CHAPTER 8

THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

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I. Introduction

Technical regulations and standards play an important part in everyday life. Governments apply "technical regulations" (mandatory measures) and "standards" (voluntary measures), and they rely on measures to assess the conformity of goods with standards and regulations ("conformity assessment procedures") for many widely accepted domestic policy purposes, among them to:

- protect the health and safety of citizens and workers
- preserve the environment
- increase consumer confidence
- prevent deceptive marketing practices
- protect national security
- protect animal and plant life and health
- to assure product uniformity, compatibility and interchangeability.

There is however a darker side to the use of technical regulations and standards. With the progressive reduction in tariffs since 1948, WTO Members, like GATT Contracting Parties before them, have turned to technical regulations, standards and conformity assessment procedures as a means of protecting domestic producers. Such protectionism is sometimes overt—for example a requirement that a product sold in a country incorporate an environmental technology only manufactured in that country. At other times it is less overt, as in the case of an economically small country that establishes standards for the dimensions of an appliance that differ from those of other countries, making it harder for foreign manufacturers to supply the domestic market.[1]

The Uruguay Round Agreement on Technical Barriers to Trade ("TBT Agreement") is designed to allow WTO Members to pursue what they have agreed are legitimate regulatory and standardization interests, while at the same time attempting to ensure that such regulations and standards do not become unnecessary obstacles to international trade in goods. This is a difficult balance to achieve since regulatory measures may have legitimate as well as protectionist purposes. The TBT Agreement is also intended to make the process of formulating, implementing and applying technical regulations, standards, and conformity assessment procedures transparent—so that Members are aware of regulations and standards that exist in other Members' jurisdictions and can influence their development and monitor their application.

These competing goals are reflected in the TBT Agreement's preamble or recitals which sets forth the philosophy of this Agreement.[2] These recitals set the TBT Agreement

[1] Large foreign manufacturers with substantial economies of scale might find it uneconomical to retool their factories to compete for market share in a small market.

[2] In relevant part the TBT Agreement's preamble provides:

> *Recognizing* the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;
>
> *Desiring* therefore to encourage the development of such international standards and conformity assessment systems;
>
> *Desiring* however to ensure that technical regulations and standards, including packaging, marking and labeling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;
>
> *Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for

squarely in the context of the Uruguay Round Agreement and the objectives of GATT 1994. However, the recitals go further. They establish the preference, given voice in the Agreement, for the use of "international" standards and conformity assessment procedures. The recitals also establish the important policy objective, again repeated in the TBT Agreement, of assuring that regulations, standards and conformity assessment procedures do not create unnecessary obstacles to international trade.[3]

The preamble evidences that the drafters of the TBT Agreement sought to achieve a balance between assuring that technical regulations, standards and conformity assessment procedures do not become unnecessary obstacles to international trade and allowing Members the regulatory autonomy to protect legitimate interests through the use of these potential barriers.[4] If the TBT Agreement is applied too strictly, the legitimate policy interests of Members will be thwarted. If the TBT Agreement is applied too laxly, technical regulations may be used for protectionist purposes and the gains Members have achieved through progressive rounds of tariff reductions may be lost.

The result is that some sensitivity is required when dealing with TBT issues, in particular from a developing country viewpoint. Developing countries fear that technical regulations and standards imposed by developed countries purportedly for social policy goals may in reality be for protectionist purposes. Developed countries fear that the TBT Agreement will be applied too strictly and that trade measures designed to pursue legitimate social policy objectives will be struck down.

This chapter provides a detailed examination of the provisions of the TBT Agreement. As of August 2004, there have only been two WTO dispute settlement decisions interpreting the TBT Agreement. What little experience that exists is incorporated into the following analysis.

II. Brief Historical Overview

A. The GATT

The 1947 General Agreement on Tariffs and Trade ("GATT") does not treat technical regulations and standards in much detail. Although the term "regulation" appears in several places in the GATT Agreement, and the term "standards" is mentioned in Article XI, only GATT Articles III:4, XI:2, and Article XX are significant.[5] Article III:4 of

> the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;
>
> *Recognizing* that no country should be prevented from taking measures necessary for the protection of its essential security interest;
>
> *Recognizing* the contribution which international standardization can make to the transfer of technology from developed to developing countries;
>
> *Recognizing* that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavors in this regard . . .

[3] Packaging, marking and labeling requirements are singled out for special attention in the preamble's fifth recital as potential obstacles to international trade.

[4] Based on the Appellate Body's decision in *U.S.—Shrimp*, it can be inferred that both the preamble to the WTO Agreement and the preamble of the TBT Agreement will play a role in the interpretation of the TBT Agreement. *United States—Import Prohibition of Certain Shrimp and Shrimp Products,* Report of the Appellate Body, WT/DS58/AB/R (1998) ("*U.S.—Shrimp")*, ¶¶ 152–155.

[5] Article XX's introductory paragraph ("chapeau") uses the term "measure" which would include a regulation. Article XX(d) specifically uses the term "regulations".

the GATT Agreement requires that the principle of "national treatment" be applied to regulations and requirements affecting the "internal sale, offering for sale, purchase, transportation, distribution or use" of "like products". It is the GATT Article with the greatest relevance to the treatment of regulations and standards, as well as procedures for assessing whether products conform with regulations and standards.[6] The basic principle is that regulations and standards should not be applied so as to discriminate between "like" foreign and domestic products, that is to say, similar foreign and domestic products, sold within a country.[7]

Article XI:2 of the GATT Agreement applies to commodities—a term of art among trade lawyers.[8] It permits import and export prohibitions necessary for the application of standards and regulations for the classification, grading or marketing of commodities in international trade. It operates as an exception to the general Article XI rule that only duties, taxes and other charges should be applied to restrict imports and exports.

Lastly, Article XX(b) and (g) of the GATT Agreement establish exceptions to GATT obligations, in practice often to Article III of the GATT Agreement, that may be applicable to technical regulations and standards. Among other goals, these exceptions are designed to offer GATT Contracting Parties, and now WTO Members, a means of protecting, when "necessary", human, animal or plant life and health, as well as enacting regulatory measures relating to the protection of exhaustible natural resources. They can be used to justify certain regulatory and standardization measures provided that, in the words of Article XX's chapeau, the measures do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

The above provisions of GATT 1947 do not establish a comprehensive legal structure for the treatment of technical regulations and standards. However, the important principles contained in these GATT provisions served as a basis for the Tokyo Round Standards Code, and later the WTO TBT Agreement. In particular, the TBT Agreement contains a general obligation of non-discrimination that draws inspiration from GATT Articles I and III, and provides room for exceptions similar to those present in GATT Articles XX and XXI.

B. The Tokyo Round Standards Code

This first step toward the establishment of a more comprehensive legal structure to discipline the application of technical regulations and standards came with the growing realization that GATT Article III:4 is subject to abuse. It is not particularly difficult for

[6] GATT Article III:4 provides in part that:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

In brief, the national treatment principle requires that foreign and domestic "like products" be subjected to similar tax and regulatory treatment. The national treatment principle, together with the MFN principle (Article I), form the principle of non-discrimination that is fundamental to the WTO system. See Chapter 5 of this book.

[7] The phrase "like product" is a term of art. It is discussed *infra* Part V(A)(1).

[8] The term commodity usually refers to food or metal products. Such products are frequently traded by investors. In Report of the GATT panel, *Canada—Measures Affecting Exports of Unprocessed Herring and Salmon,* L/6268, BISD 35S/98, 112 (1988), ¶¶ 4.2–4.3, herring and salmon appear to have been accepted by the panel to be commodities for purposes of Article XI:2(b). The panel report dealt with whether a particular Canadian law was a marketing regulation for commodities (fish products).

a government to implement technical regulations that comply with Article III:4, but that nevertheless act as non-tariff barriers. Non-tariff barriers, in the form of domestic regulations, make excellent protectionist tools and were used by certain GATT Contracting Parties, including Japan,[9] to protect domestic producers. The use of non-tariff barriers to protect domestic manufacturers necessitated the establishment of a stronger regime governing the application of technical regulations and standards. Negotiations on the reduction of non-tariff barriers during the Tokyo Round eventually led to the Tokyo Round Agreement on Technical Barriers to Trade,[10] usually known as the "Standards Code", a title that remains useful because it distinguishes the Tokyo Round TBT Agreement (the Standards Code) from the Uruguay Round TBT Agreement.

The Standards Code came into effect on January 1, 1980. It was a plurilateral agreement—meaning that GATT Contracting Parties could but were not required to become members. Nevertheless, 32 Contracting Parties, primarily developed and advanced developing countries, opted to join. Despite the fact that its membership was limited and the Standards Code lacked a strong dispute settlement mechanism (which, like much of the GATT regime, was dependent on a consensus of its members), it provided a good testing ground for how best to discipline the use of technical regulations and standards. Significant portions of the WTO TBT Agreement are drawn from the Standards Code.

III. The TBT Agreement

The Uruguay Round Agreement on Technical Barriers to Trade entered into force on January 1, 1995. Much was learned from the Tokyo Round experience, and weaknesses present in the Tokyo Round Standards Code are addressed in the TBT Agreement. Two examples illustrate this point: (1) the TBT Agreement is an integral part of the single undertaking that forms the WTO Agreement—meaning that the TBT Agreement is a multilateral undertaking and as a result all WTO Members are bound by its obligations; and (2) the TBT Agreement has a much stronger enforcement mechanism, being subject to the WTO Agreement's Dispute Settlement Understanding ("DSU") which does not require consensus for adoption of panel and Appellate Body recommendations.

A. Terminology in the TBT Agreement

The TBT Agreement is applicable to "technical regulations", "standards", and "conformity assessment procedures"—procedures used to assess compliance with technical regulations and standards. Each of these terms is defined in Annex 1 of the TBT Agreement.

1. Technical Regulation

A technical regulation is defined in Annex 1 Paragraph 1 of the TBT Agreement as a:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.

[9] Jackson singles out the case of Japan. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 222 (1997).

[10] The (Tokyo Round) Agreement on Technical Barriers to Trade, GATT, BISD, 26/S 8 (1980), (*entered into force* January 1, 1980), *reprinted in* 18 ILM 1079 (1979).

In *EC—Asbestos* the Appellate Body set forth a three-part test, derived from Annex 1.1 of the TBT Agreement, for a "document" to be classified as a technical regulation:

1) The document must apply to an *identifiable* product or group of products,
2) The document must lay down one or more *product characteristics*, and
3) Compliance with the product characteristics must be *mandatory*.[11]

One example of a technical regulation would be a law stating that only kitchen ovens that are one meter wide may be sold in State X. A second example would be a law stating that toys could not be sold in State X unless their packaging was recyclable. Kitchen ovens or toy packaging that do not comply with the terms of these technical regulations would not be permitted to be sold in State X, whether produced in State X or imported.

Being mandatory, technical regulations have the greatest potential to restrict international trade. This is because the sale of products with "characteristics" that do not meet applicable technical regulations will be prohibited by law.

The three criteria presented in *EC—Asbestos* were reiterated and applied in *EC—Sardines* where both the Panel and the Appellate Body examined as a threshold issue whether a particular trade measure was a technical regulation within the sense of Annex 1.1 of the TBT Agreement.[12] Since this important TBT case is referred to several times in this chapter, a brief description of the facts is provided below.

EC—Sardines concerned a complaint by Peru against the European Communities. The case involved the marking or labeling for sale of preserved and canned fish products made from two small and rather similar fish species—*Sardina pilchardus Walbaum* which is primarily found in the Eastern North Atlantic, Mediterranean and Black Seas, and *Sardinops sagax sagax*, which is found off the Peruvian and Chilean coasts. Both belong to the same family and sub-family, but to a different genus.[13]

In June 1989 the European Union adopted Council Regulation (EEC) No. 2136/89 ("EC Regulation"), which lays down common marketing standards for preserved sardines.[14] The EC Regulation reserved the use of the name "sardines" to *Sardina pilchardus*, a species found in or near European waters, thereby effectively prohibiting Peru from marketing its *Sardinops sagax sagax* as preserved "sardines" in the European Union.

The Panel found that "... the EC regulation is a technical regulation as it lays down product characteristics for preserved sardines and makes compliance with the provisions contained therein mandatory."[15] The EC appealed this decision, arguing that the measure is not a technical regulation based on the test established in *EC—Asbestos* since the regulation allegedly failed to meet the first and second criteria of the test.[16] More specifically the EC argued that the product was not identifiable since the product coverage

[11] *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products,* Appellate Body Report, WT/DS135/AB/R (2001) ("*EC—Asbestos*"), ¶¶ 66–70 (emphasis added).

[12] *European Communities—Trade Description of Sardines*, Report of the Panel, WT/DS231/R, ¶¶ 7.24–7.35; and *European Communities—Trade Description of Sardines*, Report of the Appellate Body, WT/DS 231/AB/R (2002) ("*EC—Sardines*"), ¶¶ 173–195.

[13] *Sardina pilchardus Walbaum* and *Sardinops sagax sagax* both belong to the *Clupeidae* family and the *Clupeinae* sub-family. They belong to the genus *Sardina* and *Sardinops* respectively. *EC—Sardines*, Report of the Panel, *supra* note 12, ¶¶ 2.1–2.2.

[14] *Council Regulation (EEC) 2136/89 of June 21, 1989 Laying Down Common Marketing Standards for Preserved Sardines*. The EC Regulation is appended to the Panel Report, Annex 1. *See EC—Sardines*, Report of the Panel, *supra* note 12, ¶¶ 2.5–2.6.

[15] *EC—Sardines*, Report of the Panel, *supra* note 12, ¶ 7.35.

[16] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, ¶¶ 173–174 (*citing EC—Asbestos*).

of its regulation is limited to preserved *Sardina pilchardus*, and the EC measure does not regulate fish made from *Sardinops sagax* or any other species.[17] Second, it argued that the requirement to state a certain name on the label does not involve just a labeling requirement but also a "substantive naming rule". It sought to draw a distinction between labeling requirements, which it accepted are covered by the TBT Agreement, and naming rules, which it argued do not reflect product characteristics and are therefore not covered by the TBT Agreement.[18]

The Appellate Body rejected both arguments. With respect to the first argument the Appellate Body found that a product does not have to be mentioned explicitly in a document for the product to be identifiable, and that identifiable does not mean expressly identified.[19] The Appellate Body upheld the Panel's finding that the EC Regulation is applicable to an identified product, "preserved sardines". More importantly it rejected the EC's contention that preserved sardines only referred to *Sardina pilchardus.* In doing so, it followed its reasoning in *EC—Asbestos*, that product identification relates to "aspects of compliance and enforcement"; since the EC Regulation had been enforced against imports of *Sardinops sagax*, *Sardinops sagax* was an identifiable product for purposes of the EC regulation.[20]

Next the Appellate Body turned to the question of whether the EC Regulation laid down product characteristics. Again turning to its findings in *EC—Asbestos* the Appellate Body reiterated that product characteristics "include not only 'features and qualities intrinsic to the product', but also those that are related to it, such as the 'means of identification'."[21] It found it unnecessary to determine whether the TBT Agreement distinguishes between "labeling" and "naming", holding instead that the requirement that "preserved sardines" be prepared exclusively from *Sardina pilchardus* establishes a product characteristic "intrinsic to" preserved sardines. Further, it agreed with the Panel's finding that "a means of identification" is a "product characteristic".[22]

The Appellate Body's decision in *EC—Sardines* is significant as it clarifies what is a technical regulation for TBT purposes—a threshold issue that will arise in other TBT cases. The EC's position was untenable, both legally and from a policy perspective. In effect the EC argued that product identification should be determined based on a strict reading of the text of its regulation and not based on the legal consequences of its regulation for imports. Had the EC's position prevailed, it would have become far easier to use product names to evade the classification of a trade measure as a technical regulation. The Appellate Body's decision thus helped preserve the effectiveness of the TBT Agreement.

The definition in the TBT Agreement of a technical regulation is broad. Nevertheless, Article 2.8 of the TBT Agreement does establish a preference for specifying technical

[17] *Id.* ¶ 173.
[18] *Id.* ¶ 174.
[19] *Id.* ¶ 180.
[20] *Id.* ¶¶ 185–186, *citing EC—Asbestos*, ¶ 70 which states:

> A "technical regulation" must, of course, be applicable to an identifiable product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible [. . .] Although the TBT Agreement clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise expressly identified in a "technical regulation". Moreover, there may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does not expressly identify products by name, but simply makes them identifiable—for instance, through the "characteristic" that is the subject of regulation.

[21] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, ¶ 189 (*citing EC—Asbestos* ¶ 67).
[22] *EC—Sardines*, Report of the Appellate Body, *supra* note 12,¶ 190.

regulations based on product requirements rather than design or descriptive standards. By so doing, the Agreement leaves the Members with the maximum discretion to determine how to address legitimate TBT objectives. An example of a technical regulation based on a product requirement would be a provision requiring that a car bumper be able to withstand an impact at a speed of six kilometers/hour without damage. The same type of requirement based on a design or descriptive standard might require that car bumpers be made of a certain grade of steel and be mounted on specific springs designed to recoil a minimum amount upon impact.

2. Standard

The TBT Agreement is also applicable to standards. A standard is defined in Annex 1 Paragraph 2 of the TBT Agreement as a:

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.[23]

The critical distinction between a technical regulation and a standard is that a technical regulation is mandatory and a standard is voluntary. A merchant can still try to sell a product that does not meet an applicable standard. Likewise an importer can import products that do not meet an established standard.

An example of a standard would be a guideline issued by a standardizing body establishing a common format for DVDs (digital video disks). Manufacturers whose DVD players use the common format would be able to advertise their conformity with the standard. Such DVD players would probably be more attractive to consumers given that consumers want to be able to rent DVDs that will work on their players. DVD players that use a different format could still be sold but the manufactures would lose any marketing benefits conferred by using the common standard. A familiar example of standards that illustrates how important standards can be, is the competition that occurred between two video standards—VHS and Betamax. The VHS standard triumphed over Betamax. Consumers who had purchased a video-recorder that used the Betamax standard eventually found that they were unable to rent movies recorded using the Betamax standard.

Another example of a standard would be rules or guidelines governing the use of a "recyclable symbol". Products conforming to the "rules, guidelines or characteristics for products" established by the standardizing authority would be able to bear the recyclable symbol.[24] Products that do not meet these criteria would not be permitted to bear the symbol, but would still be permitted to be sold.

Voluntary "standards" are used for many reasons, chief among them to assure proper performance, uniformity and interchangeability of a particular good. For example, manufacturers of products requiring batteries usually adapt their products to standardized voltages, and manufacturers of machines benefit by using standardized nuts and bolts so that repairs are more easily made. In the latter example, the manufacturers benefit by being able to buy standard nuts and bolts instead of producing them themselves; the users benefit by being able to make repairs more easily.

Neither a WTO panel nor the Appellate Body has had the opportunity to rule in a case involving a Member's standards. A dispute involving standards also never arose under the Tokyo Round Standards Code.

[23] *TBT Agreement*, Annex 1.2.

[24] *See TBT Agreement*, Annex 1 ¶ 2.

3. Conformity Assessment Procedure

Lastly, the TBT Agreement is applicable to conformity assessment procedures. A conformity assessment procedure is defined in Annex 1 Paragraph 3 of the TBT Agreement as:

> Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.
>
> Explanatory note:
>
> Conformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

Conformity assessment procedures are, as the term suggests, procedures for determining whether a given product conforms to an applicable technical regulation or standard. For example, if a WTO Member requires as a condition for the sale of a machine tool that a special guard be present to protect the hands of users, an inspection to determine if the guard is in place would be a conformity assessment procedure implemented to verify compliance with a technical regulation.

Likewise, if a WTO Member establishes standards whereby certain products may bear a "recyclable symbol", a test to make sure that a product meets the standards required to bear the symbol would be a conformity assessment procedure implemented to verify compliance with a standard. Regardless of whether the product conforms to the standard, it can be sold. The question is only whether or not the product will be permitted to bear the symbol.

B. Structure and Scope of the TBT Agreement

The scope of the TBT Agreement is set forth in TBT Article 1, and by reference to Annex 1 which defines the key terms, including: "technical regulations", "standards" and "conformity assessment procedures". Technical regulations, standards, and conformity assessment procedures are treated in separate portions of the TBT Agreement. Technical regulations are dealt with in Articles 2–3. Standards are governed by Article 4 and Annex 3—the Code of Good Practice for the Preparation, Adoption and Application of Standards. This Code sets forth almost all of the substantive provisions governing the treatment of standards. Conformity assessment procedures fall under Articles 5–9. The remainder of the Agreement, Articles 10–14, deals with transparency, technical assistance, special and differential treatment, institutional issues and dispute settlement.

Pursuant to the respective definitions set forth in Annex 1, technical regulations and standards are given form in "documents". Written form is thus implied. Technical regulations and standards may relate to product characteristics, terminology, symbols, packaging, marking or labeling requirements. As the principal difference between a technical regulation and a standard is that compliance with a technical regulation is mandatory while compliance with a standard is voluntary, technical regulations require a certain degree of product standardization, while standards merely encourage standardization. Conformity assessment procedures serve to verify whether this standardization has occurred through sampling, testing, inspection, evaluation, verification, registration, accreditation and approval procedures.

The TBT Agreement does not apply to all technical regulations, standards and conformity assessment procedures. Several provisions within the WTO Agreement, and more specifically the TBT Agreement, limit its scope. They are described in the first five

subsections below. One Appellate Body decision establishes the retroactive scope of the TBT Agreement. It is described in the sixth subsection.

1. Not Applicable to Trade in Services

The TBT Agreement is a portion of Annex 1A of the WTO Agreement. Annex 1A contains the Multilateral Agreements on Trade in Goods. These covered agreements, including the TBT Agreement, do not apply to trade in services. As a result, trade in services does not fall within the TBT Agreement.

2. TBT Agreement vs. Government Procurement Specifications: Procurement Carved Out

Pursuant to Article 1.4 of the TBT Agreement, the TBT Agreement is not applicable to government procurement activities—more specifically purchasing specifications prepared by governmental bodies for the production or consumption requirements of governmental bodies. Government purchasing specifications may fall instead under the WTO Agreement on Government Procurement ("AGP"). The AGP is a plurilateral agreement and the majority of developing countries, as well as a few developed countries, have not joined the AGP. Their procurement activity falls neither under the TBT Agreement nor under the AGP.

3. SPS vs. TBT Measures: SPS Carved Out

Pursuant to Article 1.5 of the TBT Agreement, the TBT Agreement is not applicable to sanitary and phytosanitary measures as defined in Annex A of the Agreement on Sanitary and Phytosanitary Measures ("SPS Agreement"). This is an explicit carve-out of SPS measures from the purview of the TBT Agreement. As a result, to understand the scope of the TBT Agreement, one must review Annex A(1) of the SPS Agreement. This provision defines an SPS measure as any measure applied:

> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
> (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.
>
> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labeling requirements directly related to food safety.

Despite the fact that Article 1.3 of the TBT Agreement provides that the TBT Agreement is applicable to agricultural products, it is the SPS Agreement and not the TBT Agreement that applies when a Member is protecting animal, plant or human health from the entry,

spread or establishment of pests, diseases, additives, contaminants, toxins or disease carrying organisms within its territory.

Cases do exist where different aspects of a product's "life-cycle" may fall under the coverage of both agreements. For example, agricultural products might be subject to an SPS inspection for pests at the border, then incorporated into a canned soup that is subject to labeling requirements requiring (1) the specification of the product's nutritional content and (2) whether the container is recyclable (both falling under the TBT Agreement).[25] However, it is virtually impossible that the two agreements would apply simultaneously to the same subject matter. A hypothetical instance where the distinction is somewhat blurred could be the case of hormone-treated meat. If an SPS measure is introduced to prevent health risks allegedly associated with the consumption of hormone-treated meat, the SPS Agreement would apply. If there are no health risks, the TBT Agreement might still be applicable, for example to a technical regulation introduced to prevent deceptive practices (arguably a labeling requirement intended to alert consumers to the fact that they are purchasing meat from an animal that was treated with hormones). Admittedly this example does raise questions related to the treatment of non-product-related production methods which are discussed in the following section.

4. Probably Inapplicable to Non-Product-Related Processes and Production Methods

The definitions of a "technical regulation" and a "standard" quoted above are ambiguous as to whether the TBT Agreement applies to technical regulations and standards regulating manufacturing "processes and production methods" ("PPMs") when the PPMs utilized are not detectable in the final product—so-called "non-product-related processes and production methods" ("NPR-PPMs"). This is a controversial issue. The view generally held in the trade community is that the TBT Agreement was not intended to apply to PPMs, unless the PPM is product-related (detectable in the final product).[26]

For example, it is highly unlikely that the TBT Agreement would apply to a law prohibiting the importation of aluminum produced using electricity derived from nuclear power. Instead, it is probable that GATT Article XI would be applied in a challenge to such a regulation on the grounds that generally only duties, taxes and other charges may be applied to restrict imports.

Nevertheless, there is one slight uncertainty. As just noted, an ambiguity exists in the definitions of "technical regulation" and "standard" in Annex 1 of the TBT Agreement—it is somewhat unclear whether NPR-PPMs were meant to be excluded from the definitions of technical regulations and standards, and thus from the TBT Agreement. As a result, and although highly improbable, room may exist to argue that the TBT Agreement could, in certain instances, also be applied to NPR-PPMs.

It bears noting that WTO Members have notified certain NPR-PPMs to the TBT Committee (for example, eco-labeling schemes based on a life-cycle analysis).[27] Such

[25] The SPS Agreement and not the TBT Agreement would apply to a labeling requirement if the intent or purpose of the labeling requirements is sanitary or phytosanitary in nature within the meaning of Annex A ¶ 1 of the SPS Agreement.

[26] *See generally* ARTHUR E. APPLETON, ENVIRONMENTAL LABELLING PROGRAMMES: INTERNATIONAL TRADE LAW IMPLICATIONS 92–94 (1997).

[27] "Notification" in the TBT sense of the term means to inform officially other WTO members of a particular action through the WTO Secretariat. Eco-labeling schemes are usually voluntary labeling programs where a label is awarded to environmentally friendlier products based on an environmental assessment of all phases of a products life-cycle—including, production, use, and disposal.

notifications do not seem to be evidence that a particular Member believes the TBT Agreement applies to NPR-PPMs. They are instead indicative of the efforts that certain WTO Members have made to ensure the transparency of their eco-labeling schemes.

Some may argue that the Appellate Body's decisions in *U.S.—Shrimp* suggests a willingness of the Appellate Body to close its eyes to the NPR-PPM debate, and from this draw the conclusion that the TBT Agreement should be applied to NPR-PPMs. In *U.S.—Shrimp*, the Appellate Body found (without discussing the PPM issue) that a U.S. regulatory measure, applicable to an NPR-PPM, and which violated GATT Article XI, satisfied an exception to GATT Article XX, but failed to meet the conditions of Article XX's chapeau.[28] In a subsequent proceeding under Article 21.5 of the DSU,[29] the Appellate Body ruled that a modified version of the U.S. measure met the conditions of Article XX's chapeau. This latter decision allowed the United States to impose an import ban based on an NPR-PPM.

The relevance of *U.S.—Shrimp* for purposes of the TBT Agreement has not been established. *U.S.—Shrimp* did not involve the TBT Agreement and the provisions at issue are not the same. It is doubtful that *U.S.—Shrimp* lends much legal support for the argument that the TBT Agreement should be applied to NPR-PPMs, although from a policy perspective *U.S.—Shrimp* does seem to take a friendlier view of trade-related environmental measures based on NPR-PPMs.[30]

5. Applicability to Import Prohibitions

The definition of "technical regulation" contained in Annex 1 to the TBT Agreement does not list import prohibitions or bans among the covered measures. However, the *EC—Asbestos* decision established that the TBT Agreement is applicable to import prohibitions and bans that are based on product characteristics, and exceptions to the prohibition or ban (based also on particular product characteristics) exist. In *EC- Asbestos* the Appellate Body found:

> Like the Panel, we consider that, through these exceptions, the measure sets out the "applicable administrative provisions, with which compliance is mandatory" for products with certain objective "characteristics". The exceptions apply to a narrowly defined group of products with particular "characteristics". Although these products are not named, the measure provides criteria which permit their identification, both by reference to the qualities the excepted products must possess and by reference to the list promulgated by the Minister.
>
> Viewing the measure as an integrated whole, we see that it lays down "characteristics" for all products that might contain asbestos, and we see also that it lays down the "applicable administrative provisions" for certain products containing chrysotile asbestos fibers which are excluded from the prohibitions in the measure. Accordingly, we find that the measure is a "document" which "lays down product characteristics . . . including the applicable administrative provisions, with which compliance is mandatory." For these reasons, we conclude that the measure constitutes a "technical regulation" under the TBT Agreement.[31]

[28] *U.S.—Shrimp*, *supra* note 4, ¶¶ 125–145.

[29] *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia)*, WT/DS58/AB/RW (2001), ¶¶ 91–93.

[30] "Notification" in the TBT sense of the term means to inform officially other WTO members of a particular action through the WTO Secretariat. Eco-labeling schemes are usually voluntary labeling programs where a label is awarded to environmentally friendlier products based on an environmental assessment of all phases of a products life-cycle—including, production, use, and disposal.

[31] *EC—Asbestos*, *supra* note 11, ¶¶ 74–75. (footnote omitted)

6. Retroactive Application of the TBT Agreement

In *EC—Sardines* the Appellate Body dealt with whether the TBT Agreement applies to technical regulations adopted before the entry into force of the Uruguay Round Agreement on January 1, 1995. More specifically, the question posed was whether the EC had an obligation pursuant to Article 2.4[32] of the TBT Agreement to reassess its existing technical regulations in light of the adoption of new international standards.

The Appellate Body recalled that under Article 28 of the Vienna Convention treaties do not generally apply retroactively. According to the Appellate Body, this principle of interpretation was relevant to the interpretation of the covered agreements.[33] The Appellate Body then examined the EC's argument that the TBT Agreement applied only to the preparation and adoption of technical regulations, but not to their maintenance. The Appellate Body found that the text of Article 2.4 of the TBT Agreement did not support the EC's contention. The Appellate Body referred to its reasoning in *EC—Hormones*, where it addressed the temporal scope of the SPS Agreement. There, the Appellate Body stated:

> We agree with the Panel that the SPS Agreement would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the SPS Agreement reveals a contrary intention. We also agree with the Panel that the SPS Agreement does not reveal such an intention. The SPS Agreement does not contain any provision limiting the temporal application of the SPS Agreement, or of any provision thereof, to SPS measures adopted after 1 January 1995. In the absence of such a provision, it cannot be assumed that central provisions of the SPS Agreement, such as Articles 5.1 and 5.5, do not apply to measures which were enacted before 1995 but which continue to be in force thereafter. If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly.[34]

Like the trade measure in *EC—Hormones*, the EC Regulation at issue in *EC—Sardines* was an existing regulation that had not "ceased to exist." Nothing in Article 2.4 of the TBT Agreement suggested that there was a "contrary intention" to exclude the applicability of the Agreement to existing measures. Article 2.4 was a "central provision" of the TBT Agreement, and in the Appellate Body's view it could not "just be assumed that such a central provision does not apply to existing measures."[35]

[32] Article 2.4 of the TBT Agreement provides:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis of their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

[33] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, ¶ 200.

[34] *European Communities—Measures Concerning Meat and Meat Products ("EC—Hormones")*, Report of the Appellate Body, WT/DS26/AB/R and WT/DS48/AB/R (1998), 128. (footnote omitted)

[35] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, 208. The Appellate Body also rejected the EC's argument that the Appellate Body's ruling in *EC—Hormones* was not relevant to Article 2.4 of the TBT Agreement because, unlike Articles 2.2, 2.3, 3.3 and 5.6 of the SPS Agreement, Article 2.4 of the TBT Agreement did not contain the word "maintain." The Appellate Body noted that its analysis in *EC—Hormones* focused on Article 5.1 and 5.5 of the SPS Agreement, which also did not include the word "maintain." Similarly, the Appellate Body rejected the EC's argument that the context of Article 2.4 of the TBT Agreement demonstrates that it was not intended to cover the application of technical regulations because, when a provision was intended to do so, this was specifically mentioned. The Appellate Body agreed with the Panel's analysis, noting that the title of Article 2 specifically mentioned the term "application" ("Preparation, Adoption and Application of Technical Regulations by Central Government Bodies"). *Id.* ¶¶ 209–12.

The Appellate Body also noted that Article XVI:4 of the WTO Agreement required each Member to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the [covered] agreements."[36] The Appellate Body stated that this provision established a clear obligation on all WTO Members to ensure the conformity of their existing laws, regulations and administrative procedures with the obligations in the covered agreements. Indeed, in the Appellate Body's view, the EC's reading of Article 2.4 of the TBT Agreement "[flew] in the face of the object and purpose of the TBT Agreement."[37] The TBT Agreement is replete with provisions recognizing the important role of international standards in the promotion of harmonization and facilitation of trade. The Appellate Body specifically noted the obligations established in Article 2.5 and 2.6 of the TBT Agreement.[38] The Appellate Body's decision in *EC—Sardines* means that Article 2.4 of the TBT Agreement applies to technical regulations that were adopted prior to January 1, 1995 and which have not ceased to exist.[39]

IV. Applicability of the TBT Agreement at Various Governmental and Non-Governmental Levels

The TBT Agreement sets forth rules and disciplines applicable to international, regional, governmental and non-governmental organizations at different levels of society. Within the limits of what is politically acceptable, the TBT Agreement has a wide field of application. This is in response to the fact that technical regulations, standards, and conformity assessment procedures are not only administered by national authorities, but also by international, regional and local authorities, as well as non-governmental organizations (all defined in Annex 1 of the Agreement). The TBT Agreement thus seeks to bring discipline to technical barriers established and applied at many different levels of society. The application of the basic TBT rules differs slightly depending on the level of application, *e.g.*, whether by a governmental versus non-governmental organization, and whether technical regulations, standards, or conformity assessment procedures are involved. These distinctions are addressed in the following sections.

A. Technical Regulations (Articles 2 and 3)

Pursuant to Article 2 of the TBT Agreement, Members have an obligation to ensure that "central government bodies" abide by the provisions of the TBT Agreement governing technical regulations. A central government body is defined in Annex 1 of the Agreement as the "Central government, its ministries and departments or any body subject to the

[36] *Id.* ¶ 213. There is a similar provision in Article 15.2 of the TBT Agreement, not noted by the Panel, imposing an obligation upon each Member, "promptly after the date on which the WTO Agreement enters into force for it, [to] inform the Committee [on Technical Barriers to Trade] of measures in existence or taken to ensure the implementation and administration of this Agreement." The provision appears to have an object only if the TBT Agreement is interpreted to require Members to bring their existing technical regulations into conformity with their obligations under the TBT Agreement.

[37] *Id.* ¶ 214.

[38] In ¶ 214 the Appellate Body noted that Article 2.5 of the TBT Agreement "establishes a rebuttable presumption that technical regulations that are in accordance with relevant international standards do not create unnecessary obstacles to trade". The Appellate Body also noted in the same paragraph that Article 2.6 "encourages Members to participate in international standardizing bodies with a view to harmonizing technical regulations on as wide a basis as possible".

[39] *Id.* ¶ 216.

control of the central government in respect of the activity in question." The definition of central government bodies is very wide with "control" being the important element.

With only very minor exceptions, pursuant to Article 3 of the TBT Agreement Members also have an obligation to take reasonable measures to ensure that "local governmental"[40] and "non-governmental bodies"[41] within their territories comply with the rules set forth in the TBT Agreement governing technical regulations. In addition, Members are not allowed to take measures that would require or encourage local government or non-governmental bodies to act inconsistently with the rules governing technical regulations.

Article 3.1 of the TBT Agreement establishes two exceptions. A Member is not responsible for taking reasonable measures to ensure that non-governmental bodies, and local governmental bodies beyond the level directly below the central government body, comply with the requirement to notify a technical regulation to other Members through the WTO Secretariat (1) when an international standard does not exist or a measure is not in conformity with an international standard, or (2) when urgent problems of safety, health, environmental protection or national security arise or threaten to arise.[42]

B. Standards (Article 4 and the Code of Good Practice)

Article 4 of the TBT Agreement references the "Code of Good Practice for the Preparation, Adoption and Application of Standards" ("Code of Good Practice"). The Code of Good Practice is found in Annex 3 of the TBT Agreement. The Code is designed to regulate the use of voluntary standards. It is open for acceptance by standardizing bodies within a WTO Member, whether at the central, local or non-governmental level. It is also open to regional standardizing bodies.

Standardizing bodies that accept the Code of Good Practice assume the well-known obligations discussed in Part V of this chapter, including most-favored-nation treatment, national treatment, harmonization, mutual recognition and transparency obligations. Pursuant to Article 4(1) of the TBT Agreement, Members must ensure that central government standardizing bodies accept and comply with the Code of Good Practice. Members must also take "such reasonable measures as may be available to them" to ensure that local governmental, non-governmental and regional standardizing bodies (of which they are a member) accept and comply with the Code. As with technical regulations, Members are not permitted to take measures that would require or encourage local government or non-governmental bodies to act inconsistently with the Code.[43] Article B of the Code requires standardization organizations accepting or withdrawing from the Code to notify the International Standardization Organization.

C. Conformity Assessment Procedures (Articles 5–9)

Articles 5–9 of the TBT Agreement set forth provisions relevant to determining the scope and applicability of the TBT Agreement to conformity assessment procedures.

[40] A local government body is defined in Annex 1 as a "Government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.) its ministries or departments or any body subject to the control of such a government in respect of the activity in question."

[41] A non-governmental body is defined in Annex 1 as a "Body other than a central governmental body or a local governmental body, including a non-governmental body which has legal power to enforce a technical regulation."

[42] These exceptions are provided rather clumsily in Article 3.1 which contains a cross-reference to Article 2—specifically paragraphs 9.2 and 10.1.

[43] TBT Article 4(1).

Article 5 provides for most-favored-nation treatment, national treatment, harmonization of assessment procedures, notice, transparency, equivalence, and exceptions in case of urgent problems. Article 6 provides for equivalence, accreditation, mutual recognition, and foreign participation in conformity assessment procedures. These principles are discussed in Part V of this chapter.

Articles 5 and 6 govern conformity assessment by central government bodies and are particularly important—they set out the applicable legal obligations. They also provide a reference point for Articles 7–9 which govern the application of the TBT Agreement to local government bodies, non-governmental bodies and international and regional systems.

1. Central Government Bodies (Articles 5 and 6)

Members have an obligation pursuant to Articles 5 and 6 to ensure that central government bodies abide by the provisions of the TBT Agreement governing conformity assessment. Not only does Article 5 implement many of the general principles applicable throughout the TBT Agreement to conformity assessment procedures, it also establishes very detailed procedural obligations governing transparency, notice, harmonization, procedural requirements and confidentiality.

2. Local Government Bodies (Article 7)

Members are required pursuant to Article 7 to take reasonable measures to assure that local government bodies within their territory comply with Articles 5 and 6 of the TBT Agreement. No indication is given in the TBT Agreement as to what measures would be considered reasonable.[44] Article 7.1 provides an exception with respect to the obligation to notify proposed procedures not in accordance with the relevant guidelines of international standardizing bodies, as well as an exception to notify urgent problems of safety, health, environmental protection, and national security that arise or threaten to arise.[45]

Members must also ensure that the conformity assessment procedures of local government bodies on the level directly below the central government body are notified in accordance with Articles 5.6.2 and 5.7.1, except when the technical content of the local procedures is substantially the same as that previously notified by the central government body.

Members must not take measures that encourage local government bodies within their territories to act inconsistently with Articles 5 and 6 of the TBT Agreement. This obligation mirrors the obligation established at the central government level. Furthermore, Article 7.5 of the TBT Agreement makes Members fully responsible for the observance of Articles 5 and 6 by local government bodies. Members are required to implement a legal mechanism to "support the observance" of the provisions of Articles 5 and 6 by other than central government bodies.

3. Non-Governmental Bodies (Article 8)

Pursuant to Article 8 Members must take reasonable measures to ensure that non-governmental bodies within their territories that operate conformity assessment procedures comply with the provisions of Articles 5 and 6 of the TBT Agreement. As with the treatment of local government bodies described above, no indication is given in the TBT Agreement as to what measures would be considered reasonable. Members are not

[44] Possibly relevant Appellate Body and GATT decisions do exist. They define "reasonable" but in a different context. *See infra* Part V(B)(2).

[45] TBT Articles 5.6.2 and 5.7.1 respectively.

required to ensure that non-governmental conformity assessment bodies comply with the requirement to *notify* proposed measures. However, Members are not permitted to take measures that have the effect of requiring or encouraging non-governmental conformity assessment bodies to act inconsistently with Articles 5 and 6.

Members must also ensure that central government bodies do not rely on conformity assessment procedures operated by non-governmental bodies unless these bodies comply with the legal obligations set forth in Articles 5 and 6 (except for the obligation to notify proposed conformity assessment procedures).

4. International and Regional Application (Article 9)

Article 9 encourages Members to formulate and adopt international systems for conformity assessment, become members of such systems, and participate in these systems. Members must also take reasonable measures to assure that international and regional conformity assessment bodies in which relevant bodies within their territory participate, comply with the obligations set forth in Articles 5 and 6, and that central government bodies only rely on international and regional assessment systems to the extent that these systems comply with Articles 5 and 6.

V. Major Principles Applicable (in Various Forms) Throughout the TBT Agreement

There are common principles that are applicable throughout the TBT Agreement whether technical regulations, standards or conformity assessment procedures are involved. An understanding of these principles, many of which appear in other covered agreements and in GATT 1947, is required to comprehend the TBT Agreement. The following principles are analyzed in turn:

(A) Non-discrimination
(B) The Prevention of Unnecessary Obstacles to International Trade
(C) Harmonization
(D) Equivalence and Mutual Recognition
(E) Transparency
(F) Derogations from TBT Disciplines in the Event of Urgent Circumstances

A. The Non-Discrimination Principle

As applied in the GATT, the non-discrimination obligation contains two elements: "most-favored-nation treatment" ("MFN treatment"), and "national treatment". MFN treatment is an obligation not to use customs duties, charges, rules, regulations and formalities to discriminate between "like products" imported from different WTO Members.[46] National treatment is similarly an obligation not to use taxes, charges and regulations to discriminate between domestic and imported "like products."[47]

An example will help to illustrate the non-discrimination obligation. State A manufactures televisions, and also imports televisions from States B and C. All three States are WTO Members. Assuming that all televisions in question are "like products," State A has an obligation to apply the same taxes, duties and regulatory treatment to television

[46] *See generally* GATT Article I.
[47] *See generally* GATT Article III.

imports from States B and C (MFN treatment); and an obligation not to apply taxes, charges and regulations to favor domestic televisions over television imports from States A or B (national treatment).

Turning more specifically to the TBT Agreement, the "non-discrimination" obligation is an obligation to ensure that technical regulations, standards and conformity assessment procedures are not applied to favor domestic over imported like products, or like products from one Member over those from another Member.[48] If two products are not like products, the non-discrimination principle does not apply as between those products. This raises the important question of what constitutes a like product for TBT purposes.

1. "Like Products"

Whether two products are "like products" and thus require similar or identical treatment is one of the more perplexing legal questions arising under the WTO Agreement. In part this is because the term "like product" is not defined in the WTO Agreement. As a result, product likeness is determined on a case-by-case basis. In what has become a famous but unhelpful passage, the Appellate Body noted in its interpretation of GATT Article III:2 (a taxation provision) that:

> The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.[49]

The two most important WTO Appellate Body decisions interpreting product likeness are *Japan –Alcoholic Beverages*[50] and *EC—Asbestos*.[51] They set forth four factors that are relevant in varying degrees:

(1) physical characteristics (the properties, nature and quality of a product),
(2) HS classification,[52]
(3) consumers' tastes and habits (perception and behavior), and
(4) product end uses.[53]

At the time of writing there has not been a TBT case in which the term "like product" has been interpreted or defined. WTO cases interpreting GATT Article III have examined the phrase "like product", but their relevance to the interpretation of the TBT Agreement has not been formally established. In both *Japan—Alcoholic Beverages* and *EC—Asbestos* the Appellate Body even warned "against the automatic transposition of the interpretation of "likeness" under the first sentence of Article III:2 to other provisions where the phrase

[48] The principle of non-discrimination is found in the following provisions of the TBT Agreement: Article 2.1 (technical regulations); ¶ D of the Code of Good Practice (standards), and Article 5.1.1 (conformity assessment procedures).

[49] *Japan—Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996) ("*Japan—Alcoholic Beverages")*, Part H(1)(a).

[50] *Id.* This case involved a tax scheme that was found by the Appellate Body to violate GATT Article III:2.

[51] *EC—Asbestos*, *supra* note 11. This case involved a regulatory measure that was found to violate GATT Article III:4.

[52] HS is the Harmonized System of tariff classification administered by the World Customs Organization. It is used by countries to classify products for tariff purposes. *See* Chapter 36 of this book.

[53] *EC—Asbestos*, *supra* note 11, ¶ 101.

"like products" is used".[54] Given however that the like product provisions of the TBT Agreement appear to be a logical extension of the non-discrimination obligations, and that GATT Article III:4 specifically deals with regulatory discrimination, it is probable that GATT non-discrimination disputes, in particular those dealing with GATT Article III:4, will provide guidance in the interpretation of the term "like product" which appears in various places in the TBT Agreement, in particular Article 2.1.[55] There is no reason why the same four factors should not receive consideration in a TBT dispute.

B. The Prevention of Unnecessary Obstacles to International Trade

As a general rule, technical regulations, standards and conformity assessment procedures must not be prepared, adopted or applied so as to create unnecessary obstacles to international trade. This provision lies at the heart of the TBT Agreement. The prevention of unnecessary obstacles to international trade is a principle applicable to technical regulations, standards and conformity assessment procedures,[56] but its application is not necessarily identical in all three areas. The treatment of technical regulations receives considerable attention below. The treatment of standards and conformity assessment procedures, where different from that of technical regulations, is indicated.

The prevention of unnecessary obstacles to international trade is set forth within the context of technical regulations in Article 2.2 of the TBT Agreement:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products.

As defined in Article 2.2, technical regulations must:

- not be more trade restrictive than *necessary* to achieve a policy goal (the least trade restrictive measure), and
- fulfill a *legitimate objective*, taking into account the *risks* that non-fulfillment would create.

With respect to standards, the phrase "prevention of unnecessary obstacles to international trade" is not defined in either Article 3 or in the Code of Good Practice. Nor is it defined in any WTO panel or Appellate Body decision considering the TBT Agreement. Given the similarities between technical regulations and standards (the primary regulatory difference is that one is mandatory and the other voluntary), it is probable that the same

[54] *EC—Asbestos*, *supra* note 11, ¶ 88 n.60 (*citing* the Appellate Body Report in *Japan—Alcoholic Beverages* at 113).

[55] Article 2.1 of the TBT Agreement provides:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country.

[56] The prevention of unnecessary obstacles to international trade is set forth in Article 2.2 (technical regulations); ¶ E of the Code of Good Practice (standards); and Article 5.1.2 (conformity assessment procedures).

definition applicable to technical regulations would also apply in the case of standards, but this remains to be proven.

With respect to conformity assessment procedures, the phrase "unnecessary obstacles to international trade" is defined in Article 5.1.2:

> . . . *inter alia*, that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create.

Articles 2.2 and 5.1.2 of the TBT Agreement suggest a multi-part test wherein the following factors, analyzed below, must be considered:

(1) legitimacy of the objective, and the
(2) necessity of the measure—including:
    (a) its reasonableness, and
    (b) the risk of non-fulfillment of the legitimate objective.

1. Legitimate Objectives

Technical regulations must fulfill a legitimate objective. Examples of legitimate objectives are set forth in a *non-exclusive* list in Article 2.2. Legitimate objectives for technical regulations include:

- National security requirements
- Prevention of deceptive practices
- Protection of human health or safety
- Protection of animal life or health
- Protection of the environment

The phrase "legitimate objective" is not used in the analogous provision relating to standards.[57] However, there is no reason to believe that the objectives enumerated for technical regulations would not be considered legitimate for "standards". This point has not yet been addressed in a dispute settlement proceeding.

Many of the objectives deemed legitimate for the purpose of technical regulations will be familiar to readers as exceptions under GATT Article XX (General Exceptions) and Article XXI (National Security).[58]

Other objectives that are probably legitimate for TBT purposes but are not listed in Article 2.2 include:

(1) Product quality: regulations and standards establishing quality norms are widely applied to grade and standardize products, including agricultural products and consumer goods.
(2) Product compatibility/uniformity: Regulations and standards establishing norms regarding voltage, amperage, wattage, bandwidth, size, form, unit of

[57] ¶ E of the Code of Good Practice.

[58] Some of the panel reports interpreting Article XX of GATT 1947 may have influenced the development of the legitimate exceptions contained in Article 2.2 of the TBT Agreement. *See, e.g., Thailand—Restrictions on Importation of and Internal Taxes of Cigarettes*, Report of the Panel, BISD 39S/155 (1990); *United States—Restrictions on Imports of Tuna*, Report of the Panel, BISD 40S/155, *reprinted in* 30 ILM 1594 (1991) (unadopted); *United States—Restrictions on Imports of Tuna*, Report of the Panel, *reprinted in* 33 ILM 842 (1994) (unadopted); and *United States—Taxes on Automobiles*, Report of the Panel, *reprinted in* 33 ILM 1399 (1994) (unadopted).

> measurement, etc. are widely applied to household appliances, communications gear (radios and televisions), computer equipment, automobiles, and many other technical products. Such product standardization facilitates economies of scale, and may also serve to improve consumer confidence.

Regulations and standards furthering product quality and product compatibility/uniformity exist throughout the developed world, and increasingly in developing countries. They have not been the subject of a panel proceeding under the TBT Agreement. The drafters' failure to specifically identify these objectives in Article 2.2 of the TBT Agreement as "legitimate objectives" may have been an oversight given that their importance as objectives of the TBT Agreement is suggested in the Agreement's preamble.[59]

A much more controversial question at the "outer limits" of an analysis of the TBT Agreement is whether labor and human rights objectives should be considered among the "legitimate objectives" for purposes of Article 2.2 of the TBT Agreement. At the root of this question one finds other additional and controversial WTO issues, such as the applicability of the TBT Agreement to NPR-PPMs, and the relationship between the TBT Agreement and international labor and human rights conventions. One also finds other questions including whether human rights and labor norms are the type of standardization activity the Members intended to regulate when they negotiated the TBT Agreement, and whether the TBT Agreement is really the right legal instrument for addressing cross-border human rights and labor norms.[60]

Labor and human rights objectives are not specifically mentioned in Article 2.2 of the TBT Agreement as legitimate objectives. Nevertheless, the protection of human life and health is deemed a legitimate objective. Just conceivably this provision might be "stretched" to encompass certain labor and human rights objectives. Although from a trade-policy perspective it was once easy to argue that when NPR-PPMs are at issue the TBT Agreement does not apply, this question seems to have become more complicated in light of the Appellate Body's decision in *U.S.—Shrimp* (Article 21.5 proceeding) wherein the United States successfully invoked GATT Article XX to justify import restrictions against shrimp that were not caught in conformity with U.S. environmental laws (an NPR-PPM).[61] *U.S.—Shrimp* was, of course, not a TBT decision, and any such argument would only be by analogy.

The relationship between the WTO Agreement and human rights and labor norms is the subject of several chapters in this book.[62] It need only be pointed out here that including labor and human rights norms in the WTO framework is controversial, and opposed by many developing country Members. Developing country Members tend to view labor and human rights norms, and their application and supervision, as being within the scope of

[59] The preamble of the TBT Agreement is reproduced *supra* note 2.

[60] Many other unanswered questions exist. Are U.N. organizations, such as the International Labor Organization, international standardizing bodies within the meaning of the TBT Agreement? Annex 1 ¶ 4 of the TBT Agreement defines an "international body or system" as a "[b]ody or system whose membership is open to the relevant bodies of at least all Members." More generally, how should principles of public international law, such as the primacy of certain human rights norms, and the responsibility of States under certain international human rights treaties and labor agreements, be treated from the perspective of the TBT Agreement?

[61] *See supra* note 28 and accompanying text. The U.S. measure was only authorized after Malaysia's continued refusal to enter into an international cooperative arrangement that would have protected certain endangered sea turtles from being killed when shrimp are netted.

[62] *See* Chapters 59–62 of this book, where these subjects are addressed in detail.

other international agreements and organizations.[63] Many developing countries also fear that labor and human rights norms will be invoked by developed countries for protectionist purposes, and that the labor and human rights practices of certain developing countries may make them particularly vulnerable to cross-border trade measures, enacted for what developed countries allege to be human rights and labor motives.

2. Necessity

The concept of "necessity" is found in the provisions applicable to regulations, standards and conformity assessment procedures.[64] Article 2.2 of the TBT Agreement provides that "technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create." It is probable that the negotiators were influenced by language in panel reports defining "necessary" within the context of GATT Article XX (General Exceptions). In the *Thai Cigarettes* dispute a GATT Panel concluded that a measure could be considered to be "necessary" in terms of GATT Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which a contracting party could "*reasonably*" be expected to employ to achieve its regulatory (health policy) objective.[65]

The term "reasonable" does not appear in the definition of "necessary" in the TBT Agreement, but without the requirement that a less restrictive trade measure be reasonably available, the "necessity" test would be unworkable—establishing a standard that would be extraordinarily difficult to meet. Legitimate TBT measures might be found to violate the TBT Agreement too easily, and as a result the regulatory autonomy and sovereignty of WTO Members could come under considerable challenge.[66] Therefore, it seems certain that a requirement of reasonableness will be read into TBT Article 2.2, as it was into GATT Article XX by GATT panels and the Appellate Body.

In both the *Korea—Beef* [67] and the *EC—Asbestos*[68] decisions the Appellate Body examined what constitutes a "reasonably available" measure for purposes of the exceptions set forth in GATT Article XX(b) and (d). The Appellate Body found that: (1) a determination of whether a WTO consistent alternative measure is reasonably available requires a "weighing and balancing process" in which an assessment is made as to whether the alternative measure "contributes to the realization of the end pursued";[69] (2) the more vital or important the common interests or values pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends;[70] (3) a measure should be sufficient to achieve a member's chosen level of health protection;[71] and (4) a measure does not cease to be "reasonably" available simply because it involves administrative

[63] For example the International Labor Organization, the various United Nations human rights organizations, and the instruments produced by these organizations.

[64] Article 2.2, ¶ E of the Code of Good Practice, and Article 5.1.2 respectively.

[65] *Thailand—Taxes On Cigarettes*, *supra* note 57, ¶¶ 74–75. The "least restrictive trade measure test" is given voice in the Article 2.2 definition of "necessary".

[66] *See generally* REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW (Thomas Cottier and Petros C. Mavroidis eds. 2000).

[67] *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R (2001) ("*Korea—Beef")*, ¶¶ 159–166.

[68] *EC—Asbestos*, *supra* note 11, ¶¶ 169–175.

[69] *Id.* ¶ 171 (*citing Korea-Beef*, *supra* note 66, ¶¶ 166 and 163).

[70] *Id.* ¶ 172 (*citing Korea-Beef*, *supra* note 66, ¶ 162.)

[71] *Id.* ¶ 174.

difficulties for a Member.[72] It is probable that a panel or the Appellate Body would read a similar test into the TBT Agreement.

The evaluation of whether a technical regulation is more trade-restrictive than necessary to fulfill a legitimate objective requires consideration of the "risks non-fulfillment [of the legitimate objective] would create." A non-exclusive list of elements that can be considered in an examination of the risk of not fulfilling a legitimate objective is provided in Article 2.2 of the TBT Agreement:

- available scientific and technical information,
- related processing technology, and
- intended end-uses of products.

This assessment of risk is different from the formal science-based risk assessment required in the SPS Agreement,[73] as science if relevant is only one component to be taken into account. Furthermore, many of the matters for which technical regulations and standards are applied are not closely related to scientific considerations (*e.g.*, consumer and worker protection). Although it would seem that this examination of risk should be related to the reasonableness of the TBT measure and therefore its necessity, like most of the TBT Agreement, no decisions interpreting this provision exist.

No mention of an analysis of the "risks" of non-fulfillment is present in the analagous provisions of the TBT Agreement governing standards and conformity assessment proceedings, but the derogations discussed in Part V(F), which are related to urgent problems of safety, health or environment, may imply examining the risk of not fulfilling a legitimate objective.

The necessity test is further elaborated in Article 2.3 of the TBT Agreement which sets forth provisions governing changed circumstances. Article 2.3 provides that:

> Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

This provision implies, among other things, a continuing obligation to review technical regulations in light of new objectives, new circumstances and new technological developments.

Changed circumstances are not mentioned in the Code of Good Practice, but the concept nevertheless seems implicit in assuring that standards do not become unnecessary obstacles to international trade. This is further illustrated by Article 5.2.7 (applicable to conformity assessment procedures) which limits the conformity assessment procedures employed to verify that a standard is met when product specifications have been changed. If a product's specifications are changed after the product has been found to conform with a technical regulation or standard, pursuant to Article 5.2.7 the conformity assessment procedure for the modified product is to be limited to what is necessary to provide adequate confidence that the product still conforms with the technical regulation or standard. This provision assures that only necessary conformity assessments will be conducted and reduces the potential that conformity assessments will be applied to impede trade.[74]

[72] *Id.* ¶ 169 (*citing United States—Standards for Reformulated and Conventional Gasoline*, Report of the Panel, WT/DS2 (1995)).

[73] *See* Chapter 7 of this book.

[74] Instances may nevertheless arise when significant changes in a product's specifications necessitate a complete conformity reassessment.

To summarize this rather long discussion of necessity, the "necessity test" requires that a given trade measure be the least trade-restrictive measure that would achieve a legitimate policy goal. A requirement of reasonableness should be read into this test, thereby allowing a weighing and balancing of the measure in terms of the end pursued and the risk of non-fulfillment of the legitimate objective.[75] There is also a continuing obligation to assess changed circumstances, and to alter a TBT measure in the event of changed circumstances to assure that the trade measure remains the least trade-restrictive.

C. Harmonization—Use of Relevant International Standards

As a general rule, Members are encouraged to participate in the international harmonization of standards, and to use agreed international standards as a basis for domestic technical regulations, standards and conformity assessment procedures.[76] The use of technical regulations that are in accordance with relevant international standards to achieve one of the legitimate objectives explicitly mentioned in Article 2.2 of the TBT Agreement[77] is rebuttably presumed not to create an unnecessary obstacle to international trade.

The emphasis on harmonization in the TBT Agreement is based on the view among WTO Members that (a) trade is disrupted less if Members use internationally-agreed standards as a basis for domestic regulations and standards, (b) producers and consumers benefit from a degree of harmonization (in part because of economies of scale and technical compatibility), and that (c) conformity assessments are facilitated if Members follow international guidelines and procedures for such assessments.

With respect to technical regulations, there are three provisions that will be referred to in the following discussion. These provisions are set forth in their entirety:

> 2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.
>
> 2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.
>
> 2.6 With a view to harmonizing technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.

In general, analogous provisions exist and have already been noted for standards and conformity assessment procedures.[78]

Turning to the last and least complicated provision first, Article 2.6 requires Members, within the limits of their resources, to participate in the work of international

[75] This may be one step closer to a requirement that a trade measure be proportional and adequate.

[76] The following provisions govern harmonization: Article 2.4–2.6 (technical regulations); Paragraphs F–G of the Code of Good Practice (standards); and Articles 5.4 and 5.5 (conformity assessment procedures).

[77] *See supra* Part V(B)(1).

[78] *Id.*

standardization organizations with respect to products for which they have adopted or expect to adopt technical regulations and standards. Members also have a similar participation obligation with respect to the preparation of standards and "guides and recommendations" for conformity assessment procedures.[79]

The remaining provisions, Articles 2.4 and 2.5, were the subject of the *EC—Sardines* dispute and merit considerable attention. Pursuant to Article 2.4, the use of *relevant* international standards, or the relevant parts of an international standard, as a *basis* for domestic technical regulations, is *required* "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued". Thus, even a measure that is non-discriminatory may violate the TBT Agreement if it is not based on international standards. Article 2.4 provides three examples of when it might not be appropriate to use international standards as a basis for domestic technical regulations: (1) fundamental climatic factors, (2) fundamental geographical factors, and (3) fundamental technological problems.

The Panel and the Appellate Body decisions in *EC—Sardines* addressed many points (underlined above) relevant to the interpretation of TBT Article 2.4. The decision examined whether the standard at issue was relevant; whether the international standard was used as a basis for the EC's technical regulations; and what is meant by the Article 2.4 phrase "ineffective or inappropriate means . . . ". These three points are addressed in the first three subsections below, and Article 2.5 is addressed in the fourth subsection.

1. The Characterization of Codex Standard 94 as a Relevant International Standard

Peru's complaint against the EC measure was predicated on its position that CODEX STAN 94-1981, Rev.1-1995 ("Codex Standard 94") was a relevant international standard for purposes of Article 2.4 of the TBT Agreement. A contrary finding would have meant that Article 2.4 of the TBT Agreement would not have applied. The EC argued that only standards adopted by consensus are relevant international standards. Second, it argued that even if Codex Standard 94 is a standard, it is not relevant since the EC Regulation only covers preserved sardines and Codex Standard 94 covers "sardine-type" products as well as preserved sardines.[80]

With respect to the EC's contention that only standards adopted by consensus are relevant, the Appellate Body found that the Explanatory Note to Annex 1.2 supports the conclusion that consensus is not required for the adoption of a standard.[81]

With respect to the EC's second argument, that Codex Standard 94 was not a relevant international standard, both Parties accepted that the ordinary meaning of the term "relevant" is "bearing on or relating to the matter in hand; pertinent".[82] The EC sought to convince the Appellate Body that the broader scope of Codex Standard 94 meant that it was not "relevant" to the dispute.[83] The Appellate Body reasoned instead that the Codex standard was relevant because it applies to *Sardina pilchardus.*[84] Therefore the standard can be said "to bear upon, relate to, or be pertinent to the EC Regulation because both refer to preserved *Sardina pilchardus.*"[85] It further reasoned that the standard was relevant

[79] These provisions are located in the following TBT provisions: Article 2.6 (technical regulations); ¶ 3(G) of the Code of Good Practice (standards); and Article 5.5 (conformity assessment procedures).

[80] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, ¶ 218.

[81] *Id.* ¶ 222. In relevant part the Explanatory Note to Annex 1.2 of the TBT Agreement provides: "This Agreement covers also documents that are not based on consensus."

[82] *Id.* ¶ 227.

[83] *Id.* ¶ 230.

[84] *Id.* ¶ 231.

[85] *Id.*

because twenty fish species specified in the standard, in addition to *Sardina pilchardus*, were legally affected by the exclusion in the EC Regulation.[86]

2. Whether Codex Standard 94 Was Used as a Basis for the EC Regulation

The EC also appealed the Panel's finding that Codex Standard 94 was not used "as a basis" for the EC Regulation. Section 6.1.1(ii) of Codex Standard 94 provides:

> The name of the product shall be:
>
> . . .
>
> (ii) "X Sardines" *where X is the name of* a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer. (emphasis added)

The EC, relying on the ambiguity of the English language version of this provision, argued that paragraph 6.1.1(ii) of Codex Standard 94 gives each country the option of designating the product at issue "X sardines" or using the common name of the species.[87] More specifically, the EC argued that the phrase: "the common name of the species in accordance with the law and custom of the country in which the product is sold", should be interpreted as a self-standing option for "naming" independent of the formula "X sardines".[88] This would have allowed the EC to restrict the use of the term "Sardines" to *Sardina pilchardus*.

The Appellate Body rejected the EC argument, favoring instead the textual interpretation put forth by the Panel.[89] The Appellate Body found that paragraph 6.1.1(ii) envisages combining the term "sardines" with one of the four alternatives (the X in "X sardines") presented in paragraph 6.1.1(ii), stating "that section 6.1.1(ii) permits the marketing of non-*Sardina pilchardus* as 'sardines' with one of four qualifiers."[90] A review of the French version of the provision, which was also authentic, further confirmed the Appellate Body's interpretation.[91]

The Appellate Body next examined whether the EC used section 6.1.1(ii) "as a basis" for its technical regulation.[92] The EC argued that interpretation of this phrase required consideration of the text as a whole, and that the criterion to be applied is not whether the standard is the "principal constituent" of the technical regulation, but instead whether there is a "rational relationship" between the standard and the technical regulation as regards the substantive aspects of the standard at issue.[93]

The Appellate Body rejected this argument. In seeking to establish the proper meaning of the phrase "as a basis for", which appears in Article 2.4 of the TBT Agreement, the Appellate Body turned first to its decision in *EC—Hormones* where a similar issue was addressed—the meaning of the phrase "based on" which appears in Article 3.1 of the SPS Agreement. This phrase was interpreted in *EC—Hormones* to mean "'stands' or is 'founded' or 'built' upon or 'is supported by' the latter."'[94] The Appellate Body went on

[86] *Id.* ¶ 232.
[87] *Id.* ¶ 236.
[88] *Id.* ¶ 236.
[89] *Id.* ¶¶ 238–239.
[90] *Id.* ¶ 239.
[91] *Id.* ¶ 239.
[92] *Id.* ¶¶ 240–258.
[93] *Id.* ¶ 241.
[94] *Id.* ¶ 242 (*citing EC—Hormones*, *supra* note 34, ¶ 166). In ¶¶ 163–166 of *EC—Hormones* the Appellate Body concluded that "based" does not mean "conform to". In *EC—Sardines* the Appellate Body refrained from deciding whether "as a basis" in Article 2.4 of the TBT Agreement has the same meaning as "based on" in Article 3.1 of the SPS Agreement. *EC—Sardines*, ¶ 244, n.169.

to uphold the Panel's finding that "basis" means "principal constituent" and "fundamental principal or theory",[95] adding that "basis" also means "the main constituent", [a] thing on which anything is constructed", and "a determining principle".[96] The Appellate Body concluded that "there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other."[97]

The Appellate Body found no support in Article 2.4 of the TBT Agreement for the EC's "rational relationship" standard,[98] and further found that an international standard cannot be considered the basis for a technical regulation if the two are contradictory.[99] The Appellate Body next identified a manifest contradiction between the international standard and the EC Regulation, noting that the effect of Article 2 of the EC Regulation was to prohibit preserved fish products prepared from twenty species from being labeled as sardines, while Codex Standard 94 permits these same fish products to be labeled as "X sardines", where X stands for one of four qualifiers.[100] Based on these determinations, the Appellate Body concluded that the Codex standard had not been used "as a basis for" the EC Regulation.[101]

3. Ineffective or Inappropriate Means

Article 2.4 of the TBT Agreement provides an exception to the obligation to use relevant international standards when "such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued. . . ." In its analysis of Article 2.4, the Appellate Body examined the meaning of "ineffective or inappropriate means" as well as the meaning of the term "legitimate objectives".[102] With respect to the first examination, the Appellate Body upheld the Panel's findings that:

> . . . the term "ineffective or inappropriate means" refers to two questions—the question of the *effectiveness* of the measure and the question of the *appropriateness* of the measure—and that these two questions, although closely related, are different in nature. The Panel pointed out that the term "ineffective" "refers to something which is not 'having the function of accomplishing', 'having a result', or 'brought to bear', whereas [the term] 'inappropriate' refers to something which is not 'specially suitable', 'proper', or 'fitting"'.[103]

The Appellate Body also reaffirmed the Panel's finding that:

> . . . in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfillment of the legitimate objective pursued. . . . The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed.[104]

[95] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, ¶ 243.
[96] *Id*. ¶ 244.
[97] *Id.*
[98] *Id*. ¶ 247.
[99] *Id*. ¶¶ 248–249. The Appellate Body also found that the "relevant parts" of the international standard are all of those "that relate to the subject-matter of the challenged prescriptions or requirements." *Id.* ¶¶ 250–251.
[100] *Id*. ¶ 257–258.
[101] *Id*.
[102] *Id.* ¶¶ 285–291.
[103] *Id.* ¶ 285 (*citing* Report of the Panel, ¶ 7.116).
[104] *Id.* (*citing* Report of the Panel, ¶ 7.116).

In the Appellate Body's view, an international standard is effective if it has the capacity to accomplish the legitimate objectives set forth, and it is appropriate if it is suitable for the fulfillment of these objectives.[105] "Ineffective" and "inappropriate" thus have different meanings and it is conceptually possible that a measure could be effective but inappropriate, or appropriate but ineffective.[106]

With respect to the second question, the meaning of the term "legitimate objectives" as used in Article 2.4, the Appellate Body upheld the Panel's finding that the legitimate objectives referred to in Article 2.4 must be interpreted in the context of Article 2.2 which also refers to legitimate objectives.[107] The Appellate Body noted two implications of this finding: (1) the legitimate objectives within Article 2.4 covered those enumerated in Article 2.2 (national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment), and that (2) the use of the term "*inter alia*" in Article 2.2 means that the legitimate objectives in Article 2.4 extend beyond the list of specific objectives listed in Article 2.2.[108]

Applying these findings to the facts before it in *EC—Sardines*, the Appellate Body determined that the Complainant had the burden of establishing that the international standard was an effective and appropriate means for the fulfillment of the "legitimate objectives" pursued through the EC Regulation—namely market transparency, consumer protection, and fair competition.[109] To satisfy this burden of proof the Complainant must establish a *prima facie* case.[110] If the Complainant succeeds in doing so, then a presumption arises that the Respondent must rebut in order for its defense to prevail.[111] If the Complainant establishes a *prima facie* case that the Respondent is unable to rebut, the Respondent must, consistent with its obligation under the TBT Agreement, use the international standard "as a basis for" its regulations as the international standard will have been shown to be both effective and appropriate to fulfill the "legitimate objectives" being pursued by the Respondent.[112]

The Appellate Body thus found that the burden of proof standard enunciated in *EC—Hormones*,[113] an SPS dispute, should also be applied in *EC—Sardines*. The Complainant challenging a measure as inconsistent with Article 2.4 of the TBT Agreement bears the burden of proving that: (1) the standard was not used as a basis for the challenged regulation, and (2) the international standard is not ineffective and inappropriate to fulfill the legitimate objectives at issue.[114]

4. Rebuttable Presumption Favoring the Use of Certain Harmonized Standards

Pursuant to Article 2.5 a Member that prepares, adopts or applies a technical regulation that may have a significant effect on the trade of other Members shall upon the request of another Member explain the justification of the regulation in terms of

[105] *Id.* ¶ 288.
[106] *Id.* ¶ 289 (*citing* Report of the Panel, ¶ 7.116).
[107] *Id.* ¶ 286.
[108] *Id.*
[109] *Id.* ¶ 287. Note that fair competition (in particular) is not a legitimate objective explicitly set forth in Article 2.2.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *EC—Hormones*, *supra* note 34.
[114] *EC—Sardines*, Report of the Appellate Body, *supra* note 12, ¶¶ 275–282.

Articles 2.2–2.4 of the TBT Agreement. In *EC—Sardines* the Appellate Body notes that the Panel was concerned the Complainant might not be in a position to spell out the legitimate objectives of the technical regulation and to assess the appropriateness of the relevant international standard.[115] The Appellate Body found that this concern was not justified since the TBT Agreement established a mechanism in Article 2.5 for Members to seek information about the objectives of technical regulations.[116] Members were bound to abide by their obligation to provide information pursuant to this provision in good faith and in accordance with the principle of *pacta sunt servanda* embodied in Article 26 of the Vienna Convention, and it could not be assumed that they would not comply with their obligation.[117] In addition, Article 10.1 of the TBT Agreement requires Members to establish an "enquiry point" for purposes of addressing queries from other Members. This serves as a further mechanism for Members to obtain information about the objectives of particular technical regulations, and the appropriateness and effectiveness of international standards to serve as a basis for these technical regulations.[118]

If a Member bases a domestic regulation (1) on an international standard, and if (2) the domestic regulation is for one of the legitimate objectives explicitly mentioned in Article 2.2, pursuant to Article 2.5 it is "rebuttably presumed" not to create an unnecessary obstacle to international trade.[119] This presumption makes it more difficult for a Member challenging the WTO-consistency of a technical regulation based on an international standard to make a *prima facie* case that the trade measure at issues creates an unnecessary obstacle to international trade. This portion of Article 2.5 has not yet been tested. In *EC—Sardines* both the Panel and the Appellate Body found that the technical regulation at issue was not based on an international standard so this presumption was inapplicable.

It is conceivable that the rebuttable presumption that a measure does not create an unnecessary obstacle to international trade will provide a mild incentive for international harmonization as well as for reliance on international standards. It would however appear that as a result of the Appellate Body's decision to graft the *EC—Hormones* interpretation of how the burden of proof should be applied into the TBT Agreement, the Complainant already shoulders a sizable burden of proof. It is unclear how Article 2.5 affects or alters the application of this burden of proof.

D. Equivalence and Mutual Recognition

The TBT Agreement incorporates provisions on both equivalence and mutual recognition.[120] Members are encouraged to accept foreign technical regulations as "equivalent" to their own technical regulations (even if they differ) provided that they fulfill the same objectives.[121] Likewise, Members are encouraged to accept foreign conformity assessment procedures as "equivalent" to their own procedures provided that they are assured of conformity with standards and technical regulations equivalent to their own.[122] The notion of equivalence is not mentioned in the Code of Good Practice (applicable to standards), nor is it defined in the TBT Agreement.

[115] *Id.* ¶ 276.
[116] *Id.* ¶ 277.
[117] *Id.* ¶ 278.
[118] *Id.* ¶ 279.
[119] These legitimate objectives are discussed *supra* Part V(B)(1).
[120] The provisions on equivalence and mutual recognition are found in the following TBT articles: equivalence for technical regulation—Article 2.7; equivalence for conformity assessment procedures Article 6.1; mutual recognition for conformity assessment procedures—Article 6.3.
[121] TBT Article 2.7.
[122] TBT Article 6.1.

Members are encouraged to enter into negotiations for the mutual recognition of the results of conformity assessment procedures.[123] By accepting the results of another Member's conformity assessment procedures, testing costs are reduced and less time is lost. Confidence in a trading partner's testing procedures would seem to be a prerequisite for the acceptance of a mutual recognition agreement.[124]

Although mutual recognition and equivalence may be worthwhile objectives, there is skepticism among some WTO Members concerning the effectiveness of international standardization efforts, and the extent to which equivalence, mutual recognition (and for that matter harmonization) can be increased between countries at different levels of development.

E. Transparency

"Transparency" is the process whereby the creation, terms, and application of technical regulations, standards and conformity assessment procedures are made public, and opportunities are provided for the public (including other Members) to comment on proposed technical regulations, standards and conformity assessment procedures. Transparency obligations are found throughout the TBT Agreement.[125] They take several different forms and are applicable at different points in the promulgation and application of a TBT measure. With respect to standards, some of these obligations are only applicable to Members when the relevant standardizing bodies have accepted the Code of Good Practice.

Transparency obligations generally include the following requirements:

1) *Pre-enactment publication*: A WTO Member is required to publish a notice prior to the enactment of a technical regulation, standard or conformity assessment procedure ("measure").[126] The publication and timing of the notice must be sufficient to allow interested parties to become acquainted with the proposed measure at an early appropriate stage.The TBT Agreement does not specify where the notice must be published.
2) *Notification*: A Member is required to notify other WTO Members through the WTO Secretariat prior to the enactment of a technical regulation or a conformity assessment procedure (when amendments to the measure can still be introduced). This notification must include the products to be covered and a brief indication of the objective and rationale for the technical regulation or procedure.[127] No such obligation is imposed with respect to standards.
3) *Provision of copies*: Upon request, a WTO Member must provide other Members with copies of draft technical regulations, standards, and conformity assessment procedures.[128]
4) *Allowance of time for comments*: Prior to the enactment of a measure, a Member must allow other Members a reasonable time for written comment, and for

[123] TBT Article 6.3.
[124] TBT Article 6.
[125] Transparency provisions are found in: Articles 2.9, 10 (technical regulations); Article 10 and Paragraphs J-Q of the Code of Good Practice (standards); and Articles 5.5 and 10 (conformity assessment procedures).
[126] Pre-implementation notice provisions are contained with respect to technical regulations in Article 2.9.1; with respect to standards in ¶ L of the Code of Good Practice; and with respect to conformity assessment procedures in Article 5.6.1.
[127] Notification is required by: Article 2.9.2 (technical regulations); and Article 5.6.2 (conformity assessment procedures).
[128] The provision of copies is required by Article 2.9.3 (technical regulations), ¶ M of the Code of Good Practice (Standards); and Article 5.6.3 (conformity assessment procedures).

discussions concerning proposed measures.[129] For draft standards, a sixty day period must be provided for comments.[130]

5) *Publication of measures*: WTO Members are obliged to publish or otherwise make available technical regulations, standards and conformity assessment procedures to other Members and to interested parties.[131]
6) *Creation of inquiry points*: Members are required to establish "inquiry points" to answer reasonable inquiries from and provide relevant documents to Members and other interested parties concerning technical regulations, standards and conformity assessment procedures.[132] Inquiry points have the responsibility to provide information concerning a WTO Member's participation in regional and international standardization and conformity assessment bodies. Inquiry points also have the responsibility of providing certain information concerning the activities of non-governmental standardization organizations.[133]

For example, a Member seeking to enact an environmental law regulating engine exhaust (a technical regulation) would be required, prior to enactment of the law, to provide drafts of the measure to other Members, allow comments from them, publish the measure, and notify Members through the WTO Secretariat of the measure. A Member's inquiry point would be responsible for providing information and relevant documents relating to the law.

F. Derogations from Transparency in the Event of Urgent Problems

Transparency measures applicable prior to the adoption of technical regulations and conformity assessment procedures may be omitted in the event of urgent problems related to safety, health, the environment or national security.[134] In such cases, *post-facto* obligations exist to notify Members of the measures enacted, make copies available upon request, and to consider comments from other Members. With respect to draft standards, the sixty day period allowed for comment may be shortened in the event of urgent problems related to safety, health, or the environment.

For example, if State A discovers that a type of packing material produces deadly emissions when burned and immediately outlaws its production and use within its territory, it must immediately notify other WTO members of the ban, make copies of the ban available upon request, and permit comments from all Members on the regulatory measure.

VI. Other Important Provisions of the TBT Agreement

A. Technical Assistance—Article 11

Technical assistance is the provision of expert assistance to developing countries by other Members, the WTO Secretariat, or third parties. TBT Article 11 sets forth a broad range

[129] Written comments must be permitted with respect to technical regulations in Article 2.9.4; standards: Paragraphs L and N of the Code of Good Practice; and conformity assessment procedures: Article 5.6.4.
[130] ¶ L of the Code of Good Practice (standards).
[131] Publication is required with respect to technical regulations in Article 2.11; standards in ¶ O of the Code of Good Practice, and in Article 5.8 for conformity assessment procedures.
[132] Article 10.
[133] Article 10.1.4 and 10.3.
[134] Provisions applicable to urgent problems appear in the following provisions: Technical Regulations: Article 2.10; Standards: Annex 3, ¶ L, Code of Good Practice; Conformity Assessment Procedures: Article 5.7.

of technical assistance provisions. WTO Members are required to:

- Advise other Members, especially developing country Members on the preparation of technical regulations.
- Provide technical assistance, in particular to developing countries, regarding the establishment of national standardizing bodies, and participation in these bodies, and encourage their national standardizing bodies to do likewise.
- Take reasonable measures to arrange for regulatory bodies within their territories to advise other Members, in particular developing country members. Provide technical assistance on agreed terms regarding the establishment of regulatory and conformity assessment bodies, and assistance on the methods by which their technical regulations can best be met.
- Take reasonable measures, in particular with respect to developing country Members, to advise on the establishment of bodies for the assessment of conformity with standards.
- Grant technical assistance, especially to developing country Members, regarding the steps that should be taken by foreign producers seeking access to conformity assessment systems operated by governmental and non-governmental bodies.
- Encourage organizations within their territory which are members of, or participants in, international or regional conformity assessment systems to advise other Members, and consider requests for technical assistance from other Members (in particular developing countries) regarding the establishment of institutions which would enable relevant organizations within their territories to fulfill the obligations of membership or participation in international and regional conformity assessment systems.
- Grant other Members, especially developing country Members, technical assistance on the institutions and legal framework of international and regional systems for conformity assessment sufficient to enable them to fulfill the obligations of membership or participation in such systems.
- Give priority to the needs of the least-developed country Members.

B. Special and Differential Treatment—Article 12

The TBT Agreement requires Members, in particular developed country Members, to provide more favorable treatment to developing countries based on the financial and trade needs of the developing country in question. Article 12 of the TBT Agreement sets forth a broad range of provisions "intended" to provide more favorable treatment to developing countries.[135] Although Article 12 does not provide developing countries

[135] More specifically, Article 12 requires that Members provide differential and more favorable treatment to developing countries by:

— Giving particular attention to the provisions of this Agreement concerning the rights of developing country Members.
— Taking into account the special development, financial and trade needs of developing country Members in the implementation of the TBT Agreement at the national level.
— Taking into account the special development, financial and trade needs of developing country Members in the implementation of the TBT Agreement*'s* institutional arrangements.
— Assuring that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members. Members are to do this by taking into account the special development, financial and trade needs of developing country Members in the preparation and application of technical regulations, standards and conformity assessment procedures.

with permanent derogations to the substantive provisions of the TBT Agreement, the pro-developing country character of Article 12 is unambiguous although not particularly meaningful. Many of the provisions are non-binding and probably not enforceable.

The provisions set forth in Article 12 related to special and differential treatment ("SDT") take several different forms. They require Members to:

(a) *Recognize and to take into account* the special needs of developing countries in the promulgation and application of technical regulations, standards and conformity assessment procedures. Factors to be recognized include the developmental, financial and trade needs of developing country Members, and the preservation of indigenous technology and production methods.
(b) *Facilitate the participation* of developing countries in international standardization and conformity assessment bodies. One means of facilitation is to encourage developing country participation in the standardization and conformity assessment process; a second means is to take measures to ensure that international standards are prepared for products of interest to developing countries.

— Recognizing that developing country Members may adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs.
— Recognizing that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.
— Recognizing and taking fully into account that developing country Members may face special problems, including institutional and infrastructure problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures.
— Recognizing and taking fully into account that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement.
— Taking reasonable measures to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.
— Taking reasonable measures to ensure that international standardizing bodies, upon request of developing country Members (if practicable) prepare international standards concerning products of special interest to developing country Members.
— Providing, in accordance with TBT Article 11, technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, Members are required to take into account the stage of development of the requesting Members, in particular least-developed country Members. This requirement is found in Article 12.7.
— Bearing in mind during "consultations" the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures.
— Granting time-limited exceptions to obligations arising under the TBT Agreement. (This is potentially a very important form of special and differential treatment.)
— Taking into account, during consultations, the special difficulties experienced by developing countries in regard to formulating and implementing technical regulations, standards, and conformity assessment procedures; taking into account the special needs of developing countries with respect to financing, trade and development. This last requirement, which appears in TBT Article 12.9, is not well drafted. Some may seek to argue that assistance concerning financing, trade and development is only required during consultations. If so, such assistance would be too late to be of much use.

(c) *Provide technical assistance*.[136]
(d) *Grant time-limited exceptions*:[137] pursuant to Article 12.8, the TBT Committee is authorized to grant a "time-limited exception" to obligations under the TBT Agreement in order to ensure that developing countries are able to comply with the TBT Agreement. In granting such exceptions the Committee is to consider:
— The special problems experienced by developing countries in the preparation and application of technical regulations, standards and conformity assessment procedures,
— The special development and trade needs of the developing country Member, and
— The stage of technological development of the particular developing country.

C. Consultations And Dispute Settlement—Article 14

Pursuant to Article 14.1 of the TBT Agreement, alleged violations of the TBT Agreement are treated pursuant to the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied in the WTO Agreement's Dispute Settlement Understanding ("DSU").[138] This is the normal manner in which WTO disputes are handled.

Under Article 14.2 of the Agreement parties to a TBT dispute or panels hearing a TBT dispute may establish a "technical expert group" to assist in questions requiring technical expertise. Annex 2 of the TBT Agreement sets forth a procedure governing the role of experts. In particular, it provides who may serve as an expert, establishes the authority of experts to seek information and advice, protects confidential information, and allows the Members concerned (parties and third parties to a dispute) to comment on the draft report developed by a Technical Expert Group.

Article 14.4 provides that the dispute settlement provisions can be invoked when a Member considers that another Member has not achieved satisfactory results under TBT Articles 3,[139] 4,[140] 7, 8 and 9[141] and its trade interests are "significantly affected". Each of these five provisions impose an obligation on Members to take "reasonable measures" to ensure that local government bodies, non-government bodies, and international and regional systems, comply with the terms of the TBT Agreement. In the event that Members do not take reasonable measures to ensure compliance with the applicable provisions, they are responsible for the acts of the various bodies mentioned in Articles 3, 4, 7, 8 and 9 as if the bodies were themselves Members of the WTO

As of the time of writing,[142] there have only been two disputes where the TBT Agreement received significant attention, *EC—Asbestos* and *EC—Sardines*. However only *EC—Sardines* was decided based on the TBT Agreement. These decisions have been discussed throughout this chapter. Some miscellaneous points not treated above are discussed in the two subsections that follow.

[136] *See* TBT Article 11 and Article 12.7.
[137] *See* Article 12.8 and the discussion of Article 13 *infra* Part VI(D).
[138] The DSU is contained in Annex 2 of the WTO Agreement.
[139] Article 3 governs the Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies.
[140] Article 4 governs the Preparation, Adoption and Application of Standards.
[141] Article 7, 8 and 9 govern respectively: Procedures for Assessment of Conformity by Local Government Bodies, Procedures for Assessment of Conformity by Non-Governmental Bodies and International and Regional Systems.
[142] August 2004.

1. EC—Asbestos (Miscellaneous Points)

The *Asbestos* decision examined the applicability of the TBT Agreement, and more particularly what constitutes a technical regulation, but did not examine substantive issues involving the TBT Agreement. What constitutes a technical regulation has already been examined in Part III(A)(1).

EC—Asbestos also dealt with the relationship between the GATT 1994 and the TBT Agreement and the order of analysis in a dispute settlement proceeding when both GATT 1994 and the TBT Agreement are applicable to a particular trade measure. The Panel in *EC—Asbestos* found:

> Both the GATT 1994 and the TBT Agreement form part of Annex 1A to the WTO Agreement and may apply to the measures in question. Consequently, although we do not in principle exclude application of the TBT Agreement and/or the GATT 1994 to the Decree, we have to determine the order in which we should consider this case. According to the Appellate Body in *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, when the GATT 1994 and another Agreement in Annex 1A appear *a priori* to apply to the measure in question, the latter should be examined on the basis of the Agreement that deals "specifically, and in detail," with such measures.[143]

The Panel first examined whether the trade measure at issue was a technical regulation. If it were a technical regulation within the meaning of the TBT Agreement, the TBT Agreement would apply, since it is the agreement that deals with the measure in the "most specific and most detailed" manner.[144] The Panel however ruled that the portion of the decree containing the import ban was not a technical regulation pursuant to the TBT Agreement.[145] Although this finding was reversed by the Appellate Body,[146] the Appellate Body chose not to complete the TBT analysis based on the unavailability of undisputed facts and sufficient factual findings at the Panel level, and based on its determination that the "novel" TBT claims had not been explored in depth before the Appellate Body.[147]

2. EC—Sardines (Miscellaneous Points)

EC—Sardines was the first dispute decided entirely based on the TBT Agreement. It will almost certainly encourage further TBT disputes. Recalling the Appellate Body's decision in *EC—Bananas III* wherein the Appellate Body stated that when two agreements apply simultaneously, a Panel should consider the more specific agreement before the more general agreement,[148] the Panel acceded to Peru's request to examine its TBT claim before its GATT Article III claim.[149]

Peru's primary argument, and the one that prevailed before both the Panel and the Appellate Body, was that the EC measure was inconsistent with Article 2.4 of the TBT Agreement because the EC did not use Codex Standard 94 as a basis for its technical regulation despite the fact that the standard would be an effective and appropriate means to

[143] *European Communities—Measures Affecting Asbestos and Asbestos-containing Products*, Report of the Panel, WT/DS135/R (2001) ¶ 8.16.
[144] *Id.* ¶ 8.17.
[145] *Id.* ¶¶ 8.72–8.73.
[146] *EC—Asbestos*, Report of the Appellate Body, *supra* note 11, ¶ 76.
[147] *Id.* ¶¶ 79–83.
[148] *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R (1997), ¶ 204.
[149] *EC—Sardines*, Report of the Panel, *supra* note 12, ¶ 7.15.

fulfill the legitimate objectives of the EC Regulation.[150] Neither the Panel nor the Appellate Body reached Articles 2.1 and 2.2 of the TBT Agreement or Article III of the GATT. As a result, and a point worthy of emphasis, each made a finding of a violation of Article 2.4 of the TBT Agreement without a formal finding that the EC's trade measure was discriminatory. The important TBT issues in this decision have already been examined in depth above.

D. Institutional Considerations

1. The Work of the Committee on Technical Barriers to Trade

Article 13 of the TBT Agreement creates a Committee on Technical Barriers to Trade. Representatives of each of the Members are entitled to participate. The Committee meets as necessary, but at least once a year. The TBT Committee has numerous responsibilities: (1) it provides Members with an opportunity to consult on TBT issues; (2) it carries out whatever responsibilities the Members may assign to it, and establishes working parties and other bodies to carry out these responsibilities; (3) it works to avoid duplication between its activities and the work of governments in other technical bodies; and (4) it grants "time-limited exceptions" to obligations arising under the TBT Agreement.[151]

2. Built-in Reviews of the TBT Agreement—Articles 12.10, 15.3 and 15.4.

The TBT Agreement contains many provisions that mandate its review by the Members. Article 15.3 of the TBT Agreement requires that the TBT Committee annually review the implementation and operation of the TBT Agreement taking into account the objectives of the Agreement. Article 15.4 requires that every three years the TBT Committee must conduct a review of the implementation and operation of the TBT Agreement, with a view to recommending adjustments of the rights and obligations of the Agreement where necessary. This review is designed to ensure mutual economic advantage and the balance of rights and obligations, without prejudice to the provisions concerning special and differential treatment contained in Article 12. Based on the implementation experience, the TBT Committee is entitled to submit proposals to amend the TBT Agreement to the Council. Two triennial reviews have been held, the first in 1997,[152] and the second in 2000.[153] These documents, referenced by number, are available on the WTO's web site. They offer a somewhat critical review of the successes and failures under the TBT Agreement.[154]

The TBT Committee is also required pursuant to TBT Article 12.10 to "examine periodically the special and differential treatment, as laid down in this Agreement, granted

[150] *Id*. ¶ 3.1(a).

[151] *See* TBT Articles 12.8 and 13. This point is mentioned *supra* Part V(B) in the discussion of special and differential treatment.

[152] WTO Document No. G/TBT/5 (97–5092) November 19, 1997.

[153] WTO Document No. G/TBT/9 (00–4811) November 13, 2000.

[154] The first report noted, among other findings, that the status of implementation of the TBT Agreement was not satisfactory. Transparency and developing country concerns (including the need for more technical assistance, and the need to make operational the special and differential treatment provisions) are also set forth. The second report provides a list detailing which Members have notified inquiry points and measures taken to ensure the implementation of the TBT Agreement. Activities organized by the TBT Committee are also listed. Information exchange, capacity building, technical assistance and special and differential treatment were also concerns. Again, the TBT Committee found that the status of implementation needed to be improved.

to developing country Members on national and international levels." It has done so in each of two triennial reviews conducted pursuant to Article 15.4.

3. Web Resources

The WTO maintains a comprehensive website at <www.wto.org>. One can find background information concerning the TBT Agreement, the complete text of the TBT Agreement, the results of the annual and triennial TBT Committee Reviews, Member notifications, training information, national TBT inquiry points, minutes of TBT Committee meetings, working documents of the TBT Committee, a list of standardizing bodies that have accepted the Code of Good Practice, and many other TBT-related documents.

4. Doha Work Program

The TBT Agreement was not the subject of major attention during the Doha Ministerial meeting. The "Decision on Implementation-Related Issues and Concerns"[155] does however define the "reasonable interval" between publication and entry into force of a technical regulation as a period of not less than six months (except in certain specified urgent circumstances).[156] In addition, one crosscutting issue present in the same instrument may have implications for the TBT Agreement. The Decision on Implementation-Related Issues and Concerns instructs the Committee on Trade and Development to identify mandatory and non-binding provisions governing special and differential treatment and to consider the implications of converting non-binding SDT provisions into mandatory provisions, as well as to consider how SDT provisions can be made more effective. Given that the SDT provisions in the TBT Agreement are not particularly meaningful for developing countries, and since the TBT Agreement's preamble does hold out some hope of benefits for developing countries,[157] these provisions may be ripe for review during the negotiations on the Doha Work Program.

VII. Conclusion

The TBT Agreement seeks to achieve a balance between permitting Members the regulatory autonomy to protect legitimate interests (through the use of technical regulations, standards and conformity assessment procedures), and assuring that technical regulations, standards and conformity assessment procedures do not become unnecessary obstacles to international trade. The TBT Agreement cannot be applied too strictly or the legitimate interests of Members will be thwarted. But it cannot be applied too laxly or the value achieved through progressive rounds of tariff reductions will be lost.

Further complicating this fine balance are various actors in civil society with divergent interests. For example, the environmental community is afraid that the TBT Agreement will be applied narrowly and that what they view as "legitimate" environmental measures will not meet the requirements of the TBT Agreement. Likewise, labor and human rights

[155] *Implementation-Related Issues and Concerns*, Decision of November 14, 2001, WTO/MIN(01)/17, November 20, 2001, ¶ 5.2.

[156] *See* Transparency, *supra* Part V(E).

[157] Recital seven of the TBT Agreement's preamble suggests that international standardization can facilitate the transfer of technology to developing countries, but fails to explain how or why. Recital eight expresses the desire of the Members to assist developing countries in formulating and applying technical regulations, standards and conformity assessment procedures.

organizations are concerned that these items are not specifically mentioned in the TBT Agreement—even though the protection of human life and health is deemed a legitimate interest in Article 2.2.

On the other side, developing countries are often suspicious that trade measures (technical regulations and standards) allegedly taken by developed countries for social policy goals are in reality for protectionist purposes. Likewise, many in the business community react negatively to the possibility that trade measures will be applied to further social policy objectives for fear of being economically disadvantaged by protectionist measures.

Perhaps as a result of these competing interests, and a desire not to subject the GATT and later the WTO to criticism, until recently panels avoided applying the Tokyo Round Standards Code and now the TBT Agreement, tending to resolve potential TBT cases under GATT rules.[158] With the Appellate Body's decision in the *Asbestos* case holding that the TBT Agreement was applicable to the import ban in question and that it is proper to begin the analysis of a trade measure with the most specific agreement, as well as the 2002 decision in the *Sardines* dispute, this situation is changing. We can expect to see more panels and the Appellate Body deciding regulatory disputes involving trade in goods through the application of the TBT Agreement. We can also expect to see an increase in TBT disputes, primarily because, despite the need for domestic policy autonomy to address legitimate interests, technical regulations, standards, and conformity assessment procedures are sometimes used as protectionist devices.

Since it is probable that TBT disputes will increase, it is time to address another problem during the Doha Round. Although the TBT Agreement contains provisions in favor of developing countries concerning the grant of special and differential treatment and technical assistance, there is a need to increase the level of technical assistance available, and to evaluate whether the provisions governing special and differential treatment are sufficient and effective. It is also time to ascertain whether international standardization efforts have been effective, and the extent to which harmonization, equivalence and mutual recognition can or should be increased.

[158] No case was ever decided under the Tokyo Round Standards Code. Until recently decisions were also avoided under the Uruguay Round TBT Agreement. *See, e.g., United States—Standards for Reformulated and Conventional Gasoline*, *supra* note 71, ¶ 6.43 where, having decided the case based on the provisions of the GATT 1994, the Panel chose not to address the TBT questions that were presented.