REGULATORY COOPERATION, REGIONAL TRADE AGREEMENTS, AND WORLD TRADE LAW: CONFLICT OR COMPLEMENTARITY?

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I
INTRODUCTION

Traditionally, a major function of the free trade agreements, whether bilateral or regional, has been the reduction to zero of tariffs among the parties. These agreements lead to greater liberalization than that available through the World Trade Organization (WTO) multilateral system.[1] Critics of such deals have worried that the result will be so-called "trade diversion," in which goods are sourced from within the free trade area in question, even if the lowest-cost—that is, the most efficient producer—is elsewhere.[2] But the WTO system has traditionally been permissive of arrangements that provide more advantageous market access in the form of lower tariffs or related border measures to parties in a free trade area (like the North American Free Trade Agreement) or customs union (like the European Union). Specifically, Article XXIV of the General Agreement on Tariffs and Trade (GATT) provides an exception to the Most Favored Nation (MFN) obligation with respect to border measures when it is necessary to create and maintain such preferential arrangements.[3] As applied rates of tariff on all but the most sensitive (in a political economy sense) products have been significantly reduced among most major trading states, however, the rationale for regional agreements has shifted to nontariff, nonborder measures, whether through intellectual property rules or through domestic regulations and standards.[4] The extent to which a WTO-

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1. *See generally* Shujiro Urata, *Globalization and the Growth in Free Trade Agreements*, 9 ASIA-PAC. REV. no. 1, 2002, at 20 (exploring regional integration and trade through the lens of free-trade agreement and regional-trade agreement growth in Japan).

2. *See, e.g.*, JAGDISH BHAGWATI, TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE xii, 17 (2008) (describing the surge of preferential trade agreements as "a trade wreck").

3. General Agreement on Tariffs and Trade art. XXIV, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

4. Michael Trebilcock, Robert Howse & Antonia Eliason, *The Regulation of International Trade*,

plus approach as contemplated in the Transatlantic Trade and Investment Partnership (TTIP), for example, is consistent with the WTO approach based on nondiscrimination among all members of the WTO is much less clear from the law and jurisprudence than it is for preferential tariffs or elimination of tariffs on a bilateral or regional basis, protected, as mentioned by GATT Article XXIV.

This article addresses several issues. First, does the exception in Article XXIV of GATT apply at all to GATT disciplines that require nondiscrimination in regulatory measures between WTO members when the same conditions prevail? Second, the WTO's Agreement on Technical Barriers to Trade (TBT) is a specialized agreement that focuses on product standards and regulations.[5] Likewise, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) focuses on such standards in the food and agriculture sectors.[6] Neither of these agreements contains any equivalent of the GATT Article XXIV provisions that would exempt regulatory cooperation in the context of a free trade agreement from the relevant WTO disciplines. Yet both agreements contain obligations to use international standards.[7] The question is how these obligations might limit the use of specific standards as a basis for free trade in goods among parties to free trade agreements. Whereas mutual recognition is encouraged by both agreements—and the TBT specifically addresses regional standardization—the MFN provision is nonetheless affirmed.[8] This raises the issue of the extent to which such standards can exclude or impose greater barriers to products from WTO members not parties to that free trade area. Third, the General Agreement on Trade in Services (GATS) does contain a provision analogous to Article XXIV of the GATT.[9] It has not been tested in any dispute before any of the WTO Dispute Settlement Organs—that is, the Dispute Settlement Body, the panels constituted by the Dispute Settlement Body, or the WTO Appellate Body—and the GATS contains its own code-of-conduct approach for addressing regulatory differences on a sector-by-sector basis. So far, a completed agreement has only been achieved in the area of accounting standards.[10]

II
TRADE IN GOODS: THE GATT

The MFN provision, found in Article I of GATT, applies on its face not only to tariff concessions, but also to regulatory measures adopted by the WTO

§ 258 (4th ed. 2013).

5. Agreement on Technical Barriers to Trade, Jan. 1, 1995, 1868 U.N.T.S. 120 [hereinafter TBT].

6. Agreement on the Application of Sanitary and Phytosanitary Measures, Jan. 1, 1995, 1867 U.N.T.S. 493 [hereinafter SPS].

7. *See* TBT , *supra* note 5, pmbl.; SPS *supra* note 6, pmbl.

8. *See* TBT *supra* note 5, art. 4.1.

9. General Agreement on Trade in Services, Jan. 1 1995, 169 U.N.T.S. 183 [hereinafter GATS].

10. *See International Accounting Standards*, DELOITTE, http://www.iasplus.com/en/standards/ias.

members, whether unilaterally or through bilateral or regional regulatory cooperation.[11] Therefore, when cooperation under a bilateral or regional trade agreement leads to a relaxation of regulatory barriers to trade, the same benefits must be provided to all WTO members for whom similar conditions exist. This last qualification is important: when bilateral or regional regulatory cooperation produces, for instance, mutual recognition or harmonized standards on the basis of which goods are afforded market access between the parties to these arrangements, it is not necessary to offer comparable market access to a member state that is unable or unwilling to meet justified criteria. These justified criteria include the level of protection in domestic regulation to which parties of the bilateral or regional arrangement are stipulating as a condition for market access among themselves.

EU-level regulations have frequently been challenged in WTO dispute settlement. A pre-WTO GATT case, *European Economic Community—Imports Of Beef From Canada* (*EEC–Beef)*, illustrates the basic operation of the MFN principle in relation to regulatory standards.[12] The European Economic Community (EEC) had conditioned preferential market access for certain beef imports on their quality certification by the United States Department of Agriculture (USDA).[13] Canada brought a complaint before a GATT panel, arguing this stipulation violated the MFN provision because it gave advantageous treatment to beef imports from the United States, which were in fact the only products certified by the USDA to the quality standard in question.[14] Importantly, Canada stated it could provide evidence that its beef, although not entitled to certification by the USDA, was of equivalent quality to the USDA-approved American beef.[15]

Not surprisingly, the panel found the condition of USDA certification, constituted a violation of MFN.[16] At the time, no free trade agreement existed between the United States and the EEC, but one could easily imagine a bilateral deal with a mutual recognition provision that generally required each of the parties to accept the others' quality certification standards and procedures as a basis for market access. Applying the logic of the *EEC–Beef* panel, such an arrangement between the United States and the EEC would

11. GATT, *supra* note 3, art. I, The text of Article I reads:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed in the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rule and formalities in connection with importation and exportation … any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

12. Report of the Panel, *European Economic Community—Imports of Beef from Canada*, L/5099 (Mar. 10, 1981), GATT B.I.S.D. (28th Supp.) (1981).

13. *Id.* ¶ 2.4–2.5.

14. *Id.* ¶ 3.6.

15. *Id*.

16. *Id.* ¶ 4.6.

have violated the MFN provision unless extended to Canada and its regulatory authorities (assuming Canadian standards and conformity assessment procedures were equivalent in terms of achieving the policy purpose in question), and their conformity assessment procedures were equally credible. In sum, regional or bilateral arrangements are not per se contrary to MFN, but they must be *open*—that is, allow all WTO members the opportunity to demonstrate equivalency.

In the well-known *United States—Import Prohibition Of Certain Shrimp And Shrimp Products* (*US–Shrimp*) case,[17] decided during the current WTO era, the WTO Appellate Body was confronted with a U.S. scheme that addressed the mortality of sea turtles caused by non-use of Turtle Excluder Device trawlers. Regarding the extraterritorial application of the scheme, the U.S. statute provided for negotiations with U.S. trading partners to ensure adequate protection of sea turtles.[18] If negotiations failed after a certain deadline, shrimp imports from the countries that had not reached a regulatory cooperation agreement with the United States would be prohibited, unless the shrimp fishers adopted the turtle exclusion technology required of domestic fishers under U.S. law.[19] The United States succeeded in reaching such an agreement with countries in the Western Hemisphere, but not with Asian countries, the complainants in this dispute.[20]

The WTO Appellate Body held, based upon evidence presented at the first instance level, that the import ban on shrimp from the Asian countries could not be justified under the Article XX exception[21] of the GATT relating to the conservation of exhaustible natural resources; the United States, inter alia, had failed to make an equivalent effort to negotiate an accord with the Asian partners.[22] The chapeau of Article XX required that a measure justified under Article XX must not be applied in an arbitrarily or unjustifiably discriminatory manner.[23] Pursuing a solution of regulatory cooperation with some WTO members to the exclusion of others constituted such discrimination.[24]

In a follow-up ruling, the Appellate Body clarified that the terms of a regulatory cooperation agreement with some WTO members could provide a benchmark as to what must, generally speaking, be offered to others in order to meet the nondiscrimination requirement.[25] But allowances must be made for different conditions in different countries or regions. Thus, it would not be a per

17. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

18. *Id.* ¶ 1.

19. *Id.* ¶ 3.

20. *Id.* ¶ 6.

21. *Id.* ¶ 59.

22. *Id.* ¶171.

23. *Id,* ¶ 177.

24. *Id.* ¶ 184.

25. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 124, WTO Doc. WT/DS58/AB/RW (adopted Oct. 22, 2001).

se violation of the relevant nondiscrimination norm that the *same* deal is not offered to a different group of countries, but *any less favorable* aspect would need to be justified. In sum, the *Shrimp–Turtle* cases reinforce the notion that any bilateral or regional regulatory cooperation must be open to all other WTO members and must not lead to discriminatory conditions for market access—that is, conditions not justified by objective differences between the countries in question. More recently in the *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products* (*EC–Seal Products*) case, the WTO Appellate Body stressed that de facto discrimination is prohibited under Article I of the GATT, and that any detrimental impact on competitive opportunities for a comparable imported product from one WTO Member relative to others is likely to violate Article I.[26]

The *Brazil—Measures Affecting Imports of Retreaded Tyres* (*Brazil–Retreaded Tyres*) case provides another illustration of the WTO law obstacles to preferential liberalization of regulatory trade barriers under a free trade agreement.[27] In that case, Brazil sought to justify a ban on imports of retreaded tires on environmental and health policy grounds.[28] The WTO Appellate Body accepted these reasons; however, under its obligations in the Mercosur free trade arrangement, Brazil was required to exempt other Mercosur countries from the ban.[29] The Appellate Body held this exemption violated the requirement that measures justified under Article XX of the GATT not be applied in a manner that is arbitrarily or unjustifiably discriminatory, reasoning the exemption of the Mercosur countries was unrelated to the environmental and health objectives on the basis of which Brazil had sought to justify its tire measure as a whole.[30]

III
ARTICLE XXIV OF GATT: REGIONALISM AND REGULATORY COOPERATION

In *Brazil–Tyres* the WTO Appellate Body did not refer to Article XXIV of the GATT. The provision allows preferential treatment of members in a free trade area or customs union—a stark deviation from the MFN provision of Article I of the GATT. One reason why Article XXIV did not become the basis for considering Brazil's Mercosur exemption is the restrictive approach to Article XXIV the Appellate Body had taken some years before in the *Turkey—Restrictions on Imports of Textile and Clothing Products* (*Turkey–Textiles*) case.[31]

26. Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/R–WT/DS401/R (adopted May 22, 2014).

27. Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted June 12, 2007).

28. *Id.* ¶ 2.

29. *Id*. ¶ 258.

30. *Id.*

31. Appellate Body Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, WTO Doc. WT/DS34/AB/R (adopted Nov. 19, 1999).

In that ruling, the Appellate Body held that Article XXIV must be strictly read to allow deviations only from the MFN obligation of the GATT and no other provision, even when Article XXIV plays an ancillary or closely related function to the MFN obligation in sustaining the nondiscriminatory character of the multilateral trading system.[32] Further, the Appellate Body held it must be shown that the deviation from MFN is necessary for the operation of the free trade area or customs union.[33] Although the concept of a free trade area or customs union as articulated in Article XXIV of the GATT clearly entails elimination of all or virtually all tariffs and related border measures between the parties, it is far from clear that preferential treatment with respect to regulatory-type measures is a sine qua non of a free trade area or customs union.

An evolutionary interpretive approach to Article XXIV might lead to the view that addressing regulatory barriers is essential to the operation of free trade agreements or customs unions as they are currently understood; Article I of GATT, the MFN obligation, applies explicitly not only to tariffs but also to internal regulations and other measures. This invites the question as to why the Article XXIV exception to MFN would also not apply, mutatis mutandis, to these other measures when they would otherwise run afoul of Article I.[34]

Yet applying Article XXIV to regulatory cooperation in the context of a free trade area or customs union may not be so simple. Article XXIV does not permit a free trade area or customs union to result in an overall *increase* of trade restrictiveness toward third parties—WTO members outside of the preferential arrangement.[35] This could well be the case if regulatory cooperation under a regional arrangement yields a regulatory standard that becomes a condition of market access to that entire area and resultantly shuts out third country producers who do not meet that standard who, prior to the exercise in regulatory cooperation or coordination, might have been able to sell their products to one or more countries within the free trade area. Suppose, for example, Japanese producers have been selling certain advanced electronic equipment to the United States but not to Europe, where interconnectivity standards are inconsistent with Japanese products. If under TTIP, the standard were harmonized to match Europe's, Japanese producers would lose access to the U.S. market. This kind of trade diversion, based on regulatory cooperation or harmonization under free trade arrangements, clearly is in tension with the approach of Article XXIV of GATT.

32. *Id.* ¶ 64.

33. *Id*.

34. *See, e.g.*, Joel P. Trachtman, *Toward Open Recognition? Standardization and Regional Integration Under Article XXIV of GATT* (The Changing Architecture of the Global Trading System: Regionalism and the WTO, Working Draft, Apr. 22, 2002), http://ssrn.com/abstract=317858.

35. GATT, *supra* note 3.

IV
THE TECHNICAL BARRIERS TO TRADE AGREEMENT

The TBT Agreement operates concurrently with and independently of GATT, and contains disciplines that relate to most kinds of product standards and regulations that affect international trade.[36] Notably, whereas the TBT Agreement has an MFN obligation (held by the Appellate Body in several cases to be functionally equivalent to that in GATT),[37] TBT has no equivalent Article XXIV exception.[38] Additionally, no equivalent exists to the Article XX exceptions in GATT for public morals, health, conservation of exhaustible natural resources and the like. Responding to this last gap, the Appellate Body has read into the MFN provision of TBT the notion that if the detrimental treatment of like-imported products flows exclusively from a "legitimate regulatory distinction," then it is permissible.[39]

The extent to which less favorable treatment of imports by WTO members not part of a regional regulatory cooperation or harmonization regime may be justified as a "legitimate regulatory distinction" may be derived by considering the broader context of the TBT Agreement. The TBT Agreement contains a range of specific provisions that constrain regulatory cooperation or harmonization that is not open to all WTO members.[40] Its preamble refers to the requirement that TBT measures "not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries *where the same conditions prevail*."[41] This suggests the considerations concerning the same language in the chapeau of Article XX of GATT discussed above would also be relevant under the TBT Agreement. The exclusive regional arrangements that limit regulatory cooperation to only some WTO members, such as the parties to a free trade agreement may well be incompatible with the TBT Agreement as a general matter, as would regulatory market access restrictions from which the members of a free trade agreement are exempt but that are applied to other WTO members.

Article 2.6 of TBT refers to the goal of "harmonizing technical regulations on as wide a basis as possible . . . ." Article 4.1 of TBT requires that WTO Members "take such reasonable measures as may be available to them to ensure that . . . regional standardization bodies of which they or one or more bodies within their territories are members, accept and comply with" the Code

36. *See* ROBERT HOWSE ET AL., THE REGULATION OF INTERNATIONAL TRADE 288–322 (4th ed. 2014).

37. See *id.*

38. Trachtman suggests that Article XXIV of GATT be read into the TBT Agreement. *See* Trachtman, *supra* note 34, at 9. However, as indicated, the structure of Article XXIV would make its application to regulatory measures very problematic, even assuming that the Appellate Body were prepared to take such a radical step.

39. Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/AB/R (adopted Apr. 4, 2012).

40. *Id.*¶ 174.

41. TBT, *supra* note 5, pmbl. (emphasis added).

of Good Practice in the TBT Agreement. In addition to a range of notification and transparency requirements, the Code of Good Practice stipulates,

> With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part, within the limits of its resources, in the preparation by relevant international standardizing bodies of international standards regarding subject matter for which it either has adopted, or expects to adopt, standards. For standardizing bodies within the territory of a Member, participation in a particular international standardization activity shall, whenever possible, take place through one delegation representing all standardizing bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to which the international standardization activity relates.[42]

Further, regional standardization bodies "shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies."[43]

The concern that regional regulatory cooperation, standardization or harmonization could have trade-restrictive effects is implied in the requirement in 10.7 of the TBT Agreement that

> [w]henever a Member has reached an agreement with any other country or countries on issues related to technical regulations, standards or conformity assessment procedures which may be a significant effect on trade, at least one Member party to the agreement shall notify other Members through the Secretariats of the products to be covered by the agreement and include a brief description of the agreement.

Notably, the TBT Agreement does not require that such bilateral or regional agreements be extended to all WTO members but rather only that the parties to such agreements "are encouraged to enter, upon request, into consultations with other Members for the purposes of concluding similar agreements or of arranging for their participation in such agreements."[44]

One of the key disciplines of the TBT Agreement is the obligation for WTO members to use relevant "international standards" as a "basis" for their technical regulations, unless the international standards are ineffective or inappropriate.[45] But international standards themselves are mostly of a voluntary nature and do not result, in most cases, in binding treaty commitments; quite a few of these standards are the creation of nongovernmental bodies, or private–public partnerships in which industry is the driving force. By virtue of Article 2.4 of the TBT Agreement, a very broad range of normative material—including privately generated norms in some cases—is transformed into an international legal obligation.

Article 2.4 of the TBT Agreement requires WTO members to use international standards as a basis for their domestic regulations when they are available and appropriate.[46] In dicta in the *European Communities—Trade*

42. Agreement on Technical Barriers to Trade Annex 3, Jan. 1, 1995, 1868 U.N.T.S. 120.

43. *Id.*

44. TBT, *supra* note 5, art. 10.7.

45. *Id.* at art. 2.4.

46. *Id.* ("[E]xcept when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued.").

Description of Sardines (*EC–Sardines*)[47] ruling, the Appellate Body suggested that "a very strong and very close relationship" may be required between domestic regulations and international standards to satisfy the obligation under TBT 2.4 to use international standards as a "basis."[48] The Appellate Body has implied that international standards have considerable automatic legal force in the WTO.[49] The TBT Agreement, however, does not define international standards, nor does the agreement attempt to list the international regimes that are qualified to promulgate international standards within the meaning of TBT 2.4.

In its consideration of Mexico's claims under TBT 2.4, the panel in *Tuna–Dolphin II* found that a regional organization, the Agreement on the International Dolphin Conservation Program (AIDCP)—whose membership consisted of several countries in the Western Hemisphere[50] and the Pacific—was an international standardization body based in part on the determination that the AIDCP was open to all WTO members.[51] The panel reasoned that openness to all WTO members includes a situation in which the existing members of a body may, at their discretion, decide to accept a WTO Member as a new member of that body.[52] The panel also suggested the criterion of openness could be fulfilled if, during a certain temporal window, all WTO members had an opportunity to choose to join the body.[53]

Unsurprisingly, the Appellate Body reversed the panel's finding that the AIDCP was a standardization body open to all WTO members.[54] The Appellate Body acknowledged that the states parties to the AIDCP could invite a WTO Member to join the AIDCP at their discretion, but it was not persuaded that such an invitation was a mere formality that would automatically follow from a WTO Member's expression of interest in membership.[55] Thus, the AIDCP is not

47. Appellate Body Report, *European Communities—Trade Description of Sardines*, WTO Doc. WT/DS231/AB/R, DSR 2002:VIII, 3359 (adopted Sept. 26, 2002).

48. *Id.* ¶ 245.

49. *See id* ¶¶ 245–246 (stressing the close relationship between an international standard that is the basis for a technical regulation).

50. Including Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Perú, the United States, Vanuatu, and Venezuela.

51. Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/R (adopted Sept. 15, 2011).

52. *Id.* at 280 ("[T]he AIDCP remains open to accession to any State . . . that is invited to accede to the Agreement on the basis of the parties' decision. To this day, the AIDCP membership is therefore open on a nondiscriminatory basis to the relevant bodies of at least all WTO Members in accordance with the principle of openness.").

53. *Id.* (concluding that because the AIDCP membership was open from May 1998 until May 1999 to states whose vessels fished in the Agreement Area without restrictions on who could fish in the area, the AIDCP was open to all WTO Members).

54. Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012) [hereinafter *U.S.–Tuna II]*.

55. *Id.* ¶ 35.

"open" to all WTO members as a matter of right.[56]

There is an additional difficulty with the panel's ruling, which the Appellate Body failed to address but is of considerable importance in understanding the scope of international standards within the meaning of TBT 2.4. The relevant language in TBT defining an international standardization body, as noted, refers to openness to membership of not all WTO members but rather the *standardization bodies* of all WTO members.[57] The TBT recognizes that these bodies may include private industry or consumer entities, mixed public and private entities, or state agencies and entities that have "legal power to enforce a technical regulation."[58] The AIDCP is a regional treaty regime, and thus arguably only a state or another entity with international legal personality, such as an intergovernmental organization, could be a "member," if indeed "member" means a party to the constitutive instrument of the regime. Given that *standardization bodies* often lack the international legal personality to join international organizations or treaty regimes, a risk exists that the extremely important standardization activities of international intergovernmental organizations (ranging from the World Health Organization to the International Atomic Energy Agency to the International Labor Organization) would not qualify as international standards within the meaning of TBT 2.4.

One solution would be to say it is sufficient that every WTO Member be able to join the organization such that its standardization bodies, whether private, public, or mixed, can participate in the standardization work in question through the Member's official delegation. Here, however, there is the concern that a state might have different positions in an international intergovernmental organization than those of a nonstate standardization body, and in any case would not want the activities or positions of the nonstate body attributed to it. So this solution is not perfect. It also will not work where the international intergovernmental organization permits only states to be Members, since not all Members of the WTO are states—for example, Hong Kong.[59]

Although reversing the panel on whether the AIDCP is "open'" to all WTO members, and failing to take account of the complexities just discussed, the Appellate Body did (to its credit) elaborate a broader framework for understanding the meaning of "international standards" in TBT 2.4, offering useful guidance to future panels.

First, the Appellate Body held that

> a required element of the definition of an "international" standard for the purposes of the *TBT Agreement* is the approval of the standard by an "international standardizing body," that is, a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members. As we see it, the

56. *Id.* ¶ 35–36.

57. TBT, *supra* note 5, XVII Annex 1.A.4 ("Body or system whose membership is open to the relevant bodies of at least all Members.").

58. *Id.* at XVII Annex 1.A.8.

59. Thanks to Gabrielle Marceau for a very useful discussion on this issue.

> different components of this definition inform each other. The interpretation of the term "international standardizing body" is therefore a holistic exercise in which the components of the definition are to be considered together.[60]

Second, the Appellate Body noted,

> [A] 'standardizing body'," that is, a body with 'recognized activities in standardization', does not need to have standardization as its principal function, or even as one of its principal functions.[] At the same time, we note that the factual dimension of the concept of 'recognition' would appear to require, at a minimum, that WTO Members are aware, or have reason to expect, that the international body in question is engaged in standardization activities.[61]

These are important findings because, subject to the difficulty concerning openness to standardization bodies of all WTO members, it allows the standardization activities of international organizations, the main mandate of which is not standardization, to nevertheless be eligible as international standards within the meaning of TBT 2.4. The same would be true of nongovernmental organizations concerned with fair trade or sustainability, for example.

Third, the Appellate Body found that "the *TBT Agreement* also aims to encourage the development of international standards by bodies that were not already engaged in activities at the time of the adoption of the *TBT Agreement*."[62] This is very important because international standards (codes of conduct) figure significantly in emerging issues such as sustainability of biofuels and deforestation. For example, the relevant bodies may not have existed prior to the creation of the WTO.

Fourth, in a finding with broad jurisprudential implications, the Appellate Body reasoned:

The TBT Committee Decision assists in the determination of whether an

> international body has "recognized activities in standardization." As an initial matter, we note that the TBT Committee Decision establishes principles and procedures that WTO Members have decided 'should be observed' in the development of international standards. Evidence that an international body has followed the principles and procedures of the TBT Committee Decision in developing a standard would therefore be relevant for a determination of whether the body's activities in standardization are "recognized" by WTO Members. More specifically, we recall that the word "recognize" is defined as "[a]cknowledge the existence, legality, or validity of, [especially] by formal approval or sanction; accord notice or attention to; treat as worthy of consideration" and that the concept of 'recognition' has a factual and a normative dimension. . . other elements of the *TBT Agreement*, as well as the TBT Committee Decision, reflect the intent of WTO Members to ensure that the development of international standards take place transparently and with wide participation. The obligations and privileges associated with international standards pursuant to Articles 2.4 and 2.5 of the *TBT Agreement* further underscore the imperative that international standardizing bodies ensure representative participation

60. *U.S.–Tuna II*, *supra* note 54, ¶ 359.

61. *Id.* ¶ 362.

62. *Id.* ¶ 379.

> and transparency in the development of international standards. In analyzing whether an entity is an "international standardizing body," a panel needs to balance these considerations.[63]

The TBT Committee Decision[64] referenced by the Appellate Body contains six principles: (1) transparency, including that all proposals and final results be "easily" accessible to all interested parties in all WTO members; (2) openness, including what would seem both de facto and de jure nondiscriminatory participatory opportunities at all stages of standards development; (3) impartiality and consensus, (4) effectiveness and relevance, including prioritization of performance-based standards and a requirement not to give preference to the needs or interests of particular counties and regions; (5) coherence, including cooperation and coordination with other relevant international standardization bodies; and (6) facilitation of meaningful participation of developing countries.[65] The Appellate Body appears to give particular normative weight to participation and transparency.

The Appellate Body finding that the TBT Decision is relevant to the determination of whether a standardization body not merely is open to all WTO members but is engaged in recognized standardization activities—an absolute legal precondition to the standard being an international standard within the meaning of TBT 2.4—implies that, since there is no list of recognized bodies or activities within the TBT Agreement itself, *each time* there is a claim concerning an "international standard" under TBT 2.4, the adjudicator must examine the extent to which the body emitting that standard meets in its activities the requirements of the six principles (not just those directly related to the meaning of "openness"). This is a profoundly qualitative exercise that entails an evaluation of aspects that go well beyond the particular standard being invoked in the dispute. In effect the Appellate Body has transformed what would be at best the "soft law" of the Decision into a code of administrative procedure and practice for international standardization.

In the case of standardization initiatives under free trade agreements that entail bilateral or regional regulatory cooperation or harmonization, it is hard to imagine the WTO Appellate Body will not also refer to the decision in judging the extent to which regional standards provide a basis for "legitimate regulatory distinctions" in cases where a nonparty to the free trade agreement argues disparate impact discrimination due to the detrimental effect of the regional standard on its access to the markets of the countries within the free trade area.

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63. *Id.* ¶¶ 376, 379.

64. Committee on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995*, WTO Doc. G/TBT/1/Rev.9 (Sept. 8, 2008).

65. *Id.* at 37–39.

V

THE WTO SANITARY AND PHYTOSANITARY MEASURES AGREEMENT

The Sanitary and Phytosanitary Measures Agreement (SPS) applies to a subset of product regulations and standards that relate to food and agriculture.[66] There are considerable similarities between the SPS and TBT Agreements, although the SPS has a distinctive feature requiring that science-based risk assessments support those SPS regulations not in conformity with—that is, stricter than—the relevant international standards.[67] Like the TBT, the SPS places considerable emphasis on harmonization through international standards, but unlike the TBT, the SPS lists the most relevant international standardization organizations, such as the Codex Alimentarius Commission of the Food and Agriculture Organization.[68] This emphasis on harmonization is readily apparent in Article 2.3 of the SPS, which provides, "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail."

VI

THE GENERAL AGREEMENT ON TRADE IN SERVICES

Unlike the SPS and the TBT, the General Agreement on Trade in Services[69] (GATS) does have a provision, Article V, that allows for some deviation from nondiscrimination in relation to the operation of a free trade area or customs union. There are some similarities between this provision and the wording of the parallel provision in GATT's Article XXIV, but also important differences. Article V states that GATS "shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement," provided there is "substantial sectoral coverage" and absence of or elimination of "substantially all discrimination" between domestic and imported services among the parties to the agreement.[70] But this is subject to a requirement that the agreement not "raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement" for Members outside the agreement.

GATS in Article VI sets out a process for creating sectoral multilateral disciplines through "qualification requirements and procedures."[71] To date, progress has been slow in the development of such sectoral codes, with accounting standards as the exception. There is, however, an interim

66. SPS, *supra* note 6.
67. *Id.* at art. 5.8.
68. *Id.* at art. 3.4.
69. GATS, *supra* note 9.
70. *Id.* at art. V.
71. *Id.* at art. VI.4.

discipline—that is, until a sectoral code is implemented—requiring members who have made a commitment to liberalize services in a particular sector must, inter alia, ensure that their regulatory measures are "based on objective and transparent criteria, such as competence and the ability supply the service" and are "not more burdensome than necessary to ensure the quality of the service." Existing international standards are cited as a preferred benchmark for determining whether a member is in conformity with this interim discipline.

With respect to mutual-recognition agreements, GATS has a very specific norm that these must be open to all WTO members. Thus, Article VII.2 provides that a WTO member party to a mutual-recognition agreement "shall afford adequate opportunity for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it," and Article VII.3 states, "A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers."

If we interpret Article V on "economic integration" in light of these provisions, it provides a very limited basis for arguing that regulatory cooperation or harmonization within the free trade area providing preferential access to free trade agreement parties is required in order to create or operate a free trade area. This is because opening up such regulatory cooperation to harmonization to others, on comparable terms, as explicitly contemplated in the GATS, would not, on any plausible scenario, prevent liberalization of trade *within* the free trade area.

VII
CONCLUSION

The WTO multilateral legal framework is permissive of regulatory cooperation and harmonization in the context of bilateral or regional trade agreements. At the same time, there is very limited ambit under that framework to operate a two-tier approach, in which regulatory barriers to market access are higher for those WTO members that are outside the bilateral or regional free trade area. Any such differences would generally need to be justified based upon objective policy considerations, as opposed to the mere membership of the preferred states in the free trade arrangement. Further, WTO law and jurisprudence stress international standards as a basis for regulatory cooperation or harmonization, or both, as well as the importance of the openness, transparency, and participatory rights of all WTO members in international standardization activity. It is not permissible to allow a WTO member, without justification, to offer regulatory cooperation to some states, such as members of a bilateral or regional free trade area, but to deny the same regulatory cooperation to similarly situated states. The longstanding member-state conception of Article XXIV of GATT—as a provision that allows for preferential elimination of tariffs among the members of a free trade area or

customs union—has often led to an assumption that such arrangements may also offer preferential treatment with respect to regulatory barriers to trade. But there is safe haven in the WTO framework for regulatory discrimination between WTO members that are parties and those that are nonparties to a bilateral or regional free trade agreement. The new regional agreements being negotiated now may provide avenues for enhanced regulatory cooperation, but to be consistent with WTO norms, these avenues must be opened up to all WTO members where the conditions are appropriate for their participation.