

TBT and SPS Provisions in Regional Trading Agreements

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Introduction

Good morning. Let me start by thanking the conference organizers for the invitation to speak to you today. I would also like to thank Jean-Pierre Chauffour and his colleagues at the World Bank for facilitating my travel to this meeting.

Standards and conformity assessment procedures can be a big problem for business in international trade and governments that are negotiating regional trade agreements (RTAs) typically seek to go beyond what is provided in the relevant WTO agreements in dealing with TBT and SPS measures.

Research into the practice of addressing TBT and SPS measures in RTAs tends to suggest that such agreements can converge with, and support, the multilateral trading system. However, to ensure that this is the case, RTAs should include – where possible – a number of important best practice provisions. I'll revert to this at the end of my comments today.

RTAs – whatever model is followed – nearly always incorporate an active work program of cooperation on standards and certification issues. Yesterday, Peter Holmes and a number of others referred to this as the establishment of a “pathway”. This produces a stronger economic development focus as opposed to the way these issues are treated in WTO Agreements. The WTO Agreements are designed to set standards and guidelines whereas RTAs generally go beyond that and actually aim to contribute to economic integration through the phased elimination of standards-related barriers. Some of the most ambitious RTAs in this regard are those concluded among developing countries, including in ASEAN and Mercosur.

Regional standards in a multilateral world

Open regionalism

What about the interface of regional agreements and their standards provisions and the multilateral world? Most observers would agree that regional trade agreements have the potential to undermine aspects of the multilateral trading system. Clearly, the potential is highest where the RTAs operate exclusively on a preferential or discriminatory basis.

On the other hand, it can be argued that, in general, the treatment of TBT and SPS measures in RTAs can lead to open regionalism. While an agreement to eliminate an unnecessary obstacle to trade may utilise, for example, the adoption of an international standard or recognition of one another's conformity assessment approach as equivalent, it is important for both parties to recognize that good regulatory practice is marked by consistency of application.

This would be illustrated at a minimum, by the new or harmonized standard being applied to all products on the market. Not only am I talking about national treatment but because it often does not make sense for authorities (public or private) to implement two different approaches to deal with the same problem, standards-related activities are often likely to have MFN applicability notwithstanding their origins in a preferential agreement.

For example, suppose in an RTA context, a government enquiry point is obliged to provide information in a notification that is additional to that supplied under the WTO TBT agreement. Why would it not make sense to provide this additional information to all interested parties? Looked at from another standpoint, other countries that can satisfy the technical aspects of an equivalence agreement negotiated pursuant to an RTA should be encouraged and permitted to join up to the agreement. These examples both illustrate potential contributions to open regionalism.

Finally, many RTAs encourage the use of international standards. Adherence to international standards is a third aspect to open regionalism as this contributes to reducing the costs associated with regulatory diversity.

Potential for discrimination

In general, the inclusion in an RTA of TBT and SPS provisions is motivated by a desire to remove barriers to greater economic integration – not by an intention to discriminate against third parties.

That said, where RTAs expressly oblige the parties either to harmonize standards and procedures or establish mutual recognition regimes, there is some risk of de facto discrimination. For example, as Caroline Lesser points out in her study for the OECD, because they require a high degree of mutual confidence in respect of the effectiveness of procedures and the competence of regulatory bodies, as well as sufficient administrative resources and capacities to implement, MRAs tend to be concluded only between more highly developed partners in RTAs – including between more highly developed members of ASEAN.

De facto, less developed countries tend to see their trade discriminated against by such arrangements. Lesser makes the point, however, that obligations for greater transparency in the use of MRAs and facilitated accession for third parties can counter some of the potential negative effects of mutual recognition.

In their study for the WTO, Roberta Piermartini and Michele Budetta caution that RTAs where elimination of trade barriers is built on harmonization might also have a harmful effect on trade. In the first place, there is the risk that full harmonization of standards might hamper trade by reducing the degree of product differentiation on the market. In addition, such an approach creates a situation of de facto discrimination against developing countries that lack technology sufficient to meet the standards. Key to overcoming this problem is the sort of technical assistance and capacity building found in the Euromed agreements.

Regional public goods

Standards-related provisions in RTAs can have an important role in the delivery of regional public goods and in tackling market failures. For example, the largest number of standards and technical regulations are adopted with the aim of promoting or protecting human safety or health. The beneficial impact of well-developed standards and regulations can be seriously undermined in segmented markets where differing regulatory environments create barriers to trade in safe products. RTA provisions aimed at harmonization and or equivalence and the adoption of mutual recognition agreements can create a market environment in which safe products can move freely in international commerce.

Take the case of Mercosur. A relatively large number of Mercosur resolutions have as their main objective ensuring that products made or marketed in Mercosur countries (e.g. cosmetics, perfumes, medical products, toys, bicycles) do not pose health or safety risks to consumers. To this end, some resolutions list substances that are permitted or prohibited in the production process; others provide best practice guidelines in the manufacturing process; and others deal with verification of best practices in manufacturing.

Another way in which RTAs can help to deliver regional public goods is through provisions like those found in the Thailand-Australia RTA which create a product trace-back system that can be vital in ensuring human, animal and plant life and health by making it possible to rapidly identify and isolate the source of contamination or disease in the supply chain.

The practice of TBT /SPS at the regional level

Implementation

As most of you know, there are different models for dealing with the elimination of TBTs as trade barriers in RTAs. In RTAs involving the EU, there is a strong preference for harmonization of standards and conformity assessment procedures. As a trade-off, the EU typically backs – both technically and financially – significant technical assistance programs to assist developing country partners with the harmonisation effort. Where the EU concludes an agreement with more distant countries, like Chile, there is not normally an obligation to harmonize completely to EU standards and procedures; instead, the agreement calls for the promotion and use of both EU and international standards.

Agreements concluded among Asian countries and those involving the participation of the United States take a different approach than that of the EU. Rather than requiring harmonization, the RTAs typically try to facilitate mutual recognition agreements and approaches based on equivalence of different approaches in different countries. The U.S. RTAs normally include the establishment of a committee charged with addressing TBT measures or SPS rules that are seen to be creating trade problems.

Parties to RTAs tend to make the agreements' provisions on TBT and SPS legally binding and enforceable through dispute settlement – although there are some exceptions. In most of the agreements surveyed for this project, the parties to the agreement have the option of bringing a dispute before the WTO dispute settlement understanding or before the RTA-specific dispute settlement mechanism. The agreements generally favour dispute avoidance – trying to work out differences through consultation or work in a technical group – over litigation, even if litigation is an

option. In some cases, implementing committees are charged with pursuing resolution of disputes, implicitly through cooperative consultation.

This conference is focussed on RTAs in Asia and Europe and there is not time today to review all aspects of the implementation of the eleven RTAs reviewed for the purpose of our draft paper, but a quick review of four RTAs allows us to see how the different approaches operate in practice.

In the **EU-Morocco Agreement**, one of the “Euromed” agreements, the action program aimed at eliminating trade barriers associated with standards and conformity assessment obliges the parties to the RTA to take appropriate steps to promote the use by Morocco of EU technical rules and EU standards for industrial and agricultural products and certification procedures. A system of accreditation of conformity assessment procedures based on international and EU standards is also foreseen for Moroccan adoption.

In July 2003, at the Palermo Euromed Ministerial meeting, Euromed participants agreed to address the approximation of legislation in the field of standards, technical regulations and conformity assessment procedures through a six point program. The six points call for:

- Identifying priority sectors;
- Building acquaintance with applicable EU legislation and conducting a gap analysis;
- Transposing necessary framework legislation and sectoral legislation;
- Creating or reforming institutions;
- Setting up necessary certification and conformity assessment bodies; and
- Identifying technical assistance needs.

In other words, in the Euromed agreements, there’s a pathway to deal with the issues over time.

In the **EU agreement with Chile**, the focus is on use of technical regulations and conformity assessment procedures based on international standards unless the standards are judged to be ineffective or inappropriate to fulfil legitimate objectives. Chile and the EU also accept to work towards compatibility and/or equivalence of their respective technical regulations, standards and conformity assessment procedures. A special committee on technical regulations, standards and conformity assessment is established under the RTA and is charged inter alia with consultation and prompt resolution of disputes. The committee has also identified the need for and launched a technical assistance program funded by the EU.

The Technical Regulations and Sanitary and Phytosanitary chapter of the **Singapore – Australia FTA** builds on an earlier bilateral Mutual Recognition Agreement on Conformity Assessment. The chapter includes “best efforts” obligations on harmonisation of mandatory requirements; acceptance of the equivalence of each other’s mandatory requirements and cooperation on SPS questions that might arise in the bilateral relationship. The core purposive policy in this RTA is found in its provisions relating to the negotiation of “sectoral annexes” that are in effect the implementing arrangements for the chapter. For SAFTA, the sectoral annexes are intended to resolve specific issues in the bilateral relationship over time.

SAFTA’s Sectoral Annex on Horticultural Goods establishes the concept of “accredited exporter” defined as “an exporter of the scheduled horticultural goods who has demonstrated to its regulatory authority that it possesses the necessary technical capabilities, management competence, facilities, equipment and production systems required to meet the mandatory requirements of the importing Party”. In an early “success story”, Australia and Singapore have agreed that Australia will

minimize import control, inspection and approval procedures where orchids shipped by Singaporean accredited exporters are accompanied by the required certificates and reports.

The SAFTA conformity assessment procedure has had effects in other market sectors. In the past Australian electrical products exported to Singapore had to be inspected and approved by two separate Singaporean agencies before they could be approved for sale. Since the implementation of SAFTA, Singapore now recognizes Australian conformity assessment procedures¹.

The **ASEAN** countries have not had generally applicable obligations in respect of SPS and TBT amongst them apart from the WTO Agreements and have relied instead on the negotiation and implementation of sectoral mutual recognition agreements (MRAs). This is about to change with the implementation of the new ASEAN Trade in Goods Agreement (ATIGA) which contains new obligations in both the TBT and SPS areas.

In the TBT area, for example, ATIGA will obligate ASEAN member governments to follow the TBT Agreement's "Code of Good Practice", use international standards where possible and ensure that technical regulations are not adopted in ways that frustrate trade in ASEAN. Where applicable, technical regulations must be applied in ways that facilitate the implementation of any ASEAN sectoral MRAs and conformity assessment procedures are expected to be consistent with international standards and practices. A unique feature of the ATIGA is the establishment of a "Post Market Surveillance" system, supported by "Alert Systems" designed to ensure ongoing compliance on the part of producers.

In the SPS area, ATIGA obligates members of ASEAN to be guided by international norms and standards in their SPS-related activities and encourages ASEAN member governments to develop equivalence agreements and explore additional opportunities for intra-ASEAN cooperation.

Implementation costs, institutions and technical assistance needs

A few words on implementation costs, institutions and technical assistance needs. The major costs to governments and their economies in the areas of TBT and SPS do not arise out of the technical implementation of the WTO or RTA agreements themselves but in complying with SPS and TBT measures of their trading partners. Although data on the cost of compliance with RTA partner measures is not readily available, the WTO Secretariat has attempted to measure the cost of technical assistance related to compliance with standards-related measures in recent years. The data collected demonstrates that these costs can be substantial but also that the costs are mitigated to a significant degree by large technical assistance flows from developed country WTO Members.

As I noted earlier, many of the RTAs studied for this project are "living agreements" in the sense that they create bilateral or regional institutions – like the committees and working groups established in the US-Australia FTA, the NZ-China FTA and others. The RTA committees are typically tasked with drawing up work plans and prioritizing issues for resolution. Effective participation in the bilateral process implies the need for a certain amount of capacity-building – at least in those developing countries with less experience in TBT and SPS measures. Technical assistance for a developing country partner is a regular feature of EU RTAs, like those with Morocco and Chile.

¹ Ibid.

Conclusions: Best Practice in RTA Provisions

To wrap up, it is possible, I think to reach some conclusions on best practice in RTAs and the kind of provisions that should be incorporated in any agreement in respect of TBT and SPS issues.

First, there should be an undertaking by the parties to the RTA to use international standards whenever possible as this guarantees a high level of protection in the integrated market and makes it easier for third parties to trade into that market.

Second, where the parties to the RTA decide to pursue an approach of harmonizing their standards and conformity assessment procedures, they should accept that it might be necessary to limit harmonization to essential health and safety standards and rely on mutual recognition and equivalence techniques for other areas.

Third, harmonization where one partner is less developed than the other will necessitate the incorporation in the RTA of technical assistance and capacity-building measures.

Fourth, where technical regulations and conformity assessment procedures cannot be harmonized then it is important for the purposes of the RTA that the parties work to eliminate duplicate or multiple measures or tests being required for the same product. This is particularly important for SMEs who cannot afford the high cost of meeting differing regulations and testing regimes. MRAs are important tools in this respect but they need to be implemented in accordance with principles of open regionalism.

Fifth, transparency is very important for business and consumers in this area of international trade. RTA partners should consider "WTO Plus" notification obligations and a commitment not to implement any technical regulation or SPS measure until it has been published and comments taken into account from the RTA partner.

Sixth, yesterday we talked about using RTAs to establish "pathways". Where possible, the RTA should be a living agreement with a commitment to a work plan or prioritization of problem resolution through a process like those of the Euromed agreements, SAFTA or the China-New Zealand RTA.

Seventh, to be meaningful, the RTA provisions on TBT and SPS should be legally binding through a judicious combination of "soft" and "hard" law. Eventual recourse to the RTA dispute settlement provisions should be an option as well as recourse to the WTO DSU.

Finally, RTA parties should agree to an overall commitment wherein technical regulations and conformity assessment procedures are always applied on a national treatment basis and where third parties whose technical regulations and conformity assessment procedures can be demonstrated as equivalent to the level agreed to by the RTA partners are permitted to benefit from the arrangements agreed between the partners. In this way, the RTA can converge with and support the non-discriminatory multilateral system.

Thank you for your attention.