crucial strategy for avoiding multiple, overlapping and often conflicting regulations, since they have all been associated with fragmentation effects from decentralised regulatory processes. Consequently, attempts to find higher consistency among regulations and conformity assessment procedures between various jurisdictions became regarded as a welcome effort among the WTO members to shift the discussion of standards from a contentious agenda of legality of non-tariff barriers to a more trade-favourable agenda of international harmonisation (Peel 2010: 25).

These harmonisation efforts based on the use of international standards contribute to the strengthening of non-governmental organisations responsible for the elaboration of voluntary requirements. Consequently, the limits of state performance are determined by the intensity with which this arrangement of standard-setting entities operates, whose normative production has increasingly exempted countries from the burden of controlling all the regulatory processes. By allowing states to only manage the selection of benchmarking standards used for mandatory regulations, this decentralisation also contributes to the steering of resources from national governments to forums responsible for administering trade rules (such as the TBT Committee).

In order to deem international standards as consistent with WTO rules, they have to meet a number of criteria, such as transparency, openness, impartiality and consensus, effectiveness and relevance, and coherence, and to address the concerns of developing countries (WTO, G/TBT/9, para. 20 and Annex 4). Finally, the TBT Code of Good Practice also created specific guidelines in order to ensure the consistency of requirements set by a given standard-setting institution with the WTO rules (Annex 3 of the TBT Agreement).

Government bodies are not the only participants in the process of drawing up requirements. Currently, non-governmental organisations, such as individual firm schemes (retailers), collective national schemes (business/industrial associations) and collective international schemes (international organisations and business/industrial associations) also participate in the process (OMC, G/SPS/GEN/746). These non-state entities are responsible for the creation of the so-called 'private standards.' Even though these measures are in general voluntary, their implementation can limit the access of specific goods

to some markets. Besides, seeking process standardisation within Global Value Chains (GVC)<sup>7</sup> may require suppliers to adapt to rules observed in the production routines of multinational companies, which are characterised by the interconnection of business networks on a global scale.

The newly created private standardisation process is somehow integrated into a rationale of improvement which is imposed by the market itself and whose goal can range from improving the quality of the production chain to creating differentiated products and fostering ethical values (Liu 2009). Moreover, private requirements can have various regulatory scopes and can be related to, for example, the preservation of social values, incentives to organic farming, and concerns about climate change, among others.

As a rule, private standards are non-mandatory. Nevertheless, some of those standards can be considered mandatory in practice because, when retailers or exporters disregard them, they may be prevented from accessing suppliers or third markets. Therefore, private standards can eventually produce early effects or replace public regulation (Henson and Humphrey 2009), thus imposing an additional burden on the production process.

Private standards may result in asymmetries between different parts of the production chain, as large private players can exert more effective control over the creation of requirements which bind the primary level of the production cycle, and affect sectors characterised by a high level of diffusion (FIESP 2014). As a consequence, there has been a gradual loss of autonomy of players subject to regulatory measures, especially small and medium companies, which may incur higher production expenditures to adapt to private requirements.

For this reason, various countries have argued for clearer regulation of private standards in the multilateral trade system. However, not only has this topic not been included in the current mandate of the Doha negotiation rounds, but it has also faced significant resistance to more thorough discussion within the WTO thematic committees. For instance, several members of the WTO have raised the issue of private standards at the meetings of the SPS Committee, mostly arising from concerns that such measures would amount to sanitary and phytosanitary measures that are more trade-restrictive than necessary for health protection. In June 2005, Saint Vincent and the Grenadines and other developing countries challenged the WTO-consistency of EurepGAP (currently GlobalGAP), a non-governmental certification scheme that affected the importation of bananas to the UK and European supermarkets, thus creating possible trade distortions against developing countries (G/SPS/R/37/Rev.1).

Since then, private standards have been regularly discussed at meetings of the SPS Committee. Although the SPS Committee first started considering private standards as a trade concern, very few specific examples have been submitted without any concrete progress on the extent to which private standards should be addressed as a trade-restrictive measure, with many members only limiting their positions to restating the importance of international standards in facilitating safe trade and recognising the potential role of private standards (Wolff 2008). Eventually, in January 2007, the WTO Secretariat provided a background note on the topic of private and commercial standards with a view to stimulating discussion in the SPS Committee (G/SPS/GEN/746).

With a view to understanding why private standards have been struggling to enter the agenda of the WTO and what the main hurdles for the multilateralization of this subject are, the following section will make use of Kingdon's MSF as a main tool of analysis.

## **The political challenges of including private standards in the WTO mandate under the MSF**

### *The origin of Kingdon's theoretical model and its main criticisms*

According to the multiple streams approach, there are three families of processes (streams) in government agenda setting: problem recognition (problems stream), the formation and refining of policy proposals (policies stream) and politics (politics stream). While governmental agenda is set in the problems or political streams, the alternatives are generated in the policy stream (Kingdon 2010: 87, 194).

For an issue to become part of the governmental agenda at a certain time, it is necessary, under this rationale, that it attracts the interest of public decision makers. However, only matters considered worthy of policymakers' attention become public policies and be part of the so-called decision agenda (Kingdon 2010: 166). Other issues brought up by stakeholders which do not prompt the attention of policy makers are on the systemic agenda, or non-governmental agenda, and are put off until a new opportunity arises (Ackrill and Kay 2011). An issue awakes the interest of policymakers and effects changes upon the agenda when the three above-mentioned independent streams are linked: *problems stream*, *politics stream* and *policy stream*.

The convergence of these three streams, so-called *coupling* under the multiple streams theoretical framework, occurs in moments classified as policy windows, which are only open for short periods of time. Moreover, while the problems stream and the politics stream strongly influence the circumstances that make the convergence possible, the policy stream does not influence the agenda directly because the alternatives formulated stand out only after the recognition of problems and the existence of political demands (Kingdon 2010). Coupling may also differ depending on the stream in which the window is open.

Furthermore, the process of coupling the three streams is stimulated by the action of *policy entrepreneurs*, who are willing to invest their resources in promoting a position in return for anticipated future gain in the form of purposive or solidary benefits (Kingdon 2010). Individuals who are willing to invest in ideas can be government officials (either congressmen or bureaucrats of the Executive Branch) or not (interest groups and academics for example). They are similar to an expert on a specific matter, are skilled, and can couple the three streams when a window opens (Capella 2014).

Kingdon's multiple streams model was created with the purpose of analysing the processes of agenda formation within the fragmented American political system (in particular the Congress). Nevertheless, his work became a reference in comparative analyses in political science, so that the model's central concepts later became incorporated by other



studies interested in explaining the general dynamics of political processes (Zahariadis 1995; Barzelay 2006).

The multiple streams model is based on the earlier 'garbage can' concept developed by Cohen, March and Olsen (1972), according to which the political environment is pluralistic and composed of multiple actors, goals and perceptions. However, Kingdon's theoretical contributions made such an approach even more appealing, since it extended far beyond its original focus of study. In addition, the metaphors of multiple flows have been considered simple yet highly explanatory, thus making them applicable to various types of situations, moments, or political agendas. The use of the Kingdon model is further favoured due to its unparalleled flexibility: the application of its theoretical framework does not require hypothesis testing or advanced knowledge of political theory, which has opened up a new range of empirical studies (Cairney and Jones 2016). Another important advantage of this model is that it has allowed a new approach with ambiguities and uncertainties in political decision-making, which were otherwise considered theoretical anomalies by more rationalist theories (Chapel 2007).

It is true that such characteristics have also been subject to criticism. There are frequent references, for instance, to the excessive fluidity of the model, which would make it somewhat limited in its capacity of establishing more mechanical relations between problems and alternatives (Sabatier and Weible 2014). Other problems in applying the concept of streams and their connection to the eventual agenda formation have also been recognised.<sup>8</sup> In any case, Kingdon's model has proved useful in political sciences scholarship to promote comparative analysis.<sup>9</sup>

### *The MSF and the multilateral trade system*

While Kingdon's theoretical framework has been broadly applied in the political literature, this approach is still seldom seen in the context of international trade. In an examination of the empirical applications of the multiple streams model, Cairney and Jones (2016) assess 41 articles and texts considered central in the literature on this theoretical framework. This analysis indicates a change of focus in the use of the model created by Kingdon: 20 cases apply to cases of national amplitude (half involving the USA); 13 have subnational applications (five of which include US states, while six relate to European countries); and eight articles involve international case studies (seven of them involving the European Union and one related to the United Nations).

Although Kingdon's MSF was originally conceived to explain policy process in the political system of the USA, it has also been adopted to explain political systems that deviate from that approach. This is the case for parliamentary systems, whose policymaking processes were widely analysed by using MSF. Particularly with regard to studies in the domain of International Relations and international organisations, such as UN peace-keeping, security studies and intergovernmental counterterrorism policies, the framework often had to be substantially adapted, given the political system and the level of representation being analysed (Herweg et al 2018).

In any event, where political systems hold a degree of uncertainty on what relates to the policy preferences of their parties, they would prove suitable as objects for MSF analysis, as long as they display similarly fluid conditions (in terms of issues and institutions) as the US political system. In particular, international organisations have been regarded as a particularly suitable field for MSF analysis, given their characteristic of semi-autonomous bureaucracies and decision-making processes, which can be fruitfully explained by MSF (Barnett and Finnemore 2004).

In this context, there are no specific theoretical limitations that could prevent the MSF from applying to the WTO regime. In fact, the WTO can occupy the same position as domestic states in Kingdon's framework, where WTO members and their bureaucracies act as the decision makers. In assigning it this position, it is possible to investigate the elements that produce changes in the international trade agenda and to better understand the relevance of private standards in the changing regulatory processes in the WTO.

Though there is no global government, the WTO is a member-driven organisation whose decisions are based on negotiation, majorities and (sometimes) consensus. Therefore, from certain perspectives, governance issues that are similar to executive, legislative and judicial challenges can be found inside the multilateral trade regime, under analogous conditions to the ones faced domestically by national states (Ehlermann and Ehring 2005).

In fact, states have a governmental agenda, which is in principle set according to proposals presented by candidates to public offices. Likewise, the WTO periodically sets a negotiating agenda – currently, at least formally, still under the Doha mandate established in 2001. This agenda comprises matters previously specified by a mandate agreed among its members, the so-called negotiating mandate, which is debated within the WTO throughout a period previously established. Including a topic on the WTO's agenda means that its members must step up their efforts to tighten up the rules applicable to trade disciplines (agricultural subsidies, trade facilitation, government procurement, etc.).

Similarly, supplemental theories on MSF conceive the domestic policy community on a broader basis, as ideas flows move beyond national boundaries and circulate internationally (Lovell 2016). Whereas this approach may prove useful to understand the ability of the international community to influence and speed up the gestation of policy ideas domestically, it also illustrates how states can project their presence overseas when looking for policy solutions capable of dealing with international problems. In other words, it is possible to interpret the WTO as a network of policymakers mainly composed of its member states, where international policy solutions continuously influence national decision-making processes and create an ongoing interplay of policies between internal and external arenas. At the same time, a policy community exists in the WTO beyond the mere action of interacting governments through so-called transnational activism (Herweg et al 2018). Transnational activists, such as trade associations seeking to legitimise private standards within the WTO domain, may be conceptualised as policy entrepreneurs seeking to couple problems and solutions to receptive audiences, by reframing issues, building coalitions, lobbying, protesting, and bridging domestic interests with international conflict (Tarrow 2005).

Naturally, there are some differences and similarities between domestic and international processes which are relevant to the discussion, but do not prevent the application of this framework to the multilateral dynamics (Ackrill and Kay 2011). In this sense, Kingdon's analysis assumes that bringing a topic into a domestic governmental agenda represents an opportunity to discuss an issue, and possible progress depends on the political interest of its local stakeholders in advancing it. Likewise, incorporating a topic into a multilateral agenda gives implicit signs that member states have recognised that a new issue must be effectively tackled – and not only discussed – according to the available alternatives. There are also similarities between the two spheres concerning the recognition of an issue as a problem. Domestically, the recognition of an issue as a problem by a decision-making body becomes possible after a plethora of factors takes place; this problem then becomes incorporated in the list of priorities. Likewise, by creating a negotiating mandate in the international sphere, WTO members provide an opportunity to bring priority matters to the discussion (Ford 2002). This can occasionally result in the formulation of new rules of conduct applicable to WTO members.

### *Problems stream*

The first stream refers to the analysis of how issues are recognised as a problem. Three elements influence the attention of decision makers: indicators; focusing events, crises and symbols; and feedback about government measures.

The multilateral international trade regime has made progress in systematically mapping the so-called regulatory private standards, which can serve as indicators and help to evidence certain issues require attention and must be recognised by decision makers as a problem. In December 2008, the WTO conducted research to map private standards and assess their impact on trade (WTO, G/SPS/W/232). In June 2009, a new document containing the answers of 22 members to a survey circulated to members (WTO, G/SPS/GEN/932). Because some members expressed concern over limitations noticed in the report (lack of accuracy and specificity in data provided by the respondents) a revised version taking the commentaries into account was presented (WTO, G/SPS/GEN/932/Rev.1).

The survey has confirmed that large retail chains (such as supermarkets and hypermarkets) are the main entity accountable for the imposition of private standards. Fresh fruits and vegetables and refrigerated and frozen meat were identified as the products the most affected by private standards. The survey has also revealed that private standards are considered, by exporters, as a precondition for exporting to many states. Moreover, producers who fail to adapt to these requirements, even if they observe official regulatory clauses, miss opportunities to access these markets, and seek alternative ones. Another finding is that players incur high costs to fulfil the requirements set out by private standards, and the costs are higher than they usually are when players comply with public regulatory requirements. Expenses may arise out of investments in infrastructure, internal and external audit, annual certification fees, and the costs of adapting to regulatory re-

quirements, which change throughout time. The extra disbursement increases the transaction costs of operations and can be harmful to the internationalisation of companies.

The second element (events, crises and symbols) corresponds to, in the multilateral trade system, the reoccurring reports of difficulties accessing markets due to existing market standards that place an onerous burden on exporters affected by private requirements.

For that matter, the issue of private standards was first raised in the World Trade Organization in June 2005, when Saint Vincent and the Grenadines raised concerns with regard to requirements imposed by EurepGAP (now GlobalGAP) (G/SPS/R/37/Rev.1, para.16-20). Further discussions on the subject were held in the multilateral arena through the inclusion of private standards on the agenda of the March 2007 SPS Committee meeting (WTO, G/SPS/R/43, para. 40-42).

That private standardisation organisations have been playing a growing leading role (while official public requirements have been simultaneously weakening) is also evidenced by the concerns voiced by Cuba in an October 2010 meeting of the WTO Committee on Sanitary and Phytosanitary Measures:

We consider private standards to be trade restrictive in that they concern selected market segments and can only be met by a limited number of producers. Moreover, they are often stricter than the limits laid down by the international organizations or the country's own human health protection standards, and even than the domestic legislation of the country concerned (WTO, G/SPS/GEN/1055).

Another two developing countries raised similar concerns. Cuba's claims were followed by concerns presented by Belize (WTO, G/SPS/GEN/1240, March 2013) and Nigeria (WTO, G/SPS/GEN/1398, March 2015), which also circulated communications expressing the difficulties that private standards create while they continue to go beyond the measures prescribed by governments. The member states of MERCOSUR also expressed their concerns through a communication presented in 2009:

Once sanitary and phytosanitary matters begin to be governed by private standards and the latter have an impact on international trade, it becomes the responsibility of the SPS Committee to address the issue and use the instruments available in the SPS Agreement and in the GATT 1994 to prevent the use of private standards from undermining rights and obligations assumed by governments in the WTO (G/SPS/W/246).

The criticisms presented by Cuba, Belize and Nigeria, coupled with the concerns of the MERCOSUR states, are in part evidenced by the multiplication of private standards related, for instance, to the promotion of sustainable practices. In this sense, the database developed by the International Trade Centre reveals the existence of at least 230 voluntary standards developed by different standards organisations, applicable to more than 80 sectors and 180 countries. Such requirements involve issues such as environment, social aspects, economic viability, business ethics, and quality management.<sup>10</sup>

Another indicator of a significant problems stream concerns the frequency under which private standards and their interrelationship with international trade arises in the thematic sessions organised by the WTO Public Forum: whereas between 2010 and 2013 there were only six thematic sessions on the subject, between 2014 and 2018 there were 21 events directly or indirectly related to this subject:

**Table 1 – Frequency of sessions on private standards in the WTO Public Forum**

Year	Sessions related to the issue of private standards (A)	Number of sessions (Workshops and Working Sessions) (B)	(A)/(B)
2010	3	40	7.5%
2011	1	46	2.2%
2012	1	44	2.3%
2013	1	54	1.9%
2014	4	68	5.9%
2015	7	88	8.0%
2016	3	100	3.0%
2017	4	106	3.8%
2018	3	112	2.7%
TOTAL	27	658	4.1%

Source: Created by the authors with data from WTO (2019).

Lastly, there are no empirical examples of the third element (feedback) from the international community on actions and programmes agreed on by states (individually or collectively) to bring issues to the attention of policymakers. In the regulatory sphere, there is no register of such a practice. The lack of public policies concerning the monitoring of private standards could be the reason for the inexistence of evidence.

### *Policy stream*

The second stream is related to the set of available alternatives and solutions to perceived issues. Solutions are not necessarily produced as issues are perceived. They can be initially produced disregarding the issues that draw the attention of government officials. Among the wide range of ideas provided by communities of experts (policy communities), only a limited number prove to be technically feasible and with acceptable costs, so as to provoke a response from the political community and survive in the decisional arena (Kingdon 2010).

Kingdon describes it as a selection process, analogous to biological natural selection (so-called *policy primeval soup*), by which many ideas float around but just some are selected out for survival while others are discarded. The selection process is guided by the

imposition of criteria which include technical feasibility, congruence with the values of community members, and the anticipation of future constraints, among others. Ideas play a key role in the process of consideration: although proposals are evaluated partly in terms of political support, logical or analytical criteria are important as well (Kingdon 2010: 200-201).<sup>11</sup>

As regards private standards, however, much of the proposal generation process can be undermined by the existence of a fragmented policy community of specialists. The various regulatory agencies inside domestic governments (especially among developing countries) have different backgrounds and varied levels of awareness of the issue, and the general lack of a centralised authority responsible for developing a consistent policy in the regulatory sphere may result in a fragmented policymaking process (Fransen and Conzelmann 2015). From a multiple stream perspective, this will usually lead to a disjointed policy, lack of common orientations and agenda instability (Kingdon 2010).

Similarly, the stakeholders interested in stimulating the discussion on private standards and its impact on international trade comprise academics, experts and increasingly international organisations willing to channel efforts to better understand the matter. Therefore, strategies to adjust private standards to trade-related goals, while maintaining an adequate level of consumer protection and product quality, must be developed under a coordinated action or body, with the aim of producing viable policy proposals (Amaral 2015).

Consequently, efforts made by multilateral organisations (such as the WTO) to incorporate market regulation and the creation of private forums are part of the initiatives to reconcile public and private standards. These forums, though immune to the direct meddling of government, have new and strengthened mechanisms of participation, transparency and other regulatory good practices. On the other hand, there is no consensual perception among stakeholders that international multilateral regimes led by public officials must be responsible for regulating private matters. Difficulties in attributing to the WTO, for example, the duty to conduct the private regulatory agenda are related to the WTO's legitimacy to interfere in non-state conduct. Attributing responsibility for formulating and implementing private measures to the state requires, in principle, identifying government participation in the development of initiatives (Marceau 2014).

### *Multi-stakeholders platforms*

Research has been done to demonstrate that private measures need a distinct forum to debate their conformity with WTO clauses. Some argue that it is necessary to engage in an international dialogue about the significance of a multi-stakeholder platform which would be able to hold a monopoly over the private regulatory process and combine, in a single structure, technical expertise and political legitimacy to restrain the proliferation of regulatory standards (Thorstensen and Vieira 2016).

The quest for consolidating a private governance framework suggests the existence of a new perception of the strategic role to be played by non-state institutions in structuring

a new, cohesive, regulatory system – thus encouraging the emergence of so-called policy entrepreneurs, i.e. actors who use their knowledge of the political process to further their own policy goals.<sup>12</sup> Such a framework is characterised by the creation of a meta-organisation responsible for the definition of guidelines about the process of formulating and implementing regulatory requirements.

### *The incorporation of market regulations in the WTO rules*

Private standards may cause disproportionality between the level of restriction created by the requirement and the risk it aims to mitigate, thus creating an unnecessary restriction to trade (Mavroidis and Wolfe 2017). In this case, exporters interested in questioning such measures must provide a focal point with information that evidences the restrictive character of the obstacles imposed and the necessity to remove them. A similar procedure is followed when one questions compulsory public standards. It is the presentation of formal complaint on the possible existence of a barrier imposed overseas.

In terms of trade regulation, there is no government body before which the country of origin of the product subject to the measure can challenge and overcome the barrier, because the measures that originate are presumably private standards. When a requirement imposed by a country is not expressly laid down by government bodies, it is necessary to analyse whether the private regulatory bodies responsible for setting it can be considered within the scope of the TBT and SPS agreements and questioned before the WTO.<sup>13</sup>

In the *Japan – Film* case analysed by the WTO Dispute Settlement Body (WT/DS44/R), for example, it was considered that a set of incentives dependent on governmental action can be considered a public measure, since they contributed to a certain specific conduct of private entities. This means that, from a legal perspective, implicit government support can be characterised as circumvention of multilateral trade rules (Wouters and Geraets 2012: 485),<sup>14</sup> thus offering an alternative to the presumed lack of legitimacy of the organisation to deal with the discussion about private standards.

Analysing the conformity of private standards with WTO rules from a legal perspective is crucial for the evaluation of necessary measures to give the matter a multilateral dimension. Therefore, it is important to encourage the debate on which body could be the competent one to proceed with the discussion; on the viability of attributing to a WTO member regulatory measures adopted by private bodies; and on the WTO's legal competence to demand its members enforce the Code of Good Practice for the Preparation, Adoption and Application of Standards (Code of Good Practices, Annex 3 of the TBT Agreement) (Amaral 2015).

Current discussions on the reach of the TBT and SPS agreements concerning private standards have not yet produced any practical results on the treatment of the matter (Mavroidis and Wolfe 2017). There is neither explicit indication that the content of the WTO's agreements comprehends and regulates market requirements nor conviction about the competence of the organisation to reduce the potentially restrictive effects produced by

private standards. All hypotheses regarding state responsibility for private conduct involve, to this date, precedents with limited scope or legal interpretations with multiple constraints.

### *Politics stream*

The political dimension that characterises the third stream is based on processes of bargaining and political negotiation. It differs from the practices of persuasion and diffusion of ideas that characterise the stream of alternatives (Capella 2007). Three elements are taken into account: national mood, organised political forces and changes produced inside the decision-making sphere. These elements can exert influence on the formation of the governmental (or, in the case of international institutions, quasi-governmental) agendas.

The national mood is characterised by the notion that a large number of constituents in the policymaking space are thinking along certain common lines – for instance, citizens in a given nation-state or member states in a multilateral forum. In this context, ideas can be generated and become part of the policymaking and implementation agendas. In this sense, various policy entrepreneurs effectively arise in the process: ‘advocates for the newly viable proposals find a receptive audience, an opportunity to push their ideas’ (Kingdon 2010: 149). Organised political forces are mainly the pressure groups, which can express either support for or opposition and resistance to a specific policy. Lastly, government changes involve shifts in the administration, in the composition of legislative and executive bodies, and in other key bodies that are part of the governmental structure.

Concerning changes inside the government and how they can affect the stream at the international level, take as an example the US trade agenda. In 2016, ministers and representatives of 12 countries (including the USA) signed the Trans-Pacific Partnership (TPP) after eight years of negotiations. The President of the USA at the time, Barack Obama, defended the initiative and argued it was necessary to consolidate the USA’s position as a rule setter in international trade and contain China’s growing participation (see Obama 2016). However, the ratification of the agreement by the 12 signatories was undermined in 2017 by the Memorandum signed by the new US President, Donald Trump, declaring the country must withdraw from the partnership (White House 2017).

As one can note, the strategic realignment of US trade policy has immediately impacted not only on its negotiating trade agenda, but evidently also on the multilateral arena. It is reasonable to assume that the beginning of a new administration, coupled with an national mood characterised by the primacy of measures that aim to protect domestic production to the detriment of foreign materials and goods (White House 2017), can exert a strong influence and work changes in the content of both the domestic and multilateral trade agendas.

The political stream can also influence the WTO’s intergovernmental agenda setting in other ways. Once a new round of negotiations starts (Doha in 2001, for example), multilateral trade negotiations are resumed every two years in the Ministerial Conferences. These conferences are precisely the locus where political forces converge. Therefore, they



represent an opportunity to strengthen positions that reflect the domestic interests of WTO members.

However, particularly with regard to the inclusion of private standards (technical, sanitary and phytosanitary) in the international trade system, there has been no clear evidence of mobilised political forces willing to integrate this matter into the WTO agenda. To illustrate this point, we now discuss how WTO members have addressed the issue of private standards through specific policy proposals (G/SPS/55),<sup>15</sup> as well as an electronic working group (e-WG) that has been created under the leadership of China and New Zealand in October 2013. Although the content of such proposals is essentially part of the policy stream under MSF analysis, it is the process through which WTO members eventually blocked their progress in the multilateral agenda that evidences the dynamics of the politics stream in that organisation, as well as the limitations faced by policy entrepreneurs in that domain.

In March 2011, the WTO Secretariat presented to the e-WG a report containing twelve possible actions regarding SPS-related private standards for consideration (G/SPS/W/247). Among a total of twelve, agreement was only possible on six proposals, which were presented to the SPS Committee by the working group for endorsement (G/SPS/W/256).<sup>16</sup>

Actions endorsed by the Committee include: the development of a working definition of SPS-related private standards; providing information to international standard-setting bodies about standards on a regular basis; updating the Committee on developments in other WTO fora that could be of relevance for discussions on SPS-related private standards; communicating with entities involved in private SPS standards (such as retail firms, producers, certifiers and NGOs); and working with international standards-setting bodies referenced in the SPS Agreement, in order to support the development of materials underlining the importance international SPS standards.

Among the five actions adopted, the quest for a working definition of sanitary and phytosanitary private standards is noteworthy. This analysis resulted, in March 2014, in research on the current definitions adopted by other international organisations concerning private standards (G/SPS/GEN/1334/Rev.1). The compilation made by the WTO contains a set of existing definitions of a 'private standard' as used in other international organisations.<sup>17</sup>

The interruption of the discussions on a working definition of private standards was determined by the opposition of countries averse to the entry of this issue into the WTO, where the USA and the European Union were the main opponents. The European bloc advocated, for example, the establishment of a warning preventing any possible working definition on private standards from having any effect on the rights and obligations of members under the Agreement.<sup>18</sup> As reported by the President of the TBT Committee in 2015:

[...] the e-WG's difficulty to agree on a working definition of SPS-related private standards reflected more than a mere drafting problem and required a broader perspective (G/SPS/R/79).

Although many standards organisations are private, they are recognised by governments as ‘national standards bodies’ (Thorstensen et al 2015). As a result, the relative difficulty in advancing private standards ideas on the SPS Committee may in part be explained by the opposition of interest groups to the progress of this topic on the agenda. By disguising themselves as public bodies, private actors may have their general interests voiced by their respective WTO member state representatives, therefore preventing the issue of private standards from reaching the agenda.

The remaining four endorsed actions were subject to moderate progress, according to a report from the Secretariat provided in 2017. On the one hand, progress was made regarding the exchange of information between WTO members and the Codex Alimentarius (Action 2), as well as thematic discussions on private standards within the TBT Committee and in other fora (Action 3). On the other hand, there were modest actions involving the exchange of experience with private standardisation bodies (Action 4), which were mainly led by a number of developing countries (Belize, China, the Philippines, Nigeria and the Dominican Republic). There was also a low level of progress in developing information materials on the topic (Action 5) (G/SPS/GEN/1612).

In addition to the low progress involving the five agreed actions, the seven remaining proposals were set aside due to lack of consensus. Those actions include (6) exchanging information regarding SPS-related private standards among members; (7) providing a forum for the discussion of specific trade concerns related to SPS-related private standards; (8) developing guidelines on the implementation of the above-mentioned Article 13 of the SPS Agreement; (9) developing transparency mechanisms regarding SPS-related private standards; (10) developing a Code of Good Practice aimed at preparing, adopting and applying SPS-related private standards; (11) developing guidelines for the governments of WTO members to liaise with entities involved in SPS-related private standards; and (12) seeking clarification as to whether the SPS Agreement applies to SPS-related private standards.

Therefore, the absence of a political disposition to discuss the subject, mostly expressed through a diffuse resistance to incorporate proposals in the WTO agenda, seems to have been counterbalanced by a continuous insistence of developing countries otherwise. While contributions to the discussion presented by actors such as the MERCOSUR members and China, together with the complaints brought by Belize, Cuba and Nigeria, seek to highlight the growing rise of a problem motivated by the proliferation of private standards, the political resilience of other members in certain cases, of powers such as the USA and the European Union, still prevents the WTO from addressing this issue. This process seems to highlight not only the limitations of private standard advocates in successfully inserting this topic into the WTO agenda, but also that such advocates as policy entrepreneurs have failed to seize the opportunity to initiate action, in part by not capturing the interests of governments in furthering this agenda. As pointed out by Herweg et al (2018), entrepreneurs are often not successful due to their lack of greater access to policymakers.

## Coupling the streams: convergence towards an integration of private standards into the WTO framework

Given the different streams discussed above and their respective explanation on the issue of private standards in the WTO, the next theoretical step is to assess whether such streams (problems, policy and politics) can converge, thus creating an opportunity to shift the WTO agenda towards more effective mechanisms and procedures for the insertion of private standards in the multilateral trade system. From a multiple streams analysis, it becomes a question of whether an opportunity has finally arisen to acknowledge a *problem* as such (government-based negotiations on trade regulation have reached a limit), whether a feasible *solution* has emerged (private standards as an alternative), and if there are *political conditions* favourable to implementing that solution. If the three above-mentioned streams are finally coupled, a window may open, and a new policy mechanism may eventually be integrated into the regime's mainstream agenda.

Regarding the problem stream, the present analysis suggests that there are sufficient elements to justify a shift in the importance attributed to private standards. These elements include unprecedented research conducted in 2008 (indicators), complaints and reports of the difficulties generated by the imposition of market standards, and several rounds of discussion involving this subject (focusing events, crises and symbols).

Within the scope of the policy stream, concrete proposals have emerged from the 'primeval soup' in order to deal with private standards. To be considered feasible, such proposals have sought to meet certain criteria of survival imposed by the international community (e.g. technical feasibility and value acceptability). Attempts to make states accountable for some private standards and to establish a code of conduct, although facing great resistance to moving forward, seem to fall within the rules set out in the WTO Agreements.

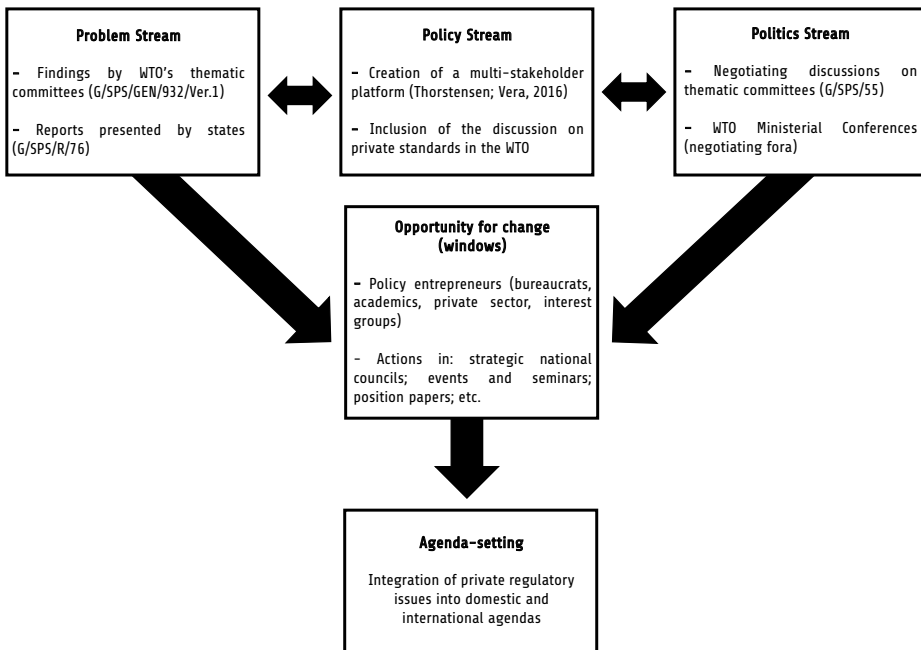
The politics stream, in turn, proved to be the most critical for our analysis. Despite the acknowledged existence of problems and the significant number of proposals to address them, there seems to be a resisting force among a number of WTO member states which prevents private standards from effectively being integrated into the international trade agenda. This political unwillingness has been able to suppress the progress of discussions held in thematic committees of the WTO, to the point of even inhibiting the development of a working definition on private standards.

According to Kingdon, agenda (or policy) windows can only open in two of the three streams: the problem or the politics stream. However, this is not what is happening with private standards – and there are at least two main reasons for that. In the first place, the political relevance of a problem may affect the willingness of decision makers to deal with it and use it as an agenda window (Herweg 2017). In this context, the challenging aspects of private standards may have a limited ability to influence the internal political agenda of WTO members, reducing their incentives for addressing the problem. Secondly, even proposals that survive the softening-up process in the policy stream seem to face resistance in

the politics stream from a group of WTO members who are unwilling to support further legal commitments on this matter.

In a nutshell, the convergence of the streams can be represented by the following chart, which shows that the issue has not effectively been integrated into the international and domestic governmental agenda due to the difficulties (especially concerning the politics stream) described in the present paper. As seen below, private standards pose a problem for some members of the international community. At the same time, specific sectors of civil society, academia and the private sector seek to respond to these challenges by proposing solutions that address these issues and provide a way to mitigate the harmful effects of market regulation. In any case, both flows evolve in the absence of the political willingness of states (particularly developed countries) to respond to these challenges, as demonstrated by the lack of progress in discussions on private standards in the WTO.

**Figure 1 – Coupling streams of private standards into the domestic and international (WTO) agendas**



Source: Developed by the authors.

## Conclusion

The multiple streams approach as proposed by Kingdon seeks to understand the process of setting and changing the agenda of governmental policies. For that purpose, he argues that when decision streams converge with each other, they are able to produce changes in

terms of public policies, given that a specific group (policy entrepreneurs) benefit from the moment when the windows are open.

Based on the multiple streams approach, one can seek to understand the dynamics that characterise international trade agenda setting – especially when referring to the issues of private standards (technical, sanitary and phytosanitary ones) – and the reasons for which the matter has hardly advanced in the WTO's multilateral negotiations.

Against this backdrop, the participation of specific agents (career bureaucrats, academics, private sector representatives) in international and national fora has contributed to broadening the perception of states about the impacts of market standards and technical requirements, particularly on: the potential trade-distortive effects of such measures; the variety of private requirements (which can often overlap) on the production process; the lack of a multi-stakeholder platform with a significant level of participation of the international community; and the difficulty to make states liable for the conduct of private agents backed by the authority conferred upon them to create those rules.

Despite the growing debate and the relevance of private standards, especially due to the weight of organised political forces and pressure groups, a couple of countries (especially developed or dominant ones) have resisted a deeper insertion of this topic into the multilateral agenda. The likely lack of national mood (i.e. a breeding ground for new ideas to emerge) in common among the WTO member states that could be conducive to promoting the topic of private standards, coupled with an unwillingness to explore solutions and ideas already mapped by some WTO members, seems to be an obstacle that discourages countries from engaging in an effective discussion on innovative forms of trade regulation at the multilateral level.

## Notes

- 1 The TBT Agreement encourages WTO members to use international standards in the process of drawing up domestic regulations, unless these standards are ineffective or inappropriate to fulfil a particular policy objective (Article 2.4). Among the benefits derived from technical harmonisation, some of the most relevant are: reduction of costs related to production, product design, and the promotion of consumer welfare (due to the existence of a wide range of attractive product options).
- 2 Technical norms (whether sanitary or phytosanitary) differ from regulations due to a fundamental characteristic: norms are non-mandatory requirements. Conformity assessment mechanisms, in turn, verify compliance with requirements created by norms and regulations, by means of inspection, certification or sampling procedures.
- 3 A 'regulatory measure' is equivalent to a 'technical regulation' when: i) the measure is applicable to a product or a group of products that can be distinguished from others; ii) the measure establishes characteristics the product must have and/or production processes and methods related to it; iii) it is mandatory to comply with requirements concerning the characteristics of the product (TBT Agreement, Annex 1).
- 4 See preamble and Arts. 2.2, 2.10, 5.4, 5.7 of the TBT Agreement; Preamble and Arts. 2.1, 3.2, 3.3, 4.1, 5.3, 5.4, 5.5, 5.6, 10.2, 12.4, Art. 5 of the Annex A and e Arts. 3c e 6 of Annex B of the SPS Agreement.
- 5 Under the SPS Agreement Annex A, sanitary and phytosanitary measures have the goals of: i) protecting human and animal life and health from risks arising from the presence of contaminants, additives, toxins or pathogenic organisms in food, beverages or livestock feed; and ii) protecting human, animal and plant life and health from the risks arising from pests and diseases. The SPS is applicable to every sanitary and phytosanitary measure adopted within the territory of a WTO member.

- 6 According to Article 3.2 of the SPS Agreement, sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994. In its turn Article 2.5 of the TBT Agreement provides that whenever a technical regulation is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade. Although the standards created by these international organisations are not binding on WTO members, conformity with the standards secures compliance with TBT and SPS commitments (Peel 2010: 26).
- 7 Production chains can be defined as a set of activities that firms and workers undertake to develop a particular product inside a single company or in various companies. This process usually occurs in intrafirm networks on a global scale and involves sequences of tangible and intangible value-adding activities from conception to end use. Focus on global-scale affiliate and supplier networks provides a holistic top-down view, typical of GVCs (Gereffi and Fernandez-Stark 2011).
- 8 Kingdon later recognises the need to change some of his original postulates: 'I think that one amendment to that formulation is reasonable: There are some links between these streams at times other than the open windows and the final couplings. Policy entrepreneurs anticipate political constraints as they develop proposals, for instance, or politicians seek the counsel of policy specialists as they work up campaign themes. Couplings are attempted often, and not just close to the time of final enactment. But the independence of the streams is still noticeable in the real world, and postulating that independence in building theories still has its uses (Kingdon 2010: 229).
- 9 Kingdon's framework has been widely applied, for example, to the analysis of US foreign policy agenda (Wood and Peake 1998), the privatisation of public companies in the United Kingdom, France and Germany (Zahariadis 1995; Zahariadis and Allen 1995), and efforts to combat illegal drug use in the USA (Sharp 1994), among others. Approximately 300 cases have already been analysed based on this theoretical model since its inception (Jones et al 2015; Zahariadis 2016). Jones et al (2015) analysed 1933 studies containing citations of Kingdon's framework since 2000. Of these, 1622 had relations considered 'superficial' by the authors, leaving a total of 311 cases with applied use of Kingdon's theory.
- 10 For more information, see: <https://sustainabilitymap.org/standard-identify>.
- 11 Although the process of natural selection may be useful to understand the development of proposals in the policy stream, the agenda-setting process is not necessarily gradualistic. In this sense, Frank Baumgartner and Bryan Jones classify the agenda-setting process as a 'punctuated equilibrium', where systems may suddenly change after being settled into an equilibrium for a time, then settle into a new equilibrium again (Baumgartner and Jones 1993). In this sense, Kingdon recognises that, while agenda changes suddenly and non-incrementally (looking like punctuated equilibrium), alternatives are developed gradually, in a more Darwinian fashion. Despite this, Kingdon states that perhaps continual change, not equilibrium, is the hallmark of agenda-setting. These adaptive models could be described as a 'perpetual novelty' (Kingdon 2010: 226-227).
- 12 The skills entrepreneurs have in implementing their ideas and seeking new solutions for identified problems is evidenced, for example, with the emergence of new fora that aim to coordinate different regulatory frameworks created by private stakeholders. A remarkable example is the United Nations Forum on Sustainability Standards – UNFSS, which has been created with the goal of contributing to the participation of developing countries in the dialogue about voluntary sustainability standards. Nevertheless, only a few countries have joined the UNFSS debates.
- 13 Both the TBT (Article 4.1) and SPS (Article 13) Agreements provide for state responsibility where they fail to ensure that 'non-governmental standards institutions' act in a manner consistent with the provisions of those agreements. However, in order for them to be related to the obligations laid down in the agreements, these institutions must have legal authority granted by a governing body or a strong link between non-governmental institutions and government (Mavroidis and Wolfe 2017).
- 14 Unlike the cases characterised by the active involvement of states in the conduct of private agents, there is no clarity as to whether passivity towards private conduct considered illegal under the WTO agreements would lead to the need for readjustment in relation to multilateral rules (Mavroidis and Wolfe 2017).
- 15 Though only five actions have been supported by the Committee, another seven proposals, which were not consensual among the members, were drafted in March 2011 by the Working Group (G/SPS/W/256).

Among the five actions adopted, the quest for a working definition of sanitary and phytosanitary private standards is noteworthy. This analysis resulted, in March 2014, in research on the current definitions adopted by other international organisations concerning private standards (G/SPS/GEN/1334/Rev.1). The compilation made by the WTO contains a set of existing definitions of a 'private standard' as used in other international organisations, such as the Food and Agriculture Organization (FAO), the World Health Organization (WHO), the International Trade Centre (ITC), the Organisation for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD), among others.

- 16 After discussions, consensus was not reached on Action 6 (G/SPS/W/261).
- 17 Such as the Food and Agriculture Organization (FAO), the World Health Organization (WHO), the International Trade Centre (ITC), the Organisation for Economic Cooperation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD), among others.
- 18 According to the European position: 'This working definition is without prejudice to the rights and obligations of Members, or the views of Members on the scope of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures' (G/SPS/W/283).

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# Padrões Privados na OMC: uma Análise de Múltiplos Fluxos de Resistir às Forças nas Negociações Comerciais Multilaterais

**Resumo:** O sistema comercial internacional vem enfrentando uma diminuição relativa na importância das tarifas em favor de exigências regulatórias de natureza não tarifária (padrões técnicos, sanitários e fitossanitários). A proliferação dessas medidas, que consistem essencialmente em regras de rotulagem de produtos e processos e métodos de produção, pode ser explicada pela crescente influência de agentes privados, como corporações e associações comerciais. Embora esses atores estejam dispostos a desenvolver e aplicar uma estrutura regulatória concorrente em uma ampla gama de tópicos, isto também pode gerar regras comerciais mais fragmentadas tanto geográfica quanto materialmente, resultando em uma significativa resistência por parte dos governos para integrar os padrões privados ao sistema multilateral de comércio. Portanto, surge um debate crescente sobre as maneiras pelas quais os padrões privados foram bloqueados nos atuais processos de negociação da Organização Mundial do Comércio (OMC). Contando com o Modelo dos Múltiplos Fluxos (MMF) de Kingdon, abordamos essa questão com um foco particular nos esforços e embates atuais da OMC para incorporar regulações privadas à agenda de comércio internacional.

**Palavras-chave:** padrões privados; comércio internacional; OMC; múltiplos fluxos; agenda governamental; grupos de interesse.

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