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WORLD TRADE ORGANIZATION

3.10 Technical Barriers to Trade



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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

The WTO *Agreement on Technical Barriers to Trade* (“*TBT Agreement*”), which entered into force in 1995, is the multilateral successor to the *Standards Code*, signed by 32 GATT contracting parties at the conclusion of the 1979 Tokyo Round of Trade Negotiations. The purposes of the *TBT Agreement* can be broadly described as: (1) assuring that technical regulations, standards and conformity assessment procedures, do not create unnecessary obstacles to international trade, while (2) leaving Members adequate regulatory discretion to protect human, animal and plant life and health, national security, the environment, consumers, and other policy interests.

This Module provides a detailed examination of the *TBT Agreement*, one of the more technical agreements negotiated during the Uruguay Round. Without compromising the details necessary to understand this Agreement, a serious effort has been made to explain the Agreement in terms that someone with only a minimal familiarity with the WTO will understand.

The legal analysis of the Agreement is divided into six sections. In the first Section, the reasons for the adoption of the *TBT Agreement* are set forth and the treatment of regulations and standards under the *General Agreement on Tariffs and Trade* (“GATT”) is examined. The second Section examines the general scope of the *TBT Agreement*. The definitions of the key concepts of “technical regulations”, “standards,” and “conformity assessment procedures” are provided. Certain important issues are analysed, in particular the relationship between the *TBT Agreement*, the GATT 1994, the *Agreement on the Application of Sanitary and Phytosanitary Measures* (“SPS Agreement”), and the *Agreement on Government Procurement* (“AGP”). In addition, the treatment pursuant to the *TBT Agreement* of import prohibitions and processes and production methods (“PPMs”) is discussed. The third Section deals with the structure of the *TBT Agreement* and the applicability of the Agreement on other than central government bodies. The fourth provides a nuts and bolts examination of the principles and rules of the *TBT Agreement*, such as the principle of non-discrimination, the obligation to prevent unnecessary obstacles to international trade and the obligation to use international standards as a basis for technical regulations. The fifth Section deals with technical assistance and special and differential treatment for developing country Members provided for in the *TBT Agreement*. Finally, the sixth Section deals with dispute settlement and institutional matters under the *TBT Agreement*.

1. WHY AN AGREEMENT ON TECHNICAL BARRIERS TO TRADE? OBJECTIVES

Objectives

On completion of this section, the reader will be able:

- **to assess why the *WTO Agreement* incorporates the *TBT Agreement*, an agreement on technical barriers to trade.**
- **to appreciate the competing policy goals present in the *TBT Agreement*.**
- **to discuss the history of the Agreement.**

1.1 Introduction

The phrase “technical barriers to trade” refers to the use of the domestic regulatory process as a means of protecting domestic producers.

The *TBT Agreement* seeks to assure that:

- (1) mandatory product regulations,
- (2) voluntary product standards, and
- (3) conformity assessment procedures (procedures designed to test a product’s conformity with mandatory regulations or voluntary standards)

do not become unnecessary obstacles to international trade and are not employed to obstruct trade.

The *TBT Agreement* seeks to balance two competing policy objectives:

- (1) The prevention of protectionism, with
- (2) the right of a Member to enact product regulations for approved (legitimate) public policy purposes (i.e., allowing Members sufficient regulatory autonomy to pursue necessary domestic policy objectives).

These goals are described in more detail below.

1.1.1 The Prevention of Protectionism

The progressive tariff reductions that have taken place in the GATT/WTO framework have left certain industrial and political leaders looking for other means of protecting their industries. These means of protection frequently take the form of non-tariff barriers (i.e., means other than tariffs for protecting business sectors).

Technical regulations, standards and conformity assessment procedures are all potential non-tariff measures that are sometimes used for protectionist purposes. As such, they can be potential barriers to international trade.

The TBT Agreement establishes rules and disciplines designed to prevent mandatory technical regulations, voluntary standards, and conformity assessment procedures from becoming unnecessary barriers to international trade. However the TBT Agreement seeks to leave Members with sufficient domestic policy autonomy to pursue legitimate regulatory objectives.

1.1.2 *The legitimate regulation of products for public policy purposes*

Juxtaposed with the desire to prevent protectionism, is the need to assure that Members retain sufficient regulatory autonomy to accomplish domestic policy goals. Domestic regulations can accomplish several objectives unrelated to protectionism. For example, domestic regulations can serve as a means of protecting consumer health and safety, the environment and national security. Domestic regulations can also further economies of scale, and increase consumer confidence, by assuring uniform technical and production standards. Economic development, and the improved education that should result, can lead to demands from consumers and sometimes the business community for an increase in regulations or standards.

Article 2.2 TBT

Both the preamble of the *TBT Agreement* and Article 2.2 of the *TBT Agreement* identify certain regulatory goals that are deemed “legitimate” for regulatory purposes. Article 2.2 sets forth a list of legitimate TBT objectives which includes:

- protection of life/health (human, animal and plant)
- safety (human),
- protection of national security,
- protection of the environment, and
- prevention of deceptive marketing practices.

The list of legitimate objectives in Article 2.2 is not exclusive. While not specified, it is widely agreed that technical harmonization (for example, regulations that standardize electrical products, computers, communications equipment, etc.), and quality standards (for example grading requirements for produce and commodities) are legitimate. Both technical harmonization and quality standards are already widely utilized, particularly by developed country Members.

The *TBT Agreement* seeks to achieve a fine 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. If the *TBT Agreement* is applied too strictly, the legitimate policy interests of Members will be thwarted. If the TBT 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.

Some sensitivity is required when dealing with TBT issues. Developing countries fear that trade measures (technical regulations and standards) allegedly taken by developed countries 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.

1.2 History

1.2.1 *GATT 1947*

GATT 1947

Technical regulations and standards are not treated in great detail in the *General Agreement on Tariffs and Trade* (“GATT”). Although the term “regulation” appears throughout the GATT 1947, and the term “standards” is mentioned in Article XI, only GATT Articles III:4, XI:2, and Article XX have, from a regulatory perspective, much significance.¹ These articles are, however, vague with respect to the rules applicable to technical regulations and standards.

Historically, Article III of the GATT 1947 on national treatment was subject to abuse. Early in the life of the GATT 1947, certain contracting parties began to use technical regulations and inspection requirements as trade barriers, necessitating the establishment of a stronger regime governing the application of technical regulations and standards. This gave birth to the “*Standards Code*”.

1.2.2 *Standards Code of 1979*

Standards Code

After prolonged negotiations in the Tokyo Round of Trade Negotiations, a plurilateral agreement (i.e., an agreement not signed by all GATT contracting parties) was concluded in 1979. This early TBT agreement, dubbed the “*Standards Code*”, served as a basis for the WTO’s *TBT Agreement*. With only 32 signatories, and few teeth², the *Standards Code* nevertheless provided a good testing ground for how best to discipline the use of technical regulations and standards.

1.2.3 *TBT Agreement*

TBT Agreement

The Uruguay Round *TBT Agreement*, which entered into force on 1 January 1995, bears a resemblance to the Tokyo Round *Standards Code*. However, much was learned from the Tokyo Round experience, and some of the weaknesses of the Tokyo Round agreement were remedied in the WTO’s *TBT*

¹ Article XX of the GATT is also significant to the extent that the term “measure” includes regulations. However, only Article XX(d) specifically mentions regulations.

² Being dependent on consensus, the GATT system lacked a strong enforcement mechanism.

Agreement. First, the *TBT Agreement* is a multilateral as opposed to a plurilateral agreement meaning that it applies to all WTO Members – it forms part of the Uruguay Round’s “single undertaking”. Second, the *TBT Agreement* has a much stronger enforcement mechanism, being subject to the WTO’s Dispute Settlement Understanding (DSU).

1.3 Test Your Understanding

- 1. Why is the *TBT Agreement* a part of the WTO Agreement?**
- 2. What are the goals of the *TBT Agreement*?**
- 3. Which WTO Members are bound by the *TBT Agreement*?**
- 4. What was the *Standards Code*?
Who was bound by the *Standards Code*?**

2. SCOPE OF THE *TBT AGREEMENT* OBJECTIVES

Objectives

On completion of this section the reader will be able:

- to discuss the general scope of the *TBT Agreement*.
- to distinguish between key concepts of “technical regulations”, “standards,” and “conformity assessment procedures”.
- to appreciate the relationship between the *TBT Agreement* and (1) the *Agreement on the Application of Sanitary and Phytosanitary Measures*, and (2) the *Agreement on Government Procurement* which will be examined.

2.1 General Scope and the Key Concepts

The *TBT Agreement* is applicable to “technical regulations” “standards”, and “conformity assessment procedures” applicable to technical regulations and standards. These terms are each defined in Annex 1 of the Agreement. These definitions establish the general scope of the Agreement.

2.1.1 *Technical Regulation*

Annex I.1 TBT

Pursuant to paragraph 1 of Annex I of the TBT Agreement a “technical regulation” is 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 labelling requirements as they apply to a product, process or production method.

In *EC – Sardines* the Appellate Body referring back to its Report in *EC - Asbestos* set forth a three part test for determining if a measure is a technical regulation:

- 1) the document applies to an identifiable product or group of products;
- 2) the document must lay down one or more product characteristics; and
- 3) compliance with these characteristics must be mandatory.³

Example 1: A law stating that only refrigerators that are one meter high can be sold in State X is a technical regulation.

³ Appellate Body Report *European Communities – Trade Description of Sardines* (“*EC – Sardines*”) WT/DS231/AB/R, adopted 23 October 2002, paras. 189-195 referring to *European Communities - Measures Affecting Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paras. 66-70,

Example 2: A law stating that all product packaging must be recyclable is an example of a technical regulation.

2.1.2 Standard

Annex I.2 TBT

Pursuant to paragraph 2 of Annex I of the *TBT Agreement* a “standard” is defined as a:

Document approved by a recognised 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 labelling requirements as they apply to a product, process or production method.

Example 1: A government guideline saying that all eggs weighing 62 grams or more are entitled to be labelled “Grade A” is a standard (provided that eggs weighing less may still be sold).

Example 2: A guideline defining what products can display a “recyclable symbol” is a standard (provided that products that do not bear the symbol may still be sold).

2.1.3 Conformity Assessment Procedure

Annex I.3 TBT

Pursuant to paragraph 3 of Annex I of the *TBT Agreement*, a “conformity assessment” procedure is:

Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.

Paragraph 3 further explains that 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.

Example: Assume a country requires as a condition for the sale of spirits that the correct alcoholic content be displayed on the bottle. An official test of the beverage to determine that the correct alcoholic content is displayed would be a conformity assessment procedure implemented to verify compliance with a technical regulation.

2.1.4 Summary

The *TBT Agreement* is applicable to “technical regulations”, “standards”, and “conformity assessment procedures” applicable to technical regulations and standards.

The principle difference between a technical regulation and a standard is that compliance with a technical regulation is mandatory, while compliance with a standard is voluntary.

Conformity assessment procedures are used to determine whether a technical regulation or standard has been complied with.

2.2 Questions Concerning the Scope of Application of the TBT Agreement

2.2.1 *TBT measures and the GATT 1994*

With respect to the relationship between the GATT 1994 and the *TBT Agreement* and the applicability of the GATT 1994 to TBT measures, 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.⁴

The Panel thus decided to examine first whether the measure at issue was consistent with the TBT Agreement, the agreement that deals specifically and in detail with what was allegedly a TBT measure.

2.2.2 *Non-Product-Related Processes and Production Methods*

The definitions of a “technical regulation” and a “standard” are ambiguous with respect to one point. Does the *TBT Agreement* govern technical regulations and standards applicable to manufacturing “processes and production methods” (“PPMs”) when the PPMs utilized are not detectable in the final product – so-called “Non-Product-Related PPMs” (“NPR-PPMs”)?

This is a controversial question. 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). However, Members have notified certain NPR-PPMs to the TBT Committee.⁵ This has been the

⁴ Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-containing Products (“EC – Asbestos”), WT/DS135/R*, adopted as modified 5 April 2001, para. 8.16.

⁵ “Notification” in the TBT sense of the term means to inform officially other WTO members of a particular action through the WTO Secretariat.

case, for example, for eco-labelling schemes based on a life-cycle analysis.⁶

Example: The *TBT Agreement* would probably not apply to a law prohibiting the domestic sale or import of aluminium produced using electricity derived from nuclear power.

2.2.3 SPS v. TBT Measures

Article 1.5 TBT

Article 1.5 of the *TBT Agreement* provides;

The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures.

Pursuant to Annex A(1) the *SPS Agreement*, an SPS measure is 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.

Example: The *TBT Agreement* would not apply to a law regulating the use of artificial colouring in food products.

2.2.4 TBT Agreement and. Government Procurement Specifications

Article 1.4 TBT

The *TBT Agreement* is not applicable to purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies. Such measures could fall instead under the *WTO Agreement on Government Procurement* (“AGP”). However, not all WTO Members are bound by the AGP, and not all government procurement activities fall within the AGP.

⁶ *Eco-labelling schemes are usually voluntary labelling programmes 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.*

Example: The *TBT Agreement* would not apply to purchasing specifications used to procure government trucks.

2.2.5 The TBT Agreement and Import Prohibitions

Although the definition of technical regulation does not list import prohibitions or bans among the covered measures, the *TBT Agreement* is applicable to certain import prohibitions and bans. The *TBT Agreement* applies when an import prohibition or ban is based on product characteristics, and exceptions to the prohibition or ban (based also on particular product characteristics) exist. This question was addressed by the Appellate Body in the *EC - Asbestos* case which 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.⁷

2.2.6 Application of the Agreement to TBT Measures Adopted Prior to 1 January 1995

In *EC - Sardines* the Appellate Body ruled that the *TBT Agreement* applies to measures adopted prior to the entry into force of the *WTO Agreement* (i.e., 1 January 1995) provided that the trade measure at issue has not ceased to exist.⁸

2.2.7 Summary

The *TBT Agreement* does not apply to SPS measures and does not apply to government procurement. The *TBT Agreement* applies to import prohibitions based on particular product characteristics.

The *TBT Agreement* probably does not apply to non-product-related processes and production methods (NPR-PMS). NPR-PPMs refers to manufacturing processes that are not detectable in the final product.

⁷ Appellate Body Report, *EC – Asbestos*, paras.74-75 (footnote omitted).

⁸ *Ibid.*, para. 216.

2.3 Test Your Understanding

- 1. What is a technical regulation? What is a standard? Give three examples of each.**
- 2. What is a conformity assessment proceeding? Why are they covered by the TBT Agreement?**
- 3. What matters are covered by the SPS Agreement and not the TBT Agreement?**
- 4. Does the TBT Agreement apply when a government seeks to procure goods? What is the AGP?**
- 5. What is the difference between “product related” and “non product-related” processes and production methods (PPMs and NPR-PPMs)? Do you think that “non-product-related processes and production methods” should be covered by the TBT Agreement? Why or why not?**
- 6. Can the TBT Agreement be applied to a technical regulation dated January 1985? Under what circumstances?**

3. ORGANIZATION OF THE *TBT AGREEMENT*

Objectives

On completion of this section, the reader will be able:

- **to discuss the structure and organization of the *TBT Agreement* and its applicability at various governmental levels.**
- **to consult the *TBT Agreement* when confronted with a potential TBT problem.**

3.1 Structure of the TBT Agreement

The *TBT Agreement* applies to technical regulations, standards, and conformity assessment procedures. They are each treated in separate portions of the *TBT Agreement*.

Technical regulations are dealt with in Articles 2 and 3 of the *TBT Agreement*. Standards are governed by Article 4. Article 4, however, makes an explicit reference to Annex 3 of the Agreement. Annex 3 of the Agreement contains the *Code of Good Practice for the Preparation, Adoption and Application of Standards* (“*Code of Good Practice*”). This “Code” is very important. It is in the Code where almost all of the substantive provisions governing the treatment of standards are found.

Conformity assessment procedures are dealt with in Articles 5 and 9 of the *TBT Agreement*.

The principles and rules discussed in Articles 10 through 15 of the *TBT Agreement* are applicable to each of these areas. There are however certain minor differences in scope and treatment.

In the *WTO Agreement*, important provisions, in particular definitions, are found in Annexes. In the *TBT Agreement*, Annex 1 provides definitions and Annex 3 contains the Code of Good Practice.

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

The *TBT Agreement* applies to various governmental and non-governmental organizations at different levels of society. This is because 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.

The *TBT Agreement* sets forth rules and disciplines applicable to international, regional, governmental and non-governmental organizations. The application of the basic TBT rules differs slightly depending on the regulatory level at

issue, and whether technical regulations, standards, or conformity assessment procedures are involved.

Within the limits of what is politically acceptable, the *TBT Agreement* has a wide field of application. This is evident from the broad definitions of central, local and non-governmental bodies found in Annex 1 and reproduced below.

3.2.1 Technical Regulations

Article 2 TBT

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 as:

[a] [c]entral government, its ministries and departments or any body subject to the control of the central government in respect of the activity in questions.

Article 3 TBT

With only very minor exceptions, pursuant to Article 3 of the *TBT Agreement*, Members have an obligation to take reasonable measures to ensure that *local governmental and non-governmental bodies* within their territories also comply with the rules set forth in the *TBT Agreement* governing the treatment of 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 the treatment of technical regulations. A “local government body” is defined in Annex 1 as:

[a] [g]overnment other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.) its ministries or departments or any.

A “non-governmental body” is defined as:

[a] [b]ody 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.

Article 3 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, as provided for in paragraph 9.2 and 10.1 of Article 2.

3.2.2 Standards

Article 4 TBT

Article 4 of the *TBT Agreement* references the *Code of Good Practice*. This Code 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* accept obligations explained in Section 4 of this Module, including most-favoured-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.

Members are not permitted to take measures that would require or encourage local government or non-governmental bodies to act inconsistently with the Code.

3.2.3 Conformity Assessment Procedures

Articles 5 through 9 of the *TBT Agreement* set forth provisions relevant to determining the scope and applicability of the *TBT Agreement* to conformity assessment procedures. Article 5 provides for most-favoured-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 and rules are discussed in Section 4 below.

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

Articles 5-6 TBT

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.

Article 7 TBT

Members are required, pursuant to Article 7 of the *TBT Agreement*, to take reasonable measures to assure that *local government bodies* within their territory comply with TBT Articles 5 and 6 of the *TBT Agreement*. Article 7.1 provides an exception with respect to the obligation to notify, as referred to in paragraphs 6.2 and 7.1 of Article 5. However, Members must ensure that conformity assessment procedures of local government bodies on the level directly below the central government body be notified in accordance with paragraphs 6.2 and 7.1 of Article 5, 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*.

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.

Article 8 TBT

Article 8 of the *TBT Agreement* requires that Members 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*. Members are not required to ensure that non-governmental conformity assessment bodies comply with the requirement to notify proposed measures.

Members are not permitted to take measures that have the effect of requiring or encouraging non-governmental conformity assessment bodies from acting in a manner inconsistent with the provisions of Articles 5 and 6.

Members are required to 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 of the *TBT Agreement*.

Article 9 TBT

Members are encouraged to formulate and adopt international systems for conformity assessment, become members of such systems, and participate therein. Members must 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 of the TBT Agreement, and that central government bodies only rely on international and regional assessment systems to the extent that these systems comply with the provisions of Articles 5 and 6.

3.3 Test Your Understanding

- 1. How is the *TBT Agreement* organized? What is the Code of Good Practice?**
- 2. What divisions does the *TBT Agreement* make between different governmental and non-governmental entities?**
- 3. To what extent does the *TBT Agreement* apply to the standardizing activities of governmental bodies, non-governmental bodies and international bodies?**
- 4. Does the *TBT Agreement* apply to international and regional conformity assessment bodies?**

4. KEY PRINCIPLES AND RULES OF THE *TBT AGREEMENT*

On completion of this section, the reader will be able to discuss the key legal principles and rules applicable to TBT measures as a result of the *TBT Agreement*, including non-discrimination, the prevention of unnecessary obstacles to international trade, harmonisation, equivalence and transparency. Many of these principles and rules may already be familiar to the reader from other portions of the *WTO Agreement*.

4.1 Overview

Although the *TBT Agreement* has three separate fields of application (technical regulations, standards, and conformity assessment procedures), there are common principles and rules that are generally applicable throughout. This section concerns these common principles and rules. Because the analysis is lengthy, an outline of the structure of this section is provided:

- Non-discrimination
- The prevention of unnecessary obstacles to international trade
 - Legitimate objectives
 - Necessity
 - Reasonableness
 - Changed circumstances
- Harmonization
- Use of international standards
- Equivalence and Mutual recognition
- Transparency
- Derogations in the event of urgent measures.

4.2 The Non-Discrimination Principle

The WTO's "non-discrimination" obligation is applicable to technical regulations, standards and conformity assessment procedures. The principle of non-discrimination is found in the following provisions of the *TBT Agreement*:

For technical regulations: Article 2.1

For standards: Annex 3(D) (Code of Good Practice)

For conformity assessment procedures: Article 5.1.1.

MFN and NT

The non-discrimination obligation has two elements: "most-favoured-nation treatment" ("MFN treatment"), and "national treatment". In a nutshell, "**most-favoured-nation**" (MFN) treatment is an obligation not to discriminate

between “like products” imported from different WTO Members. “**National treatment**” is an obligation not to discriminate between domestic and imported “like products.”

Example: State A manufactures widgets, and also buys widgets from States B and C. All are WTO Members. Assuming these widgets are “like products”, State A has an obligation to apply the *same* tax and regulatory treatment to widgets imports from States B and C (MFN treatment); State A also has an obligation not to favour (from a tax and regulatory perspective) domestic widgets over widget imports from States A or B (national treatment).

Non-discrimination is an obligation not to discriminate between imported and domestic “like products” and among imported “like products”. 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 purposes of the TBT Agreement.

Like product

Whether two products are “like products” is one of the most difficult legal problems in the *WTO Agreement*. Likeness is determined on a case-by-case basis and the notion of likeness is not consistent throughout the *WTO Agreement*. To date there has not been a TBT case in the WTO in which the term “like product” has been defined. The concept of “like product” has been examined in a number of WTO disputes on Article III of the GATT 1994, but it is unknown to what extent the ruling in these cases should be applied to the concept of “like product” in the TBT Agreement.

One of the most important WTO dispute settlement decisions interpreting “likeness” is that of the Appellate Body in *Japan – Alcoholic Beverages II*.⁹ The Appellate Body noted in its interpretation of GATT Article III:2 of the GATT 1994, in what has become a famous passage, 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.¹⁰

The *Japan - Alcoholic Beverages* decision confirms that, with respect to likeness determinations, this is an area where absolute rules are not established, and may never be established. It is probable that in the event a TBT dispute arises involving a like product question, WTO panels and the Appellate Body will seek guidance from GATT 1947 and WTO decisions interpreting likeness

⁹ Appellate Body Report *Japan – Taxes on Alcoholic Beverages* (“*Japan – Alcoholic Beverages II*”), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R), adopted 1 November 1996, DSR 1996:1, p. 97.

¹⁰ Appellate Body Report *Japan – Alcoholic Beverages II*, p. 114

within the context of the non-discrimination obligations of the GATT, Article I (MFN) and Article III (national treatment). Not only do both Articles I and III employ the term “like product”, because Article III:4 governs product regulations, there is a relation between it and the *TBT Agreement*. Cases interpreting the meaning of “like product” within Article III should therefore be of particular relevance when interpreting this language in the *TBT Agreement*.

Possible Test

WTO decisions examining Article III of the GATT 1994 have applied a four part test in which the following factors are examined:

- physical characteristics (the properties, nature and quality of a product),
- HS classification,¹¹
- consumers’ tastes and habits (perception and behaviour), and
- product end uses.¹²

Although this multi-part test is widely accepted in GATT Article III cases, until a panel or Appellate Body decision examines what is a like product for TBT purposes, there is no way to be certain that the same test will be applied in TBT cases. Its application does, however, seem likely.

4.3 The Prevention of Unnecessary Obstacles to International Trade

Technical regulations, standards and conformity assessment procedures must not be prepared, adopted or applied so as to create unnecessary obstacles to international trade. The prevention of unnecessary obstacles to international trade is a principle applicable to technical regulations, standards and conformity assessment procedures, but its application is not necessarily identical in all three areas. The obligation to prevent unnecessary obstacles to international trade is set forth in the following provisions:

For technical regulations: Article 2.2

For standards: Annex 3(E) (Code of Good Practice)

For conformity assessment procedures: Article 5.1.2.

With respect to *technical regulations*, the prevention of unnecessary obstacles to international trade is defined in Article 2.2 to mean that technical regulations must: (1) not be more trade restrictive than necessary to achieve a policy goal (the least-trade-restrictive measure), and must (2) fulfil a legitimate objective, taking into account the risks that non-fulfilment would create. The concepts of “necessary”, “legitimate objective” and “risk of non-performance” are discussed below.

¹¹ HS is the Harmonized System of tariff classification. It is used by WTO Members to classify products for tariff purposes.

¹² See, e.g., *Appellate Body Report, EC - Asbestos*, para. 101.

With respect to *standards*, the prevention of unnecessary obstacles to international trade is not defined in either Article 3 of the *TBT Agreement* 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 definition that is applicable to technical regulations would also be applied 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 which provides:”

...conformity assessment procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. This means, 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.”

The terms underlined in the above explanation of “unnecessary obstacles to international trade) are examined below. Understanding these terms is essential to comprehend what constitutes an unnecessary obstacle to international trade.

4.3.1 Legitimate Objectives

Technical regulations must fulfil a legitimate objective. This is, in fact, one of the “goals” of the *TBT Agreement* discussed in Section 2 of this Module. Examples of the legitimate objectives permissible with respect to technical regulations 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, and
- other undefined objectives.

As noted above, the other legitimate objectives, not listed in Article 2.2 almost certainly include:

- regulations designed to standardize electrical products, computers equipment, communications equipment; etc., and
- quality standards.

Both types of regulations already exist widely, particularly in developed countries.

Labour rights and human rights considerations are not specifically mentioned in the *TBT Agreement* as legitimate objectives – but the protection of human life and health is deemed a legitimate interest in Article 2.2. Should labour and human rights objectives be considered legitimate objectives for TBT purposes? This is a controversial issue, as well as a political question that goes beyond the scope of this Module. It bears noting, however, that PPM considerations may be involved, and that in the event NPR-PPMs are at issue, it is uncertain whether the *TBT Agreement* applies.¹³

If a Member bases a domestic regulation on an international standard, and if the domestic regulation is for one of the legitimate objectives explicitly mentioned in Article 2.2, it is rebuttably presumed not to create an unnecessary obstacle to international trade.¹⁴

The phrase “legitimate objective” is not used in the analogous provision relating to standards. 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.

4.3.2 *Necessity*

The concept of “necessity” is found in the provisions applicable to regulations, standards and conformity assessment procedures. Article 2.2 of the *TBT Agreement* provides that technical regulations cannot be more trade restrictive than necessary to achieve a policy goal. It is probable that the negotiators were influenced by language in GATT panel reports defining “necessary” within the context of Article XX of the GATT 1994 (General Exceptions).

In the *Thailand - Cigarettes* case (which cited earlier GATT cases) a GATT panel concluded that a measure could be considered to be “necessary” in terms of Article XX(b) of the GATT 1947 only if there were no alternative measure consistent with the GATT, or less inconsistent with it, which a contracting party could “reasonably” be expected to employ to achieve its regulatory (health policy) objective.¹⁵

This test (the least restrictive trade measure) appears to have been given voice in the Article 2.2 definition of “necessary”. With respect to technical regulations and conformity assessment procedures, an “assessment” of the risks of non-performance of the legitimate objective is carried out. A non-exclusive list of elements that can be considered in a risk assessment is provided in Article 2.2 of the *TBT Agreement* (applicable to technical regulations) of the *TBT Agreement*:

¹³ See above, Section 2.2.2.

¹⁴ Article 2.5 of the *TBT Agreement*. See below, Section 4.5.

¹⁵ Panel Report *Thailand - Restrictions on Importation of and Internal Taxes On Cigarettes* (“*Thailand - Cigarettes*”), adopted 7 November 1990 DS10/R - 37S/200, paras. 74-75.

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

4.3.3 Reasonableness

The term “reasonable” does not appear in the (apparent) definition of “necessary” in the *TBT Agreement*, but there is little doubt that a requirement of reasonableness must be read into Article 2.2 of the *TBT Agreement*, as it was in Article XX of the GATT by panels and the Appellate Body. 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 achieve.

In both the *Korea-Beef*¹⁶ and the *EC - Asbestos*¹⁷ decisions the Appellate Body examined what constitutes a “reasonably available” measure for purposes of the exceptions (predicated on the necessary test) set forth in Article XX(b) and (d). The Appellate Body found that:

- 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.”¹⁸
- 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.¹⁹
- A measure should be sufficient to achieve a member’s chosen level of health protection.²⁰
- A measure does not cease to be “reasonably” available simply because it involves *administrative difficulties* for a Member.²¹

Applying the “reasonableness standard” set forth in *Korea-Beef* and *EC - Asbestos* in conjunction with the “necessary test” set forth in the *TBT Agreement* would reduce the likelihood that legitimate TBT measures would be struck down based on an overly strict interpretation of the *TBT Agreement*. Without this standard, far fewer TBT measures would be permitted.

4.3.4 Changed Circumstances

In order to assure that unnecessary obstacles to international trade are avoided, Article 2.3 of the *TBT Agreement* provides with respect to *technical regulations*

¹⁶Appellate Body Report *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (“Korea – Beef”)*, WT/DS161/AB/R, WT/DS169/AB/R, (10 January 2001), paras. 159-166.

¹⁷Appellate Body Report, *EC- Asbestos*, paras. 169-175.

¹⁸ *Ibid.*, para. 171 citing Appellate Body Report, *Korea-Beef*, paras. 166 and 163.

¹⁹ *Ibid.*, para. 172 citing Appellate Body Report, *Korea-Beef*, para 162.

²⁰ *Ibid.*, para.174.

²¹ *Ibid.*, para. 169 citing Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2.

that if circumstances change or an objective can be addressed in a less trade-restrictive manner, the more restrictive trade measure must be removed.

The *Code of Good Practice*, applicable to *standards*, does not refer to “changed circumstances” This concept is nevertheless implicit in the avoidance of unnecessary obstacles to international trade. Not only is this evident from the notion of avoiding unnecessary obstacles, it is demonstrated by Article 5.2.7, which limits the scope of conformity assessment procedures used to verify that a standard is met in the event that product specifications are changed.

With respect to conformity assessment procedures, it should be noted that 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 reduces the potential that conformity assessments will be applied to impede trade. Instances may nevertheless arise when significant changes in a product’s specifications necessitate a complete conformity reassessment.

4.4 Harmonization

Harmonization is a central pillar of the *TBT Agreement*. Members are encouraged to participate in the international harmonization of standards, and to use agreed international standards as a basis for domestic technical regulations and standards. The emphasis on harmonization is based on the view that (a) trade is disrupted less if Members use internationally agreed standards as a basis for domestic regulations and standards, and (b) producers and consumers benefit from a degree of harmonization (because of economies of scale and questions of technical compatibility respectively). The relevant provisions of the *TBT Agreement* relating to harmonization and the use of relevant international standards are:

for *technical regulations*: Articles 2.4-2.6

for *standards*: Annex 3(F)-(G) (Code of Good Practice)

for *conformity assessment procedures*: Articles 5.4 and 5.5

Members have an obligation, within the limits of their resources, to participate in the work of international standardization organizations with respect to products for which they have adopted or expect to adopt technical regulations or standards. Members also have a similar obligation with respect to the preparation of “guides and recommendations” for conformity assessment procedures. The provisions of the *TBT Agreement* relating to this obligation are:

for *technical regulations*: Article 2.6

for *standards*: Annex 3(G) (Code of Good Practice)

for *conformity assessment procedures*: Article 5.5 .

Harmonization is a pillar of the *TBT Agreement*. Members are required, within the limits of their resources, to participate in the work of international organizations seeking to harmonize international standards. Technical regulations designed to further one of the “legitimate objectives” set forth in Article 2.2 benefit from a rebuttable presumption that they do not create unnecessary obstacles to international trade.

4.5 Use of Relevant International Standards

Article 2.4 TBT

With respect to technical regulations, Article 2.4 of the TBT Agreement provides that:

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 fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

In the *EC - Sardines* decision the Panel found, and the Appellate Body confirmed, that a standard promulgated by Codex Alimentarius, the Codex Stan 94, is a relevant international standard for purposes of Article 2.4 of the *TBT Agreement*.²² The international standard need not be promulgated by consensus by the recognized standardizing body in order to fall within Article 2.4.²³

The Panel in *EC – Sardines* found that the Codex Stan 94, the international standard in question, had not been “used ... as a basis” for the TBT measure at issue. The European Communities appealed that finding. The Appellate Body held:

We agree with the Panel’s approach. In relying on the ordinary meaning of the term “basis”, the Panel rightly followed an approach similar to ours in determining the ordinary meaning of “based on” in EC – Hormones. 169 In addition to the definition of “basis” in Webster’s New World Dictionary that was used by the Panel, we note, as well, the similar definitions for “basis” that are set out in the The New Shorter Oxford English Dictionary, and also provide guidance as to the ordinary meaning of the term:

3 [t]he main constituent. ... 5 [a] thing on which anything is constructed and by which its constitution or operation is determined; a determining principle; a set of underlying or agreed principles.

From these various definitions, we would highlight the similar terms “principal constituent”, “fundamental principle”, “main constituent”, and “determining

²² Appellate Body Report *EC - Sardines*, para. 233

²³ *Ibid.*, para. 227.

principle”—all of which lend credence to the conclusion 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.²⁴

The Appellate Body considered it unnecessary to determine in general the meaning of “used ... as a basis”. It held that it is clear that when a technical regulation is totally contradictory to a standard, that the standard is definitely *not* used as a basis for the technical regulation.²⁵ *In casu*, the TBT measure at issue prohibited something that is explicitly provided for under the international standard.

The Panel in *EC – Sardines* also found that the Codex Stan 94, the international standard in question, was not an “ineffective or inappropriate means for fulfilling the legitimate policy objectives pursued. These objectives were market transparency, consumer protection and fair competition. On appeal, the Appellate Body agreed with the Panel that an “ineffective means” is a means which does not have the capacity to accomplish the legitimate objective pursued and that an “inappropriate means” is a means which is not specially suitable for the fulfilment of the legitimate objective. Effectiveness bears on the result and appropriateness on the nature. The Appellate Body upheld the Panel’s finding that the use of the international standard was neither an ineffective nor an inappropriate means to fulfil the legitimate objectives pursued.²⁶

The Appellate Body also found that the burden of proof standard enunciated in the *EC - Hormones*²⁷ dispute, an SPS dispute, should also be applied in the *EC - Sardines* case. The complaining Member challenging a measure as inconsistent with Article 2.4 of the *TBT Agreement* has the burden of proving that: (1) the standard was not used as a basis for the challenged regulation, and that (2) the international standard is not ineffective and inappropriate to fulfil the legitimate objective at issue.²⁸

Article 2.5 TBT

If a Member prepares, adopts or applies a technical regulation for one of the legitimate objectives explicitly mentioned in article 2.2 and, the measure is in accord with the relevant international standard, this measure is, pursuant to Article 2.5 rebuttably presumed not to create an unnecessary obstacle to international trade. This presumption makes it harder for a complaining Member challenging the WTO consistency of a TBT to make a *prima facie* case that the measure at issue does create an unnecessary obstacle to international trade.

The creation of a rebuttable presumption in favour of certain technical regulations based on international standards should provide a greater incentive for international harmonization and for reliance on harmonized standards.

²⁴ Appellate Body Report, *EC – Sardines*, para. 244 (footnotes omitted)

²⁵ Para. 148.

²⁶ Appellate Body Report, *EC – Sardines*, para. 290.

²⁷ Appellate Body Report, *EC - Measures Concerning Meat and Meat Products (Hormones)* (“*EC - Hormones*”) WT/DS26/AB/R; WT/DS48/AB/R, adopted 13 February 1998.

²⁸ Appellate Body Report, *EC - Sardines*, paras. 275 - 282.

4.6 Equivalence and Mutual Recognition

Members are encouraged to accept foreign technical regulations as “equivalent” to their own technical regulations (even if they differ) provided that they fulfil the same objectives.²⁹ Likewise, Members are encouraged to accept foreign conformity assessment procedures as “equivalent” to their own procedures provided they are satisfied that those procedures offer an assurance of conformity with standards and technical regulations equivalent to their own procedures. Although the notion of equivalence is not mentioned in the Code of Good Practice (applicable to standards), the principle of equivalence is made applicable to standards through Article 6.1 (conformity assessment procedures).

Members are encouraged to enter into negotiations for the mutual recognition of the results of conformity assessment procedures. 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 to the acceptance of a mutual recognition agreement. The relevant provisions of the *TBT Agreement* on equivalence and mutual recognition are:

for *technical regulations*: Article 2.7 (on equivalence)

for *standards*: none but equivalence is incorporated in Article 6.1 re: conformity assessment procedures

for *conformity assessment procedures*: Article 6 (on both equivalence and mutual recognition).

There is some scepticism among WTO Members concerning the effectiveness of international standardization efforts, and the extent to which harmonization, equivalence and mutual recognition can be increased between countries at different stages of development

4.7 Transparency

Transparency is another central tenet of the *TBT Agreement*. 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 *WTO Agreement*.

4.7.1 Transparency Obligations

The provisions of the *TBT Agreement* relating to transparency are:

²⁹ The term “equivalent” is not defined in the *TBT Agreement*.

for *technical regulations*: Articles 2.9 and 10

for *standards*: Annex 3(J)(Q) (Code of Good Practice) and Article 10

for *conformity assessment* procedures: Articles 5.5 and 10.

Transparency obligations take several different forms and are applicable at different points in the promulgation and application of a measure. They include the following requirements set out in Articles 2.9, 2.10, 5.6 and 5.8 as well as Annex 3 (L), (M), (N) and (O):

- The publication of a pre-implementation notice prior to enactment of a measure sufficient to allow interested parties to become acquainted with a proposed measure.³⁰
- Prior to the enactment of a technical regulation or a conformity assessment procedure (when amendments to the measure can still be introduced), the notification of other Members through the WTO Secretariat of the products to be covered and the provision of a brief indication of the objective and rationale for the technical regulation or procedure. For draft standards, the provision of a 60 day period for comments.³¹
- Upon request, provide Members with copies of draft technical regulations, standards, and conformity assessment procedures.³²
- Prior to the enactment of a measure, allow Members a reasonable time for written comment, and for discussions concerning proposed measures, and take these comments/discussions into consideration.³³
- Publish “or otherwise make available” technical regulations, standards, and conformity assessment procedures to other members and to interested parties.³⁴
- In addition, Members are required, pursuant to Article 10 of the *TBT Agreement*, to establish “enquiry points” to answer reasonable inquiries from, and provide relevant documents to, Members and other interested parties concerning technical regulations, standards and conformity assessment procedures. Enquiry points have the responsibility to provide information concerning a WTO Member’s participation in regional and international standardisation and conformity assessment bodies. Enquiry points also have the responsibility to provide certain information concerning the activities of non-governmental standardization organizations.

³⁰ See for technical regulations: Article 2.9.1; for standards: (L) (Code of Good Practice); and for conformity assessment procedures: Article 5.6.1.

³¹ See for technical regulations: Article 2.9.2; for standards: (L) (Code of Good Practice); and for conformity assessment procedures: Article 5.6.2.

³² See for technical regulations: Article 2.9.3; for standards: Annex 3 (M) (Code of Good Practice); and for conformity assessment procedures: Article 5.6.3.

³³ See for technical regulations: Article 2.9.4; for standards: Annex 3 (L) and (N) (Code of Good Practice); and for conformity assessment procedures: Article 5.6.4.

³⁴ See for technical regulations: Article 2.11; for standards: Annex 3 (O) (Code of Good Practice); and for conformity assessment procedures: Article 5.8.

Transparency is a cornerstone of the *TBT Agreement*. Transparency obligations exist prior to the formation of technical regulations, standards and conformity assessment procedures, and continue throughout the life of these measures.

Example: A Member seeking to enact an environmental law regulating automobile exhaust would be required, prior to enactment of the law, to provide drafts of the measure to other Members, permit comments from them, publish the measure, and notify Members through the Secretariat of the measure. Once enacted the Member would be obliged to provide information and relevant documents relating to the law to any interested party.

4.7.2 *Derogations from Transparency in the Event of Urgent Problems*

The transparency obligations 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. 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 60 day period allowed for comment may be shortened in the event of urgent problems related to safety, health, or the environment. The provisions of the TBT Agreement providing for derogations from the transparency obligations are:

- for *technical regulations*: Article 2.10
- for *standards*: Annex 3, (L) (Code of Good Practice)
- for *conformity assessment procedures*: Article 5.7.

Example: State A discovers that a type of packing material produces deadly emissions when burned. It immediately outlaws its production and use within its territory. It must then immediately notify other WTO members of the ban, making copies of the ban available upon request, and permitting comments from all Members on the regulatory measure.

4.8 Test Your Understanding

1. **What does non-discrimination mean? What is the difference between national treatment and most-favoured-nation treatment?**
2. **What is a like product? Provide two examples of like products. What makes you think that the products you have identified are like products?**
3. **What does the obligation in Article 2.2 of the *TBT Agreement* to prevent unnecessary obstacles to international trade entail?**

4. **What does the term “necessary” mean for TBT purposes?**
5. **What regulatory goals are considered to be legitimate objectives for TBT purposes? Is the list in TBT Article 2.2 exclusive? In your opinion, what other objectives could or should be included?**
6. **What is the difference between harmonization, equivalence and mutual recognition?**
7. **What is transparency? Why is transparency important from the perspective of the *TBT Agreement*? What kinds of transparency obligations exist under the *TBT Agreement*?**

5. DEVELOPING COUNTRY MEMBERS AND THE *TBT* AGREEMENT

Objectives

On completion of this section, the reader will be able:

- **to assess the technical assistance that is available under the *TBT Agreement* to WTO Members and, in particular developing country Members.**
- **To appreciate the special and differential treatment provided for in the *TBT Agreement* for developing country Members.**

5.1 Technical Assistance

Article 11 *TBT*

Technical assistance can be defined as the provision of expert assistance by other Members, the WTO Secretariat, or third parties. Normally, developing countries are the recipient of technical assistance. Article 11 of the *TBT Agreement* sets forth a broad range 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 standards bodies, and participation in these bodies, and encourage their national standards 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 fulfil the obligations of membership or participation in international and regional conformity assessment systems.

- Grant other Members, especially developing country Members, technical assistance related to the institutions and legal framework of international and regional systems for conformity assessment sufficient to enable them to fulfil the obligations of membership or participation in such systems.
- Give priority to the needs of the least-developed country Members.

Developing countries are working to assure that commitments made with respect to such assistance are respected.

5.2 Special and Differential Treatment

Article 12 TBT

The *TBT Agreement* requires Members, in particular developed country Members, to provide more favourable treatment to developing country Members based on the financial and trade needs of the latter.

Article 12 of the *TBT Agreement* sets forth a broad range of provisions providing special and differential treatment to developing country Members. Although Article 12 does not provide developing country Members with permanent derogations to the substantive provisions of the TBT Agreement, the pro-developing country character of Article 12 is unambiguous.

Pursuant to Article 12 of the *TBT Agreement*, Members are required to provide special and differential, i.e., more favourable treatment, to developing country Members in several different forms. Article 12 requires:

- Members to 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.
- The facilitation of participation of developing country Members in international standardisation and conformity assessment bodies. One means of facilitation is through encouraging developing country participation in the standardisation 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.
- The provision of technical assistance in accordance with Article 1 of the *TBT Agreement*.
- The grant of time-limited exceptions obligations arising under the *TBT Agreement*.

Under the WTO Work Programme agreed at the Ministerial Conference in Doha in November 2001, the WTO provisions granting special and

differential treatment to developing country Members will be reviewed and their effectiveness evaluated.

5.3 Test Your Understanding

1. **What types of technical assistance are available under the *TBT Agreement*? Do you think that the technical assistance available is satisfactory? Why or why not?**
2. **What forms of special and differential treatment are available? Do you think they are satisfactory? Why or why not?**
3. **How are LDCs treated for purposes of technical assistance and special and differential treatment?**

6. DISPUTE SETTLEMENT AND INSTITUTIONAL MATTERS OBJECTIVES

Objectives

On completion of this section the reader:

- **will be familiar with how disputes are settled under the *TBT Agreement*.**
- **will have learned that the WTO’s *Dispute Settlement Understanding* (“DSU”) applies to TBT disputes. An important dispute involving the *TBT Agreement* will be noted.**
- **will be familiar with the Committee on Technical Barriers to Trade. This WTO Committee is charged with overseeing the application and administration of the *TBT Agreement*.**
- **will also be informed of the regular reviews of this Agreement that the WTO Members are required to conduct.**

6.1 Dispute Settlement

Article 14.1 TBT

As provided for in Article 14.1 of the *TBT Agreement* alleged violations of the *TBT Agreement* are handled pursuant to the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied in the WTO Dispute Settlement Understanding (“DSU”).³⁵ This is the normal manner in which WTO disputes are handled.

Annex 2 TBT

At the request of a party to the dispute, or at its own initiative, a panel hearing a TBT dispute may, pursuant to Article 14.2 of the *TBT Agreement*, establish a “technical expert group” to assist in questions requiring technical expertise. Annex 2 of the *TBT Agreement* establishes a procedure governing the role of experts. Annex 2:

- provides criteria for the selection of 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 TBT

Article 14.4 of the *TBT Agreement* provides that the dispute settlement provisions can be invoked when a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 of the *TBT Agreement* and its trade interests are significantly affected. This means that with respect to technical regulations (Article 3), standards (Article 4), and conformity assessment procedures (Articles 7, 8 and 9), Members have an obligation, and are fully responsible for ensuring that local government bodies,

³⁵ See Chapters 3.1, 3.2, 3.3 and 3.4 of this Handbook.

non-government bodies, and international and regional systems, comply with the terms of the *TBT Agreement*. A DSU proceeding can be commenced against a Member in the event of non-compliance.

Today there has only been one WTO dispute in which the outcome depended on the *TBT Agreement*, *EC – Sardines* which was decided on the basis of the *TBT Agreement*. In *EC – Sardines*, the Panel and, on appeal, the Appellate Body found that the EC's regulation on the marketing of "preserved sardines" was inconsistent with Article 2.4 of the *TBT Agreement*.³⁶

The *EC - Asbestos* decision examined the applicability of the *TBT Agreement*, in particular what constitutes a technical regulation, but it was not based on the *TBT Agreement*.

The *TBT Agreement* also played a prominent role in the *EC – Asbestos dispute* concerning a French import ban on asbestos and asbestos-containing products, but this dispute was decided on the basis of the GATT 1994. In *EC – Asbestos*, the Panel had ruled that the *TBT Agreement* was not applicable to an import ban such as the measure at issue in the dispute. The Appellate Body reversed the Panel's finding on this point and found that the *TBT Agreement* was applicable.³⁷ However, the Appellate Body declined to complete the legal analysis and to apply the *TBT Agreement* to the import ban on asbestos and asbestos-containing products.

Until recently, panels have avoided applying the *TBT Agreement*, preferring instead to resolve potential TBT cases based on GATT rules. With the Appellate Body's 2001 decision in the *EC - Asbestos* case holding that the *TBT Agreement* was applicable to the import ban in question, and the 2002 decision in the *EC - Sardines* dispute finding the EC measure at issue inconsistent with Article 2.4 of the *TBT Agreement*, this has now changed. As a result, one can 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 indeed sometimes used as protectionist devices.

6.2 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 WTO Members are entitled to participate. The Committee meets as necessary, but at least once a year.

The TBT Committee has several responsibilities:

- It provides Members with an opportunity to consult on TBT issues.

³⁶ See above, Section 4.5.

³⁷ See above, Section 2.2.5.

- It carries out whatever responsibilities the Members may assign to it, and establishes working parties and other bodies to carry out these responsibilities.
- It works to avoid duplication between its activities and the work of governments in other technical bodies.

Article 1.3 TBT

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 12.8 TBT

Pursuant to Article 12.8 of the *TBT Agreement*, the TBT Committee is authorized to grant “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 an exception 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.

The Committee is required to take into account special problems experienced by the least-developed country Members (LDCs).

Article 12.10 TBT

Pursuant to Article 12.10 of the *TBT Agreement*, the TBT Committee is also obliged to “examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country Members on national and international levels.” It has done so in each of two triennial reviews discussed below.

Article 15.4 TBT

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 balance of rights and obligations, without prejudice to the provisions concerning special and differential treatment of Article 12.

Based on the implementation experience, the TBT Committee is entitled to submit proposals to amend the *TBT Agreement* to the Council for Trade in Goods.

To date, two triennial reviews have been held, the first in 1997: G/TBT/5 (97-5092) 19 November 1997; and the second in 2000: G/TBT/9 (00-4811) 13 November 2000. These documents, referenced by number, are available on the WTO’s internet site. They offer a somewhat critical review of the successes and failures under the *TBT Agreement*

6.3 Test Your Understanding

- 1. Does the WTO's Dispute Settlement Understanding Apply to the *TBT Agreement*?**
- 2. What role, if any, do experts have in TBT disputes?**
- 3. Is a Member responsible if a technical regulation established within a region violates the *TBT Agreement*? Can another Member challenge the consistency of such a regulation with the *TBT Agreement* under the DSU?**
- 4. What is the Committee on Technical Barriers to Trade? What are its responsibilities?**
- 5. How often must the implementation and operation of the *TBT Agreement* be reviewed? What provisions must be reviewed?**
- 6. Does your country have a national TBT enquiry point and if so what is its address? Has it notified TBT measures to the WTO? Try to answer these questions by looking at the WTO website.**

7. CASE STUDIES

1. The State of Airmania is a developed country with very high environmental standards applicable to domestic industries. Consumers in Airmania have a strong demand for environmentally friendly products. They also have the technology to manufacture environmentally friendly products.

The State of Anxiety is a developing country with considerable industrial capability. It is a beneficiary of export driven development and is an important trading partner of Airmania. Airmania imports a large portion of Anxiety's manufactured goods. While the State of Anxiety has many environmental laws on its books, they are seldom enforced. Economic advancement for now plays a more important role than environmental protection. Both Airmania and Anxiety are founding Members of the WTO Agreement.

Airmania has just introduced a law implementing a variation on an "eco-labelling programme" pursuant to which manufactured goods that satisfy certain criteria will be eligible to be labelled as "Eco-Friendly". The criteria will be developed and administered by a local non-governmental organization in Airmania known as "Eco-Lab". Eco-Lab will examine all phases of a given product's life-cycle (a cradle-to-grave analysis). This will include an analysis of how a product is made (the production processes used and the environmental implications of these processes), as well as environmental factors associated with a product's packaging, its use, and its subsequent disposal. Eco-Lab will be entirely responsible for establishing the criteria and testing whether products satisfy the criteria and can wear the "Eco-Friendly" label.

Conformity with Airmania's programme is voluntary – in other words a manufacturer in Anxiety will not need a label from Eco-lab to sell its products in Airmania. However, it is expected that having the "Eco-Friendly" label will make products very popular among Airmania's environmentally conscious consumers.

You are an attorney for industrial exporters in the State of Anxiety. Your clients are worried that the eco-labelling scheme will make it more difficult to sell their goods in Airmania. Your clients have approached you with questions concerning the WTO Agreement, in particular the *TBT Agreement*.

Variation No. 1

- a) Does Airmania's law fall under the *TBT Agreement*?
- b) If yes, is it a technical regulation, a standard or a conformity assessment procedure?
- c) What are Airmania's obligations under the *TBT Agreement* with respect to notification and transparency?

- d) What are Airmania's obligations with respect to national treatment and MFN treatment?
- e) Is Airmania's objective legitimate? How does this point affect your analysis?
- f) Is it significant that because of their environmental knowledge and production skills, Airmania's domestic industries may benefit from the labelling scheme?
- g) Is Airmania allowed pursuant to the *TBT Agreement* to implement the scheme described above? If not, what changes must be made?
- h) How is your analysis affected by the fact that the labelling criteria includes processes and production methods?
- i) What would your evaluation of this dispute be under GATT Articles III and XX of the GATT 1994?

Variation No. 2

With one exception, the facts are the same:

Airmania's labelling programme is mandatory, but only applies to the use and disposal of products (and not to production processes). If your products do not qualify for a label, you can not sell them in Airmania.

- a) Does this change your analysis and your answer to the questions above? (Work your way through each question.)
 - b) What would your evaluation of this dispute be under Articles III and XX of the GATT 1994?
2. Westland is a developed country and a major exporter of agricultural goods. It has recently begun to plant genetically. It produces two products from these GMO seeds: edible soybean oil used for cooking, and a light oil used as a machine lubricant.

Graceland is a developing country that has, based on ethical grounds, for human safety, outlawed planting GMO seeds in its territory and has implemented a technical regulation outlawing the sale in its territory of any product derived from GMO seeds. The only exception to this ban is if less than one percent of the product is derived from GMOs. Graceland's technical regulation was implemented on an urgent basis without any notice to other WTO Members or to the WTO Secretariat. The measure has now been in effect for six months.

In order to improve its agriculture, Graceland has asked Westland for technical assistance in plant hybridization, and additional assistance in drafting a second

technical regulation banning GMO imports in the event that its present technical regulation is struck down in a WTO dispute settlement proceeding. Westland has refused to offer any technical assistance.

Westland has challenged Graceland's ban under the *TBT Agreement*. Graceland has retained your services to defend itself in a WTO dispute settlement proceeding. In particular Graceland seeks answers to the following questions.

- a) Does the *TBT Agreement* apply and if so to what extent?
- b) If the *TBT Agreement* does apply, which provisions are applicable?
- c) If Graceland invokes its right to special and differential treatment, what effect will this have in its dispute with Westland?
- d) What right does Graceland have to technical assistance and what kind of assistance is Westland obligated to offer?
- e) What arguments is Graceland likely to face in a dispute involving the *TBT Agreement*?
- f) Does Graceland have a potential counterclaim against Westland and how should it proceed?

8. SUGGESTED READING

8.1 Books and Articles

- **Cottier, T. and Mavroidis, P.** (eds.), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (University of Michigan Press, 2000).
- **The WTO Secretariat**, *Guide to the Uruguay Round Agreements*, Kluwer Law International (The Hague 1999).
- **Baldwin, R.**, *Regulatory Protectionism, Developing Nations, and a Two-Tier World Trade System*, Brookings Trade Forum 2000, 237-280.

8.2 Panel and Appellate Body Reports

- Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (“EC – Asbestos”), WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R.
- Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (“EC – Asbestos”), WT/DS135/AB/R, adopted 5 April 2001.
- Panel Report, *European Communities – Trade Description of Sardines* (“EC – Sardines”), WT/DS231/R, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R.
- Appellate Body Report, *European Communities – Trade Description of Sardines* (“EC – Sardines”), WT/DS231/AB/R, adopted 23 October 2002.

8.3 Documents and Information

- WTO, A Training Package, Module 3, Goods: Rules on NTMs (1998).
- WTO, First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/5 (97-5092), (19 November 1997).
- WTO, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/9 (00-4811), (13 November 2000).
- WTO, Technical Barriers to Trade, <www.wto.org/english/tratop_e/tbt_e/tbt_e.htm> (visited 15 February 2002). (This is the WTO’s access point for TBT-related information.)

The WTO maintains an excellent website at www.wto.org. On this site 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, the WTO's TBT training guide, lists of 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.