

Committee on Technical Barriers to Trade

RESTRICTIVE TRADE EFFECTS OF STANDARDS, TECHNICAL REGULATIONS AND
CONFORMITY ASSESSMENT PROCEDURES

Background Paper by the Secretariat

I. INTRODUCTION

1. This Paper has been prepared in response to a request by the Committee for a background document discussing the restrictive trade effects that may be associated with standardization, testing and certification activities. The focus is thus on impediments associated with technical requirements, including conformity assessment procedures, that the trading community or individual exporters may deem, for different reasons, to be unnecessarily stringent. For example, such problems may be associated with requirements in areas not (yet) subject to international harmonization, thus leaving scope for disparate, incompatible national approaches, or with national provisions going beyond existing international standards. In addition, due to their resource constraints, smaller and less economically advanced countries may have been prevented from effectively participating in international standardization processes and be dissatisfied with the outcome and any ensuing trade effects. From a more general perspective, however, such problems would need to be set against other, positive effects on market access, competition and, thus, consumer welfare likely to result from the availability and use of common standards.

2. Standards-related trade issues have gained prominence in recent years for various reasons. First, with the reduction of tariff barriers in subsequent GATT Rounds, the policy focus has shifted to alternative barriers to market entry which may frustrate the effects of tariff liberalization. Second, the demand by industries and consumers for new standards and technical regulations appears to have expanded over time due to technical developments, and the necessity to ensure the reliable and safe operation of complex products and systems, as well as rising public interest in health, safety and environmental issues. And, thirdly, regulatory developments at regional level, including inside the EC, have stimulated the international debate about ways and means to avoid market segmentation and promote regulatory reform.

3. The following presentation is essentially in two parts, with the first being devoted to product-related standards and technical regulations. A second part deals with issues related to conformity assessment procedures. This separation was inspired mainly by the fact that the material content of standards and technical regulations, and the ensuing trade effects, are influenced by national policy objectives and priorities, thus entailing a degree of subjectivity. By contrast, conformity assessment procedures appear more amenable to objective criteria, relating for example to the technical competence of a foreign institution to perform tests against, and certify compliance with, an importing country's regulations.

II. STANDARDS AND TECHNICAL REGULATIONS

(i) Underlying objectives and potential effects

4. Standards and technical regulations are generally intended to enhance overall economic performance, facilitate trade and/or implement certain public policy objectives. They are deemed necessary, for example, to ensure the interoperability of complex technical systems, improve market transparency and reduce information cost, prevent fraud, or contain health- and environment-related risks. In addition, standards may reduce the risk of individual companies introducing their own requirements with a view to, or the effect of, compartmentalizing markets and creating dominant positions. Without the information content conveyed through common standards, demand for technically complex or otherwise sensitive products could shrink and/or focus on a few well-established suppliers.

5. However, there are risks and pitfalls as well. While acknowledging the positive effects of regulation, in particular on health, safety and environmental grounds, recent policy discussions have also pointed to the economic losses associated with over-regulated markets. It is widely held that excessive requirements could undermine market contestability, discourage new entrants and, thus, condone economic inefficiencies. Trade, employment and growth may suffer, with the ensuing welfare losses being compounded by the inability of consumers to express their true preferences.

6. In turn, this suggests that there may be optimal levels of regulation at which the adverse impact of regulatory involvement (or regulatory neglect) on consumer welfare, trade and overall economic performance is minimized. However, there may be a variety of such a optima depending on, and varying with, the underlying regulatory goals, national preferences, climatic and technical conditions, and a country's legal/institutional framework. For example, consumer welfare considerations in a densely populated region may call for the tightening of environmental regulations for cars beyond the levels maintained by main trading partners, or relatively lax product liability provisions may prompt national authorities to opt for tighter safety regulations than deemed necessary in countries with stricter liability rules. (At the same time, tighter regulations may spur industrial innovation and, thus, afford domestic companies a head start in new market areas.) Yet, in all these cases, access conditions might deteriorate, with a potentially adverse impact on competition, resource efficiency and innovation.

7. While, as a rule, low levels of regulation tend to be beneficial for foreign suppliers, there could also be cases where relatively stringent requirements contribute to propping up user confidence and boosting overall sales.¹ In these circumstances, the access costs for importers may be outweighed by the positive impact of an expanding market on business performance. This would require, nevertheless, that regulations are not drafted and applied for industrial policy or other domestic economic purposes, and foreign companies are allowed fair participation in the standardizing process.

8. As importers are not normally a homogenous group, additional considerations may come into play if their domestic commercial background is taken into account. For instance, some suppliers, especially from developing countries, may find it more difficult than others to bridge a widening regulatory gap vis-à-vis foreign markets. Small companies lacking sufficient own funds, technical expertise and international contacts are supposed to have particular information and adjustment problems. A study on adjustments in the Indian leather industry to a German ban on the use of a toxic chemical (pentachlorophenol - PCP) for tanning suggests that informal (unorganized) enterprises were far more

¹Concerning certification requirements, for example, it has been estimated that "green" tropical timber certificates may result in revenue increases, due to a price premium and expanding sales, of up to 5 per cent of total developing countries' revenue from tropical timber exports. See ESCAP/UNCTAD (1996).

affected than organized medium and larger scale units. The latter could draw on their long-term customer relations and their access to, and command of, advanced technologies.²

9. The trade effects of technical regulations may thus depend on a variety of factors, including the country-product pairs involved and the domestic availability of substitute products and technologies. However, these factors and their effects are not easily quantifiable. A recent publication found that "the empirical economic literature is ... replete with estimates of the welfare losses from conventional protectionist measures and the benefits of liberalizing them. By contrast, the effects of technical barriers are typically hard to measure. They are often hidden in the firm-specific costs of modifying a product to meet a standard or regulation, or in the ways that non-compliance with a standard may affect consumer purchasing decisions. Broad systemic studies of technical barriers are generally lacking, and the available information tends to be limited to particular markets and industries in which disputes have arisen or in which case studies have been undertaken. Even then, much of what we know is impressionistic and anecdotal."³

(ii) Issues raised in the Committee on Technical Barriers to Trade

10. Discussions in the TBT Committee may be illustrative of certain standards-related problems concerning the international trading community. However, they do not necessarily give a representative picture. First, membership of the Tokyo Round Committee was far from being universal, with less than half of the Committee's 46 members in 1995 being developing countries. Second, focusing on obligations under the relevant Agreements, GATT/WTO Committees tend to be more concerned with implementation and compliance issues rather than with access problems of a more general nature.

11. Since the TBT Committee's coming into being in January 1980, Members have referred to it a total of 41 cases (country/product combinations) of standards-related concerns. They involved the material content, or the application, of standards and technical regulations, including labelling and packaging requirements, as well as testing and certification procedures. While there is a significant degree of overlap and, thus, double-counting, the problems raised may be categorized into four groups: (i) non-compliance with notification requirements under the Agreement (23 cases); (ii) restrictive provisions considered to create an "unnecessary obstacle to trade" (20); (iii) cases involving denial of m.f.n. or national treatment (11); and (iv) departures from existing international standards, including labelling provisions, without sufficient justification (3). Some 40 per cent of all cases raised involved, among other things, labelling, marking or packaging requirements; while their focus was in particular on food products, they also included textiles, motor vehicles, wood and wood products, technical appliances and a range of other products. No further information was available, however, on any further action. While the TBT Agreement provides the basis to solve standards-related trade problems through consultations, current information requirements provide no clue, whatsoever, on their outcome.

12. Reflecting the regional composition of the Tokyo Round TBT Committee, a majority of the cases discussed, 28 in total, concerned standards-related problems between developed countries. Of these, 13 cases involved both the United States and the European Communities or current EC member States (some cases predated their accession to the EC). An additional 10 cases concerned problems between developed and developing countries. Not a single issue was pursued beyond the consultation stage; while there have been attempts to invoke the dispute settlement provisions of the Tokyo Round TBT Agreement, e.g. concerning the European Communities' ban on hormonal growth promoters, no panel has been established.

²The study also noted that problems confronting the companies consisted mainly of lack of information, testing facilities and substitute chemicals. See German Development Institute (1994).

³Sykes (1995).

(iii) Empirical studies

13. The following section provides an overview of various empirical studies on the impact of new external technical requirements on business costs or trade. Given the diversity of the countries and sectors covered and the approaches chosen, it is difficult, however, to draw general conclusions. In particular, the overview may over-emphasize the economic impact of technical requirements, whether positive or negative, as research not leading to significant results may have gone unpublished.⁴ Further, the cost estimates provided by some studies are not necessarily indicative of, and must not be equated with, similar effects on trade or competitiveness. Rather, any standards-related cost increases may be offset by savings elsewhere in the production process, absorbed in the form of lower factor returns or outweighed by simultaneous cost increases in competing industries abroad.⁵

Adjustment costs to new environmental standards: studies by the UNCTAD and ESCAP Secretariats and independent researchers

14. Research undertaken by the UNCTAD Secretariat suggests that compliance with specific environmental standards in external markets may prove more expensive for developing country industries, sometimes even in absolute terms, than for their developed country counterparts.⁶ This is attributed mainly to a lack of investment in infrastructure as well as the absence of technologies and inputs required for effective adjustment. In addition, it appears more difficult for small than for large firms to cope with environmental regulations as large companies have better access to information, inputs and finance, and are more likely to achieve the scale of operations required for efficient technology use. Given differences in export patterns, both by product and destination, and in the domestic availability of more environmentally sound products and processes, the trade effects of external environmental regulations may, however, vary widely between developing country exporters.⁷

15. According to surveys conducted in India, textiles and clothing is the sector most severely effected by foreign environmental requirements.⁸ Compliance cost for textiles and leather producers are estimated to amount to 3 to 5 per cent of total cost, with one company even reporting incremental cost of 10 to 15 per cent resulting from the use of substitute chemicals in leather processing. By contrast, the impact on businesses of new packaging requirements appears to have been marginal to date; some exporters even achieved cost reductions owing to the use of cheaper materials.

⁴For example, according to a report by the Economic and Social Commission for Asia and the Pacific (ESCAP), the fact that the trade impact of external environmental requirements has not been covered extensively by a recent study on the Philippines, contrary to the impact of stricter domestic policies, may indicate that external measures have not seriously constrained Philippine trade. See ESCAP/UNCTAD (1996).

⁵The latter factor may explain, at least in part, why a study on the Malaysian refrigerator and air conditioner sector showed no evidence of adverse effects stemming from the Montreal Protocol. See ESCAP/UNCTAD (1996).

⁶For an overview see UNCTAD (1995).

⁷For example, according UNCTAD (TD/B/WG.6/6), Indian exporters reported that a German ban on PCPs had raised the cost of tanning leather, while Argentinean producers did not indicate any significant cost increases. This might have been due at that time, *inter alia*, to Argentina's trade liberalization policies which had facilitated imports of substitute chemicals.

⁸ESCAP/UNCTAD (1996).

16. In a survey carried out among Turkish exporters, a slight majority responded that environmental regulations in western markets did not adversely effect their competitiveness.⁹ While a few textiles producers feared that they would be unable to meet certain importers' requirements, given their outmoded technologies, some other companies expected that their competitive position would improve. These expectations were based mainly on the view that competitors in other European and Mediterranean countries might find it more difficult than Turkish firms to respond to demand shifts in export markets favouring more advanced process and production technologies and the increased use of organic materials. By contrast, Turkish companies which also supplied domestic and non-OECD markets, were generally concerned about the adverse impact on production costs of their coping with disparate quality requirements.

*The economic effects on EC member States of the 1992 Single Market: the Cecchini Report*¹⁰

17. The Cecchini Report was commissioned by the EC Commission in 1985 to assess the economic benefits of removing trade barriers between Member states and, in the context of the 1992 Single Market programme, creating a fully integrated common market. A business survey underlying the Report identified technical barriers, i.e. the effects of national product regulations and standards, as one of the most important costs to business in the pre-1992 EC environment. Other problems at the time of the Cecchini Report included administrative barriers, physical border controls and delays, and restrictions imposed by Community law. At the sectoral level, the costs of technical barriers to EC-based producers were estimated at: ECU 0.85 to 1.1 billion (US\$ 0.83 to 1.07 billion)¹¹ for telecommunications equipment; ECU 2.6 billion for motor vehicles (including costs attributed to the existence of an excessive number of different car platforms); ECU 0.5 to 1 billion for foodstuffs (including costs resulting from the then national ingredient requirements, labelling and packaging laws, etc.); and ECU 0.82 billion for building products.¹²

Other studies

18. In the early 1970s, Saudi Arabia set up a national standards organization whose activities benefited from technical cooperation extended, *inter alia*, under EC programmes. Reportedly, technical cooperation extended by the United States did not include standards for many years; and experts feel that this had an adverse impact on market access. The U.S. share in Saudi Arabia's imports fell from 30 per cent in 1980 to 19 per cent in 1987.¹³

⁹The survey covered some 60 companies in the textiles and clothing, machinery and equipment, and food sectors. See Aruoba (1993).

¹⁰Cecchini (1988).

¹¹At 1986 annual average exchange rates.

¹²The latter estimate excludes economies of scale which alone are expected to generate savings of some ECU 1.7 billion in the five larger EC economies.

¹³According to Sykes (1995). In 1989, the U.S. Government and the private sector initiated a pilot standards programme which consisted mainly of employing two standards experts, one in Riyadh and one at the U.S. National Institute of Standards and Technology. They were commissioned to transmit Saudi Arabian draft standards for comment to potentially affected U.S. industries, develop a coordinated position, and communicate it to the Saudi Arabian Standards Organization (SASO). During the first two years of operation, SASO reportedly incorporated essentially all comments in the drafts and no standards adverse to U.S. products were adopted. (Tupper, 1992).

(iv) Relevant requirements under the TBT Agreement and scope for application

Disciplines on the domestic regulatory process

19. As indicated above, regulatory objectives are likely to vary widely between countries and products, depending, for example, on income levels, natural and climatic conditions and population preferences. Article 2 of the TBT Agreement, while defining trade-related requirements, thus leaves considerable leeway for the pursuit of country-specific objectives. Under Article 2.2, Members are committed not to prepare, adopt or apply technical regulations "with a view to or the effect of creating unnecessary obstacles to international trade". The relevant regulations "shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks that non-fulfilment would create". Thus, the Agreement seeks to minimize the trade-restrictive effects arising from Members' pursuit of legitimate objectives, including the protection of human health or safety and the environment. The listing given in this context is open-ended.

International standardization

20. By definition, regulatory access barriers could be lowered if countries were able to agree on and implement common requirements. International regulatory harmonization would help to ensure a neutral basis for competition, by eliminating the possibility for national "champions" of influencing their domestic regulatory environment, and offer consumers an attractive range of low-priced, mass-produced goods. However, the scope for international regulatory harmonization is limited by the diversity of production and consumption conditions worldwide. Thus, while WTO Members are required under the TBT Agreement to rely on international standards as a basis for their technical regulations, Article 2.4 expressly exempts cases where such standards "would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of climatic or geographical factors or fundamental technological problems". Again, the list of possible exceptions is open-ended. Encouraging the use of international standards, Article 2.5 stipulates that national regulations conforming to international standards "shall be rebuttably presumed not to create an unnecessary obstacle to international trade".

21. In order for the Agreement's referral to international standards to be effective, such standards must be available. This depends, in turn, on the work of the competent international bodies and the contribution, including through technical and financial support, that countries are prepared to make. Experts have expressed concern in certain cases about lengthy standardization processes, implying the risk that the results are already obsolete at the date of promulgation, and about various options incorporated in a final standard to accommodate diverging views among participants. In turn, this could undermine the positive trade effects associated with the use of such standards.

22. Given the resource constraints that may affect developing countries' ability to prepare standards, establish national standardization bodies and participate in international bodies, Members are encouraged under Article 11 of the TBT Agreement to provide advise and grant technical assistance on mutually agreed terms and conditions.

Acceptance of foreign regulations

23. The acceptance of foreign regulation may be contemplated, in particular, by smaller countries whose producers' performance suffers from standards-related market segmentation or by participants in regional integration projects. As a result, products complying with disparate regulatory features may compete head-on in the same market. Consumers might thus not only be able to express their preferences within a relatively homogenous range of goods but, possibly, be confronted with products incorporating diverging levels of health, safety or technical risks. In such circumstances, the concept

of competition could even imply, to a certain degree, competition between regulatory strategies in the same market. However, consumers and regulators may not be prepared to fully accept the uncertainties involved, but strive for adequate safeguards. These might include assurances from partner countries that their relevant regulations are based on similar principles. Thus, the commitment under the TBT Agreement to "give positive consideration" to accepting foreign regulations as equivalent (Article 2.7), is linked to the proviso that Members are satisfied that such regulations adequately fulfil the same objectives as their own.

24. The European Communities' experience suggests that the clarification of basic objectives - or minimum requirements - is particularly important in sensitive product areas in order for a recognition strategy to work (Box 1). In the absence of a harmonized regulatory baseline, for example via the Communities' "new approach" directives, the recognition principle may prove unable to overcome national regulators' and users' concerns and suspicions. According to an expert's view, without regulatory approximation, reference to foreign or international standards "hangs in the air" as the essential requirements are unspecified at multilateral level.¹⁴

Box 1

Standards harmonization versus recognition of equivalence: the EC approach

Until the mid-1980s, the European Communities' integration strategy relied strongly on full regulatory harmonization of technical specifications. Given the cumbersome procedures involved, compounded by demanding voting requirements at policy level (unanimity), the results remained disappointing. Streamlining regulatory procedures and removing the wide array of EC-internal technical barriers thus became a major element of the 1985 Single Market programme.

Inspired by landmark rulings of the European Court of Justice ("Cassis de Dijon"), the Communities' internal market policy has relied since on a three-pronged strategy: (a) continued full harmonization in areas such as pharmaceuticals, pesticides, food additives and motor vehicles, which are deemed particularly sensitive for health, safety, technical or trade policy reasons; (b) the establishment of essential technical requirements in other sensitive areas, complemented by voluntary technical specifications developed by European standards-making institutions; and (c) free circulation of the broad range of non-sensitive products. The second option, the Communities' so-called "new approach", is intended to overcome barriers in areas where member States have "legitimately imposed technical requirements on products for public policy reasons, and conflicting national legislation restricts the free movement of products". While producers are free to deviate from the additional technical specifications, they may be required to substantiate, for example through independent certification, that the essential safety requirements are met. New approach directives cover areas such as simple pressure vessels, toy safety, medical devices and telecommunication equipment.

Source: GATT (1991 and 1993).

Special and differential treatment of developing countries

25. Article 12 of the TBT Agreement contains provisions to help ease the difficulties developing countries may encounter in living up and adjusting to the requirements of the Agreement. These include, *inter alia*, the obligation on developed country Members: to take into account the special development and trade needs of developing countries in the implementation of the Agreement and the operation of its institutional arrangements; to ensure that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to developing country exports; not to expect developing countries to use as a basis international standards which are not appropriate to their development,

¹⁴Sykes (1995), p. 113f, and comments by Jacques Pelkman, p. 164ff.

financial and trade needs; to ensure that international standards-related bodies and systems are organized and operated so as to facilitate active representative participation; to encourage standardization activities in product areas of special interest to developing countries; and to provide technical assistance to avoid the creation of unnecessary obstacles to the expansion and diversification of exports from developing countries. Finally, under Article 12.10, the Committee is to examine periodically the special and differential treatment, as laid down in the Agreement, granted to developing countries on national and international levels.

26. The Secretariat has received no information on the policies pursued and measures taken to date under Article 12 in the area of standards, technical regulations and conformity assessment procedures. While this might be indicative of the absence of such initiatives, it could also reflect the lack of appropriate notification and recording requirements within Member countries.

III. CONFORMITY ASSESSMENT PROCEDURES

(i) Potential trade effects

27. Conformity assessment may be considered the final link in a regulatory chain that starts with domestic or international standardization. And this link may determine the strength of the whole chain. In other words, attempts to reduce technical trade barriers should ensure that liberalization effects in other areas are not thwarted by the persistence of onerous testing and certification requirements. Although the WTO Secretariat is not aware of empirical studies on the trade effects of such requirements in individual product fields, it is not difficult again to conceive of a conflict between domestic regulatory and foreign trade interests. Especially in areas deemed sensitive on health and safety grounds, consumers and regulators may prefer compliance with relatively strict provisions - domestic or international - to be confirmed and certified subject to national procedures and practices. In turn, this may lead to costly and, possibly, redundant testing and certification procedures. While assuring domestic consumers of the safety and reliability of a product, they may have a deterrent impact on foreign firms, in particular on new or small suppliers, as against well-established incumbents.

28. Mutual recognition agreements (MRAs) may help to meet domestic regulatory requirements without confronting foreign suppliers with unnecessary costs. For example, in the areas covered, they would provide for the importing country accepting foreign tests and certificates as being equivalent to tests conducted and certificates issued by domestic bodies. In turn, however, as MRAs agreements may affect the competitive position of non-participants, their trade implications could warrant further discussion in WTO fora.

29. In the TBT Committee, discussions on actual impediments resulting from conformity assessment requirements have remained limited to eight cases to date. They concerned complaints about preferential access conditions for national producers to certification and homologation systems in Spain and Japan (raised in the first half of the 1980s),¹⁵ onerous testing and certification requirements in Brazil and Hungary (1992 and 1994),¹⁶ and alleged mis-specification of a car-safety test in Canada (1996).

¹⁵The products involved were metal softball bats (Japan) and heating radiators, electric medical equipment, metallic tableware and sanitary fittings. The cases are included in the data referred to in Section II(ii). See GATT documents TBT/Spec/7 and TBT/Spec/9 of 20 September 1982 and 20 February 1984.

¹⁶While pesticide registration requirements in Brazil were considered as too expensive and demanding, complaints in the case of Hungary concerned costly and non-transparent certification requirements for over 300 consumer goods. See GATT documents TBT/M/42 and TBT/M/45 of 17 June 1992 and 14 January 1994.

(ii) Provisions in the TBT Agreement

30. Mirroring the provisions of Article 2.2 on technical regulations, Article 5.1.2 of the TBT Agreement requires Members to ensure that conformity assessment procedures are not prepared, adopted or applied "with a view to or the effect of creating unnecessary obstacles to international trade". This is understood to imply, *inter alia*, that the procedures are not stricter or applied more strictly than necessary to give the importing country "adequate confidence" that a product conforms with the relevant regulations. Moreover, the Agreement commits Members in principle to adopting the relevant guides or recommendations of international standardizing bodies. (However, there is no "incentive" similar to the rebuttable presumption expressed in Article 2.5 to provide that procedures based on international rules are not considered to constitute an unnecessary obstacle to trade.) Members are further held, whenever possible, to provide for the acceptance of foreign conformity assessments if they are satisfied that these offer an assurance of conformity equivalent to their own procedures. In this context, the Agreement explicitly recognizes that consultations may be necessary to arrive at a mutually satisfactory understanding with a view, in particular, to ensuring the competence of the bodies concerned and limiting the acceptance of conformity assessments to designated bodies.

31. To prevent that such consultations result in exclusive arrangements among a few countries, Members are required under Article 9 of the TBT Agreement, whenever practicable, to formulate and adopt international systems of conformity assessment. Moreover, Article 10.7 encourages participants in agreements covering technical regulations, standards or conformity assessment procedures to enter into consultations with other countries "for the purpose of concluding similar agreements or of arranging for their participation in existing agreements".

32. Under Article 11, Members are held to provide advise and grant technical assistance, on mutually agreed terms and conditions, regarding the steps to be taken by developing country producers to have access to conformity assessment systems. In addition, Members are to grant technical assistance to other Members regarding the establishment of the institutions and the legal framework that would enable them to accede to or participate in such systems.

(iii) Main features of mutual recognition agreements

33. Mutual recognition agreements (MRAs) may prove a flexible, economically attractive approach to overcoming access barriers associated with incompatible standards and/or multiple testing and certification requirements. While such agreements could cover the entire regulatory process - from the recognition of a standard's equivalence to the acceptance of test results and certificates - countries are in no way precluded from focusing on specified stages. Under the TBT Agreement (Article 6), the concept of MRAs covers only conformity assessment procedures, i.e. testing and certification. MRAs in such areas may thus well coexist with harmonized or, as the case may be, diverse product standards and requirements between the same countries for the same product. Through obviating repetitive testing and certification of the product in individual markets, mutual recognition agreements may nevertheless play an important part in reducing marketing costs, accelerating product dissemination and, thus, promoting competition. In addition, in opening a new market segment to foreign access, MRAs may contribute to enhancing regulatory and procedural efficiency in participating countries.

34. As MRAs are relatively recent policy development, it is difficult to buttress empirically their perceived positive effects on market access. While recent policy initiatives to discuss or conclude such agreements are indicative of the participants' positive expectations, these are not necessarily shared

by third countries if non-originating products do not qualify the "preferences" extended under an agreement.¹⁷ In fact, such products normally remain subject to multiple testing and certification.

35. In view of their perceived trade impact, MRAs are often considered as an exchange of concessions, comparable to tariff agreements.¹⁸ Unilateral recognition of foreign regulations, tests or certificates does not apparently play a significant rôle, at least among major developed countries. Evidence from various GATT/WTO Trade Policy Reviews suggests that unilateral recognition is more the result of resource constraints in developing countries than of a deliberate policy decision, in appropriate areas, to ensure market contestability and reap the ensuing benefits in terms of lower prices and wider product choice.

36. From the perspective of the multilateral system, mutual recognition agreements risk creating overlapping, mutually incompatible regulatory régimes. For example, if country A concludes an agreement with B and C, the relevant rules and conditions may differ and, moreover, exclude bilateral trade between the latter two countries. (In turn, B and C might decide to negotiate a separate agreement of different content.) While, on the one hand, significant tariff reductions in subsequent GATT/WTO Rounds have eased the external ramifications of traditional free trade agreements, MRAs may introduce similar effects on a country/sector basis - beyond the scope of GATT Article XXIV. In addition, given the resource impact involved in MRA-related negotiations and the importance of developing a "common language" among participants in terms of product testing and approval requirements, MRAs are likely to focus on certain country/product clusters. In this context, modern technology products and other strongholds of industrial economies - including telecommunications equipment and pharmaceuticals - may prevail over traditional manufactures and other key supplies of developing countries.

37. Not all of these problems are easily amenable to policy correction. Some may be considered as inevitable - and acceptable - side-effects of a genuinely positive development. Some are rooted, to a certain degree, in the contractual nature of the WTO framework and the absence of a strong institutional centre governing the scope of regulatory activities. Unlike in federal States or integrated common markets, there are no coordination mechanisms at multilateral level to ensure broad sectoral and regional coverage of new policy initiatives and, thus, prevent (unintentional) discrimination. As comparable levels of institutional integration are elusive among WTO Members, however, the challenge for them would be to create conditions conducive to the conclusion of MRAs, while defusing adverse effects for non-beneficiaries.

38. For this purpose, core features of MRAs or even model agreements may be discussed and developed in the WTO, building on the relevant provisions in Articles 9 and 10.7 of the TBT Agreement. Comparable work is already being done at regional level, for instance in APEC. By way of example, Members may wish to consider the following benchmark criteria for mutual recognition agreements: (a) openness to any country with a proven ability to implement the relevant obligations; (b) a commitment not to include non-technical aspects related, for example, to actual or future trade flows; and (c) non-discriminatory treatment of products originating in non-participating countries. The latter point may prove of particular importance to smaller and less economically advanced countries lacking the economic and technical capacity to operate own test and certification systems and, thus, actively participate in mutual recognition agreements. Given the beneficial effects that MRAs may have on market access and, by implication, competition and innovation, there should be any interest in exploiting and extending these effects across the widest possible range of sectors and countries.

¹⁷MRAs exist between Australia and New Zealand on a variety of products; APEC and FTAA members are currently considering the possibility of such agreements, and the United States, Canada, Japan, Australia and other countries are involved in discussions or negotiations with the EC.

¹⁸Leebron (1996).

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