

**Toward Open Recognition?  
Standardization and Regional Integration  
Under Article XXIV of GATT**

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*Abstract*

This paper provides a legal analysis of the significance of standards, technical regulations and SPS provisions (collectively, “TBTSPS” provisions) in regional trade agreements (“RTAs”) in relation to the multilateral trading system. It first examines the ways in which RTA regulation of national TBTSPS measures may contribute to or detract from liberalization goals. It then describes how GATT Article XXIV and the Understanding on the Interpretation of Article XXIV (the “Understanding”), as presently understood, regulate RTA regulation of national TBTSPS measures. Based on its analysis, this paper makes the following recommendations:

1. Interpret Article XXIV:5 of GATT to provide an exception from obligations contained in the TBT Agreement and SPS Agreement, principally the MFN obligation, in accordance with the Turkey-Textiles necessity test. This avoids imposing an inappropriate barrier to formation of RTAs.
2. Interpret “other restrictive regulations of commerce” and “other regulations of commerce” in Articles XXIV:5 and 8 to include only discriminatory and unnecessary TBT or SPS measures. This avoids requirements to eliminate or harmonize non-protectionist TBT or SPS measures. It avoids imposing an inappropriate barrier to formation of RTAs.
3. Interpret Article I:1 of GATT and the MFN provisions of the TBT Agreement and SPS Agreement to clarify authorization for only “open” mutual recognition agreements, similar to the permission contained in Article VII of GATS. This ensures that recognition arrangements will not provide an avenue of discrimination or other defection from WTO multilateral free trade principles. Today, it is not clear that any mutual recognition agreements are authorized.

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“Perhaps it was dangerous to take too academic or too legal a position on any GATT Article, considering the fact that negotiation results usually were not based on academic or legal considerations.”<sup>1</sup>

## 1. Introduction

This paper provides a legal analysis of the significance of standards, technical regulations and SPS provisions (collectively, “TBTSPS” provisions) in regional trade agreements (“RTAs”) in relation to the multilateral trading system. It first examines the ways in which RTA regulation of national TBTSPS measures may contribute to or detract from liberalization goals. It then describes how GATT Article XXIV and the Understanding on the Interpretation of Article XXIV (the “Understanding”),<sup>2</sup> as presently understood, regulate RTA regulation of national TBTSPS measures. This paper concludes by suggesting how Article XXIV and the Understanding might be reinterpreted or revised to conform more closely with the normative goal, expressed in Article XXIV:4, of balancing regional integration goals with multilateral liberalization goals.

This paper finds that most of the “fortress RTA” types of concerns, as they relate to TBTSPS measures, are addressed if not precluded by WTO law as presently understood, and that the remaining potential “fortress RTA” concerns relating to TBTSPS measures are of uncertain significance. However, policymakers continue to express concern. Recently, USTR Robert Zoellick, urging the U.S. Senate to approve fast track authority, made the following remarks:

Each [RTA] agreement without us [the U.S.] may set new rules for intellectual property, emerging high-tech sectors, agriculture standards, customs procedures or countless other areas of the modern, integrated global economy—rules that will be made without taking account of American interests.”<sup>3</sup>

During the late 1980s, there was much concern, associated with the development of the single market in Europe, with the process and outcome of standard-setting in a variety of areas. Standards and technical regulations can be used for protectionism, and can also create barriers to

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<sup>1</sup> Statement by the representative of the U.S. to the Committee on Regional Trade Arrangements, WT/REG/M/15, 13 January 1998, para. 16.

<sup>2</sup> Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.

<sup>3</sup> Robert B. Zoellick, *Falling Behind on Free Trade*, N.Y. TIMES, 14 April 2002, sec. 4, p. 13, col.1.

trade that exceed in value the benefits they provide, or can create unnecessary barriers to trade. Furthermore, coordination within RTAs may simply have the result of promoting intra-regional trade, at the expense of imports from outside the RTA.

The requirements of Article XXIV of GATT and the Understanding with respect to RTA regulation of national TBTSPS measures are somewhat unclear. This paper suggests that WTO law be read to require RTAs internally to impose a rule of national treatment-type nondiscrimination and necessity. However, it must be recognized that the WTO system already provides this anti-protectionism discipline, and so this requirement has little traction.

On the other hand, Article XXIV:8 does not appear to require harmonization or mutual recognition arrangements. To the extent that RTAs engage in harmonization, their harmonized TBTSPS measures must conform to the requirements of WTO law, namely the GATT, the TBT Agreement and the SPS Agreement. The regulation of RTA rules of mutual recognition, under the MFN obligation of Article I:1 of GATT, and under Article XXIV, is unclear, and rules of mutual recognition may present some opportunities for RTA protectionism. It would be useful to clarify the meaning of “other restrictive regulations of commerce” in Article XXIV:8, and “other regulations of commerce” in Article XXIV:5 and 8 in order to clarify what Article XXIV requires and what it prohibits.

## 2. National TBTSPS Measures, RTA Disciplines on National TBTSPS Measures and Multilateral Trade: Friends or Fortresses?

This part will examine the ways in which TBTSPS measures, promulgated by either states or RTAs, and RTA disciplines on national TBTSPS measures, may impede multilateral trade. It will also examine how RTA disciplines on national TBTSPS measures may assist in achieving the goal of liberalized trade.

### a. National and RTA TBTSPS Measures as Barriers to Trade

In regulatory theory, TBTSPS measures are, of course, restraints on competition and trade. Of course, so are legal rules of property and contract—this observation does not have normative impact. TBTSPS measures may be motivated by public policy goals of addressing information asymmetries between producers and consumers, of internalizing externalities, of redistribution, etc.<sup>4</sup>

In a public interest-motivated model of the production of TBTSPS rules, government would engage in a domestic cost-benefit analysis of these rules, in terms of the regulatory benefits versus the costs occasioned by restraint on competition and trade. However, this

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<sup>4</sup> See Charles P. Kindleberger, *Standards as Public, Collective and Private Goods*, 36 KYKLOS 377 (1983).

domestic cost-benefit analysis might not take full account of costs to foreign producers occasioned by national TBTSPS measures.<sup>5</sup> RTA provisions addressing TBTSPS issues, and the relevant GATT, TBT and SPS Agreements, may be designed either directly to reduce the costs to foreign producers (as by harmonization or recognition requirements), or to cause domestic rule-makers to take the costs to foreign producers into account in formulating their TBTSPS measures (as by requirements of proportionality, necessity or balancing). It is in this sense that these RTA provisions are allied with the WTO: they have a common enemy in the form of national TBTSPS measures that excessively burden international trade.

b. Potential Threats to Multilateral Trade

To the extent that RTAs substitute RTA-wide TBTSPS measures for national TBTSPS measures, or develop other means of integration in TBTSPS measures, they have the opportunity to disadvantage goods imported from outside the RTA. During the preparation of Europe's "single market" initiative from 1988 until 1992, concerns were raised that the single market project had the goal, or would have the effect, of creating a "Fortress Europe."<sup>6</sup> It is worth analyzing the claim of protectionism through integration in the TBTSPS field, as it may apply to RTAs more broadly today.

i. Discriminatory or unnecessary harmonized rules.

A "fortress" might arise through the establishment of harmonized TBTSPS measures that discriminate against outside commerce, or regulate unnecessarily. This is prohibited by GATT Articles I and III, the TBT Agreement and the SPS Agreement. Discrimination may be *de jure* or *de facto*. *De facto* discrimination may be more difficult to identify and eliminate. One type of *de facto* discrimination designs facially neutral TBTSPS measures to favor domestic production over imports. This type of discrimination may be reduced through multilateral rules requiring

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<sup>5</sup> See Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR J. INT'L L. 32 (1998). However, in Mexico, regulators "are required to check whether relevant international standards provide a least trade restrictive solution for achieving regulatory objectives." OECD, Working Party of the Trade Committee, Trade and Regulatory Reform: Insights from the OECD Country Reviews and Other Analyses, para. 36, 3 November 2000.

<sup>6</sup> For a popular treatment of this issue, see NICHOLAS COLCHESTER & DAVID BUCHAN, EUROPOWER: THE ESSENTIAL GUIDE TO EUROPE'S ECONOMIC TRANSFORMATION IN 1992 (1990). The Commission realized the danger of this perception, and in 1988 explained that "any product, which is introduced on the Community territory, as long as it satisfies the legislation of the importing member country, and is admitted on its markets, will be entitled, as a matter of principle, to the benefits of free circulation in the Community." Europe 1992: Europe World Partner, Communiqué of the European Commission, 19 October 1988, at 3.

transparency and access to the process by which TBTSPS measures are established, such as those contained in the TBT Agreement and SPS Agreement. It may also be addressed through negative integration rules at the multilateral level. In discussions of regional integration “negative integration,” is used to refer to judicially-applied standards that have the effect of striking down national regulation, such as national treatment, necessity, or balancing rules. These types of negative integration rules are also available in the WTO context. The TBT Agreement and SPS Agreement also discipline the process by which positive integration at the RTA level in the form of harmonization takes place. By “positive integration,” we mean the “legislation” of harmonized rules or rules of mutual recognition: the “positive” establishment of regulation at the RTA level. The point is that RTAs have no greater capacity to disadvantage imports through harmonization than individual states have through their TBTSPS-setting processes.

Harmonized RTA TBTSPS measures may disadvantage foreign producers without any discrimination or failure of necessity. That is, it is argued that by virtue of harmonization, and creation of a single market, insiders have an advantage in addressing the single market. However, the advantage depends on an assumption that outsiders cannot take advantage of the single market in the very same way—by imports or by investment.

The important point with respect to harmonized rules that discriminate or unnecessarily burden outsiders is that the normal WTO rules apply to discipline these, just as they would if a particular WTO member state adopted discriminatory or unnecessary regulation.

ii. Discriminatory access to benefits of negative integration.

The RTA may enact a regime of negative integration, applying national treatment, proportionality, necessity or other disciplines to national regulation. However, this negative integration would require changes in national TBTSPS measures, which, according to the WTO rule of MFN, would seem to be required to be made available to other WTO members. It may be that an RTA could at one time have argued that it is not required to make these changes in TBTSPS measures available to third countries, but this argument would be unlikely to succeed, especially under the relevant recent WTO Appellate Body jurisprudence, for reasons set out in sections 3 and 4 below. It is worth noting that within the EC, a foreign good, once it has entered any member state, may freely travel to another member state according to the principle of “free circulation,” taking advantage of EC rules of negative integration.

iii. Discriminatory access to benefits of internal mutual recognition.

An RTA may enact a regime of positive integration through rules of mutual recognition. By excluding non-RTA states from this regime, it may promote intra-RTA trade at the expense of imports from outside the RTA. Intra-RTA mutual recognition regimes, like intra-RTA negative integration regimes, may raise interesting issues under the MFN principle of Article I of GATT, as well as under Article XXIV. Multilateral requirements of recognition based on equivalence

or necessity, either applied by courts or imposed by legislation, can address *de facto* discrimination that arises from failure to recognize home country regulation that meets the host country goal.

As discussed in more detail below, the multilateral trade system, via the WTO, may intervene to regulate the RTA regulators of national TBTSPS regulators in connection with any or all of these types of restrictions.

In addition to the WTO rules that apply to RTA measures as well as to national measures, Article XXIV of GATT may impose additional restrictions on the formation or operation of RTAs. These additional restrictions relate to Article XXIV:8 “internal requirements” for eliminating most barriers with respect to substantially all intra-RTA trade, as well as “external requirements” of a common commercial policy for customs unions. These restrictions may be understood as intended to create hurdles to the creation of RTAs, in order to protect the operation of the MFN principle.<sup>7</sup> In addition, Article XXIV:5 requires that external barriers not be increased. From a normative perspective, it is not clear which is better for global welfare, or even for the multilateral trade system: requiring and promoting RTA regulation of national TBTSPS measures, or forbidding or inhibiting this activity. Given this uncertainty, perhaps a first prescription should be “do no harm.” In any event, it would appear that the multilateral system poses a greater legal threat to RTA TBTSPS measures than vice-versa.

c. Potential Benefits to Multilateral Trade

Despite the modest potential that RTA TBTSPS disciplines may have to impede multilateral trade, it should be understood that they also have the capacity to promote multilateral trade (not to mention their capacity to promote regional trade). Following are some potential positive effects for multilateral liberalization that may arise from RTA TBTSPS disciplines.

i. RTA-driven “autonomous” TBTSPS liberalization.

As noted above, to the extent that RTA negative integration disciplines are stricter<sup>8</sup> than WTO disciplines on national TBTSPS measures, and provided that the operation of these disciplines provides MFN benefits, these disciplines would reduce the trade impediments that might result from national TBTSPS measures. Furthermore, in addition to the negative integration measures, positive integration measures in the form of harmonization can also

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<sup>7</sup> See Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview*, in NEW DIMENSIONS IN REGIONAL INTEGRATION (Jaime de Melo & Arvind Panagariya, eds. 1993).

<sup>8</sup> In order to be “stricter,” the substantive rules themselves need not be more rigorous; the intensity and bindingness of enforcement activity could render an RTA discipline “stricter,” or, for that matter, less strict.

provide benefits to outsiders. That is, as suggested above, to the extent that an RTA harmonizes its approach to a particular TBTSPS measure, outsiders can be expected to realize some economies of scale, comparable to those realized by insiders. The expected MFN nature of a substantial segment of RTA TBTSPS liberalization distinguishes TBTSPS measures from tariff reduction within an RTA.

ii. The “Lock-In Effect.”

The “lock-in” effect refers to the idea that governments may use RTA obligations to bind subsequent governments to liberalization programs.<sup>9</sup> However, GATT and the WTO can achieve similar “lock-in” effects,<sup>10</sup> as with China.

iii. “Parallel processing” in reduction of non-tariff barriers.

The leading goal of the multilateral trading system is increased welfare through reduction of barriers to trade. It may be that once tariff barriers are eliminated, the most fruitful path to the goal of further reduction of barriers is through reduction of TBTSPS barriers. If RTAs, comprised of smaller groups of states, with greater homogeneity of regulatory preferences, can reduce TBTSPS barriers more efficiently than multilateral measures, the multilateral system should “use” RTAs to achieve its goals. This benevolent perspective on regional standardization suggests that regions may be analogized to parallel processors, working out regional solutions that make it easier for multilateral solutions to coalesce later.<sup>11</sup> There is an alternative interpretation of this prospect: that regional solutions, establishing differing paths, will make later multilateral solutions more difficult. The choice of interpretation will depend on the degree of sunk costs, or path dependence, involved in regional standardization, compared to the costs of transition to multilateral solutions. Furthermore, regional integration may diminish incentives for multilateral liberalization.

iv. RTAs as “laboratories” of integration.

RTA TBTSPS disciplines may serve as an example or a pathfinder for future multilateral

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<sup>9</sup> JEFFREY A. FRANKEL, *REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM* 216 (1997).

<sup>10</sup> *See* Bhagwati, *supra* note 7, at 25.

<sup>11</sup> For a more general statement of this perspective, *see* WTO SECRETARIAT, *REGIONALISM AND THE WORLD TRADING SYSTEM* (1995).

disciplines: as laboratories of integration<sup>12</sup> and sources of intellectual capital. On the other hand, we have questions about the extent to which RTA disciplines might result in circumstances where the RTA proceeds along a path that makes multilateral integration more difficult,<sup>13</sup> or that may pre-determine the path of multilateral integration.<sup>14</sup> path dependence. Thus, the RTA may take advantage of “first mover” advantages in TBTSPS activities, and use its prior action to impose outcomes on other states.<sup>15</sup>

c. The Building Blocks versus Stumbling Blocks Analysis of TBTSPS Measures

Economists have devoted much research to the question of whether regional arrangements for free trade areas or customs unions are welfare-enhancing or welfare-reducing.<sup>16</sup> This study began with the seminal work of Jacob Viner, comparing the trade creating (welfare-enhancing) effects with the trade diverting (welfare-reducing) effects of regional integration. In the years since 1950, economists have critiqued and extended the static Vinerian analysis in a number of ways.<sup>17</sup> Economists have spent much less time considering the effects of regional arrangements relating to TBTSPS measures.<sup>18</sup> Yet in a (developed) world where tariffs are already very small, reducing the barrier component of TBTSPS measures takes on greater

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<sup>12</sup> For an elaboration, see Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: a New Perspective on Trade Regionalism*, 42 HARV. INT’L L.J. 419 (2001).

<sup>13</sup> See Bhagwati, *supra* note 7, at 22.

<sup>14</sup> See Walter Mattli, *International Governance for Voluntary Standards: A Game-Theoretic Perspective*, in TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 337 (George A. Bermann, Matthias Herdegen & Peter L. Lindseth, eds. 2001).

<sup>15</sup> For an example, see the Consultation Document Prepared by the European Commission’s Directorate General for Enterprise on the Review of the New Approach, 13 December 2001, available at [http://europa.eu.int/comm/enterprise/consultations/new\\_approach\\_rev/documents/consultation\\_doc.pdf](http://europa.eu.int/comm/enterprise/consultations/new_approach_rev/documents/consultation_doc.pdf), at 6 (“A more consistent implementation of the New Approach within the European Community will help the Community to encourage international alignment with its regulatory framework. . . . strengthening the Community’s negotiating position with third parties”).

<sup>16</sup> See Arvind Panagariya, *Preferential Trade Liberalization: The Traditional Theory and New Developments*, 36 J. ECON. LIT 287 (2000).

<sup>17</sup> *Id.*

<sup>18</sup> See Note by the Secretariat, *A Brief Review of the Literature on the Trade Effects of Article XXIV Type Regional Agreements*, MTN.GNG/NG7/W/54, 12 October 1989.

importance.

The 1988 Cecchini Report, which formed the intellectual basis for the European Community's single market program, showed important barriers to trade based on TBTSPS measures, and substantial benefits accruing to Europe from reduction of TBTSPS-based barriers to trade.<sup>19</sup> Sykes conjectures that barriers in today's multilateral system are even more significant,<sup>20</sup> and the potential benefits even greater, because at the time of the Cecchini Report, Europe had already taken some measures to reduce these barriers, and because intra-European trade was already substantial.<sup>21</sup> This leaves us with two empirical questions: (i) what are the benefits of reduction of TBTSPS barriers in other regions (besides Europe), and (ii) what is the relationship between regional benefits and multilateral benefits? Each of these questions has both a static and dynamic component. To elaborate, is there any inconsistency between regional reduction of TBTSPS barriers and either (i) from a static standpoint, global welfare, or (ii) from a dynamic standpoint, global reduction of TBTSPS barriers? In addition to the potential immediate efficiency gains, is there also a possibility for dynamic institutional gains that will result in efficiency gains, due to learning, institutional innovation, demonstration effects or other factors?

It is well-understood that trade diversion, *per se*, is welfare-reducing. One way of understanding RTAs is to examine whether the welfare reduction resulting from trade diversion is greater or less than the welfare enhancements resulting from trade creation. This kind of test, though, is difficult enough to apply *ex post*, and seems impossible to apply reliably *ex ante*. Furthermore, it is a rather passive and aggregative test. In analyzing Article XXIV, Bhagwati suggests that

A different, and my preferred, approach is not to pretend to find rules of thumb to exclude CUs and FTAs "likely" to be trade-diversionary, but rather to examine the different ways in which trade diversion could arise and then to establish disciplines that would minimise its incidence.<sup>22</sup>

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<sup>19</sup> PAOLO CECCHINI ET AL, THE EUROPEAN CHALLENGE 1992: THE BENEFITS OF A SINGLE MARKET (1988) (summarizing results of research project on the "costs of non-Europe").

<sup>20</sup> See Organization for Economic Cooperation and Development, Proceedings of the Conference on Consumer Product Safety Standards and Conformity Assessment: Their Effect on International Trade, Paris: OECD (1996).

<sup>21</sup> ALAN O. SYKES, PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS MARKETS (1995).

<sup>22</sup> Bhagwati, *supra* note 7, at 16.

This is a more active and precise approach. Bhagwati suggests that Article XXIV:5 operates in this spirit, by seeking to ensure that external barriers are not increased at the formation of an RTA, although “it is evident to trade economists that *maintaining* external tariffs unchanged is, in any event, not the same as eliminating trade diversion.”<sup>23</sup> Therefore, Bhagwati recommends rules that would require a reduction in external tariffs.

This approach, while contested in the tariffs field, does not easily translate to the TBTSPS field. What would it mean to require a reduction of external TBTSPS measures? Would they be less onerous than internal TBTSPS measures? Given the existing requirement for national treatment and MFN, distinguishing the TBTSPS context from the tariff context in connection with RTAs,<sup>24</sup> there is little scope for discrimination against outside products. Are there non-discriminatory RTA measures in the TBTSPS field that result in welfare reduction in a way that is different from the measures that states are permitted to take under current WTO disciplines? As suggested above, the main area where this applies seems to be rules of mutual recognition, which may be developed within or without RTAs.

b. Market Access-Based Analysis

Of course, if we consider TBTSPS measures to be comparable in economic effect to a tariff—if we ignore the regulatory motivation of these measures—then the analysis of regional versus multilateral tariff reduction is applicable. However, TBTSPS measures have a dual character. On the one hand, they are comparable to taxes, as opposed to tariffs, assuming that they are applied on a national treatment basis—tariffs are most assuredly inconsistent with national treatment. This perspective does not take into account path dependence, economies of scale and other factors that may cause non-discriminatory TBTSPS measures to have differential effects.<sup>25</sup> On the other hand, this type of regulation usually has some non-protectionist regulatory purpose: to reduce information asymmetries, to require the internalization of externalities, to establish a focal point rule (such as driving on the right), or simply to engage in redistribution (a subsidy). It is this regulatory purpose that distinguishes TBTSPS measures from tariffs, and makes the treatment of the trade barriers caused by TBTSPS measures more complicated.

The expected MFN nature of RTA TBTSPS liberalization, explained in more detail

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<sup>23</sup> *Id.*

<sup>24</sup> We argue below that Article XXIV does not provide an exception that would extend to RTA TBTSPS measures that discriminate against outside states. Of course, the purpose of Article XXIV with respect to *tariffs* is to *permit* discrimination against outside states.

<sup>25</sup> However, one feature of TBTSPS disciplines is to attempt, through disciplines on the way that TBTSPS measures are promulgated, to reduce the possibility for differential effects due to disguised discrimination.

below, further distinguishes TBTSPS measures from tariff reduction within an RTA. The negative integration, given WTO MFN disciplines, is expected to raise few concerns: it is the positive integration—harmonization and recognition—that provides opportunities for mischief. Thus, it might be argued that regional disciplines on national TBTSPS measures in the form of negative integration—striking down discriminatory or unnecessary national TBTSPS measures—would be expected to do little harm to the multilateral system of trade. This perspective is congruent with the interpretation of GATT Article XXIV developed below: Article XXIV:8(a)(i) and (b) are best understood as calling for negative integration, as opposed to positive integration.

Bagwell, Mavroidis and Staiger consider the effects on trade of environmental and labor “standards,” focusing on the *reduction* of national regulation of production in ways that enhance the competitive position of import competing or export industries.<sup>26</sup> They see the “trade and . . .” problem as one of incomplete “property rights” in connection with WTO market access commitments—those commitments may be undermined by modifications of national labor or environmental regulation. In addition, exporting states may reduce standards in support of mercantilism: in order to promote exports through reduced domestic labor or environmental protection. Bagwell, Mavroidis and Staiger are concerned with *production* standards, while this paper focuses (as do the SPS Agreement and the TBT Agreement) on product standards. However, a similar analytical technique may apply. That is, we may understand TBTSPS measures as means of defection from market access commitments.

However, the important distinction is that TBTSPS measures, as *product* regulation, result in a relatively level playing field: all competing products in a given market are subject to the *same* requirements. Due to national treatment and MFN obligations, there is no legally valid discrimination in the application of TBTSPS measures except in the case of recognition arrangements. On the other hand, tariffs are by definition discriminatory departures from the “national treatment” principle: domestically produced products are not subject to tariffs. Of course, an additional important point, as with production standards, is that their main purpose is, or should be, independent of their trade effects. Of course, this paper is not concerned with *national* TBTSPS measures as impediments to trade, but with RTA TBTSPS measures.

Once we understand these measures as potential avenues of defection from market access commitments, we can see that RTA harmonization could be designed to erect barriers to imports, and that RTA recognition agreements could provide differentially enhanced access to internal producers, compared to foreign producers. As discussed above, the former potential threat is addressed, at least in part, by WTO regulation of RTA TBTSPS measures as substitutes for national TBTSPS measures. It is the latter threat, of defection from MFN obligations through mutual recognition arrangements, that seems more pressing, and may not be addressed by WTO

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<sup>26</sup> Kyle Bagwell, Petros C. Mavroidis & Robert W. Staiger, *It's a Question of Market Access*, 96 AM. J. INT'L L. 56 (2002).

law remedies.<sup>27</sup> Bagwell, Mavroidis and Staiger see potential scope for non-violation complaints and Article XXVIII renegotiations as bases for “rebalancing” market access after a change in production standards. It is possible that these types of “rebalancing” could be applied in respect of recognition arrangements for product standards also. In fact, this may be a basis for understanding the requirements of Article XXIV:5. However, such an effort would require difficult calculations as to the magnitude of the shift in relative market access due to the recognition arrangements.

While there are some caveats, there may be substantial reasons, in welfare as well as political terms, for the WTO to accept, and even foster, the negative and positive integration of TBTSPS regulation within RTAs. In Sections 3 and 4 below, we evaluate the ways in which GATT and the Understanding regulate, and foster, TBTSPS integration in RTAs. In the spirit of Bhagwati’s search for precision in designing the conditionality for RTAs, we suggest conditions that might be established to reduce the possibility that TBTSPS measures may reduce global welfare.

### 3. The Relationship Between Article XXIV and GATT, the TBT Agreement and the SPS Agreement

As we consider the relationship between regional TBTSPS measures and multilateral reduction of trade barriers, it is important to analyze the current circumstances under WTO law. The sources of law in this area are Article XXIV of GATT, the Understanding, the TBT Agreement and the SPS Agreement. Article XXIV, of course, dates from 1947, while the rest of these agreements came into existence in the Uruguay Round (although the TBT Agreement had a predecessor dating from the Tokyo Round).

#### a. Article XXIV

Article XXIV of GATT provides a conditional right for members to enter into free trade areas and customs unions.<sup>28</sup> With respect to the core internal attribute of a free trade area or customs union—internal tariffs of zero—this right is needed as an exception to allow the clear violation of the MFN obligation of Article I of GATT. However, one of the most important interpretive questions that remain is what other attributes are authorized by Article XXIV? This question arises in connection with the subject of this paper—TBTSPS measures—but also with respect to other types of measures, such as safeguards. Article XXIV also imposes important requirements on free trade areas and customs unions. TBTSPS measures may play a role in the

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<sup>27</sup> See the discussion below of the possibility that these arrangements violate MFN obligations.

<sup>28</sup> See Gabrielle Marceau & Cornelis Reiman, *When and How is a Regional Trade Agreement Compatible with the WTO?*, 3 LEG. ISS. ECON. INTEGRATION 297 (2001).

satisfaction of these requirements.

b. The Relationship Between Article XXIV and the TBT Agreement and SPS Agreement

Does Article XXIV provide an exception from the requirements of the TBT Agreement and the SPS Agreement? Neither Article XXIV nor the TBT and SPS Agreements expressly so provide. What happens where Article XXIV permits what these other agreements prohibit? This could come up in our case where, for example, an RTA SPS measure violates the prohibition under Article 2.3 of the SPS Agreement against arbitrary or unjustifiable discrimination between members where identical or similar conditions prevail. In the context of an intra-RTA mutual recognition agreement, it is possible that RTA-origin goods might be admitted where external goods are excluded, despite the fact that similar substantive conditions prevail.<sup>29</sup> On the other hand, it might be argued that Article 4 of the SPS Agreement, authorizing recognition arrangements, might serve as a defense. Even if it were clear that Article 4 provided a defense under the SPS Agreement, it is not clear that it provides a defense under GATT.

The EC – Bananas III and Canada - Periodicals decisions of the Appellate Body in connection with the relationship between GATT and GATS suggest that the obligations under those agreements are *cumulative*. This conclusion is supported, in the context of the relationship between GATT Article III, the TRIMS Agreement and the SCM Agreement (Indonesia – Automobiles), GATT Article XIII and the Agreement on Agriculture (EC – Bananas III), GATT Article XIII and the Safeguards Agreement (US – Line Pipe) and the Agreement on Safeguard and GATT Article XIX (Korea-Dairy Safeguards).

We agree with the statement of the Panel that: It is now well established that the WTO Agreement is a "Single Undertaking" and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously<sup>30</sup> ... In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to "read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously."<sup>31</sup> An important corollary of this principle is that a treaty should be

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<sup>29</sup> This depends on the answer to several interpretive questions, including what is meant by "similar conditions."

<sup>30</sup> Panel Report, Korea–Dairy Safeguards, para. 7.38

<sup>31</sup> [Original Footnote] We have emphasized this in Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, circulated 14 December 1999, para. 81. See also Appellate Body Report, *United States – Gasoline*, p. 23; Appellate Body Report, *Japan – Alcoholic Beverages*, p. 12; and Appellate Body Report, *India – Patents*, para. 45.

interpreted as a whole, and, in particular, its sections and parts should be read as a whole.<sup>3233</sup>

This was a simple application of the principle of effective interpretation. It is suggested that the principle of effective interpretation is relevant both for rights and obligations. In *Brazil-Desiccated Coconut*, the Appellate Body upheld the panel decision that the transitional rights given in the SCM Agreement could not be nullified by an interpretation of Article VI of GATT 1994.<sup>34</sup>

Thus, we might ask, what does “effective interpretation” require in the context of a modern application of Article XXIV? The WTO's obligations and rights must apply cumulatively and harmoniously unless set aside because of a conflict with another provision, or because another provision is *lex specialis*.<sup>35</sup> However, the panel in *Turkey – Textiles* also insisted that since the WTO Members have a right under Article XXIV to form regional trade agreements, the interpretation of the other WTO provisions should be such as to ensure that this right does not become a “nullity”.<sup>36</sup> Should this principle be extended to other WTO provisions,

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<sup>32</sup> [Original Footnote] The duty to interpret a treaty as a whole has been clarified by the Permanent Court of International Justice in *Competence of the I.L.O. to Regulate Agricultural Labour* (1922), PCIJ, Series B, Nos. 2 and 3, p. 23. This approach has been followed by the International Court of Justice in *Ambatielos Case* (1953) *ICJ Reports*, p. 10; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) *ICJ Reports*, p. 15; and *Case Concerning Rights of United States Nationals in Morocco* (1952) *ICJ Reports*, pp. 196-199. See also I. Brownlie, *Principles of Public International Law*, 5<sup>th</sup> ed. (Clarendon Press, 1998), p. 634; G. Fitzmaurice, “The Law and Procedure of the International Court of Justice 1951-1954: Treaty Interpretation and Other Treaty Points”, 33 *British Yearbook of International Law* (1957), p. 211 at p. 220; A. McNair, *The Law of Treaties* (Clarendon Press, 1961), pp. 381-382; I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), pp. 127-129; M.O. Hudson, *La Cour Permanente de Justice Internationale* (Editions A Pedone, 1936), pp. 654-659; and L.A. Podesta Costa and J.M. Ruda, *Derecho Internacional Público*, Vol. 2 (Tipográfica, 1985), p. 105.

<sup>33</sup> Appellate Body Report, *Korea–Dairy Safeguards*, paras. 74, 81.

<sup>34</sup> Appellate Body Report on *Brazil – Measures Affecting Desiccated Coconut* (WT/DS22/11/Rev.2), adopted 20 March 1997, p. 17.

<sup>35</sup> On this issue see Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions*, 35 *J. WORLD TRADE* 1090 (2001).

<sup>36</sup> Panel Report in *Turkey – Restrictions on Imports of Textiles and Clothing Products*, WT/DS33/R, adopted as amended by the Appellate Body Report, 19 November 1999, paras. 9.96

including the SPS Agreement and TBT Agreement? Given an understanding of the SPS Agreement and TBT Agreement as interpretations and extensions of principles that already existed within GATT—Articles I, III, XI and XX—should we read the statement in the *chapeau* of Article XXIV:5 to the effect that “nothing in this Agreement [the GATT] shall prevent” to refer to the obligations of the SPS Agreement and the TBT Agreement as well? From the policy standpoint of avoiding unnecessary impediments to RTA integration, the answer would appear to be “yes.”

The General Interpretative Note to Annex 1A to the WTO Charter (the “General Interpretative Note”) provides that “[i]n the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement establishing the World Trade Organization (referred to in the agreements in Annex 1A as the “WTO Agreement”), the provision of the other agreement shall prevail to the extent of the conflict.”

The other agreements in Annex 1A include, *inter alia*, the SPS Agreement and the TBT Agreement. Thus, the latter prevail over GATT in the event of conflict. This raises an important question about what is meant by “conflict.”<sup>37</sup> Is the kind of potential overlap, where one agreement authorizes what another agreement forbids, a conflict within the General Interpretative Note?

The answer is likely to be “no.” In WTO law, the type of conflict that is meant involves a circumstance where one agreement requires what another forbids.<sup>38</sup> This is not the case here. Therefore, the General Interpretative Note is not likely to provide a ready answer, and the correct interpretive principle is that of “effectiveness.” This principle would suggest that the TBT Agreement and the SPS Agreement, as part of the single undertaking, should be treated in the

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and 9.103 [hereinafter, Turkey-Textiles Panel Report].

<sup>37</sup> See William J. Davey & Werner Zdouc, *The Triangle of TRIPS, GATT and GATS*, chapter 2 in \_\_\_\_\_.

<sup>38</sup> See Gabrielle Marceau & Joel P. Trachtman, *GATT/SPS/TBT: Comparison and Conflict*, working paper dated 23 March 2002, citing Appellate Body Report on Guatemala – Anti-Dumping Investigation regarding Portland Cement from Mexico, WT/DS60/AB/R, adopted 25 November 1998, para.65. The same narrow definition of conflict was also used in Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS54, 55, 59 and 64/R, adopted 23 July 1998, paras.14.29-14.36 and 14.97 to 14.99; Appellate Body Report on United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS 184/AB/R, adopted 23 August 2001, at para. 55, 62; Panel Report in Indonesia–Certain Measures Affecting the Automotive Industry, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, footnote 649, adopted 23 July 1998.

same way as the provisions of the GATT, although Article XXIV:5 fails to refer specifically to them. This reading should be clarified through a definitive interpretation or an understanding, or it may be clarified through dispute settlement.

c. The Relationship Between Article XXIV and Articles I, III and XI of GATT

In the Turkey–Restrictions on Imports of Textile and Clothing Products decision,<sup>39</sup> the Appellate Body examined the relationship between Article XXIV and other provisions of GATT. In particular, the question arose whether Article XXIV applies only to the MFN principle, or whether it provides an exception to other requirements of GATT.

The case concerned the final phase of the creation of a customs union between Turkey and the EC. As of 1 January 1996, Turkey harmonized its tariffs, and its textiles and clothing quantitative restrictions, with those of the EC. India claimed that the imposition of these quantitative restrictions on textiles and clothing violated GATT Articles XI and XIII, as well as Article 2.4 of the Agreement on Textiles and Clothing, and was not justified by Article XXIV.

The Appellate Body found that the words “shall not prevent” (with reference to the formation of a customs union or a free trade area) in the *chapeau* of Article XXIV:5 are critical to a determination of the scope of the exception under Article XXIV.

The panel had found that Article XXIV does not provide an exception from the rules against quantitative restrictions contained in Articles XI and XIII of GATT 1994.<sup>40</sup> The Appellate Body determined that the panel did not fully analyze the *chapeau* of Article XXIV:5, and proceeded to do so. The Appellate Body emphasized the words “shall not prevent” and held that “Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed.”<sup>41</sup> “It follows necessarily that the text of the *chapeau* of paragraph 5 of Article XXIV cannot be interpreted without reference to the definition of a “customs union”. The definition of a customs union contained in Article XXIV:8 of GATT 1994 is as follows:

A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

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<sup>39</sup> WT/DS34/AB/R, adopted 19 November 1999 [Turkey-Textiles Appellate Body Report].

<sup>40</sup> Turkey Textiles-Panel Report, *supra* note 36, paras. 9.188 and 9.189.

<sup>41</sup> Turkey Textiles-Appellate Body Report, *supra* note 39, para. 46.

- (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
- (ii) ... substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.

Article XXIV:8(a)(i) sets the internal requirement to eliminate duties and other restrictive regulations with respect to substantially all trade. Article XXIV:8(a)(ii) sets the external requirement for a “common external trade regime.”<sup>42</sup> In addition, Article XXIV:5(a) imposes an additional external requirement to the effect that duties and other regulations of commerce “shall not on the whole be higher or more restrictive than the general incidence” prior to formation. (We examine below the application of these requirements to TBTSPS measures.)

The Appellate Body found that Article XXIV:4, and the preamble of the Understanding, provide an important part of the context for interpretation of the chapeau of Article XXIV:5, to the effect that a balance must be struck between the positive internal effects of customs unions, and any negative trade effects on third parties: this is an economic test.<sup>43</sup>

The Appellate Body held that the state using the Article XXIV defense has a burden of proof to the effect that the requirements of Article XXIV:5 and 8 are met, and that the measure for which the defense is sought is *necessary* to the customs union: that compliance would prevent the formation of the customs union.<sup>44</sup> The panel failed to examine compliance with Article XXIV:5 and 8.<sup>45</sup>

With respect to the necessity criterion, Turkey asserted that if it had not imposed the

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<sup>42</sup> Turkey-Appellate Body Report, *supra* note 39, para. 49.

<sup>43</sup> Turkey-Appellate Body Report, *supra* note 39, paras. 55-57, *citing* Panel Report, para. 9.120.

<sup>44</sup> Turkey-Appellate Body Report, *supra* note 39, para. 58.

<sup>45</sup> The panel expressed that it is arguable that it did not have jurisdiction to consider such compliance, but the Appellate Body noted in this respect its opinion in India-- Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, to the effect that a panel has jurisdiction to examine matters that are also committed to political evaluation. WT/DS90/AB/R, adopted 22 September 1999, paras. 80 – 109.

quantitative restrictions at issue here, the EC would have "exclud[ed] these products from free trade within the Turkey/EC customs union."<sup>46</sup> The EC would have done so to prevent trade diversion: to prevent these products from flowing into the EC through Turkey, and thereby avoiding the application of the EC's quantitative restrictions. These goods accounted for 40% of Turkey's trade with the EC, thus raising concerns that, if they were excluded, Turkey's regional arrangement with the EC would not satisfy the "substantially all trade" criterion.

However, the Appellate Body agreed with the panel that there existed less trade restrictive alternatives, including the use of rules of origin to distinguish between Turkish and third country textiles.<sup>47</sup> This would have addressed the problem of trade diversion, and obviated the need to exclude the textiles and clothing sector from the EC-Turkish customs union. However, the Appellate Body did not address the fact that such rules of origin would require administration, and would prevent the formation of the kind of customs union that the EC and Turkey wish: one that would not require border controls on goods.

Under the Appellate Body's approach, the EC and Turkey are not entitled under Article XXIV to an exception necessary for a customs union with features that go beyond those specified in Article XXIV itself. In the panel decision in *United States–Line Pipe Safeguards*, the panel interpreted the Turkey-Textiles necessity test differently. The panel distinguished Turkey-Textiles on the basis that the measure there restricted imports, while the measure at issue in the Line Pipe case involved the facilitation of internal trade—the "raison d'être" of a FTA. It concluded "If the alleged violation of GATT 1994 forms part of the elimination of 'duties and other restrictive regulations of trade', there can be no question of whether it is necessary for the elimination of 'duties and other restrictive regulations of trade'."<sup>48</sup> This may be understood as a statement that any measure to comply with Article XXIV:8 is irrebuttably "necessary."

The approach of the Appellate Body in *Turkey-Textiles* seems to decline to balance the integration benefits against the detriments to third party commerce, although the Appellate Body's language, based on Article XXIV:4, seems to call for this type of balancing. In Article XX jurisprudence, under GATT 1947, panels developed the necessity test to require that the measure be the least trade restrictive alternative reasonably available. The reasonable availability component of this test, if carried over to the necessity test the Appellate Body has developed

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<sup>46</sup> Turkey's appellant's submission, para. 56.

<sup>47</sup> Turkey-Appellate Body Report, *supra* note 39, para. 62-63.

<sup>48</sup> Panel Report, *United States–Line Pipe Safeguards*, WT/DS202/R, 29 October 2001, para. 7.148 (citation omitted). This holding was determined by the Appellate Body to be moot and without legal effect, as the Article XXIV issues only became relevant if there was no failure of "parallelism." Appellate Body Report, *United States–Line Pipe Safeguards*, WT/DS202/AB/R, adopted 8 March 2002, para. 199.

here, might have provided a different outcome. Furthermore, as noted below, in Korea-Beef and Asbestos, the Appellate Body has extended the “necessity” criterion to comprehend a kind of balancing test.

The Appellate Body concluded that Turkey failed to satisfy its burden of proof that formation of a customs union between the EC and Turkey would have been prevented if Turkey were not allowed to adopt the quantitative restrictions at issue.

d. Necessity and Balancing

In subsequent jurisprudence, the Appellate Body has had occasion to revisit the necessity test in the context of Article XX(b) and (d) of GATT. The Article XX test would certainly not necessarily be applied to Article XXIV. However, there are some interesting similarities, and they are worthy of exploration. In both, the Appellate Body is trying to balance between an “exception” and trade restrictiveness. While in Turkey-Textiles, the Appellate Body speaks in terms of a less GATT inconsistent alternative, it is not clear why the broader balancing developed in Korea-Beef and Asbestos could not be applied under Article XXIV.

Of course, it is unclear how the Korea-Beef and Asbestos balancing tests will be used in future cases under Article XX(b) and (d). It is even less clear what implications this jurisprudence will have in connection with Article XXIV. On the one hand, the Appellate Body’s interpretation of the language of the *chapeau* of Article XXIV:5—“shall not prevent”—provides a link to the “necessity” qualifier of Article XX(b) and (d), and the *chapeau* of Article XX. Furthermore, in Turkey-Textiles, the Appellate Body pointed out that Article XXIV:4 seems to suggest balancing between the dual objective of facilitating internal trade without raising barriers to external trade:

This [combined] objective demands that a balance be struck by the constituent members of a customs union, but it should *not* do so in a way that raises barriers to trade with third countries. . . . The *chapeau* cannot be interpreted correctly without constant reference to this purpose.<sup>49</sup>

e. Necessity and Article I and III of GATT, the TBT Agreement and the SPS Agreement

Now that we have reviewed the relevant jurisprudence, we can apply Article XXIV to the specific concerns regarding RTA integration of TBTSPS measures. The Turkey-Textiles report would suggest that each case would be required to be examined individually, but that the burden of proof would be on the RTA (or more accurately, except possibly in the case of the EC, its

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<sup>49</sup> Turkey-Textiles Appellate Body Report, *supra* note 39, para. 57.

member<sup>50</sup>). To the extent that RTA regulation of TBTSPS measures might violate MFN or national treatment, or other obligations, in GATT, in the SPS Agreement or in the TBT Agreement, are these violations eligible for exception under Article XXIV: are they sufficiently “necessary” under the Turkey-Textiles test?

The Turkey-Textiles “necessity” test could suggest that the exception from these other norms is limited to what is required to form a customs union or free trade area under Article XXIV:8. But it is not clear that the Appellate Body found that Article XXIV imposes such a limit. In other words, it is not clear that the Appellate Body meant that the only measures that are permitted under the *chapeau* of Article XXIV:5 are those that form the most minimalist customs union or free trade area that meets the requirements of Article XXIV:8. Could it not be that the measures permitted are those required to form a customs union or free trade area that meets the balancing test articulated by the Appellate Body? The Appellate Body stated that Article XXIV:4 demands balancing between trade facilitation internally and avoidance of additional barriers externally. It further stated that for this purpose “the chapeau of paragraph 5, and the conditions set forth therein for establishing the availability of a defense under Article XXIV, must be interpreted in the light of the purpose of customs unions set forth in paragraph 4.”<sup>51</sup> This approach might lead to an evolving definition of “other restrictive regulations of commerce,” as used in Article XXIV:8(a)(i) and (b), and “other regulations of commerce,” as used in Article XXIV:8(a)(ii) and XXIV:5(a). In Turkey-Textiles, the panel suggested that “other regulations of commerce is an evolving concept.”<sup>52</sup> This definition might expand and contract depending on this balancing test.

To conclude, the question of whether a particular measure is “necessary” depends on the definition of “other restrictive regulations of commerce” and of “other regulations of commerce.” Measures that would violate other WTO law are prohibited, unless they are necessary to form a customs union or free trade area in this sense: if they are not required, they are prohibited.

In section 4, we review the requirements of Article XXIV:5 and XXIV:8, in order to determine what integration measures with respect to TBTSPS measures RTAs are required to take. We conclude that Article XXIV:8 most likely does not require either harmonization or rules of recognition. Nor, given the understanding presented below of Article XXIV:4 and 5, could one imagine that Article XXIV:8 requires discrimination in providing access to the benefits of negative integration. That is, where an RTA rule of negative integration results in a change in national TBTSPS regulation, that change would be required to be provided on an MFN and national treatment basis to all WTO members, and not just members of the RTA. Therefore,

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<sup>50</sup> See Marceau & Reiman, *supra* note 28.

<sup>51</sup> Turkey-Textiles Appellate Body Report, *supra* note 39, para. 57.

<sup>52</sup> Turkey-Textiles Panel Report, *supra* note 36, para. 9.120.

RTA harmonization or recognition of TBTSPS measures would be required to comply with these other norms.

f. Is Mutual Recognition a Violation of MFN?

It would not be important to the legality of mutual recognition arrangements whether or not they comply with Article XXIV, unless they violate another provision of WTO law. So we must determine whether these types of arrangements violate the MFN obligation under Article I:1. This analysis raises an interesting question about the scope of MFN obligations.<sup>53</sup> There are two issues. First, does the MFN obligation apply on a product-by-product basis? Second, does the MFN obligation apply to provide non-RTA states an opportunity to qualify for recognition?

Mutual recognition arrangements (“MRAs”) are an important mechanism, both within and without RTAs,<sup>54</sup> to reduce regulatory barriers to trade.<sup>55</sup> The core of mutual recognition is recognition: the acceptance of foreign regulation as “equivalent” to domestic regulation, and therefore as an adequate and definitive substitute for the otherwise applicable domestic regulation. The “mutual” aspect describes arrangements in which recognition is accorded reciprocally: placing the condition of reciprocity on recognition would seem inconsistent with the principle of unconditional MFN treatment. The legal question for us is whether, and under what circumstances, a state may recognize foreign regulation of TBTSPS measures without recognizing the TBTSPS measures of all WTO members.

Recall that in the Canada-Autos case, the Appellate Body confirmed that Article I:1 addresses de facto, as well as de jure, discrimination. The Appellate Body emphasized the unconditional and broad scope of Article I:1 in finding that mere differential treatment of products originating in different member states, regardless of the producer-based rationale,

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<sup>53</sup> See generally, William J. Davey & Joost Pauwelyn, *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product,”* in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW at 13 (Thomas Cottier, Petros C. Mavroidis & Patrick Blatter, eds. 2000).

<sup>54</sup> The European Community has entered into a number of MRAs with third states. See, e.g., Agreement on Mutual Recognition Between the European Community and the United States of America, OJEC No. L31, 4 February 1999. The European Community has also entered into similar agreements relating to conformity assessment. These deal largely with conformity assessment, as opposed to recognition of substantive technical regulations themselves.

<sup>55</sup> See Kalypso Nicolaidis, *Non-Discriminatory Mutual Recognition: An Oxymoron in the New WTO Lexicon*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW at 267 (Thomas Cottier, Petros C. Mavroidis & Patrick Blatter, eds. 2000).

violates Article I:1. Although the Appellate Body did not emphasize this, its interpretation is based on the “like products” reference of Article I:1—automobiles are like products regardless of whether their manufacturers have or have not invested in Canada.<sup>56</sup> Given the focus on Article I:1's reference to the matters referenced in Article III:4, and to “any advantage,” it appears possible that “like products” treated differently due to different recognition arrangements might result in a violation of MFN. It appears even more likely that the advantage of inclusion in a regime of recognition might be required to be provided on an MFN basis.

There would seem to be a conflict between mutual recognition and a strict understanding of the MFN and national treatment obligation, to the effect that imported “like” products cannot be treated differently from “like” products from other member states, or those produced domestically.<sup>57</sup>

In the *Asbestos* case, the Appellate Body articulated a fairly broad definition of “like products” for application under Article III:4.<sup>58</sup> Although the definition of “like products” in Article I:1 may be narrower, the Appellate Body’s *response* to this broad definition may be useful to refer to in the Article I:1 context. The Appellate Body recognized that this interpretation of “like products” would result in a relatively broad scope of application of Article III:4. In order to avoid a commensurately broad scope of invalidation of national law, the Appellate Body focused on the second element required under Article III:4: “A complaining Member must still establish that the measure accords to the group of ‘like’ imported products ‘less favourable treatment’ than it accords to the group of ‘like’ domestic products. The term ‘less favourable treatment’ expresses the general principle, in Article III:1, that internal

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<sup>56</sup> Appellate Body Report: Canada—Certain Measures Affecting the Automotive Industry, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, para. 85. *See also*, Appellate Body Report, European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS/27/AB/R, adopted 25 September 1997, paras. 205-206, *citing* United States—Non-Rubber Footwear, adopted 19 June 1992, 39 B.I.S.D. 128, para. 6.9.

<sup>57</sup> For an example of a circumstance in which the fact of government certification did not provide sufficient distinction, *see* Panel Report, European Economic Community—Imports of Beef from Canada, adopted 10 March 1981, 28 B.I.S.D. 92. For an example of differential import licensing procedures violating Article I:1, *see* Panel Report, EC—Regime for the Importation, Sale and Distribution of Bananas, adopted 25 September 1997, WT/DS27/R, paras. 7.188-7.193; 7.251-7.256; 7.235-7.241.

<sup>58</sup> *See* Robert E. Hudec, “Like Product”: *The Differences in Meaning in GATT Articles I and III*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW at 101 (Thomas Cottier, Petros C. Mavroidis & Patrick Blatter, eds. 2000).

regulations ‘should not be applied . . . so as to afford protection to domestic production.’”<sup>59</sup>

Thus, two dimensions of discriminating treatment are required: first, like products must be treated differently; second, foreign like products as a class must be treated differently from, and less favourably than, domestic like products. It is not enough to find a single foreign like product that is treated differently from a domestic like product. Rather, the class of foreign like products must be treated less favorably than the class of domestic like products. In order for this to occur, it would seem necessary that the differential regulatory treatment be predicated, either intentionally or unintentionally, on the foreign character of the product. The area left for panel or Appellate Body discretion is in determining, in cases of de facto and unintentional disparate regulatory treatment, whether there is a violation of the national treatment requirement. It is possible that this “less favourable treatment” test (even though this language is not replicated in Article I:1) would apply, *mutatis mutandis*, to protect *bona fide* mutual recognition, especially where it is administered on a non-preferential basis,<sup>60</sup> from criticism under Article I MFN.

In this light, we might note that the TBT Agreement and the SPS Agreement contain provisions encouraging recognition regimes. This encouragement, in order to have *effet utile*, must be interpreted as providing some form of protection against Article I:1 challenge. However, the language of these agreements would not appear to condone artificial, RTA-based, limitations on the right to “qualify” for recognition.<sup>61</sup> Furthermore, any arguable exception under Article XX of GATT (or *compliance* with the necessity requirements of the TBT Agreement and SPS Agreement) would require that the recognition regime not discriminate in an arbitrary manner, and may require that the recognition regime be necessary. These requirements would seem to

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<sup>59</sup> WTO Appellate Body Report: European Communities—Measures Affecting and Asbestos-Containing Products, WT/DS135/AB/R, para. 100, adopted 5 April 2001.

<sup>60</sup> Interestingly, this possible approach would be roughly consistent with the structure of GATS Article VII.

<sup>61</sup> See Davey & Pauwelyn, *supra* note 53, at 23-24, evaluating mutual recognition agreements under the MFN principle: “On the one hand, such agreements offer an effective means of facilitating trade. On the other hand, they also have an impact on the competitive strength of non-participating countries. This is why two WTO agreements (TBT and SPS) encourage Members to negotiate MRAs but at the same time require that they do so in a transparent and open way.” See also Petros C. Mavroidis, *Transatlantic Regulatory Cooperation: Exclusive Club or ‘Open Regionalism’*, in *TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 263, 266 (George A. Bermann, Matthias Herdegan & Peter L. Lindseth, eds. 2001): “any interpretation of the WTO agreements that the MFN principle precludes MRAs must be rejected, because it runs counter to the principle of ‘effective interpretation’ of the treaties as laid down in the Vienna Convention on the Law of treaties.”

argue that recognition regimes could not be exclusive to members of an RTA, but, as under the GATS, would be required to be offered on an open basis.

Interestingly, this logic would have results similar to those explicitly stated in Article VII of GATS. Indeed, the language of Article 4 of the SPS Agreement requires recognition on an open and objective basis. Under this provision, the fact of intra-RTA recognition arrangements would make it more difficult to resist extra-RTA recognition. Article 2.7 of the SPS Agreement does not provide as strong a requirement, calling on members to “give positive consideration” to accepting foreign technical regulations as “equivalent.” Furthermore, the application of the necessity requirements in Article 2.2 of the SPS Agreement and Article 2.2 of the TBT Agreement might be affected by RTA recognition arrangements in the following way. Once a state enters into a recognition arrangement, it becomes more difficult to argue that its own regulation must meet complete compliance by other imports, when those other imports are equivalent. In other words, the recognition arrangement may set a lower standard of necessity.

To conclude, while it appears that recognition arrangements may be legal under WTO law, there seems little support for “closed” recognition as it might appear within an RTA. Does Article XXIV provide an exception that would allow closed recognition?

#### 4. The Regional-Multilateral Relationship in the WTO As It Pertains to TBTSPS Measures: Article XXIV and the Understanding

The Appellate Body’s decision in Turkey-Textiles will have important implications for the treatment of TBTSPS measures in RTAs under Article XXIV. As noted, that decision suggests that measures that are not required to form a customs union or free trade area are prohibited. But there may be different ways of understanding what is required. In this section, we examine

- The **internal requirement** for customs union or free trade area status under Article XXIV:8(a)(i) for customs unions and Article XXIV:8(b) for free trade areas,
- The **external requirement** for customs union status under Article XXIV:8(a)(ii),
- The **requirement not to raise external barriers** under Article XXIV:5, and
- The application of the **necessity test** developed in Turkey-Textiles.

Our focus is on what is required to constitute an RTA under Article XXIV. But our second purpose is to explore what is prohibited under Article XXIV.

##### a. The Internal Requirement for Customs Union or Free Trade Area Status

First, we must analyze how TBTSPS measures relate to the “internal requirement” under Article XXIV:8(a)(i) (customs unions) and Article XXIV:8(b) (free trade areas) that “duties and

other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories . . . .”<sup>62</sup> Is RTA regulation of TBTSPS measures, like that of the EC single market program, required, and if so, to what extent? This depends, first, on whether TBTSPS measures are included in “other restrictive regulations of commerce” . It is also worth noting the reference to Article XX in the parenthetical; this suggests that at least some SPS measures might be excluded from the requirement of elimination.

- i. What is an “Other Restrictive Regulations of Commerce” under Article XXIV:8(a)(i) and (b)? How does it differ from an “Other Regulations of Commerce” Under Article XXIV:5(a) and (b), and Article XXIV:8(a)(ii)?

There are two similar terms contained in Article XXIV:8 and Article XXIV:5. They are “other restrictive regulations of commerce” (“ORRCs”) and “other regulations of commerce” (“ORCs”).<sup>63</sup> GATT neither defines nor specifically distinguishes these terms. ORRC is used to deal with intra-RTA regulation—the internal requirement—while ORC is used to deal with barriers to external trade. In the terms of Article XXIV:4, ORRC deals with “facilitating” intra-RTA trade, while ORC deals with avoiding raising barriers to external trade. However, in substantive terms, both refer to barriers to trade. We deal with both in this section, for purposes of ease of exposition, as their definitions are linked. However, our treatment of the definition of “ORC” is a digression from our analysis of the internal requirements for FTAs, which depends on the definition of “ORRC”.

From the most basic interpretive perspective, assuming, based on the principle of effective interpretation, that these terms are intended to have different meanings, it appears that ORC encompasses a wider scope than ORRC.<sup>64</sup> One supposes that the *expressio unius* principle of interpretation could be deployed to argue that ORCs do not include *restrictive* regulations, but this would assume great incompetence on the part of the draftsman, and would seem contrary to the intent of at least Article XXIV:5.

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<sup>62</sup> This language is drawn from Article XXIV:8(a)(i), relating to customs unions, and Article XXIV:8(b), relating to free trade areas. The language is the same.

<sup>63</sup> For the drafting history of Article XXIV and the Understanding in connection with ORCs, see Background Note by the Secretariat, Systemic Issues Related to “Other Regulations of Commerce,” WT/REG/W/17/Rev.1, 5 February 1998. For a useful review of the approach taken to these terms by working parties in the GATT years, see Background Note by the Secretariat, Systemic Issues Related to “Other Regulations of Commerce,” WT/REG/W/17/Add.1, 5 November 1997.

<sup>64</sup> See Statement by the representative of Canada to the Committee on Regional Trade Arrangements, WT/REG/M/15, 13 January 1998, para. 26.

It should be noted that Article XXIV:5(a), referring to ORCs, sets forth an obligation that duties and ORCs “shall not on the whole be higher or more restrictive” than prior to formation. The reference to restrictiveness here would seem to argue that ORC and ORRC were intended to have similar meaning. That is, as regulations cannot grammatically be “higher”, the only obligation under this provision with respect to ORCs is to ensure that they are not “more restrictive.” Therefore, the only ORCs actually addressed are those that are “restrictive.” Therefore, at least in this particular context, there is no particular difference between ORC and ORRC. This argument may be slightly weakened by the fact that Article XXIV:8(a)(ii), where ORC is also used, does not refer to restrictiveness, although there is no guarantee that ORC has the same meaning in both provisions.

(1) Toward a Definition of ORRC That Would Include Only  
“Protectionist” TBTSPS Measures

The text of Article XXIV:8 suggests that the term “ORRC” would ordinarily include *some* measures permitted under Articles XI, XII, XIII, XIV, XV and XX of GATT, but these measures are excepted from the obligation to dismantle internal barriers. So, for example, it appears that quantitative restrictions would ordinarily be ORRC’s, but where there is an exception, as for example under Article XI:2, these would not be required to be eliminated. SPS and TBT measures that are not discriminatory would ordinarily be permitted under Article III, although some discriminatory measures could theoretically be permitted under Article XX.<sup>65</sup> Article III is not referenced, but it is not clear that the list of GATT provisions is intended to be exhaustive.<sup>66</sup> The fact that Article XX is referenced suggests that it is at least possible that TBTSPS measures might be included as ORRCs, except to the extent permitted under Article XX, but does not allow us to draw a strong inference.

More importantly, it might be argued that TBTSPS measures are not ordinarily “restrictive” or “regulations of commerce,”<sup>67</sup> because they are not intended, as duties are, to

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<sup>65</sup> There may be a rather metaphysical argument to the effect that these non-discriminatory SPS and TBT measures, applied at the border, are “permitted” under Article XI because, under an interpretation of *ad* Article III, these measures are subject to Article III, and not subject to Article XI.

<sup>66</sup> See Robert E. Hudec & James D. Southwick, *Regionalism and WTO Rules: Problems in the Fine Art of Discriminating Fairly*, in *TRADE RULES IN THE MAKING: CHALLENGES IN REGIONAL AND MULTILATERAL NEGOTIATIONS* 47, 64 (Miguel Rodriguez Mendoza, Patrick Low & Barbara Kotschwar, eds. 1999).

<sup>67</sup> Within federations like the U.S., or within the EC, these measures are considered “regulations of commerce,” at least for purposes of authority for positive integration and judicial application of negative integration. However, these definitions have shifted over the history of

reduce market access. (To the extent this argument depends on the inclusion of the word “restrictive,” this may be an argument for differentiating between ORRCs and ORCs.) Here, the word “other” would be understood to draw this link between duties and the types of “regulations of commerce” covered by Article XXIV:8—the regulations included are those that are restrictive in the same sense as duties. Perhaps this would include TBTSPS measures that are discriminatory against foreign goods, or that are otherwise “restrictive” in the same sense as a duty.

Moreover, it would be absurd to include all TBTSPS measures as ORRCs, because the implication would be that Article XXIV:8(a)(i) and XXIV:8(b) require their *elimination*. It must be that if any TBTSPS measures are included, it is a subcategory of them. This would seem to support the interpretation that only discriminatory, or perhaps also unnecessary, TBTSPS measures are ORRCs.

It appears that WTO members have not addressed this particular issue, but their post-1947 discussions seem supportive of the interpretation of ORRC suggested above. “Most of the discussion has focused on whether safeguard and anti-dumping measures should be considered ORRCs. . . . Some Members argued that what is important is whether the application of some specific measures among RTA parties led to restrictions on the trade of third parties, and not whether they constituted ORRCs.”<sup>68</sup> Although this paper does not deal with the service sector, it is worth noting that the coordinate provision of GATS, Article V:1(b), limits its scope to discriminatory measures.

In the Report of the 1970 Working Party on “EEC–Association with African and Malagasy States,” some members opined that the maintenance of fiscal charges on imports from other members was inconsistent with Article XXIV:8(b), *where these charges had no domestic counterpart*.<sup>69</sup> The parties to that convention replied that “so far as they knew, the elimination of fiscal charges had never yet constituted an element necessary for recognition that a free-trade area was consistent with the GATT rules. . . . The General Agreement made a clear-cut distinction between measures which had a protective effect and other measures applied in like manner to

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these entities engaging in economic integration. Therefore, a teleological interpretation, in the WTO’s current circumstances, might find that TBTSPS measures are not yet “regulations of commerce” in the sense of this requirement.

<sup>68</sup> Note by the Secretariat, Synopsis of “Systemic” Issues Related to Regional Trade Agreements, WT/REG/W/37, 2 March 2000, para. 45 and n. 93. The latter part of this quote seems odd in the context of paragraph 8, which deals with internal restrictive regulations of commerce.

<sup>69</sup> L/3465, adopted 2 December 1970, 18 B.I.S.D. 133, para. 7.

domestic and imported products.”<sup>70</sup> While there appeared to be some disagreement on the facts, both sides seemed to agree on the principle.

This issue came up again soon after in the Report of the Working Party on “EEC–Agreement of Association with Malta.” In response to a *reductio ad absurdum* argument to the effect that Malta could replace all its tariffs with “revenue duties,” the parties to the association agreement responded that “the existence of revenue duties, which by definition ruled out discriminatory application, could not be regarded as jeopardizing the establishment of free trade.”<sup>71</sup> This suggests that discriminatory character is the critical feature.

It may be desirable for the meaning of “ORRC” to be delineated more clearly in dispute settlement or in a definitive interpretation of GATT. It is also perhaps desirable to take an evolutionary approach to the definition of “ORRC.” This evolutionary approach, following the Shrimp-Turtle decision of the Appellate Body, would recognize that as tariff barriers have declined, non-tariff barriers such as TBTSPS measures have become more important barriers to trade, in both relative and absolute terms.

Thus, we might consider the definition of “ORRC” to depend on what is “inherent” in a customs union or free trade area, as India argued in the Turkey-Textiles case.<sup>72</sup> What is “inherent” may depend on the historical moment, and on the circumstances. This interpretation would be consistent with the Appellate Body’s call in the Turkey-Textiles decision for balancing the objectives of internal trade facilitation and avoiding barriers to external trade. So, a case-by-case approach, recognizing the possibility of evolution in what is “inherent” in an RTA, and balancing these goals, may be the best route to defining “ORRCs.” This evolutionary approach might lead us to the conclusion that only protectionist (discriminatory or unnecessary) TBTSPS measures are included in “ORRC,” and therefore subject to the requirement of elimination.

Similarly, if RTAs are only required to eliminate protectionist TBTSPS measures, then they are not permitted to violate other provisions of WTO law to engage in harmonization or recognition.

## (2) Toward a Definition of ORC

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<sup>70</sup> *Id.*, para. 8.

<sup>71</sup> L/3665, adopted 29 May 1972, 19 B.I.S.D. 90, para. 15. In para. 17, it was noted that “The discussion brought to light the fact that the English and French versions of Article XXIV paragraph 8(a) differed inasmuch as the English text referred only to ‘duties’, whereas the french text referred to ‘droits de douane’ (customs duties). The Working Party did not reach any conclusion on the point.”

<sup>72</sup> Turkey-Textiles Appellate Body Report, *supra* note 39, para. 21.

This section is a digression from the issue of the definition of “ORRC” and the requirements of Article XXIV:8(a)(i) and (b) of GATT, but it is useful to cover the definition of “other regulations of commerce” as used in Article XXIV:5 and XXIV:8(a)(ii) before traveling too far from our discussion of the definition of ORRC. GATT contains no definition of “other regulations of commerce” or “ORC.”<sup>73</sup> It is not clear whether ORC was intended to have the same meaning as ORRC. “It has been generally recognized that paragraph 8 deals mainly with those measures that are internal to the customs union or FTA, whereas paragraph 5 governs external relations, and that the former paragraph describes the minimum parameters which an RTA must meet.”<sup>74</sup> This view seems consistent with the structure of paragraph 8(a), which refers to ORRCs with respect to its internal test, and ORC with respect to its external test. Thus, the purposes of these two provisions seem different: one requires reduction of barriers to intra-RTA imports, and the other requires reduction of barriers to imports from outside the RTA.

In Turkey-Textiles, the panel made the following statement:

While there is no agreed definition between Members as to the scope of this concept of "other regulations of commerce", for our purposes, it is clear that this concept includes quantitative restrictions. More broadly, the ordinary meaning of the terms "other regulations of commerce" could be understood to include any regulation having an impact on trade (such as measures in the fields covered by WTO rules, e.g. *sanitary and phytosanitary*, customs valuation, anti-dumping, *technical barriers to trade*; as well as any other trade-related domestic regulation, e.g. *environmental standards*, export credit schemes). Given the dynamic nature of regional trade agreements, we consider that this is an evolving concept.<sup>75</sup>

If ORC includes quantitative restrictions, it is difficult to see why it would not also include TBT or SPS measures that amount to or are somehow analogous to quantitative restrictions. Thus, while “ORC” is an evolving concept, at least some TBTSPS measures will be covered. It would seem appropriate to include “protectionist” TBTSPS measures as ORCs, especially if these are included in ORRC, as suggested above.

ii. The Requirements of Article XXIV:8(a)(i) and Article XXIV:8(b)

We now return to our discussion of the requirements of Article XXIV:8(a)(i) and (b),

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<sup>73</sup> For a useful analysis, see Communication from Australia, WT/REG/W/25, 1 April 1998.

<sup>74</sup> Secretariat Synopsis, *supra* note 68, para. 46. See also para. 62.

<sup>75</sup> Turkey-Textiles Panel Report, *supra* note 39, para. 9.120 (emphasis added).

based on the definition of ORRC. If “ORRC” were to be interpreted to include all TBTSPS measures, it appears that Article XXIV:8(a)(i) and Article XXIV:8(b) would require that they be eliminated with respect to customs unions and free trade areas, respectively. This would obviously go too far. If TBTSPS measures are covered, only some portion of them, such as discriminatory or disproportionate TBTSPS measures, must be included.

It would appear that the better understanding is that only protectionist TBTSPS measures would be seen as “restrictive” and therefore subject to a requirement of elimination. Thus, an RTA would be required to prohibit discrimination (and perhaps “unnecessary” regulation) in this area. However, as WTO law already does so, this requirement would not seem to have much traction, at least in RTAs exclusively among WTO members.<sup>76</sup>

b. The External Requirement for Customs Union Status.

Second, we must examine the extent to which failure to engage in RTA regulation of TBTSPS measures may violate the external requirement of Article XXIV:8, as applied to customs unions. Article XXIV:8(a)(ii) requires that “substantially the same duties and other regulations of commerce are applied by each of the members of the union. . . .” Does this reference include in the “common external trade regime” the approach to external TBTSPS measures? The answer to this question depends on what is meant by “other regulations of commerce.” We refer to the discussion above of the meaning of ORC. While the definition of ORC is not clearly delineated, and may well be in flux, it would seem absurd to require harmonization of TBTSPS measures for external application under clause (ii) of Article XXIV:8(a), while only eliminating protectionist TBTSPS measures internally under clause (i). Thus, whatever the full meaning of ORC, it seems appropriate to expect that in the field of TBTSPS measures, it is not greater than ORRC. If this is accepted, the combination of these provisions results in what amounts to an MFN requirement: protectionism in TBTSPS measures (argued above to be included in ORRC) must be eliminated both internally and, because it is also included within “ORC,” externally. However, this is largely accomplished already under WTO law. Thus, this requirement too lacks traction given the evolution of WTO law in the Uruguay Round.

In Turkey-Textiles, the Appellate Body interpreted “substantially the same” to require a high degree of sameness—“comparable trade regulations having similar effects do not meet this

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<sup>76</sup> If, alternatively, all TBTSPS measures are included as ORRCs then (assuming we all agree that elimination is absurd) this provision might require further integration. This further integration might include negative integration in the form of proportionality or other tests (again, to the extent not already included in WTO law), and/or requirements of mutual recognition or harmonization within the RTA.

standard.”<sup>77</sup> The commonality need not be exact, but the external trade regimes must be substantially the same. According to the Appellate Body, it must “closely approximate ‘sameness,’” and the Appellate Body rejected the panel’s interpretation to the effect that the external trade regimes of constituent states may be “comparable.”<sup>78</sup> This would seem to argue for a requirement that customs unions have uniform external requirements for TBTSPS measures, to the extent that TBTSPS measures are included in ORCs. Given the requirements of MFN and national treatment in the GATT, the TBT Agreement and the SPS Agreement, a common external regime would require a common internal regime.

However, this outcome would be absurd if “ORC” goes beyond protectionism. As we have suggested, Article XXIV:8(a)(i) cannot require “elimination” of non-protectionist TBTSPS measures. It would be odd indeed if Article XXIV:8(a)(ii) required the harmonization externally of non-protectionist measures that were not required to be harmonized internally under Article XXIV:8(a)(i).

c. The Requirement Not to Raise External Barriers.

Third, and somewhat inconsistently with the tests discussed above, to what extent does internal TBTSPS integration impose a risk of violation of the requirement in Article XXIV:5 that the “duties and other regulations of commerce” are on the whole higher or more restrictive than the general incidence prior to formation of the customs union or free trade area.<sup>79</sup> In other words, if common external TBTSPS measures upon formation are higher than the general incidence prior to formation, would this cause the RTA to violate Article XXIV? Would this rule have a de-regulatory bias? Would TBTSPS measures be evaluated separately from duties, or on an aggregate barriers to trade basis?

Paragraph 2 of the Understanding provides that “for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.” This would suggest that these types of measures may be required to be evaluated separately, without quantification or aggregation.<sup>80</sup>

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<sup>77</sup> Turkey-Textiles Appellate Body Report, *supra* note 39, para. 50.

<sup>78</sup> Turkey-Appellate Body Report, *supra* note 39, para. 50, *citing* Panel Report, para. 9.151.

<sup>79</sup> I do not here try to deal with interim agreements, which are also referenced in this provision.

<sup>80</sup> For an argument that import restrictions in the form of quotas or regulations can, at least conceptually, be translated into tariff levels, *see* Marceau & Reiman, *supra* note 28. While

On the other hand, in Turkey-Textiles, the Appellate Body found that Article XXIV:5(a) requires “that the effects of the resulting trade measure and policies of the new agreement shall not be more trade restrictive, overall, than were the constituent countries’ previous trade policies.”<sup>81</sup> This suggests that the test under Article XXIV:5 is something of a balancing test. The Appellate Body agreed with the panel that Article XXIV:5(a), as elaborated and clarified by paragraph 2 of the Understanding, calls for an “economic” test for assessing the compatibility of a specific customs union with Article XXIV.<sup>82</sup> The Appellate Body referred to Article XXIV:4 as a basis for interpreting the rest of Article XXIV, requiring balancing between positive internal effects and negative trade effects on third parties.

Australia has provided an interesting hypothetical example worth discussing here:

Country E maintains a strict system of sanitary and phytosanitary regulations which underpins its considerable success on export markets in plant and animal products. It now decides to enter into a free-trade agreement with Country F which, for reasons of comparative advantage, has operated under less stringent rules. Both countries agree that there would be considerable efficiency gains through closer economic integration, but that this result was only possible if at the same time there was a harmonisation of sanitary and phytosanitary rules at the level of Country E's regulations. Inevitably, this would mean a raising overall in the incidence of restrictive regulation, but how should it be considered in the context of the rules expressed in Article XXIV:8? Obviously, nobody would claim that sanitary and phytosanitary regulations are irrelevant in a free-trade area, but here we have the paradoxical situation that imposing them would promote economic integration.<sup>83</sup>

This example is extremely useful, as it points out the inherent potential conflict between the goals of Article XXIV:8 and those of Article XXIV:5. That is, imposing heightened SPS measures might promote economic integration, while it might increase barriers to third countries. Would the Turkey-Textiles “necessity” test find that raising SPS measures was not necessary? After all, the goals of Article XXIV:8 could be met by harmonization at the (lower) Country F level. Or, if external barriers are evaluated on an aggregate basis, would this RTA be required to

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we have experience, under the Agriculture Agreement, in tariffication of protectionist quotas, it is far more difficult to imagine how a TBTSPS measure might be tariffied, due to its regulatory character.

<sup>81</sup> Turkey-Textiles Appellate Body Report, *supra* note 39, para. 55, quoting Turkey-Textiles Panel Report, para. 9.121.

<sup>82</sup> Turkey-Textiles Appellate Body Report, *supra* note 39, para. 55, quoting Turkey-Textiles Panel Report, para. 9.120.

<sup>83</sup> Communication from Australia, *supra* note 73, para. 10.

“compensate” by reducing barriers in another area?

This may be an absurd result, as Country F had the freedom to raise the level of its SPS measures, within the parameters of the SPS Agreement, separately. In fact, an adviser to this RTA might suggest that Country F raise the level of its SPS measures “autonomously” prior to entering the RTA. On the other hand, its motivation—not being a changed “appropriate level of protection” but being economic integration—might raise concerns under the SPS Agreement.

Does Article XXIV:5 address the circumstance where, by virtue of internal reductions of barriers through positive integration, without increasing absolute barriers, imports are made *relatively* less competitive? It does not appear intended to do so, as this is the natural implication of Article XXIV: internal barriers may, indeed they must, be dismantled, and external barriers cannot be increased. Therefore, there is no guarantee that imports will remain competitive.

d. TBT Agreement

The TBT Agreement contains remarkably little addressing RTAs. Articles 4.1, 9.2 and 9.3 seek to ensure that regional standard-setting and conformity assessment mechanisms comply with certain obligations of the TBT Agreement. Perhaps this is based on an assumption that TBT measures are not subject to Article XXIV, or that the interpretive issues outlined above are already well-understood.

Of course, Article 2.1 provides a requirement of MFN treatment, as well as national treatment. We address above the possibility that RTA arrangements could violate the MFN requirement.

Article 2.7 seeks to promote recognition of other members’ technical standards. This could presumably validate a regional arrangement for recognition, but leaves open the question of compliance with the MFN requirement discussed above.

Article 2.4 of the TBT Agreement calls for use of international standards in the preparation of technical regulations, but does not refer to regional standards.

e. SPS Agreement

The SPS Agreement takes a somewhat different approach to drafting, but covers regional measures in approximately the same substantive way as the TBT Agreement. Article 13 of the SPS Agreement provides that

Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions

of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement.

Article 2.3 of the SPS Agreement contains a somewhat more nuanced requirement for MFN than that found in the TBT Agreement, providing that “Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members.” It specifically allows for justifiable discrimination. It is possible that justifiable discrimination might be found to exist under circumstances of a mutual recognition agreement in connection with an RTA.

The SPS Agreement contains provisions substantively similar, for our purposes, to those of the TBT Agreement relating to harmonization and recognition. Although Article 4 of the SPS Agreement calls for recognition on objective terms, it does not provide sufficient guidance as to whether RTA recognition arrangements would violate MFN obligations.

f. Compare GATS Article VII

This paper is not intended to address GATS *per se*. The lack of authority for regional integration of TBTSPS measures in the TBT and SPS Agreements contrasts with the treatment of this topic in the GATS.<sup>84</sup> Article V of GATS has a similar structure to Article XXIV of GATT, regulating the formation of RTAs in relation to services. But Article VII provides an additional facility. It allows for autonomous, reciprocal or regional, or even plurilateral, arrangements for recognition of standards or criteria for the authorization, licensing or certification of services suppliers. It requires that other members be permitted to demonstrate the qualification of their regulatory regime for recognition. Recognition arrangements may not be used as a means of discrimination.

Article VII presumably provides an exception from the requirements of GATS Article II, requiring MFN treatment. One might ask, if this facility was acceptable in the field of services, why was it not provided with respect to TBTSPS measures? It cannot be that its specific inclusion in GATS suggests an interpretation that similar recognition was not intended in the goods sector. Article VII of GATS seems to have struck an appropriate balance, but its relationship to the regional integration provision of GATS, Article V, is unclear.<sup>85</sup>

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<sup>84</sup> This lack of authority supports the argument made earlier in this paper that Article XXIV was intended to cover “necessary” exceptions to the TBT and SPS Agreements.

<sup>85</sup> See Aaditya Mattoo, *MFN and the GATS*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW at 51 (Thomas Cottier, Petros C.

## 5. Conclusion

The requirements of Article XXIV of GATT and the Understanding with respect to RTA regulation of national TBTSPS measures are somewhat unclear, in large measure due to the imprecision of the definitions of “other restrictive regulations of commerce” in Article XXIV:8, and “other regulations of commerce” in Article XXIV:5 and 8. This paper suggests that the WTO law be read to require RTAs internally to impose a rule of national treatment-type nondiscrimination and necessity. However, it must be recognized that the WTO system already provides this anti-protectionism discipline, and so this requirement has little traction.

On the other hand, Article XXIV:8 does not appear to require harmonization or mutual recognition arrangements. To the extent that RTAs engage in harmonization, their harmonized TBTSPS measures must conform to the requirements of WTO law, namely the GATT, the TBT Agreement and the SPS Agreement. The regulation of RTA rules of mutual recognition, under the MFN obligation of Article I:1 of GATT, and under Article XXIV, is unclear, and rules of mutual recognition may present some opportunities for RTA protectionism. It would be useful to clarify the meaning of “other restrictive regulations of commerce” in Article XXIV:8, and “other regulations of commerce” in Article XXIV:5 and 8 in order to clarify what Article XXIV requires and what it prohibits.

The core question raised by this paper has to do with the treatment of recognition arrangements. Should RTAs be permitted to maintain exclusive recognition arrangements, effectively discriminating against similarly-situated third states and “like” third state products? Or should they be required, as under Article VII of the GATS, to practice what might be termed “open recognition”? Open recognition would establish RTA *conditions* for recognition, but permit third states to meet those conditions. This paper has suggested that, although the legal requirements are not clear, open recognition may be required under Article I:1 and XXIV of GATT. It might be useful to clarify these requirements.

In order to ensure that RTA TBTSPS measures do not unnecessarily inhibit trade with outside parties, and in order to ensure that WTO requirements for MFN and Article XXIV requirements do not unnecessarily inhibit regional integration, the following three initiatives are recommended:

1. Interpret Article XXIV:5 to provide an exception from obligations contained in the TBT Agreement and SPS Agreement, principally the MFN obligation, in accordance with the Turkey-Textiles necessity test. This avoids imposing an inappropriate barrier to formation of RTAs.

2. Interpret “other restrictive regulations of commerce” and “other regulations of commerce” in Articles XXIV:5 and 8 to include only discriminatory and unnecessary TBT or SPS measures. This avoids requirements to eliminate or harmonize non-protectionist TBT or SPS measures. It avoids imposing an inappropriate barrier to formation of RTAs.

3. Interpret Article I:1 of GATT and the MFN provisions of the TBT Agreement and SPS Agreement to clarify authorization for only “open” mutual recognition agreements, similar to the permission contained in Article VII of GATS. Today, it is not clear that any mutual recognition agreements are authorized. This ensures that recognition arrangements will not provide an avenue of discrimination or other defection from WTO multilateral free trade principles.

These initiatives could be effected by the dispute settlement process, or by action of the member states of the WTO.

These initiatives would assist in ensuring that RTA TBTSPS integration contributes to global welfare, and that WTO rules do not inappropriately inhibit the formation of RTAs. However, this paper’s analysis does not purport to answer the question of building blocks or stumbling blocks in connection with regional integration in the TBTSPS field.

This paper has also not addressed the dynamic time path issue: whether RTA integration of TBTSPS issues will help to achieve greater welfare through institutional growth. One problem with this question is that it is not clear that either RTA or multilateral standardization would increase welfare in any particular circumstance. While Kindleberger suggests that world standards are a public good,<sup>86</sup> Sykes,<sup>87</sup> Stephan<sup>88</sup> and others point out that harmonization may diminish welfare through suppression of efficient variation and regulatory competition. In a sense, both perspectives are correct, but depend on the particular type of product, and the preferences of individuals and states.<sup>89</sup>

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<sup>86</sup> Kindleberger, *supra* note 4, at 393.

<sup>87</sup> Sykes, *supra* note 21.

<sup>88</sup> Paul B. Stephan, *Regulatory Cooperation and Competition: The Search for Virtue*, in *TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 167 (George A. Bermann, Matthias Herdegan & Peter L. Lindseth, eds. 2001).

<sup>89</sup> See Pascal Lamy, *Facing the Challenge of Globalisation: Regional Integration or Multilateral Rules*, Buenos Aires, 1 March 2002, available at [http://www.europa.eu.int/comm/trade/speeches\\_articles/spla99\\_en.htm](http://www.europa.eu.int/comm/trade/speeches_articles/spla99_en.htm).

Flexible institutional arrangements are needed to permit the emergence of private, national, regional and global TBTSPS measures in response to circumstances and preferences as they vary and as they emerge over time. The balancing test enunciated by the Appellate Body in Turkey-Textiles may serve to provide an appropriate degree of flexibility. The Appellate Body's "economic test," while neither operational in an economic analysis sense, nor formally realizable in a legal sense, may be a useful way forward in the near term.

In light of the above, this paper recommends another initiative: Establish a "Cecchini Report"-type project to evaluate the benefits of integration of TBTSPS measures in the multilateral system, to compare these benefits to those available through integration in regional systems, and to evaluate dynamically the relationship between these two types of activity.

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