

# RECONCILING TRADE AND SUSTAINABILITY: A CRITICAL REVIEW OF THE WTO'S ROLE IN ESG REGULATION AND TECHNICAL BARRIER

## Abstract

This review assesses the Research Handbook on the WTO and Technical Barriers to Trade, edited by Tracey Epps and Michael J. Trebilcock, which examines the relationship between international trade law and environmental, social, and governance (ESG) objectives. The handbook examines the interplay between the WTO Agreement on Technical Barriers to Trade (TBT Agreement) and national or cross-border regulatory frameworks, particularly as ESG standards become increasingly prevalent globally. Contributions of leading legal scholars address the legitimacy of the WTO in incorporating non-trade concerns, the interpretation of key TBT provisions, the influence of international and private standards, and major case law outcomes. The review highlights strengths of the volume in bridging the gap between legal doctrine and global governance. Despite achieving an admirable degree of conceptual clarity regarding environmental, social, and governance (ESG) compliance in the newly published United Nations Conference on Trade and Development (UNCTAD) handbook, the section devoted to firm-level implementation mechanisms is addressed only in passing. Besides, there is a limited development in the analysis of regulatory issues facing states in the Global South. Despite this, the resourcefulness in understanding how trade and sustainability relate to one another makes the handbook an essential guide for all researchers, policymakers, and trade negotiators.

**Keywords:** WTO law, ESG governance, Technical Barriers to Trade, sustainability standards, regulatory autonomy, international trade

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## **Introduction**

*The Research Handbook on the WTO and Technical Barriers to Trade*, edited by Tracey Epps and Michael J. Trebilcock, presents a sophisticated and comprehensive legal analysis of technical trade barriers (TBTs) within the international trading environment. The book presents a rigorous examination of the scope of the WTO Agreement on Technical Barriers to Trade (TBT Agreement), situated within the broader context of debates on regulatory legitimacy, global governance, and sustainable development. Epps, a scholar par excellence in trade law and population-health regulation, and Trebilcock, an expert in international economic law and institutional analysis, bring stellar qualifications to the venture (Epps & Trebilcock, 2013).

The handbook is structured into four thematic groupings. Knowledge of the legal architecture of the TBT Agreement, the influence of the formation of international standards, its pervasive presence in the form of self-regulatory organizations, and their collaboration with WTO disciplines and non-trade goals was considered in the first, second, third, and fourth sections, respectively. These sections outline the primary areas in which the TBT Agreement operates.

The Research Handbook offers those working on the edge a thorough and authoritative overview of the legal implications of TBTs within the WTO framework. This work is likely to be of interest to scholars and practitioners interested in normativity related to trade, institutional design, and the practice of regulation. Presenting the analysis of various contributors, the book provides a reader with a wide representation of ideas on the interconnection of the trade liberalization cycle and national regulatory autonomy, a problem of increased topicality due to the active introduction of ESG-related (environmental, social, and governance) regulations by governments, which can regulate the flow of goods.

The handbook is particularly timely and relevant to contemporary policy and academic debates. As countries incorporate ESG commitments into trade agreements, the legal interface between trade obligations and regulatory objectives becomes increasingly critical. This volume provides an essential legal and policy context for understanding how technical standards serve as both tools for regulatory cooperation and potential trade barriers. The WTO Handbook on Technical Barriers to Trade (2014) adopts a systematic approach to elucidating the legal framework and practices of the organisation. More importantly, it clarifies how the WTO and its dispute settlement organs understand and resolve the contradictions between the trade rules and imperatives of sustainability (Trachtman, 2014). Still, the review suggests that, despite its legal proficiency, the Handbook does not devote sufficient attention to the implementation and compliance issues required for efficient ESG governance.

## **Content Overview**

The book consists of twenty-three chapters and some of them are necessary for understanding the interface between the WTO and ESG.

### **WTO Legitimacy and ESG Tensions**

Robert Howse draws attention to the legitimacy dilemma facing the WTO, particularly in its ability to regulate in the public interest. He reasons that the legal culture of the organization has lagged behind an era where trade policy is aligned with environmental and human rights issues. Using examples of rulings, it has become apparent that, as seen in the cases of EC-Asbestos and US-Shrimp, Howse demonstrates that Appellate Body jurisprudence has evolved towards greater tolerance of non-trade objectives, particularly in the necessity-proportionality balancing act. As Partiti (2014) also agrees, there is often unevenness with such balancing tests when it comes to ruling disputes. Therefore, Howse suggests re-reading both GATT Article XX and TBT Article 2.2 in light of current rulemaking trends. However, the text does not directly address Global South situations, where the lack of building strong institutions and the underrepresentation of marginal actors in the WTO make the policy vulnerable to the colour of legitimacy.

### **Legal Structure of the TBT Agreement**

An article written by Joost Pauwelyn explores the provisions in the Technical Barriers to Trade Agreement at a doctrinal level, highlighting the most important of them: Article 2.1 (national treatment), Article 2.2 (necessity), and Article 2.4 (use of international standards). The author notes that, despite the TBT Agreement affirming the authority of member states to regulate in the pursuit of justifiable purposes, the necessity test could prove problematic, as governments may be deterred from developing ESG regulations that are deemed too restrictive in terms of trade. Pauwelyn (2013) also highlights that such a test presents, in its coldness, the possibility of undermining policy experiments, particularly in areas of policy contests related to sustainability. The article further faults the rule of favouring international standards under Article 2.4, arguing that it can hinder regulatory innovation. Although Pauwelyn's analysis, in terms of doctrinal aspects, is accurate, it fails to address the conflict between national innovation ESG standards and the legal limitations of the WTO, as well as nations that seek to push the limits of international norms as a whole.

### **Soft Law and Private Regulation**

Gabrielle Marceau and Joel Trachtman examine the relationship between the laws of international standard-setting bodies and the TBT Agreement. They argue that

standards produced by bodies such as ISO and Codex Alimentarius are increasingly used as reference points in trade disputes, even though these standards may lack democratic legitimacy (Trachtman, 2014). The authors observe that WTO rules encourage harmonization, establishing an implicit hierarchical structure between international norms, on the one hand, and national experimentation, on the other, particularly in cases where ESG standards exceed international baselines. The chapter highlights the legal uncertainty surrounding the role of private actors in standard-setting, which complicates compliance for both governments and businesses (Bronckers & Gruni, 2021). However, their treatment of soft law could benefit from a deeper interrogation of how private standards challenge formal state sovereignty, especially in fragmented governance settings.

### **Private Regulation and ESG Standards**

Steve Charnovitz examines the intersection of voluntary sustainability standards (VSS), including fair trade and organic certifications, with the WTO regime. On the one hand, he states that most of these norms are usually formulated to promote ESG. However, at the same time, they may also be introduced as a hidden technical trade barrier by being integrated into national regulations or procurement policies. Charnovitz raises concerns about transparency, accountability, and representativeness in private standard-setting. To support this argument, Leal-Arcas (2012) refers to the unintended protectionist effects of unilateral trade actions targeting climate and finds strong similarities to modern green ESG policy-making. Consistent with this view, Eberlein et al. (2014) conceptualize how transnational business governance interactions are growing and how they influence the regulatory legitimacy. The contribution of Charnovitz, of course, is based on the plausible assumption that national regulatory institutions are at a similar level of sophistication; however, this assumption is arguably not supported by the significant variation in the regulatory capacity across developing states.

### **Case Law and Implementation Challenges**

Other chapters by Appellate Body members and other dispute-settlement experts examine this early case law on technical trade barriers, as seen in the US-Clove Cigarettes, US-Tuna II, and EC-Seal Products cases. These precedents demonstrate how WTO panels interpret the two terms of a measure considered more trade-restrictive than necessary and whether such a measure provides less favourable treatment to imported products. The autonomy of the former US tuna II treaty case, specifically, demonstrates a judicious approach by the WTO concerning the technical rules related to sustainability-based practices of dolphin-safe labelling under the TBT Agreement. Even though conservation motives drove the measure, the WTO labelled it inconsistent, as producers of tuna in Mexico were exposed to an

unbalanced situation, which once again highlights the challenges of devising ESG-related standards that are both environmentally sound and trade-neutral. Locke (2013) provides a pivotal analysis of the boundaries of privatized ESG enforcement, an issue that the handbook barely scratches the surface of discussing. The restriction indicates how small the gap is between what the WTO members can do to employ an ethical measure of labelling without contravening the non-discrimination guidelines. The extent to which case studies can reveal or analyse the dissimilarity in dispute-resolution outcomes across different areas of interest in ESG, including labor or gender equality, as one of the potential contentious areas with diverse judicial reasoning, is not fully explored in any of them.

### **Critical Evaluation**

The handbook is distinguished by its blend of legal precision, institutional analysis, and policy relevance. It avoids the trap of formalism by grounding WTO law in real-world regulatory challenges. This makes it especially useful for scholars and practitioners interested in how law mediates the interface between trade and sustainability.

One of its key strengths lies in the coherence of its contributions. Despite the diversity of authors, the chapters consistently return to central questions: how much regulatory autonomy should WTO members retain, and how can the system adapt to accommodate non-trade objectives? The discussions are deeply informed by WTO jurisprudence and use legal doctrine to engage with broader governance concerns, making the book both doctrinally rigorous and theoretically informed (Shaffer & Polanco, 2009).

Another strength is that the volume focuses not only on hard law and state-governed governance but also on soft law and other spheres of governance, which are often overlooked in formal trade law textbooks. The handbook presents a realistic portrayal of the situation with global trade rules by acknowledging the regulatory capacity of organizations that facilitate mutual actions among private actors and international sector-setting organizations. This is a fundamental need to understand why ESG issues in the modern era often arise from hybrid regulatory procedures that combine both state and private rules.

### **Limitations and Policy Implications**

However, it has certain imperfections. The book fails to present its discussion of corporate practices of compliance and the internalization of WTO rules in firm ESG programs in a clear and orderly manner. Such a lack is noteworthy, as ethical business practices, supply chain due diligence, and corporate sustainability reporting

have gained significant importance in global trade (LeBaron & Ruhmkorf, 2017). Although some Global South topics, such as infrastructure limitations and capacity-building, are addressed, the discussion of the legal issues faced by developing countries in implementing the signed ESG-compatible regulations is quite concise. This is especially true in light of the disproportionate costs that trade restrictions and compliance costs may impose on their home industries. Besides, although the book incorporates certain Global South perspectives, it primarily focuses on OECD countries, which can be a limitation to its application in observing ESG issues in developing countries and the least developed countries (Jouanjean, 2013).

The editorial work by Epps and Trebilcock deserves particular praise. The writing style throughout is clear, precise, and accessible to readers with a background in law or policy. The structure facilitates targeted reading, and the chapters complement one another without unnecessary repetition. The intended audience appears to be a mix of legal scholars, policymakers, trade negotiators, and advanced students, all of whom would benefit from the analytical depth and legal clarity offered.

### **Relevance to Dissertation**

This book makes a direct contribution to the theoretical, doctrinal, and policy framework of a dissertation study on the use of ESG clauses in trade agreements. The TBT Agreement is a central legal instrument for understanding how WTO members can (or cannot) pursue non-trade policy objectives through technical regulations. Analyses by Pauwelyn and Howse help clarify key legal doctrines, such as necessity, proportionality, and non-discrimination, that determine the compatibility of ESG commitments with trade rules. These principles are widely employed in legal scholarship to assess the interaction between regulatory autonomy and WTO obligations.

In addition, the examination of the standard-setting and transnational regulatory networks privatization provides a valuable framework for assessing non-state ESG initiatives. Discussions by Charnovitz and Marceau, complemented by Eberlein et al. (2014)'s analysis of transnational business governance, underscore the importance of clearer legal guidance on incorporating private standards within WTO-aligned regulatory regimes.

Another substantive contribution of the current Research Handbook lies in its address of the institutional structure of the WTO, most notably the Technical Barriers to Trade (TBT) Committee. The TBT Committee is an informal platform where states reach an agreement on aligning national rules with multilateral obligations. The exchanges explain how the principles of transparency, peer review, and soft-law coordination are applied to interrelate Environmental, Social, and

Governance (ESG) policies with trade norms. Specifically, Bartels (2013) demonstrates the increasing incorporation of human rights and sustainability clauses in the EU's free-trade arrangements, thereby providing a point of comparison. Overall, the handbook provides an important structure that characterises the study of ESG provisions in bilateral, regional, and multilateral trade agreements.

## **Conclusion**

The Research Handbook is a sound and balanced academic study of the trade-off between trade liberalisation and sustainability requirements. Through a critical analysis of the TBT Agreement and other related WTO mechanisms, the duality of technical regulations as both enablers and limitations of the global trade system emerges. The focus of the handbook on legal doctrine, institutional process, and practical case law makes it an essential point of reference for policymakers, legal academics, and practitioners in the field who are tasked with navigating the complexities of ESG-guided regulation.

Notably, the volume highlights the legal ambiguities and interpretative weaknesses that arise when national or non-governmental sustainability approaches intersect with WTO disciplines. It demonstrates how policy-constraining mechanisms, such as the so-called need test or presumptions under international standards, can limit policy space, particularly in the case of developing ESG norms. A further expansion of the reader's understanding of the dynamics of transnational regulation concerns the debate on private standard-setting bodies and their increasing domination.

In the case of a doctoral study (visiting ESG provisions in trade agreements), the handbook provides all the necessary tools to analyse how regulatory legitimacy needs to be balanced with WTO consistency. It integrates legal, theoretical, and policy-based considerations, ultimately pushing the world to revise its trade regulations to be more lenient in light of the shift in sustainability objectives. It is, therefore, a pillar of trade sustainability scholarship.

However, the legal focus of the handbook, while thorough, does not fully address the implementation challenges that ESG provisions face at the institutional and firm levels. The lack of in-depth treatment of corporate compliance practices and enforcement constraints in the Global South signals an area for future development. As ESG regulations become more prevalent, future trade governance must embrace a broader, more integrated model that considers public–private standard-setting dynamics, diverse regulatory capacities, and equitable mechanisms for compliance. The handbook thus serves as a foundation, but not a final word, on embedding sustainability into international trade law.

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## USKLAĐIVANJE TRGOVINE I ODRŽIVOSTI: KRITIČKI OSVRT NA ULOGU WTO-a U ESG REGULACIJI I TEHNIČKIM PREPREKAMA

### Sažetak

Ovaj prikaz kritički ocjenjuje Research Handbook on the WTO and Technical Barriers to Trade, koji su uredili Tracey Epps i Michael J. Trebilcock, a koji se bavi odnosom međunarodnog trgovinskog prava i okolišnih, društvenih i upravljačkih (ESG) ciljeva. Priručnik istražuje međuodnos između Sporazuma Svjetske trgovinske organizacije o tehničkim preprekama u trgovini (Sporazum o TBT-u) i nacionalnih te prekograničnih regulatornih okvira, osobito u kontekstu sve većeg globalnog širenja ESG standarda. Prilozi vodećih pravnih stručnjaka analiziraju legitimnost WTO-a u uključivanju netrgovinskih pitanja, tumačenje ključnih odredbi TBT-a, utjecaj međunarodnih i privatnih standarda te najznačajniju sudsku praksu. Prikaz ističe glavne prednosti priručnika, osobito u povezivanju pravne doktrine i pitanja globalnog upravljanja. Iako novoobjavljeni priručnik Konferencije za trgovinu i razvoj Ujedinjenih naroda (UNCTAD) postiže zavidnu razinu konceptualne jasnoće u pogledu usklađenosti s okolišnim, društvenim i upravljačkim (ESG) standardima, dio posvećen mehanizmima provedbe na razini poduzeća obrađen je tek usputno. Osim toga, analiza regulatornih izazova s kojima se suočavaju države Globalnoga juga ostaje nedovoljno razrađena. Unatoč tim ograničenjima, priručnik predstavlja vrijedan izvor za razumijevanje odnosa između trgovine i održivosti te je koristan vodič za istraživače, kreatore politika i trgovinske pregovarače.

**Ključne riječi:** pravo WTO-a, ESG upravljanje, tehničke prepreke u trgovini, standardi održivosti, regulatorna autonomija, međunarodna trgovina.