MAX PLANCK COMMENTARIES ON WORLD TRADE LAW

WTO – TECHNICAL BARRIERS AND SPS MEASURES

Edited by
Rüdiger Wolfrum
Peter-Tobias Stoll
and Anja Seibert-Fohr

Max Planck Institute for
Comparative Public Law and International Law

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WTO – Technical Barriers and SPS Measures

Max Planck Commentaries on World Trade Law

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PREFACE TO THE SERIES

The idea behind the *Max Planck Commentaries on World Trade Law* is to explain the whole range of WTO law in authoritative and practical article-by-article type commentaries. The purpose is to give the reader a comprehensive and concise insight into the meaning of each rule by combining information on its legislative history, its economic and political rationale, its interpretation, existing case law and proposals for reform. Issues which are not explicitly mentioned in the rules but which are relevant for their application, like *e.g.* the question of direct applicability, are also addressed. As far as possible, reference is also made to similar rules of universal and regional economic regimes.

The format of a commentary dates back to the classical period of Roman legal science. Such commentaries were meant to collect together the relevant legal material and to provide assistance for its understanding by referring to relevant case law and by offering interpretations. Such format is well established in the German legal tradition but seems to be less so in the US legal tradition where the closest correlation may be the Restatements.

Rüdiger Wolfrum *Peter-Tobias Stoll*

PREFACE TO THIS VOLUME

Given that tariffs are by no means the only restrictions on international trade, non-tariff barriers to trade are important objects of regulation of WTO law. This volume covers some of the most relevant non-tariff barriers, *i.e.* technical barriers to trade and sanitary and phytosanitary measures.

Technical standards are increasingly determining the development, production, trade in and marketing of goods and services. They thus have a considerable impact on international trade. The Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), both negotiated during the Uruguay Round to replace the Standards Code and in force since 1995, reflect this growing importance and regulate their permissibility. The two agreements are a major development in international trade law, as they are not restricted to the prevention of discriminatory measures, but also contribute to harmonization by encouraging Members to base their policies on international standards. In this respect, one particularly interesting aspect is the role of international standardization bodies. Moreover, they emphasize the importance of transparency.

As well as the TBT and the SPS, the present volume also comprises other provisions of WTO law relevant to the subject. As technical barriers to trade also comprise measures that take effect only within the domestic markets of Members, the volume covers the principle of national treatment (Article III GATT 1994). In addition, the prohibition of quantitative restrictions (Article XI GATT 1994) is pertinent, *e.g.* with respect to conformity controls in customs clearance procedures. As Members often try to justify the legality of technical barriers by reference to a general exception, an in-depth treatment of Article XX GATT 1994 has also been included.

The political relevance of the provisions and agreements covered in this volume is underlined by the fact that some of the most controversial dispute settlement proceedings in the history of the WTO have involved either Article XX GATT 1994 (see the *US—Shrimp* case) or the TBT and the SPS (see the *EC—Hormones* case). These decisions are just two examples of the need for international trade law to accommodate other global and national policy and regulatory concerns, such as the protection of the environment, health and food safety. This volume of the Commentary elaborates on the leading cases in their context and covers the most recent developments in the case law of the Dispute Settlement Body. Most importantly, the recent

Panel Report in *EC—Approval and Marketing of Biotech Products* is fully incorporated in the texts.

Last but not least, I would like to acknowledge the help of several people without whom this book would not be in the shape it is now. In particular I would like to thank *Markus Benzing* who was heavily involved in the final editing process. Without him it would have been impossible to deliver the manuscript as planned. Furthermore, thanks are due to *David Diehl* and *Ulrike Deutsch* who formatted the manuscript, checked the footnotes and prepared the index, to *Dr. Karen Kaiser* and *Michael Koebele* for their valuable advice and to *Kate Elliott* who scrupulously checked the language.

Anja Seibert-Fohr

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TABLE OF ABBREVIATIONS AND ACRONYMS

ACJ	Andean Court of Justice (Court of Justice of the Cartagena Agreement)
ACJ Agreement	Treaty Creating the Court of Justice of the Cartagena Agreement
ACJ Internal Rules	Internal Rules for the Court of Justice of the Cartagena Agreement
ACJ Statute	Statute of the Court of Justice of the Cartagena Agreement
ACP	African, Caribbean and Pacific Group
ACWL	Advisory Centre of WTO Law
ACWL Agreement	Agreement Establishing the Advisory Centre on WTO Law
AD	Anti-Dumping Agreement
AD Committee	Committee on Anti-Dumping Practices
ADI	Acceptable Daily Intake
Afr. J. Int'l Comp. L.	African Journal of International and Comparative Law
Agric. Econ.	Agricultural Economics
Agriculture Agreement	Agreement on Agriculture
Aircraft Committee	Committee on Trade in Civil Aircraft
AJDA	Actualité Juridique Droit administrative
Am. J. Int'l L.	American Journal of International Law
ALADI	Asociación Latinoamericana de Integración
Am. U. Int'l L. Rev.	American University International Law Review
Am. U. J. Int'l L. & Pol'y	American University Journal of International Law and Policy
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the GATT 1994
Art.	Article
Arts	Articles
AS	*Amtliche Sammlung des Bundesrechts* (Official Collection of Swiss Federal Law)
ASEAN	Association of Southeast Asian Nations
ASEAN Enhanced Dispute Settlement Protocol	ASEAN Protocol on Enhanced Dispute Settlement Mechanism
ASEAN FTA	ASEAN Free Trade Area

ASEAN FTA Agreement	Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area
ANSI	American National Standards Institute
ATC	Agreement on Textiles and Clothing
AVR	*Archiv des Völkerrechts*
AYIL	Australian Yearbook of International Law
B.U. Int'l L. J.	Boston University International Law Journal
BCI	business confidential information
B.C. Int'l & Comp. L. Rev.	Boston College International and Comparative Law Review
BFA Committee	Committee on Budget, Finance and Administration
BGBl.	*Bundesgesetzblatt* (German Federal Law Gazette)
BIPM	*Bureau international des poids et mesures*
BISD	Basic Instruments and Selected Documents (published by GATT)
BOPs Committee	Committee on Balance-of-Payments Restrictions
Brook. J. Int'l L.	Brooklyn Journal of International Law
Buff. L. Rev.	Buffalo Law Review
BVerfGE	*Entscheidungen des Bundesverfassungsgerichts* (Official Records of the German Federal Constitutional Court)
BYIL	British Yearbook of International Law
CAC	Codex Alimentarius Commission
CAFTA	Central America Free Trade Agreement
CAFTA-DR	Central America-Dominican Republic Free Trade Agreement
CYELS	Cambridge Yearbook of European Legal Studies
CAP	Conformity Assessment Procedures
CASCO	(ISO) Conformity Assessment Committee
CARIBCAN	Caribbean—Canadian Trade Agreement
CARICOM	Caribbean Community and Common Market
CBD	Convention on Biological Diversity
CCC (nomenclature)	Customs Co-operation Council (nomenclature)
CCFICS	Food Import and Export Certification and Inspection

CEB	United Nations System Chief Executives Board for Coordination
CEN	European Committee for Standardization (Comitée Européen de Normalisation)
CENELEC	European Committee for Electrotechnical Standardization (*Comité Européen de Normalisation Electrotechnique*)
CFI	Court of First Instance of the European Communities
CG-18	Consultative Group of 18
Ch.	Chapter
CITES	Convention on International Trade in Endangered Species of Wild Flora and Fauna
Civil Aircraft Agreement	Agreement on Trade in Civil Aircraft
CMLRev.	Common Market Law Review
Colum. J. Eur. L.	Columbia Journal of European Law
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbia Law Review
Cornell Int'l L.J.	Cornell International Law Journal
Council for TRIPS	Council for Trade-Related Aspects of Intellectual Property Rights
CRTA	Committee on Regional Trade Agreements
CTD	Committee on Trade and Development
CTE	Committee on Trade and Environment
CTG	Ministerial Conference and the Council on Trade in Goods
CTS	Canadian Treaty Series
CU(s)	customs union(s)
Customs Valuation Agreement	Agreement on Implementation of Article VII of the GATT 1994
CYIL	Canadian Yearbook of International Law
CYELS	Cambridge Yearbook of European Legal Studies
Denv. J. Int'l L. & Pol'y	Denver Journal of International Law and Policy
Dep't St. Bull.	Department of State Bulletin
Dick. J. Int'l L.	Dickinson Journal of International Law
DIN	*Deutsches Institut für Normung e.V.*
Doc.	Document
DSB	Dispute Settlement Body

DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)
Duke J. Comp. & Int'l L.	Duke Journal of Comparative and International Law
DVBl.	*Deutsches Verwaltungsblatt*
e.g.	*exempli gratia* (for example)
EC	European Community/ies
EC Treaty	Treaty Establishing the European Community
ECHR	European Court of Human Rights
ECJ	Court of Justice of the European Communities
ECOSOC	Economic and Social Council
ECSC	European Coal and Steel Community
ECT	Treaty Establishing the European Community
ed.	editor
eds	editors
EEC	European Economic Community
EEC Treaty	Treaty establishing the European Economic Community
Eur. Envtl. L. Rev.	European Environmental Law Review
EFARev.	European Foreign Affairs Review
EFTA	European Free Trade Association
EJIL	European Journal of International Law
Eur. L. Rev.	European Law Review
EMIT	Working Group on Environmental Measures and International Trade of GATT
Envtl. L. Rep.	Environmental Law Reporter
EPIL	Encyclopedia of Public International Law
et seq.	*et sequitur* (and the following)
ETS	European Treaty Series
EU	European Union
European Convention on Human Rights	European Convention for the Protection of Human Rights and Fundamental Freedoms
EuZW	*Europäische Zeitschrift für Wirtschaftsrecht*
FAO	Food and Agriculture Organization
Fed. Reg.	Federal Register
FMD	Foot and Mouth Disease
FOGS negotiating group	Negotiating group on the Functioning of the GATT System
Fordham Int'l L.J.	Fordham International Law Review
Foreign Pol'y	Foreign Policy

FTA(s)	Free Trade Area(s)
FTAA	Free Trade Areas of the Americas
G-77	Group of 77 at the United Nations
Ga. J. Int'l. & Comp. L.	Georgia Journal of International and Comparative Law
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
Geo. J. Int'l L.	Georgetown Journal of International Law
Geo. Wash. J. Int'l L. & Econ.	George Washington Journal of International Law and Economics
Global Comm'y, Y.B. Int'l L. & Jurispr.	The Global Community: Yearbook of International Law and Jurisprudence
GMO	Genetically Modified Organisms
GOIC	Gulf Organization for Industrial Consulting
GPA	Agreement on Government Procurement
Gr.Ch.	Grand Chamber
GRUR Int.	*Gewerblicher Rechtsschutz und Urheberrecht/ Internationaler Teil*
GSP	Generalized System of Preferences
GYIL	German Yearbook of International Law
Harv. Bus. Rev.	Harvard Business Review
Harv. Int'l L.J.	Harvard International Law Journal
Havana Charter	Havana Charter for an International Trade Organization
Hastings Int'l & Comp. L. Rev.	Hastings International and Comparative Law Review
HS (nomenclature)	Harmonized System (nomenclature)
IAF	International Accreditation Forum
ICA(s)	International Commodity Agreements
i.e.	*id est* (it or that is)
ibid.	*ibidem* (in the same place)
IBRD	International Bank for Reconstruction and Development
IBRD Articles of Agreement	Articles of Agreement of the International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
ICC	International Chamber of Commerce
ICITO	Interim Commission for the International Trade Organization
ICJ	International Court of Justice

ICJ Statute	Statute of the International Court of Justice
Int'l & Comp. L.Q.	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IE	Independent Entity
IEC	International Electrotechnical Commission
IF	Integrated Framework for Trade-Related Technical Assistance to Least-Developed Countries
IFIA	International Federation of Inspection Agencies
ILAC	International Laboratory Accreditation Cooperation
ILC	International Law Commission
ILC YB	Yearbook of the International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
IMF	International Monetary Fund
IMF Articles of Agreement	Articles of Agreement of the International Monetary Fund
Int. T. L. R.	International Trade Law and Regulation
Int'l Law.	International Lawyer
Int'l Org.	International Organization
Int´l Stud. Q.	International Studies Quarterly
Int'l Trade Rep.	International Trade Reporter
IPPC	International Plant Protection Convention
IPU	International Parliamentary Union
ISC	International Sugar Council
ISO	International Organization for Standardization
Is. L. Rev.	Israel Law Review
ITC	International Trade Centre UNCTAD/WTO
ITLOS	International Tribunal for the Law of the Sea
ITO	International Trade Organization
ITTC	Institute for Training and Technical Cooperation
ITU	International Telecommunication Union

J. Confl. Res.	Journal of Conflict Resolution
J. Econ. Lit.	Journal of Economic Literature
J. Econ. Persp.	Journal of Economic Perspectives
J. Envtl. L.	Journal of Environmental Law
J. Legal Stud.	Journal of Legal Studies
J. Confl. Res.	Journal of Conflict Resolution
J. Small & Emerging Bus. L.	Journal of Small and Emerging Business Law
J. World Inv.	Journal of World Investment
JWIP	Journal of World Intellectual Property
JCMS	Journal of Common Market Studies
JIEL	Journal of International Economic Law
JITAP	Joint Integrated Technical Assistance Programme
JWT	Journal of World Trade
JWTL	Journal of World Trade Law
JUTR	Jahrbuch des Umwelt und Technikrechts
LAN	Local Area Network
L. & Bus. Rev. Am.	Law and Business Review of the Americas
Law & Contemp. Probs.	Law and Contemporary Problems
Law & Pol'y Int'l Bus.	Law and Policy in International Business
Law & Prac. Int'l Cts & Trib.	The Law and Practice of International Courts and Tribunals
Law and Bus. Rev. Am.	Law and Business Review of the Americas
LDC Sub-Committee	Sub-Committee on Least-Developed Countries
LDC(s)	least-developed country/ies
Licensing Agreement	Agreement on Import Licensing Procedures
LIEI	Legal Issues of Economic Integration
lit.	*littera(e)* (letter(s))
LJIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
Loy. L.A. Int'l & Comp. L. Rev.	Loyola of Los Angeles International and Comparative Law Review
Marrakesh Agreement	Marrakesh Agreement Establishing the World Trade Organization
Max Planck CWTL	Max Planck Commentaries on World Trade Law

Max Planck UNYB	Max Planck Yearbook of United Nations Law
Md. J. Int'l L. & Trade	Maryland Journal of International Law and Trade
MEA(s)	Multilateral Environmental Agreement(s)
MERCOSUR	*Mercado Común del Sur* (Southern Common Market)
MERCOSUR Olivos Protocol	Protocol of Olivos for the Solution of Controversies in MERCOSUR
MFN	Most-Favoured Nation
MFN principle	Most-Favoured Nation principle
Mich. J. Int'l L.	Michigan Journal of International Law
Minn. J. Global Trade	Minnesota Journal of Global Trade
MRA(s)	Mutual Recognition Agreement(s)
MRL(s)	Maximum Residue Level(s)
MTA(s)	Multilateral Trade Agreement(s)
MTN	Multilateral Trade Negotiations
MTO	Multilateral Trade Organization
MTO Agreement	Agreement Establishing the Multilateral Trade Organization
NAFTA	North American Free Trade Agreement
NAM	Non-Aligned Movement
N.D. L. Rev.	North Dakota Law Review
NIEO	New International Economic Order
NILF	*Norsk institutt for landbruksøkonomisk forskning* (Norwegian Agricultural Economics Research Institute)
NG	Negotiation Group
NGB(s)	National Governing Body/ies
NGO	Non-Governmental Organization
No.	number
NTB(s)	Non-Tariff Barrier(s) to Trade
NVC	Non-Violation Complaint
NVwZ	*Neue Zeitschrift für Verwaltungsrecht*
Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law and Business
NYIL	Netherlands Yearbook of International Law
N.Y.U. Envtl. L.J.	New York University Environmental Law Journal
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Politics
N.Y.U. L. Rev.	New York University Law Review

OECD	Organization for Economic Co-operation and Development
OECD Econ. Stud.	OECD Economic Studies
Ocean Dev. & Int'l L.	Ocean Development and International Law
OIE	*Office International des Epizooties*
OIV	*Organisation internationale de la vigne et vin* (International Vine and Wine Office)
Oilseeds Agreement	Agreement in the Form of Agreed Minutes on Certain Oil Seeds Between the European Community and Brazil Pursuant to Article XXVIII of the General Agreement on Tariffs and Trade (GATT)
OIML	International Organization of Legal Metrology
OJ	Official Journal of the European Union
OMC	*Organisation mondiale du commerce*
ORC	other regulations of commerce
ORDO	*Zeitschrift der ordoliberalen Schule*
ORRC	other restrictive regulations of commerce
OSC	other-situation complaint
Osgoode Hall L.J.	Osgoode Hall Law Journal
OTC	Organization for Trade Cooperation
ÖZöRV	*Österreichische Zeitschrift für öffentliches Recht und Völkerrecht*
para.	paragraph
paras	paragraphs
PCIJ	Permanent Court of International Justice
PGE	Permanent Group of Experts
PPA	Protocol on Provisional Application
PPM(s)	Process and Production Method(s)
PSI (Agreement)	Agreement on Pre-shipment Inspection
PTA(s)	Plurilateral Trade Agreement(s)
Publ.	publication
Q. J. Econ.	The Quarterly Journal of Economics
Quads	Quadrilaterals
RdC	*Recueil des cours/Académie de Droit International de La Haye*
RDUE	*Revue du droit de l'Union européenne*
Rec.	recital
RECIEL	Review of European Community & International Environmental Law
Recs	recitals
Rep.	report
RGDIP	*Revue générale de droit international public*
RIW	*Recht der Internationalen Wirtschaft*

RMUE	*Revue du marché unique européen*
RTA(s)	Regional Trade Agreement(s)
RTDE	*Revue trimestrielle de droit européen*
Safeguards Agreement	Agreement on Safeguards
SAT	substantially all the trade
SCM (Agreement)	Agreement on Subsidies and Countervailing Measures
SCT	Separate Customs Territory
SEOM	Senior Economic Officials Meeting
SPS (Agreement)	Agreement on the Application of Sanitary and Phytosanitary Measures
SPS Committee	Committee on Sanitary and Phytosanitary Measures
St. John's J. Legal. Comment.	St. John's Journal of Legal Commentary
STDF	Standards and Trade Development Facility
subpara.	subparagraph
subparas	subparagraphs
Subsidies Committee	Committee on Subsidies and Countervailing Measures
Syracuse J. Int'l L. & Com.	Syracuse Journal of International Law and Commerce
SZIER	*Schweizerische Zeitschrift für internationales und europäisches Recht*
TBT (Agreement)	Agreement on Technical Barriers to Trade
TBT Committee	Committee on Technical Barriers to Trade
TED(s)	Turtle Excluder Device(s)
TMB	Textiles Monitoring Body
TNC	Trade Negotiations Committee
Tokyo Round SCM Code	Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade
TPRB	Trade Policy Review Body
TPRM	Trade Policy Review Mechanism
TRIMS (Agreement)	Agreement on Trade-Related Investment Measures
TRIMS Committee	Committee on Trade-Related Investment Measures
TRIPS (Agreement)	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRM	Transitional Review Mechanism
Tul. Envtl. L.J.	Tulane Environmental Law Journal

Tul. J. Int'l & Comp. L.	Tulane Journal of International and Comparative Law
UK	United Kingdom
U. Kan. L. Rev.	University of Kansas Law Review
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UNIDROIT	International Institute for the Unification of Private Law
UNSJPF	United Nations Joint Staff Pension Fund
UNTS	United Nations Treaty Series
U. Pa. J. Int'l Econ. L.	University of Pennsylvania Journal of International Economic Law
US	United States of America
USC	United States Code
Va. Envtl. L.J.	Virginia Environmental Law Journal
Va. J. Int'l L.	Virginia Journal of International Law
Vand. J. Int'l L.	Vanderbilt Journal of International Law
VAT	value-added tax
VCLT	Vienna Convention on the Law of the Treaties
Wash. & Lee L. Rev.	Washington and Lee Law Review
WCED	World Commission on Environment and Development
WCO	World Customs Organization
WEEE	EC Draft Directives on waste from electrical and electronic equipment
WHO	World Health Organization
WIPO	World Intellectual Property Organization
World Compet.	World Competition
World Econ.	The World Economy
World Pol.	World Politics
World Trade Rev.	World Trade Review
WPDR	Working Party on Domestic Regulation
WSSN	World Standard Services Network
WTO	World Trade Organization

WTO Agreement	Agreement Establishing the World Trade Organization
WTO Headquarters Agreement	Agreement between the World Trade Organization and the Swiss Confederation to Determine the Legal Status of the Organization in Switzerland of 2 June 1995
Yale J. Int'l L.	Yale Journal of International Law
Y.B. Int'l Envtl. L.	Yearbook of International Environmental Law
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*
ZEuS	*Zeitschrift für europarechtliche Studien*
ZLR	*Zeitschrift für das gesamte Lebensmittelrecht*

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GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of:
   a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment (excluding the Protocol of Provisional Application), as rectified, amended or modified by the terms of legal instruments which have entered into force before the date of entry into force of the WTO Agreement;
   b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:
      i) protocols and certifications relating to tariff concessions;
      ii) protocols of accession (excluding the provisions a) concerning provisional application and withdrawal of provisional application and b) providing that Part II of GATT 1947 shall be applied provisionally to the fullest extent not inconsistent with legislation existing on the date of the Protocol);
      iii) decisions on waivers granted under Article XXV of GATT 1947 and still in force on the date of entry into force of the WTO Agreement;[1]
      iv) other decisions of the CONTRACTING PARTIES to GATT 1947;
   c) the Understandings set forth below:
      i) Understanding on the Interpretation of Article II:1 b) of the General Agreement on Tariffs and Trade 1994;
      ii) Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994;
      iii) Understanding on Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994;
      iv) Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994;
      v) Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994;
      vi) Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994; and
   d) the Marrakesh Protocol to GATT 1994.

2. *Explanatory Notes*
   a) The references to "contracting party" in the provisions of GATT 1994 shall be deemed to read "Member". The references to "less-developed contracting party" and "developed contracting party" shall be deemed to read "developing country Member" and "developed country Member". The references to "Executive Secretary" shall be deemed to read "Director-General of the WTO".
   b) The references to the CONTRACTING PARTIES acting jointly in Articles XV:1, XV:2, XV:8, XXXVIII and the Notes Ad Article XII and XVIII; and in the provisions on special exchange agreements in Articles XV:2, XV:3, XV:6, XV:7 and XV:9 of GATT 1994 shall be deemed to be references to the WTO. The other functions that the provisions of GATT 1994 assign to the CONTRACTING PARTIES acting jointly shall be allocated by the Ministerial Conference.

[…]

Footnote 1: The waivers covered by this provision are listed in footnote 7 on pages 11 and 12 in Part II of document MTN/FA of 15 December 1993 and in MTN/FA/Corr.6 of 21 March 1994. The Ministerial Conference shall establish at its first session a revised list of waivers covered by this provision that adds any waivers granted under GATT 1947 after 15 December 1993 and before the date of entry into force of the WTO Agreement, and deletes the waivers which will have expired by that time.

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Article III GATT 1994
National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.
3. With respect to any existing internal tax which is inconsistent with the provision of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.
4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable 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. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.
5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.
6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; *Provided* that any such regu-lation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.
7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such manner as to allocate any such amount or proportion among external sources of supply.
8. a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.
   b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.
9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

Ad Article III

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

Paragraph 1
The application of paragraph 1 to internal taxes imposed by local governments and authorities with the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term "reasonable measures" in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit, if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "reasonable measures" would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.

Paragraph 2
A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Paragraph 5
Regulations consistent with the provisions of the first sentence of paragraph 5 shall not be considered to be contrary to the provisions of the second sentence in any case in which all of the products subject to the regulations are produced domestically in substantial quantities. A regulation cannot be justified as being consistent with the provisions of the second sentence on the ground that the proportion or amount allocated to each of the products which are the subject of the regulation constitutes an equitable relationship between imported and domestic products.

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Cross References

Arts. 28, 90 ECT; Art. 301 NAFTA; Art. 1, 7 Treaty of Asunción (MERCOSUR); Art. 73, 75 Andean Subregional Integration Agreement (Cartagena Agreement); Art. 3.2 CAFTA-DR Free Trade Agreement; Art. 4 Subsection B:1 Third Draft FTAA.

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A. General

The preambles to the Marrakesh Agreement Establishing the World Trade Organization and the GATT 1947 list the elimination of discriminatory treatment in international trade relations as one of their goals, on a par with the substantial reduction of tariffs and other barriers to trade. Accordingly, the **principle of non-discrimination** is one of the essential building blocks of the WTO legal order. The WTO Agreements distinguish two components of this principle: the most-favoured-nation obligation, contained in Art. I GATT, Art. II GATS and Art. 4 TRIPS, and the national *1*

treatment obligation contained in Art. III GATT, Art. XVII GATS and Art. 3 TRIPS.

2 The **most-favoured-nation obligation** demands treatment of Members' goods on a footing not inferior to the treatment granted to the goods of the most favoured state, *i.e.* it demands equal treatment among different nations ("foreign parity"). The **national treatment obligation** adds to this standard by requiring treatment of Members' goods on a footing not inferior to the treatment granted to domestic goods ("inland parity"). The two provisions mutually reinforce each other, as national treatment granted to one Member has to be multilateralized according to the most-favoured-nation obligation.[1]

3 Within the context of GATT, national treatment requires that internal taxes, charges, laws and regulations must not be applied in a manner that treats imported products less favourably than domestic ones. Once imports into a Member have cleared customs, they have to be **treated no less favourably than like products originating in that Member** with regard to domestic taxes, laws, regulations, etc. Much like Art. XI the provision channels national protective measures into tariffs, thus providing for greater transparency[2] and enabling the progressive elimination of such discriminatory measures.

4 The **purpose** of Art. III is to avoid protectionism in the application of internal tax and regulatory measures, to ensure equality of competitive conditions between imported and like domestic products and to protect the expectations of an equal competitive relationship.[3] The provision is also meant to protect the negotiated tariff concessions under Art. II, but the purpose of Art. III is not limited to that protection, as it also applies to products that are not the subject of tariff concessions.[4]

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[1] *Senti & Conlan*, 43; *Picone & Ligustro*, 212.

[2] *Jackson*, World Trade & GATT, 286.

[3] Appellate Body Report, *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 16; Appellate Body Report, *Korea—Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, para. 120; Appellate Body Report, *Canada—Periodicals*, WT/DS31/AB/R, 18; Appellate Body Report, *US—FSC (Article 21.5—EC)*, WT/DS108/AB/RW, para. 204; Panel Report, *Italy—Agricultural Machinery*, BISD 7S/60, para. 12; Panel Report, *US—Superfund*, BISD 34S/136, para. 5.1.9; Panel Report, *Canada—Provincial Liquor Boards (US)*, BISD 39S/27, para. 5.6. See also *Mavroidis*, 127 *et seq*.

[4] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report. Tenth Meeting of the Tariff Agreement Committee Held on Thursday, 4 September 1947 at 2.30 p.m. in the Palais Des Nations, Geneva, E/PC/T/TAC/PV/10, 4 September 1947, 3, 33; *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 17; *Canada—Provincial Liquor Boards (US)*, BISD 39S/27, para. 5.30.

Art. III does not protect the expectations of any particular trade volume. The actual **trade effect** (as reflected in the volume of imports) of a purportedly discriminatory measure is therefore **irrelevant**: neither does Art. III require such trade effects of the discriminatory measure to be demonstrated,[5] nor is it relevant if the trade effects are insignificant or even non-existent.[6] The provision applies even where imports from other contracting parties are small or non-existent.[7] However, Members may have to quantify the effects of the trade measure after a successful challenge to the measure to determine the level of countermeasures (Art. 22.4 DSU).[8] *5*

At first the national treatment provisions were mainly invoked where a Member's internal measures explicitly discriminated against products with regard to their origin (***de jure* discrimination**). Many of the cases addressing national treatment that have been brought to the WTO dispute settlement system more recently concern national measures that adversely affect the competitive position of imported products even though the measures are origin-neutral on their face (***de facto* discrimination**). Commentators now put more emphasis on the difference between these two types of discrimination, demanding more flexibility for states where the latter is concerned.[9] *6*

The reason for these demands is that the determination of when a measure which is origin-neutral on its face is in violation of Art. III and thus constitutes *de facto* discrimination effectively strikes a balance between the **regulatory autonomy of the Members** and the trade objectives of the GATT. As has been observed in the context of both the EU and federal systems, the national treatment obligation has the potential to affect many domestic regulations in such areas as environmental, food and drug or tax law. The obligation thus collides with sensitivities about national sovereignty.[10] In response to such sensitivities the Appellate Body clarified in *Japan—Alcoholic Beverages II* that Members remain free to pursue their domestic goals through internal measures as long as they do not violate their WTO obligations including Art. III.[11] Also, by merely banning discrimination *7*

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[5] *Korea—Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, para. 153; *Canada—Periodicals*, WT/DS31/AB/R, 18.

[6] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 16; *US—Superfund*, BISD 34S/136, para. 5.1.9.

[7] Working Party Report, *Brazilian—Internal Taxes*, BISD II/181, para. 16.

[8] *Mavroidis*, 170.

[9] *Fauchald*, JWT 37 (2003) 3, 443, 447; *Ortino*, in: *Ortino & Petersmann* (eds), 217; Noting that the notion of *de facto* discrimination implies that one Member might be allowed to apply a measure that would not be permissible for another Member: *Ehring*, JWT 36 (2002) 5, 921, 972.

[10] *Hudec*, Int'l Law. 32 (1998), 619, 619 *et seq.; Verhoosel*, 4 *et seq.; Jackson*, Mich. J. Int'l L. 10 (1989), 207, 208; *Horn & Mavroidis*, EJIL 15 (2004), 39, 57; *Jackson*, Law and Policy, 13; *Jackson*, World Trade & GATT, 274.

[11] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10 AB R, WT DS11 AB R, 16.

and thus opting for "negative integration", Members avoided having to harmonize policies and thus further intrusion upon their sovereignty.[12]

8 Two areas of regulation have been giving rise to particularly difficult and contentious issues concerning national treatment: regulations imposing **product standards,** whether for development, production, sale or marketing, such as *e.g.* requirements relating to packaging or labelling of the products, and **sanitary and phytosanitary measures.** Regulations in these areas can easily indirectly discriminate against imports. As the general provisions of the GATT lack the precision necessary for the complex issues involved, Members have concluded the SPS and TBT Agreements containing more precise obligations for such regulations.[13]

9 A measure that has been found to be in violation of the national treatment obligation of Art. III is not automatically in violation of the GATT, as it can be **justified** under Arts XX, XXI. Of particular importance is the **general exception** contained in Art. XX, which exempts from GATT compliance measures necessary for the achievement of certain legitimate regulatory purposes.[14] The relationship between the articles demands that Art. III be taken into account as context in the interpretation of Art. XX and *vice versa*: a broad interpretation of Art. XX may not subvert the purpose of Art. III, nor may Art. III be interpreted so as effectively to render Art. XX meaningless.[15]

B. Historical Background

10 The history of national treatment has been traced back to the commercial privileges granted within the Hanseatic League from the 12th Century, which not only guaranteed foreign merchants access to the market, but also assimilated their position to that of domestic merchants. In the 17th and 18th Centuries the principle was included in a number of shipping treaties concluded between European states. It became commonplace in trade treaties during the latter part of the 19th century and was also included in the Paris[16] and Bern Conventions.[17] With the decline of free trade in the early 20th Century and in particular between the two World Wars the principle

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[12] *Mavroidis*, 127 *et seq*.

[13] *Stoll & Schorkopf*, Max Planck CWTL, Vol. 1, para. 271. On the relationship between those Agreements and Art. III GATT see below, paras 109 *et seq*.

[14] For details see generally *Wolfrum*, Article XX [Introduction] GATT 1994.

[15] Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, 18; Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, para. 115.

[16] Paris Convention for the Protection of Industrial Property, 20 March 1883, as last revised at the Stockholm Revision Conference, 14 July 1967, UNTS 828 (1972), 303.

[17] Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, as last revised at Paris on 24 July 1971, UNTS 1161 (1980), 30.

of national treatment in economic relations, too, suffered.[18] It was revived when the United States included national treatment provisions in its bilateral trade agreements negotiated under the Reciprocal Trade Agreements Act of 1934.[19] Commonly, the provision would state that "articles the growth, produce or manufacture of the United States of America" or the other contracting party "shall, after importation into the territory of the other country, be exempt from [...] internal taxes, fees, charges or exactions, other or higher than those payable on like articles of national [...] origin."[20]

The Suggested Charter for an ITO[21] submitted by the United States *11*
in preparation for the Conference on Trade and Employment contained an obligation of national treatment in its Art. 9. The provision underwent significant changes in the drafting process of the ITO Charter, such as exempting government procurement from the obligation of national treatment, before it largely obtained its current form in the Havana Charter.[22] The national treatment obligation was put into part II of the GATT 1947, immunizing existing legislation from the obligation under the **Protocol of Provisional Application**[23] of the GATT. Attempts to restrict the scope of the clause to products contained in the schedules, however, failed.[24]

C. Scope of Application: Internal Measures

Art. III applies to **internal taxes, charges, laws, regulations and** *12*
requirements. It thus dovetails with Arts II, XI: whereas Art. III covers internal taxes and charges as well as measures affecting imported products (*i.e.* internal measures), Art. II covers charges imposed on or in connection with importation and Art. XI covers measures affecting the importation of

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[18] *Erler*, 47; *Schwarzenberger*, BYIL 22 (1945), 96, 97; *Trebilcock & Giri*, in: *Choi & Hartigan* (eds), 186.

[19] Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73–316, 48, Stat. 943 (1934).

[20] See *e.g.* Art. VIII Reciprocal Trade Agreement between the United States of America and Cuba of 24 August 1934, Executive Agreement Series No. 67; Art. IV Reciprocal Trade Agreement between the United States of America and Haiti of 28 March 1935, Executive Agreement Series No. 78; Art. VI Reciprocal Trade Agreement between the United States of America and the Dominion of Canada, Executive Agreement Series No. 91.

[21] Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Annexure 11.

[22] Art. 15 Draft Charter (New York Draft), Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/34/Rev. 1, 29 May 1947; Art. 18 Draft Charter (Geneva Draft), Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, E/PC/T/186; Art. 18 Havana Charter for an International Trade Organization, 24 March 1948, CTS No. 32, 3, UN Doc. E/CONF. 2/78 (1948).

[23] UNTS 55 (1950), 308.

[24] See E/PC/T/TAC/PV/10; *Jackson*, World Trade & GATT, 277.

products (*i.e.* border measures).[25] The decisive criterion for the applicability of Art. III is thus whether a measure is internal or whether it is a border measure. The categorization of the measure in the laws of the importing Member plays only a secondary role in this determination.[26]

13 Whereas charges that are neither applied at the time or point of importation nor conditional upon importation are clearly internal measures irrespective of their policy purpose and categorization under domestic law, distinguishing internal measures and other measures is much harder for measures enforced at the time or point of importation.[27] The dividing line between internal measures and border measures in such cases is drawn by the note Ad Art. III that provides that an **internal measure which applies both to the imported and to the like domestic product** remains internal even where for the imported product the charge is collected or the measure enforced at the time or point of importation. The regime applying to the imported product does not have to be identical to that applying to the domestic product in order to fall within this provision.[28] Thus, one of the regimes could be a collection regime on the purchaser, the other a withholding one on the seller.[29]

14 Where a **measure bans both the import and the sale** of the product it could be argued that the prohibition on imports and that on sales should be examined separately. However, such an argument would tear apart a provision that pursues a single goal, namely banning the product within the territory of the Member. Given that purpose the whole measure must be examined under Art. III.[30]

15 Case law has taken a different turn where measures ban the import and sale of a product by reason of its **process and production methods** (**PPM**). In such cases, panels have held that the measure does not apply to the product, hence does not fall within the note Ad Art. III and does not constitute an internal measure, and therefore is subject to Art. XI.[31]

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[25] Panel Report, *India—Autos*, WT/DS146/R, WT/DS175/R, para. 7.220; Panel Report, *Canada—FIRA*, BISD 30S/140, para. 5.14. Note that while restrictions on importation are prohibited according to Art. XI:1 GATT, internal measures affecting the imported products can be permitted under Art. III GATT. See Panel Report, *US—Tuna (Mexico)*, BISD 39S/155, (not adopted), para. 5.9. See below, para. 107.

[26] *Jackson*, World Trade & GATT, 280.

[27] For the imposition of charges see Panel Report, *EEC—Parts and Components*, BISD 37S/132, paras 5.5 *et seq*.; Panel Report, *Canada—Gold Coins*, L/5863 (not adopted), para. 50; Panel Report, *Belgium—Family Allowances*, BISD 1S/59, para. 2.

[28] This is despite the French wording "*comme*". See Panel Report, *Argentina—Hides and Leather*, WT/DS155/R, para. 11.149; Panel Report, *EC—Asbestos*, WT/DS135/R, paras. 8.92 *et seq*.; Panel Report, *US—Section 337*, BISD 36S/345, para. 5.10.

[29] *Argentina—Hides and Leather*, WT/DS155/R, para. 11.150.

[30] *EC—Asbestos*, WT/DS135/R, para. 8.92.

[31] *US—Tuna* (Mexico), BISD 39S/155 (not adopted), paras 5.8 *et seq*.; Panel Report,

However, it is doubtful whether panels will continue to follow this approach after *EC—Asbestos*, in which the ban on import and sale of a product was examined under Art. III.[32] Also, the approach is based on a doubtful interpretation of "application to" the product, as the measures at issue ban the import of the product and thus clearly apply to the product. They are merely conditional on the non-fulfilment of certain requirements concerning the production method. Commentators habitually discuss the issue of PPMs in the context of the "like products" analysis of Art. III.[33]

D. Structure of Art. III

16 Art. III divides the national treatment obligation into supplementary and partly overlapping specific obligations relating to three different types of regulation. The interpretation of the specific obligations is informed by the **general principle** contained in para. 1. Para. 2 covers the obligation of national treatment relating to **internal taxes and other internal charges**. It is subject to the exception contained in para. 3. Art. III:4 contains the national treatment obligation with respect to **internal laws, regulations and other requirements**. Where the internal law imposes an internal tax or other internal charge, it will first be examined under Art. III:2. While, arguably, Art. III:2 should exclude the application of Art. III:4 as *lex specialis*,[34] the panel in *Mexico—Taxes on Soft Drinks* considered both provisions to apply.[35]

17 **Internal quantitative regulations** are subject to the national treatment obligation in Art. III:5 and (to the extent that they relate to the mixture, processing or use of products in specified amounts or proportions) the most-favoured nation obligation in Art. III:7. Para. 6 contains an exception to para. 5.

18 Paras 8 and 10 contain **exceptions** to all obligations contained in Art. III. Para. 9 governs internal maximum price control measures, imposing on Members a duty to take into account interests of exporting parties rather than concrete duties with respect to price control measures.

US—Tuna (EEC), DS29/R (not adopted), paras 5.6 *et seq*.; Panel Report, *US—Shrimp*, WT/DS58/R, paras 7.11 *et seq*.

[32] See discussion below, paras 20 *et seq*.

[33] *Thaggert*, in: *Cameron et al*. (eds), 69, 71 *et seq*. In accord: *Howse & Regan*, EJIL 11 (2000), 249, 253 *et seq*., basing their discussion on Art. III:4 GATT 1994 rather than the note Ad Article III.

[34] Similar: *Mavroidis*, 129.

[35] Panel Report, *Mexico—Taxes on Soft Drinks*, WT/DS308/R, para. 8.14. The panel failed to exercise judicial economy and also examined Art. III:4, para. 8.102.

19 Art. III is complemented by an interpretative note. This interpretative note Ad Art. III is contained in Annex I to GATT 1994. According to Art. XXXIV, the Annex is an integral part of the Agreement. The article and Ad article thus have the same legal status. The Ad article does not replace or modify the language of the article, but clarifies its meaning.[36]

E. General Principle: Avoiding Internal Protectionism (Art. III:1)

20 Art. III:1 articulates the general principle that **internal measures may not be applied so as to afford protection to domestic production.** "Toward this end, Article III obliges Members to provide equality of competitive conditions for imported products in relation to domestic products."[37]

21 Panels do not examine compliance of internal measures with Art. III:1 as a separate obligation. Some panels have considered it unnecessary to do so after finding a violation of the more specific obligations contained in Art. III:2, III:4.[38] Others have rightly stated that Art. III:1 does not contain a legally binding obligation, but rather a **statement of general principle** because of the words "recognize" and "should" in Art. III:1 and the word "principles" in Art. III:2, sentence 2.[39] As a general principle, Art. III:1 is part of the context of the specific obligations contained in the other paragraphs of Art. III and informs their interpretation without diminishing the meaning of the words used in the other paragraphs.[40]

22 One of the most contentious questions of interpretation of Art. III is whether "**so as to afford protection"** has to be read as implying an objective test, focusing on the effect of the internal measure on competition, or a subjective test focusing on the purpose of the measure.[41] While commentators time and again advocate a subjective test, panels nowadays prefer to take an objective approach.[42]

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[36] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 24; Panel Report, *Korea—Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, footnote 346; Panel Report, *Chile—Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, footnote 349.

[37] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 18.

[38] Panel Report, *US—Gasoline*, WT/DS2/R, para. 6.17; Panel Report, *US—Malt Beverages*, BISD 39S/206, para. 5.2.

[39] Panel Report, *Japan—Alcoholic Beverages II*, WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.12.

[40] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 18; *EC—Asbestos*, WT/DS135/AB/R, paras 93 *et seq*.

[41] *Horn & Weiler*, in: *Horn & Mavroidis* (eds), 14, 19, 23.

[42] See below, para. 59.

Art. III:1 also plays an important part in the interpretation of the term "like products" in Art. III:2, sentence 1 and III:4. A GATT Panel read the provision as imposing an aim and effects test for the determination of like products, a test that has since been rejected.[43] *23*

The Note Ad Art. III:1 makes it clear that the application of Art. III:1 to **internal taxes imposed by local governments** and authorities within the territory of a Member is subject to the provisions of Art. XXIV:12.[44] As the federal state clause is applicable in any event, Ad Art. III:1 serves a clarifying role. Given that the federal state clause has been strictly interpreted, there is little room for a federal state to justify its local authorities' non-compliance.[45] In so far as the note refers to internal taxes technically inconsistent with the letter, but not the spirit, of Art. III, it was drafted with the specific case of certain domestic products subject to prices fixed by local public monopolies in Colombia in mind.[46] *24*

F. Internal Taxes or Other Internal Charges (Art. III:2)

Art. III:2 imposes **two separate tests** for whether internal taxes or other internal charges comply with GATT.[47] The Appellate Body had the opportunity to refine the two tests in the *Japan—Alcoholic Beverages II*, *Korea—Alcoholic Beverages* and *Chile—Alcoholic Beverages* cases.[48] WTO panels first address a possible violation of **Art. III:2, sentence 1**, which requires the imported and domestic products to be like and a taxation of the imported products in excess of the domestic ones. If one of these two requirements is not fulfilled, there is no violation of the first sentence and the panel proceeds to examine compliance with Art. III:2, sentence 2.[49] *25*

The obligation contained in **Art. III:2, sentence 2** compares taxation of directly competitive or substitutable products. This category is broader than "like products", *i.e.* all like products are directly competitive or substitutable, but not *vice versa*. Whereas imperfectly substitutable products can thus be *26*

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[43] See below, para. 34.

[44] *Canada—Gold Coins*, L/5863 (not adopted), paras 49 *et seq*.

[45] *Trebilcock & Howse*, 35; See Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, Art. XXIV:12.

[46] GATT Analytical Index I, 130.

[47] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 19; Panel Report, *Indonesia—Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.103.

[48] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R; *Korea—Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R; *Chile—Alcoholic Beverages*, WT/DS87/R, WT/DS110/R.

[49] *Canada—Periodicals*, WT/DS31/AB/R, 22 *et seq*.

assessed only under Art. III:2, sentence 2, perfectly substitutable products also fall within the ambit of Art. III:2, sentence 1.[50]

I. Like Products Test (Art. III:2, sentence 1)

27 An internal tax or other internal charge is inconsistent with Art. III:2, sentence 1 if (i) the taxed imported and domestic products are **like products** and (ii) the taxes applied to the imported products are **in excess of those applied to the like domestic products**.[51] Art. III:2, sentence 1 does not require proof of "protective application", *i.e.* application of the internal charge so as to afford protection to domestic production under Art. III:1, as the provision does not invoke the first paragraph.[52]

1. Like Products under Art. III:2, sentence 1

28 The term "like products" appears over a dozen times in the GATT alone and is one of the key terms of the Agreement. The Appellate Body in *Japan—Alcoholic Beverages II* has emphasized that the term does not have the same meaning under each of these provisions. Its breadth in each provision has to be **determined with respect to the particular provision** in question, its context and the circumstances of the given case.[53] The definition of the term "like products" under Art. III:2 thus differs from its definition under other provisions of the GATT.[54] Nevertheless it is advisable also to bear in mind WTO case law on "like products" in Art. III:4[55] as there is a strong process of cross-fertilization in the case law on the two provisions.

29 In Art. III:2 "like products" is **construed narrowly** to retain the distinction between the test contained in Art. III:2, sentence 2, which, according to Ad Art. III:2, is applicable to directly competitive or substitutable products, and the test under Art. III:2, sentence 1, applicable to like products (a subset of directly competitive or substitutable products).[56]

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[50] *Korea—Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, para. 118; *Canada—Periodicals*, WT/DS31/AB/R, 28; *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 25.

[51] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 18 *et seq*.; *Canada—Periodicals*, WT/DS31/AB/R, 22 *et seq*.

[52] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 18; *Argentina—Hides and Leather*, WT/DS155/R, para. 11.137; See below, para. 34.

[53] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 21. That is not to say that the criteria for the different provisions always differ significantly. Note that in *Indonesia—Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, paras 14.110 *et seq*., 14.141 the panel considered the facts supporting a finding of likeness under the SCM Agreement sufficient to support such a finding under Art. III:2 and similarly under Art. I.

[54] For a critical evaluation see *Hudec*, in: *Cottier & Mavroidis* (eds), 101 *et seq*.

[55] See below, paras 67 *et seq*.

[56] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 19; *Korea—Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, para. 118.

The dictionary defines "**like**" as "[h]aving the same characteristics or qualities as some other […] thing; of approximately identical shape, size, etc., with something else; similar".[57] Like products are thus products that share a number of identical or similar characteristics or qualities, a meaning that is reinforced by the French "*produits similaires*" and the Spanish "*productos similares*".[58] *30*

The determination of likeness requires a comparison of the imported and the domestic products. Both GATT and WTO panels determine the likeness of the products involved on a **case-by-case basis** involving an element of discretionary judgment. A list of **factors relevant** to this determination under all provisions of GATT 1994 in which the term "like products" is used has been compiled by the Working Party Report on *Border Tax Adjustments*, which enumerates (i) the product's **end-uses** in a given market; (ii) **consumers' tastes and habits**, which change from country to country; (iii) the **product's properties**, nature and quality, *i.e.* its physical characteristics.[59] Other accepted criteria include (iv) a sufficiently detailed **uniform tariff classification**[60] and (v) **elasticity of substitution**.[61] In applying these criteria to Art. III:2, sentence 1 it has to be borne in mind that the definition of like products in that provision is narrower than that used in other provisions.[62] *31*

As Art. III aims to protect equal competitive conditions in the market, the **market place** is of critical importance for the determination of likeness of two products.[63] Thus, products that are like in one market are not necessarily like elsewhere. Even though the importance of market criteria would seem to speak in favour of drawing parallels with competition law, a WTO panel held that the definition of "market" for Art. III may be broader than that used in competition law, as the two areas of law have different purposes.[64] Doctrinal works on the importance of market-based criteria are split: whereas some authors argue in favour of giving more room to economic criteria and are much more ready than WTO case law to draw inspiration from competition law,[65] others criticize the emphasis *32*

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[57] *L. Brown* (ed.), The New Shorter Oxford English Dictionary, Vol. I, 1993, 1588.
[58] *EC—Asbestos*, WT/DS135/AB/R, para. 90.
[59] Working Party Report, *Border Tax Adjustment*, BISD 18S/97, para. 18; *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 20; *Canada—Periodicals*, WT/DS31/AB/R, 21.
[60] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 21; Panel Report, *Japan—Alcoholic Beverages I*, BISD 34S/83, para. 5.6; *US—Gasoline*, WT/DS2/R, para. 6.9.
[61] *Japan—Alcoholic Beverages II*, WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.22.
[62] *Ibid.*, 20.
[63] *Ibid.*, para. 6.22.
[64] *Korea—Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, para. 10.81.
[65] See *Choi*, 33 *et seq.*

on the market place, as consumption patterns are liable to change. Much of this criticism, however, can be accounted for by a proper methodology for establishing the competitiveness of the products.[66]

33 **Rejected criteria** include tariff bindings or concessions made under Art. II unless they are extremely precise with regard to product description, because such bindings merely represent trade concessions and can be too broad for likeness;[67] characteristics of the producer of the products;[68] differences in process and production methods as long as they are not reflected in the product itself.[69]

34 Another rejected criterion is the so-called **aim and effects test**. Reading Art. III:2, sentence 1 and Art. III:4 in the light of the principle of Art. III:1 the GATT Panel in *US—Malt Beverages* applied this test to determine whether products were like. It argued that Art. III is not intended to prevent Members from using their fiscal and regulatory powers for purposes other than to afford protection to domestic production, and therefore the determination of whether two products are like hinges on the purpose of the regulation (whether it is intended to afford protection) and its markets effects, *i.e.* whether it has a *bona fide* regulatory purpose and protective effects.[70] WTO cases starting with *Japan—Alcoholic Beverages II* have rejected the aim and effects test, arguing that, unlike Art. III:2, sentence 2, para. 2, sentence 1[71] and para. 4[72] of Art. III do not contain a reference to Art. III:1. Furthermore, the aim and effects test requires consideration of the legitimacy of the regulatory purpose in the analysis under Art. III and thus collapses the considerations necessary for Art. XX into Art. III, threatening to circumvent the specific requirements of Art. XX and shifting the burden of proof of the aim of the regulation to the complainant.[73] Even though para. 2, sentence 1 and para. 4 of Art. III are expressions of the general principle contained in Art. III:1, they do not require any additional element stemming from Art. III:1 to be fulfilled.[74] Despite the explicit rejection of the aim and effects test in WTO cases, that approach remains popular in literature and sometimes seems to be applied by panels intuitively in the

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[66] *Horn & Weiler*, in: *Horn & Mavroidis* (eds), 14, 20.
[67] *Ibid*., 22.
[68] See below, para. 72.
[69] See below, paras 73 *et seq*.
[70] *US—Malt Beverages*, BISD 39S/206, paras 5.25, 5.71 *et seq*.; Panel Report, *US—Taxes on Automobiles*, DS31/R (not adopted), paras 5.9 *et seq*.; *Hudec*, Int'l Law. 32 (1998), 619, 626 *et seq*.
[71] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 18.
[72] Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, paras 215 *et seq*.
[73] *Japan—Alcoholic Beverages II*, WT/DS8/R, WT/DS10/R, WT/DS11/R, 6.16 *et seq*., *Hudec*, Int'l Law. 32 (1998), 619, 628.
[74] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 18.

case-by-case approach to determining likeness of products.[75] Commentators have not failed to point out that the subjective purpose a legislator pursues with a measure examined under Art. III also seems to play a role in other guises at times, *e.g.* under the heading of "protective application" in Art. III:2, sentence 2, a purportedly objective criterion,[76] or "less favourable treatment" in Art. III:4.[77]

35 The following products have, **for example, been held like products** under Art. III:2, sentence 1: vodka and shochu,[78] the Toyota Corolla, Ford Escort, Peugeot 306, Opel Optima and the Timor (which is based on the Kia Sephia),[79] beet sugar and cane sugar as sweeteners in the production of soft drinks and syrups;[80] soft drinks and syrups sweetened with high fructose corn syrup and soft drinks and syrups sweetened with cane sugar; soft drinks and syrups sweetened with beet sugar and soft drinks and syrups sweetened with cane sugar.[81] In the following cases the products were held **not to be like**: shochu and liqueurs, gin, genever, rum, whisky, brandy.[82]

36 Commentators have suggested several **alternative methods** for establishing likeness. One commonly suggested approach would let countries establish comparators, such as ecological efficiency of the product, to compare products. Panels would then have to examine whether the chosen comparator was legitimate and whether the architecture of the measure was properly tailored to the comparator.[83] The disadvantage of the approach is that panels would have to rule on the legitimacy of comparators established by Members.[84] Probably the most popular alternative approach to establishing likeness is one that focuses heavily on market factors such as cross-price elasticity, often borrowing from competition law.[85]

37 **Where imports of the product have been banned** in violation of WTO obligations[86] and where the tax at issue distinguishes the products

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[75] *Hudec*, Int'l Law. 32 (1998), 619, 634; *Srinivasan*, World Trade Rev. 4 (2005), 69, 92; *Choi*, 83.

[76] *Horn & Mavroidis*, EJIL 15 (2004), 39, 58.

[77] *Regan*, JWT 36 (2002) 3, 443, 444, 477 *et seq.*

[78] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 32; see *Japan—Alcoholic Beverages I*, BISD 34S/83, para. 5.6.

[79] *Indonesia—Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, paras 14.110 *et seq.*

[80] *Mexico—Taxes on Soft Drinks*, WT/DS308/R, para. 8.36.

[81] *Ibid.*, para. 8.136.

[82] *Japan—Alcoholic Beverages II*, WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.23.

[83] *Horn & Weiler*, in: *Horn & Mavroidis* (eds), 14, 26 *et seq.*

[84] *Horn & Mavroidis*, EJIL 15 (2004), 39, 60.

[85] *Ibid.*, 39, 61 *et seq.*, 66 *et seq.*; *Choi*, 156; See also *Hudec*, in: *Cottier & Mavroidis* (eds), 101, 117. *Mavroidis*, 147 *et seq.* departs from the notion of directly competitive or substitutable products and narrows it down.

[86] *Canada—Periodicals*, WT/DS31/AB/R, 20 *et seq.*

on the basis of factors not relevant to their likeness, such as nationality,[87] panels have compared the domestic products with **hypothetical imports** rather than with specific existing imports. In those cases there is no need to demonstrate the existence of actually traded like products, nor does the likeness need to be discussed in the complaint, as the hypothetical imports are necessarily like the domestic products in all relevant criteria.[88]

2. Discriminatory Internal Charges in Excess of Those on Like Domestic Products

38 The provision covers **internal charges**[89] of any kind. The term "charge" denotes a pecuniary burden and a "liability to pay money laid on a person". A mechanism for the collection of a tax imposing a pecuniary burden can be such a charge.[90]

39 The taxes and other internal charges have to be levied **directly or indirectly on the product**. The provision requires some connection, even if indirect, between the relevant internal taxes or charges and the taxed product. The GATT terminology is not identical to the common tax terminology, as "indirect taxes" are taxes levied directly on a product, whereas "direct taxes" can only be taxes levied indirectly on the product.[91] Examples of taxes levied directly on a product include excise taxes,[92] sales taxes, cascade taxes and value added tax regardless of its technical construction.[93] A tax imposed directly on a finished product can, however, also be imposed indirectly on an input. This is the case where the use of a certain input triggers a tax on the finished product, even if the tax is imposed *ad valorem* of the finished product.[94] A tax on a service related to a product (such as its distribution) is indirectly imposed on the product if the tax is imposed on services related to the product but not on the same services related to a like product.[95] Similarly, a tax not on the product but on the processing of the product would be considered a tax levied indirectly on the product.[96]

40 Where a regulation provides for **penalties** for non-compliance, these penalties do not constitute separate taxes or charges for the purposes of

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[87] *Indonesia—Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, paras 14.112 *et seq.; Argentina—Hides and Leather*, WT/DS155/R, para. 11.168.

[88] *Argentina—Hides and Leather*, WT/DS155/R, para. 11.168; An examination is warranted, however, where, in case of a ban, sufficiently similar imports exist: *Canada—Periodicals*, WT/DS31/AB/R, 20 *et seq*.

[89] For a definition of "internal" see above, paras 12 *et seq*.

[90] *Argentina—Hides and Leather*, WT/DS155/R, para. 11.143.

[91] For a definition see Annex I footnote 58 SCM.

[92] *US—Superfund*, BISD 34S/136, para. 5.1.1.

[93] Working Party Report, *Border Tax Adjustments*, BISD 18S/97, para.14.

[94] *Mexico—Taxes on Soft Drinks*, WT/DS308/R, paras 8.44 *et seq*.

[95] *Ibid*., para. 8.49.

[96] GATT Analytical Index I, 141.

Art. III:2; rather they have to be considered together with the underlying measure.[97] Income **taxes** as such are not charges on a product.[98] However, where a tax-rate is applied to the price of an imported product, the tax is levied on the product even if its price is merely taken as a proxy for future income.[99] Where the legislator intends to regulate a service sector (advertising) and does so by imposing a tax on a product (split-run periodicals), the tax remains a tax on a product.[100]

The provision makes no distinction as to the **purpose of the tax**, leaving the regulator free to pursue the policy objectives it wants to pursue. Accordingly, it is irrelevant whether a charge is levied for general revenue purposes, for environmental reasons, or to promote efficient tax administration.[101] *41*

The taxes imposed on imported products may not be **in excess of** those on like domestic products, *i.e.* the provision demands at least identical or better tax treatment for the imported products. Even the smallest amount of taxation in excess of that on like domestic products based on the chosen mode of taxation suffices for there to be a violation of Art. III:2, sentence 1, as the provision is not qualified by a *de minimis* standard.[102] However, the provision does not require a specific mode of taxation.[103] Also, the mere fact that the systems of taxation for imported and for domestic products are different, *e.g.* using different methods of calculation of prices, does not amount to discrimination.[104] *42*

There is no standard **methodology for the comparison of the taxes**, however, several observations can be made. Thus, panels compare the actual, not the nominal, tax burden on the products.[105] Where payment is due at different times the loss of interest has to be factored into the calculation.[106] Normally the comparison looks at each individual case of imported and like domestic products. Where less favourable tax treatment is found for some *43*

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[97] Panel Report, *US—Tobacco*, BISD 41S/131, para. 81; Panel Report, *EEC—Animal Feed Proteins*, BISD 25S/49, para. 4.4.

[98] See the *travaux préparatoires* cited in GATT Analytical Index I, 144. An income tax privilege tied to purchases of domestic goods, however, can be argued to constitute a relevant internal charge. See *Jackson*, World Trade & GATT, 285.

[99] *Argentina—Hides and Leather*, WT/DS155/R, paras 11.158 *et seq*.

[100] *Canada—Periodicals*, WT/DS31/AB/R, 17.

[101] *Argentina—Hides and Leather*, WT/DS155/R, para. 11.144; *US—Superfund*, BISD 34S/136, para. 5.2.4.

[102] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 23; *US—Superfund*, BISD 34S/136, para. 5.1.9. BISD 39S/206, para. 5.6. Note that the provision also does not require trade effects, see above, para. 5.

[103] *Japan—Alcoholic Beverages II*, WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.24.

[104] *Japan—Alcoholic Beverages I*, BISD 34S/83, para. 5.9 lit. c, cited with approval by *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 29.

[105] *Argentina—Hides and Leather*, WT/DS155/R, para. 11.183.

[106] *Ibid.*, para. 11.188.

products it cannot be balanced against more favourable treatment granted in other instances.[107] While this individual-case approach is well adapted to *de jure* discrimination, for cases of *de facto* discrimination the approach described below will have to be adopted.[108] A finding of excess taxation cannot be eliminated by an *ex post facto* rationalization of the taxation alleging it not to be in excess of that on like domestic products based on a different calculation of the taxation from the one chosen.[109]

44 A state within a **federal system** taxing out-of-state products in excess of in-state products has to grant imported products treatment no less favourable than that accorded to the most-favoured domestic products.[110]

45 A long-standing disputed area in the domain of national treatment with respect to internal taxes is the question of **border tax adjustment**, *i.e.* "fiscal measures which put into effect, in whole or in part, the destination principle (*i.e.* which enable exported products to be relieved of some or all of the tax charged in the exporting country in respect of similar domestic products sold to consumers on the home market and which enable imported products sold to consumers to be burdened with some or all of the tax charged in the importing country in respect of similar domestic products)".[111] Without border tax adjustment the products would be double taxed, namely at the place of production and at the place of purchase. Border tax adjustment on imports is subject to scrutiny under Art. III:2. The GATT report of the Working Party on *Border Tax Adjustments* held that taxes levied directly on the product (unlike *e.g.* social security charges) are eligible for border tax adjustment.[112] The GATT provisions limit the amount that may be adjusted. Border tax adjustment on imported products in excess of taxes borne by like domestic products is discriminatory.[113] Below the amount of taxes borne by like domestic products Members are free to set the level of adjustment.[114] Border tax adjustment remains a contentious issue, as coun-

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[107] *Ibid.*, para. 11.260.

[108] See below, para. 57. For the methodology of comparison see also below, para. 86.

[109] *Japan—Alcoholic Beverages II*, WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.25 (with Japan trying to rationalize discriminatory taxation on alcoholic beverages based on alcoholic content by a comparison of tax/price ratios).

[110] *US—Malt Beverages*, BISD 39S/206, para. 5.17; *Canada—Provincial Liquor Boards (US)*, BISD 39S/27, para. 5.4 footnote 1.

[111] *Border Tax Adjustments*, BISD 18S/97, para. 4.

[112] *Ibid.*, para. 14; See Art. II:2 lit. a GATT concerning border tax adjustment of imports, which explicitly refers to Art. III:2 GATT; For the border tax adjustment of exports see Art. VI:4; Ad Art. XVI GATT; Annex 1 lit. h. SCM. For details, such as the treatment of *taxes occultes* and other taxes see BISD 18S/97.

[113] For details see Committee on Trade and Environment, Taxes and Charges for Environmental Purposes, Border Tax Adjustment, Note by the Secretariat, WT/CTE/W/47, 2 May 1997, paras 23 *et seq*.

[114] *Border Tax Adjustments*, BISD 18S/97, para. 11.

tries relying mainly on direct taxes, *e.g.* the United States, cannot adjust these taxes and regard the different treatment as unfair.[115]

As the policy behind the tax is irrelevant for its eligibility for border tax adjustment, **environmental taxes** can be adjusted insofar as they are levied directly on products.[116] The adjustment of such taxes enables a country to pursue its environmental goals without endangering the competitiveness of its industry. To enable such adjustment regulators have to bear in mind that the environmental tax has to be levied directly on the product. This is not the case where the charge is levied solely according to criteria that do not take the product into account, such as the potential of an industry to reduce emissions. Thus, expenditure in trading greenhouse gas emission allowances within the EU would not be eligible for border adjustment.[117] *46*

3. Burden of Proof

The complainant has to establish a *prima facie* case on both issues, namely that the products are like and that the imported products are subject to internal taxes or other internal charges in excess of those applied to the like domestic products.[118] The rule that the plaintiff has to establish a *prima facie* case of violation applies even where the respondent fails to reply to the complainant's allegations.[119] *47*

II. Directly Competitive or Substitutable Products Test (Art. III:2, sentence 2)

Art. III:2, sentence 2 explicitly invokes Art. III:1 and must be read together with Ad Art. III:2. An internal tax or other internal charge is inconsistent with Art. III:2, sentence 2 if (i) the imported products and the domestic products are **directly competitive or substitutable products** which are in competition with each other; (ii) the directly competitive or substitutable imported and domestic products are **not similarly taxed**; and (iii) the dissimilar taxation is applied so as to afford **protection to domestic production**.[120] *48*

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[115] *Jackson*, Law and Policy, 219. In-depth *Jackson*, World Trade & GATT, 294.

[116] *US—Superfund*, BISD 34S/136, para. 5.2.4.

[117] For the criteria for the allocation of such allowances see Annex III of the Directive 2003/87/EC of 13 October 2003, OJ 2003 L 275/32, 25 October 2003.

[118] *Japan—Alcoholic Beverages II*, WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.14.

[119] *Mexico—Taxes on Soft Drinks*, WT/DS308/R, paras 8.18 *et seq*.

[120] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 24; *Korea—Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, para. 107; *Chile—Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, para. 47.

1. Directly Competitive or Substitutable Products

49 According to Ad Art. III:2, a violation of Art. III:2, sentence 2 can be demonstrated only where competition between directly competitive or substitutable products is involved. **Competitive** means "characterized by competition". **Substitutable** means "able to be substituted". **Directly** implies some proximity in the competitive relationship between the domestic and the imported products. Products are directly competitive or substitutable if they are interchangeable or offer alternative ways of satisfying a particular need or taste. The category is broader than that of like products, so that products outside the scope of Art. III:2, sentence 1 may still fall within sentence 2, while products that are like are automatically directly competitive or substitutable.[121] The *travaux préparatoires* confirm that the category should not be so narrowly construed as to defeat the anti-discrimination purpose of Art. III.

50 Whether products are directly competitive or substitutable is determined on a **case-by-case** basis.[122] **Relevant criteria** for the determination are products' physical characteristics, common end-uses, tariff classifications, their competitive behaviour in the relevant markets as shown by the elasticity of substitution, *i.e.* cross-price elasticity,[123] consumers' perceptions and behaviour in respect of the products,[124] channels of distribution and prices.[125] The focus is on the quality rather than the quantity of competition: while quantifications of the extent of competitive overlap or cross-price elasticity are helpful as one consideration in the determination, they are not dispositive, as that would leave the determination open to manipulations by protectionist government policies and could import a type of trade effects test into Art. III.[126]

51 Competition in the relevant **markets** is one means of identifying the directly competitive or substitutable products.[127] The directly competitive or substitutable relationship must be present in the market at issue in the case. Considerations of consumer behaviour in other, similar, markets can be relevant, however, particularly where demand in the market at issue has been influenced by a history of regulatory barriers and provided that the other market displays characteristics similar to the market at issue.[128]

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[121] *Korea—Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, paras 114 *et seq*.
[122] *Japan—Alcohlic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 25.
[123] *Ibid*.
[124] *Mexico—Taxes on Soft Drinks*, WT/DS308/R, para. 8.68.
[125] *Korea—Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, para. 10.43.
[126] *Ibid*., paras. 109, 128 *et seq*. See also paras 15, 42 *et seq*.
[127] *Japan—Alcohlic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 25.
[128] *Korea—Alcohlic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, para. 137.

The notion of directly competitive or substitutable products is not static, *i.e.* limited to products that consumers already regard as substitutable. Cross-price elasticity is just one, and not the decisive, criterion. Otherwise protectionist internal taxation might influence consumer preferences and prevent a finding of direct competition and substitutability, which would defeat the purpose of the provision.[129] Potential demand (latent demand) of the imports can thus be taken into account, whether for gauging the effect on consumer demand of the abolition of the criticized tax differential or for compensating other causes of latent demand.[130] *52*

A panel does not have to compare each domestic and each imported product item by item. It can **group products** and consider the group *in toto*, provided that the components of the group have sufficient common characteristics, end-uses, channels of distribution and prices, and the grouping does not result in individual product characteristics being overlooked.[131] *53*

The following products have, for **example**, been found to be directly competitive or substitutable: shochu and other distilled spirits and liqueurs listed in HS 2208 (except for vodka which is a like product);[132] domestic distilled alcoholic beverages produced in Chile, including pisco and imported products identified by HS 2208;[133] imported split-run periodicals and domestic non-split-run periodicals covering the same issue area;[134] high fructose corn syrup and cane sugar.[135] The negotiating history further mentions apples and oranges; domestic linseed oil and imported tung oil; domestic synthetic rubber and imported natural rubber.[136] *54*

2. Not Similarly Taxed

Ad Art. III:2 requires the products that are compared not to be similarly taxed. "Not similarly taxed" must be interpreted differently from taxation "in excess of" to preserve the distinction between the tests in the first and the second sentences of Art. III:2.[137] Products are not similarly taxed if the **tax burden on the imported products is heavier** than that on the directly competitive or substitutable domestic products and the amount of differential taxation is **more than** *de minimis*. Whether the *55*

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[129] *Ibid.*, paras 114 *et seq*. Contra: *Mavroidis*, 134.
[130] *Ibid.*, paras 120 *et seq*. The Ad note cannot be read to state the contrary. *Ibid.*, para. 117.
[131] *Ibid.*, paras 142 *et seq*.
[132] *Japan—Alcohlic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 32.
[133] *Korea—Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, para. 8.1.
[134] *Canada—Periodicals*, WT/DS31/AB/R, 28.
[135] *Mexico—Taxes on Soft Drinks*, WT/DS308/R, para. 8.78.
[136] *Korea—Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, para. 10.38.
[137] *Japan—Alcohlic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 26 *et seq*.

amount of differential taxation is more than *de minimis* has to be determined on a case-by-case basis.[138]

56 The **methodology of comparison** of the tax burden closely resembles that of Art. III:2, sentence 1.[139] Normally, the comparison looks at each individual case of imported and like domestic products. Dissimilar taxation of even some imported products as compared to directly competitive or substitutable domestic products is inconsistent with the provision and cannot be balanced against more favourable treatment granted in other instances.[140]

57 Without explicitly stating so, panels take a different approach **in cases of *de facto* discrimination**. Departing from the purpose of the provision to provide for equality of competitive conditions for all directly competitive or substitutable imported products in relation to domestic products, panels compare the treatment of all directly competitive or substitutable imported and domestic products without regard to whether the fiscal measures under examination place them into one or several different fiscal categories. If a high percentage of the domestic products are subject to a low tax rate, whereas a high percentage of the directly competitive or substitutable imported products are subject to a high tax rate, non-similar taxation has been established.[141]

3. So as to Afford Protection

58 Pursuant to the explicit reference in Art. III:2, sentence 2 to Art. III:1 the tax measure has to be applied **so as to afford protection**. This requirement of protective application constitutes a separate element of the test under Art. III:2, sentence 2.[142]

59 The Appellate Body held the relevant **inquiry** to be an **objective** one.[143] The issue is how the measure is applied. Protective application is determined by a comprehensive and objective analysis of the design, architecture, revealing structure, application and underlying criteria of the measure in question on domestic as compared to imported products.[144] It is irrelevant whether the intent or aim or any of the motivating reasons of the legislator

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[138] *Ibid.*, 27.
[139] See above, para. 43. For the methodology of comparison see also below, para. 86.
[140] *Canada—Periodicals*, WT/DS31/AB/R, 29.
[141] *Chile—Alcohlic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, paras 52 *et seq*.
[142] *Japan—Alcohlic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 27; *Chile—Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, para. 55.
[143] See above, para. 22.
[144] *Japan—Alcohlic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 29; Korea—*Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, para. 149; *Chile—Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, para. 62; *Canada—Periodicals*, WT/DS31/AB/R, 30.

or regulator was the desire to engage in protectionism, and it is therefore unnecessary to sort through the expressions of such legislative intent.[145] While the subjective intentions of the legislator are irrelevant for the inquiry,[146] the **statutory purposes or objectives**, *i.e.* the purposes of the legislator insofar as they have been given objective expression in the statute itself, are highly relevant for the analysis.[147] Where the defending party states the objectives and purposes of the measure to defend it, trying to rebut the impression of protective application, the panel will examine whether the features of the measure are related to the stated objectives and purposes to establish whether the purpose is expressed in the statute. It will not enquire whether the measure is necessary to achieve the stated purpose.[148]

60 A very **large amount of differential taxation** by itself can constitute sufficient evidence of protective application.[149] However, mere differences in the system of taxation for imported and for domestic products, such as different methods of calculation of prices for tax purposes, are not sufficient to show protective application.[150]

61 The following **considerations have been found to be irrelevant** as evidence of protective application: trade effects;[151] evidence of past protective measures that are no longer in force;[152] the fact that domestic products, too, can be subject to the higher fiscal category that most imports fall into.[153]

62 The **Appellate Body has found protective application** where a purportedly progressive tax measure which is origin-neutral on its face in practice turned out to tax most domestic products at its lowest and most

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[145] *Japan—Alcohlic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 27 *et seq.; Chile—Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, paras 61 *et seq*. In contrast to these statements the Appellate Body cited a number of documents showing precisely such intent in *Canada—Periodicals*. Arguably, its finding of protective application in the case could, however, stand on the magnitude of dissimilar taxation alone, that the Appellate Body found "beyond excessive, indeed, [...] prohibitive". *Canada—Periodicals*, WT/DS31/AB/R, 30 *et seq*.; See also para. 31.

[146] The declared intent cannot be totally disregarded where the legislator's explicit objective was to afford protection to domestic products. *Mexico—Taxes on Soft Drinks*, WT/DS308/R, para. 8.91.

[147] *Chile—Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R paras. 62, 71.

[148] *Ibid*., para. 72. *Mavroidis*, 143, criticizes this reasoning as superfluous, because it runs counter to the case law stating that protective application can be evidenced by a wide tax differential alone (see below, para. 60). However, a Member can rebut the presumption of protective application in such a case by explaining the tax structure as long as the attacked measure really reflects the stated objectives.

[149] *Japan—Alcohlic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 29; *Korea—Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, para. 149; *Canada—Periodicals*, WT/DS31/AB/R, 30.

[150] *Japan—Alcohlic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 29.

[151] See above, para. 5.

[152] *Chile—Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, para. 74.

[153] *Ibid*., para. 67.

directly competitive or substitutable imports at its highest level, much above the lowest one;[154] where a tax operated in such a way that the lower tax brackets covered almost exclusively domestic products and the higher brackets almost exclusively imported products;[155] and where differentiated internal taxes together with a high import duty isolated the domestic products from foreign competition.[156] The latter proposition is doubtful, however, as it should have been considered impermissible to include import duties in the consideration of whether the internal tax is applied so as to afford protection, as these duties are subject to other obligations under the GATT.

4. Burden of Proof

63 The three elements of the test under Art. III:2, sentence 2 have to be established by the complainant who is alleging a violation of the provision.[157] A *prima facie* case has to be made with respect to all products in question. There is no presumption that products within one tariff classification will be treated alike.[158] The defending party can rebut, *e.g.* by declaring the objectives of the measure which are other than to afford protection, in which case the panel tries to relate the observable structure of the measure to the declared purpose. However, it may not examine whether the tax measure is necessary for achieving its stated objectives.[159]

III. Exception for Certain Existing Discriminatory Taxes (Art. III:3)

64 **Art. III:3 permits the retention of an internal tax that is in violation of Art. III:2 if** (i) the tax is specifically, *i.e.* explicitly, **authorized under a trade agreement** of the Member; (ii) that trade agreement was in force on 10 April 1947, the opening date for the Second Session of the Preparatory Committee for the Havana Conference; and (iii) the trade **agreement also binds the import duty on the taxed product against increase**. If the requirements are fulfilled, the Member can

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[154] *Ibid.*, paras 63 *et seq*.

[155] *Korea—Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, para. 150. Note, however, that "[t]he relative proportion of domestic versus imported products within a particular tax category is not, in and of itself, decisive of the appropriate characterization" under the "so as to afford protection" prong. *Chile—Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, para. 67. Given the conspicuous jump in the rate of a purportedly progressive tax according to alcoholic content just below the alcoholic content of most imported spirits the Appellate Body in *Chile—Alcoholic Beverages* has analyzed the measure correctly. Critical: *Mavroidis*, 144 *et seq*.

[156] *Japan—Alcohlic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 31.

[157] *Ibid.*, 24.

[158] *Korea—Alcohlic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, para. 156.

[159] *Chile—Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, paras 71 *et seq*. See above, para. 59.

maintain the discriminatory tax until it can obtain release from the obligations of the trade agreement with respect to the tariff.

The **rationale** of the exception is that in the above situation a Member cannot transfer the margin of protection it afforded by the discriminatory internal taxation to a customs duty. The provision allows the Member to postpone compliance with Art. III:2 until this transfer can take place.[160] The provision thus illustrates that Art. III also channels protectionism into the preferred format of tariffs. The exception has hitherto not been invoked in any dispute. *65*

G. Laws, Regulations, Requirements (Art. III:4)

A measure is in violation of Art. III:4 if (i) the imported products[161] concerned are **like the domestic products**, (ii) the measure under examination is a **law, regulation or requirement that affects the internal sale, offering for sale, purchase, transportation, distribution or use**, and (iii) the imported products are accorded **less favourable treatment** than the like domestic products.[162] It is not necessary to show that the measure affords protection to domestic production.[163] *66*

I. Like Products under Art. III:4

The Appellate Body first ruled on the meaning of "**like products**" in Art. III:4 in *EC—Asbestos*. It recalled that the meaning of the term "like products" can differ from provision to provision, and that its meaning in other provisions is merely relevant as context in interpreting the same terms under Art. III:4.[164] More important as **context** than the meaning of "like products" in other provisions is the general principle expressed in Art. III:1. Whereas in Art. III:2 this principle is embodied in two different obligations applying to "like" and "directly competitive or substitutable" products, in Art. III:4 it is embodied in a single obligation. As a legislator can often pursue its ends by both fiscal and non-fiscal regulations and the general principle contained in Art. III:1 should be applied consistently to the two different types of regulation, the term "like products" has to be read **more** *67*

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[160] See GATT Analytical Index I, 161 *et seq*.

[161] To find that products are not "imported products", it has to be established that importation of the products is inherently impossible—it is not sufficient to show that some of the products are in transit. Panel Report, *EC—Commercial Vessels*, WT/DS301/R, para. 7.63.

[162] Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 133; *India—Autos*, WT/DS146/R, WT/DS175/R, paras. 7.172.

[163] *EC—Bananas III*, WT/DS27/AB/R, para. 216; Panel Report, *Dominican Republic—Cigarettes*, WT/DS302/R, para. 7.202. See above, para. 34.

[164] *EC—Asbestos*, WT/DS135/AB/R, paras 88 *et seq*.

broadly in Art. III:4 than in Art. III:2, sentence 1.[165] The Appellate Body refused to rule on whether the scope of "like products" under Art. III:4 is co-extensive with the combined scope of "like" and "directly competitive or substitutable" products under Art. III:2, although it held that its scope is no broader than that combined scope.[166] Given the Appellate Body's desire to extend the principle in Art. III:1 in a similar way to both fiscal and non-fiscal regulations, "like products" in Art. III:4 should be read as co-extensive with the combined scope of "like" and "directly competitive or substitutable" products under Art. III:2.

68 As the national treatment obligation is meant to guarantee equality of competitive conditions for imported and domestic products, the decisive question for "likeness" under Art. III:4 is whether **products are in a competitive relationship**. "Competitiveness" or "substitutability" between two products is a matter of degree, and it cannot be stated in the abstract what degree of competition between two products suffices to make them "like", albeit it is certain that not all products in some competitive relationship are "like".[167] Despite the importance of the competitive relationship, it is not necessary to demonstrate actual trade in the products concerned to establish likeness.[168]

69 As in Art. III:2, sentence 1 in practice the determination of likeness is made on a **case-by-case** basis, involving an element of discretionary judgement. Building on the Working Party Report on *Border Tax Adjustments*, the Appellate Body in *EC—Asbestos* established a non-exhaustive **list of relevant and interrelated criteria**, that may serve as a tool in examining the relevant evidence: "(i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes."[169]

70 The adoption of this list does not extinguish the duty of a panel to examine all of the relevant evidence. If the panel uses the list, **the different criteria need to be examined separately**. Only after weighing the (possibly contradictory) evidence pertaining to all of the factors on the list can a determination of likeness be made.[170] Several facts need to be borne

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[165] *Ibid.*, paras 94 *et seq*.
[166] *Ibid.*, para. 99.
[167] *Ibid.*, para. 99, but see para. 154 of the same case.
[168] *India—Autos*, WT/DS146/R, WT/DS175/R, para. 7.302. See above, para. 5.
[169] *EC—Asbestos*, WT/DS135/AB/R, para. 101; See also *US—Gasoline*, WT/DS2/R, para. 6.9.
[170] *EC—Asbestos*, WT/DS135/AB/R, paras 102, 109, 111, 117. In a concurring opinion,

in mind in considering the separate criteria. With respect to **criterion (i)**: where the products at issue are physically obviously different, a higher burden is placed on the complaining party to establish that the products are nevertheless like. To overcome this burden evidence has to be submitted on the second and third criteria.[171] With respect to **criteria (ii) and (iii)**: due to their direct impact on the competitive relationship between the products, their end-uses and consumer preferences are of particular importance for the examination.[172] **Criterion (iii)** should be treated with appropriate care, as Members can influence consumer preferences by internal regulation. In such a situation the complaining Member may submit evidence of latent demand, or evidence of substitutability from a relevant third market to establish likeness.[173]

71 The examination of likeness is a comprehensive one. A product's toxicity and carcinogenicity are relevant physical properties. The **health risks** associated with a product also influence consumers' tastes and habits. As such risks have a significant impact on the competitive relationship between products, they cannot be ignored in the examination. Considering health risks in the examination of likeness does not nullify the effect of Art. XX lit b.[174]

72 **Some factors cannot be taken into account** for establishing likeness. The provision requires a comparison of the treatment of the products rather than their producers. Hence the characteristics of the **producers** of the products or the data held by them do not have a bearing on the likeness of the products. A state cannot justify according less favourable treatment to imported products by reference to the characteristics of the producer.[175] Also, **different origin** does not render domestic and imported goods unlike.[176] An **aim and effects test** has been rejected.[177]

73 One of the most contested issues in all of WTO law is the question whether a difference in **process and production methods (PPM)** causes products not to be like. Answering this question in the affirmative would allow a wide variety of legislation for environmental, human rights and other purposes

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one Appellate Body member considered the demonstration of pronounced physical difference sufficient to establish the unlikeness of products where the difference leads to one of the products being toxic and the other one not. *Ibid.*, paras 152 *et seq.*

[171] *Ibid.*, paras 118, 121, 139, 147.

[172] *Ibid.*, para. 117.

[173] *Korea—Alcohlic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, paras 115 *et seq.*

[174] *EC—Asbestos*, WT/DS135/AB/R, paras 113 *et seq.*

[175] *US—Gasoline*, WT/DS2/R, para. 6.11; with respect to Art. III:2 GATT: *US—Malt Beverages*, BISD 39S/206, para. 5.19.

[176] *India—Autos*, WT/DS146/R, WT/DS175/R, para. 7.174; Panel Report, *Canada—Autos*, WT/DS139/R, WT/DS142/R, para. 10.74; *US—FSC (Article 21.5—EC)*, WT/DS108/RW, para. 8.133.

[177] See above, para. 34.

to be regarded as non-discriminatory. In the unadopted Panel Report in *US—Tuna*[178] a GATT panel held that Art. III:4 requires a comparison of the products and that distinctions that go to production methods and are not reflected in the product itself are not relevant for the determination of likeness.[179] To be unlike products thus need to be different with respect to their physical properties. Several commentators have rejected this approach. They suggest that, at least where the production process of a product violates labour or human rights standards or other international treaty standards such as those established by CITES, the product in question should not be considered "like" a product that was produced in compliance with those standards.[180] Such an argument can be supported by the role of international law in the interpretation of WTO law in accordance with Art. 3.2 DSU, 31.3 lit. c VCLT.[181]

74 Even though there are good arguments in favour of a more flexible approach, at least where violations of quasi-universal international treaties are concerned, currently there is no indication that the **WTO** is likely to change its approach towards PPMs. This approach can be described as follows: products produced by different production methods are physically identical, have identical end-uses and customs classifications. Consumers can distinguish between the products only where they are labelled differently. The products are therefore like products. Holding otherwise poses the danger of countries circumventing the GATT regime and establishing arbitrary discriminatory systems without having to justify their regulations under Art. XX, as it is unclear which production methods would render products unlike. This finding does **not** imply that **any regulation based on PPMs is *per se* illegal**; rather it may be permitted under Art. XX.[182] In addition, some PPMs are explicitly included wtihin the scope of the TBT Agreement. Where those PPMs are in compliance with the Agreement they are also justified under the GATT.[183]

75 A much discussed question is whether **genetically modified organisms** (**GMO**), most importantly food or crops, are "like" their non-modified counterparts. The United States regards the production of a product by

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[178] *US—Tuna (Mexico)*, BISD 39S/155 (not adopted).

[179] *Ibid*., para. 5.15; See *Marceau*, JWT 33 (1999) 5, 87, 91 *et seq*. The position is also supported by the Appellate Body's interpretation of "like products" in the Agreement on Safeguards, see Appellate Body Report, *US—Lamb*, WT/DS177/AB/R, WT/DS178/AB/R, para. 94.

[180] *Wai*, EJIL 14 (2003), 35, 61; *Francioni*, in: *Francioni*, 1, 17 *et seq*.; *Fauchald*, JWT 37 (2003) 3, 443, 454.

[181] See *Stoll*, Max Planck CWTL, Vol. 2, Article 3 DSU, para. 25.

[182] *Francioni*, in: *Francioni*, 1, 14 *et seq*.

[183] *Stoll & Schorkopf*, Max Planck CWTL, Vol. 1, para. 273. On the coverage of the TBT Agreement with respect to PPMs see *Köbele*, Article 1 TBT, paras 30–40.

genetic engineering as a PPM rather than a characteristic of the product.[184] However, it can also be argued that where the modification is detectable, *i.e.* the products are physically different, the products are not like. Even though they may fall into identical tariff classifications and share similar end-uses, consumers in many markets are averse to transgenic crops. Such aversion stems from alleged health risks of the crops, but also from the very real risks they can pose to biodiversity, because they can transfer genetic material to their surroundings and replace a variety of conventional crops.[185] On the other hand it can be argued that modern methods of plant breeding pose very similar risks to biodiversity and that consumer perception has been changed by a history of government regulation in the area.[186] In light of the relevant international law on biodiversity it seems reasonable to consider the two categories as not being "like". In *EC—Approval and Marketing of Biotech Products* the panel avoided the fateful question whether biotech products are like their non-biotech equivalents for the purposes of Art. III:4. To a large extent, it was able to do so by reason of judicial economy.[187] As to the remaining challenges, the panel's reasoning was flawed, as it ruled in terms reminiscent of the aim and effects test that the plaintiff failed to substantiate an allegation that there was discrimination between like products as to their origin—the alleged discrimination was merely between biotech and non-biotech products.[188]

II. Laws, Regulations or Requirements Affecting the Internal Sale, Offering for Sale, Purchase etc. of the Products

Laws are statutes. **Regulations** are "mandatory rules applying across the board".[189] A **requirement** is "[s]omething called for or demanded; a condition which must be complied with".[190] The meaning of requirement differs from that of regulation. The word has to be read in the context of "affecting the internal sale etc". Requirements can therefore be either obligations an enterprise is legally bound to carry out or conditions an enterprise voluntarily accepts in order to obtain an advantage from the government.[191] Taken *76*

[184] *Food and Drug Administration*, Statement of Policy: Foods Derived from New Plant Varieties, Fed. Reg. 57 (1992), 22984–23005.
[185] *Musselli & Zarrilli*, JWIP 3 (2002), 373, 386 *et seq*.
[186] In depth: *Böckenförde*, 392 *et seq*.
[187] *EC—Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.3422.
[188] *EC—Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.2514 *et seq*.
[189] *India—Autos*, WT/DS146/R, WT/DS175/R, para. 7.181.
[190] *Ibid*., para. 7.181.
[191] *Ibid*., paras 7.183 *et seq.; Canada—Autos*, WT/DS139/R, WT/DS142/R, para. 10.73; *EEC—Parts and Components*, BISD 37S/132, para. 5.21; *Canada—FIRA*, BISD 30S/140, para. 5.4. The panel in *Japan—Film* held that the terms laws, regulations and requirements should be read broadly and assumed that they encompass "a similarly broad range of government action and action by private parties that may be assimilated to government action"

together, the term "all laws, regulations and requirements" is equivalent in breadth to the term "measure" used in Art. XXIII:1 lit. b.[192]

77 **Requirements** play an important role in cases in which companies plan to set up a factory or invest in a Member. To obtain the necessary licences, permissions or other benefits, Members have at times demanded more or less formal **commitments by the companies** that the products produced in the factory will have a minimum percentage of domestic content.[193] The Annex to the TRIMS Agreement contains a non-exhaustive list of TRIMs that violate Art. III:4. A government measure requiring the signing of an agreement to obtain advantages, such as *e.g.* import licenses, is a requirement if the agreement containing the conditions challenged under Art. III:4 can thereafter be enforced. The agreement itself is a requirement, too, as it has to be considered together with the government measure, even where the latter has been abolished, because the government measure remains the historical basis upon which companies entered into the obligation.[194] The means actually used to enforce a measure are irrelevant for the finding of a "requirement"; the enforceability of the measure in itself is sufficient to support such a finding.[195]

78 An important issue is the question when **acts of private parties** can be attributed to the government. The panel in *Canada—Autos* held that private action amounts to a requirement where there is a *nexus* between that action and the action of the government "such that the government must be held responsible for that action". The legal enforceability of the private party's undertaking is not required under this test; a demand, request or the imposition of a condition by the government in whatever legal form leading to clearly specified and verifiable commitments by the private party is sufficient.[196]

79 The provision encompasses **substantive as well as procedural laws**, regulations and requirements. In fact, enforcement measures are inseparable from the substantive provisions they serve to enforce, as a regulator can change the effect of the latter by changing the procedure for enforcing them.[197]

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as the word measure in Article XXIII:1 lit. b GATT 1994. Panel Report, *Japan—Film*, WT/DS44/R, para. 10.376.

[192] *Mavroidis*, 149.

[193] *Jackson*, World Trading System, 215.

[194] *India—Autos*, WT/DS146/R, WT/DS175/R, para. 7.179, paras 7.188 *et seq*., 7.314, 8.37 *et seq*.

[195] *Ibid*., para. 7.191.

[196] *Canada—Autos*, WT/DS139/R, WT/DS142/R, paras 10.107, 10.123. The panel's broad holding is probably a response to the difficulty in establishing conclusively that a government demanded a certain action to provide a benefit in return.

[197] *US—Section 337*, BISD 36S/345, para. 5.10.

80 The scope of application of Art. III:4 does not include all laws, regulations and requirements, but only those affecting the specific activities mentioned in the provision. The term **affecting** implies "having an effect on", indicating a broad scope of application.[198] It goes beyond measures directly governing sale, offering for sale etc. and includes measures adversely **modifying the conditions of competition** between the domestic and imported products,[199] *e.g.* indigenization requirements for components of a finished product (*i.e.* requirements to use local content),[200] export obligations attached to the purchase of imported components on the domestic market,[201] or an advantage conferred upon the use of domestic products that is denied in the case of the use of imported products.[202] It also applies to regulations concerning the use of names in the presentation of products for sale[203] or bookkeeping requirements conditional on the use of a certain product.[204] It is not necessary to establish that the adverse effect on the conditions of competition is of great importance.[205]

81 Even though the measure has to **affect the internal sale**, the broad scope of the word "affecting" implies that measures applying only to imported products or conditions on importation are not necessarily outside the scope of Art. III:4.[206] Neither are procedures and requirements for the distribution of import licences among operators.[207] However, where a measure merely limits the number of products that can be imported duty-free it does not affect the internal sale of the product.[208]

82 Further measures which are covered by Art.III:4 are those affecting the **offering for sale, purchase, transportation, distribution or use** of products. The fact that the GATS agreement provides an extensive set of rules on services does not reduce the scope of Art. III:4 so that effects

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[198] *EC—Bananas III*, WT/DS27/AB/R, para. 220; *US—FSC (Article 21.5—EC)*, WT/DS108/AB/RW, paras 208 *et seq*.

[199] *India—Autos*, WT/DS146/R, WT/DS175/R, para. 7.196; *Italy—Agricultural Machinery*, BISD 7S/60, para. 12.; *Canada—Autos*, WT/DS139/R, WT/DS142/R, para. 10.80; See also Panel Report, *Dominican Republic—Cigarettes*, WT/DS302/R, para. 7.169; *Mexico—Taxes on Soft Drinks*, WT/DS308/R, para. 8.108.

[200] *India—Autos*, WT/DS146/R, WT/DS175/R, para. 7.197.

[201] *Ibid.*, para. 7.307.

[202] *Canada—Autos*, WT/DS139/R, WT/DS142/R, para. 10.82.

[203] Panel Report, *EC—Geographical Indications (Australia)*, WT/DS290/R, para. 7.263.

[204] *Mexico—Taxes on Soft Drinks*, WT/DS308/R, para. 8.112.

[205] *Ibid.*, paras 10.83 *et seq*.

[206] *India—Autos*, WT/DS146/R, WT/DS175/R, para. 7.306.

[207] *EC—Bananas III*, WT/DS27/AB/R, para. 211. The panel emphasized the distinction between the requirement to present a licence upon importation of a product and the procedures for allocating such licences. See Panel Report, *EC—Bananas III (Ecuador)*, WT/DS27/R/ECU, para. 7.177.

[208] *Canada—Autos*, WT/DS139/R, WT/DS142/R, paras 10.148 *et seq*.

on internal **transportation** and **distribution** remain relevant.[209] While **measures affecting the internal transportation** of the product, such as a mandatory delivery system for imported beer,[210] are subject to scrutiny under Art. III:4, the application of **differential internal transportation charges** which are based exclusively on the economic operation of the means of transport and not on the nationality of the product is explicitly permitted by Art. III:4, sentence 2.

83 Where the internal laws or regulations contain **technical barriers to trade**[211] or **sanitary and phytosanitary measures**[212] they are subject to the TBT or SPS Agreement.[213]

III. Less Favourable Treatment

84 The measure at issue may not accord less favourable treatment to the imported products than to like domestic products. According treatment **no less favourable** means "according conditions of competition no less favourable to the imported product than to the like domestic product".[214] The provision calls for "effective equality of opportunities for imported products in respect of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products".[215] Both measures that are discriminatory on their face as to the origin of products (*de jure* discrimination) and measures that upset the equality of opportunities between imported and domestic products without being discriminatory on their face (*de facto* discrimination) can accord less favourable treatment.[216]

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[209] *Canada—Periodicals*, WT/DS31/AB/R, 19; *Indonesia—Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.35.

[210] *Canada—Provincial Liquor Boards (US)*, BISD 39S/27, para. 5.12 *et seq.*; *US—Malt Beverages*, BISD 39S/206, para. 5.50.

[211] For the terminology see *Köbele*, Article 1 TBT, paras 12 *et seq.*

[212] For the terminology see *Charnovitz*, Article 1 SPS, paras 1 *et seq.*

[213] On the relationship between those Agreements and Art. III see below, paras 109 *et seq.*

[214] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 135; *India—Autos*, WT/DS146/R, WT/DS175/R, para. 7.199; Panel Report, *EC—Geographical Indications (US)*, WT/DS174/R, para. 7.230. The conditions attached to the grant of a subsidy can result in such less favourable treatment, *e.g.* by conditioning the subsidy on the purchase of domestic products. *EC—Commercial Vessels*, WT/DS301/R, para. 7.65.

[215] *US—Gasoline*, WT/DS2/R, para. 6.10; *Japan—Film*, WT/DS44/R, para. 10.379; *US—Section 337*, BISD 36S/345, para. 5.11. The panel in *Japan—Film* considered the test to be similar to that applied under Art. XXIII:1 lit. b GATT 1994 ("upsetting the competitive relationship") apart from the fact that the latter test calls for a comparison at two points in time, namely the time of the grant of the concession and the time of the dispute. *Japan—Film*, WT/DS44/R, para. 10.380.

[216] *Japan—Film*, WT/DS44/R, para. 10.380.

The test enquires whether a measure **modifies the conditions of competition** in the relevant market **to the detriment of imported products**.[217] It is not necessary to show a reduction in actual trade flows, nor can proof of less favourable treatment be rebutted by a demonstration of increased trade, *i.e.* again trade effects play no role in the inquiry.[218] The test also does not enquire into whether the measure accords formally different or identical treatment to imported and domestic products. Just as a measure that accords formally different treatment to imported products does not necessarily violate Art. III:4, a measure that accords formally identical treatment is not necessarily in compliance with Art. III:4.[219] A measure according formally identical treatment violates Art. III:4 if in practice the importer will incur significantly higher costs in complying with the measure than the domestic producer.[220] *85*

Several observations can be made on the **methodology for the comparison** of the treatment granted.[221] The no less favourable treatment test is applied to each individual case of imported products, thus preventing less favourable treatment in one case from being balanced by more favourable treatment in other cases.[222] This approach, though well adapted to *de jure* discrimination, is impossible to pursue in the case of ***de facto*** **discrimination**, in which the regulation at issue does not use origin as a criterion for distinguishing between products. In *EC—Asbestos*, where such a case was at issue, the Appellate Body called for a comparison between the treatment of the relevant group of imported products and that of the group of "like" domestic products, pointing out that the term "less favourable treatment" expressed the general principle of Art. III:1 of avoiding protective application.[223] Building on this comment by the Appellate Body it is appropriate to consider that less favourable treatment would be established either where the regulation's burden on imports is significantly higher than that on domestic products[224] or where most imports fall into the disfavoured regulatory category and most domestic products into the favoured category.[225] *86*

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[217] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 137; *Dominican Republic—Cigarettes*, WT/DS302/AB/R, para. 91.

[218] *India—Autos*, WT/DS146/R, WT/DS175/R, para. 7.316; WT/DS302/R, para. 7.192. See above, para. 5.

[219] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 136; *EC—Asbestos*, WT/DS135/AB/R, para. 100; *US—Gasoline*, WT/DS2/R, para. 6.25; *Dominican Republic—Cigarettes*, WT/DS302/AB/R, para. 94; *US—Section 337*, BISD 36S/345, para. 5.11.

[220] *Dominican Republic—Cigarettes*, WT/DS302/R, paras 7.180 *et seq*.

[221] See also above, paras 43, 56 *et seq*.

[222] *US—Gasoline*, WT/DS2/R, para. 6.14; *US—Section 337*, BISD 36S/345, para. 5.14. *Ehring* refers to this test as the "diagonal test", *Ehring*, JWT 36 (2002) 5, 921, 924.

[223] *EC—Asbestos*, WT/DS135/AB/R, para. 100.

[224] *Dominican Republic—Cigarettes*, WT/DS302/R, paras 7.180 *et seq*.

[225] Ehring calls this approach the "asymmetric impact test". *Ehring*, JWT 36 (2002) 5, 921, 924.

However, in *Dominican Republic—Cigarettes*, another case concerning alleged *de facto* discrimination, the Appellate Body held that a detrimental effect on a given imported product that can be explained by factors or circumstances unrelated to its foreign origin does not necessarily imply that the measure accords less favourable treatment.[226]

87 The **Appellate Body has found less favourable treatment**, *e.g.* in the case of the EC's hurricane licences, which allowed for additional imports of third-country bananas at lower in-quota tariffs to compensate for losses incurred as a result of a natural disaster, but were issued exclusively to EC producers and producer organizations or operators including or directly representing them, thus constituting an incentive for operators to market EC bananas to the exclusion of third-country bananas;[227] where a Member required small retailers to sell only domestic or only imported beef, resulting in the vast majority of small retailers choosing to sell only domestic beef and thus effectively cutting off the distribution system for foreign beef;[228] where the eligibility for tax benefits relating to exports was made dependent on an input of imported products and labour performed abroad in the production of the property exported limited to 50% of the fair market value.[229] It **rejected less favourable treatment** in the case of a requirement to post a bond imposed equally on importers and domestic producers of cigarettes, the per unit cost of which was higher for the imported cigarettes at a particular period because of the smaller market share of the importer compared to those of the two domestic producers.[230]

IV. Burden of Proof

88 The burden of proof of the three elements of the claim is on the party asserting the claim. Once it has put forward sufficient evidence for a *prima facie* case, the other party can rebut that case.[231]

H. Internal Quantitative Regulations (Art. III:5)

89 Art. III:5 imposes two separate tests for internal quantitative regulations: Art. III:5, sentence 1 prohibits **internal quantitative regulations relating to the mixture**, processing or use of products in specified amounts or

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[226] *Dominican Republic—Cigarettes*, WT/DS/302/AB/R, para. 96.
[227] *EC—Bananas III*, WT/DS27/AB/R, para. 213.
[228] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, paras 143 *et seq*.
[229] *US—FSC (Article 21.5—EC)*, WT/DS108/AB/RW, paras 214 *et seq*.
[230] *Dominican Republic—Cigarettes*, WT/DS/302/AB/R, para. 99.
[231] *Japan—Film*, WT/DS44/R, para. 10.372; *EC—Asbestos*, WT/DS135/R, para. 8.79.

proportions which require, directly or indirectly, that any specified amount or proportion must be supplied from domestic sources. Art. III:5, sentence 2 prohibiting the **protective application of quantitative regulations** in other manners is subsidiary to sentence 1 and applicable only where there is no violation of the test imposed by sentence 1.[232]

Art. III:5, even though more specific than Art. III:4,[233] has not hitherto been applied in **disputes under the WTO regime**. States have generally preferred to raise claims under Art. III:4 even where domestic content requirements were challenged, because Art. III:4 applies to a wider range of measures, including certain commitments by private parties[234] and measures merely "affecting" certain internal activities rather than measures "requiring" a proportion of domestic content.[235] *90*

I. Internal Quantitative Mixing Regulations (Art. III:5, sentence 1)

A party claiming a violation of Art. III:5, sentence 1 needs to show (i) an internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions (ii) that requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources.[236] *91*

Regulation has to be read as including both laws[237] and other mandatory rules emanating from the state. The regulation has to be internal.[238] Also, it has to be a quantitative regulation, *i.e.* it has to specify a quantity of a product or of products at issue. Furthermore the regulation has to **relate to the mixture, processing or use of products in specified amounts or proportions**. It can thus relate to the use of input products in the production process, in processing or in a mixture.[239] An obligation to purchase a quantity of a product under certain conditions does not relate to the mixture, processing or use of products.[240] The regulation can set the quantity of the products used, mixed or processed either in the form of a **proportion**, *e.g.* determining the ingredients of a mixture by giving percentages,[241] or by determining **specified amounts**. Both regulations *92*

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[232] Panel Report, *US—Tobacco*, BISD 41S/131, para. 69.
[233] *Ibid.*, para. 65.
[234] See paras 77 *et seq.*; *India—Autos*, WT/DS146/R, WT/DS175/R.
[235] *Indonesia—Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R.
[236] *US—Tobacco*, BISD 41S/131, paras 67 *et seq.*
[237] *Ibid.*, para. 67.
[238] See above, paras 12 *et seq.*
[239] GATT Analytical Index I, 183.
[240] *EEC—Animal Feed Proteins*, BISD 25S/49, para. 4.6.
[241] *US—Tobacco*, BISD 41S/131, para. 67.

which are discriminatory on their face (*e.g.* demanding 50% domestic wheat in a mixture, *de jure* discrimination) and those which are origin-neutral on their face (*e.g.* demanding a certain percentage of butter in the production of margarine, *de facto* discrimination) are relevant quantitative regulations.

93 A violation is established if the regulation **requires, directly or indirectly**, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. The regulation directly requires that a specified amount or proportion of a product which is subject to it must be supplied from domestic sources if it demands a certain percentage of domestic content and imposes a penalty for non-compliance.[242] An indirect requirement of supply from domestic sources would be established where the regulation required the use of a material that was mostly domestically produced rather than a competing material that is only imported. There is no violation if the regulation prefers one product over another, but is directed as much against the substantial domestic production of the disadvantaged product as it is against the import of such product.[243] The regulation has to require supply from domestic sources. The history of the provision indicates that the use of a certain amount of domestic content has to be compulsory.[244] However, it seems appropriate to interpret the provision somewhat more broadly, because it is irrelevant in practice whether the regulation imposes a penalty for not complying with a domestic supply requirement or whether the regulation offers a benefit for complying with the requirement.

II. Protective Application of Quantitative Regulations (Art. III:5, sentence 2)

94 Like Art. III:2, sentence 2, Art. III:5, sentence 2 invokes Art. III:1 and has to be read together with the Ad Note to the paragraph. The test applies only to measures consistent with Art. III:5, sentence 1. A regulation violates Art. III:5, sentence 2 if (i) it is an **internal quantitative regulation**, (ii) **not all of the products** subject to the regulation **are produced domestically** in substantial quantities,[245] and (iii) the regulation is applied so as to **afford protection** to domestic production.

95 The **internal quantitative regulation** need not relate to the mixture, processing or use of products as in Art. III:5 sentence 1. Thus, an obligation to purchase a quantity of a product under certain conditions is subject to

[242] *Ibid.*, para. 68.
[243] GATT Analytical Index I, 184.
[244] *Ibid.*, 187.
[245] Panel Report, *Spain—Soyabean Oil*, L/5142 (not adopted), paras 4.4 *et seq.*

scrutiny under Art. III:5, sentence 2.[246] Because of the parallelism of the provision to Art. III:2, sentence 2 and the similar purpose of the two provisions, namely to provide for equal competitive conditions for domestic and imported products, the interpretation of "**protective application**" mirrors that of the same term under Art. III:2, sentence 2.[247] Ad Art. III:5, sentence 2 makes it clear that the fact that the proportion or amount allocated to each of the products which are the subject of the regulation constitutes an equitable relationship between imported and domestic products does not suffice to justify the regulation under Art. III:5, sentence 2: Even a regulation establishing such an "equitable relationship" can be protective.

III. Exception for Certain Existing Internal Quantitative Regulations (Art. III:6)

96 Art. III:6 exempts internal quantitative regulations already in force on a certain date from compliance with Art. III:5. The **relevant date** is determined by each Member for itself. Members can choose from three dates: 1 July 1939,[248] 10 April 1947[249] and 24 March 1948.[250] Members are free to **modify regulations** under the paragraph as long as they do not alter them to the detriment of imports.[251] In tariff negotiations, regulations under the paragraph are to be **treated as customs duties**, which illustrates the tendency of the GATT to channel discrimination into tariffs that will be eliminated over time.

IV. Most-favoured Nation Treatment as to Internal Quantitative Mixing Regulations (Art. III:7)

97 Art. III:7 introduces an additional obligation concerning internal quantitative regulations relating to the mixture, processing or use of products in specified amounts or proportions. Whereas Art. III:5, sentence 1 prevents the use of such regulations to allocate specified amounts or proportions to domestic products, Art. III:7 prohibits the application of such regulations in a manner that **allocates any amount or proportion among external**

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[246] *EEC—Animal Feed Proteins*, BISD 25S/49, para. 4.6; erroneous: *Canada—FIRA*, BISD 30S/140, para. 5.13.

[247] See above, paras 58 *et seq*.

[248] 1 July 1939 was chosen as a pre-war date, to permit Members to take account of departures from their pre-World War II practice, where applicable. GATT Analytical Index I, 188.

[249] 10 April 1947 was the opening date of the Second Session of the Preparatory Committee at Geneva.

[250] 24 March 1948 was the date of the signing of the Havana Conference Final Act. This date was chosen rather than the date of entry into force of the Charter to prevent Members from imposing new regulations in violation of Art. III:5. *Ibid*., 188.

[251] *Ibid*., 188.

sources of supply, and thus also among different foreign countries. The provision ensures most-favoured nation treatment with respect to internal mixing regulations.[252] It is one of several "MFN-type" clauses contained in GATT 1994.[253]

I. Exceptions (Art. III:8)

98 Art. III:8 contains **two different exceptions**: lit. a of the paragraph refers to government procurement, lit. b to subsidies paid to domestic producers.

I. Government Procurement (Art. III:8 lit. a)

99 Art. III:8 lit. a excepts laws, regulations and requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale from the scope of all of Art. III. **Government procurement** has long been a highly contentious issue within the GATT system. The initial United States proposal in the ITO negotiations to extend the non-discrimination obligations to government procurement[254] failed, but some contracting parties agreed to such obligations in the 1979 Tokyo Round Agreement on Government Procurement. Today, several Members have made national treatment commitments relating to government procurement in the plurilateral Agreement on Government Procurement (GPA) that superseded the 1979 Agreement.[255] However, much remains subject to debate, thus even after the demise of communism countries still vary widely in their ideas of the appropriate areas of government activity and the very definition of government procurement.[256]

100 **Procurement** of products purchased for governmental purposes includes not just sale, but acquisition by any contractual means.[257] The negotiation

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[252] *Ibid*., 189.

[253] See Arts IV lit. b; V:2, 5, 6; IX:1; XIII:1; XX lit. j GATT. *Canada—Autos*, WT/DS139/AB/R, WT/DS142/AB/R, para. 82.

[254] See above, para. 11.

[255] Committee on Government Procurement - Relationship of the Tokyo Round Agreement on Government Procurement to the 1994 Agreement on Government Procurement, Note by the Secretariat, GPA/W/65, 9 January 1998.

[256] *Jackson*, Law and Policy, 225; Working Group on Transparency in Government Procurement, Work of the Working Group on the Matters Related to the Items I - V of the List of the Issues Raised and Points Made, Note by the Secretariat, WT/WGTGP/W/32, 23 May 2002.

[257] See *ibid*., para. 13; Art. 1.2 Agreement on Government Procurement; Panel Report, *US—Sonar Mapping*, GPR.DS21/R (not adopted), para. 4.5.

history indicates that all government bodies, including local authorities, are included in the term **governmental agencies**.[258] Also included are public utilities.[259] The governmental agency does not have to be the contracting partner for the procurement to be done by the governmental agency. Even a private entity's procurement can be government procurement, where such factors as payment by the government, governmental use of or benefit from the product, government possession, government control over the obtaining of the product and particularly governmental regulation of the purchase point towards attribution of the procurement to the government.[260] To fall within the exception, the procurement has to be **for governmental purposes** and **not with a view to commercial resale** or with a view to use in the production of goods for commercial sale. Hence state enterprises that buy products in order to resell them on the market or to use them in the production process of products that are to be sold on the market do not profit from the exception.[261] The mere fact that after use for governmental purposes the product is sold on the market does not prevent the application of the exception.

101 The GATT panel in *Belgium—Family Allowances* has taken a narrow approach to when laws, regulations and requirements **govern** government procurement, holding that the provision did not apply to a Belgian law imposing an internal charge on foreign goods purchased by public bodies, as such a charge did not govern government procurement.[262] But the panel misread the text of the provision: Art. III:8 lit. a is an exception to all of Art. III and thus also to its provisions on internal charges. A law imposing internal charges on government procurement is thus a law governing government procurement.

II. Subsidies (Art. III:8 lit. b)

102 Art. III:8 lit. b clarifies that the (product-related) rules of Art. III **"shall not prevent" the payment of subsidies exclusively to domestic producers**, including subsidies paid from the proceeds of internal non-discriminatory product taxes. Conceptually, the article does not exclude the application of Art. III, as does lit. a of the paragraph, it merely clarifies the scope of the provision.[263]

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[258] GATT Analytical Index I, 191.

[259] *Trebilcock & Howse*, 201.

[260] See Art. 1.3 Agreement on Government Procurement; *US—Sonar Mapping*, GPR. DS21/R (not adopted), para. 4.7.

[261] See Ministerial Conference, Fourth Session, Doha, 9–13 November 2001, Report of the Working Party on the Accession of China, WT/MIN(01)/3, 10 November 2001, para. 44; Panel Report, *Canada—Provincial Liquor Boards (EEC)*, BISD 35S/37, para. 4.26.

[262] *Belgium—Family Allowances*, BISD 1S/59, para. 4.

[263] Note that the scope of the provision has not changed with the advent of the SCM

103 **Subsidies** involve the expenditure of revenue by a government.[264] They can also be effected through government purchase of domestic products. Art. III:8 lit. b makes it clear that the payment of subsidies exclusively to domestic producers to the exclusion of foreign producers of the product is not a violation of GATT.[265] The subsidies must be provided exclusively and thus **directly to the producers**. Subsidies benefiting producers indirectly, *e.g.* subsidies to consumers,[266] do not qualify—even though their economic effect may be similar. Nor do measures not involving expenditure, such as a reduction of the tax on a product,[267] other forms of tax discrimination on products,[268] or a reduction in postal rates.[269] The fact, however, that consumers profit indirectly from the subsidy, because the subsidy enables the producer to charge lower prices, is irrelevant, as that is true for most subsidies to producers.[270]

104 Art. III:8 lit. b explicitly provides that the collection of **internal taxes or charges** the proceeds of which are used for subsidies remains subject to Art. III:2. If the subsidy derives from product taxes, those taxes must be imposed and collected on a non-discriminatory basis. A government may therefore "use the proceeds of taxes collected equally on all imported and domestic products in order to provide a subsidy to domestic producers" while excluding producers abroad.[271]

J. Internal Maximum Price Controls (Art. III:9)

105 Art. III:9 governs **internal maximum price control measures**. It notes that such provisions, even though conforming to the other paragraphs of Art. III, can have **prejudicial effects** on the interests of Members supplying imported products. The *travaux préparatoires* of the provision indicate that this is the case where the country establishing the price control

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Agreement. *Indonesia—Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, paras 14.30 *et seq.; US—Malt Beverages*, BISD 39S/206, para. 5.8.

[264] *Canada—Periodicals*, WT/DS31/AB/R, 34.

[265] The same is also true for the regulatory framework providing for such subsidies. *EC—Commercial Vessels*, WT/DS301/R, para. 7.68.

[266] *Indonesia—Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.119; *Italy—Agricultural Machinery*, BISD 7S/60, para. 14; *US—Tobacco*, BISD 41S/131, paras 109, 111; Panel Report, *EEC—Oilseeds I*, BISD 37S/86, para. 137.

[267] *US—Malt Beverages*, BISD 39S/206, para. 5.12.

[268] *Indonesia—Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.43. A proposal explicitly to allow such discrimination as a form of indirect subsidization was rejected at the Havanna Conference. GATT Analytical Index I, 196.

[269] *Canada—Periodicals*, WT/DS31/AB/R, 34.

[270] *EC—Commercial Vessels*, WT/DS301/R, para. 7.73.

[271] *Ibid.*, 34; *Indonesia—Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, paras 14.30 *et seq.* (emphasis deleted), 14.119; *US—Malt Beverages*, BISD 39S/206, para. 5.8.

has such a strong market position as a buyer (monopsony power) that its price is likely to become the effective world price. If this country sets a low maximum price, it will harm the interest of exporting countries. Rather than obliging countries not to impose such measures, the paragraph merely requires Members **to take account of the interests of exporting Members with a view to avoiding such prejudicial effects to the fullest practicable extent**. This obligation should be read as a duty on a Member imposing a prejudicial maximum price control measure to justify the measure and to show that it has taken the interests of exporting Members into account. The provision has not been at issue in dispute settlement, but it is common for new Members to make a commitment during their accession process to apply internal maximum price control measures in conformity with Art. III:9.[272]

K. Exception for Exposed Cinematograph Films (Art. III:10)

106 Art. III does not prevent the imposition of internal quantitative regulations that (i) relate to exposed cinematograph films and (ii) meet the requirements of Art. IV. The provision does not except such quantitative regulations just from Arts. III:5, 7, but also from the other paragraphs of Art. III. The exception was included at the urging of nations maintaining film quotas as a **cultural policy**.[273]

L. Relationship to Other Provisions

I. Art. XI

107 Art. III covers internal measures,[274] whereas Art. XI applies to border measures. The distinction between the two provisions is particularly difficult where importation is technically permitted, but prevented *de facto*, *e.g.* by a complete ban on the sale of the product. Normally, the two provisions do not overlap. However, in exceptional cases, such as that of state trading enterprises with a monopoly over both importation and distribution of the products, a measure may fall within the scope of both Arts. III and XI.[275] Where claims are raised under both Arts. XI and III there is no specific

[272] See Technical Note on the Accession Process, Note by the Secretariat, Revision, WT/ACC/10/Rev. 2, 22 October 2004, 52 *et seq*. with such statements by the Kyrgyz Republic and Jordan.

[273] *Jackson*, World Trade & GATT, 293.

[274] See above, paras 17 *et seq*.

[275] *India—Autos*, WT/DS146/R, WT/DS175/R, para. 7.221, 7.224, 7.296; *Canada—Provincial Liquor Boards (EEC)*, BISD 35S/37, para. 4.26; in-depth: *Tietje*, 225 *et seq*.

order in which the claims have to be addressed, as the proper application of one of the articles does not require a prior finding under the other one.[276] If the challenged measure is inconsistent with one of the articles, a panel does not need to address the other for reasons of judicial economy.[277]

II. Art. XX

108 On the relationship between Art. XX and Art. III see above, paras 9, 34, 74.

III. SPS Agreement

109 Where a measure falls within the SPS Agreement, it will be examined exclusively under that agreement: if it complies, it is presumed also to fulfil the relevant GATT obligations pursuant to Art. 2.4 SPS. If it does not comply, a panel does not need to examine its GATT compliance for reasons of judicial economy.[278] Case law on Art. III can, however, be used in the interpretation of the SPS Agreement where appropriate. *E.g.* the Appellate Body's interpretation of "less favourable treatment" can be used when interpreting the term "in no less favourable manner" that appears in the national treatment obligation established in Annex C:1 lit. a, sentence 2 SPS.[279]

IV. TBT Agreement

110 According to the Appellate Body, the TBT Agreement imposes obligations in addition to those contained in the GATT 1994,[280] *i.e.* measures falling under the TBT Agreement have to comply with both Agreements.[281] As the TBT Agreement contains the more specific obligations, compliance with that Agreement, including with its national treatment obligation in Art. 2.1, will be examined before compliance with GATT obligations.[282] Art. 2.5 TBT contains a rebuttable presumption that certain technical regulations do not create an unnecessary obstacle to international trade.

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[276] *India—Autos*, WT/DS146/R, WT/DS175/R, para. 7.168.
[277] *Ibid.*, paras 7.207 *et seq*.
[278] *EC—Hormones (US)*, WT/DS26/R/USA, paras 8.31 *et seq*., 8.272 *et seq*.
[279] *EC—Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.2401 *et seq*.
[280] *EC—Asbestos*, WT/DS135/AB/R, para. 80.
[281] *Stoll & Schorkopf*, Max Planck CWTL, Vol. 1, para. 296.
[282] Panel Report, *EC—Sardines*, WT/DS231/R, para. 7.16.

M. Outlook/Evaluation

111 The force of the WTO's obligations of non-discrimination has recently been questioned given the scope of the exceptions.[283] However, the numerous panel and Appellate Body reports enforcing the national treatment obligation attest to its continued relevance. In addition, the deterrent effect of the provision has to be borne in mind: it is a powerful weapon in domestic debates in favour of free trade, preventing many a discriminatory measure from being passed. As such, it remains one of the cornerstones of the WTO. But there is more to the provision. By including *de facto* discrimination in its scope—an inevitable step, given that countries can easily channel their trade-restrictive measures into such discrimination—the Appellate Body has obtained a tool for harmonizing regulations to some extent. It is a powerful tool that has to be, and so far has been, used wisely.

[283] *Srinivasan*, World Trade Rev. 4 (2005), 69, 74.

Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO-Technical Barriers and SPS Measures.*
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Article XI GATT 1994
General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.
2. The provisions of paragraph 1 of this Article shall not extend to the following:
   a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
   b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
   c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:
      i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
      ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
      iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.

Annex I
Notes and Supplementary Provisions
Ad Article XI

Paragraph 2 (c)
The term "in any form" in this paragraph covers the same products when in an early stage of processing and still perishable, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.

Paragraph 2, last subparagraph
The term "special factors" includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement.

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CROSS REFERENCES

Art. III GATT; Art. 2 SPS; Art. 2 TBT; Arts 28, 29 ECT; Art. 309 NAFTA.

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A. General

Art. XI:1 prohibits quotas, import and export licences, and any measure other than duties, taxes and other charges that prohibit or restrict trade. The heading of Art. XI refers to the **"elimination of quantitative restrictions"** which, taken literally, would embrace only quotas. Since Art. XI:1 refers to **"other measures"** besides quotas and licences, the term 'quantitative restrictions' has to be understood broadly so as to cover all measures which do not come under the concept of tariff barriers to or tariff restrictions on trade. The explicit reference to quotas and import or export licences is thus merely illustrative. Such a broadly understood scope of Art. XI:1 is necessary effectively to implement the overall objective of GATT, namely to liberalize international trade, since the ingenuity of States *1*

in developing new non-tariff restrictions on trade seems to be unlimited.[1] The broad scope of Art. XI:1 has been confirmed in GATT and WTO case law. The Panel in *Japan—Semi-Conductors* qualified Art. XI as "very broad in scope" and emphasised that it is to be read as a general ban on non-tariff restrictions.[2] This reading of Art. XI:1 has since been confirmed.[3]

2 Art. XI:1 embraces non-tariff trade restrictions or barriers placed on the import of products, their export, or sale for export. By referring to export and import alike Art. XI:1 protects the foreign producer as well as the national exporter.[4] The provision refers not only to import and export but also to the sale for export, thus also covering activities in the exporting State intended to lead to export. The legal norms or measures governing the import or export of goods prescribe external requirements, and those dealing with sale for export may prescribe external as well as internal requirements.

3 This prohibition of Art. XI:1 reflects a **"tariffs-only approach"** which is based upon the consideration that tariffs are for economic and administrative reasons the best mechanisms for governing trade in goods. Non-tariff trade restrictions on import or export constitute absolute limits, while tariffs do not. Further, non-tariff restrictions may have a trade-distorting effect; their allocation is, in general, problematic and their administration, apart from that concerning quotas, not always transparent. In spite of the negative economic effects of non-tariff restrictions on trade the States Parties to GATT 1947 for many years failed to respect the prohibition on introducing or maintaining quantitative restrictions. In the Uruguay Round the overall detrimental effects of non-tariff restrictions on exports and imports were acknowledged. This is reflected in the GATT 1994 Understanding on Balance-of-Payments Provisions, the Agreement on Safeguards, the Agreement on Agriculture and the Agreement on Textiles and Clothing where non-tariff restrictions have been eliminated.

4 Art. XI:1 has to be read in conjunction with Art. XIII. There is a close connection between Arts XI:1 and III:4.[5]

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[1] *Jackson*, Law and Policy, at 154 points out that various attempts have been made to catalogue existing non-tariff trade restrictions.

[2] See Panel Report, *Japan—Semi-Conductors*, BISD 35S/116, at note 104.

[3] Panel Report, *India—Quantitative Restrictions*, WT/DS90/R, as upheld by the Appellate Body Report, WT/DS90/AB/R, at note 5.128 qualified Art. XI as "very broad in scope" and emphasized that it is to be read as a general ban on non-tariff restrictions.

[4] *Tietje*, Normative Grundstrukturen, at 274.

[5] On that see below, para. 24.

B. Drafting History

When the **Havana Charter**[6] was negotiated the US government, in particular, was in favour of eliminating quantitative restrictions on trade, an approach not shared by the European governments. The US government held that such restrictions had a negative effect on the world economy. But it was not only such economic considerations which were guiding the policy of the US government in this respect. Quantitative restrictions were considered by the US government as the mechanism which allowed States to disengage from the development of the world economy and from the post-World War II attempt to liberalise international trade. This again was seen as one of the policies which ought to ensure the development of a new and sustainable peaceful international order. In contrast thereto European governments, although endorsing the liberalization of trade in general, were in favour of maintaining quantitative restrictions on trade, considering that this mechanism would protect the restructuring of their industries destroyed during the Second World War. *5*

The regime on the prohibition of non-tariff trade restrictions and the exceptions thereto as provided by **GATT 1947** reflects both approaches. As a matter of principle quantitative restrictions on trade are prohibited. However, several exceptions are provided for, such as for the protection of agricultural production (Art. XI:2),[7] for the protection of the balance of payments and the labour market (Arts XII to XIV)[8] and for the protection of the domestic economy in cases of necessity (Art. XIX:1). Non-tariff restrictions on trade may be established on the basis of Art. XIX:1 as specified in Arts 2 and 5 of the Agreement on Safeguards. Finally, non-tariff restrictions may be agreed upon on an interim basis in the process of accession to GATT. *6*

C. Art. XI: 1—Elimination of Non-tariff Trade Restrictions

Art. XI:1 provides protection for the **importer** as well as for the **exporter**.[9] The latter is of particular significance for understanding the nature and purpose of the norm. It indicates that GATT not only deals with measures of States affecting other States, which would be in keeping with traditional international law dealing with economic relations among States, but it also *7*

[6] Havana Charter for an International Trade Organization, 24 March 1948, CTS No. 32, 3; UN Doc. E/CONF. 2/78 (1948).

[7] Initiated by the US Government, see *Senti*, GATT, at 159.

[8] Initiated by European Governments, see *Senti*, GATT, at 159.

[9] Affirmed in Panel Reports; see, for example, *Canada—Herring and Salmon*, BISD 35S/98, para. 4.1; *Japan—Semi-Conductors*, BISD 35S/116, para. 104.

has an **effect on the internal normative order of States**.[10] This is particularly evident concerning the provision that Members must not establish non-tariff trade restrictions or prohibitions in respect of the sale for export.

8 Art. XI:1 refers to "importation of any product" and the "exportation or sale for export of any product". It has been disputed whether this wording refers to concrete transactions in this respect only or whether it refers to the legal order in a given State in general, thus protecting the ability to export or import as the case may be. Only the latter interpretation is in keeping with the object and purpose of this provision.[11] This is of general legal significance since it endorses the interpretation that GATT not merely protects particular economic transactions but is striving for liberalization of the trade in goods in general. The latter equally indicates that GATT not only regulates economic relations on a bilateral basis but also prescribes an **international normative order generally based upon free market principles**.

9 Given the mandatory wording of Art. XI:1 there is no room to argue that there are **inherent limitations** of the prohibition to establish or maintain non-tariff trade restrictions which arise from historical or cultural considerations. The existence of such inherent limitations was rejected in several panel reports as early as the first half of the 1980s.[12]

10 The complaining party who asserts the affirmative of a particular claim bears the **burden of proving it**. It is for this party to adduce evidence establishing a *prima facie* case that what is claimed is true. The burden then shifts to the defendant; he has to respond in order to rebut the claim.[13] It is not sufficient, though, to advance theories or to raise a claim based on circumstantial evidence. The claimant must, by providing data or facts which can be ascertained by the Panel, enable the latter to make an objective assessment of the matter before it.[14]

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[10] *Tietje*, Normative Grundstrukturen, at 274.

[11] The Panel on *US—Superfund*, BISD 34S/136, para. 5.2.2. stated: "The general prohibition of quantitative restrictions under Article XI […] and the national treatment obligation of Article III […] have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both Articles are not only to protect current trade but also to create the predictability needed to plan future trade"; confirmed in Panel Report, *Japan—Agricultural Products I*, BISD 35S/163, para. 5.4.3; Panel Report, *EEC—Oilseeds I*, BISD 37S/86, para. 150. The Panel on *Japan—Leather II*, BISD 31S/94, at para. 55 has pointed out that non-tariff trade restrictions result in increased transaction costs which adds a further argument to the interpretation taking into account object and purpose of Art. XI:1 GATT 1947.

[12] Panel Report, *EEC—Import Restrictions*, BISD 30S/129, paras 15, 17, 19; *Japan—Leather II*, BISD 31S/94, at paras 21 *et seq*., 44.

[13] Appellate Body Report, *US—Wool Shirts and Blouses*, WT/DS33/AB/R; *India—Quantitative Restrictions*, WT/DS90/R, para. 5.117.

[14] Panel Report, *Argentina—Hides and Leather*, WT/DS155/R and Corr.1, at para. 11.28.

11 Art. XI:1 distinguishes between "prohibitions" and "restrictions". **Prohibitions** refer to a total ban on export or import,[15] whereas **restrictions** embrace all measures which make export or import more difficult without making it impossible.[16] Both notions refer to the effect of the measures taken, namely quotas, import or export licences or other measures. Therefore it is necessary to distinguish between a measure taken and the effect it has. It is immaterial whether a measure does or does not intend negatively to affect export or import; it is the effect which is relevant. It is established in GATT/WTO case law that Art. XI:1 extends to restrictions or prohibitions of a merely *de facto* nature.[17] Members claiming that a certain measure constitutes a *de facto* prohibition or restriction have to prove that such measure has had a negative effect on trade. What is essential to prove is the existence of a causal link between the measure allegedly having a restrictive effect and the decline or suspension of trade. In such a situation the respondent has the choice of proving either that the measure taken has no restrictive effect or that the decline of trade resulted from different causes.

12 Art. XI:1 explicitly refers to **quotas**. These are numerical restrictions on imports or exports. Quotas are usually expressed in terms of units of production on an annual basis. The impact of quotas on import or export is different from that of tariffs. Once the mandated quantity limit is reached, further units are barred from export or import. Import quotas are by far the most common quotas. By establishing quotas the importing Member is theoretically in a position more accurately to control imports than by levying tariffs. The same is true for the exporting Member in respect of export quotas. They give that State the ability exactly to control exports. The economic effect of quotas is different from that of tariffs. A tariff raises revenues for the importing government. A quota, instead, increases the market price of an imported product, because the number of goods available is reduced while consumer demand theoretically may remain unchanged. The excess profit is collected by the foreign producer and the national producer of the competing item.

13 Art. XI:1 further refers to **import or export licences**. Import licensing is governed by the Agreement on Import Licensing Procedures (Licensing

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[15] National laws banning imports with a view to outlawing certain production methods for environmental reasons have been considered as prohibitions or restrictions on imports (see for example Panel Report, *US—Shrimp*, WT/DS58/R, para. 7.17).

[16] Restriction has been defined as a limitation on action, a limiting condition or regulation; see *India—Quantitative Restrictions*, WT/DS90/R at para. 5.142, as upheld by the Appellate Body Report, *India—Quantitative Restrictions*, WT/DS90/AB/R.

[17] *India—Quantitative Restrictions*, WT/DS90/R at para. 11.17, as upheld by the Appellate Body Report, *India—Quantitative Restrictions*, WT/DS90/AB/R; see also *Japan—Semi-Conductors*, BISD 35S/116, paras 105–109.

Agreement).[18] The Licensing Agreement is designed to minimise the negative impact of the licensing procedure where licensing is permitted under GATT. In accordance with Art. 1.3 Licensing Agreement, import licensing must be neutral in administration and administered in a fair and equitable manner. Forms and procedures must be simplified, and licensing rules must be transparent. It is permissible to allocate licences according to the past performance of an applicant, but there must be a reasonable distribution of licences to new importers. In this respect in particular importers from developing countries have to be taken into account.[19] Before the finalisation of the Multilateral Trade Negotiations on licensing systems a GATT panel on *EEC—Minimum Import Prices* had concluded that an automatic licensing system did not constitute a restriction prohibited under Art. XI.[20] Its finding may be generally summarised as follows: any licensing system for exports or imports which is non-automatic or which constitutes a significant administrative or monetary impediment to the free circulation of goods constitutes a restriction under Art. XI:1. This was reaffirmed in later case law.

14 The prohibition in Art. XI:1, finally, refers to **"other measures"**. Other measures are virtually any requirement or regulation designed to restrict or resulting in the restriction of imports or exports whether intended or not. Data collection and monitoring requirements,[21] minimum price systems,[22] the prohibition on importing copyrighted works not manufactured domestically,[23] the requirement of security deposits,[24] and the prohibition on importing goods not produced in a certain way[25] have been considered to be in violation of GATT. Also indirect effects on the trade in goods, such as restrictions on advertising, may fall under Art. XI:1.[26] Virtually every measure taken which restricts or prohibits exports or imports is to be qualified as an "other measure" under Art. XI:1. The intention behind it is irrelevant.

15 An early GATT panel on *EEC—Minimum Import Prices* concluded that a minimum import pricing system, enforced by additional security, constituted

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[18] Agreement on Import Licensing Procedures, LT/UR/A-1A/5, 15 April 1994.

[19] *Matsushita et al.*, at 128, 129.

[20] *EEC—Minimum Import Prices*, BISD 25S/68, at para. 4.9; see also *India—Quantitative Restrictions*, as upheld by the Appellate Body Report, *India—Quantitative Restrictions*, paras 5.129—5.130, while referring to *EEC—Minimum Import Prices*. The Panel on *Japan—Semi-Conductors*, BISD 35S/116, at para. 118 found that "export licensing practices […] leading to delays of up to three months in the issuing of licenses […] constituted restrictions […] inconsistent with Article XI:1.".

[21] *Japan—Semi-Conductors*, BISD 35S/116.

[22] *Ibid.*; and *EEC—Minimum Import Prices*, BISD 25S/68, para. 4.14.

[23] *US—Manufacturing Clause*, BISD 31S/74, para. 34.

[24] *EEC—Minimum Import Prices*, BISD 25S/68, para. 4.14.

[25] *US—Shrimp*, WT/DS58/R, para. 7.17.

[26] Panel Report, *Canada—Periodicals*, as modified by the Appellate Body Report, *Canada—Periodicals*, WT/DS31/AB/R, 17 *et seq*.

an "other measure" under Art. XI:1.[27] While the report was not adopted unanimously, present WTO case law confirms the findings of the majority. The channelling of imports through governmental agencies may constitute a restriction under Art. XI:1 if, and to the extent that, the operation of the state trading entity is such as to result in a restriction.[28] Also the introduction of an actual user requirement according to which import licences are granted only to those persons who use the imported goods for manufacturing in their own industrial units or for their own research[29] or the establishment of points of sale for imported beer[30] constitute restrictions under Art. XI:1. Measures of a Contracting Party which were intended to ensure that products were not sold below company-specific costs were considered to be trade restrictions under Art. XI:1.[31] This was a matter of consequence, as the establishment of minimum import prices had already been considered a trade restriction.[32] What is relevant was that the Panel qualified the national measures as such although they were not legally binding.[33] In doing so the Panel took into account whether the "administrative guidance" given by the government was effectively directing the economic activities of exporters. Therefore the findings of the Report can be summarised to the effect that non-binding measures of a government or governmentally controlled agency may constitute trade restrictions to the extent such measures effectively influence the relevant economic activities.[34]

D. Measures Undertaken by Non-governmental Entities

16 The application of Art. XI:1 faces a problem when export or import restraints, although non-governmental in form, closely approximate to government action. It has frequently been pointed out in GATT/WTO case law that only governmental measures fall within the ambit of Art. XI:1.[35] It has also been held, though, that even if action was taken by private parties it may nevertheless be deemed governmental if there was sufficient government involvement.[36] A government may, in one way or

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[27] *EEC—Minimum Import Prices*, BISD 25S/68, para. 4.14.
[28] *India—Quantitative Restrictions*, WT/DS90/R, as upheld by the Appellate Body Report, *India—Quantitative Restrictions*, WT/DS90/AB/R, para. 5.134.
[29] *India—Quantitative Restrictions*, WT/DS90/R, as upheld by the Appellate Body Report, *India—Quantitative Restrictions*, WT/DS90/AB/R, para. 5.142.
[30] Panel Report, *Canada—Provincial Liquor Boards (EEC)*, BISD 35S/37, para. 4.24.
[31] *Japan—Semi-Conductors*, BISD 35S/116, para. 104.
[32] *EEC—Minimum Import Prices*, BISD 25S/68, para. 4.9.
[33] *Japan—Semi-Conductors*, BISD 35S/116, para. 106.
[34] *Ibid.*, paras 108–111.
[35] Panel Report, *Japan—Film*, WT/DS44/R, para. 10.43; confirmed in *Argentina—Hides and Leather*, WT/DS155/R and Corr.1, para. 11.18.
[36] *Japan—Film*, WT/DS44/R, para. 10.56; confirmed in *Argentina—Hides and Leather*, WT/DS155/R and Corr.1, para. 11.19.

another, encourage voluntary restraint of exporting firms or restraint of merchants or customers in importing or purchasing certain foreign products respectively. The question to be answered under Art. XI is whether such governmental action may be considered a measure under Art. XI. Further it is doubtful whether under Art. XI an obligation exists for a government to counter actions of non-governmental groups against the export or import of certain products.[37]

GATT/WTO case law has not yet developed abstract rules concerning the qualification of actions taken by private entities or individual persons as being governmental in nature, although some inspiration could have been gained in this respect from the customary international law rules on state responsibility.[38] According to these principles, actions of private entities are attributable to the government if such entities exercise elements of governmental authority, if the actions in question are directed or controlled by the government or if such actions are acknowledged and adopted by the government as its own. For example, it would be sufficient for an action of a private entity to be deemed governmental and to come within Art. XI:1 if it were part and parcel of the governmental system concerning the implementation or enforcement of governmental policies. Equally actions undertaken by private entities which had been endorsed or even guided by the government would qualify as governmental. However, no obligation under WTO law exists to counter purely private actions which have a restrictive effect on trade.

E. Exceptions to the Prohibition of Non-tariff Barriers to Trade

17 Several **exceptions** exist to the prohibition set out in Art. XI: 1, three of which are referred to in para. 2. The latter are export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential for the exporting contracting party (lit. a); import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade (lit. b); and import restrictions instituted as a part of the management of domestic agricultural production and

[37] The Panel on *Argentina—Hides and Leather*, WT/DS155/R and Corr.1, para. 11.18–11.19 stated that private activity can at least be subsumed under Art. XI:1 "if there is sufficient government involvement with it".

[38] See in this respect Arts 4 to 11 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, as developed and adopted by the International Law Commission, ILC 53[d] report, UN GAOR, 56th session, supp. No. 10, at 43, UN Doc. A/56/10 (2001).

marketing (lit. c). For the interpretation of these exceptions it is essential to take into consideration that they are designed to protect agricultural production as such, but not, however, the industrial processing of agricultural products.[39]

18 Additional exceptions are to be found elsewhere in GATT. For example, Arts XII and XVIII:B permit the use of quotas to deal with balance-of-payments problems. Quotas are further permitted as safeguard measure under Art. XIX. Further exceptions are to be found concerning agriculture, textiles and aircraft. Finally, the general exceptions in Arts XX and XXI are relevant.

19 It is well established in the case law of GATT 1947 Panels that the party invoking an exception bears the **burden of proving** that it has met all the conditions of that exception.[40]

20 According to Art. XI:2 lit. a, restrictions on export are temporarily permissible if the objective is to overcome **"critical shortages of foodstuff or other products"**. A critical shortage exists not only in, for example, times of a famine but already when there is a significant shortage of an important product or when there is the established likelihood that such shortage will occur. The provision refers to "products essential for the exporting contracting party". The meaning of this concept has to be established by taking into account that such products must have the same relevance for the exporting country as foodstuff and that the invocation of the exception under Art. XI:2 lit. a has to meet the test of proportionality. On this basis a shortage in commodities and industrial products essential for the economy of the exporting contracting party may justify a temporary export restriction on these goods.[41]

21 Art. XI:2 lit. b permits prohibitions or restrictions on exports or imports "necessary for the classification, grading or marketing of commodities in international trade". Unlike the TBT the reference to standards also includes technical standards agreed upon on a voluntary basis.[42] The restrictions and prohibitions applied have to be necessary. This emphasizes the need to apply the proportionality test.[43]

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[39] Panel Report, *Canada—Ice Cream and Yoghurt*, BISD 36S/68, para. 74, while referring to the legislative history of these exceptions (Havana Reports, Interim Commission for the International Trade Organization, Reports of the Committees and Principal Sub-Committees, Geneva, ICITO/I/8, September 1948, 94).

[40] Panel Report, *EEC—Apples (US)*, BISD 36S/135; *Canada—Ice Cream and Yoghurt*, BISD 36S/68.

[41] *Senti*, WTO, para. 552; *Berrisch*, in: *Prieß & Berrisch* (eds), at 118.

[42] *Berrisch*, in: *Prieß & Berrisch* (eds), 114, 118.

[43] Working Party, Review of the Working Party on Quantitative Restrictions, L/332/Rev.1, BISD 3S/170, 2, 4 and 5 March 1955, 189–190.

22 Art. XI:2 lit. c permits import restrictions instituted as a part of the management of **domestic agricultural production and marketing**. This exception refers to three alternative objectives the government in question may pursue under this exception, namely (i) restriction of the quantities of the like domestic product or of a domestic product for which the imported product can be directly substituted or (ii) the removal of a temporary surplus of the like domestic product or a domestic product for which the imported product can be directly substituted or (iii) restriction of the quantities permitted to be produced of any animal product the production of which is directly dependent on the imported commodity. Any restriction falling under Art. XI:2 lit. c must further meet the requirements set out in the last para. of Art. XI:2 lit. c.

23 To be more specific, exceptions under Art. XI:2 lit. c must meet seven conditions: (1.) the measure on import must constitute an import restriction, rather than a prohibition;[44] (2.) the import restriction must be on an agricultural or fisheries product;[45] (3.) the import restriction and the domestic marketing or production restriction must apply to "like" products in any form (or directly substitutable products if there is no substantial production of the like product);[46] (4.) the restrictions must derive from governmental measures which result in the restriction of the quantities of the domestic product permitted to be marketed or produced;[47] (5.) the import restriction must be necessary for the enforcement of the domestic supply restriction;[48]

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[44] In Panel Report, *US—Tuna (Canada)*, BISD 29S/91, the Panel noted the difference in language between Art. XI:2 lit. a and lit. b and Art. XI:2 lit. c and found that the provision of Art. XI:2 lit. c could not justify the application of an import prohibition.

[45] The term "agricultural product" is not defined in GATT. It is the long-standing practice of GATT panels to accept that products falling under Chapter 1 to 24 of the Customs Cooperation Council Nomenclature can be regarded, in principle, as agricultural products (see for example, *EEC—Apples (US)*, BISD 36S/135; *Canada—Ice Cream and Yoghurt*, BISD 36S/68). Apart from that, the Panel Report on *Canada—Ice Cream and Yoghurt* felt it necessary to refer also to the common views of the consumer as well as the industry (para. 64).

[46] In identifying "like products" GATT case law follows a two step procedure. It first establishes the domestic reference product, namely the product produced by farmers and subject to restrictions (see: *Canada—Ice Cream and Yoghurt*, BISD 36S/68, para. 66) and, secondly, whether the foreign products are "like" products. It is further established in GATT case law that the words "like product" as used in Art. XI:2 lit. c do not merely mean "competing product". According to that case law Art. XI. 2 lit. c read together with its supplementary Note calls for a differentiation, namely between restrictions on the importation of products that are like the product subject to domestic supply restrictions and restrictions on the importation of products that are processed from a product that is like the products which meet all of these restrictions (*Japan—Agricultural Products I*, BISD 35S/163; *Canada—Ice Cream and Yoghurt*, BISD 36S/68, para. 70.) To the extent that the supplementary Note to para. 2 lit. c requires that the restricted products "compete directly" with the fresh product, the Panel on *Canada—Ice Cream and Yoghurt*, BISD 36S/68, para. 73 observed that this notion did not cover indirect competition.

[47] The governmental measures must be designed to restrict production; a mere regulation is insufficient. See *Canada—Ice Cream and Yoghurt*, BISD 36S/68, para. 78.

[48] The Working Party on Quantative Restrictions (1955) has concluded: "[I]t would be an abuse of intent of the provisions under Article XI: 2(c) GATT if the contracting parties were

(6.) the contracting party applying the relevant restrictions on imports must give notice of the total quantity or value of the product permitted to be imported during a specified future period; (7.) the restrictions applied under (i) must not reduce the proportion of total imports relative to total domestic production, as compared with the proportion which might reasonably be expected to occur between the two in absence of restrictions.[49] It seems to be impossible successfully to invoke the exceptions under Art. XI:2 lit. c.

F. Relationship Between Arts XI and III GATT

24 As far as the import of goods is concerned Art. XI:1 has to be distinguished from Art. III (national treatment). Art. III is relevant for goods after they have cleared customs, whereas Art. XI:1 applies to measures that affect the actual importation of products. The demarcation line is not as clear as it appears. Ad Art. III states that a measure "enforced or collected in the case of an imported product at the time or point of importation" can be regarded as an internal measure. The demarcation between measures falling under Art. III and those under Art. XI is not merely academic. Art. III permits internal measures which have to be non-discriminatory as between imported and domestic goods, whereas Art. XI:1 prohibits non-tariff trade barriers without further qualification. For example, it is possible to restrict the import of lobster not reaching a particular size if the domestic product has to meet the same requirement.[50] Such a requirement is an internal regulation although it is enforced upon importation. In comparison it would be impermissible to restrict the import of lobsters on the basis of the way they have been caught if this has no impact upon the product as such. Jurisprudence has been developed to distinguish between Arts. III and XI:1. Under normal circumstances a measure will have to be analysed under Art. III first; only if it does not come within the scope of that provision will it have to be assessed under Art. XI.

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to apply restrictions to processed products ecceding those necessary to secure enforcement of the actual measures restricting production or marketing of the primary products [...]." (BISD 3S/189/190). The import restrictions on agricultural or fisheries products must be necessary to the enforcement of certain governmental measures. Moreover, if the products are in an early stage of processing and still perishable, they must compete directly with the fresh product and make the restriction on the fresh product ineffective if freely imported, see supplementary note to Art. XI:2 lit. c.

[49] *EEC—Apples (US)*, BISD 36S/135.

[50] Panel Report under Chapter 18 of the Canada-US Free Trade Agreement, *Lobsters from Canada*, Secretariat File No. USA 89-1807-01, 25 May 1990.

G. Relationship Between Art. XI:1 and Art. 2 SPS and Art. 2 TBT

25 The relationship between GATT and the SPS was discussed in the *EC—Hormones* dispute.[51] The agreements are technically distinct from each other although the SPS Agreement refers in its Preamble to GATT and qualifies the SPS Agreement as an implementation agreement in particular in respect of Art. XX lit. b GATT 1994. According to the General Rule on Interpretation of Annex 1 A to the WTO Agreement, in a case of divergence between the GATT and one of the agreements referred to in Annex 1 A the latter shall prevail. This is, in fact, not a rule of interpretation but a rule to solve a conflict of law.

26 Since the SPS Agreement is an implementation agreement of Art. XX lit. b GATT 1994 restrictive national trade measures which are in conformity with the SPS Agreement cannot constitute an unjustified trade restriction under Art. XI:1. This conclusion, which already follows from the very nature of the SPS Agreement, is expressed in Art. 2.4 SPS in the form of an assumption. According to it sanitary and phytosanitary measures which conform to the relevant provisions of the SPS Agreement shall be presumed to be in conformity with the obligations of the Contracting Parties under GATT. It is hard to imagine how a Contracting Party may refute such assumption, although it is theoretically not excluded.

As a matter of consequence sanitary or phytosanitary measures not being based on a risk assessment as provided for under the SPS Agreement or being more trade restrictive than necessary[52] constitute unjustified trade restrictions.[53] In such cases it is sufficient to set out the violation of the SPS Agreement. The presumption of Art. 2.4 SPS renders reference to Art. XI:1 unnecessary.

27 Technical barriers to trade constitute trade restrictions, as is indirectly acknowledged in the Preamble and Arts 2.2 to 2.5 TBT. Unlike the SPS

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[51] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R;WT/DS48/AB/R, paras 8.31–8.42.

[52] A footnote to Art. 5.6 SPS-Agreement details this qualification measure is more trade restrictive than required if there is another SPS measure which:

(a) is reasonably available taking into account technical and economic feasibility;

(b) achieves the Members appropriate level of protection;

(c) is significantly less restrictive to trade than the SPS measure contested.

[53] The Panel on *Australia—Salmon*, WT/DS18/R, para. 9.1 stated: "Australia, by maintaining a sanitary measure which is not based on a risk assessment, has acted [...] inconsistently with the requirements contained in Article 5.1 of the Agreement on the Application of Sanitary and Phytosanitary Measures and, on that ground, has also acted inconsistently with the requirements contained in Article 2.2 of that Agreement." See also *Japan—Agricultural Products II*, as modified by the Appellate Body Report, *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 72.

Agreement, the TBT Agreement does not make clear in its Preamble that it is an implementation agreement of GATT. Therefore the relationship between the GATT and the TBT agreement, as far as trade restrictions are concerned, seems to be less clear. However, the TBT Agreement acknowledges that it is the right of the Contracting Parties to adopt technical regulations which may constitute barriers to trade to the extent that such regulations have been adopted to serve the following objectives: protection of human health or safety, animal or plant life or health or the protection of the environment. This means that the resulting restrictions on trade are considered to be justified. The key provision governing the relationship between the TBT Agreement and GATT, as far as trade restrictions are concerned, is Art. 2.5 TBT. According to this provision it is to be presumed that a technical regulation that is prepared, adopted or applied for one of the legitimate objectives under the TBT Agreement and is in accordance with relevant international technical standards—both criteria apply cumulatively—does no constitute or create an unjustifiable obstacle to international trade. This assumption is rebuttable, though. It is worth noting that Art. 2.5 TBT refers to the possibility of rebutting such an assumption, whereas the parallel provision of the SPS Agreement does not.

28 On this basis it is to be concluded that the provisions of the TBT Agreement referring to technical regulations which may constitute trade restrictions are *lex specialis* in respect of provisions of GATT concerning non-tariff restrictions to trade. This being the case it would have been a matter of consequence that dispute settlement bodies under GATT/WTO assessed first whether a technical regulation was in conformity with the relevant provisions of the TBT Agreement. Nevertheless, the *US—Gasoline* Panel[54] did not consider the TBT Agreement. A different approach was pursued by the *EC—Asbestos* Panel[55] with which the Appellate Body concurred although some of its arguments seem to indicate that the obligations under GATT and the TBT Agreement should be considered in parallel.[56] Art. 2.5, sentence 2 TBT, though, points more in the direction of dealing with the TBT Agreement as *lex specialis* as far as restrictions on trade are concerned.

H. Outlook

29 Art. XI:1 influenced the drafting of Arts 28 and 29 ECT and of Art. 309 NAFTA. It can be noted, however, that the ECJ's jurisprudence with regard

[54] Panel Report, *US—Gasoline*, WT/DS2/R, para. 6.43, as modified by the Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R.

[55] Panel Report, *EC—Asbestos*, Panel Report WT/DS135/R and Add. 1, as modified by the Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R.

[56] *Ibid.* at para. 8.16.

to Arts. 28 and 29 EC Treaty is more refined and legally sophisticated than the WTO dispute settlement system's case law on Art. XI GATT 1994. Nevertheless, Art. XI is a pivotal clause of the GATT, clearly reflecting its philosophy, namely the general liberalization of trade. In this respect Art. XI:1 has the same legal significance for the WTO system as Arts 28 and 29 ECT have for the economic order established for the EU.

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Article XX GATT 1994
General Exceptions [Introduction]

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Preamble, para. 8 and Arts 2.2, 2.4 SPS; Art. 30 ECT; Art. 2101 NAFTA; Art. 3.2 DSU; Art. 31.1 VCLT; Art. 91 lit. f Association Agreement between the European Community and Chile; Art. 226.1 lit. j Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy.

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A. General **1**
B. Structure **4**

A. General

1 Art. XX provides Members with the option to take **national protective measures** in a range of defined policy areas, thus exempting them, under certain conditions, from WTO rules and concessions concerning the

protection and promotion of free trade. The policy objectives legitimizing such exemptions are set out in lit. a to j. The provision thus acknowledges that Members may decide that such policies should take precedence over the objective of liberalizing trade. It is the right of each Member rooted in sovereignty to decide to opt for introducing exceptions or to fully honour its commitments in respect of trade liberalization.

2 Art. XX is part of a larger system of exceptions, including the security exceptions in Art. XXI and exceptions for free trade areas in Art. XXIV,[1] as well as, for instance, waivers under Art. XXV:5. As regards trade in services, the GATS contains a similar provision in Art. XIV. In the realm of intellectual property and the TRIPs Agreement, a number of provisions such as Art. 13, 17, 26.2, 30 and 73 TRIPs reflect the idea of exemption in view of certain legitimate policy objectives but follow a different regulatory pattern.

3 Art. XX has become a model provision for regional and bilateral trade agreements. These often contain similarly worded provisions, or explicitly refer to Art. XX. Thus, Art. 2101 NAFTA explicitly incorporates Art. XX. Art. 30 ECT largely borrows from the wording of Art. XX and in fact, from Art. XXI, too.[2] Art. 30 ECT is particularly noteworthy in this regard, because in spite of the similarity of the wording, the legal context and the meaning of Art. 30 ECT are quite different from those of Art. XX, especially when taking into account the approach developed by the European Court of Justice in the *Cassis de Dijon* case.[3] This example suggests a word of caution. The parallels which exist in this regard between different trade agreements should not camouflage the fact that GATT and other systems of trade and trade integration vary considerably in their basic legal structures and underlying principles. Relying on cases and developments of a seemingly "parallel" provision always requires a thorough analysis of the underlying basic structures and principles as well as their potentially considerable divergences.

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[1] For details see *Tevini*, Article XXIV GATT 1994, Max Planck CWTL, Vol. 2.

[2] The provision reads: "The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

[3] C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1978] E.C.R. 649.

B. Structure

4 Art. XX is divided into two parts—a **Chapeau**, followed by **ten paragraphs**, each dealing with a particular policy objective, such as the protection of public morals (lit. a), the protection of life and health of humans, animals and plants (lit. b), the protection of monopolies, patents and trade marks (lit. d), protection against the exploitation of prison labour (lit. e), the protection of national treasures (lit. f), the protection of exhaustible natural resources (lit. g) and the protection of certain mineral resources being essential for the domestic market or economy (lit. h, i, j and lit. c).[4]

5 Each of these **paragraphs** formulates a **policy objective** which may be legitimately pursued under that exception. Different terms like "necessary" (lit. a, b, d), "relating to" (lit. c, e, g), "imposed for" (lit. f), "in pursuance of" (lit. h), "involving" (lit. i) and "essential" (lit. j) are used in the paragraphs to specify the relationship between the objective and the application of a measure.[5] The provisions also contain specific limitations.

6 Furthermore, the **Chapeau** formulates **general limitations** on the application of these measures, which in particular are meant to ensure that the application of a measure does not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or constitutes a disguised restriction on international trade.

7 The paragraphs are **not mutually exclusive**. On the contrary: members may and often do refer to more than one subparagraph of Art. XX in the application of a single measure.

8 It has taken some time fully to explore and develop an understanding of the structure of Art. XX and, in particular, the **relationship between the Chapeau and the ten specific clauses**. However, it has been firmly established since the Appellate Body Report in *US—Gasoline* that the application of Art. XX requires a **two-tiered approach**. According to that approach, it is, first, necessary to examine whether the national measure in question is justified under one of Art. XX lit. a to j and, secondly, whether the application of these national measures meets the requirements of the Chapeau.[6] The two-tiered approach has been followed by the Panel reports in *US—Shrimps* and *EC—Asbestos*.[7] This approach should be firmly established by now in the case law of the WTO dispute settlement system.

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[4] Art. XX lit. c deals with import as well as export, whereas Art. XX lit. i is concerned only with export; for details see *Matz-Lück*, Article XX lit. c GATT 1994 and *Matz-Lück*, Article XX lit. i GATT 1994.

[5] The Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R emphasized that the difference in wording reflected a difference in the relationship.

[6] *Ibid.*, 22.

[7] Panel Report, *EC—Asbestos*, WT/DS135/R, para. 8.167.

In *US—Gasoline*, the Appellate Body rightly emphasized that such a sequence *9*
in the analysis of a claimed justification for an exemption under Art. XX is a **requirement of the fundamental structure and logic of that provision**. Referring to the drafting history of the Chapeau of Art. XX the Appellate Body stated that it is the objective of the Chapeau to safeguard against the misuse of the justification clauses in Art. XX lit. a to j, and that such an assessment is only possible once the clause which may have been misused has been identified. The Appellate Body added that the standards established in the Chapeau are necessarily broad in nature, and that accordingly the contours and contents of these standards will vary as the kind of justification varies. As an example the Appellate Body indicated that the "arbitrary discrimination" standard may have a different meaning for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.

Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO-Technical Barriers and SPS Measures.*
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Article XX GATT 1994
General Exceptions [Chapeau]

Subject to the requirement that such measures 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

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A. General

1 The Chapeau contains **two elements**, one of an affirmative nature stating that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures [...]", and one formulating a condition subjecting these measures "[...] to the requirement that such measures 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".

The textual **interpretation** of Art. XX as a whole and the relationship between these two parts of the article have been controversially discussed in the case law of the dispute settlement system of the WTO as well as in literature.[1] Various theories have been advanced in the literature concerning the object and purpose of the Chapeau of Art. XX. *2*

The Appellate Body Report on *US—Shrimp* characterized the task of interpreting the Chapeau as "the delicate one of locating and marking out a **line of equilibrium** between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions [...] of GATT 1994".[2] According to the Appellate Body the "line of equilibrium" should ensure that "neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement".[3] *3*

It has also been stated that the Chapeau of Article XX should protect against **abuses of rights** under Article XX lit. a to j.[4] These approaches to the interpretation of the Chapeau are not necessarily mutually exclusive. The difficulty of interpreting the Chapeau in fact rests first in establishing the content of the conditionalities as formulated in the Chapeau and, secondly, in finding an adequate relationship between such conditionalities and the rights WTO Members enjoy in formulating their national policies according to Article XX lit. a to j. *4*

B. Drafting History

The drafting history of Art. XX in general is not enlightening. However, that of the Chapeau gives some indication of the intentions of the drafters.[5] The first draft of GATT proposed by the United Kingdom and the United States in December 1945 provided for the customary exceptions to free trade and permitted their unconditional application. Belgium and the Netherlands noted, however, during the London session of the preparatory committee: "indirect protection is an undesirable and dangerous phenomenon. [...] Many times the stipulations 'to protect animal or plant life or *5*

[1] *Bree*, Dick. J. Int'l L. 17 (1998–1999), 99–134; *Neuling*, Loy. L.A.Int'l & Comp. L. Rev. 22 (1999–2000), 1–50; *Mavroidis*, 34 JWT (2000) 1, 73–78; *Gaines*, U. Pa. J.Int'l Econ. L. 22 (2001), 739–862.

[2] Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, para. 159.

[3] *Ibid.*, para. 159.

[4] *Ibid.*, para. 158.

[5] See in general *Charnovitz*, JWT 25 (1991) 5, 37, 38–47; *Neuling*, Loy. L.A. Int'l & Comp. L. Rev.22 (1999–2000), 1, at 13–16.

health' are misused for indirect protection."[6] It was recommended that a clause be inserted "which prohibits expressly [the use of] such measures [to] constitute an indirect protection".[7] The United Kingdom offered an amendment specifying that trade measures should not be "applied in such a manner as to constitute a means of arbitrary discrimination between countries where the same conditions prevail, or as a disguised restriction on international trade".[8] This clause was borrowed from the International Convention for the Abolition of Import and Export Prohibitions and Restrictions of 1927[9] negotiated under the auspices of the League of Nations. This Convention, which did not enter into force, called for the abolition of trade barriers, excluding tariffs, while providing for certain exceptions, subject to the condition "that they are not applied in such a manner as to constitute a means of arbitrary discrimination between foreign countries where the same conditions prevail, or a disguised restriction on international trade".

6 This clause was modified, though; the prohibition of "arbitrary discrimination" no longer applies to foreign countries only. Instead the Chapeau incorporates the principles of national treatment and of non-discrimination.

C. Interpretive Development of the Normative Concept

7 The interpretation of the Chapeau of Art. XX has been developed in a long sequence of dispute settlement decisions and scholarly writings, and is still the subject of some discussion. This process has been part of a larger effort to clarify the structure of the entire article. This is why many of the arguments put forward deal with the overall structure of Art. XX.

I. *US—Gasoline* and the General Structure

8 For a long time, the Chapeau of Art. XX did not play a prominent role in case law. It has sometimes been referred to in dispute settlement, but without much relevance. In *US—Spring Assemblies*, the Panel found that an exclusion order directed against patent-infringing assemblies was not discriminatory because it was directed at all foreign sources.[10] In two cases panels held that the measures in question did not constitute disguised trade restrictions within the meaning of the Chapeau.[11] These panel reports did not add to

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[6] See GATT Analytical Index I, 563.
[7] Note of the Netherlands and the Belgo-Luxembourg Economic Union, EPCT/C.II/32, 30 October 1946.
[8] *Charnovitz*, JWT 25 (1991) 5, 37, 38–47, at 44.
[9] LNTS 97 (1929–1930), 393, 8 November 1927.
[10] Panel Report, *US—Spring Assemblies*, BISD 30S/107, paras 54–55.
[11] *Ibid.*, at para. 55; Panel Report, *US—Canadian Tuna*, BISD 29S/91, para. 4.8.

the interpretation of the Chapeau, nor did they clarify the relationship between the Chapeau and the second part of Art. XX.

9 The Appellate Body in ***US—Gasoline***[12] discovered the Chapeau and was the first to provide for its interpretation. In doing so it took a different approach from that taken by the Panel.[13] The Panel, after assessing baseline establishment rules of the US Environmental Protection Agency which distinguished between domestic and foreign producers or refiners,[14] had concluded that these were inconsistent with Art. III:4 and could not be justified under any of the Art. XX exceptions. The Appellate Body held instead that the baseline establishment rules of the US Environmental Protection Agency satisfied the requirements of Art. XX lit. g but constituted an "unjustifiable discrimination" and a "disguised restriction on international trade" under the Chapeau of Art. XX.[15]

10 In this Report, the Appellate Body also developed a **two-tiered approach** to Art. XX.[16] It further emphasised, referring to the wording, that under the Chapeau it is not the measure as such which has to be assessed but rather the manner in which it was applied.[17] This is of some relevance since it means that the focus of assessing the national measure is different under the Chapeau from that under the second part of Art. XX.

11 As the final general consideration the Appellate Body reasoned that the **standards** to be used under the Chapeau could **not be identical to** those under the national treatment clause in **Art. III:4**, for example, since this would render the Chapeau devoid of substance. The meaning and consequences of this dictum[18] which was referred to in subsequent reports and in the pleadings of the parties has been much discussed in literature.[19]

12 As regards the **wording** of the Chapeau, the Appellate Body stated that "arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction on international trade" may be read together and that they

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[12] Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R.

[13] Panel Report, *US—Gasoline*, WT/DS2/R.

[14] The case dealt with the validity of a US regulation which aimed to control pollution from the combustion of gasoline which was either manufactured in, or imported into, the United States. The regulation in dispute was enacted under the US Clean Air Act of 1990. The Gasoline Rules provided for baselines which were to be determined either on an individual basis or on a statutory basis, as determined by the Environmental Protection Agency. They provided that certain domestic refiners had to determine an individual baseline by one of three methods. Blenders and importers, unless they had data as the domestic refiners, had to use a statutory baseline and accordingly less flexibility compared to some of the domestic competitors.

[15] *US—Gasoline*, WT/DS2/AB/R, 29.

[16] See below, paras 21 and 22.

[17] This was already noted in *US—Spring Assemblies*, BISD 30S/107, para. 56.

[18] *US—Gasoline*, WT/DS2/AB/R, 22.

[19] See below, paras 43 *et seq*.

impart meaning to one another. The notion of "disguised restriction" was considered to embrace arbitrary or unjustifiable discrimination but without ruling out the fact that those other situations might be covered, too. One may note critically that in applying its interpretation of the Chapeau to the measures taken by the US administration the Appellate Body did not substantially deviate from the ruling of the Panel on the basis of Art. III:4. Further one has to observe that the Appellate Body did not provide for an interpretation of the notions "arbitrary or unjustifiable discrimination" or "disguised restriction on international trade". This was due to the fact that the US regulations in question evidently discriminated in their application between domestic refiners and importers, and purely administrative arguments had been advanced to justify such discrimination.

II. Further developments

13 In the *Shrimp* case, the Appellate Body contributed greatly to the understanding of the Chapeau.

1. The Panel Reports in General

14 The *US—Shrimp* case deals with the protection of turtles against being killed as an incidental effect of shrimp trawling.[20]

[20] To reduce turtle mortality a turtle excluder device was developed—actually a trap door at the top of the nets through which turtles can escape. According to United States studies this device reduces incidental turtle mortality by ninety-seven per cent while the effect on the efficiency of the shrimp operation is minimal. The United States required all boats of the US shrimp fleet to install this device. To meet the concerns of the US shrimp fleet, [provision] Section 609 of Public Law 101–102 (referred to as Section 609) was adopted by the US Congress. Sec. 609 lit. a calls upon the Departments of State and Commerce to initiate the negotiation of agreements with other countries for the protection and conservation of sea turtles. Sec. 609 lit. b prohibits from 1 May 1991 the import of "wild-caught" shrimp. Exporting countries are exempted from this prohibition if "certified" by the Department or State based on documentary evidence of the adoption of a regulatory programme governing the incidental taking of sea turtles comparable to that of the United States and an average rate of incidental sea turtles comparable to the US average. The State department provided for a regulation specifying several aspects of sec. 609. In practice—and this was relevant to the case—it determined that it would not certify any programme that did not contain a US style comprehensive turtle excluder device requirement. The territorial scope of Sec. 609 was originally limited by the State Department to the wider Caribbean and Western Atlantic. The United States entered into negotiation with those States and these negotiations resulted in the adoption of the Inter-American Convention for the Protection and Conservation of Sea Turtles. However, a decision of the US Court of International Trade found that limiting the geographical scope of the section did not meet the requirements of that section. Accordingly the State Department revised its guidelines and extended Section 609 to shrimp harvesting in all foreign nations. The states newly exposed to the shrimp embargo under sec. 609 lit. b (India, Malaysia, Pakistan and Thailand) initiated the WTO proceedings. For further details see Panel Report, *US—Shrimp*, WT/DS58/R, paras 2.1–2.16; *Gaines*, U. Pa. J. Int'l Econ. L. 22 (2001), 739, 762–770.

15 The Appellate Body Report in the *US—Shrimp* case can be adequately assessed only by taking into consideration the Report of the Panel[21] and the reasoning of the United States advanced before the Appellate Body.[22] Further, though limited clarification on the interpretation of the Chapeau is to be gained from the Panel Report in *US—Shrimp (Article 21.5—Malaysia)*.[23] More enlightening in this respect is the Panel Report in *EC—Asbestos*.[24]

16 The Panel in the *US—Shrimp* case held that USC Section 609 constituted a restriction under Art. XI. This was not disputed. Although the United States had claimed that the measures taken were justified under Art. XX lit. b and g, which was contested, the Panel in the *US—Shrimp* case, referring to the Appellate Body Report in the *US—Gasoline* case[25] first dealt with the Chapeau. It concluded that the Art. XX Chapeau allowed Members to derogate from GATT provisions only so long as, in doing so, they did not undermine the WTO multilateral trading system, which would make their reliance on an exception contained in Art. XX an abuse of rights. Examining the US measures on this basis it found that they constituted an unjustifiable discrimination between countries where the same conditions prevail and thus were not within the scope of measures permitted under Art. XX.[26]

17 The Appellate Body Report criticised the Panel Report for its conceptual approach to the Chapeau of Art. XX. First the Appellate Body noted that the Panel misconstrued the ordinary meaning of the words in Art. XX by focussing on the content or design of the import ban. The Appellate Body emphasised that the Chapeau of Art. XX refers to the application of the measure.[27] Secondly, the Appellate Body held that the Panel misconstrued the ordinary meaning of the words of the Chapeau of Art. XX by interpreting it in the light of the objective and purpose of the whole WTO Agreement, rather than in terms of the objective and purpose of the Chapeau.[28] Finally the Appellate Body criticised the fact that the Panel started its analysis with an interpretation of the Chapeau rather than the exceptions under lit. a to j of Art. XX.[29] It found that the US legislation (Section 609) as such met the requirements of Art. XX lit. g. In a second step it analysed whether

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[21] *US—Shrimp*, WT/DS58/R.

[22] *US—Shrimp*, WT/DS58/AB/R, para. 148. For a discussion of this reasoning see below, paras 20 *et seq*.

[23] Panel Report, *US—Shrimp (Article 21.5—Malaysia)*, WT/DS58/RW; affirmed by the Appellate Body Report, *US—Shrimp (Article 21.5—Malaysia)*, WT/DS58/AB/RW.

[24] Panel Report, *EC—Asbestos*, WT/DS135/R.

[25] *US—Gasoline*, WT/DS2/AB/R.

[26] *Ibid*., paras. 7.48–7.49.

[27] *US—Shrimp*, WT/DS58/AB/R, para. 150.

[28] *Ibid*., para. 151.

[29] *Ibid*., para. 152.

the US legislation, as applied, met the requirements of the Chapeau of Art. XX, which it found it did not.

18 In consequence of the Appellate Body Report the United States made some changes to its practices and policies towards the Asian complainants in adopting amended guidelines for the implementation of Section 609. In 2000 Malaysia initiated the appointment of a review panel under Art. 21.5 DSU. In its Report[30] it considered the measures by the United States to be in conformity with Art. XX, a finding which was upheld by the Appellate Body Report.[31]

19 In *US—Shrimp*, the United States advanced an interpretation of the unjustifiable discrimination standard established by the Chapeau which was rejected in the Appellate Body Report.[32] This difference in views reflects a fundamental difference in approach.

20 The United States argued: "In context, an alleged 'discrimination between countries where the same conditions prevail' is not 'unjustifiable' where the policy goal of the Article XX exception being applied provides a rationale for the justification. If, for example, a measure is adopted for the purpose of conserving an exhaustible natural resource under Article XX(g), it is relevant whether the conservation goal justifies the discrimination. In this way, the Article XX chapeau guards against the misuse of the Article XX exceptions for the purpose of achieving indirect protection." The United States further argued somewhat modifying its original reasoning by stating: "[A]n evaluation of whether a measure constitutes 'unjustifiable discrimination [between countries] where the same conditions prevail' should take account of whether differing treatment between countries relates to the policy goal of the applicable Article XX exception. If a measure differentiates between countries based on a rationale legitimately connected with the policy of an Article XX exception, rather than for protectionist reasons, the measure does not amount to an abuse of the applicable Article XX exception."

2. A "Balance of Rights and Obligations"?

21 The arguments against this approach advanced by the United States are based upon the structure of Art. XX. As the Appellate Body Report states, **the exceptions of Art. XX are "limited and conditional"**.[33] They are limited because they apply only in defined circumstances, and they are conditional in that national measures are acceptable under the Chapeau only if they do not constitute a means of arbitrary or unjustifiable discrimination

[30] *US—Shrimp (Article 21.5—Malaysia)*, WT/DS58/RW, para. 5.137.
[31] *US—Shrimp (Article 21.5—Malaysia)*, WT/DS58/AB/RW, para. 153.
[32] *Ibid.*, paras 149 *et seq.*
[33] *Ibid.*, para. 157.

or a disguised restriction on trade. First it has to be established whether a particular national measure is justified under one of the exceptions provided in lit. a to j of Art. XX. If this test has been met the national policy which the measure is intended to implement (such as the conservation of exhaustible natural resources) has already been taken into consideration. If such policy consideration were also to guide a decision under the Chapeau the latter would be meaningless, since every national measure which either serves an objective justifiable under Art. XX lit. a to j or—as phrased by the United States is "based on a rationale connected with the policy of an Article XX objective"—would pass the threshold test of the Chapeau. It is a standard principle of interpretation, though, that it must not result in a provision or a part thereof becoming meaningless.[34]

22 The counter position taken by the Appellate Body can be summarized as follows: The Appellate Body states that the object and purpose of the Chapeau is the prevention of the abuse of rights,[35] and infers from this that there is a "need to maintain a **balance of rights and obligations** between the right of a Member to invoke one or another of the exceptions of Art. XX, specified in lit. a to j, on the one hand and substantive rights of other members under GATT 1994, on the other hand".[36]

23 **The introduction into the Chapeau of a balancing test is open to criticism for several reasons**. First, it is questionable whether one may speak of equal rights which are to be balanced. Art. XX creates the right to impose trade restrictions and thereby to limit the rights of other states. Other states are, however, not granted a legal right by the Chapeau of Art. XX; they are merely protected from the abuse of rights.

24 Secondly, proceeding from the broadly based object of a provision—here the avoidance of the abuse of rights—risks giving the interpretation a particular twist not covered by the provision's wording.[37] In the case of the Chapeau of Art. XX it is necessary to take into account that the established principle of international law prohibiting the abuse of rights[38] may be covering state measures not prohibited by the wording of the Chapeau.

25 Moreover, the Appellate Body argues that in order not to constitute an abuse of rights, the manner of application of a measure must be **reasonable**. The quotation from the Appellate Body Report on the *US—Gasoline* case reads:

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[34] *US—Gasoline*, WT/DS2/AB/R, 23.
[35] See above, para. 9.
[36] *US—Shrimp*, WT/DS58/AB/R, para. 156.
[37] *Gaines*, U. Pa. J. Int'l Econ. L. 22 (2001), 739, 826 *et seq.*; *Bree*, Dick. J. Int'l L. 17 (1998), 99, 119 *et seq*.
[38] Explicitely referred to in *US—Shrimp*, WT/DS58/AB/R, para. 158.

26 "The chapeau is animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement. If those exceptions are not to be abused or misused, in other words the measures falling within the particular exceptions must be applied reasonably, with due regards both to the legal duties of the parties claiming the exception and the legal rights of the other parties concerned."

27 The Panel Report in *EC—Asbestos* has further refined the approach of the Appellate Body.[39] It considers first whether the measure is discriminatory in its application and as a second step whether the discrimination is arbitrary and/or unjustifiable. The Panel considers the test of whether the application is of a discriminatory nature as being objective, whereas the second step opens up the possibility of considering whether the measure in question was applied in a **reasonable** manner.

28 **The introduction of the notion of reasonableness has no foundation in the wording** of the Chapeau of Art. XX. The Panel develops the justification for resorting to a reasonableness test on the basis that the Chapeau of Art. XX and Art. XX lit. a to j address two opposing legal positions which are at the same level, whereas the Appellate Body Report in the *US—Shrimp* case developed this approach from the principle that the rights under Art. XX lit. a to j must not be abused. It is questionable whether the introduction of the notion of reasonableness is sustained by the construction of Art. XX.

29 Rather, the Chapeau of Art. XX on the one hand and Art. XX lit. a to j together with Art. III or Art. XI on the other require **different levels of examination**. If a national measure has been adopted it is first necessary to ascertain whether such measure violates a GATT provision, and thereafter it has to be established whether it is justified under one or another of the exceptions under Art. XX lit. a to j. This is the level at which a balance between the interests of the WTO Members in the free movement of goods and the interest of other Members in the protection of national or community interests must be struck. The Chapeau of Art. XX is concerned with the application of such national measures which have passed the test under Art. XX lit. a to j. Hence **its purpose is limited, and to refer in connection with the Chapeau to a balance of interests is misleading**. The introduction of a balancing test would mean that a measure which has been legitimately applied under one of the exceptions of Art. XX could still be illegal because it was outweighed by more

[39] *EC—Asbestos*, WT/DS135/R, para. 8.226.

important concerns of international trade.[40] This would introduce into the consideration of the Chapeau elements which should already have been taken into account. Therefore the Panel Report in *EC—Asbestos*[41] correctly stated that the prohibition of discrimination under Art. III:4 must have a meaning different from the one in the Chapeau of Art. XX. Otherwise it would be impossible to pass the test of the Chapeau of Art. XX.

30 Consequently, the application of a balancing test is not supported by the structure of the Chapeau of Art. XX as defined by the Appellate Body itself. It would have been preferable for the Appellate Body to have based its reasoning solely on the structure of Art. XX, namely that **the exceptions of Art. XX are "limited and conditional"**.[42] They are limited because they apply only in defined circumstances and they are conditional in that national measures are acceptable under the Chapeau only if they do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade. Hence, the Appellate Body should link its findings only to the question whether there was an arbitrary and unjustifiable discrimination.

D. Textual Interpretation

I. Focus of the Chapeau: Application of Measures

31 It is firmly established that under the Chapeau of Art. XX the WTO dispute settlement bodies will focus on the **application** of a measure rather than on its content as such.

32 Since it is the application of national measures which is of essence the WTO dispute settlement bodies may consider—and in fact did so in the *US—Shrimp* case—whether the administration has exhausted all possibilities provided for by the legislature. This brings the WTO dispute settlement bodies into a **position similar to that of national courts.**

33 The consequences of this have not yet been fully considered in the case law of the WTO dispute settlement bodies. At least it should not be held against such approach that in ascertaining the compatibility of measures of the underlying national legislation, dispute settlement bodies are exceeding their own functions while assuming those of national courts. If a national legislature adopts certain measures under Art. XX lit. a to j this legislative measure will be scrutinised by the WTO dispute settlement bodies, which

[40] *Mavroidis*, JWT 34 (2000) 1, 73, 79.
[41] *EC—Asbestos*, WT/DS135/R, para. 8.227.
[42] *Ibid.*, para. 157.

will establish whether the balance between the provisions safeguarding the freedom of trade and Art. XX lit. a to j has been achieved. If such legislative measure provides for several options, as did USC Section 609, and if the executive disregards some of these options it may disregard elements which were essential for achieving the balance required under the structure of GATT. Hence, comparing a flexible legislative measure with less flexible administrative implementation may be one of the methods by which a WTO dispute settlement body can establish whether the threshold of the Chapeau to Art. XX has been met.

II. Unjustifiable Discrimination

34 When it is being established whether there is a difference in treatment concerning the application of a national measure it is immaterial whether such difference was **intentional or accidental.** This is relevant, though, in ascertaining whether the discrimination was unjustifiable or arbitrary.

35 There is considerable uncertainty about when discrimination in application is to be qualified as arbitrary or unjustifiable. This is due to the fact that hitherto the attempt has been made to interpret these terms in the light of a preconceived objective of the Chapeau.[43] In particular, it has been said that a Member may argue successfully that the difference in treatment is merely due to national administrative considerations of the country applying the measure in question.[44] These were, at least to a certain extent, the reasons for the design of the administrative measures taken by the United States which triggered the *US—Shrimp* case and the *US—Gasoline* case. In both cases the considerations underlying these administrative measures failed the test of the Chapeau of Art. XX.

36 According to the Appellate Body, it is **necessary to take into account different conditions in the Members**. As already stated,[45] the Appellate Body Report interpreted the notion of unjustifiable discrimination from the point of view that the Chapeau of Art. XX reflects the general principle of international law that prohibits abuse of rights. In this context the Appellate Body Report is critical of the fact that the United States' measures had a coercive effect on the Asian States and the United States applied them without considering whether shrimp trawling would have an effect on sea turtles and to shrimps caught in the waters of states not certified under Section 609 although the trawlers met the United States' standards. It found discrimination in the fact that the import of shrimps was prohibited only because they had been caught in waters of countries

[43] *US—Shrimp*, WT/DS58/AB/R, para. 148.
[44] *US—Gasoline*, WT/DS2/AB/R, 25.
[45] See above, para. 9.

that were not certified by the US, although these countries used methods identical to those employed by the United States.[46]

III. Failure to Negotiate

Moreover, the Appellate Body Report in the *US—Shrimp* case dealt at length with the alleged unilateral and coercive nature of the measures taken and with the **failure to negotiate**. It was noted critically that the United States had made no effort to negotiate an agreement with the Asian states as it had done with the Caribbean and several Latin-American states, although Section 609 provided for such consensual solution as the first option. This the Appellate Body Report qualifies as "plainly discriminatory".[47] Thus, the Appellate Body mainly argues that before taking unilateral measures the US should have negotiated a multilateral solution and that the lack of cooperation with the Asian states led to unjustified discrimination.[48] *37*

The Appellate Body deviated substantially in its reasoning from that in previous reports since it did not categorically condemn **unilateral or coercive national measures**, but considered their application. In doing so the Appellate Body opened the door to a more flexible approach to WTO trade law as regards environmental and other policies, as reflected in Art. XX lit. a to j. *38*

Those considerations concerning the permissibility of unilateral measures instead of negotiated solutions or measures which have a coercive objective should more appropriately be made under Art. XX lit. a to j. It is at this level that the necessary balance between the policy considerations as enshrined in Art. XX lit. a to j and the guarantees and concessions safeguarding the freedom of trade can be achieved, rather than at the level of application to which the Chapeau is devoted. Hence, these issues shall be appropriately considered there.[49] That the Appellate Body Report on *US—Shrimp* dealt with these issue under the Chapeau of Art. XX is due to the particular situation of that case, namely that the United States implemented its legislation with respect to some WTO Members by negotiating an agreement, whereas with respect to others it relied entirely on its national certification system. Therefore it should not be deduced from the Appellate Body Report in the *US—Shrimp* case that in future such issues should be dealt with in the context of the Chapeau of Art. XX. This will be the case only if these aspects have a bearing on the application of the measure in question. *39*

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[46] *US—Shrimp*, WT/DS58/AB/R, paras 164 and 165.
[47] *Ibid.*, para. 172.
[48] *Ibid.*, para. 166.
[49] See *Matz-Lück & Wolfrum*, Article XX lit. g GATT 1994, paras 26 *et seq.*

40 Equally discriminatory in the Appellate Body's view is the fact that the Caribbean and Latin American states had more extended **phase-in periods** than the Asian states and have been receiving technical assistance which other states did not receive to the same extent.[50]

IV. Arbitrary Discrimination

41 The Appellate Body finds that the **rigidity and inflexibility of the certification process** constitutes not only unjustifiable, but also arbitrary discrimination.[51]

42 Secondly, under this heading the Appellate Body Report in *US—Shrimp* examines **procedural requirements**. It discusses the transparency of the certification procedure under Section 609 and criticises the fact that this process was "singularly informal and casual" and that Members whose applications for certification had been rejected were denied basic fairness and due process.[52] It comes to the conclusion that the US, when denying certification, failed to provide a formal written, reasoned decision, an opportunity to the applicant country to be heard and a formal legal review procedure.[53]

43 In this respect the Appellate Body Report refers to Art. X:3 which establishes transparency, due process and basic fairness as fundamental principles of world trade law. On both accounts discrimination was seen in comparing those countries whose application for certification was granted and those where they were denied.

44 In establishing that there are two groups of states—the Asian states and the Caribbean and Latin American states—which were treated differently the Appellate Body Report remains within the framework of the Chapeau of Art. XX. It seems to be sustainable further to argue that the denial of due process to one group of states qualifies such discrimination as arbitrary, even though the notion of "arbitrariness" contains an element of motive. The Appellate Body Report fails to elaborate on this point.[54]

V. Countries Where the Same Conditions Prevail

45 Even if it is found that there was a difference in treatment, it has to be established that such discrimination was arbitrary or unjustifiable "between countries where the same conditions prevail". This latter element has to

[50] *US—Shrimp*, WT/DS58/AB/R, paras 173–174.
[51] *Ibid.*, para. 177.
[52] *Ibid.*, para. 181.
[53] *Ibid.*, paras 180, 183.
[54] Critical in this respect *Bree*, Dick. J. Int'l L. 17 (1998–1999), 99, 128.

be considered together with "arbitrary" and "unjustifiable". A difference in treatment may be justifiable by the conditions existing in one of the countries in question. For example, it would be justifiable to render technical assistance to developing countries so as to achieve certain environmental or social standards, and not to do so to industrialised countries. There must be valid grounds for the difference in treatment,[55] and these grounds must originate from the targeted countries, and not the country applying the measure in question.

46 As the Appellate Body in *US—Gasoline* has stated, the word "discrimination" in the Chapeau of Art. XX covers both discrimination between products from different supplier countries and discrimination between domestic and imported products.[56] Both aspects may be scrutinised by a WTO dispute settlement body.

VI. Disguised Restriction of International Trade

47 The Appellate Body Report on the *US—Shrimp* case does not provide for an interpretation of the notion "disguised restriction of international trade", but the Panel Report in the *EC—Asbestos* case does so.[57] To a certain extent it could rely upon the Appellate Body Report in the *US—Gasoline* case, which made clear that concealed restrictions do not exhaust the term "disguised restrictions".[58] Rather, it must be examined whether a measure that formally meets the requirements of Art. XX lit. a to j is in fact designed to pursue a **protectionist and trade-restrictive objective**.[59] It may well be difficult for a Panel or an Appellate Body to ascertain whether such aim or motive exists, but it may obtain pointers by considering the design, architecture and structure of the measure in question.[60]

[55] On this basis the Panel Report on *EC—Tariff Preferences*, WT/DS246/R, considered the different treatment of Pakistan and Iran to be in violation of the Chapeau of Art. XX (para. 7.235).
[56] *US—Gasoline*, WT/DS2/AB/R, 23.
[57] *EC—Asbestos*, WT/DS135/R, para. 8.231 *et seq*.
[58] *US—Gasoline*, WT/DS2/AB/R, 24.
[59] *EC—Asbestos*, WT/DS135/AB/R, para. 8.236.
[60] *Ibid*., para. 8.236 points into this direction.

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Article XX GATT 1994

a) necessary to protect public morals;

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Case Law

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A. General

1 Art. XX lit. a has hitherto been of little practical relevance. Although it has occasionally been invoked in DSU proceedings by defendant parties together with other Art. XX exceptions to justify internal measures that were deviant from GATT prescriptions,[1] neither panels nor the Appellate

[1] See for example Panel Report, *US—Malt Beverages*, BISD 39S/206, para. 3.125; Panel Report, *US—Tuna (Mexico)*, BISD 39S/155, para. 4.2.

Body have dealt with the provision in their decisions. Nevertheless, Art. XX lit. a deserves special attention because of its **great potential**. On the one hand, the vague notion of public morality makes Art. XX lit. a prone to an interpretation as a catch-all provision within the exceptions of Art. XX and, on the other hand, it may open the door to the incorporation of human rights and social standards in the law of international trade.

B. Drafting history

The public morality exception of Art. XX lit. a was already contained in the first outline of the ITO Charter drafted by the US government in December 1945 and was incorporated as such into the final text of GATT.[2] From the modern perspective surprisingly, there was little debate in the whole negotiation process about the later Art. XX lit. a GATT 1947. The analysis of discussions in the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Development reveals only that at least some delegates considered the public morality exception to apply to trade restrictions on alcoholic beverages.[3] This lack of the negotiating history is probably due to the fact that public morality exceptions were a **common feature of bi- and multilateral commercial treaties** at that time and that states simply wanted to incorporate these well-established exceptions into the new instrument. To understand what states had in mind as falling under the public morality exception of the later Art. XX lit. a GATT 1947, it may therefore be helpful to examine the needs to which the public morality exceptions contained in prior commercial treaties corresponded.[4] Morally motivated trade restrictions were imposed on the basis of international treaties or national laws and included bans on trade in slaves, opium, liquor, obscene publications, firearms, abortion-inducing drugs and anti-Muslim publications. The aims pursued by these trade restrictions were very often dual: States not only wanted to secure public morality in their own country but also aimed at protecting morals in other countries. The prohibition of the import of slaves for example not only served to prevent the use of slaves in the import-banning state, but also had the aim of protecting potential victims in the exporting country. Some measures, on the other hand, such as the import ban on anti-Muslim publications adopted by some Muslim states were plainly inwardly directed. *2*

[2] *Charnovitz*, Va. J. Int'l L. 38 (1998), 689, 704.

[3] Report of the Drafting Committee of the Preparatory Committee, United Nations Conference on Trade and Employment, UN Doc. E/PC/T/34, 5 March 1947.

[4] For an extensive analysis of public morality exceptions in prior commercial treaties see *Charnovitz*, Va. J. Int'l L. 38 (1998), 689, 705 *et seq*.

C. Interpretation

I. Basis and Methods

3 The **interpretation** of Art. XX lit. a has to be based on the rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties. Because of the ambiguity of the concept of public morality, the ***travaux préparatoires*** of the treaty and the circumstances of its conclusion will be one important, but **subsidiary, means of interpretation** according to Art. 32 VCLT.

4 Prior **GATT adjudications concerning other Art. XX exceptions** have to be taken into account with regard to problems of interpretation common to all or several of the enumerated exceptions. Given the textual similarity and the similar purposes that Art. XIV lit. a GATS and Art. XX lit. a are designed to serve, the recent panel and Appellate Body decisions in *US—Gambling* that applied the public morality exception of Art. XIV lit. a GATS for the first time will be an important guide for the interpretation of Art. XX lit. a.[5] Finally, insights may be gained from the application and interpretation of the parallel public morality exception in Art. 30 ECT.

II. Public Morals

1. Definition and Content

5 According to the ordinary meaning of the term, public morals refer to "**standards of right and wrong conduct maintained by or on behalf of a community or nation**".[6] This autonomous definition of the treaty term "public morals" acknowledges that the material content of public morals, that is the content of the standards of conduct, is contingent on the values sustained by a certain community. Seen against the background of the overall purpose of Art. XX to protect Members' sovereignty[7] and to allow the protection of important internal interests and the implementation of national policy decisions,[8] the public morals exception then empowers Members to invoke their national standards of right and wrong conduct to deviate from GATT prescriptions under certain, narrowly defined circumstances.[9] The point of reference for the application of Art. XX lit. a is not

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[5] Vice versa Appellate Body Report, *US—Gambling*, WT/DS285/AB/R, para. 291. For an extensive review of the Appellate Body decision in *US—Gambling* see *Marvell*, NYU L. Rev. 81 (2006), 802, 811 *et seq*.

[6] Panel Report, *US—Gambling*, WT/DS285/R, para. 6.465.

[7] *Stoll & Schorkopf*, Max Planck CWTL, Vol. 1, para. 170.

[8] Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R.

[9] *Blüthner*, 344, 345. Critically *Feddersen*, Minn. J. Global Trade 7 (1998), 75, 107, 111, 115.

universal or WTO-specific standards of conduct, but national standards defined according to the national system and scale of social, cultural, ethical and religious values of the Member that invokes the provision.[10]

6 The term "public morals" also encompasses **human rights and social standards** that are part of the legal order of the Member invoking the exception. That human rights and social standards may be counted among the national standards of moral conduct is due to the modern concept of inherent human rights respect for which is considered to be a moral issue.[11] According to the principle of evolutionary interpretation developed by the Appellate Body in *US—Shrimp*,[12] modern developments regarding human rights have to be taken into account when interpreting Art. XX lit. a to ensure the effectiveness of the provision.[13] Principally, therefore, a Member may rely on Art. XX lit. a to justify trade restrictive measures adopted by reason of the violation of human rights or social standards.[14] A good example, although relating to trade in services, is the *Omega* case recently decided by the ECJ.[15] In that case Germany relied successfully on the fundamental right to human dignity contained in Art. 1 of the German Basic Law to prohibit the operation of a laserdrome game consisting of firing on human targets and to justify the ensuing—the equipment for the game was imported from the United Kingdom—infringement of the freedom to provide services contained in Art. 49 ECT.

7 These national standards which constitute the point of reference for the application of Art. XX lit. a may be identical with moral standards accepted by the international community as a whole or by the Member which is the target of the trade restrictive measure. This will most likely be the case with human rights and social standards which form part of national moral

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[10] This corresponds to the approach adopted by the ECJ to the parallel provision of Art. 30 E.C.T.: "In principle, it is for each Member State to determine in accordance with its own scale of values and in the form selected by it the requirements of public morality in its territory." (C-34/79, *Regina v. Henn & Darby*, [1979] E.C.R. I-3795, Rec. 15; C-121/85, *Conegate v. HM Customs & Excise*, [1986] E.C.R. I-1007, Rec. 14). The European Court of Human Rights also considers the term "public morals" used in Art. 10 II ECHR to be contingent on national particularities. See ECHR, *Handyside v. United Kingdom*, [1976], A 24, para. 48: "In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements […]."

[11] *Howse*, Am. U. Int'l L. Rev. 18 (2003), 1333, 1368.

[12] WT/DS58/AB/R, paras 129–131.

[13] *Cleveland*, JIEL 5 (2002), 133, 162.

[14] *Howse*, Am. U. Int'l L. Rev. 18 (2003), 1333, 1368.

[15] See C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundestadt Bonn*, [2004] E.C.R. I-9609, Rec. 28 *et seq*. and the commentary by *von Walter*, AJDA 61 (2005), 152–155.

standards of conduct but are also accepted as binding by the international community as a whole or by the exporting state. If a **standard of conduct common to the Member invoking the exception and the targeted Member** forms the basis of the trade restrictive measure, the protection of Art. XX lit. a is enhanced: Not only may trade restrictions based on the product itself be justified, but also restrictions adopted by reason of moral deficiencies in the production process.[16] In a nutshell, it is not necessary for the applicability of Art. XX lit. a for the moral standard invoked to be accepted by the international community or the targeted Member. If this is the case, however, the possibilities for action under Art. XX lit. a are greater.

2. Application in the WTO Dispute Settlement Procedure

8 For the application of Art. XX lit. a in the WTO dispute settlement procedure, the definition of public morals as national standards of moral conduct means that the dispute settlement body must adopt a **deferential standard of review**.[17] It must defer to the way Members determine the material content of their moral standards of conduct. As a consequence, panels may only examine the plausibility of the assertion that certain conduct contravenes public morality as understood by the Member invoking the exception, but may not measure the conduct against their own or an asserted universal standard of conduct. An assertion will generally not be plausible if, for example, the Member relies on the public morality exception as a basis for the prohibition of the import of pornographic material, but at the same time does not take any action against trade in pornographic material within its territory. In such a case, the assertion that a standard of conduct exists in that Member which forbids pornographic material is not plausible.[18]

III. "To Protect [...]"

9 The notion of **protection** implies the existence of a **risk to public morals**[19] in the form of a (potential) violation of a Member's standards of

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[16] See below, paras 22–24.

[17] *Blüthner*, 345, 346.

[18] See C-121/85, *Conegate v. HM Customs & Excise*, [1986] E.C.R. I-1007, Rec. 16: "[...] a Member State may not rely on grounds of public morality in order to prohibit the importation of goods from other Member States when its legislation contains no prohibition on the manufacture or marketing of the same goods on its territory." See also C-243/01, *Gambelli and others*, [2003] E.C.R. I-13031, Rec. 69 on restrictions on betting services: "In so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings."

[19] *Mutatis mutandis* Panel Report, *EC—Asbestos*, WT/DS135/R, para. 8.170.

conduct. Three cases have to be distinguished according to the origin of the risk to the moral standard of conduct. In the first case, the risk to public morals has its origin in the targeted product itself or its characteristics. A typical example is a ban on the import of pornographic material. Cases in which the targeted product itself constitutes a risk to public morals in the importing Member without any doubt fall within Art. XX lit. a.

10 The second set of cases consists of trade restrictive measures adopted with the aim of changing the policy of the exporting Member on moral standards unrelated to the targeted product. In these cases, the risk to public morals emanates not from the targeted product itself, but from conduct that has no relationship whatsoever with the product. Human rights violations in a foreign Member, for example, could be invoked as grounds for an import ban on products of this Member because the human rights violations offend public morals in the importing Member. Such measures cannot be justified under Art. XX lit. a which requires a **minimum link between the targeted product and the risk to public morals**.[20] That risks for public morality that arise out of the general situation in a state may not lead to import prohibitions on products that do not in one way or another "incorporate" the violation of moral standards is due to the purpose of Art. XX and its role as an exception to the prohibition of trade restrictions. This provision justifies measures incompatible with GATT prescriptions if the unrestricted trade guaranteed by these prescriptions results in a risk to one of the public policy goals enumerated in the exceptions. If the risk to one of the public policy goals does not have its origin in trade, however, trade restrictive measures may not be adopted. Allowing the adoption of trade restrictive measures to change the general human rights situation in a Member, for example, would mean denaturing Art. XX lit. a, as it would be turned into an enforcement mechanism for legal instruments or policies entirely unrelated to world trade. This cannot be the purpose of a provision contained in a treaty aimed at regulating trade.

11 If one considers the intensity of the link between the product and the risk to public morals, the third set of cases can be placed between the two situations mentioned above. Here, the product itself is morally neutral, but the **production process** offends public morality in the state invoking the exception. One example of this kind of measure was the European Community's efforts to protect animals from leghold traps[21] by means

[20] For the requirement of a connection between the targeted product and the risk for public morals *Eres*, Geo. J. Int'l L. 35 (2004), 597, 619.

[21] A leghold trap is a "device designed to restrain or capture an animal by means of jaws which close tightly upon one or more of the animal's limbs, thereby preventing withdrawal of the limb or limbs from the trap." (Council Regulation (EC) No. 3254/91 of 9 November 1991 on prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating

of a regulation not only banning the use of such traps in the European Community but also prohibiting the import of goods manufactured from certain wild animals unless the state of origin had banned leghold traps or met internationally agreed humane trapping methods.[22] The products concerned by the import ban themselves—goods manufactured from dead animals—were not considered morally offensive; it was only the way in which these goods were produced that was seen as reprehensible. Whether Art. XX lit. a is applicable if the risk to public morals has its origin not in the product itself, but in the production process, is highly controversial.

12 Closely linked with this problem is the question of the territorial reach of Art. XX lit. a. May Members protect only their own citizens against the violation of moral standards or may they also adopt trade restrictive measures to protect citizens of other Members? Import bans adopted because of the morally offensive nature of the production process will, as the production process takes place in another Member, typically be aimed at protecting public morals in the other Member. So was the European Union's import ban on animals caught with leghold traps intended to protect animals not in the European Union, but in the exporting Member. Allowing Members to adopt trade restrictive measures to protect people in other Members on the basis of Art. XX lit. a means giving them a legal basis for **exporting their own moral standards** to foreign countries. This mechanism becomes obvious in the European Community's efforts concerning leghold traps which plainly had the aim of pressurizing the exporting Member to adopt the importing Member's standards of conduct concerning the production process. The European Union tried to force its moral views concerning trapping methods on other Members which do not share the same moral views on this issue.

13 **Production-based measures** pose an interpretative problem common to most Art. XX exceptions. They are particularly relevant for Arts XX lit. b and g[23] and are the object of an animated scholarly debate. The arguments used in this debate and prior adjudication on these problems in the context of other Art. XX exceptions[24] constitute important tools for the interpretation of Art. XX lit. a. Several authors exclude measures based on production methods from the scope of Art. XX lit. a. Some argue the lack

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in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards, OJ 1991 L 308/1).

[22] Council Regulation (EC) No. 3254/91, Arts 2, 3.1. On the debate on the WTO conformity of the import ban and on the resolution of the dispute see *Feddersen*, Minn. J. Global Trade 7 (1998), 75, 98 *et seq*.; *Nollkaemper*, J. Envtl. L. 8 (1996), 237, 240 *et seq*.

[23] See the corresponding commentaries in this volume.

[24] See in particular *US—Tuna (Mexico)*, BISD 39S/155.; Panel Report, *US—Tuna (EEC)*, DS29/R; Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R.

of a sufficient *nexus* between the risk and the targeted product;[25] others base their opinion on an argument *e contrario* from Art. XX lit. e. Art. XX lit. e being the only exception explicitly addressing production methods—prison labour—, the other exceptions were not intended to include production-related measures—so it is contended.[26] Other authors draw the opposite conclusion from the existence of Art. XX lit. e. In their view, the inclusion of Art. XX lit. e shows that the general structure of Art. XX does not exclude its applicability to production-related measures.[27]

14 That Art. XX does not generally exclude measures that aim at influencing policies of another Member by conditioning market access for foreign products on compliance with certain, internal standards of conduct was established by the Appellate Body in *US—Shrimp*[28] and is without any doubt confirmed by Art. XX lit. e. But it has to be decided with regard to every subparagraph whether this particular exception allows the export of internal standards through production-related measures. Art. XX lit. e is not of much help in answering this question.

15 Given the variety of national standards in the area of public morality according to cultural, historical and religious background, it does not seem compatible with the purpose of Art. XX lit. a to allow the extraterritorial imposition of national standards of moral conduct through production-based trade restrictions. Art. XX lit. a takes into account the diversity of moral values in Members and the different susceptibilities of Members in this context. Imposing one Member's moral standards on another denies this diversity which forms the basis for the exception. Therefore, in general, Art. XX lit. a does **not cover production-related trade restrictions**. This principle will not apply, however, if the moral standards involved are international standards accepted as binding by the exporting Member. In these cases, which will most likely concern human rights and international labour standards, an interpretation that conforms with human rights will lead to the applicability of Art. XX lit. a.[29]

IV. Necessity of Protective Measures

16 As far as the relationship between the measure taken by the Member and the goal pursued is concerned, Art. XX lit. a, like Arts XX lit. b and d, requires that the measure be necessary for the goal pursued. In view of this parallel wording, the understanding of the requirements of necessity

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[25] *Eres*, Geo. J. Int'l L. 35 (2004), 597, 618 *et seq*.
[26] *Feddersen*, Minn. J. Global Trade 7 (1998), 75, 109; *Reuß*, 98.
[27] *Feddersen*, 245; *Nollkaemper*, J. Envtl. L. 8 (1996), 237, 248, 252; *Howse*, J. Small & Emerging Bus. L. 3 (1999), 131, 143.
[28] *US—Shrimp*, WT/DS58/AB/R, para. 121.
[29] See below, paras 22–24.

developed by the Appellate Body in *Korea—Various Measures on Beef* with regard to Art. XX lit. d can be transposed to Art. XX lit. a.[30] Determining the necessity of the challenged measure accordingly involves a **balancing process** which takes into account the importance of the standard of conduct involved, the extent to which the measure contributes to the protection of public morals and the trade impact of the measure. In particular, regard has to be had to the existence of WTO-consistent alternative measures. Not just any available alternative measure is relevant in this context, however. Rather, only alternative measures that would allow the state to achieve the level of protection it seeks with its measure will be taken into account.[31]

17 In the exceptional cases in which Art. XX lit. a is applicable to production-based measures—namely where universal or common moral standards are concerned—the necessity test acquires particular importance insofar as it helps to **exclude protectionist measures** disguised as moral values from the scope of application of Art. XX lit. a. Overbroad national measures cannot be justified. Production-related trade restrictions should therefore generally apply only to products which have been produced in an immoral manner. In principle, it is not permissible in these cases to define the targeted goods by their origin in a certain Member, because then products originating from this Member but respecting the standards of conduct relating to the production process will also be caught by the trade restrictive measure. However, the theoretically available alternative to a state-of-origin-based import ban has to be shown to be effective in reaching the objective pursued by the state.[32]

18 The **burden of proving** the necessity for a measure is on the Member invoking the exception of Art. XX lit. a.[33] This does not imply, however, that the Member invoking the exception must show that there are no reasonably available alternatives to protect public morals. The proof of such a negative fact would be impracticable and very often impossible. Therefore, it is considered sufficient for the Member invoking the exception to make a *prima facie* case for the necessity for the measure. If the Member sustaining the WTO incompatibility of the measure then identifies specific WTO-consistent alternative measures, the Member invoking the exception will have to show that this alternative is not in fact reasonably available because, for example, it would not allow the Member to attain an equivalent level of protection.

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[30] See *Reyes-Knoche & Arend*, Article XX lit. d GATT 1994, paras 17 *et seq*.

[31] Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, para. 174. For a critical review of the weighing and balancing analysis in the context of restrictions based on public morality see *Marvell*, NYU L. Rev. 81 (2006), 802, 826 *et seq*.

[32] *Nollkaemper*, J. Envtl. L. 8 (1996), 237, 254 *et seq*.

[33] For the burden of proof see *US—Gambling*, WT/DS285/AB/R, paras 309–311.

D. Lit. a in Perspective: Core Labour Standards and Human Rights Standards as Prescriptions of an International Public Morality

19 The public morality clause of Art. XX lit. a is often cited as one possible means of integrating human rights considerations and social standards into WTO law. In the extensive literature on the **relationship between WTO law and human rights law** and on the **relationship between WTO law and international social standards** however, general considerations prevail, and an analysis of specific provisions of WTO law is seldom undertaken. With regard to Art. XX lit. a, these issues re-emerge in the interpretative question whether Members may invoke the protection of Art. XX lit. a for trade restrictive measures adopted on human rights grounds or on the basis of international social standards.

I. The Relationship Between WTO Law and the Law of International Human Rights and Social Standards

20 Since the 1990s, the relationship between the law of international trade and human rights has become the subject of much discussion.[34] It is contended that the liberalization of trade as personified by the WTO constitutes a danger for the protection of human rights. Developing countries on the one hand fear that economic globalization may bring about an even greater disadvantage for developing countries. A special area of concern in this context is the TRIPS agreement and its provisions on the protection of intellectual property, which constitute an impediment to the distribution of affordable AIDS drugs in developing countries.[35] The industrial states on the other hand are more concerned about the question whether they may still adopt trade sanctions to force other states to comply with international human rights.[36] Because of the economic interdependence of states, human rights advocates consider the enforcement of human rights through the international trading system as a particularly effective mechanism that could make up for the deficiencies and weaknesses of the human rights system's own enforcement mechanisms.[37] The **rejection of "trade without values"** is the background for recent efforts by scholars and practitioners to accommodate the prescriptions of international human rights law with the advantages of liberalized international trade by integrating human rights into the law of world trade.[38]

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[34] *Hörmann*, in: *Hilf & Oeter* (eds), 647, paras 1 *et seq*.
[35] On this problem see *Paech*, 45 *et seq*.
[36] *Vásquez*, JIEL 6 (2003), 797, 801.
[37] See for example *Ehrenberg*, Yale J. Int'l L. 20 (1995), 361, 377 *et seq*.; *Stirling*, Am. U. J. Int'l L. 11 (1996), 1, 33 *et seq*.
[38] Only a selection of the innumerable contributions on ways to accommodate trade law

21 Although much older, the debate on the relationship between international trade law and social standards is one aspect of the debate on the relationship between WTO law and human rights. The four core standards contained in the **ILO Declaration on Fundamental Principles and Rights at Work**[39] to which reference is usually made in this context, namely (1.) freedom of association and the right to collective bargaining, (2.) the elimination of all forms of forced or compulsory labour, (3.) the abolition of child labour and (4.) the elimination of discrimination in employment and occupation correspond to human rights with the same content. The debate between industrial states and developing countries centres on the question whether trade restrictions may be used to pressure Members to comply with these international labour standards.[40] Proponents of an incorporation of social standards into WTO law through a social clause[41] argue that this is necessary to improve the plight of workers in certain countries. A **race to the bottom** with regard to labour standards could be avoided only if all countries complied with certain minimum social standards and social dumping were avoided. Developing countries on the other hand fear that the industrial states' focus on compliance with international labour standards is aimed at depriving them of their **comparative advantage** consisting of cheap labour. They contend that industrial states pursue protectionist policies disguised in an aura of humanity and concern for workers' rights. Against this background, the Singapore Ministerial Declaration of 13 December 1996 speaks out against the use of labour standards for protectionist purposes and stresses that the comparative advantages especially of low-wage countries must be upheld. In addition, it designates the ILO as the competent body to deal with labour standards, thereby provisionally putting an end to discussions on the incorporation of a social clause into WTO law.[42]

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and human rights can be given here: *Alston*, EJIL 13 (2002), 815–844.; *Howse*, EJIL 13 (2002), 651–659.; *Marceau*, EJIL 13 (2002), 753–814; *Petersmann*, EJIL 13 (2002), 621–650.

[39] ILM 37 (1998), 1237 *et seq*., 18 June 1998.

[40] On this debate see *Howse*, J. Small & Emerging Bus. L. 3 (1999), 131–172; *Puth*, in: *Hilf & Oeter* (eds), 637–646.

[41] On the debate on the introduction of a social clause into the GATT see *Feddersen*, 209 *et seq*.; *Reuß*, 119 *et seq*.

[42] Para. 4 of the Singapore Ministerial Declaration (Ministerial Conference, Singapore, Draft Singapore Ministerial Declaration, WT/MIN(96)/DEC, 13 December 1996): "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration."

II. Art. XX lit. a as a Basis for Trade Restrictive Measures Adopted to Protect Human Rights or Labour Standards

As *de lege ferenda* solutions to the problems described above are slow to evolve, the proponents of a human rights respecting trading system turn to the texts of WTO law looking for opening clauses that may permit the accommodation of liberalized trade and human rights. Art. XX lit. a might constitute such an opening door for human rights and social standards if it permitted Members to rely on the public morality exception to protect human rights and ensure compliance with core labour standards. The emphasis here is on the compatibility of **unilateral action** for the protection of human rights with Art. XX lit. a, as multilateral trade sanctions such as economic embargos ordered by the UN Security Council are covered by Art. XXI lit. c.[43] The question whether Art. XX lit. a covers human rights-protective measures has to be answered by way of interpretation which will touch on many of the interpretive problems encountered earlier. *22*

1. Possibility of Protecting Human Rights and Social Standards Extraterritorially

According to the general principles of interpretation developed above, **product-based trade restrictions** fall under Art. XX lit. a independently of the moral standard invoked.[44] Therefore, a Member may ban the import of products that threaten human rights or social standards in the Member itself. A good example is a ban on the import of products that are used for games that are incompatible with human dignity.[45] These cases do not raise any particular problems under Art. XX lit. a. *23*

Production-related measures, in contrast, do not fall within the scope of Art. XX lit. a because this provision builds on the diversity of moral standards and consequently cannot be used to impose one Member's own moral standards on another.[46] This result obtained in application of the general principles of interpretation, however, cannot be valid if the Member subject to the trade restrictions adheres to the same moral values invoked by the Member adopting the restriction. The fact that the Member subject to the trade restriction has bound itself under international law to respect certain human rights and social standards has to be taken into account in the interpretation of Art. XX lit. a. According to general interpretative rules, Art. XX lit. a has to be **interpreted** in the light of relevant international law in force between the parties to the GATT and therefore also *24*

[43] *Vásquez*, JIEL 6 (2003), 797, 810.
[44] See above, para. 8.
[45] See the *Omega* case decided by the ECJ, see above, footnote 15.
[46] See above, para. 14.

in light of international human rights law in force between the parties to the GATT.[47]

25 If the human right or the social standard invoked by the Member imposing trade restrictive measures on another Member forms part of customary law, and is therefore binding on all states, or if it is contained in a treaty ratified by the state subject to the trade restriction, the moral standard forming the basis for the trade restriction does not depend on a specific cultural, historical or religious background, but is accepted as valid by the whole community of states or by the states parties to the human rights treaty. Therefore, when a Member adopts trade restrictive measures to pressure another Member to comply with international human rights or social standards obligatory for this Member, it **does not impose its own national standards of conduct on the other state**. Therefore, where international standards of conduct are involved, Members may adopt trade restrictive measures based on the violation of moral standards of conduct through the production process, because in these particular circumstances no export of national moral standards takes place. Rather, the measure aims at ensuring respect for internationally recognized standards in other Members. Just as respect for the common heritage of mankind by states is in the interest of each state, respect for international human rights and labour standards by other states constitutes a legitimate concern.[48] The international human rights movement is motivated by the understanding gained through the abhorrent experiences of the Holocaust that human rights violations in a state have repercussions on the world community, and may even have implications for world peace. Therefore, respect for human rights is no longer considered to be part of the *domaine réservé* of states and constitutes an obligation owed to the whole of the international community. The *erga omnes* character of human rights provisions[49] confirms that each state has a **legitimate interest in the respect for human rights by other states**.[50]

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[47] *Bartels*, JWT 36 (2002), 353, 354; *Cleveland*, JIEL 5 (2002), 133, 149, 150.

[48] See also *Howse*, Am. U. Int'l L. Rev. 18 (2003), 1333, 1369.

[49] See the description of *erga omnes* obligations by the ICJ in the *Barcelona Traction* case (*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgement of 5 February 1970, ICJ Reports 1970, 3, para. 33): "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."

[50] *Cleveland*, JIEL 5 (2002), 133, 160.

An **interpretation of Art. XX lit. a**[51] **that conforms with human rights** thus results in applying this provision to trade restrictive measures adopted by Members to prevent human rights violations in the course of the production process in other Members which are bound by such norms.[52] It does not warrant trade restrictive measures aimed at changing the general human rights situation in a Member, however. As has been pointed out above, trade restrictions of this kind that are adopted because of the violation of human rights standards that has no relation to the targeted product are not compatible with the purpose of Art. XX.[53] *26*

The inclusion of trade restrictions that do not fulfil this minimum link requirement cannot be based on the argument that inclusion is necessary to avoid conflicts between the international law of human rights and GATT law.[54] The international law of human rights—be it conventional or customary—obliges states to respect and ensure human rights to all individuals within their jurisdiction. Whereas states may occasionally incur responsibility under international human rights law for human rights violations occurring outside their territory, namely in cases in which they exercise extraterritorial jurisdiction,[55] they are not obliged to take measures in order to prevent other states from committing human rights violations.[56] International human rights law does not oblige states to adopt trade sanctions against states committing human rights abuses. Therefore, **conflict between states' human rights obligations and GATT's prohibition of trade restrictions does not exist**.[57] The only conflict that could arise is between the permissive rule of general international law allowing trade sanctions with the aim of preventing human rights violations and the prohibitive rule of GATT. But it is precisely the aim of the law of international trade to formulate specific rules for trade between states that deviate from the rules of general international law. To interpret the GATT in the light of permissive rules of general international law that the parties *27*

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[51] For an alternative interpretation of Art. XX lit. a that takes into account international human rights law see *Bartels*, JWT 36 (2002), 353, 376 *et seq*. who suggests that trade restrictive measures based on human rights violations unrelated to the product are permitted insofar as the Member may legally exercise extraterritorial jurisdiction under international law. This argument is based on a misconception. By banning the import of products from Members with a negative human rights record, a state does not exercise extraterritorial jurisdiction because it does not directly regulate the conduct in the other Member. This conduct is only indirectly regulated through the trade restrictive measure. See *Charnovitz*, Va. J. Int'l L. 38 (1998), 689, 719, note 179; *Nollkaemper*, J. Envtl. L. 8 (1996), 237, 244, 245.

[52] *Charnovitz*, Va. J. Int'l L. 38 (1998), 689, 742, 743.

[53] See above, para. 9.

[54] For such an approach see *Diller & Levy*, Am. J. Int'l L. 91 (1997), 663, 694.

[55] On the human rights responsibility of states for extraterritorial acts see the contributions in *Coomans*.

[56] *Cleveland*, JIEL 5 (2002), 133, 153.

[57] In the same direction *Hörmann*, in: *Hilf & Oeter* (eds), 647, para. 36; *Neumann*, 288; *Vásquez*, JIEL 6 (2003), 797, 821.

to the GATT wanted to be superseded by the special trade rules contained in the GATT does not make sense.[58]

2. The Necessity of Trade Restrictive Measures Adopted to Ensure Compliance with International Human Rights

28 It is often suggested that the adoption of trade restrictive measures to ensure compliance with international human rights even if permissible *per se* would regularly fail the necessity test. The **possibility of concluding international agreements to resolve human rights problems** is considered to be a relevant, GATT-consistent alternative measure.[59] This argument is flawed insofar as not only international agreements but also customary law already exist in the area of human rights. Rather, the question is whether the enforcement of these international human rights obligations by means of trade sanctions is necessary.

29 When one applies the necessity test as developed by the panels and the Appellate Body, the existence of an international obligation to respect the human right in question will be a strong indicator of the importance of the values protected by the measure,[60] and even more so if the obligation has the status of *ius cogens*. The massive, systematic or grave character of human rights violations in the production process will also weigh strongly in favour of the necessity of the measure. The way in which the measure contributes to the prevention of human rights violations has to be critically assessed in each case. Against the background of the Singapore Ministerial Declaration it is sometimes suggested that Members expressed their conviction that trade sanctions adopted to ensure respect for social standards in other Members are not effective and therefore fail the necessity test.[61] The Singapore Declaration, however, rejects the use of labour standards only for protectionist purposes and specifically expresses the wish to maintain the comparative advantages of low-wage states. This cannot be used as an argument to deny the necessity of measures that Members adopt not for protectionist reasons but because they are sincerely concerned about grave violations of core labour standards, for example through the use of child labour, in the production process.[62] **Alternative measures** have to be taken into account. Given the rather strict necessity test applied by the panel

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[58] *Vásquez*, JIEL 6 (2003), 797, 827 *et seq*.

[59] *Appleton*, in: *Koufa* (ed.), 421, 444. This approach corresponds to the one of the non-adopted Panel Report in *US—Tuna (Mexico)*, BISD 39S/155, concerning Art. XX lit. b, para. 5.28).

[60] *Marceau*, EJIL 13 (2002), 753, 791.

[61] *Puth*, in : *Hilf & Oeter* (eds), 637, para. 14.

[62] A similar argument is put forward by *Howse*, Am. U. Int'l L. Rev. 18 (2003), 1333, 1370, 1371.

in *US—Gambling*,[63] it seemed as if Members would be required to consult with the Member concerned and to give it the opportunity to meet human rights concerns before adopting the trade restrictive measures.[64] The ensuing decision of the Appellate Body, however, negates this conclusion. The Appellate Body considered that the possibility of engaging in consultations with a view to arriving at a negotiated settlement was not an alternative to be taken into account as the results of such a process were uncertain and therefore not comparable to the measures actually adopted.[65]

[63] Panel Report, *US—Gambling*, WT/DS285/R, paras 6.522 *et seq*. Critically in this respect *Pauwelyn*, ASIL Insight, November 2004.
[64] See also *Cleveland*, JIEL 5 (2002), 133, 166.
[65] *US—Gambling*, WT/DS285/AB/R, para. 317.

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Article XX GATT 1994

b) necessary to protect human, animal or plant life or health;

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A. General

I. Overview

Lit. b, dealing with a broad range of sensitive issues like public health, disease control, food safety, consumer protection, animal welfare and environmental policies is obviously one of the most relevant exceptions of Art. XX. Therefore, it figures prominently in the **trade and environment** debate.[1] The growing awareness of and concerns about the environment and its degradation have resulted in intensive regulatory activity internationally as well as in many Members, and this quite often entails trade measures. *1*

In recalling what has been stated above in more general terms,[2] Art. XX lit. b can be considered to make it clear that—generally—WTO rules shall not prevent Members from protecting "human, animal or plant life or health" as a **matter of** their **sovereignty**. It thus addresses the potential trade implications of related measures. Such implications are obvious in the case of goods carrying pests and diseases but may also arise in the case of more indirect effects which may, for instance, result from the implementation of emissions trading schemes. *2*

[1] For a detailed discussion see *Matz-Lück & Wolfrum*, Article XX lit. g GATT 1994, paras 41 *et seq*.

[2] See *Wolfrum*, Article XX GATT 1994 [Introduction], para. 1.

3 However, the kinds of policies envisaged by Art. XX lit. b may result in trade restrictions and protectionism. Safety standards may restrict imports of foodstuffs and agricultural products and thus close export markets which are of particular importance for developing countries. Therefore, Art. XX lit. b also figures in the continuing discussion on **trade and development**.[3]

4 Art. XX lit. b has been and is very likely further to be the subject of several disputes under GATT 1947 and WTO.[4] Nevertheless, so far, only one WTO Member has been successful in invoking this provision to justify exceptions to the basic GATT/WTO principles (in the *EC—Asbestos* case). This rather "bad scorecard" raises the controversial questions whether the test imposed by Art. XX lit. b is too severe, and whether the provision or its interpretation should be amended.

II. Equivalent Regulations in Other Trade Agreements

5 Often, the general exception clauses of other trade agreements are either modelled on Art. XX or contain similar justifications. Probably, the most prominent provision corresponding to lit. b is **Art. 30 ECT**: prohibitions or restrictions on imports, exports or goods in transit justified, *inter alia*, on grounds of the protection of health and life of humans, animals or plants shall not constitute a means of arbitrary discrimination or a disguised restriction on trade between EC Member States. This exception clause relates to the fundamental principle of the free movement of goods—Art. 28 ECT and has been importantly developed by the case law of the ECJ,[5] which *inter alia* introduced an element of proportionality.[6]

6 Furthermore, Art. XX is explicitly incorporated into NAFTA by a general reference in **Art. 2101.1 NAFTA**. This provision expressly makes it clear that in the context of NAFTA, Art. XX lit. b "*include[s] environmental measures* necessary to protect human, animal or plant life or health".[7] So far, in this context there have been no disputes initiated between the three Parties (Canada, Mexico, US). Consequently, one must turn to the GATT/WTO case law for additional guidance on the scope of the obligations contained in NAFTA.

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[3] The overwhelming majority of WTO Members are developing or least-developed countries. At the Doha Ministerial Conference, in November 2001, Trade Ministers launched the Doha Development Agenda. With this Agenda, WTO Members have placed development issues and the interests of poorer Members at the heart of the WTO's work.

[4] For a good summary see WT/CTE/W/203, Annex.

[5] See, for example, ECJ, C-104/75, *De Peijper*, [1976] E.C.R. 613; C-227/82, *Van Bennekom*, [1983] E.C.R. 3883; C-174/82, *Sandoz*, [1983] E.C.R. 2445; C-40/82, *Commission v. United Kingdom*, [1984] E.C.R. 283; C-178/84, *Commission v. Germany*, [1987] E.C.R. 1227.

[6] See, for example, ECJ, C-302/86, *Danish Bottles*, [1988] E.C.R. 4607, Rec. 10 *et seq.*

[7] Italics added.

Finally, exceptions equivalent to Art. XX lit. b have been incorporated into many trade agreements, for example, Art. 91 lit. b of the **Association Agreement between the European Community and Chile**.[8] Other agreements explicitly refer to Art. XX lit. b, as is, for instance, the case with Art. 5 lit. k of the **Cooperation Agreement between the European Community and Mexico**.[9] *7*

III. Relevance of the SPS Agreement

When negotiations on agricultural trade liberalisation were taking place during the Uruguay Round (1986–1994), it was the common view among Members that Art. XX GATT 1947 and the plurilateral 1979 Standards Code[10] had been inadequate to provide the legitimate health measures that the Members wanted.[11] In particular, it was felt that there was a need to elaborate more detailed rules for sanitary and phytosanitary measures (SPS measures) which could easily be transformed into non-tariff trade barriers and become protectionist tools.[12] The negotiations, together with the establishment of the WTO, resulted in a new and separate **Agreement on the Application of Sanitary and Phytosanitary Measures** (**the SPS Agreement**),[13] which covers some important issues within the broader subject range of Art. XX lit. b.[14] *8*

According to its Preamble, the SPS Agreement has been created to "elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX lit. b".[15] Arts 2.3 and 5.5 SPS in part mirror the wording of lit. b and the Chapeau of Art. XX.[16] Furthermore, Art. 2.4 SPS stipulates *9*

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[8] Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, OJ 2000 L 352, 3 *et seq*.

[9] Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, OJ 2000 L 276, 44 *et seq*.

[10] Agreement on Technical Barriers to Trade, BISD 1980, 8 *et seq*.

[11] For example, Art. XX lit. b GATT 1947 did not sufficiently clarify or specify how to deal with complicated health measures nor require the notification of planned or adopted measures.

[12] For example, many countries prohibit imports of agricultural products on the basis of questionable concerns about pests or diseases in order to protect domestic farmers or industries from international competition.

[13] See below, paras 67 *et seq*.

[14] The scope of application is defined by Art. 1 and Annex A:1 SPS, see generally *Charnovitz*, Article 1 SPS.

[15] However, the SPS Agreement contains no explicit requirement of a prior violation of GATT provisions. See Panel Report, *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.38.

[16] In *Australia—Salmon*, the Appellate Body found that Art. 2.3 SPS incorporates part of the Chapeau of Art. XX GATT. See Appellate Body Report, *Australia—Salmon*, WT/

that SPS measures which are in conformity with the SPS Agreement are presumed to be in accordance with GATT, in particular the provisions of Art. XX lit. b.[17] Similarly, Art. 3.2 SPS provides that SPS measures which conform to international standards shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of GATT.[18] Because of all these links, obviously, **a close interrelationship between the two agreements exists**. This point should be kept in mind when interpreting Art. XX lit. b.

B. Legislative History

10 Exceptions "to protect human, animal or plant life or health" were common to earlier trade agreements.[19] As early as 1927 the International Convention for the Abolition of Import and Export Prohibitions and Restrictions contained an exception for measures "for the protection of public health or for the protection of animals or plants against disease, insects and harmful parasites".[20]

11 Art. XX lit. b exactly parallels the wording of Art. 43 of the 1948 Charter of the International Trade Organization (ITO), which goes back to the proposal of the United Kingdom and the United States at the 1946 preparatory session in London. At the meeting of a special committee in New York in 1947, an addition was made on an initiative taken by the delegate of Belgium and Luxemburg: it required importing countries to take corresponding domestic safeguards under similar conditions. This additional requirement reflected concerns about the abuse of such regulations by importing countries. However, this addition was omitted from the text at the Second Session of the Preparatory Committee in Geneva in 1947. The proposed addition is significant because Art. XX lit. g contains similar language. However, the fact that it was omitted in the case of lit. b should not be misinterpreted: it

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DS18/AB/R, paras 250–251. However, the text of Art. 2.3, sentence 1 SPS is not exactly identical to the Chapeau of Art. XX as it states "[…] between Members where *identical or similar* conditions prevail, *including between their own territory and that of other Members*." (italics added).

[17] In *EC—Hormones*, the Panel found with respect to Art. 2.4 SPS that "to presume that one set of obligations (*in casu* GATT) is met because another set of obligations (*in casu* the SPS Agreement) has been fulfilled, seems to imply that the latter set of obligations imposes at least as many as, and probably more obligations than, the former." See *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.40.

[18] It should be noted that the Appellate Body, without analysis, interpreted Art. 3.2 SPS as a rebuttable presumption. See Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 170.

[19] For a good summary see *Charnovitz*, JWT 25 (1991) 5, 37, 38 *et seq*.; *Fidler*, GYIL 40 (1997), 300, 309 *et seq*.

[20] *Charnovitz*, Tul. Envtl. L.J. 13 (2000), 271, 272.

can hardly be concluded that measures can be exempted by reference to lit. b in cases where the importing state does not have similar measures in place domestically. Furthermore, of course, the relevance of such *travaux préparatoires* is limited, according to the rules on interpretation of the international law of treaties.[21]

When GATT 1947 was being drafted, there was very little discussion about the scope of Art. XX lit. b, perhaps because its language was similar to that in bilateral treaties, in the 1927 Convention and in the ITO. Furthermore, there was a tendency to use general language rather than a detailed list-type definition in deference to the sovereign right of Members to define their own policies in this regard. *12*

C. Wording and Interpretation

The concept of Art. XX has been importantly developed in dispute settlement under GATT 1947 and the WTO in a relatively small number of cases. These decisions related to several of the exceptions formulated by Art. XX and even to other relevant agreements, like the SPS and TBT Agreements as well as GATS, which used identical language.[22] *13*

The wording of Art. XX lit. b is quite broad. However, it has to be kept in mind that Art. XX is an **exception clause** which, according to the general rules on interpretation, **has to be interpreted cautiously**.[23] *14*

Art. XX lit. b envisages a **three-fold test**, which requires to ascertain, "(1) that the policy in respect of the measures for which the provision was invoked is within the range of policies designed to protect human, animal or plant life or health; (2) that the measures for which the exception was being invoked were necessary to fulfil the policy objective; and (3) that the measures were applied in conformity with the requirements of the introductory clause of Article XX".[24] *15*

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[21] Nevertheless, in the two *US—Tuna* cases the panel referred extensively to the drafting history of Art. XX lit. b. See Panel Report, *US—Tuna (Mexico)*, BISD 39S/155, paras 5.25–5.26; Panel Report, *US—Tuna (EEC)*, DS29/R, paras 5.31–5.33. See also *Matz-Lück & Wolfrum*, Article XX lit. g GATT 1994, para. 23.

[22] Compare Arts 2.2, 2.3, 5.5, 5.6 SPS; Art. 2.2 TBT; Art. XIV lit. b GATS.

[23] *US—Tuna (EEC)*, DS29/R, paras 5.26 and 5.38. However, the Appellate Body stated that "[…] merely characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation." See *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 104. Also see *Wolfrum*, Article XX GATT 1994 [Chapeau], paras 7 *et seq*.

[24] Panel Report, *US—Gasoline*, WT/DS2/R, para. 6.20; Panel Report, *EC—Asbestos*, WT/DS135/R, paras 8.167–8.169.

I. Policies Designed to Protect Human, Animal or Plant Life or Health

16 In *US—Gasoline*, it was made clear that Art. XX lit. b relates to certain **policies** "within the range of those concerning the protection of human, animal and plant life or health".[25] In *EC—Asbestos*, the Panel and the Appellate Body largely referred to the **concept of risk** and **the determination of the level of protection**.[26] In doing so, the dispute settlement institutions appear to have borrowed from the concept of risk policies as inherent in the SPS Agreement (Arts 2 and 5 SPS).

1. Definition of "Human, Animal or Plant Life or Health"

17 The notion of "human, animal or plant life or health" is a core element of Art. XX lit. b and defines its substantive scope. To fall under lit. b, a measure must first have the subjective intention of protecting **humans, animals or plants and relate to life or health**. When those terms are being interpreted, other international agreements and the work of other international organizations may be taken into account.

18 The meaning of "**human** life or health" is evident.[27] For instance, in *Thailand—Cigarettes*, the Panel acknowledged, in agreement with the parties to the dispute, that **smoking** "constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX lit. b".[28] In *EC—Asbestos*, the Panel held that the policy of prohibiting chrysotile **asbestos** implemented by the French Decree falls within the range of policies designed to protect human life or health.[29]

19 A clear medical or scientific definition of human **"health"** does not exist. According to the World Health Organization (WHO) health "is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".[30] However, this far-reaching definition very likely goes considerably further than the notion of human health in Art. XX lit. b. It appears that the latter requires at least some physical effect or implication.

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[25] *US—Gasoline*, WT/DS2/R, para. 6.21.

[26] *EC—Asbestos*, WT/DS135/R, paras 8.170 *et seq*.; Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, paras 158 *et seq*.

[27] The question when human life begins—an issue relevant in relation to embryonic stem cells—will, until international consensus has been reached, have to be decided on the basis of the national law of the state in question.

[28] Panel Report, *Thailand—Cigarettes*, BISD 37S/200, para. 73.

[29] *EC—Asbestos*, WT/DS135/R, para. 8.194.

[30] Preamble to the Constitution of the WHO as adopted by the International Health Conference 1946, signed on 22 July 1946 and entered into force on 7 April 1948. The definition has not been amended since 1948.

On the other hand, Art. XX lit. b goes beyond the standard interpretation of individual health and includes **public health**.[31]

As far as **"plants"** are concerned, the definition of the International Plant Protection Convention (IPPC) is relevant. This includes "living plants and parts thereof, including seeds and germplasm".[32] *20*

Concerning **"animals"**, in the two *US—Tuna* disputes, the Panel and the parties accepted that the protection of dolphin life or health was a policy that could fall under Art. XX lit. b.[33] The distinction between "animal health" and **"animal welfare"** is difficult but crucial in this regard, as the latter falls outside the scope of lit. b.[34] *21*

Because of the inclusion of the term "life", the argument can be made that only **living objects** (like animals or plants, including living parts thereof) are covered and non-living objects (like trophies or wood) fall outside the scope of lit. b.[35] Apparently, import restrictions cannot protect the *life* or health of *dead* animals or plants.[36] However, the exact borderline in this respect remains unclear and is open for determination on a case-by-case basis.[37] For instance, in the case of "plants" it may be argued that branches, cut flowers or cut trees fall outside the scope of lit. b, but tubers, corms, bulbs, rhizomes, plant tissue cultures, or other plant products are included, as long as their growth, reproduction or propagation is ensured. *22*

Art. XX lit. b addresses animals and plants **without regard to their actual or potential value**.[38] While such a utilitarian perspective is *23*

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[31] "Public health" refers to all organized measures (whether public or private) to prevent disease, promote health, and prolong the life of the population as a whole.

[32] Art. II:1 International Plant Protection Convention (IPPC) of 1997. The IPPC was originally adopted in 1951, and revised in 1979 and again in 1997. The IPPC of 1997 introduces significant changes, particularly with respect to the elaboration and adoption of international phytosanitary standards, and explicitly reflects WTO principles.

[33] *US—Tuna (Mexico)*, BISD 39S/155, paras 5.24–5.29; *US—Tuna (EEC)*, WT/DS29/R, para. 5.30.

[34] Normally, measures concerning "animal welfare" considerations do not have an effect on the quality or final characteristics of the product itself rather than on how that product was produced (*e.g.*, how animals were kept, transported and slaughtered). Measures for the welfare of animals are also not covered by the SPS Agreement, see *WTO*, Sanitary & Phytosanitary Measures, 11. The discussion about "animal welfare" is characterized by various regulatory efforts to improve conditions for animals being used in the production of certain products, such as cosmetics or pharmaceuticals.

[35] In contrast, *living or non-living natural* resources may fall within the scope of Art. XX lit. g. See Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, paras 128–131.

[36] *Charnovitz*, JWT 25 (1991) 5, 37, 51–52.

[37] Some problematic examples could be fruits and vegetables preserved by deep freezing, or processed products of animal or plant origin.

[38] Art. XX lit. b covers measures which protect both marketable goods (like crops, flowers, fish or livestock) and non-marketable goods (like public health or wild flora and fauna) for which observable market prices are not available.

somehow inherent in the notion of "resources" in Art. XX lit. g, the wording of lit. b lacks such perspective. In contrast, the SPS Agreement distinguishes between human life or health and the protection of animals or plants in various aspects.[39] Additionally, the SPS Agreement expands and specifies the scope of SPS measures by defining the term "animal" to include fish and wild fauna, and the term "plant" to include forests and wild flora.[40] The argument can be made that these specifications are also valid for Art. XX lit. b.

2. Coverage of Other Objects and the Environment in Particular

24 While the terms human, plant and animals seem clear, some difficulties arise when looking at them more closely, for example, when taking into account a modern environmental and ecological perspective. On the one hand the question might arise whether Art. XX lit. b would also cover measures which aim at the protection of **micro-organisms**, because nowadays such organisms are considered neither animals nor plants but viewed as a distinct category of its own. Taking into consideration that micro-organisms were often considered plants in earlier times, the wording of Art. XX which goes back to 1947 might be considered to cover micro-organisms. Also, it appears that the wording was intended to be quite comprehensive in covering all living material.

25 However, this does not indicate that Art. XX lit. b can be understood as fully reflecting modern concepts of ecology and environmental protection. It may be questionable whether and to what extent it covers measures which are based on an ecosystem approach. Lit. b does not explicitly mention the protection of the **environment** as a justification for trade-restrictive measures.[41] The environment did not come into consideration when the GATT was originally drafted in 1946. The wording of the provision as well as that of the GATT as such remained unchanged in the Uruguay Round negotiations and, similarly, the SPS Agreement does not contain any reference to the environment. In contrast, Art. 2.2 TBT specifically mentions the protection of the environment as one of the legitimate objectives for

[39] For instance, with regard to SPS measures relating to animal or plant life or health, economic factors are to be taken into account by Members according to Art. 5.3 SPS, which include "the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks".

[40] Annex A:1 SPS and the corresponding footnote. See Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.218 *et seq*. See also Art. 724 NAFTA.

[41] Similarly, the protection of the environment *per se* is also not explicitly covered by the definition of "SPS measure" contained in Annex A:1 SPS. See *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.197 *et seq*.

laying down technical standards and regulations.[42] Art. 30 ECT, the wording of which parallels that of Art. XX lit. b, has been extensively interpreted by the ECJ to cover the environment, though.[43]

In the meantime several proposals have been made **to broaden the scope of Art. XX**.[44] *26*

However, the lack of explicit reference does not mean that Art. XX lit. b is irrelevant for measures aimed at protecting the **environment**. On the contrary, **most of the measures in question will be covered** by the term "human, animal or plant life or health". For instance, the Panel in *US—Gasoline* held "that a policy to reduce air pollution resulting from the consumption of gasoline was a policy within the range of those concerning the protection of human, animal and plant life or health mentioned in Article XX(b)".[45] *27*

Nevertheless, there will also be many environmental measures falling outside the scope of Art. XX lit. b. For example, environmental threats to animal life or health in general, *e.g.* loss of habitat or excessive hunting, may not be covered by Art. XX lit. b.[46] Equally, it would be difficult to bring measures to protect global commons or the ozone layer, or measures aimed at the prevention of global climate change within the scope of this provision. *28*

As regards genetically modified organisms (GMOs), a wide range of possible measures may fall within the scope of the SPS Agreement according to the views of the Panel in the *EC—Approval and Marketing of Biotech Products* case. However, it is not ruled out that others would not and would have to be judged upon on the basis of Art. XX lit. b or lit. g.[47] *29*

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[42] Additionally, the Preamble of the Agriculture Agreement also mentions the environment.

[43] ECJ, C-240/83, *Brûleurs d'Huiles*, [1985] E.C.R. 531, Rec. 13; C-302/86, *Danish Bottles*, [1988] E.C.R. 4607, Rec. 9.

[44] For example, in a Non-Paper of 19 February 1996 the EC made the proposal to amend Art. XX lit. b by adding "or the environment; and measures taken pursuant to specific provisions of Multilateral Environmental Agreements complying with the provisions of the 'Understanding on the Relationship between measures taken pursuant to MEAs and WTO Rules'.", cited in: TN/TE/S/1. This amendment would ensure that the environment would not need to be read into Art. XX through the interpretation of other imperatives listed in that provision. Another option would be the adoption of an "Understanding for Interpretation" with respect to the application of Art. XX lit. b.

[45] *US—Gasoline*, WT/DS2/R, para. 6.21.

[46] The ECJ gave the reference to animal life protection in Art. 30 ECT a rather broad meaning covering the preservation of species and the conservation of biodiversity more generally. See ECJ, C-67/97, *Danish Bees*, [1998] E.C.R. I-8033.

[47] See *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.147 *et seq*. Because of the huge range of biotechnological products and the complexity of risks associated with them, it always seems necessary carefully to analyse the particular objectives and contents of every single measure. For example, it would be quite difficult to cover GMOs that may have adverse effects exclusively on the conservation and sustainable use of biological diversity.

3. Policies Designed "to protect" and the Existence of a Risk

30 Furthermore, Art. XX lit. b requires that the measures in question be aimed at **protecting** humans, animals or plants. The French and Spanish versions deviate slightly in wording and read: "nécessaires à la *protection* de la santé *et* de la vie des personnes *et* des animaux ou à la *préservation* des végétaux",[48] and the Spanish version states: "necesarias para *proteger* la salud *y* la vida de las personas *y* de los animales o para *preservar* los vegetales".[49] However, these differences are not likely to imply a different legal meaning.[50]

31 In *EC—Asbestos*, the Panel noted that "inasmuch as they include the notion of 'protection', the words 'policies designed to protect human life or health' imply the existence of a *health risk*."[51] Therefore, first of all **a risk must be identified**.[52] The Panel made it clear that Art. XX lit. b does not cover measures which are based on a mere hypothesis. A preventive measure may be taken only if the risk, despite the fact that its reality and extent have not been fully demonstrated by conclusive scientific evidence, appears nevertheless to be adequately based on scientific data available at the time when the measure was taken. However, Art. XX lit. b does not require one to quantify the risk to life or health. **A risk may be evaluated in either qualitative or quantitative terms**.[53]

32 A "**risk**" can be defined as the probability (that is the chance) of a harm or damage occurring to a specific product or goods as a result of certain circumstances.[54] In determining the existence of a risk, it has to be taken into account that a number of agents or substances produce harmful effects only when a threshold in terms of dosis, exposure or duration is met, while in other cases no such threshold exists from the point of view of the potential for harm.[55]

33 In determining such risk, the relevant societal circumstances are to be taken into account, including the use of substances and means of protection. For

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[48] Italics added.
[49] Italics added.
[50] According to Art. 33.1 VCLT, the text of a treaty is equally authoritative in each authentic language.
[51] *EC—Asbestos*, WT/DS135/R, para. 8.170 (italics in the original). See also *ibid.*, para. 8.184.
[52] *Ibid.*, para. 8.184. For example, the dispute settlement institutions in *EC—Asbestos* concluded that chrysotile-cement products do pose a significant risk to human life or health. See *EC—Asbestos*, WT/DS135/R, paras 8.193–8.194, and *EC—Asbestos*, WT/DS135/AB/R, para. 162.
[53] *EC—Asbestos*, WT/DS135/AB/R, para. 167, referring to *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 186.
[54] In this context, "hazard" (danger) is commonly used in a broader sense and describes any product or procedure capable of having an adverse effect on human, animal or plant health.
[55] *EC—Asbestos*, WT/DS135/R, paras 8.190 *et seq*.

instance, in the *EC—Asbestos* case, the argument that asbestos does not pose any risk when contained in concrete was rejected, as it was considered that any subsequent working could release the fibres and that "[c]ontrolled use is impossible to implement where hundreds of thousands of people are involved in sectors as unregulated in terms of health as the building industry".[56]

34 The existence of a risk has to be determined on the basis of the relevant rules of evidence.[57] Therefore, "[t]he **burden of proof** rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".[58] In *EC—Asbestos*, the Appellate Body held that "[t]he Panel enjoyed a margin of discretion in assessing the value of evidence, and the weight to be ascribed to that evidence",[59] and that "the Panel remained well within the bounds of its discretion in finding that chrysotile-cement products pose a risk to human life or health".[60]

35 **Evidence to prove a risk** has to be **scientific** in nature and requires that scientific data and studies be taken into account. The panel in question will probably need expert advice and will set up a panel of experts according to Art. 13 DSU.[61] Justifying a measure under Art. XX lit. b, does **not require a consensus among scientists**; a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent or non-mainstream opinion coming from "qualified and respected sources".[62] According to the Appellate Body in *EC—Asbestos*, a "Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion".[63]

36 Once the existence of an identifiable or ascertainable risk has been established, it is for the Member to determine the **level of protection** which it considers appropriate in a given situation.[64] It is by reference to

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[56] *Ibid.*, para. 8.196.
[57] *Ibid.*, para. 8.170.
[58] See Appellate Body Report, *US—Wool Shirts and Blouses*, WT/DS33/AB/R, 14; Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, 21.
[59] *EC—Asbestos*, WT/DS135/AB/R, para. 161.
[60] *Ibid.*, para. 162.
[61] See *infra* para. 59; *Arend*, Article 13 DSU, Max Planck CWTL, Vol. 2, paras 18 *et seq*.
[62] *EC—Asbestos*, WT/DS135/AB/R, para. 178, referring to *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 194.
[63] *EC—Asbestos*, WT/DS135/AB/R, para. 178.
[64] *Ibid.*, para. 168. In *Australia—Salmon*, the Appellate Body asserted that the "'appropriate level of protection' established by a Member and the '[…] measure' have to be clearly distinguished. They are not one and the same thing. The first is an *objective*, the second is an *instrument* chosen to attain or implement that objective." See *Australia—Salmon*, WT/DS18/

that level of protection that Members must then determine the **level of risk**, *i.e.* the critical probability threshold for adverse effects on health and for the seriousness of those possible effects, which in their judgement is no longer acceptable for society and above which it is necessary, in the interests of protecting health, to take preventive measures in spite of any existing scientific uncertainty. Such level of protection guides the measures to be adopted and forms the basis of the "necessity test" under Art. XX lit. b. As such determination is considered to arise out of its sovereignty, a Member enjoys discretion within the limits of "necessity".[65] Thus, it may decide fully to halt the risk ("zero risk level"), or to employ a more relaxed approach in view of other policy considerations. Consequently, such determination does not depend on quantification or the magnitude of a risk. In *EC—Asbestos*, the Appellate Body noted that "it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place".[66]

II. Necessity of the Measure to Achieve Policy Goals

1. The Necessity Test

37 Art. XX lit. b explicitly requires the performance of what has been commonly referred to as a **"necessity test"**: measures must be **"necessary"** to protect human, animal or plant life or health.[67] The examination of whether or not a measure is "necessary" has proved to be a crucial step in panel practice.[68]

38 In *Thailand—Cigarettes*, the Panel concluded that the term "necessary" had the same meaning under lit. b and lit. d of Art. XX because the same objective was intended.[69] Furthermore, the Panel established a requirement of so-called **"least-trade restrictiveness"**: a measure could be considered to be "necessary" only if no alternative measure existed which was less inconsistent with the provisions of the GATT, and could reasonably be expected to be adopted by the Member in question.[70]

AB/R, para. 200 (emphasis in the original, footnote omitted). According to the Appellate Body, "[t]he right of a Member to determine its own appropriate level of sanitary protection is an important right." See *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 172.

[65] *EC—Asbestos*, WT/DS135/AB/R, para. 168. Accordingly, the Appellate Body did not question France's goal of reducing the spread of asbestos-related health risks to zero.

[66] *EC—Asbestos*, WT/DS135/AB/R, para. 168.

[67] The term "necessary" does not appear in the official, but non-authentic German translation of Art. XX lit. b. It is obvious that this does not imply any changes regarding the content or interpretation.

[68] See, for example, Panel Report, *US—Section 337*, BISD 36S/345, para. 5.26; *US—Gasoline*, WT/DS2/R, para. 6.24; *EC—Asbestos*, WT/DS135/R, paras 8.196 *et seq*.

[69] *Thailand—Cigarettes*, BISD 37S/200, para. 74.

[70] *Ibid*., para. 75. The Panel found that in this case less restrictive alternatives, *e.g.* increased prices or advertising restrictions, were available.

In order to apply the "necessity test", the dispute settlement institutions must, first, establish the scope of the health policy objectives pursued by the Member and, secondly, consider the existence of measures consistent, or less inconsistent, with the GATT 1994.[71] In determining whether a suggested alternative measure is "reasonably available", several factors must be taken into account. Apart from that problems arising in respect of the implementation of alternative measures are relevant. An alternative measure which is impossible to implement is not "reasonably available".[72] However, in *US—Gasoline* the Panel held, in essence, that an alternative measure did not cease to be "reasonably available" simply because it involved **administrative difficulties** for a Member.[73] The determination whether a concrete measure is "necessary" or "least-trade restrictive" to implement a specific policy goal involves an assessment of complex interdependencies, hypothetical causalities and several probabilities. *39*

In *EC—Asbestos*, the Appellate Body noted that the extent to which the alternative measure "contribute[d] to the realization of the end pursued" was to be taken into consideration.[74] It observed that "'[t]he 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."[75] This seems to suggest that there may be differing levels of scrutiny applicable to the analysis of the "necessity test", depending on the importance of the "interests or values" it serves. The Appellate Body noted that in this case the objective pursued by the measure was the preservation of human life and health, a value "both vital and important in the highest degree".[76] *40*

In most of the cases the question focuses on whether any alternatives to an outright ban could be used. Since another less restrictive measure (*e.g.* labelling) could always be conceived of and therefore is in some sense "available", this criterion seems to impose an insurmountable hurdle for regulators. However, in *EC—Asbestos* the Appellate Body ruled that France "could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to 'halt'. Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection".[77] Furthermore, **"controlled** *41*

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[71] *EC—Asbestos*, WT/DS135/R, para. 8.199.
[72] *EC—Asbestos*, WT/DS135/AB/R, para. 169.
[73] *US—Gasoline*, WT/DS2/R, paras 6.26 and 6.28. The Panel's findings on this point were not appealed.
[74] *EC—Asbestos*, WT/DS135/AB/R, para. 172, referring to Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, paras 166 and 163.
[75] *EC—Asbestos*, WT/DS135/AB/R, para. 172, referring to *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 162.
[76] *EC—Asbestos*, WT/DS135/AB/R, para. 172.
[77] *Ibid.*, para. 174 (italics in the original).

use" practices, for which Canada had contended and which were the international standard, could not be demonstrated to be effective in practice. Thus, the ban was deemed "necessary" within the meaning of Art. XX lit. b.[78]

42 Necessity has to be proved by the Member adopting the measure in question and is subject to scientific evidence. In *EC—Asbestos*, the Panel noted that "the determination of the existence of other measures consistent or less inconsistent with the GATT largely depends on a scientific assessment of the risk. In any event, this determination cannot be interpreted as restricting the freedom of Members to take certain measures under Article XX lit. b, in the absence of a measure that would be consistent or less inconsistent with the GATT 1994".[79]

43 The Panel in *US—Gasoline* made it clear that it did not have to examine the necessity of the policy goal (the protection of the public health, for instance) unlike the necessity of the measure in question.[80] Therefore, the Panel in *EC—Asbestos* concluded that "we do not have to assess the choice made by France to protect its population against certain risks, nor the level of protection of public health that France wishes to achieve. We must simply determine if the French policy of prohibiting the use of chrysotile-asbestos falls within the range of policies designed to protect human life or health".[81]

44 The *Korea—Various Measures on Beef* case suggests that **precaution** may play a role in determining whether a measure is "necessary" under Art. XX if it relates to "the importance of the common interests or values".[82] This could include, nowadays or in the future, the application of the "precautionary principle".[83]

2. A Proportionality Test?

45 The definition of the "necessity test" was supplemented in *Korea—Various Measures on Beef*. In its report, the Appellate Body addressed the issue of "necessity" under Art. XX lit. d and found that the Panel was correct in

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[78] *Ibid*., para. 175.
[79] *EC—Asbestos*, WT/DS135/R, para. 8.183 (footnote omitted).
[80] *US—Gasoline*, WT/DS2/R, paras 6.22 and 7.1. See also *US—Section 337*, BISD 36S/345, para. 5.26, and *Thailand—Cigarettes*, BISD 37S/200, para. 74.
[81] *EC—Asbestos*, WT/DS135/R, para. 8.171.
[82] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 164.
[83] The relevance of the "precautionary principle" in the interpretation of the SPS Agreement was discussed in *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, paras 120 *et seq*., and *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.76 *et seq*.

following the standard set out by the Panel in *US—Section 337*.[84] However, the Appellate Body introduced some additional considerations: it first interpreted the word "necessary" and observed that its meaning was not limited to what was "indispensable" or "of absolute necessity" or "inevitable" but referred to a range of degrees of necessity. The Appellate Body further considered that "a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'".[85]

46 In *Korea—Various Measures on Beef*, the Appellate Body bifurcated the "necessity test" as follows: first, situations where the claim may be that a measure is "indispensable", *i.e.* where the measure is the only one available. Secondly, situations where a Member may be able to justify its measure as "necessary" within the meaning of Art. XX, even if there were other measures available. For the second situation, the Appellate Body adopted the following approach: "determination of whether a measure, which is not 'indispensable', may nevertheless be 'necessary' within the contemplation of Article XX lit. d, involves in every case *a process of weighing and balancing a series of factors* which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."[86]

47 It may be possible to say that there has been some development in the interpretation of the necessity requirement of Art. XX lit. b. It has evolved from a **least-trade restrictive** approach to a **less-trade restrictive** one, supplemented by a proportionality test ("a process of weighing and balancing a series of factors"). Therefore, it may be argued that the "necessity test" comes close to the **principle of proportionality** in international, regional or national law.[87] While the latter certainly includes the notion of necessity as explained above, it further requires a balancing between the ends to be achieved and the means to be applied, which actually does not really form part of the "necessity test". This "proportionality in the narrow

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[84] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, paras 159 *et seq*.

[85] *Ibid*., para. 161.

[86] *Ibid*., para. 164 (italics added).

[87] For example, the principle of proportionality has been recognised in settled case law as one of the general principles of EC law. According to that principle, measures (especially of the EC institutions) must not exceed what is appropriate and necessary for achieving the objectives legitimately pursued by the measure in question, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least restrictive and that the disadvantages caused must not be disproportionate to the aims pursued. See ECJ, C-331/88, *The Queen v Minister for Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa and Others*, [1990] E.C.R. I-4023, Rec. 13; C-180/96, *United Kingdom v. Commission*, [1998] E.C.R. I-2265, Rec. 96.

sense", that is to say the weighing of damage to individual rights against the benefits accruing to the general interest, would be problematic in most of the cases under Art. XX lit. b: first, the dispute settlement institutions have to "second guess" the aim itself if it turns out that a severely restrictive measure is necessary for its achievement. Secondly, normally the importance of the aims pursued, namely the protection of (public) health, is such as to justify adverse economic consequences, even of a substantial nature, and that the maintenance of (public) health should take precedence over all other considerations. Consequently, in *Thailand—Cigarettes*, the Panel noted that Art. XX lit. b "clearly allowed contracting parties to give priority to human health over trade liberalization".[88]

48 It is yet another question whether the principle of proportionality is **part of the test under the Chapeau**.[89]

III. Conformity with the Introductory Clause (Chapeau) of Art. XX

49 Further, in order to comply with the requirements of lit. b, a measure has to meet the conditions set out in the introductory clause (the so-called Chapeau) in order to be exempted from the rules of the GATT.[90]

50 In the special context of lit. b three points regarding the Chapeau have to be highlighted: first, the **impact of the SPS Agreement** on the interpretation of the Chapeau remains unclear. On the one hand, the Chapeau applies equally to all the exceptions of Art. XX. On the other hand, the more detailed rules of the SPS Agreement specifically and exclusively address lit. b.[91] Obviously, Arts 2.3 and 5.5 SPS have adapted their language from the Chapeau and further elaborated the disciplines contained therein. Therefore, the strict disciplines of the SPS Agreement could be used in the context of Art. XX lit. b as well. However, it is rather unlikely that the dispute settlement institutions will directly or indirectly apply special requirements such as a risk assessment (Art. 5.1 SPS) or national regulatory consistency (Art. 5.5 SPS). The GATT itself provides no indication of any intention on the part of the Members to do so. To sustain such an assumption and to warrant such a far-reaching interpretation, treaty language far more

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[88] *Thailand—Cigarettes*, BISD 37S/200, para. 73.

[89] *Desmedt*, JIEL 4 (2001), 441, 473 *et seq*. While interpreting the Chapeau, the Appellate Body noted in *US—Gasoline* that the US had "more than one alternative" measure whose use may have avoided any discrimination. See *US—Gasoline*, WT/DS2/AB/R, 24.

[90] For details see *Wolfrum*, Article XX GATT 1994 [Introduction], para. 8. These tests were only applied by the Panel in *EC—Asbestos* since the complaining WTO Member had not invoked the Chapeau of Art. XX on appeal. See *EC—Asbestos*, WT/DS135/R, paras 8.224–8.240; *EC—Asbestos*, WT/DS135/AB/R, paras 18–20 and 155.

[91] Compare last recital in the Preamble of the SPS Agreement.

specific and compelling than that found in Art. XX lit. b would be necessary.[92] Consequently, the Panel in *EC—Asbestos* stated that "the Appellate Body had not sought to extend the principles of the SPS Agreement to the examination of the measures for which Article XX(b) had been invoked or even to base itself on them, although the SPS Agreement was already in force".[93]

51 The **meaning of the term "measure"**, which is not further defined in the Chapeau, could become crucial in the special context of lit. b. As is the case for all the exceptions of Art. XX, the provision focuses on the **application of a measure** rather than on the measure itself in more abstract terms.[94] The operation of the distinction between a measure itself and its application is still unclear.[95]

52 It should be noted further that the scope of "measures" referred to in the Chapeau of Art. XX is broader than the notion of an "SPS measure" in the context of the SPS Agreement, which is carefully and narrowly defined by Annex A:1 of that Agreement. However, that definition explicitly includes **"processes and production methods"** (**PPMs**) and **"packaging and labelling requirements"** the relevance of which in the context of Art. XX is still the subject of much debate.

53 Measures in accordance with Art. XX lit. b are taken, in many cases, spontaneously and **unilaterally**. This could be in contrast to the interpretation of "unjustifiable discrimination" in the Chapeau: in *US—Shrimp* the dispute settlement institutions stated that WTO Members have an obligation to make serious good faith efforts to **negotiate with the object of concluding bilateral and multilateral agreements** for the achievement of a certain policy goal before resorting to unilateral measures.[96] Furthermore, in *US—Tuna (Mexico)* the Panel considered that "if the broad interpretation of Article XX lit. b suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would

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[92] The same argumentation was used by the Appellate Body in *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 165.

[93] *EC—Asbestos*, WT/DS135/R, para. 8.180.

[94] *US—Gasoline*, WT/DS2/AB/R, 21; *US—Shrimp*, WT/DS58/AB/R, para. 160; *EC—Asbestos*, WT/DS135/R, para. 8.226.

[95] *Marceau & Trachtman*, JWT 36 (2002) 5, 811, 834. This rather problematic distinction is also illustrated in the Panel Report, *Argentina—Hides and Leather*, WT/DS155/R, footnote 566, and *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.1329 *et seq*. and 7.1386 *et seq*.

[96] *US—Shrimp*, WT/DS58/AB/R, para. 166; Panel Report, *US—Shrimp (Article 21.5—Malaysia)*, WT/DS58/RW, paras 5.63–5.67; Appellate Body Report, *US—Shrimp (Article 21.5—Malaysia)*, WT/DS58/AB/RW, para. 134.

provide legal security only in respect of trade between a limited numbers of contracting parties with identical internal regulations".[97] It is to be noted, though, that unilateral measures are not *a priori* inconsistent with GATT, but the dispute settlement institutions require serious negotiations before and after **unilateral action is taken as a last resort**.

D. Extraterritoriality and Jurisdictional Limitations

54 A longstanding issue is whether Art. XX lit. b can be invoked to protect the life or health of humans, animals or plants **outside the territory or jurisdiction of the country invoking it**. This question was first examined in the two famous *US—Tuna* disputes: In *US—Tuna (Mexico)*, the Panel, considering that the text of Art. XX lit. b does not clearly answer the question of the location of the living things to be protected, resorted to the drafting history of that provision and concluded that only measures within the jurisdiction of the importing country are allowed.[98] In *US—Tuna (EEC)* the Panel observed that "the text of Article XX(b) does not spell out any limitation on the location of the living things to be protected",[99] and therefore trade measures could be used to address environmental problems beyond one's borders. In *US—Shrimp*, the Appellate Body did not resolve the question whether some kind of territorial nexus between the country taking the measure and the environmental problem was necessary.[100]

E. Relationship with International Standards and Agreements

55 Except in Art. XX lit. h, the GATT does not contain any explicit reference to **international standards**. Even the GATT does not specifically require the use of international standards; reliance on international or regional standards may provide a *de facto* presumption of good faith as required by Art. XX.[101] In a number of cases, international standards concerning consumer and occupational safety, or human health, or environmental protection have played a role in their application and related disputes concerning Art. XX lit. b.[102] While the SPS Agreement contains a particular interface provision

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[97] *US—Tuna (Mexico)*, BISD 39S/155, para. 5.27.

[98] *Ibid*., paras 5.25–5.26.

[99] *US—Tuna (EEC)*, DS29/R, paras 5.31–5.33. In this context, it is worth observing that in *US—Shrimp* and in *US—Shrimp (Article 21.5—Malaysia)*, neither the Panel nor the Appellate Body referred to the approach in *US—Tuna*. For a detailed discussion see *Matz-Lück & Wolfrum*, Article XX lit. g GATT 1994, paras 22 *et seq*.

[100] For a detailed discussion of this question see *Matz-Lück & Wolfrum*, Article XX lit. g GATT 1994, para. 24.

[101] *Marceau & Trachtman*, JWT 36 (2002) 5, 811, 842.

[102] *Diem*, 57; *Wirth*, Cornell Int'l L.J. 27 (1994), 817, 849.

to deal with those standards (Art. 3 SPS), Art. XX lit. b lacks any more precise guidance in this respect. Such international standards are often used as an indication of the risk at hand or the appropriateness of measures.[103] In so far as they are legally binding upon parties to a dispute, the difficult question arises whether they take precedence over WTO obligations.

Another question concerns the complex **relationship between existing GATT rules and international agreements**. In the context of Art. XX lit. b in particular the relationship with **multilateral environmental agreements (MEAs)** is crucial:[104] for example, a panel assessing the necessity of a trade measure according to a specific MEA may easily find that there is a much less trade restrictive alternative, thereby declaring the measure of the MEA incompatible with GATT rules. The WTO Committee on Trade and Environment (CTE) has since 1995 been examining the relationship between WTO rules and trade measures pursuant to MEAs.[105] *56*

F. Procedural Issues

Disputes concerning Art. XX lit. b often refer to controversial issues of environmental or consumer protection, which are highly disputed within society. Civil society organizations therefore have voiced a strong interest in submitting their views to the panels and the Appellate Body in the form of so-called ***amicus curiae*** **briefs**. On the one hand, panels have generally considered themselves to have the power to accept, consider or reject any information or argument, even if submitted in an unsolicited manner under Art. 13 DSU. On the other hand, they have strongly rejected any obligation to consider or take into account such *amicus curiae* briefs on their side or a corresponding right of the submitting entity. This view was approved by the Appellate Body.[106] *57*

As regards its own procedure, the **Appellate Body** applies a similar approach on the basis of its authority to adopt rules of procedure under Art. *58*

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[103] For example, in *EC—Asbestos*, international standards of the WHO, IARC, ISO and of the ILO Convention 162 (24 June 1986) were extensively been referred in such a way. See *EC—Asbestos*, WT/DS135/R, paras 8.188 *et seq*., para. 8.210.

[104] See, for example, TN/TE/W/10, 3 October 2002; *Stoll*, ZaöRV 63 (2003), 439 *et seq*. For a detailed discussion see *Matz-Lück & Wolfrum*, Article XX lit. g GATT 1994, paras 46 *et seq*.

[105] See TN/TE/S/1. At the fourth ministerial meeting in Doha, the CTE received a specific and renewed mandate to address the MEA question, see Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Ministerial Declaration, Adopted on 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001, para. 31. However, there is no mandate to clarify the relationship to non-parties to MEAs and to specify non-specific trade obligations.

[106] *US—Shrimp*, WT/DS58/AB/R, paras 105–108.

17.9 DSU.[107] In anticipating that a huge number of briefs would be submitted in the *EC—Asbestos* case, the Appellate Body adopted a working procedure for that particular case under Art. 16.1 of its working procedures.[108] This so-called "Additional Procedure" contained certain formal requirements.[109] This approach sparked off a broad discussion in the General Council, which made it clear that the issue was **highly contentious among Members**.[110] The issue is part of the current negotiations on improvements and clarifications to the DSU, in accordance with para. 30 of the Doha Ministerial Declaration.[111]

59 In view of the scientific evidence required, the existence of a risk and the absence of alternative measures, **expert advice** is key in dispute settlement procedures concerning Art. XX lit. b. In a number of cases, panels have sought such advice under Art. 13 DSU. In most cases, they have relied on individual experts rather than setting up an "expert review group" under Art. 13.2 and Annex 4 DSU. It lies within the panel's discretionary authority under Art. 13.2 DSU to determine whether it will seek expert advice at all, whom it will consult, and whether it will set up an expert review group.[112]

60 In exercising such authority, panels are guided by Art. 11 DSU, which requires them to "make an objective assessment of the matter before it, including an **objective assessment of the facts** of the case". This principle is also relevant in view of the proper **standard of review** which a panel has to adopt. The appropriate standard in this regard is considered to have been set by Art. 11 DSU "with great succinctness but with sufficient clarity". As far as fact-finding by panels is concerned, "their activities are always constrained by the mandate of Article 11 of the DSU: the applicable standard is neither *de novo* review as such, nor 'total deference', but rather the 'objective assessment of the facts'".[113]

61 The discretionary authority given to panels in this regard does not exempt deliberations on this point from **appellate review**.[114] The proper exercise

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[107] Appellate Body Report, *US—Lead and Bismuth II*, WT/DS138/AB/R, para. 43.

[108] *EC—Asbestos*, WT/DS135/AB/R, paras 50 *et seq*.

[109] For the text see *EC—Asbestos*, WT/DS135/AB/R, para. 52.

[110] See General Council, Minutes of Meeting, Held in the Centre William Rappard on 22 November 2000, WT/GC/M/60, 23 January 2001.

[111] See, for example, Dispute Settlement Body, Special Session, Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee, TN/DS/9, 6 June 2003, para. 6.

[112] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 147; Appellate Body Report, *Argentina—Textiles and Apparel*, WT/DS56/AB/R, paras 82, 84 and 86.

[113] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, paras 115–117.

[114] In *EC—Hormones*, the Appellate Body noted: "Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review". See *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 132.

of such authority, including the extent and type of expert advice taken into account and the proper appreciation of evidence may be questioned in appellate review. However, the Appellate Body, in recognizing the different roles of panels and appellate review bodies will confine such review to egregious errors that call into question the good faith of a panel. Very likely, the Appellate Body confines it review to cases of a "disregard" or "distortion" or "misrepresentation" of evidence and thus to cases where "the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice".[115] Thus, "in view of the distinction between the respective roles of the Appellate Body and panels, [...] a panel's appreciation of the evidence falls, in principle, 'within the scope of the panel's discretion as the trier of facts'. In assessing the panel's appreciation of the evidence, [the Appellate Body] [...] cannot base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding from the one the panel reached".[116]

G. Art. XX lit. b in the Context of other GATT and WTO Provisions

I. GATT

Art. XX lit. b is often considered together with lit. d and lit. g.[117] The special exception clauses contained in Art. XX are not mutually exclusive, though: a violation of one or more provisions of GATT might be justified under one or more exceptions of Art. XX. Although lit. b and lit. g are commonly considered the "green exceptions" of GATT, **lit. g is likely to be the first choice if environmental issues are at stake**.[118] Indeed, that provision seems to be more apt to cover measures taken to implement general conservation and management policies regarding natural resources, including environmental components. The broad notion of "natural resources" may be more appropriate to cover ecological and environmental considerations. In contrast to lit. b, lit. g requires neither a "risk" nor "necessity" in the strict sense, and thus provides for policies to address environmental concerns long before the latter result in clear-cut risks. Furthermore, the wording of lit. g gives more guidance on the interrelationship between trade-related and

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[115] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, paras 132–133, 135 and 138.

[116] Appellate Body Report, *US—Wheat Gluten*, WT/DS166/AB/R, para. 151.

[117] See, for example, *US—Gasoline*, WT/DS2/R, paras 6.29–6.37; *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 4.385.

[118] For a detailed discussion see *Matz-Lück & Wolfrum*, Article XX lit. g GATT 1994, paras 41 *et seq*.

domestic measures. However, the Chapeau itself, which is applicable to *all* the exceptions of Art. XX, severely disciplines environmental measures. **Art. XX lit. d is likely to be less important**, as its coverage is less relevant and specific than that of lit. b or lit. g.

63 In spite of its relevance, Art. XX lit. b cannot be considered to assume the role of the principal legal device for the protection of life and health in a way that such objectives may not be considered in the application of other GATT provisions. This is especially true in view of Art. III:4 and the notion of "like products". As stated in *EC—Asbestos*, Art. XX lit. b does not rule out considering **environmental and health aspects as determining the "likeness" of products** in the distinct and independent Art. III:4.[119] Nevertheless, the Appellate Body went on also to consider Art. XX lit. b although this step was not absolutely necessary for the result since it had already stated that there was no violation of Art. III:4.

II. WTO Agreement

64 The **Preamble to the WTO Agreement**—which informs not only the GATT 1994, but also all other covered agreements—acknowledges that the rules of trade should be "in accordance with the objective of **sustainable development**", and should seek to "protect and preserve the **environment**". Generally, preambles do not establish substantive rights but can help to provide a context for determining the object and purpose of a treaty.[120] Indeed, in *US—Shrimp* the Appellate Body stated that this preambular language "must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994".[121] Therefore, an environmentally friendly **expansive interpretation of Art. XX lit. b is possible**,[122] although this approach would substantially stretch the existing language. It remains to be seen whether the whole range of environmental measures can become subsumed under one of the exceptions contained in Art. XX.

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[119] *EC—Asbestos*, WT/DS135/AB/R, para. 115. See also *Hestermeyer*, Article III GATT 1994, paras 71, 73.

[120] Art. 31.2 VCLT.

[121] *US—Shrimp*, WT/DS2/AB/R, para. 153. Additionally, the Appellate Body in *EC—Tariff Preferences* noted that "[t]he Preamble to the *WTO Agreement* identifies certain objectives that may be pursued by Members through measures that would have to be justified under the 'General Exceptions' of Article XX." See Appellate Body Report, *EC—Tariff Preferences*, WT/DS246/AB/R, para. 94.

[122] This also seems to be the approach of the Appellate Body in *US—Shrimp*, WT/DS2/AB/R, paras 129–131.

III. TBT Agreement

Although the TBT Agreement, according to its Preamble, is intended to "further the objectives of GATT 1994, it does not contain any explicit links to Art. XX lit. b or any equivalent exception clause. Nevertheless, similar wording is found in Art. 2.2, sentence 3 TBT. Unlike Art. XX, this provision also mentions "human safety" and **does not stipulate a closed list of policies** ("*inter alia*"). Therefore, a wider variety of reasons (even moral, ethic and socio-economic considerations, market transparency, or consumer preferences) could be "legitimate objectives".[123] *65*

Furthermore, as in Art. XX lit. b, the term **"necessary"** is contained in Art. 2.2, sentence 2 TBT. However, this seems to contain an element of tautology: the phrase "not be more trade-restrictive" is reminiscent of the interpretation of "necessary" in Art. XX lit. b. Yet, the different balance of obligations in Art. 2.2 TBT and in Art. XX suggests that "necessary" need not have exactly the same meaning in both provisions.[124] In *EC—Asbestos*, the Appellate Body stated that "the TBT Agreement imposes obligations on Members that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994".[125] Unlike Art. XX where the burden rests on the defending party to present a *prima facie* case that the measure is justified, under Art. 2.2 TBT it is for the complaining party to make a *prima facie* case that the measure creates an unnecessary barrier to trade. *66*

IV. SPS Agreement

As mentioned earlier, **actual and potential links between the SPS Agreement and Art. XX lit. b exist**; both supplement each other and should be read together. Nevertheless, the Appellate Body emphasized, without analysis, that "in view of the structural differences between the standards of the *chapeau* of Article XX of the GATT 1994 and the elements of Article 5.5 of the *SPS Agreement*, the reasoning in our Report in *United States—Gasoline*, quoted by Panel, cannot be casually imported into a case involving Article 5.5 of the *SPS Agreement*".[126] Therefore, it remains unclear whether *67*

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[123] Whether an objective is legitimate must be examined by the dispute settlement institutions. See Appellate Body Report, *EC—Sardines*, WT/DS231/AB/R, para. 286.

[124] For a detailed discussion see *Keck-Tamiotti*, Article 2 TBT, paras 16 *et seq*. See also the arguments of the parties in Panel Report, *EC—Sardines*, WT/DS231/R, paras 4.102 *et seq*., 4.110; *EC—Asbestos*, WT/DS135/R, paras 3.279 *et seq*. However, it would be rather odd for the dispute settlement institutions to rule that a contested measure is "necessary" under the TBT Agreement and then find that it is not "necessary" under Art. XX lit. b.

[125] *EC—Asbestos*, WT/DS135/AB/R, para. 80 (italics in the original).

[126] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 239 (italics in the original).

identical terms are actually interpreted equally in both agreements. However, it would hardly be sustainable for a panel to rule that a contested measure was "necessary to protect human, animal or plant life or health" (Art. 2.2 SPS), and then find that it was not "necessary" under Art. XX lit. b.

68 The SPS Agreement is more specific and contains certain obligations which are not already imposed by GATT.[127] Therefore, it should be noted that **Art. XX lit. b is not a valid defence to violations of the SPS Agreement**.[128] Furthermore, the Panel in *EC—Hormones (US)* noted "that the general approach adopted in Article XX(b) of GATT is fundamentally different from the approach adopted in the SPS Agreement. Article XX(b), which is not limited to sanitary or phytosanitary measures, provides for a general *exception* which can be invoked to justify any violation of another GATT provision. The SPS Agreement, on the other hand, provides for specific *obligations* to be met in order for a Member to enact or maintain specific types of measures, namely sanitary and phytosanitary measures".[129]

69 There is an overlap in coverage between Art. XX lit. b and the SPS Agreement.[130] Art. XX lit. b still applies both to risks that arise from circumstances other than those expressly provided in Annex A:1 SPS as well to measures outside the territory of the invoking Member.[131]

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[127] *EC—Hormones (US)*, WT/DS26/R/USA, paras 8.38–8.40.

[128] In *EC—Hormones*, the Panel emphasised this argument when referring to the fact that "since nowhere is consistency with GATT presumed to be consistency with the SPS Agreement." See *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.42.

[129] *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.39 (italics in the original).

[130] See, for example, *EC—Hormones (US)*, WT/DS26/R/USA, paras 8.30 and 8.38.

[131] *Leyton*, in: *Brown Weiss & Jackson* (eds), 75, 97.

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Article XX GATT 1994

c) relating to the importations or exportations of gold or silver;

Case Law

Panel Report, *Canada—Gold Coins*, L/5863; Panel Report, *Canada—Herring and Salmon*, BISD 35S/98; Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R.

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A. General

The catalogue of exceptions to trade restrictions that would otherwise violate GATT provisions contains a variety of justifications that were important to the drafting states, even though they may have proven to be of little or no practical relevance in GATT panel decisions and WTO dispute settlement. The exception established by Art. XX lit. c which allows the establishment of trade regulations relating to the **import or export of gold and silver** is one of such provisions.[1] *1*

National import and export restrictions on gold and silver have a long tradition and are generally recognized safeguards for states' **financial security**. States invest in, primarily, gold and maintain gold reserves in order to be able to stabilize their currency in times of economic insecurity. Until the establishment of the international gold monetary standard established by the Bretton Woods international monetary system in 1944 most national currencies were directly dependent upon the amount of gold their central banks held. Although the function of gold reserves as a backing for national currencies was of much greater importance in 1947 when the GATT provision was drafted than it is today, states with weak currencies and developing or problematic economies continue to have a vital interest in creating national gold reserves. *2*

Furthermore, citizens who have little trust in their state's economic situation and currency stability, *e.g.* in states with traditionally difficult economic situations or unstable currencies, tend to invest in even small quantities of gold to maintain financial value and personal wealth. Hence, the regulation of the internal gold market can constitute an important element of **economic** *3*

[1] In *Canada—Gold Coins*, the Panel did not even mention Art. XX lit. c. According to its terms of reference, it was required only to examine the conformity of a newly introduced retail sales tax in the Province of Ontario with Arts II, III and XXIV:12 GATT 1947, see Panel Report, *Canada—Gold Coins*, L/5863, para. 2.

stability for a state's currency but can also protect the private gold and silver hoards of its citizens. Consequently, some states have a particular and commonly recognized interest in controlling and, if necessary, restricting the import and export of gold and silver.

4 Other free trade agreements applicable in economic relations between states also include exceptions relating to gold and silver. Usually the relevant exception forms part of a catalogue modelled on Art. XX or the trade agreement makes a general reference to the applicability of Art. XX, *e.g.* **Art. 2021.1 NAFTA**. Of the thirteen free trade agreements concluded between the EFTA states and other states, only the Agreement Between the EFTA States and Israel, 17 September 1992[2] does not include a clause that allows import or export restrictions on gold and silver like that in Art. XX lit. c in its list of general exceptions established by Art. 8.

B. Interpretation

5 As lit. c of Art. XX has not been the subject of any dispute or controversy, little can be said about its interpretation and in particular about the term "[…] **importations or exportations of gold or silver** […]".

6 However, the term "**relating to**", which is employed to specify the relationship between the policy objective and the application of a measure merits a closer look. Art. XX lit. c is not the only subparagraph using the term "relating to" in order to connect a national measure to the legitimate aim recognized by the general exceptions catalogue. The same approach is also taken by Art. XX lit. e and g. Different Panel and Appellate Body Reports have dealt with the interpretation of Art. XX lit. g and have commented on the meaning of the term "relating to".

7 According to panel decisions which addressed the term "relating to" in Art. XX lit. g, the main question was whether the measure could be considered to be essential to achieve the policy objective, or whether it would be sufficient for the measure in question to be primarily aimed at this result. In 1988 the panel in *Canada—Herring and Salmon* found that the test for a measure relating to a certain objective was whether it was primarily aimed at achieving that result.[3] Although the panel omitted to offer any evidence from the *travaux préparatores* or other sources to support their finding, the criterion of being primarily aimed at the result met with agreement in further decisions as a

[2] All free trade agreements in force between EFTA states and their trading partners are accessible online at <http://secretariat.efta.int/Web/LegalCorner>.

[3] *Canada—Herring and Salmon*, BISD 35S/98, para. 4.6.

constructive way to screen out measures with only marginal or coincidental relationships to the result.[4]

8 In *US—Gasoline* the Appellate Body stated that all the parties to and participants in the appeal agreed that the term "relating to" used by Art. XX lit. g was equivalent to **"primarily aimed at"**. Consequently, when interpreting the language used by Art. XX lit. c in this manner, only measures primarily aimed at the import or export of gold or silver qualify as potential exceptions. It follows from the application of this test that if a measure does not fulfil even this first requirement, any further review of whether the test of the chapeau language is or is not met is obsolete.

[4] *Charnovitz*, JWT 25 (1991) 5, 37, 50.

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d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

Case Law

Panel Report, *US—Spring Assemblies*, BISD 30S/107; Panel Report, *Japan—Agricultural Products I,* BISD 35S/163; Panel Report, *US—Section 337*, BISD 36S/345; Panel Report, *EEC—Parts and Components*, BISD 37S/132; Panel Report, *Thailand—Cigarettes*, BISD 37S/200; Panel Report, *US—Tuna (Mexico)*, BISD 39S/155; Panel Report, *US—Malt Beverages,* BISD 39S/206; Panel Report, *US—Tuna (EEC),* DS29/R; Panel Report, *US—Taxes on Automobiles*, DS31/R; Panel Report, *US—Gasoline*, WT/DS2/R; Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R; Panel Report, *EC—Asbestos*, WT/DS135/R; Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R; Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R; Appellate Body Report, *Dominican Republic—Import and Sale of Cigarettes*, WT/DS302/AB/R; Panel Report, *EC—Trademarks and Geographical Indications (US)*, WT/DS174/R; Panel Report, *Canada—Wheat*, WT/DS176/R; Panel Report, *EC—Trademarks and Geographical Indications (Australia)*, WT/DS290/R; Panel Report, *Mexico—Taxes on Soft Drinks*, WT/DS308/R; Appellate Body Report, *Mexico—Taxes on Soft Drinks*, WT/DS308/AB/R.

Documents

Committee on Trade and Environment, GATT / WTO Dispute Settlement Practice relating to Article XX, Paragraphs (b), (d) and (g) of GATT, Note by the Secretariat, Revision, WT/CTE/W/53/Rev.1, 26 October 1998; Committee on Trade and Environment, GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g), Note by the Secretariat, WT/CTE/W/203, 8 March 2002; Working Party on Domestic Regulation, Necessity Tests in the WTO, Note by the Secretariat, S/WPDR/W/27, 2 December 2003.

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A. General

1 Art. XX lit. d covers the potential impact on trade of measures "necessary" to enforce laws or regulations, including the four sectors explicitly stipulated in the provision: customs, monopolies, intellectual property and the control of deceptive business practices. As the clause is not limited to a specific policy area, lit. d became an important environmental exception,[1] along with Arts XX lit. b and g.

[1] See *Matz-Lück & Wolfrum*, Art. XX lit. g, paras 46 *et seq*.

B. Negotiation History

2 Based on a 1946 US Proposal,[2] Art. XX lit. d GATT 1947 was drafted by the governments attending the UN Conference on Trade and Employment (1946–1947). The provision was primarily designed as an exception to the commercial policy provisions that threatened to prevent "members from adopting or enforcing measures [...] necessary to induce compliance with laws or regulations, such as those relating to customs enforcement, deceptive practices, and the protection of patents, trademarks and copyrights, which are not inconsistent with the purpose of the Organisation".[3] During the negotiation of the Havana Charter for the International Trade Organization and GATT as the interim agreement the main idea of Art. XX lit. d GATT remained unchanged, and the following drafts constituted merely amendments, in particular with respect to the chosen stricter language concerning the term "to secure compliance with".[4] The current wording has not been altered since the GATT was provisionally applied on 30 October 1947.

3 During the negotiation period the provision was not subject to comprehensive discussion. This indicates that the drafters acted on the assumption that discrimination against certain imports in order to enforce laws consistent with GATT can be justified. By refraining from linking the exception to a compensation requirement, it may be assumed that the drafters classified national enforcement mechanisms as "important state interests".[5] An assigned focus of Art. XX lit. d GATT as to the implication of environmental concerns cannot be deduced from this because, first, there was no definite connection to an ecological application and secondly, environmental protection simply was not a relevant public issue in 1947.[6]

4 However, it must be mentioned that the Chapeau of Art. XX was incorporated after the determination of the individual exceptions in order to avoid possible manipulations by a broader interpretation of the exception requirements.[7] Thus, an interpretive approach to Art. XX lit. d in line with the negotiation history has to take account of the Chapeau of Art. XX.[8]

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[2] GATT Analytical Index I, 3 *et seq.*; *Bowen*, 183.

[3] US Department of State, Suggested Charter for an International Trade Organization, Department of State Publications No. 2598, Commercial Policy Series No. 93, Art. 32 lit g.

[4] GATT Analytical Index I, 579; see also *Charnovitz*, Va. J. Int'l L. 38 (1997–1998), 689, 696 recalling the usual practice in the process of drafting to refer to exception provisions in commercial treaties; *Feddersen*, 307.

[5] Panel Report, *US—Gasoline*, WT/DS2/R and Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, 26.

[6] Referring to Art. XX lit. b and g: *Charnovitz*, JWT 25 (1991) 5, 37–55, 38 quoting *Shrybman*, The Ecologist 20 (1990) 1, 33.

[7] See *Bowen*, 184.

[8] See generally *Wolfrum*, Article XX GATT 1994 [Chapeau].

5 Concerning "the enforcement of monopolies operated under Art. II:4 and Art. XVII" there was general agreement that restrictions or prohibitions on private trade might be imposed in order to protect the position of state-trading enterprises operated under other articles. Thus, the London and the New York Charters included a provision containing an exception to the general prohibition on quantitative restrictions, import and export prohibitions or restrictions on private trade for the purpose of establishing a new, or maintaining an existing, monopoly of trade for a state-trading enterprise operating consistently with the Charter article on state trading. At the Geneva session of the Preparatory Committee, it was agreed that this provision should be deleted from the article on quantitative provisions, but a clarification added that such measures would be covered by the commercial policy exception clause corresponding to the present Art. XX lit. d.[9] Based on this reasoning, this policy found its way to Art. XX lit. d.

C. Interpretation

I. Structure

6 The interpretation of Art. XX lit. d has been largely developed in dispute settlement. In *Korea—Various Measures on Beef* the Appellate Body highlighted. "For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be 'necessary' to secure such compliance".[10] Of course, for a measure to be justified by Art. XX and its lit. d it is further necessary for its application to conform to the requirements of the Chapeau of Art. XX.

II. Laws and Regulations not Inconsistent with the GATT

7 As stated above, lit. d does not relate to a certain policy objective, but rather addresses the need to enforce a regulation. Thus, the term "laws" and "regulations" for good reason has to be distinguished from what may be referred to as "policies". Thus, "laws and regulations" has to be understood in a technical, legal manner.

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[9] GATT Analytical Index I, 581.

[10] Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 157, with reference to *US—Gasoline*, WT/DS2/AB/R.

In the *EEC—Parts and Components* case, the Panel provided an interpretation of the phrase "to secure compliance with laws and regulations". According to the Panel, the phrase is to be interpreted as "to enforce obligations under laws and regulations", and not "to ensure the attainment of the objectives of the laws and regulations".[11] *8*

The question whether "laws" and "regulations" only relate to domestic rules or also cover obligations under international agreements was raised in *Mexico—Taxes on Soft Drinks*. In this case, Mexico considered its adopted measures as "designed to secure compliance" by the United States with NAFTA obligations conceiving NAFTA as an "international agreement that is a law not inconsistent with the provisions of the GATT 1994". Supporting the Panel decision, the Appellate Body interpreted "laws or regulations" to refer to rules that form part of the domestic legal system of a WTO Member. Following the approach of the Appellate Body, "laws" and "regulations" do not include international obligations of *another* WTO Member under an international agreement.[12] *9*

The list of possible laws and regulations is not exhaustive, as the term "including" indicates. Furthermore, the matters mentioned and their nature cannot be considered to limit the application of the provision to economic law or policy. *10*

For that reason, the significance of the issues mentioned in lit. d may be deemed to be overestimated, or even misplaced. However, it is nevertheless useful to consider those issues in more detail, as cases along such lines had an important impact on the development of the interpretation of the provision. *11*

As regards the enforcement of monopolies, the negotiation history of that particular part is telling. In its 1988 Report on *Japan—Agricultural Products I* the Panel indeed stated that Art. XX lit. d GATT 1947 permits measures necessary to the enforcement of monopolies, it does not permit contracting parties to operate monopolies inconsistently with the other GATT provisions.[13] *12*

The reference to "protection of patents, trade marks and copyrights" policy was invoked in the *US—Spring Assemblies*[14] case of 1983, the first[15] patent infringement case in GATT history. In referring to this policy, the Panel just noted "that the protection of patents was one of the few new areas of *13*

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[11] Panel Report, *EEC—Parts and Components*, BISD 37S/132, para. 5.17.
[12] Appellate Body Report, *Mexico—Taxes on Soft Drinks*, WT/DS308/AB/R, paras 58–80.
[13] Panel Report, *Japan—Agricultural Products I*, BISD 35S/163, para. 5.2.2.3.
[14] Panel Report, *US—Spring Assemblies*, BISD 30S/107.
[15] *Ibid.*, para. 51.

national laws and regulations expressly mentioned in Art. XX(d)".[16] The other important case was the *US—Section 337* case of 1989.[17] Both cases dealt with enforcement measures taken pursuant to Section 337 of the United States Tariff Act of 1930. In *US—Section 337* the Panel made it clear that, against the background of Art. XX lit. d GATT 1947, the substantive patent law of a contracting party could presumably not be challenged. In this case, the conformity of patent laws with the General Agreement was not challenged. Thus, the subject of the Panel's examination was not the effectiveness of the patent law but the question whether the enforcement of the chosen measures complied with the other requirements of Art. XX lit. d GATT 1947, and in particular the necessity test. But, in conclusion, contracting parties are required to try to enforce their patent legislation in a manner consistent with GATT provisions. In this context, it is important to emphasize the outstanding relevance of both cases, especially the *US—Section 337* case, to the conduct of negotiation on the TRIPS Agreement.[18]

14 Finally, concerning the last listed policy, "the prevention of deceptive practices", it should be noted that it includes cases of false marking of geographical origin, as had been already agreed by the London sessions of the Preparatory Committee.[19]

III. Consistence with the General Agreement

15 As lit. d clearly requires, such laws and regulations must be consistent with the General Agreement. In the *Japan—Agricultural Products I* case, adopted on 1988,[20] the Panel dealt with certain import quotas maintained by Japan. Japan invoked Art. XX lit. d GATT 1947 in relation to import restrictions administered by an import monopoly. In this case, the Panel held that Art. XX lit. d GATT 1947 "only exempts from obligations under the General Agreement measures necessary to secure compliance with those laws and regulations which are not inconsistent with the provisions of [the General] Agreement". In conclusion, the Panel noted in this case that Art. XX lit. d GATT 1947 permits measures necessary to the enforcement of monopolies only if the contracting parties operate monopolies consistent with the other provisions of the General Agreement.

16 In the following cases which were not adopted, the Panels confirmed this approach: in *US—Tuna (Mexico)*,[21] the Panel noted that "Article XX(d)

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[16] *Ibid*, para. 53.
[17] Panel Report, *US—Section 337*, BISD 36S/345.
[18] Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPS-Agreement.
[19] See EPCT/C.II/50, 5, 9; EPCT/C/II54/rev.1, 37; GATT Analytical Index I, 583.
[20] *Japan—Agricultural Products I*, BISD 35S/163, 230, para. 5.2.2.3.
[21] Panel Report, *US—Tuna (Mexico)*, BISD 39S/155.

requires that the 'laws and regulations' with which compliance is being secured be themselves 'not inconsistent' with the General Agreement".[22] The Panel found that the import prohibition under the direct and intermediary embargoes did not constitute an internal regulation within the meaning of Art. III GATT 1947, and therefore was inconsistent with Article XI:1 GATT 1947. In conclusion, due to the inconsistency with GATT rules the intermediary embargo was not justified under Arts XX lit. b, d or g GATT 1947.[23] In *US—Tuna (EEC)*[24] and *US—Taxes on Automobiles*,[25] the Panel followed similar reasoning. In both reports the Panel dismissed a justification under Art. XX lit. d GATT 1947 because, contrary to the requirements of that provision, the relevant aspects of the underlying measures were themselves inconsistent with the General Agreement.

IV. Enforcement—"Securing Compliance With"

17 As stated, Art. XX lit. d aims to cover measures which are designed to prevent actions that would be illegal under the laws or regulations of the Member concerned.[26] In *US—Gasoline*,[27] the Panel followed this reasoning. In this context, the case dealt with the question whether the aspect of the baseline establishment methods found inconsistent with the GATT 1994 secured compliance with a law or regulation not inconsistent with the GATT 1994.[28] The discrimination between imported and domestic gasoline thus achieved contrary to Art. III:4 under the baseline establishment methods did not "secure compliance" with the baseline system, because these methods were not an enforcement mechanism. In conclusion, the Panel found that the legal regulations (the system of baselines incorporated by the "Clean Air Act") constituted "simply rules for determining the individual baselines" and "as such, they were not the type of measure with which Art. XX(d) was concerned".[29]

18 The interpretation of the requirement "to secure compliance with" was the subject of the recent decisions in *Mexico—Taxes on Soft Drinks*. In this case the Panel considered this requirement to be interpreted as to "enforce compliance". According to the Panel, "to secure compliance with" does not apply to measures taken by a Member in order to induce *another* Member to comply with obligations owed to it under a non-WTO treaty.[30] While

[22] *Ibid.*, para. 5.40.
[23] *Ibid.*, paras. 5.38–5.40.
[24] Panel Report, *US—Tuna (EEC)*, DS29/R, para. 5.41.
[25] Panel Report, *US—Taxes on Automobiles*, DS31/R, para. 5.67.
[26] See also GATT Analytical Index I, 579.
[27] *US—Gasoline*, WT/DS2/R and *US—Gasoline*, WT/DS2/AB/R, para. 6.33.
[28] See for the factual aspects *US—Gasoline*, WT/DS2/R, paras 2.1–2.13.
[29] *Ibid.*
[30] Panel Report *Mexico—Taxes on Soft Drinks*, WT/DS308/R, para. 8.175.

upholding the final conclusions of the Panel, the Appellate Body agreed with Mexico insofar as it found the Panel's emphasis on "certainty" and "coercion" to be misplaced. Following the argumentation of the Appellate Body, the "to secure compliance" analysis must not include an examination of issues concerning "certainty" and "coercion" relating to the result achieved by the measure in question.[31]

V. Necessity Test

19 Furthermore, Art. XX lit. d requires what has been commonly referred to as the "necessity test". The measures must be "necessary" to "secure compliance with laws and regulations".

20 As early as in the *Thailand—Cigarettes* case, the Panel stated that the term "necessary" has the same meaning under lit. b and d by emphasizing the lack of reasons for a differentiated approach.[32] To substantiate this reasoning, the Panel emphasized that the term was used in both paragraphs in the same way to pursue the same objective: "to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding public policy goals to the extent that such inconsistencies were unavoidable".[33] On that basis the Panel concluded that a different interpretation of the term "necessary" could not be justified by the fact that lit. d applies to inconsistencies resulting from the enforcement of GATT-consistent laws and regulations, while lit. b applies to those resulting from health-related policies.[34] In further cases, the Appellate Body confirmed this approach.

21 In the *US—Section 337* case of 1989,[35] the Panel defined the "necessity test" first for lit. d. A year later, the Panel followed a similar approach for lit. b in the *Thailand—Cigarettes* case.[36] In both cases, the Panel adopted a requirement of so-called "least-trade restrictiveness"[37] to decide whether a measure was "necessary" under Arts XX lit. d and b GATT 1947. As regards the Art. XX lit. d GATT 1947 exception, in the *US—Section 337* case, the Panel found it essential to determine whether a GATT-consistent alternative could have been applied. The Panel stated that "a contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Art. XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other

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[31] Appellate Body Report, *Mexico—Taxes on Soft Drinks*, WT/DS308/AB/R, paras 74 *et seq.*

[32] Panel Report, *Thailand—Cigarettes*, BISD 37S/200, para. 74.

[33] *Ibid.*

[34] *Ibid.*

[35] *US—Section 337*, BISD 36S/345.

[36] *Thailand—Cigarettes*, BISD 37S/200.

[37] Terminology used by the Secetrariat, WT/CTE/W/203, para. 36.

GATT provisions is available to it".[38] Following this approach, the Panel concluded that "in cases where a measure consistent with other GATT provisions is not reasonably available to it, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions".[39]

Likewise, in *Thailand—Cigarettes*[40] and *in US—Malt Beverages*,[41] the Panel confirmed this approach by analysing the "necessity" requirement under the question of possible alternative measures consistent with GATT rules or less inconsistent with them, which the contracting party could reasonably be expected to use in order to achieve its pursued objectives. *22*

Additionally in *US—Gasoline* the Panel addressed the issue of the reasonableness of an alternative measure. In essence, the Panel stated that the fact that an alternative measure involved administrative difficulties did not per se provide a justification for denying its reasonableness in the sense of Art. XX lit. d.[42] It is worth mentioning that these findings were not appealed. *23*

The Appellate Body Report in *Korea—Various Measures on Beef* added some more considerations to the definition of the "necessity test". By addressing the same issue, the Appellate Body corroborated the practice of the Panel in following the standard set out in the *US—Section 337* case. The analytical proceedings of the Appellate Body in *Korea—Various Measures on Beef* consisted basically of the following steps: the Appellate Body first analysed the meaning of the word "necessary" very thoroughly by noting that the scope of the word was not limited to what is to be qualified as "indispensable"; moreover, the term refers to a range of degrees of necessity. The Appellate Body continued to consider that the term "necessity" in the sense of Art. XX lit. d lies between one pole meaning "indispensable" and the opposite pole meaning "making a contribution to". In conclusion, it stated that in this continuum, the term "necessity" is "located significantly closer to the pole of "indispensable".[43] The Appellate Body affirmed this view in *Dominican Republic—Import and Sale of Cigarettes*[44] and when addressing the necessity test in the similarly worded Art. XIV GATS in *US—Gambling*.[45] *24*

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[38] *US—Section 337*, BISD 36S/345, para. 5.26.
[39] *US—Section 337*, BISD 36S/345, para. 5.26.
[40] *Thailand—Cigarettes*, BISD 37S/200, para. 75.
[41] Panel Report, *US—Malt Beverages*, BISD 39S/206, para. 5.52.
[42] *US—Gasoline*, WT/DS2/R, paras. 6.26 and 6.28.
[43] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 161. In this context, the Appellate Body recalled that Art. XX lit g requires a measure "*relating* to the conservation of exhaustible natural resources". Without giving further reasoning, it stated that this requirement is more flexible textually than the "necessity" requirement found in Art. XX lit. d, para. 161.
[44] Appellate Body Report, *Dominican Republic—Import and Sale of Cigarettes*, WT/DS302/AB/R, paras 68 *et seq*.
[45] *Ibid*., paras 306 *et seq*.

25 Bearing the foregoing in mind, the Appellate Body divided the examination of the "necessity test" into two case categories: (1.) situations in which the claim may be that a measure is indispensable, *i.e.* where the measure is the only one available and (2.) situations in which a Member may be able to justify its measure as "necessary" within the meaning of Art. XX, even if there were other measures available.[46]

26 For the second constellation, the Appellate Body stated that "a measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects".[47] It further considered that the determination of whether a measure not qualified as "indispensable" may nevertheless be "necessary" demands in every case "a process of weighing and balancing a series of factors".[48] In particular, the following criteria should be taken into account: "the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."[49]

27 In the *EC—Asbestos*[50] case for the first time an "environmental" measure passed the necessity test. In this case, the Appellate Body addressed the issue of "necessity" under Art. XX lit. b. As stated above, these findings also applied to the Art. XX lit. d exception. By following the standard set by the *Korea—Various Measures on Beef* Report, the Appellate Body determined in the *EC—Asbestos* case the need to take into consideration "the extent to which the alternative measure "contribute[d] to the realization of the end pursued".[51] Furthermore, the Appellate Body noted that "the more vital or important" those common interests or values were, "the easier it would be to accept as necessary a measure designed to achieve those ends".[52] It observed explicitly in the *EC—Asbestos* case that the value pursued by the measure being litigated—the preservation of human life and health—is both vital and important in the highest degree.[53] This "weighing and balancing" approach was recently confirmed in the *Canada-Wheat* case.[54]

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[46] *Ibid.*, para. 163.
[47] *Ibid.*
[48] *Ibid.*, para. 164.
[49] *Ibid.*
[50] Panel Report, *EC—Asbestos*, WT/DS135/R and Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R.
[51] *EC—Asbestos*, WT/DS135/AB/R, para. 172, referring to *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 163.
[52] *EC—Asbestos*, WT/DS135/AB/R, para. 172, referring to *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 162.
[53] *EC—Asbestos*, WT/DS135/AB/R, para. 172.
[54] Panel Report, *Canada-Wheat*, WT/DS276/R, paras 6.298 *et seq*.

The Member invoking Art. XX lit. d as a justification against GATT rules has the burden of demonstrating that these two requirements are met. After demonstrating that the claimed inconsistent measure comes within the scope of the lit. d exception, the member has to prove that the measure complies with the Chapeau of Art. XX. *28*

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e) relating to the products of prison labor;

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Panel Report, *Canada—Herring and Salmon*, BISD 35S/98; Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R.

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A. General

1 In the literature on Art. XX, lit. e often goes unaddressed. The narrow and relatively precise wording seems to make an interpretation superfluous. In recent years, however, Art. XX lit. e has attracted more attention as the only exception in Art. XX explicitly applying to production-based trade restrictions. The provision has been used as an argument both for and against the applicability of other Art. XX exceptions to production-related measures.[1] In addition, proponents of a human rights-respective international trading system have identified Art. XX lit. e as a possible avenue for the integration of human rights into WTO law.

2 The **reason for the inclusion** of Art. XX lit. e in the exceptions of Art. XX is disputed. Most authors consider that the provision was intended to address the unfair competitive advantage a nation making use of prison labour may have in terms of cost of production.[2] Others contend that human rights concerns were also a driving force.[3] A human rights motive is, however, unlikely, considering that the use of prison labour does not necessarily constitute a human rights violation.

B. Interpretation

I. Applicability to Other Forms of Forced Labour

3 That Art. XX lit. e allows states to adopt trade restrictions on goods produced using prison labour is obvious. Whether Art. XX lit. e may be **interpreted**

[1] See the references for Art. XX lit. a GATT 1994 in *Wenzel*, Article XX lit. a GATT 1994, para.12.
[2] *Blüthner*, 339.
[3] *Cleveland*, JIEL 5 (2002), 133,161; *Stirling*, Am. U. J. Int'l L. & Pol'y 11 (1996), 1, 38.

extensively so as to include goods produced through **all forms of forced labour**[4] or even goods produced in violation of any international human rights or core social standards is controversial. The advantage of such an expansive reading of the provision from a human rights perspective would be—in particular when compared with Art. XX lit. a—the fact that Art. XX lit. e clearly applies to production-related measures, thereby making irrelevant the general debate on the applicability of Art. XX exceptions to production-related measures.[5] In addition, Art. XX lit. e requires only that the measure be *related to* products of prison labour, thereby absolving Members from the difficult task of proving the *necessity* of trade restrictive measures adopted on human rights grounds as required by Art. XX lit. a.[6]

4 The interpretation of Art. XX lit. e according to the general rules of interpretation contained in the VCLT leads to the restriction of the provision to products of prison labour and to the exclusion of products made by using other forms of forced labour.[7] An **expansive reading** of Art. XX lit. e clearly **cannot be based on the wording of the provision**. The object and purpose of the provision could sustain an expansive reading only if the intention of the provision were to allow states to react to prison labour because it constituted a violation of fundamental human rights. But, as has been demonstrated before, Art. XX lit. e rather pursues the economic aim of allowing protection against unfair competitive advantage.[8] Its clear wording constitutes an obstacle to an interpretation of the provision that includes all human rights in its ambit. In the application of Art. 32 VCLT, recourse to the drafting history of the provision[9] is ruled out[10] since the meaning of Art. XX lit. e is neither ambiguous nor obscure and the restrictive reading based on the wording of the provision does not lead to a result which is manifestly absurd or unreasonable. Finally, taking into account the existence of the public morals exception of Art. XX lit. a which, because of the vagueness of the term, allows for the inclusion of human rights concerns,[11] it does not seem imperative from a human rights point of view to apply Art. XX lit. e to other forms of forced labour or to any form of human rights violations.

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[4] For an inclusion of goods produced through all forms of forced labor *Bartels*, JWT 36 (2002), 353, 355; *Cleveland*, JIEL 5 (2002), 133, 162; *Diller & Levy*, 684.

[5] For this debate in the context of Art. XX lit. a see *Wenzel*, Article XX lit. a GATT 1994, paras 10–14, 22–24.

[6] For the necessity of measures adopted because the production process violates human rights or core labor standards see *Wenzel*, Article XX lit. a GATT 1994, paras 26, 27.

[7] *Blüthner*, 336–341; *Howse*, Am. U. Int'l L. Rev. 18 (2003), 1333, 1373.

[8] See above, para. 2.

[9] *Diller & Levy*, 683, 684 refer to the drafting history (or rather earlier U.S. interpretations of similar provisions in other treaties) as an argument for the inclusion of all forms of forced labor.

[10] *Appleton*, 445.

[11] See *Wenzel*, Article XX lit. a GATT 1994, paras 5, 14, 20–24.

II. The Necessary Link Between the Trade Restriction and the Goal Pursued

5 Like Art. XX lit. c and g, Art. XX lit. e uses the term "relating to" to describe the required link between the trade restriction and the policy goal pursued. The findings of the Appellate Body in *US—Gasoline* concerning the words "relating to" in Art. XX lit. g thus constitute an important tool for the interpretation of Art. XX lit. e.[12] As a consequence, to fall under Art. XX lit. e, the trade-restrictive measure must be **primarily aimed at** the product of prison labour. The fact that the product in question has been produced with the use of prison labour has to be the primary reason for the trade restriction.

[12] Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, 18, 19. See also Panel Report, *Canada—Herring and Salmon*, BISD 35S/98, para. 4.6. On the interpretation of the term "relating to" in the context of Art. XX lit. g GATT 1994 see *Matz-Lück & Wolfrum*, Article XX lit. g GATT 1994, paras 30 *et seq*.

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f) imposed for the protection of national treasures of artistic, historic or archaeological value;

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Panel Report, *Canada—FIRA*, BISD 36S/345; Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R.

Cross References

Art. 2101 NAFTA

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A. General

Art. XX lit. f acknowledges the sovereign right of states to protect their national treasures and to take measures to this end, even if they may have an impact on trade. The provision addresses the delicate relationship between culture and trade, which is also reflected by other GATT rules, such as, for instance, Art. IV, and which has been referred to recently as the concept of a "**cultural exception**". *1*

Other free trade agreements either refer to Art. XX as being applicable to the agreement, *e.g.* **Art. 2101 NAFTA**, or have modelled their general exceptions on Art. XX. Hence, in general, free trade agreements provide for an equivalent exception for trade-related measures imposed for the protection of cultural property, thereby recognizing the fundamental interest of states in retaining sovereignty over their cultural treasures. *2*

Historically, items of a state's cultural property were often transferred from the territory of origin to another state as the alleged property of the discoverer or finder, as the benefits of colonial authority or, particularly, as the **spoils of war**, whereupon they were—and often continue to be—displayed in the victorious state's museums or private collections. In the wake of World War II with its large-scale looting of cultural property, particularly by the German Reich, the protection of goods of cultural value during and after armed conflicts became an issue not only of national but also of international concern. *3*

Claims for the return of objects of national cultural property continue to be an important issue in international relations between states. Today private collectors often attempt to obtain items of states' artistic, historic or archaeological treasures by placing orders for their **acquisition** and *4*

transfer. Frequently such acquisitions are the result of criminal acts, and the subsequent transactions are illegal under the national laws of the affected state.

B. Cultural Property—State Sovereignty and Relevant International Instruments

5 It follows from the principle of state sovereignty that states are generally free to decide the fate of their national **cultural property**. This includes decisions relating to the conservation as well as to the sale and export of items of cultural property. Not even the recognition of a feature's importance as part of the world cultural heritage may necessarily prevent its destruction, degradation or loss if a state does not acknowledge that it has a national interest in its protection or does not act to safeguard it. Property rights in national treasures of artistic, historic or archaeological value are a matter of national legislation, as are rules on their export.

6 The rule that a state can prevent the loss of parts of its cultural heritage by restricting the export of national treasures of artistic, historical or archaeological value as an exception to free trade is not questioned and has not yet given rise to any GATT-related disputes. The reason for a lack of disagreement about restrictions concerning cultural property stems from an almost universal recognition of states' interest in not allowing the export of items essential to a nation's **cultural identity**.

7 The protection and conservation of a state's cultural heritage against damage and other kinds of loss, *e.g.* by sale and export, is a **universally recognized interest** in international law. As far as the illicit export of a state's national cultural heritage is concerned, *i.e.* the export of cultural property without a state's consent, the acknowledgement of this interest is primarily reflected by three international treaties: the First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict,[1] the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,[2] and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.[3]

8 In addition to rules on the prevention of damage to cultural property in cases of armed conflict, the First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict obliges

[1] UNTS 249 (1956), 358, 14 May 1954.
[2] UNTS 823 (1972), 231, 14 November 1970.
[3] ILM 34 (1995), 1322, 24 June 1995.

states to prevent the export of cultural property from a territory occupied by them during armed conflict and to **return** items exported in contravention of this principle.

C. Interpretation

"National **treasures of artistic, historic or archaeological value**" can be understood as a broad term to cover all the elements which often, and particularly in the abovementioned international instruments, are considered to form part of what is commonly referred to as "cultural property". *9*

When interpreting the subparagraphs of Art. XX, special attention is given to the language establishing the link between the national measure and the legitimate objective. Art. XX lit. f is the only subparagraph that uses the term "**imposed for**" to characterize this link. Due to a lack of disputes arising out of the use of trade-related restrictions on the export of cultural property, there is no case law to rely upon in interpreting the term. *10*

By approaching interpretation negatively, however, it can be established that in any case a measure that is "imposed for" a certain result must not strictly be "**necessary**" to achieve this aim. In accordance with the findings of the Appellate Body in *US—Gasoline*[4] concerning the interpretation of other subparagraphs, the test of whether a measure is "necessary" can be applied only if the term "necessary for" is used in the relevant subparagraph, since the different wordings indicate different meanings and cannot be interpreted in a like manner. *11*

By its **ordinary meaning** the term "imposed for" indicates a link between the measure and the desired result in such a way that the measure must serve to achieve the aim in a rather straightforward manner. In the case of Art. XX lit. f the intended result of the measure must be the protection from loss of national treasures of artistic, historic and archaeological value. Since a strict necessity test for a measure "imposed for" a certain result is not required, the measure must clearly be aimed at the objective, but it must not be the least restrictive means of achieving it. *12*

Rather, even if the two terms are not equal, the interpretation of the term "imposed for" may be compared to the interpretation of the term "**relating to**" that is, *e.g.*, used by Art. XX lit. g. According to the case law on the interpretation of the term "relating to", a measure must be "primarily aimed at" the result in order to fulfil the criteria of subparagraphs using such a wording. Interpreting the term "relating to" as synonymous with "primarily *13*

[4] Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R.

aimed at" has given rise to criticism, since this meaning may be said to be far from the ordinary meaning. When analysing possible interpretations of the term "imposed for" by relying on the ordinary meaning of the term, it becomes apparent that the test whether a measure was primarily aimed at a result would have fitted this term better than the subparagraphs using the wording "relating to".

14 It remains to be seen whether a WTO dispute settlement panel will require preconditions comparable to those in Art. XX lit. g or whether the simple aim of the conservation of national treasures will be considered to be sufficient. The general exceptions established by Art. XX have so far—particularly by older GATT panels[5]—been interpreted strictly, although a **narrow interpretation** may not necessarily be required by the character of Art. XX.[6] Consequently, it is most likely that, if a dispute over restrictions concerning items of a state's cultural heritage ever arises, a panel must find some kind of close and substantial relationship between the measure and the result to justify a challenged trade-related measure. Hence, despite the above arguments that the different wordings used by the different subparagraphs of Art. XX must not be interpreted to mean the same, the interpretation of the term "imposed for" may in fact come very close to the current interpretation of the term "relating to" in GATT and WTO dispute settlement.

[5] This shows, for example, in the interpretation undertaken by the panel in Panel Report, *Canada—FIRA*, BISD 36S/345, para. 5.20.

[6] *Zeitler*, 110 *et seq*.

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g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

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Panel Report, *US—Canadian Tuna*, BISD 29S/91; Panel Report, *Canada—Herring and Salmon*, BISD 35S/98; Panel Report, *US—Tuna (Mexico)*, BISD 39S/155; Panel Report, *US—Tuna (EEC)*, DS29/R; Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R; Panel Report, *US—Shrimp*, WT/DS58/R; Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R; Panel Report, *US—Shrimp (Article 21.5—Malaysia)*, WT/DS58/RW; Appellate Body Report, *US—Shrimp (Article 21.5—Malaysia)*, WT/DS58/AB/RW.

Cross References

Art. 3.2 DSU; Art. 31.1 VCLT; Art. 2101.1 NAFTA; Art. 91 lit. f Association Agreement between the European Community and Chile; Art. 226.1 lit. j Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy

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A. General

1 Art. XX lit. g provides a platform, generally speaking, for WTO Members to develop mechanisms which are designed to ensure that exhaustible natural resources are managed prudently.

2 As a result of the acceptance that measures relating to the conservation of natural resources under Art. XX lit. g include those aimed at the conservation of living resources,[1] relevant disputes have contributed strongly to the discussion on the relationship between trade and the environment[2] and, more specifically, on the relationship between WTO rules and multilateral environmental agreements (MEAs). As the two recognised gateways introducing and allowing environmental regulations into the WTO trade system, Art. XX lit. g and lit. b are often cited together, despite the fact that there is no explicit reference to "the environment" in either of the exception clauses. This has become an issue for criticism.[3]

3 The general exception clauses of **other free trade agreements** are often either modelled on the GATT or contain equivalent justifications. An exception clause corresponding to Art. XX lit. g is, for example, established by Art. 91 lit. f of the **Association Agreement between the European Community and Chile**.[4]

4 **Art. 2101.1 NAFTA** explicitly supplements its general reference to Art. XX by providing that in the context of NAFTA, Art. XX lit. g "applies to measures relating to the conservation of living and non-living exhaustible natural resources". By this reference NAFTA expressly clarifies the interpretation of Art. XX lit. g for its purposes, although the same result has been reached by the dispute settlement bodies' interpretation of the term "natural resources" in the context of disputes involving Art. XX lit. g.[5]

B. Legislative History

5 Art. XX lit. g is based on a **1946 US proposal**. The latter provided an exception to the freedom of export for measures "relating to the conservation of exhaustible natural resources if such measures are taken pursuant

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[1] See below, para. 16.

[2] See, for example, *Ahn*, Mich. J. Int'l L. 20 (1998–1999), 819–870; *Bowen*, Ga. J. Int'l & Comp. L. 29 (2000–2001) 181–292; *Stoll*, ZaöRV 63 (2003), 439–458; *Davey* in: *Ortino & Petersmann* (eds.), 191–216; *Opuhu Awuku* in: *Ortino & Petersmann* (eds.), 341–352.

[3] See below, para. 50.

[4] Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, OJ L 352 (2002), 3 *et seq*.

[5] See below, para. 20.

to international agreements or are made effective in conjunction with the restriction on domestic production or consumption".[6] This draft did not seem to have any direct model when it was tabled. Although no records exist to that extent the US government may have meant to refer to the export of oil. The wording of the draft and the context in which it was tabled seem to indicate that the exception was designed to provide for restrictive measures concerning export in connection with domestic conservation measures rather than measures on import concerning natural mineral resources.

6 The motivation the US government may have had when tabling its draft and the motivation of the governments concerned when accepting the wording of GATT are, apart from the uncertainties which exist in this respect, of limited relevance for the interpretation of Art. XX lit. g. According to the Vienna Convention on the Law of Treaties,[7] the *travaux préparatoires* are only supplementary means of interpretation not primary ones.

C. Interpretation

I. Dispute Settlement—The Evolving Understanding of Art. XX lit. g

7 Art. XX lit. g is one of the few general exception clauses under Art. XX that have initiated several disputes under the GATT and WTO dispute settlement mechanisms. Disputes about trade under the GATT and standards of environmental conservation date back to the late 1980s and early 1990s. Not all of the relevant reports were adopted. However, not just adopted Panel Reports such as that in *Canada—Herring and Salmon*[8] but also reports that were not adopted have to be taken into consideration. Only a consideration of all panel and Appellate Body reports in question reveals the evolving interpretation of Art. XX lit. g in the relevant GATT and WTO case law. This evolution has to be seen as a reaction to the criticism of these panel reports at the political level and in the relevant literature.

8 This means that an analysis of case law related to Art. XX lit. g has to consider the two GATT Panel Reports concerning *US—Tuna*,[9] (***Tuna (Mexico)*** and ***Tuna (EEC)***), although these reports were not adopted

[6] GATT Analytical Index I, 586; US Department of State, Suggested Charter for an International Trade Organization, Department of State Publications No. 2598, Commercial Policy Series No. 93, Art. 32.

[7] Vienna Convention on the Law of Treaties, UNTS 1155 (1969), 331, 23 May 1969, Art. 32.

[8] Panel Report, *Canada—Herring and Salmon*, BISD 35S/98.

[9] Panel Report, *US—Tuna (Mexico)*, BISD 39S/155, Panel Report, *US—Tuna (EEC)*, DS29/R.

under the GATT 1947 dispute settlement procedures. It is one of the particularities of Art. XX lit. g that it sparked criticism and drew international attention to the issue of trade and environmental conservation particularly by means of those reports the CONTRACTING PARTIES to the GATT 1947 ultimately refused to adopt.

9 As relevant as the two reports on restrictions on the import of tuna is the case dealt with under the WTO dispute settlement mechanism concerning ***US—Shrimp***, (Shrimp/Turtle case) which comprised a Panel report and an Appellate Body report.[10] The issue of the conservation of sea turtles and dolphins under the GATT Panels attracted world-wide attention. The controversy had considerable weight in the following discussions on the "greening" of the WTO and on reconciliation between free trade on the one hand and environmental conservation on the other hand.[11]

10 In particular, environmentalists have voiced massive criticism of the Panel Reports relating to Art. XX lit. b and g. However, a close analysis of the case law on Art. XX lit. b and g shows that environmental concerns have been given substantially more weight in WTO case law than in earlier GATT Panel reports. This holds true even for those cases where—for a variety of reasons—unilateral measures allegedly aiming at the conservation of natural living resources were not recognized as justifiable under Art. XX lit. g and, particularly, the introductory language of Art. XX, the so called "Chapeau".

11 Although the political issues involved in the relevant cases and the further discussion on the relationship between trade and the environment are manifold, the main legal issues centre around **five questions** of interpretation: (1.) What is meant by exhaustible natural resources; does the term, in particular, include living resources? (2.) Does Art. XX lit. g allow for the conservation of a natural resource occurring outside the territorial boundaries of the state employing certain trade measures? (3.) What does "relating to" mean? (4.) To what extent may a Member act unilaterally rather than on the basis of a negotiated instrument and coerce other Members into adopting conservation measures of an equivalent or even identical nature? (5.) What requirements have to be met by domestic restrictions on production and consumption?

12 In addition to these questions, the application and interpretation of the **Chapeau** of Art. XX is another legal issue of central relevance to the

[10] Panel Report, *US—Shrimp*, WT/DS58/R; Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R.

[11] See on that *Stoll*, ZaöRV 63 (2003) 439, 452 *et seq.*; *Bentley*, Fordham Int'l L. J. 24 (2000–2001), 107–131; *Weinstein & Charnovitz*, Foreign Affairs 80 (2001), 147–156.

case law dealing with Art. XX lit. g.[12] In contrast to the conclusions of the Panel in *US—Shrimp*,[13] it is by now the common practice of the dispute settlement bodies first to assess whether a measure meets the requirements of the subparagraphs of Art. XX before reviewing the further requirements of the Chapeau.

II. Measure

13 The question of what constitutes the **measure** in a given dispute which is to be examined by a Panel or the Appellate Body under Art. XX lit. g is, at first, a jurisdictional issue. It defines the scope of the Report of the Panel or the Appellate Body as the case may be. The underlying question is whether the whole law or only the relevant provision which allegedly violates Art. XX lit. g should be scrutinised. The Appellate Body in *US—Gasoline* stated: "no one has suggested in their final submissions that the Appellate Body should examine under Article XX [GATT 1994] any portion of the Gasoline Rule other than the baseline establishment rules held to be in conflict with Article III:4 [GATT 1994]. No one has urged an interpretation of 'measures' which would encompass the Gasoline Rule in its totality".[14] This does not mean, though, that when assessing a particular rule, such as the baseline establishment rules in the *US—Gasoline* case, the Panel or the Appellate Body should not take into account the object and purpose of the relevant law or rules complementing the one under scrutiny. On the contrary, the Appellate Body did exactly this.[15]

14 Account has also to be taken of the fact that the term "measures" is equally being used in Art. XI and that it has been given a broad meaning in this context.[16] This interpretation of the term applies to Art. XX lit. g, too.

III. Exhaustible Natural Resources

15 As already indicated, at the time of the adoption of Art. XX, the introduction of an exception for measures relating to **exhaustible natural resources** into the catalogue of justifications under Art. XX primarily focused on mineral resources such as oil. Hence, Art. XX lit. g may by its origin be read together with the other two exceptions relating to commodities, Art. XX lit. h and i.

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[12] See generally *Wolfrum*, Article XX [Chapeau] GATT 1994.

[13] The Panel found that the US measure violated the Chapeau and, consequently, did not feel any necessity to deal with Art. XX lit. b and g GATT 1994, Panel Report, *US—Shrimp*, WT/DS58/R, paras 7.29 and 7.62 *et seq*.

[14] Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, 14.

[15] *Ibid*., 19–20.

[16] See *Wolfrum*, Article XI GATT 1994, para. 14.

16 Several panels defined "exhaustible natural resources" as including migratory species of fish. For example, the Panel in *Canada's Landing Requirements for Pacific Coast Salmon and Herring* noted that both parties considered tuna stocks to be an exhaustible natural resource in need of conservation measures.[17] In *Canada—Herring and Salmon*, the Panel agreed with the parties that salmon and herring stocks are exhaustible natural resources.[18] The findings of both Panel Reports in this respect should not be overrated, though, since the qualification of those living resources as exhaustible natural resources was not disputed by the parties. The same is true for the Panel Report in *US—Tuna (EEC)*.[19] Nevertheless, the attitude of the parties in this respect reflects the changing attitude of States to the need to provide for the sustainable management and utilisation of living resources. The issue of including **living resources** in the definition of exhaustible natural resources, however, became more difficult when the complainants in *US—Shrimp* questioned this fact.[20]

17 A **textual approach** to the interpretation of Art. XX lit. g does not restrict the meaning of natural resources to non-living resources. In this context the main question relating to the interpretation of the term "exhaustible natural resources" is whether it is allowed to adapt the term to modern problems not envisaged at the time of the term's adoption. Furthermore, the question whether living resources that reproduce can be considered as "exhaustible" in contrast to *e.g.* mineral resources must be analysed.

18 In general, the interpretation of terms in international treaties based upon Art. 31.1 VCLT as an expression of customary rules on treaty interpretation follows an **objective approach** that focuses primarily on their ordinary meaning, and the context, object and purpose of the norm in question. This, however, does not mean that a term that allows for different interpretations has to be limited to its interpretation at the time of its inclusion in a treaty. Interpretation must not be static but can change with the changing perspectives of the entities competent to interpret it at any given time, *e.g.* the member states or dispute settlement bodies. This is particularly so for terms that are by their very nature open to changes in understanding, such as the expression "public morals".

19 The question whether the term "natural resources" includes living resources, although the creators of the GATT 1947 focused on mineral resources when introducing the exception, can only be addressed by reference to a

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[17] Final Panel Report under the Canada-US Free Trade Agreement, *Canada's Landing Requirements for Pacific Coast Salmon and Herring*, Secretariat File No. US 89–1807–01, 16 October 1989.

[18] *Canada—Herring and Salmon*, BISD 35S/98.

[19] *Tuna (EEC)*, DS29/R.

[20] *US—Shrimp*, WT/DS58/R, paras 3.237 *et seq*.

changed common understanding. This understanding is reflected by a variety of international instruments that embrace both the living and the non-living components as natural resources. Only if one pursues a dynamic interpretation of certain terms and, takes into consideration that "natural resources" are understood in international law to include living resources can the scope of Art. XX lit. g GATT 1994 be extended beyond its original meaning.

20 In accordance with a more **dynamic interpretation** of the GATT, the Appellate Body in *US—Shrimp* found that the generic term "natural resources" was not static, but had to take into account the relevance attached to living resources as an environmental resource.[21] Thus, the interpretation of Art. XX lit. g is now in line with the understanding of the notion of 'natural resources' in international law in general. It is, finally, a well-established fact that even living resources that are capable of reproduction may be exhausted. The situation of some species of marine living resources, such as sea turtles, whales and sharks is telling in this respect.

21 The understanding of natural resources to include living resources has been commented on widely, less so another broadening of the term "natural resources" by two other Panel Reports. The Panel Report in *US—Taxes on Automobiles*[22] and, in particular, the Panel Report in *US—Gasoline*[23] further provided for an extended understanding of the notion of "exhaustible natural resources", namely clean air. This interpretation may, in the future, become of quite some significance since it opens up the possibility of reading elements of the regime of climate protection into Art. XX lit. g. The Panels considered policies intended to conserve gasoline and to reduce the depletion of clean air as policies conserving natural resources within the meaning of Art. XX lit. g. It is now well established in international environmental law that clean air is a natural resource which requires sustainable management so that it is not depleted. It would be just a normal consequence of this to consider the ozone layer and the climate equally as natural resources which may be depleted if not managed in a way which guarantees sustainability.

IV. Jurisdictional Limitations Concerning Natural Resources?

22 In the GATT and WTO cases involving natural resources the question arose whether the resource to be conserved must be located within the **territorial boundaries** of the state imposing trade-related measures or

[21] *US—Shrimp*, WT/DS58/AB/R para. 130.
[22] Panel Report, *US—Taxes on Automobiles*, DS31/R (unadopted), paras 3.316–3.323.
[23] As in the conclusions of the Panel and Appellate Body in *US—Gasoline*, see *US—Gasoline*, WT/DS2/AB/R, 13.

whether any other link is sufficient. Two Panel Reports, both unadopted, advocated limitations in this respect. This interpretation is, however, no longer sustainable.

23 In *US—Tuna (Mexico)*, the Panel, relying on the legislative history of Art. XX and on the object of purpose of Art. XX lit. b, held that **extra-jurisdictional** protection of life and health did not extend to restricting imports whenever life or health protection policies in the exporting country were not identical to those in the importing country.[24] The Panel then found that the same consideration applied to Art. XX lit. g.[25] The Panel's reasoning was strongly influenced by functional considerations.[26] The Panel in *US—Tuna (EEC)* rejected this narrow interpretation of the jurisdictional scope of Art. XX by pointing out that such interpretation had a basis neither in the legislative history of that provision nor in its text.[27] In particular, the Panel emphasised that Art. XX lit. b did not envisage the jurisdictional limitation argued for in the Panel Report in *US—Tuna (Mexico)* and that under general international law states are not barred from regulating the conduct of their nationals with respect to people, animals, plants and natural resources outside their territory. On that basis the Panel refused to accept any such conclusion for the interpretation of Art. XX lit. g. In consequence thereof the Panel permitted the extraterritorial application of US policies to extend only to US nationals and vessels, *i.e.* through personal jurisdiction. However, the Panel emphasised that Art. XX lit. g cannot be used to achieve the environmental goals of a nation by coercing other states into changing their policies or adopting the desired conservation policies. Finally, the Panel found that existing multilateral environmental agreements were not relevant for the interpretation of Art. XX under either Art. 31 or Art. 32 VCLT.[28] These latter considerations were criticised.

24 In *US—Shrimp*, the Appellate Body found that it did not have finally to decide upon the question of extra-jurisdictional or extra-territorial application of the relevant national measures in general. The Appellate Body held that, in the case at hand, there was a **sufficient *nexus*** between the extra-territorial resource and the US territory for the purpose of Art. XX lit. g. The latter resulted from the fact that marine turtles were a highly migratory species. Although they spent large parts of their life cycles outside territorial waters

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[24] *US—Tuna (Mexico)*, BISD 39S/155, paras 5.25–5.29.

[25] *Ibid.*, para. 5.26.

[26] *Ibid.*, para. 5.27, it stated: "The Panel considered that if [...] each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement, [the] General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations."

[27] *US—Tuna (EEC)*, DS29/R, paras 5.31 and 5.33.

[28] *Ibid.*, paras 5.19, 5.20.

they regularly migrated to or traversed waters under US jurisdiction.[29] On that basis the Appellate Body concluded that for natural resources of the seas the occurrence of the relevant resource in waters under the jurisdiction of the Member invoking Art. XX lit. g is sufficient.

25 On a more general level, there is **no indication**, though, of **what constitutes a "*nexus*"** and how strong the link to the territory of a Member has to be in order for Art. XX lit. g to be relied on. The Appellate Body does not give sufficient guidance for the interpretation of Art. XX lit. g in this respect. It seems to be sustainable, though, to argue that measures undertaken by a State to protect an ecosystem which expands over areas under the jurisdiction of that State as well as over other areas may be covered by Art. XX lit. g. Equally, States may take measures under Art. XX lit. g protecting migratory species which spend part of their life cycles or a particular season in areas under their jurisdiction or which pass through an area under their jurisdiction. However, a complete lack of any connection, *e.g.* as far as the conservation of a natural resource exclusively occurring in the **high seas or the deep seabed** is concerned, would most likely lead to a jurisdictional limitation.

V. Unilateral Measure/Failure to Negotiate/Coercive Character of the Measure

26 One of the most controversially discussed aspects of the interpretation of Art. XX lit. g is whether Members may enact trade restrictions unilaterally with a view to inducing or coercing other Members to adopt equivalent or even identical environmental measures to those adopted for domestic producers. This was again the issue in the *Shrimp* case.[30] The Appellate Body criticised the "failure of the United States to engage [...] other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against shrimp exports of those other Members".[31]

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[29] *US—Shrimp*, WT/DS58/AB/R, para. 133.

[30] In 1989 the United States intensified its efforts to protect sea turtles with the adoption of Section 609 of the Endangered Species Act (Public Law No. 101–162 codified as 16 U.S.C. 1537) (section 609). Section 609(a) required the Secretary of State to begin negotiations for the development of bilateral and multilateral agreements for the protection of sea turtles. Section 609(b)(1) established a prohibition on the import of shrimp caught using technology that threatens sea turtle population. The ban was not applied to states which obtained a respective certification from the U.S. Department of State. For further details on the case see *US—Shrimp*, WT/DS58/AB/R. See also *Wolfrum*, Art. XX [Chapeau] GATT 1994, paras 13 et seq.

[31] *US—Shrimp*, WT/DS58/AB/R, para. 166.

27 The Appellate Body also criticised the coercive effect of the United States measure.[32] The analysis does not seem to differ in its outcome from findings of previous Panel reports. Both, the *Tuna (EEC)*[33] and the *Shrimp* Panel Reports[34] based their findings, amongst others, on the fact that the regulation forced other Members to change their policies.

28 It is to be noted, though, that the Appellate Body did not ultimately exclude unilateral measures, but that it required serious negotiations before taking unilateral actions as a last resort. Similar language was already included in the Panel Report on the *Shrimp* case.[35] This was again confirmed in the Report of the Review Panel.[36] Equally the Appellate Body did not categorically condemn the US legislation for being coercive but tried to examine its application. What is even more relevant is that the Appellate Body considered in this context the Rio Declaration[37] according to which unilateral actions to deal with environmental challenges should be avoided and should be based—as far as possible—on consensus.

29 The essential element in the reasoning of the Appellate Body seems to be that, before a Member can unilaterally restrict the freedom of trade, efforts are undertaken to come to a consensual solution. In this respect it is not sufficient to establish the ecological challenge and to call upon States through one or the other general multilateral environmental agreement to take action. What is necessary is that an attempt is being made to negotiate restrictions on the freedom of trade to meet such challenge rather than to take trade measures unilaterally to force Members into action. The threat to adopt trade restrictions if negotiations fail is legitimate as unilateral measures may be imposed as a means of last resort.

VI. The Relationship Between the Measure and the Legitimate Purpose

30 The interpretation of the **introductory language** of the subparagraphs to Art. XX that describes the *nexus* between the measure and the legiti-

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[32] *Ibid*., para. 161.

[33] *US—Tuna (EEC)*, DS29/R, at para. 5.26. It stated: "If, however, Article XX were interpreted to permit contracting parties to take measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the access to the markets would be seriously impaired […]."

[34] *US—Shrimp*, WT/DS58/R, at para. 751 stating: "[…] requiring that other Members adopt policies comparable to the US policy for their domestic markets and all other markets represents a threat to the WTO multilateral trading system […]".

[35] *US—Shrimp*, WT/DS58/R, at para. 7.61.

[36] Panel Report, *US—Shrimp (Article 21.5—Malaysia)*, WT/DS58/RW at para. 588; upheld by the Appellate Body Report, *US—Shrimp (Article 21.5—Malaysia)*, WT/DS58/AB/RW.

[37] ILM 31 (1992), at 874.

mate purpose allowed under its respective subparagraphs is most relevant for establishing whether a Member's unilateral measures can be justified under the general exceptions. According to the conclusions drawn by the Appellate Body in *US—Gasoline*, it would not be reasonable to suppose that the different terms used by the different subparagraphs of Art. XX would require the same degree of connection, as this would be contrary to the accepted rules of interpretation.[38]

31 The term **"relating to"** is not exclusively used by Art. XX lit. g but is also part of the exception established for imports and exports of gold and silver under Art. XX lit. c and for products of prison labour under Art. XX lit. e. However, the only Panel decisions prior to the foundation of the WTO that dealt with the interpretation of the term "relating to" were those dealing with questions under Art. XX lit. g. The Panels' findings are still relevant for today's interpretation of the exception.

32 In accordance with the general distinction between the different phrases used by the subparagraphs of Art. XX, the GATT Panel in *Canada—Herring and Salmon* decided that a measure did not have to meet the **necessity test** used in Art. XX lit. b, since the term "related to" was not equivalent to the term "necessary" used in other general exceptions under Art. X.[39]

33 On a textual approach to interpretation the term "related to" refers to a link between the measure and the aim that is not necessarily close. The establishment of a mere relationship between two things that is not further qualified by additional adjectives requires only a weak *nexus*. The Panel in *Canada—Herring and Salmon* however, came to the conclusion that measures had to be **primarily aimed at** the conservation of exhaustible natural resources, in order to be justifiable under Art. XX lit. g.[40]

34 Such an interpretation considerably narrows the **scope of application** of Art. XX lit. g. Despite criticism, WTO dispute settlement decisions have not explicitly renounced the GATT Panel interpretation of the term "relating to". Rather this understanding of the link between the measure and the conservation of natural resources was affirmed, *e.g.* by the Appellate Body in *US—Gasoline*. In this decision the Appellate Body refers to the object and purpose of the GATT when interpreting certain terms. It upholds the requirement of the primary-aim-test, despite the fact that the phrase "primarily aimed at" was "not itself treaty language".[41]

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[38] *US—Gasoline*, WT/DS2/AB/R, 16.
[39] *Canada—Herring and Salmon*, BISD 35S/98, para. 4.6.
[40] *Ibid.*
[41] *US—Gasoline*, WT/DS2/AB/R, 18.

35 In *US—Shrimp*, however, the Appellate Body avoided the language "primarily aimed at" and focused on the scope and reach of the measure and a **"reasonable" relationship** between the means and ends. In regard to the conservation of sea turtles this link between the measure and the aim was affirmed, and found to be a "real and close one" and "every bit as substantial" as the one in *US—Gasoline*.[42] Although such an interpretation strongly relies on the ordinary meaning of the phrase "relating to" and, hence, is completely in line with the focus of the general rule on interpretation, it remains to be seen whether future panels and Appellate Bodies will stop requiring that measures must be primarily aimed at the conservation of natural resources under Art. XX lit. g.

36 The Appellate Body Report in *US—Shrimp* added one further element concerning the underlying motive of the national measure challenged. It emphasised that the intention to induce or even coerce other States into changing their environmental policy does not render the measure in question *a priori* incapable of justification under Art. XX.[43]

VII. Domestic Restrictions on Production and Consumption

37 Like some other subparagraphs, Art. XX lit. g lays down further conditions that must be met in order to justify a trade-related measure. It is not sufficient that a measure relates to the conservation of exhaustible natural resources. In addition to meeting the requirements set in dispute settlement proceedings for establishing whether a measure is "relating to" the relevant objective, it must further be made effective **"in conjunction with"** restrictions on domestic production and consumption. Hence, to rely on the justification a state may not only restrict external trade but must also impose internal rules and regulations concerning the same issue.

38 The same Panel decision (*Canada—Herring and Salmon*) that first established the meaning of the term "relating to" also directs the interpretation of when a measure is made effective "in conjunction with" domestic production restrictions. The panel concluded that trade measures under Art. XX lit. g were made "in conjunction with" production or consumption restrictions, if they were—again—**primarily aimed at** making such restrictions effective.[44]

39 In the decision on *US—Gasoline* the Appellate Body decided that the interpretation of the clause "if such measures are made effective in conjunction with restrictions on domestic product or consumption" must be read to be a

[42] *US—Shrimp*, WT/DS58/AB/R, para. 141.
[43] *Ibid.*, para. 121.
[44] *Canada—Herring and Salmon*, BISD 35S/98, para. 4.6.

requirement of **"even-handedness"**[45] in the sense that only if restrictions that are imposed on foreign trading partners are made effective "jointly" or "together with" domestic restrictions on the economy can a balanced system of free trade and justifiable exceptions without protectionism be achieved. Such an interpretation of Art. XX lit. g gives up the final element of a test that allows external measures only if they are "primarily aimed at" supporting domestic measures.

VIII. *Amicus curiae* briefs by environmental NGOs

40 The question of whether and to what extent additional information by NGOs can be taken into consideration gained particular weight in disputes dealing with environmental questions, namely with the issue of living natural resources. The issue became a matter of WTO dispute settlement when the US appealed the Panel decision in *US—Shrimp inter alia* because the Panel had rejected several *amicus curiae* briefs presented by environmental NGOs and attached to the US submissions.[46]

D. Art. XX lit. g and the Trade and Environment Issue

I. Assessment of the Environmental Disputes under Art. XX lit. g

41 Although none of the environmental measures enacted by States were found to be justifiable under Art. XX lit. g if it was read together with the Chapeau of Art. XX, this finding must not be construed in such a way as to argue that the provision has no role as a justification for environmental trade-restrictive policies and respective domestic legislation.

42 The two *Tuna* reports[47] were not adopted. Hence, the reports did not develop binding force upon the parties and did not effectively interfere with US environmental legislation.

43 As early as in the *US—Gasoline* case the reasons for concluding that the relevant US measures were not a justified exception to the GATT free trade rules did not result from the limitations of Art. XX lit. g but from the interpretation of the Chapeau.[48]

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[45] *US—Gasoline*, WT/DS2/AB/R, 19.
[46] For details see *Stoll & Strack*, Article XX lit. b GATT 1994, para. 57.
[47] *US—Tuna (Mexico)*, BISD 39S/155; *US—Tuna (EEC)*, DS29/R.
[48] *US—Gasoline*, WT/DS2/AB/R.

44 Likewise, in the *US—Shrimp* case the main legal issues were the requirements established by the Chapeau and not an overly restrictive interpretation of Art. XX lit. g,[49] *e.g.* with respect to the question of extraterritorial jurisdiction, since the temporary occurrence of turtles in waters under US jurisdiction was deemed sufficient. Consequently, although the Appellate Body considered several aspects of the US legislation to be discriminatory, it held that the ban on the import of shrimps harvested without appropriate protection of sea turtles was at least provisionally justifiable. In particular, this report gave an indication of how Art. XX lit. g could be used to promote the sustainable management of natural resources, the latter term to be understood broadly.

45 Although not all matters have been resolved, in essence, the difficulties in defining the relationship between trade and the environment have moved from interpreting the environmental exceptions under Art. XX to more fundamental questions such as the applicability of the precautionary principle or the role of multilateral environmental agreements.

II. Multilateral Environmental Agreements

46 Despite the fact that, hitherto, the cases testing trade-related measures against the prerequisites of Art. XX lit. g have dealt with **unilateral measures** imposed by Members, the relationship between multilateral environmental agreements and the GATT remains an issue of concern not just in legal literature. The question behind the issue relates to the consideration whether a trade-restrictive measure imposed by a Member resulting from the implementation of a multilateral environmental agreement has to be treated in the same way as unilateral measure when tested under Art. XX lit. g.

47 Measures implementing multilateral environmental agreements and the relevant trade-related mechanisms provided for by many of them, such as **CITES**,[50] the Montreal Protocol[51] or the UN Fish Stocks Agreement,[52] could in principle fall under measures relating to the conservation of exhaustible natural resources. Another example is the Basel Convention.[53] Hence, Art. XX lit. g proves, once again, to be the gateway for fundamental considera-

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[49] *US—Shrimp*, WT/DS58/R.

[50] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), ILM 12 (1973), 1088.

[51] Montreal Protocol on Substances that Deplete the Ozone Layer, ILM 26 (1987), 1550.

[52] Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement), ILM 34 (1995), 1547.

[53] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, ILM 28 (1989), 657.

tion of the relationship between free trade and international environmental concerns. The main difference between measures based upon these or other multilateral environmental agreements on the one hand and isolated national legislation on the other is that the multilateral instruments reflect international consensus, albeit not necessarily a universal one, which the latter may be lacking. At least such multilateral environmental agreements clearly establish the necessity for the protection of the relevant natural resources, that such resources are exhaustible and that the imposition of limits on the free trade is considered an appropriate means of ensuring compliance. Therefore it may be assumed that measures based upon a multilateral environmental agreement may pass the test of Art. XX lit. g as well as that of the Chapeau of Art. XX if the measures are applied in substance to foreign and national products alike.

48 This, however, does not necessarily solve the problem with respect to those States which do not adhere to the multilateral environmental agreement in question, either because they are not parties to the agreement or because they do not fulfil their obligations. In this respect a differentiated approach is called for. The Montreal Protocol[54] and the UN Fish Stocks Agreement,[55] for example, mandate their States Parties to take restrictive action against non-member States, too. Such an approach is also to be taken into consideration in the context of Art. XX lit. g. Apart from that the Appellate Body in *US—Shrimp*[56] has indicated that trade measures may be taken with regard to States which, after all diplomatic means have been exhausted, refrain from adhering to a widely accepted multilateral environmental agreement or which fail to take corresponding environmental measures. This case-by-case approach to Art. XX lit. g does not, however, clarify the relationship between multilateral environmental agreements and the free trading system in general.

49 The need to clarify the relationship between multilateral environmental agreements and the free trading system established by the WTO was first formally recognised by the **Ministerial Decision on Trade and Environment** that was adopted by the Ministers at the meeting of the Uruguay Round Trade Negotiations Committee in Marrakesh on 14 April 1994.[57] The newly established Committee on Trade and Environment was given the task of, *inter alia*, addressing "the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements".[58] This

[54] ILM 26 (1987), 1550.
[55] ILM 34 (1995), 1547.
[56] *US—Shrimp*, WT/DS58/R.
[57] Ministerial Meeting at Marrakesh, Decision on Trade and Environment, 14 April 1994, <www.wto.org/english/docs_e/legal_e/56_dtenv.pdf>.
[58] *Ibid.*

issue has remained on the Committee's agenda ever since. Its relevance for the WTO trading system was reaffirmed by the decision at the Doha Ministerial Conference in November 2001 to enter into negotiations with the aim of clarifying the relationship between the multilateral trade and environmental regime.[59]

III. A Potential Reference to "the Environment" for Art. XX lit. g?

50 The question whether Art. XX lit. g—or Art. XX lit. b—should be amended to contain an explicit reference to **"the environment"** has been discussed extensively. The creators of the GATT 1947 did not take account of general environmental considerations other than the life of plants and animals because the issue was not yet of any serious international concern. The GATT 1994 decided against such an inclusion in the catalogue of general exceptions and instead kept the text of the GATT 1947, although environmental issues had meanwhile become a focus of international relations and despite the reference to the preservation of the environment in the preamble to the Agreement establishing the WTO.

51 The main argument against the inclusion of such a reference is the perception that measures aiming at the conservation of all sorts of environmental resources could, in principle, be tested as referring to "exhaustible natural resources" either under Art. XX lit. g or under Art. XX lit. b as referring to the protection of human, animal or plant life.

52 Hence, an amendment of Art. XX to include a reference to multilateral environmental agreements would provide only for **interpretive clarification** but not necessarily for a substantial modification. The lack of substantial change that might nevertheless result in the potential enhancement of clarity, however, could also be employed as an argument in favour of an inclusion of an exception of "the environment" into the catalogue of Art. XX, since the exceptions would not be broadened and unilateralism would not be promoted by such a clarification.

53 Other trade agreements adopted after the text of the original GATT 1947 have provided for explicit references to "the environment" to avoid interpretive difficulties in the realm of measures relating either to exhaustible natural resources or of measures relating to animals and plants. Art. 226.1 lit. j of the Revised Treaty of Chaguaramas Establishing the Caribbean

[59] Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Ministerial Declaration, Adopted on 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001.

Community Including the CARICOM Single Market and Economy,[60] for example, allows an exception for measures "relating to the conservation of natural resources or the preservation of the environment".

54 Although not referring to measures aimed at the conservation of "the environment", Art. 2101 NAFTA explicitly makes it clear that its reference to Art. XX lit. b is to be understood to cover "environmental measures necessary to protect human, animal or plant life or health". However, an extension of Art. XX lit. g—other than explicitly including living resources—is not envisaged by Art. 2101 NAFTA.

55 Before one embarks on a cumbersome process for revising Art. XX, Art. XX lit. g should be exhausted. An interpretive statement by the WTO Ministerial Conference should also be considered.[61]

[60] Text accessible at <www.caricom.org>.
[61] As to the various options see *Stoll*, ZaöRV 63 (2003), 439, 454 *et seq*.

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h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the contracting parties and not disapproved by them or which is itself so submitted and not so disapproved;

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A. General

1 Art. XX lit. h accommodates the potential need to implement commodity agreements. It is the only exemption clause which explicitly covers measures in the context of an **international agreement**.

2 The significance of policies concerning trade in **commodities**, which has already been reflected by the **Havana Charter,** is addressed by two subparagraphs of Art. XX GATT 1994: Art. XX lit. h and i. The reference to measures relating to exhaustible natural resources in Art. XX lit. g is the third exception clause designed to safeguard Members' sovereignty over policies relating to the supply of and trade in commodities.

3 While the ordinary meaning of "commodities" could be generally equated to that of "products" or "goods", in the context of "commodity agreements" it refers more specifically to fungible goods, *i.e.* **raw materials** or **semi-processed goods** such as wheat, sugar, coffee, cocoa or tin.[1]

4 In principle, trade in commodities is governed by the GATT 1994 without any distinction from other goods, *i.e.* there is no special regime relating to trade in commodities. The supply of commodities is a vital element of a state's economy. For some commodities the competitive model of a world-wide free trade market seemed insufficient to establish an orderly, just and efficacious framework. Hence, the international regulation of trade in those

[1] *Walker*, Law & Contemp. Probs. 28 (1963), 392, 392.

commodities which experienced special problems regarding their production or unregulated trading was for many years considered a necessity for international economic and developmental stability.

The exception in Art. XX lit. h refers only to **intergovernmental commodity agreements** that fulfil certain accepted criteria or are approved by the Members. The article is a reflection of the importance the international community attributed to intergovernmental commodity agreements as a means to "tame" and stabilize the market for certain commodities at the time of the negotiation of the GATT 1947. *5*

International Commodity Agreements (ICAs) are a special kind of trade agreement that played a significant role in controlling commodity markets after World War II and, particularly, during the 1970s as part of the **New International Economic Order** (**NIEO**). Today, however, they have lost their relevance. *6*

B. Commodity Agreements: Development and Actual Relevance

I. The Regulations on Commodity Agreements in the Havana Charter

The **Havana Charter** elaborated extensively on intergovernmental commodity agreements in its Chapter VI. Its Arts 55–70 set out the conditions under which commodity agreements are to be concluded and how they are to be administered. While measures restricting trade in manufactured goods were condemned by the Havana Charter, the same measures were permitted for commodities if agreed upon in an international commodity agreement. This contradiction in policies was due to the conditions that characterized the production and sale of certain primary commodities and that led to fluctuations and rapid swings in prices.[2] *7*

II. The Failure of Intergovernmental Commodity Agreements

Although the negotiation of international commodity agreements was perceived as one of the main pillars of the so-called New International Economic Order in the 1970s, all commodity agreements have by now ceased to operate effectively.[3] The last functional international commod- *8*

[2] *Wilcox*, 114.
[3] *Gilbert*, World Development 24 (1996), 1, 1.

ity agreement, the **International Natural Rubber Agreement**,[4] was terminated by the Council of the International Rubber Organization in September 1999, only two years after its entry into force.

9 While some agreements, like the **Sixth International Tin Agreement**[5] in 1985,[6] collapsed spectacularly, other commodity agreements failed due to a lack of willingness of states to continue operating under the international commodity regime.

10 Some agreements have been replaced by others that have lost the capacity to intervene in commodity trade and to regulate markets, but instead serve to improve the exchange of information and enhance co-operation in the field of certain commodities. An example of an instrument primarily concerned with improving information on the commodity in question is the **International Sugar Agreement**,[7] which was extended several times by resolutions of the International Sugar Council (ISC).[8]

C. Interpretation

11 In the absence of operational multilateral commodity agreements the exception allowed by Art. XX lit. h is of no practical relevance for **WTO case law**. It is also highly unlikely that the idea of regulative intergovernmental commodity agreements will be revived. If a Member feels the need to stabilize its supply of commodities by imposing trade-related restrictions on it, it must rely on other exception clauses permitted by the GATT 1994, *e.g.* Art. XX lit. i.

12 Not even during the operation of intergovernmental commodity agreements were there any dispute settlement proceedings involving Art. XX lit. h. Hence, there is no case law on the **interpretation** of this article. Since a measure can be justified only if it is "undertaken in pursuance of obligations" established by an accepted intergovernmental commodity agreement, the link between the measure and the commodity agreement is insoluble.

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[4] UKTS No. 91 (2000), 17 February 1995.
[5] UNTS 1282 (1982), 205, 26 June 1981.
[6] Although the instrument was once extended even after the collapse of the market regime, the Sixth International Tin Agreement expired on 30 June 1989 and the International Tin Council dissolved on 31 July 1991.
[7] UNTS 1703 (1993), 203, 20 March 1992.
[8] By the latest ISC decision dating from 29 May 2003 the International Sugar Agreement was extended until 31 December 2005.

Consequently, the test established by Art. XX lit. h is twofold: a measure must directly implement obligations established by an international commodity agreement and, furthermore, the commodity agreement in question must fulfil approved criteria or have been approved by the Members. As with all Art. XX subparagraphs, the conditions of the **Chapeau** of Art. XX must be met. *13*

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i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

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Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R.

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A. General

1 Art. XX lit. i primarily refers to the national supply of domestic **raw or semi-processed materials**. The relevance attached to trade in commodities and to safeguards concerning the supply of these at the time of the creation of the GATT 1947 is clearly visible from the exceptions established by Arts XX lit. h, lit. i and lit. g.

B. Balancing of Interests

2 Art. XX lit. i carefully balances states' sovereign interest in stabilizing and promoting their economy with the principles relating to free trade as established by the GATT. All exceptions allowed by Art. XX recognize the legitimacy of certain national interests that are of **general importance** to the Members.

3 However, the subparagraphs of Art. XX differ as to the requirements that have to be fulfilled in order to justify a measure. It is not just the question whether a measure must be "necessary" or "relating to" or "essential" to the recognized objective that distinguishes the preconditions under which a measure can be justified, but also the meeting of additional requirements established by some subparagraphs.

I. Additional Positive Requirements

4 In order to prevent states from assuming monopoly-like positions with regard to certain commodities, Art. XX lit. i imposes restrictions by setting out

further conditions that have to be fulfilled by any measure relying on the exception. First of all, export restrictions are allowed only for **domestic materials**. Hence, the export of imported commodities cannot be restricted by reference to Art. XX lit. i.

5 Secondly, the measure has to aim at ensuring only **essential quantities** of a material for a domestic processing industry, thereby preventing states from relying on policies to gather or stockpile certain materials in excess of actual need. The term "essential" is by its nature open to interpretation. So far no GATT or WTO dispute settlement organ has had to deal with the interpretation of what are "essential quantities" in this context. If a case arises, it may be desirable to establish at least some objective criteria on what constitute quantities that are "essential" to a processing industry. However, the ultimate decision in a dispute involving measures under Art. XX lit. i must depend upon its particularities, including the relevant Member's economic data concerning the commodities in question and the national market for related products. Hence, what may be essential quantities for one economy may fail to meet the requirements of Art. XX lit. i for another.

6 As a third additional requirement established by Art. XX lit. i, there must be a **governmental stabilization** plan in place that holds the domestic price of the relevant materials at a level below the world market price. Hence, there must be some (temporary) economic difficulties involving the commodity or the industry in question that call for governmental stabilization activities before a Member can invoke export restrictions on domestic raw or semi-processed materials.

II. Negative Requirements

7 To the three positive conditions that have to be met by a measure, two negative ones are added by Art. XX lit. i. Although any measure, after meeting the requirements of the relevant subparagraph, is also tested against the requirements of the **Chapeau** of Art. XX, Art. XX lit. i establishes additional negative requirements relating to non-discrimination and trade restrictions.

8 According to Art. XX lit. i a measure must not be protectionist, in the sense that it abuses the situation with the aim of raising exports or promoting the protection of certain domestic industries. To meet the second negative test a measure must not contravene the GATT provisions on **non-discrimination**.

9 This bundle of—positive and negative—additional requirements narrows the margin of applicability of the exception clause for Members. Consequently, this exception can be invoked only in very special domestic

economic circumstances in order to prevent disruptions of free trade in certain commodities.

C. Relevance and Interpretation

10 Like many other general exceptions that are allowed under the different subparagraphs of Art. XX, Art. XX lit. i has never been subject to dispute settlement proceedings under either the GATT or the WTO system.

11 According to the Appellate Body in *US—Gasoline* the relevant term used to characterize the measure is the term "**involving**".[1] Art. XX lit. i is the only subparagraph that uses this introductory language. However, the term "involving" cannot be the decisive factor for whether an export restriction can be justified under Art. XX lit. i.

12 The subparagraph also uses the term "**necessary**" to describe the *nexus* between the export restriction and its aim. Although the subparagraph is worded differently from Arts XX lit. a, b and d, any measure "involving" export restrictions on domestic materials must also meet the "necessity test" established by the relevant case law on Art. XX lit. b.[2] Otherwise, the qualification of the measure as necessary to achieve the legitimate aim of the exception would be meaningless.

13 Hence, a panel must first decide whether a measure is "involving" restrictions on exports and, in a second step, whether such a measure is necessary to ensure that essential quantities of domestic materials are available to a domestic processing industry. Only then must a panel analyse whether the further requirements established by Art. XX lit. i have been met.

[1] Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, 17.
[2] See *Stoll & Strack*, Article XX lit. b GATT 1994, paras 37 *et seq*.

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j) essential to the acquisition or distribution of products in general or local short supply; provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The contracting parties shall review the need for this sub-paragraph not later than 30 June 1960.

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Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R.

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A. General

When one examines Art. XX lit. j the **balancing** of free-trade interests and national concerns becomes particularly apparent. The exceptions allowed by Art. XX function as safeguards of Members' sovereignty over issues of generally recognized national importance. The countering of general or local shortages in supply is a concern that was perceived as an important and legitimate interest in international economic relations. Like Arts XII and XIX, Art. XX lit. j addresses a critical economic situation and provides for possible remedies. In referring to the idea of equitable sharing, the provision parallels Art. XIII. *1*

Although it does not explicitly refer to **agricultural products**, the circumstances of an application of Art. XX lit. j are most likely to be relevant concerning the supply of agricultural foodstuffs. The post-war situation at the time of the negotiation of the relevant provisions of the GATT 1947 explains the special concern of the contracting parties about permitting measures to compensate for shortages in the supply of certain goods. The acknowledgement of particular circumstances at the time of the establishment of the exception also gives reasons for the setting up of the review clause in the last sentence of the provision concerning the assessment of the continued need for Art. XX lit. j. *2*

B. Interpretation and Relevance

3 Today Art. XX lit. j is of only **historical relevance**.[1] Although the subparagraph has not been deleted from the catalogue of exceptions, it has neither been subject to any dispute settlement proceedings, nor is it likely that disputes will arise in the future.

4 No other subparagraph of Art. XX uses the term "**essential**" to establish a link between the measure and the legitimate objective it must pursue. Without any case law as guidance, it is difficult to establish to what extent the term "essential" differs from the term "necessary", which is more frequently used by the subparagraphs of Art. XX, namely Art. XX lit. a, b and d.

5 Art. XX lit. j sets out further conditions a measure has to meet. According to Art. XX lit. j a measure must not only be essential, but must also be consistent with the principle that all contracting parties are entitled to an equitable share of the relevant products. The article also introduces an explicit temporal element by providing that a measure must be discontinued as soon as a shortage in supply has ceased to exist. These further requirements seem to indicate a **narrow interpretation** of the circumstances in which a measure relying upon Art. XX lit. j can be justified.

6 Consequently, as a minimum, "essential" measures can only be those that are the least trade restrictive, *i.e.* they must be "**necessary**" to begin with. Since the Appellate Body in *US—Gasoline* made it clear that different terms used by the subparagraphs of Art. XX are not to be interpreted to mean the same, it might have been—had the article ever been subject to dispute settlement—that "essential" had been interpreted in an even stricter manner than the term "necessary", *e.g.* by referring to the temporal element indicated by the further conditions established by Art. XX lit. j.

[1] *Stoll & Schorkopf*, Max Planck CWTL, Vol. 1, para. 186.

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AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Preamble TBT

Members,

Having regard to the Uruguay Round of Multilateral Trade Negotiations;

Desiring to further the objectives of GATT 1994;

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 labelling 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 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 endeavours in this regard;

Hereby *agree* as follows:

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A. General

1 Nowhere in the TBT Agreement is the term "preamble" employed. Nonetheless, the Appellate Body in its jurisprudence has referred to the TBT Agreement's introductory clauses as the "preamble" to the TBT Agreement.[1] Be that as it may, the introductory clauses form a preamble under international law in the sense that it sets forth the common considerations and shared principles of the Members of the WTO and clarifies the

[1] See, *e.g. US—Shrimp*, WT/DS58/AB/R, paras 129–131; *EC—Tariff Preferences*, WT/DS246/AB/R, para. 161.

objectives and purposes of the TBT Agreement.[2] While undisputedly not creating any direct obligations on the part of WTO Members, the express introductory statements of intent may be of decisive importance as an input in the textual interpretation of the TBT Agreement (other than the Preamble) in a legal dispute between WTO Members.[3] Art. 31.2 VCLT pays tribute to such understanding by declaring the preamble to an international convention as constituting the context of interpreting a treaty.[4] In *EC—Sardines*, the Appellate Body readily referred to the third and eighth recitals of the Preamble to the TBT Agreement to justify a broad reading of the obligations under Art. 2.4 TBT.[5] Each of the Preamble's recitals is discussed below. With little deviations, the Preamble resembles that of its predecessor, the Tokyo Standards Code.[6]

B. Uruguay Round Negotiations (Rec. 1)

Like its predecessor, the Tokyo Round Standards Code,[7] and like most of the other agreements consolidated within the legal framework of the WTO, the Preamble to the TBT Agreement in Rec. 1 starts with a reference to the multilateral trade negotiations which gave rise to its formation: the Uruguay Round, starting with the Punta del Este Ministerial Declaration of 20 September 1986, and resulting, after negotiations had ended on 15 December 1993, in the establishment of the World Trade Organization *2*

[2] On the potential content of preambles in international law, see *You; Bittner*. Generally, international treaty law refers to the preamble as narratio and to the operative part of the treaty as dispositio. See *Treviranus*, in: *Bernhardt* (ed.), EPIL III, 1097.

[3] On other, less important functions of a preamble such as easing the conclusion of negotiations, see *Grochla*, in: *Grochla* (ed.), column 1797.

[4] In accordance with general international law, the Appellate Body in its jurisprudence frequently invokes preambular text in an attempt to shed light on a given provision. See Appellate Body Report, *US—Gasoline*, WT/DS2/AB/R, 30; Appellate Body Report, *Brazil—Desiccated Coconut*, WT/DS22/AB/R, 17. See further its report *US—Shrimp*, where, for the purpose of interpreting the meaning of "exhaustible natural resources" in Article XX lit. g GATT 1994, the Appellate Body rejected a static, "originalist" approach based on the reference in the Preamble of the WTO Agreement to "sustainable development". *US—Shrimp*, WT/DS58/AB/R, paras 129–131. In respect of the Preamble to the WTO Agreement, it has been correctly noted that although the Appellate Body frequently refers to the Preamble rather tends to give greater weight to the immediate context of a given provision in an agreement than the Preamble itself. See *Bogdandy*, Max Planck CWTL, Vol. 2, Preamble WTO Agreement, para. 4. This constitutes common practice among international courts and tribunals. Moreover, in the above-mentioned *US—Shrimp* case, the Apellate Body even relied on the preambular text to override the "wording" of Art. XX lit. g GATT 1994. *US—Shrimp*, WT/DS58/AB/R, paras 129–131.

[5] Appellate Body Report, *EC—Sardines*, WT/DS231/AB/R, para. 215. Compared to the preambles to other WTO Agreements, *e.g.*, the Agreement on Agriculture, the TBT Agreement's Preamble arguably talks more of endeavours than of strict commands.

[6] Tokyo Round Agreement on Technical Barriers to Trade, BISD 26th Supp., 1980, 8.

[7] *Ibid.*

on 1 January 1995 and the entry into force of the TBT Agreement.[8] Like in the Tokyo Round, trade diplomats felt the need to designate a separate and special agreement to deal with concerns relating to technical barriers to trade.[9] Given that, tariffs due to the negotiations over the various GATT rounds were at a historical low and regulation and standardization activities were increasing in order to protect the health and safety of citizens, safeguard the environment and protect consumers, it was clear that non-tariff barriers such as technical barriers to trade would constitute one primary means of fragmenting of world markets and protectionism in the future.[10] As a consequence, the main purpose of the Uruguay Round negotiations on technical barriers was the further improvement, clarification and expansion of the Tokyo Round Standards Code.[11]

C. Objectives of GATT 1994 (Rec. 2)

3 Rec. 2 categorizes the legal framework of the TBT Agreement as an elaboration, consolidation, and continuation of the GATT regime. By expressing the desire to "further the objectives of GATT", it emphasizes the common objectives of GATT 1994 and the TBT Agreement, *i.e.*, enhancing the welfare of its members as well as their nationals by ensuring the smooth, free, and predictable flow of international trade.[12]

4 The background of the reference to GATT is the fact that, like other multilateral agreements on trade in goods attached in Annex 1A to the WTO Agreement, the TBT Agreement owes its existence to a large degree to the earlier failure of the GATT legal regime to cope with undesired and welfare-decreasing technical barriers to trade:[13] As GATT did not have special provisions to restrict technical barriers to trade, they were dealt with under the general provisions on non-tariff barriers. Most prominent

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[8] *Hilf & Oeter*, 87–91. Though the GATT experienced six earlier negotiation rounds (Annecy 1949; Torquay 1950–51; Geneva 1956; Dillon 1960–62; Kennedy Round 1964–67; Tokyo Round 1973–79), the Uruguay Round was the largest and most ambitious one. See *Stoll & Schorkopf*, Max Planck CWTL, Vol. 1, 13.

[9] See generally on the negotiating history of the TBT Agreement, *Stewart*, 1067–1105.

[10] *Tietje* in: *Prieß & Berrisch* (eds), 277.

[11] See *Stewart*, 1074, 1086, 1092. Note that the Tokyo Round Standards Code was binding only upon those GATT Members which had specifically ratified the Standard. Forty-three of more than 100 GATT Members had done so. *Marceau & Trachtman*, JWT 36 (2002) 5, 811, 814. The single undertaking approach was an invention of the Uruguay Round.

[12] Its wording—the reference to the objectives of the GATT 1994—deviates only slightly from the wording of the parallel recital of the Tokyo Standards Code, which referred simply to the objectives of the GATT, and became necessary because technically, with the establishment of the WTO, the "new" GATT 1994 incorporated the "old" GATT 1947. See para. 1 lit. a GATT 1994. On the objectives of the WTO Agreement, See *Bogdandy*, Max Planck CWTL, Vol. 2, Preamble WTO Agreement, *passim*.

[13] See *Fischer*, 62.

in this regard is Art. III:4 GATT which requires national treatment "in respect of all laws, regulations and requirements" affecting the sale of goods, and since the early GATT history has been interpreted broadly.[14] Accordingly, regulations which on their face accord equal treatment to imported and exported goods, may still be found in violation of Art. III:4 GATT if they disproportionately burden imported products in relation to their counterparts in the importing country.[15] Art. XX lit. b GATT, on the other hand, allows the justification of such a measure to be justified only if it is necessary for the maintenance of human, animal, or plant life or safety and does not amount to an unjustifiable discrimination or disguised protectionism. Different as in the case of Art. III:4, panels traditionally interpreted the provision narrowly, since it constitutes an exception.[16] This scheme of GATT provisions showed itself unable to draw the subtle distinction between those regulations and standards which pursue legitimate objectives, such as human health or environmental protection in response to market failures, from those which were merely protectionist in nature.[17] In addition, GATT's inability to regulate or difficulty in regulating private actors directly or subsidiary governments proved to be fatal.[18]

D. International Standards and Conformity Assessment Procedures (Rec. 3)

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However, the Preamble goes further than referring to the Uruguay Round and the objectives of GATT. As the Appellate Body put it in its report *EC—Sardines*, Rec. 3 underscores the important role international standards and conformity assessment systems should, and do in fact, play in the process of promoting and facilitating international trade.[19] The economic benefits of international standards are frequently praised.[20] Generally, one international standard instead of a multiplicity of standards allows efficiency gains for producers because they need to adapt to one single standard as opposed to several.[21] A higher degree of compatibility may also result in a higher degree of competition.[22] Likewise, international standards may inhibit a further race to the bottom and the entry of products with lower standards into a given market. In addition, the possibility of externalization

[14] *Tietje*, 7–8.
[15] *Ehring*, JWT 36 (2002) 5, 921, 921–977.
[16] *Tietje*, 8.
[17] *Fischer*, 62.
[18] *Sykes*, 65.
[19] *EC—Sardines*, WT/DS231/AB/R, para. 215.
[20] See *Mayeda*, JIEL 7 (2004), 737, 742. See generally *Schick*, 16–21.
[21] *Schick*, 16.
[22] *WTO*, World Trade Report 2005, 66.

of costs due to diverging policies is further minimized. Lastly, international standards to a large degree do not share the common inherent weaknesses of their domestic counterparts.[23]

6 However, it should be stressed that even from an economic point of view there are limits to harmonization, in the sense that harmonization is not a desirable option in all cases.[24] In some cases, costs of adjustment may be too high for some countries and therefore lead to less international trade than before.[25] In other cases, diverging standards may reflect divergent consumer preferences and tastes. In such instances, international standardization will lead to a loss of variety.[26]

E. Encouragement of International Development (Rec. 4)

7 In response to this mixed evaluation, Rec. 4, which, by its wording, prefers international solutions as opposed to national ones, clarifies that the TBT, different from the GATT legal framework, generally envisions a strong case for **harmonization**.[27] On a general level, **positive integration** through the cooperation of WTO Members and the recognition and adoption of international standards is offered as the best suitable solution to the **fragmentation** of world markets.[28] Accordingly, various provisions of the TBT Agreement favour international solutions over national ones.[29] However, the wording of these provisions makes it clear that the case for harmonization under the TBT Agreement is **by no means absolute**.[30] For example, Art. 9 merely states that Members are required to participate in international conformity assessment systems "wherever practicable". Similarly, while Art. 2.4 obliges Members to use relevant international standards as a basis for their national regulation, it allows deviations when their employment would be "ineffective or inappropriate" in the achievement of legitimate objectives. Accordingly, in effect, this means that national standards and technical

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[23] See below, para. 15.

[24] The topic is inherently complex. See the empirical literature and the effects of harmonization on trade in *WTO*, World Trade Report 2005, 66–67.

[25] *Ibid.* at 66.

[26] *Ibid.*; *Sykes*, 6.

[27] *Marceau* and *Trachtmann* noted that "harmonization of standards and co-operation of states in the formulation of international standards were viewed as tools" to address concerns over "multiple and divergent standards". *Marceau & Trachtman*, JWT 36 (2002) 5, 811, 814.

[28] *Mayeda*, JIEL 7 (2004), 737, 746. See generally, on positive integration within the WTO framework, *Petersmann*, CLMRev. 37 (2000), 1363 *passim*.

[29] *E.g.*, Art. 9 TBT in respect of conformity assessment.

[30] *See also* Art. 6.3 TBT (mutual recognition of conformity assessment procedures). See Rec. 6 Preamble TBT.

regulations can deviate substantially from international standards.[31] However, in the future, a rather restrictive reading of these provisions may lead to a situation where a WTO Member is under certain circumstances *de facto* obliged to adopt an international standard. The decision of the Appellate Body in the ***Sardines* Case** has already shown this tendency.[32]

The WTO does not itself develop and administer such international standards itself, mainly for practical reasons because it lacks the necessary resources. It is not an international standardising organization. Instead, the TBT Agreement, in a move towards closer cooperation between and among international organizations, refers—in various provisions[33]—to international standards and conformity assessment procedures as vehicles of integration. At the same time, such reference has a significant impact on international standardization bodies. The reference substantially increases their actual importance because their previous non-binding international standards now enjoy a normative value. In such manner, both the WTO and the international standardization community reinforce each other.[34] *8*

F. Unneccessary Obstacles to Trade (Rec. 5)

Rec. 5 mirrors the ambivalence of technical regulations, standards and conformity assessment procedures. *9*

On the one hand, standardization may serve multiple positive functions.[35] The value of a product may not only depend just on the quality or quantity of the product, when consumed alone, but on the increasing value due to the rising number of its consumers or the availability of complementary products.[36] For example, a cell phone is more valuable if a higher number of people is using the same compatible network. And a computer is more valuable if the supply of its software increases.[37] In such circumstances, standardization may capture **network externalities** and thereby create welfare gains. Standardization can further reduce the market failure of **information asymmetries**.[38] Manufacturers or suppliers may have more information on their products than on those of others. Whether as *10*

[31] See *Baldwin*, 16 who states that there "is also a 'requirement' to use international standards, but this is largely nullified since the requirement does not apply when international standards would be 'ineffective or inappropriate' means".
[32] *EC—Sardines*, WT/DS231/AB/R *passim*. See *Keck-Tamiotti*, Article 2 TBT, paras 36 *et seq*.
[33] *E.g.* Arts 2.4, 9 TBT.
[34] The practical effect can be seen in *e.g., EC—Sardines*, WT/DS231/AB/R, *passim*.
[35] *Maskus & Wilson*, 17–18.
[36] *WTO*, World Trade Report 2005, 35–41.
[37] *Tietje*, in: *Prieß & Berrisch* (eds) at 278.
[38] *Schick*, 18–19.

a consumer or as a producing firm buying inputs, a buyer may be in a significantly disadvantaged situation compared to the seller because the latter may have more necessary information regarding the product. Such information asymmetries may significantly hamper the proper, smooth and efficient functioning of the market.[39] Moreover, standardization provides incentives to take into account the impact of the economic activities on the environment.[40] Environmental pollution is another paradigm **market failure** because the flora and fauna which are negatively affected are not adequately priced in the production process. Therefore, producers may take advantage of these resources at a price which does not reflect the actual costs.[41]

11 On the other hand, domestic rules are too often designed with the intention to **protecting one's own industry** due to the influence of certain local constituencies.[42] Even if this is not the case, the norms still reflect local culture, preferences, technologies, traditions, and resources, disproportionately increasing the adjustment costs of foreign producers for the given market in comparison to the local producers.[43] Lastly, and equally importantly in this regard, even if an imported product fulfils all the necessary requirements for a given market, further substantial costs may be incurred simply by establishing such conformity.[44]

12 As a consequence, Rec. 5 condemns only **unnecessary obstacles** to trade. Rec. 5's wording is in Art. 2.2 (in respect of technical regulations), Art. 5.2.1 (in respect of conformity assessment procedures), and letter E of the Code of Good Practice in Annex 3 TBT (in respect of standards).[45] Thus, in accordance with Rec. 6, Members are free under the TBT Agreement to pursue legitimate regulatory purposes, but in the furtherance of such goal may not employ means which result in more than the necessary distortion of international trade. Under the least restrictive means principle, a Member is obliged to select the means which is equally suitable to achieve the chosen level of protection but minimizes the distortive impact on inter-

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[39] *Ibid.* at 19.

[40] *WTO*, World Trade Report 2005, 48–49.

[41] In the environmental sector, over the last three decades, governments have become largely active. *WTO*, World Trade Report 2005, 48.

[42] *Sykes*, 1; *Tietje*, in: *Prieß & Berrisch*, (eds) 277. On the negative effects on trade, see *Schick*, 21–27.

[43] *Sykes*, *Ibid.*, 1–2. It is clear, though, that a multiplicity of standards resulting in an actual variety of products for consumers is economically desirable.

[44] *Ibid.*, 2.

[45] See also Art. 2.5 TBT which in essence establishes a rebuttable presumption that technical regulations which are in accordance with international standards do not create unnecessary obstacles to trade. See *Keck-Tamiotti*, Article 2 TBT, paras 42 *et seq*.

national trade.[46] What this exactly means exactly is one of the major tasks of adjudication under the TBT Agreement.[47]

G. Sovereignty of Members (Rec. 6)

Throughout the Uruguay Round and even more intensely thereafter, possible tensions between the legal regime of the WTO and sovereignty of individual Members have been fiercely debated.[48] Rec. 6 addresses these concerns. Without explicitly mentioning the term **sovereignty**, Rec. 6 reaffirms and reinforces the right of any Member to choose the level of protection it deems appropriate in the pursuit of legitimate goals (*e.g.*, in the context of health), as long as no unjustifiable discrimination or disguised protection results therefrom.[49] Indeed, the Appellate Body has emphasized in several decisions (even though not directly on the TBT Agreement) the "important" and "undisputed" "autonomous right" to determine the adequate level of protection a Member wants to maintain or establish.[50] Nonetheless, in respect of the SPS Agreement, which applies to a special form of technical barriers, sanitary and phytosanitary measures, a prominent expert on international trade has declared national regulatory autonomy "in no small part illusory".[51] However, the specific tension between scientific evidence requirements and sovereignty under the SPS Agreement may be weaker under the TBT Agreement since it lacks an explicit scientific evidence requirement.[52] It remains to be seen, though, to what degree the Appellate Body reads such requirement into the provisions of the TBT Agreement. In the *EC—Sardines*, the Appellate Body, against the objections of the EC and the US, ruled that international standards under the TBT

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[46] *Fischer*, 197. Whether proportionality between the regulations and the risks of non-fulfillment of objectives is additionally required is a debatable issue. See *ibid*., 203–204.

[47] So far, no Panel or Appellate Body report has addressed the issue of necessity under the TBT Agreement. The necessity jurisprudence developed under Art. XX may serve as a model in this respect. See *Keck-Tamiotti*, Article 2 TBT, paras 15–20.

[48] The debate was mainly initiated by the accession of the United States to the WTO and has not stopped ever since. See (selected from a considerable and wide array of available literature) *Aceves*, Fordham Int'l L.J. 19 (1995), 427–474; *Hainsworth*, Osgoode Hall L.J. 33 (1995), 583–622; *Schaefer*, Hastings Int'l & Comp. L. Rev. 25 (2001–2002), 341–369; *Barfield*; *Sarooshi*, EJIL 15 (2004), 651–676. See also Chapter III (Sovereignty) of the Report by the Consultative Board to the Director-General, The Future of the WTO—Addressing Institutional Challenges in the New Millenium (2004), available at <www.wto.org>.

[49] See also the wording of the Chapeau of Art. XX GATT 1994.

[50] Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, para. 168 (on GATT); Appellate Body Report, *EC—Hormones (US)*, WT/DS26/AB/R, Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 172 (on SPS Agreement); Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R, para. 199 (on SPS Agreement).

[51] *Sykes*, Chi. J. Int'l L. 3 (2002), 353, 358.

[52] *Fischer*, 197–198. See Art. 2.2 TBT.

Agreement need not be adopted by consensus.[53] Thus, even if a Member plainly rejected a proposed standard in an international standardization organization, once adopted it becomes relevant for that member by virtue of the TBT Agreement's reference to international standards.[54]

H. Security Interest (Rec. 7)

14 Rec. 7, which reaffirms the right of a member to take any measure necessary in the interest of national security, reflects the general consensus among WTO Members that real **security interests** of a Member outweigh pure economic interests and, thus, must be preserved under the TBT Agreement. It is within this context that Art. 2.2 TBT identifies national security requirements as a legitimate regulatory objective of a Member's national regulations. Parallel thereto, Art. XXI generally clarifies that Members, in matters of national security, enjoy the greatest largest autonomy and discretion under the legal framework of the WTO.[55]

I. Transfer of Technology (Rec. 8)

15 Rec. 8, by recognizing the contribution of international standards to the **transfer of technology** to developing countries, stresses an additional function of the internationalization of standards: international standards serve as vehicles for the transfer of technology.[56] They inherently carry the technology on which they are based. By adopting the international standard, developing countries are able to absorb the underlying know-how, relieving the pressure on a developing nation to develop domestic standards in all industrial sectors quickly without the institutional capacity and infrastructure to do so.[57] Accordingly, participation in an international standardization organization by a developing country is in its own interest.[58] Yet, on a practical level and very often, developing countries, particularly the smaller economies, lack the necessary resources to do so.

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[53] WT/DS231/AB/R, para. 227; *Muñoz*, RDUE 2 (2003), 457, 469, who speaks of a "minirevolution".

[54] *E.g.*, Art. 2.4 TBT.

[55] See also the parallel provisions in XIV bis GATS.

[56] See the Appellate Body's emphasis on Rec. 8 in *EC—Sardines*, WT/DS231/AB/R, para. 215. See generally on the transfer of technology, *Stoll*.

[57] *Maskus & Wilson*, 21.

[58] *Middleton*, JWTL 14 (1980) 3, 201, 216 . On a practical level and very often, developing countries, particularly the smaller economies, lack the necessary resources to do so.

J. Ramifications for Developing Countries (Rec. 9)

16 Rec. 9 recognizes the difficulties developing countries face in the process of the creation and application of technical regulations, standards, and conformity assessment procedures and expresses the desire to support them adequately in their necessary efforts in this regard. In practice, developing country members often lack the institutional capacity and infrastructure to adopt and maintain a highly specific rule-based domestic system. In many cases, for business entities the lack of the necessary infrastructure in the home market makes the entry costs in a given foreign market extremely high. In addition, modern scholarship suggests that international harmonization, once perceived as a solution, does not keep its promise to developing nations.[59] International standards still tend to reflect the culture, preference, conditions and technologies in the developed world. A highly specific rule-based system necessitates however, a legal and business community which is receptive and amenable to the norms.[60] As a consequence, imposing them on a developing country may be difficult due to the **general lack of institutional capacity,** and, even if it is not, the **legal transplanting of a foreign norm** which has no local constituencies strongly supporting it may hinder rather than consolidate the growth of a sophisticated legal order.[61]

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[59] *See Pistor*, Am. J. Comp. L. 50 (2002), 97; *Sykes*, JIEL 2 (1999), 49; *Trebilock & Howse*, 502.

[60] *Pistor*, 98.

[61] *Mayeda*, JIEL 7 (2004), 737, 745. The TBT Agreement devotes the whole of Art. 11 to the issue of assisting developing countries. Art. 12 further provides for special and differential treatment of developing country members.

Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO-Technical Barriers and SPS Measures.*
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Article 1 TBT
General Provisions

1. General terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies taking into account their context and in the light of the object and purpose of this Agreement.
2. However, for the purposes of this Agreement the meaning of the terms given in Annex 1 applies.
3. All products, including industrial and agricultural products, shall be subject to the provisions of this Agreement.
4. Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.
5. 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.
6. All references in this Agreement to technical regulations, standards and conformity assessment procedures shall be construed to include any amendments thereto and any additions to the rules or the product coverage thereof, except amendments and additions of an insignificant nature.

Annex 1:
Terms and their Definitions for the Purpose of this Agreement

The terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement.
For the purpose of this Agreement, however, the following definitions shall apply:

1. *Technical regulation*
   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.
   Explanatory note
   The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called "building block" system.
2. *Standard*
   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 labelling requirements as they apply to a product, process or production method.
   Explanatory note
   The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.
3. *Conformity assessment procedures*
   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.

4. *International body or system*
Body or system whose membership is open to the relevant bodies of at least all Members.
5. *Regional body or system*
Body or system whose membership is open to the relevant bodies of only some of the Members.
6. *Central government body*
Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.
Explanatory note:
In the case of the European Communities the provisions governing central government bodies apply. However, regional bodies or conformity assessment systems may be established within the European Communities, and in such cases would be subject to the provisions of this Agreement on regional bodies or conformity assessment systems.
7. *Local government body*
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.
8. *Non-governmental body*
Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.

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A. General

1 Art. 1 of the Agreement on Technical Barriers to Trade (TBT Agreement) together with Annex 1 thereof lays down the **basic framework for the functioning of the TBT Agreement** as a legal shield against three identified potential technical barriers to trade: technical regulations, standards (as regulated in Arts 2–4), and conformity assessment procedures (covered by Arts 5–9). Art. 1 places the TBT Agreement within the general framework of the WTO and clarifies its relationship with other WTO Agreements. Annex 1 to the TBT Agreement continues to describe and define, accompanied in part by explanatory notes, the basic terms which are frequently used throughout the TBT Agreement and give meaning to its core provisions. Hitherto, the Appellate Body has addressed and clarified some substantive issues relating to Art. 1, specifically Annex 1, in two decisions: *EC—Asbestos*[1] and *EC—Sardines*,[2] and a Panel in one decision, *EC—Trademarks/GIs*.[3]

B. Temporal Scope of the Agreement

2 The issue of **temporal application** was decided in the *EC—Sardines* proceedings. The Panel, in light of Art. 28 VCLT, which states that treaties do not generally apply retroactively, ruled that the TBT Agreement applies to measures enacted before the establishment of the WTO which have not ceased to exist.[4] On appeal, the Appellate Body referred to its *EC—Hormones* report, in which it had determined the temporal scope of the SPS Agreement.[5] The Appellate Body cited its statement that the SPS Agreement does not contain any provision limiting the temporal application of that Agreement, or any provision thereof, to measures adopted after its entry into force and, in the absence of such stipulation, it cannot be assumed that the very large group of SPS measures already in force on 1 January 1995 should be excluded from the legal regime of the SPS.[6] Fol-

[1] Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R.
[2] Appellate Body Report, *EC—Sardines*, WT/DS231/AB/R.
[3] Panel Report, *EC—Trademarks and Geographical Indications*, WT/DS290/R.
[4] Panel Report, *EC—Sardines*, WT/DS231/R, paras 7.56, 7.59–7.60.
[5] *EC—Sardines*, WT/DS231/AB/R, paras 206–207.
[6] *Ibid.*, para. 206.

lowing its reasoning in *EC—Hormones*, the Appellate Body stated that unless a provision revealed a contrary intention, the same reasoning would apply to the TBT Agreement.[7] Accordingly, the Appellate Body agreed with the Panel's interpretation and held that the TBT Agreement was not restricted to measures which were formulated and adopted by a Member after the establishment of the WTO.[8]

C. Relationships with Other WTO Agreements[9]

I. Relationship with GATT

3 Since it was not until the very late stages of the Uruguay Round negotiations that the governments decided to pursue a single-undertaking approach and annex the resulting text of each working group to the final agreement, the TBT Agreement, like most WTO Agreements,[10] does not contain a provision clarifying its relationship with GATT. In its *Korea—Dairy* report, the Appellate Body held that "it is now well established that the **WTO Agreement is a 'Single-Undertaking'** and therefore all WTO obligations are generally cumulative and Members must comply with all of them simultaneously".[11] The Appellate Body continued by saying that the other annexed agreements on goods do not supersede or replace the new GATT 1994.[12] In justifying its decision, the Appellate Body pointed to Art. II:2 WTO Agreement and the principle of effective treaty interpretation (*effet utile*).[13]

4 As regards of the TBT Agreement in particular, the Appellate Body's practice follows a similar path. In its *EC—Asbestos* report, after it had reversed the Panel's decision not to apply the TBT Agreement to the French measure, the Appellate Body declined to complete the legal analysis of the issues raised by Canada under the TBT Agreement and went on to apply Arts III and XX GATT 1994 to the measure without further explanation—an approach which can be taken only on the assumption that the **TBT Agreement and GATT apply cumulatively**.[14] Nonetheless, despite the notion of cumulative application, the principle of judicial economy, on which WTO

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[7] *Ibid*., paras 206–207. The Appellate Body answered in the negative the question whether Art. 2.4 reveals a contrary intention. *Ibid*., para. 216. Critical, *Howse*, LIEI 29 (2002), 247; *Muñoz*, RDUE 2 (2003), 457.

[8] *EC—Sardines*, WT/DS231/AB/R, para. 216. Any other result would disadvantage developing countries which had no or only limited measures in place prior to 1 January 1995.

[9] See generally on conflicts between WTO Agreements, *Falke*, ZEuS 3 (2000), 307–334; *Montaguti & Lugard*, JIEL 3 (2000), 473–484.

[10] See however, *e.g*., Art. 21.1 AoA, Art. 1.6 ATC, and Art. 1.4 SPS.

[11] Appellate Body Report, *Korea—Dairy*, WT/DS98/AB/R, para. 74.

[12] *Ibid*.

[13] *Ibid*., paras 74, 81.

[14] *EC—Asbestos*, WT/DS135/AB/R, para. 83.

adjudication heavily relies, may lead to a situation the terms of the GATT become redundant in comparison to those of the TBT Agreement. Under the principle of judicial economy, Panels and the Appellate Body refrain from examining every claim of the complaining party and make findings on only those claims they deem necessary to resolve the particular issue.[15] In the *EC—Sardines* case, the dispute on a technical barrier was exclusively resolved by a finding of a violation of the TBT Agreement.[16]

5 Based on this understanding, the general interpretative note to Annex 1A—declaring that in the event of conflict between GATT and a provision in another agreement in Annex 1A, *e.g.*, the TBT Agreement,—does not play a major role in respect of the overwhelming majority of provisions. The Appellate Body has interpreted a conflict in this sense as "a situation where adherence to one situation will lead to a violation of another provision".[17]

II. Relationship with GATS

6 The TBT Agreement does not explicitly address its relationship with the General Agreement on Trade in Services (GATS). In its *EC—Bananas* report, the Appellate Body held that **GATT and GATS may overlap**, despite the fact that GATT applies to trade in goods while GATS applies to trade in services.[18] In cases where the dispute concerns commercial activities encompassing the sale of a product either combined with the performance of services or otherwise carrying a substantial relationship with the performance of services, the scope of application of both the GATT 1994 and the GATS may be opened.[19] Since the TBT Agreement, like GATT 1994, constitutes a multilateral agreement on trade in goods, such holdings can equally be applied to the TBT Agreement in its relationship with GATS.

III. Relationship with TRIPS

7 Neither does the TBT Agreement explicitly clarify its relationship with TRIPS. Nonetheless, the notion of **cumulative application** should apply

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[15] Appellate Body Report, *US—Wool Shirts and Blouses*, WT/DS33/AB/R, 18.

[16] The Appellate Body interpreted TBT issues exclusively, whereas the complainant, Peru, had argued a violation of GATT and TBT before the Panel. See *EC—Sardines*, WT/DS231/AB/R, para. 9.

[17] Appellate Body Report, *Guatemala—Cement I*, WT/DS60/AB/T, para. 65. See generally *Falke*, ZEuS 3 (2000), 307, 321–333.

[18] Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, para. 221; see also Appellate Body Report, *Canada—Periodicals*, WT/DS31/AB/R, 19.

[19] *EC—Bananas III*, WT/DS27/AB/R, para. 221.

to the relationship of the TBT Agreement with the TRIPS as it does in relation to GATS.[20] In respect of GATT, it has been argued that the TRIPS is different and constitutes *lex specialis*.[21] However, in *EC—Trademarks/GI*, the Panel considered GATT, TBT, and TRIPS issues equally without entering into the discussion.[22]

IV. Relationship with GPA (Art. 1.4)

8 The TBT Agreement explicitly regulates its relationship with the **Agreement on Government Procurement** (GPA). Art. 1.4 excludes from the Agreement's scope of application the politically sensitive purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies and declares the GPA applicable in this regard. Art. 1.4 further makes it clear that the TBT Agreement does not cover governmental purchasing specifications regardless of whether or not an individual WTO Member has ratified the (merely plurilateral) GPA.[23]

V. Relationship with SPS Agreement (Art. 1.5)

9 Art. 1.5 declares the **TBT Agreement inapplicable to sanitary and phytosanitary measures**. The provision is complemented by Art. **1.4 SPS** which states that "[n]othing in this [SPS] Agreement shall affect the rights of Members under the [TBT Agreement] with respect to measures not within the scope of this [SPS] Agreement". Accordingly, the small category of technical barriers to trade which constitute sanitary or phytosanitary measures is subject to the legal regime of the SPS Agreement, not that of the TBT Agreement.[24] In this regard, one should remember that the SPS Agreement is an innovation of the Uruguay Round and only one Standards Code for all kinds of technical barriers has existed since the Tokyo Round. Accordingly, insofar as SPS measures are product-related specifications and, therefore, technical regulations or conformity assessment procedures, the SPS Agreement, as a special tool for the regulation of a very narrow but special category of technical barriers to trade, is **lex specialis** to the TBT Agreeement.

10 Sanitary and phytosanitary measures are defined in Annex A.1 lit. a to d SPS. The first three of these sections are similarly structured: first, they name the public good to be protected (life and health of men, animals, or plants)

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[20] See para. 6.
[21] *Bronckers*, JWT 32 (1998) 5, 137, 143.
[22] See Panel Report, *EC—Trademarks and Geographical Indications*, WT/DS290/R, *passim*.
[23] A majority of developing countries and some developed countries have not ratified the GPA.
[24] Panel Report, *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.29.

in order to continue and, then, identify the dangers to the relevant public good (*e.g.*, the spread of diseases or risks from "additives", "contaminants", or "toxins" in food). The fourth section provides for a catch-all provision for all risks arising from the entry, establishment, or spread of pests. It should be noted that the objective of protecting human, animal, or plant health as such does not render the SPS Agreement applicable, but only when it is in respect of the special risks identified (in particular, food-borne risks). In addition, the SPS Agreement applies only to measures which directly or indirectly affect international trade.[25] Therefore, technical regulations on agricultural or industrial products, regulations on product safety, or application procedures for medicinal products, even though they serve the regulatory purpose of protecting one's health, fall within the realm of the TBT Agreement. Similarly, warnings on cigarette packets are covered by the TBT Agreement since cigarettes do not constitute food, whereas value limits for contaminants in pesticides or animal drugs in food are within the realm of the SPS Agreement.[26]

11 Due to this structure of the definition of SPS measures, further difficulties arise when one and the same government regulation serves an SPS purpose and a non-SPS purpose, or addresses an SPS-risk and a non-SPS risk simultaneously. In such instances, the measure should be broken down into its individual component parts and each provision judged according to its regulatory purpose under the TBT or SPS Agreement. In the rare instances in which a government measure cannot be divided into different parts with respective regulatory purposes, TBT Agreement may applies cumulatively to the extent that the requirements for the application of the SPS Agreement are not fulfilled.

D. Scope of Application

I. General

12 Art. 1.2 contains the general rule that for the purposes of the TBT Agreement, the definitions in Annex 1 apply. The **Introductory Clause to Annex 1** declares that, for all other terms employed throughout the TBT Agreement which are not defined in the Annex, the general terms and definitions contained in the sixth edition of the ISO/IEC Guide 2 (1991) concerning standardization are to apply. In addition, Art. 1.1 adds that with respect to general terms for standardization and procedures for the assessment of conformity, the meaning given to them by the United Nations and

[25] See Art. 1.1 SPS.
[26] *Kamman*, in: *Prieß & Berrisch* (eds), 220.

international standardizing bodies should apply, taking into account their particular context and the context of the TBT Agreement. Art. 1.3 makes it clear that the TBT Agreement is not limited to industrial, as opposed to agricultural, products. In addition, Art. 1.6 ensures the effectiveness of the TBT Agreement by stating that its provisions apply also to any amendment or addition to existing technical regulations, standards, or conformity assessment procedures which are not insignificant.

II. Technical Regulation (**Annex 1.1**)

1. General

13 In its *EC—Asbestos* and *EC—Sardines* reports, the Appellate Body held that the definition of "technical regulation" as provided for in Annex 1.1 is **based on three essential features**.[27] First, the product in question must be identified. Secondly, the document which applies to the identified product must lay down product characteristics. Thirdly, compliance with the stipulations in the document must be mandatory.[28] One example of a technical regulation is the Austrian Timber Act of 1992, which, for environmental reasons, imposed mandatory labelling requirements on tropical timber, tropical timber products, and products containing such timber which were designed to be used by consumers.[29] Another example would be a state law which required that all cars had to be provided with air bags for all passengers whether in the front or back seats or an environmental statute demanding that all packaging used had to be recyclable. These examples reveal that the notion of technical regulation is quite broad, encompassing an immense multiplicity of highly different domestic norms of WTO Members.

2. Requirements

a) Identifiable Product

14 The technical regulation must be applicable to an identifiable product. In *EC—Asbestos*, the Appellate Body ruled that the **product at stake need not be explicitly named**, identified, or specified in the regulation.[30] The Appellate Body explained that nothing in the TBT Agreement suggests that products need to be named or expressly identified in the technical regula-

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[27] *EC—Asbestos*, WT/DS135/AB/R, paras 66–70; *EC—Sardines*, WT/DS231/AB/R, para. 176.

[28] On the issue of process and production methods (PPMs), see paras 30–40.

[29] See, *König*, in: *Wolfrum*, 357–361. Strong protests from ASEAN countries resulted in the repeal of the mandatory labelling requirement and an expanded scope of application to all kinds of wood. *Ibid.*, 359.

[30] *EC—Asbestos*, WT/DS135/AB/R, para. 70.

tion. In the opposite, the Appellate Body reasoned that sound administrative reasons for the creation of technical regulations may induce the regulator to enable the identification of products under the technical regulation by means of laying down the relevant product characteristics.[31] Similarly, in *EC—Sardines* the Appellate Body ruled that *Sardinops sagox*, even though not explicitly named in the relevant EC Regulation, was nonetheless identifiable because under the EC measure, any fish other than *Sardina pilarchdus* was prohibited from being identified and marketed under the name sardines.[32] Moreover, in *EC—Asbestos*, the Appellate Body provided the guideline that the proper legal status of a measure can be judged only upon examination of the measure as a whole.[33] This ruling is of particular importance for purposes of identifying applicable products because, in many instances, the products to which the measure at stake applies may be ascertained only by taking into consideration the broader context of a given provision within domestic law. In addition, in *EC—Trademarks/GI*, the Panel explained that the immensity of product coverage as such does not affect the specificity of the measure necessary to identify applicable products.[34]

15 Further, in *EC—Asbestos*, the issue arose whether a plain and general **import ban** can amount to a technical regulation by the setting out of product characteristics because, historically, technical barriers were seen as highly detailed, complex, and complicated technical specifications. A plain ban on a product does not appear to resemble this paradigm. On the other hand, every technical regulation which prescribes certain product characteristics *eo ipso* bans the import of all other products which do not fulfil the required characteristics. In addressing the issue in *EC—Asbestos*, the Appellate Body held that a mere general import ban on asbestos fibres does not amount to a technical regulation.[35] However, since the French Decree in question was an integrated measure which further stipulated provisions for products containing asbestos fibres, the measure was held to be not merely a ban but to lay down a negative product characteristic, *i.e.*, the absence of asbestos fibres in any product.[36] Accordingly, the Appellate Body's approach is a mere formal one depending on the connecting factor of the regulation:[37] a measure merely banning a material does not constitute a technical regulation (although it affects products), whereas a measure which specifically addresses the end product for the production or assembly of which the preliminary product or additive is needed constitutes a technical regulation.

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[31] *Ibid.*
[32] *EC—Sardines*, WT/DS231/AB/R, para. 184.
[33] *EC—Asbestos*, WT/DS135/AB/R, para. 64.
[34] *EC—Trademarks and Geographical Indications*, WT/DS290/R, para. 7.457.
[35] *EC—Asbestos*, WT/DS135/AB/R, para. 71.
[36] *Ibid.*, paras 72–75.
[37] *Tietje*, in: *Prieß & Berrisch* (eds), 286.

b) Laying Down of Characteristics

In *EC—Asbestos*, the Appellate Body announced that **product characteristics** may be laid down in two ways—in a positive or negative form.[38] A regulator may opt for a document which positively prescribes the existence of certain product characteristics or negatively stipulates that a product must not have certain characteristics. In order to illustrate the meaning of the word "characteristic" under the TBT Agreement, the Appellate Body listed a number of synonyms. Characteristics include "any objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product". Such characteristics may relate to a product's "composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity".[39] According to the Appellate Body, it is sufficient to prescribe only one characteristic.[40] *16*

The Appellate Body divides product characteristics into two categories. The first includes **intrinsic features** and qualities of the product, whereas the second includes **related characteristics** such as the means of identification, the presentation, and the appearance of a product. According to the Appellate Body, this dichotomy of characteristics is confirmed by the examples given in the definition of technical regulation in sentence 2 itself, *i.e.*, "terminology, symbols, packaging, marking or labelling requirements".[41] *17*

In *EC—Sardines*, the EC attempted to draw a distinction between **substantive naming rules** not falling within the scope of the definition of technical regulation and procedural labelling requirements falling within its scope.[42] Referring to its ruling in *EC—Asbestos*, where it held that a means of identification is a product characteristic, the Appellate Body rejected the EC's approach by stating that a (labelled) name clearly identifies a product.[43] Lastly, the definition contained in Annex 1 explicitly includes "applicable administrative provisions", *i.e.*, procedures in relation to products and their characteristics. *18*

c) Mandatory Compliance

Lastly, the Appellate Body in *EC—Asbestos* emphasized the central feature which differentiates between a technical regulation and a standard. It held that for a regulatory measure to amount to a technical regulation, compliance must be mandatory, *i.e.*, it must regulate the product in a binding, *19*

[38] *EC—Asbestos*, WT/DS135/AB/R, para. 69.
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*, para. 67.
[42] *EC—Sardines*, WT/DS231/AB/R, para. 187.
[43] *Ibid.*, para. 191 (citing *EC—Asbestos*, WT/DS135/AB/R, para. 67).

compulsory fashion.[44] Accordingly, if technical regulations incorporate the norms of voluntary standards in a binding way, as it is frequently done by legislatures, the incorporated standards under the incorporating legal instrument turn into a technical regulation. The Tokyo Standards Code explicitly addressed this situation by declaring in respect of the definition of technical regulation that it also covered a situation where a standard "of which the application has been made mandatory not by separate regulation but by virtue of general law".[45] The omission of this *passus* in the new TBT Agreement does not affect the legal analysis.

III. Standard (Annex 1.2)

1. General

20 The definition of **"standard"**, as provided for in Annex 1.2, despite resemblances, substantially deviates in one regard from its counterpart "technical regulation". Like with respect to technical regulations, the definition explicitly includes "terminology, symbols, packaging, marking or labelling requirements". However, with standards, compliance is voluntary.[46] The inclusion of voluntary norms pays tribute to the overwhelmingly important role numerous institutions issuing non-binding stipulations play in shaping and enacting standards which are actually followed by market participants. Prominent examples of these institutions are the *Deutsche Institut fuer Normung e.V.* (DIN) in Germany or the American National Standards Institute (ANSI) in the United States of America. However, one should not be deceived by the legal categorization as non-binding. In practice, it is often the case that such standards present de facto market access standards as products may not be marketable unless they comply with such standards. An example of a standard is the specification that eggs above a certain weight may be labelled "Grade A1" as long as eggs of a lighter weight are not prohibited from being marketed, or the possibility of a toy carrying the label "wood only" if the product at stake does not contain plastics.

2. Voluntary/Mandatory Distinction

21 In the majority of TBT disputes, the mandatory/voluntary distinction should not be in dispute between the parties. It seems relatively clear that whenever a government refers to a private voluntary specification partly

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[44] *EC—Asbestos*, WT/DS135/AB/R, para. 68. See also *EC—Sardines*, WT/DS231/AB/R, para. 194.

[45] See Explanatory Note to Annex 1.1 of the Tokyo Round Agreement on Technical Barriers to Trade, BISD 26th Supp., 1980, 8; Middleton, JWTL 14 (1980) 3, 201, 203. On the other hand, if the incorporation is non-binding, there is no technical regulation but a mere standard. See *Schick*, 160–163.

[46] On the issue of process and production methods (PPMs), see below, paras 30–40.

or fully into its legislation, the specification loses its nature as a (voluntary) standard and turns into a (mandatory) technical regulation. Far more complicated are instances in which technical specifications appear prima facie to be voluntary, but the government exercises a certain degree of pressure to ensure conformity with its terms. In future cases, the real question will then be what degree of governmental pressure for the implementation of a standard is necessary to transform a standard into a technical regulation.[47] The delineation is of importance since the TBT Agreement imposes a substantially stricter regime on technical regulations than on standards. It is difficult to formulate clear-cut rules in this regard. Instead, Panels should examine and decide the issue of what kind of governmental pressure is needed on a case-by-case basis.[48] Note though that since the TBT Agreement also provides for the regulation of voluntary instruments, it could equally be argued that under the TBT Agreement there is no need for a broad reading of binding effect and, instead, the norm's formal status as binding or non-binding should be decisive in this respect.

3. International Standards

a) No Separate Definition

Unlike Annex A.3 SPS, the TBT Agreement does not contain any definition of **international standards**. However, it provides for a description of international standardizing bodies or systems.[49] Accordingly, the definition of international standards is restricted to those standards developed by an international standardizing body.[50] Consequently and important in practice, standards which were originally designed and created for national markets do not amount to international standards, even if *de facto* used as global standard and open for all WTO Members, and such understanding may fuel fears that European countries may abuse their numerical superiority in the classic international standardizing bodies in order to proliferate their European standards globally.[51] *22*

[47] The Panel in Panel Report, *Japan—Film*, WT/DS44/R, para. 10.56, speaks of sufficient government involvement to find a measure subject to dispute settlement.

[48] See statements of the Panel on finding a "measure" subject to dispute settlement. *Ibid.* Different factual situations are possible. For example, the loss of certain advantages otherwise provided by the government if the "standard" is not followed may turn a "standard" into a technical regulation.

[49] See Annex 1.3 and 1.4 TBT, which speak of international and regional bodies or systems. See paras 45–52.

[50] As a consequence, an international standard must fulfill all requirements of a standard. Mere process-based standards, such as ISO's 14000-series may therefore not amount to an international standard since no product characteristics are laid down. See para. 16.

[51] See *Fischer*, 214.

b) No Consensus Requirement

23 In *EC—Sardines*, the issue arose whether only those international standards which are adopted by **consensus** count as standards under the TBT Agreement or whether any international standard (subject to the remaining conditions) satisfies the definition contained in Annex 1.2.[52] The Appellate Body stated that the Explanatory Note to the definition of standard supports the conclusion that consensus is not required for standards of the international standardization community. The Appellate Body said that the Explanatory Note refers to "documents", a term which is also employed in the singular in the first sentence of the definition of standard and must be interpreted as having the same meaning in both the definition and the Explanatory Note.[53] Accordingly, the Appellate Body concluded that the term "documents" in the last sentence of the Explanatory Note refers to standards in general and not just to those adopted by entities other than international bodies, as the EC proposed. The Appellate Body declared that the use of the term "also" in the last sentence logically suggests that that sentence elaborates on the preceding sentence. Lastly, noting that the definition of standard in the ISO/IEC Guide, to which the Chapeau of the Annex explicitly refers, includes the requirement of consensus, the Appellate Body argued that the omission of the term constituted a deliberate choice by the negotiators.[54]

c) Judicial Review of International Standards

24 *EC—Sardines* touched upon another matter which may become controversial in the future—whether infringements of the internal procedures of international standardization organizations in the adoption process affect the status of international standards so adopted under the TBT Agreement. The EC argued that, based on the interpretation given by the complainant to the international standard Codex Stan 94 of the **Codex Alimentarius Commission** (**CAC**), Codex Stan 94 would be invalid because such reading would be irreconcilable with an earlier draft of Codex Stan 94, and that in such late stage of the process, according to the CAC's rules of procedure, merely "editorial" as opposed to "substantial" amendments to the draft were allowed, while any substantial amendment would have required the text to be referred back to the relevant committees for further discussion before final adoption.

25 The Panel, however, merely declared that Codex Stan 94 is clear on its face and noted that the minutes of the CAC meeting themselves referred to the changes as "editorial", which, in the Panel's view, further supports the

[52] *EC—Sardines*, WT/DS231/AB/R, para. 219.
[53] *Ibid.*, para. 222.
[54] *Ibid.*, paras 224–225. On positive integration, see *Koebele*, Preamble TBT, paras 6–7.

view that the adoption of the amendment better reflected the true intention of the drafters.[55] In future cases, the possibility of a judicial review of standardizing institutions' internal procedures cannot be totally ruled out in particular if the institution itself does not offer a legal forum for challenging its standards in respect of internal rules. The publication of a standard by a recognized body, though, may be considered *prima facie* evidence that the published standard is valid.[56]

IV. Conformity Assessment Procedures (Annex 1.3)

1. General

26 **Conformity assessment procedures** constitute the third technical barrier to trade (in addition to technical regulations and standards) as embraced by the TBT Agreement. Whether a national or harmonized international standard, or one recognized as equivalent applies, the competent bodies in the importing countries may still seek assurance that products to be introduced within their markets actually conform to the applicable standard. The best technical regulations or standards are useless if costly and time-consuming conformity assessment procedures in practice inhibit the entry into the market of the products affected. An example is a country whose statutes stipulate that an aeroplane's wing must be able to withstand a certain amount of pressure. A test in which the required pressure is exerted on a wing is a conformity assessment procedure. Economically, in the ideal case conformity assessment will be conducted only once close to the manufacturer's or supplier's home base in the exporting country—and therefore, be relatively inexpensive—and their results should be recognized worldwide in all importing countries.

2. Types of Conformity Assessment

27 Generally, conformity assessment is categorized based on the entity which is conducting the assessment and by the technique employed:[57] **First-party assessment** relates to a supplier's (unilateral) declaration of conformity based on self-assessment and self-control. **Second-party assessment** is conducted by the importing purchaser or by inspection/testing bodies on behalf of the former. **Third-party assessment** is carried out by an institution independent of both the supplier and the purchaser.[58] **Testing and**

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[55] *EC—Sardines*, WT/DS231/R, para. 7.95.

[56] *Fischer*, 212.

[57] See generally, Committee on Technical Barriers to Trade, Background Note by the Secretariat, WTO, Preparation of the Fourth Triennial Review: Conformity Assessment Procedures, <www.wto.org/English/tratop_e/tbt_e/tbt_wrkshop_note_16march06_e.doc>, 26 October 2005.

[58] *WTO*, World Trade Report 2005, 98.

inspection aim at the determination of certain characteristics of a product. Testing is often restricted to samples and does not involve the whole batch. Inspection is often combined with testing, and is based on a visual impression of the product or one gained by the application of very simple instruments, such as scales. **Certification** is another, more sophisticated type of conformity assessment. Here, the product is assessed against a specific standard or technical regulation, which is not necessarily the case if the product is merely being tested or inspected. In addition, formal recognition of conformity is issued typically in combination with the right to sue a certification mark on the product or packaging.[59] The entity performing such activities may have received **accreditation** from an accreditation body which must have the best available know-how and expertise even though it does not itself carry out conformity assessment procedures but controls those who do.[60] Accreditation is of particular importance when neither the official authorities nor the suppliers or importers are in a position to judge the quality and know-how of the conformity assessment provider.[61] The cheapest and, by far, fastest type of conformity assessment is the supplier's declaration of conformity, but, depending on the nature of the risks involved, governments may not be inclined to allow them. However, with a strong legal regime in place providing for ex post liability, such as **product liability** torts law in the United States of America, it is a viable option even for sensitive products.[62] For example, **suppliers' declarations of conformity** are admissible for motor vehicles and related equipment in the United States.[63]

3. Scope of the Definition

28 Annex 1.3 defines conformity assessment procedures as any "procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled".[64] Therefore, the primary function of a conformity assessment procedure is to ensure that a given product actually meets the prescribed requirements (as contained in technical regulations or standards). The Explanatory Note clarifies that the definition should be read broadly. According to the Note, it encompasses "procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combi-

[59] *Ibid.*
[60] *Ibid.*, 100.
[61] *Ibid.*
[62] *Schick*, 11.
[63] Committee on Technical Barriers to Trade, Background Note by the Secretariat, WTO, Workshop on Supplier's Declaration of Conformity (SDOC), <www.wto.org/English/tratop_e/tbt_e/tbt_wrkshop_note_21march05_e.doc>, 21 March 2005, 10.
[64] Accordingly, the TBT Agreement abolishes the distinction between conformity assessment and certification which was part of its predecessor, the Tokyo Standards Code. See Arts 5 and 7, Tokyo Round Agreement on Technical Barriers to Trade, BISD 26th Supp., 1980, 8.

nations". Thus, the definition entails all types of conformity procedures in which the product is being assessed against a specific standard or technical regulation. The breadth of the Note's scope responds to the fact that in practice modes of conformity assessment vary widely.

29 It follows from the distinct nature of conformity assessment procedures that there is **no overlap with the definition of both standard and technical regulation** under the TBT Agreement. In *EC—Geographic Indications*, Australia deemed inspection structure requirements a technical regulation within the meaning of the TBT Agreement. However, the Panel declared that the explanatory note refers to "procedures… for inspection" as an example of conformity assessment[65] and may as such fall a priori outside the scope of definition of technical regulation as it would lead to the cumulative application of Arts 2 to 4 and Arts 5 to 9 to the same measure.[66]

V. Process and Production Methods (PPMs)

1. General

30 The issue of the coverage of PPMs is one of the most debated topics under the TBT Agreement. The notion of PPMs as such stems from the manufacturing or production phase of a product. The term refers to the ways in which and techniques by which a product is manufactured or produced, or a natural product is extracted or captured. Economists divide PPMs into two basic categories—product-related and non-product-related.[67] Product-related PPMs are based on the physical characteristics of the end product. They are employed to ensure the safety and functionality of the product for the consumer or buyer and concern its consumption. Non-product-related PPMs concern the production method exclusively and do not impact the end product physically. They are aimed at the achievement of social goals such as labour standards or human rights, or environmental goals such as environmental standards, and may or may not matter to the buyer or consumer of the product. For example, shrimps caught by vessels equipped with (life-saving) **Turtle Excluder Devices** (TEDs) are not different from shrimps caught by vessels without TEDs.[68] They do not differ in terms of quality, food value, nutrition, or taste. The only difference is non-product-related and lies in the production method employed. It is only the fishing of shrimps without TEDs that causes the accidental death of sea turtles. Similarly, cars manufactured by workers paid less than a given minimum

[65] *EC—Trademarks and Geographical Indications*, WT/DS290/R, para. 7.515.
[66] *Ibid*., para. 7.513.
[67] *Charnovitz*, Yale J. Int'l L. 27 (2002), 59, 65.
[68] See the factual summary of the Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, paras 2–6.

wage do not differ from those assembled by workers paid more than the minimum wage or electricity generated by a nuclear power plant is not different from electricity created by a hydroelectric power station.[69]

2. Coverage

31 It is a common understanding and not in dispute among WTO lawyers that PPMs which are related to the product are covered by the definitions of technical regulation and standard in Annex 1, as these explicitly encompass process and production methods. Substantial disagreement exists, however, whether and if so to what degree the definitions and, consequently, the TBT Agreement apply to PPMs which are not related to the product itself. Unfortunately, so far there has been no definitive decision on the coverage of non-product-related PPMs. However, discussions in the TBT Committee and CTE, while no consensus among WTO Members has been reached, have established the prevailing view that the TBT does not cover **non-product-related PPMs**.[70]

32 The discussion on the coverage of PPMs is based on the fact that the definition of technical regulation as well as that of standard contained in Annex 1 leaves leeway for more than one interpretation. Both definitions mention in their first sentence **"products" and "related" processes and production methods**. The uncertainty arises out of the second sentences, both of which refer simply to "a product, process or production method". One possible interpretation reads sentence 2 as a mere illustration of the corresponding sentence 1. On this view, as sentence 2 is subordinate to sentence 1, it was not necessary to repeat the term "related" in sentence 2. Another possible interpretation sees sentence 2 as being of a constitutive nature. It broadens the definition and scope of the TBT Agreement. Such view can point for support to the word "also" in sentence 2, which seems to imply an enlargement of the definition. The same ambiguity can be traced in the definition of standard in Annex 1.

33 The **negotiation history** supports the view that non-product-related PPMs are not covered by the TBT Agreement. The Tokyo Code did not cover PPMs. During the Uruguay Round negotiations, consent had been reached on including production and process methods. The Draft Final Act of 1990 lists in the definitions of technical regulation and standard production and process methods on an equal footing with product characteristics. During informal negotiations in 1991, Mexico proposed to include the word "related" in the definitions of standard and technical regulation and the inclusion of the word "their" in the definition of "technical regulation".[71] In

[69] Examples after *Rottenburg*, 24.
[70] See *Joshi*, JWT 38 (2004) 1, 69, 81–85, 87; *Chang*, JWT, 31 (1997) 3, 137, 147.
[71] WT/CTE/W/10, G/TBT/W/11, paras 146–147. The proposals were accepted.

explaining its proposals, Mexico revealed its intention to amend the draft in such a way as unequivocally to exclude any PPMs which do not impact the final product. Later attempts to include the term "their" in the definition of standard failed, not because of opposition but because they were made at a late stage in the negotiations which increased the unwillingness of the negotiators to reopen the text.[72] As a consequence, it can be said with sufficient confidence that a majority of the drafters of the TBT Agreement intended to exclude PPMs which are not product-related.[73]

34 Yet, **several developments may reduce the significance of the negotiating history** for interpretation purposes. First, at the time of the Uruguay Round, it was still widely thought that PPMs *per se* violated GATT and could hardly be justified by virtue of Art. XX GATT 1994.[74] Accordingly, resistance to the extension of the TBT Agreement to cover PPMs would have been perceived as their legalization. The Appellate Body's *Shrimp* decisions may have changed the perception in this regard.[75] While not explicitly addressing the issue of PPMs, the decisions concerned one, as in this case the US aimed at the protection of endangered sea turtles by forcing shrimp fishermen selling their shrimps on the US market to employ TEDs, which would prevent the incidental killing of sea turtles during fishing. In 2001, the Appellate Body finally reaffirmed (again closing its eyes to the issue of PPMs) that that policy as such could be justified under Art. XX GATT 1994.[76] Secondly and relatedly, while the Appellate Body's decisions were restricted to GATT law, the Appellate Body's similar unorthodox stance on PPM under the TBT Agreement of simply closing its eyes to the problem cannot be excluded. Thirdly, while at the time of the Uruguay Round the phenomenon of PPMs (in the form of environmental labelling) was still relatively limited, opponents of their coverage by the TBT Agreement could therefore hope to outlaw and abolish them totally once and for all. Such hopes turned out to be unrealistic. Given the widespread use of PPMs in many developed countries, they should be addressed and regulated instead of being merely rhetorically condemned.

35 The **practice of the TBT Committee** further confirms a rather pragmatic view. In a decision on the notification requirement under Art. 2.9, the Committee held that Members are obliged to notify all mandatory labelling requirements that are not based substantially on a relevant international

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[72] *Ibid.*, paras 148–151.

[73] See *Joshi*, JWT 38 (2004) 1, 69, 90.

[74] See *Charnovitz*, Yale J. Int'l L. 27 (2002), 59, 75–77. For a restatement of case law, see *ibid.*, 79–103. See also *Howse & Regan*, EJIL 11 (2000), 249 *passim*.

[75] Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R; Appellate Body Report, *US—Shrimp (Article 21.5—Malaysia)*, WT/DS58/AB/RW.

[76] *US—Shrimp (Article 21.5—Malaysia)*, WT/DS58/AB/RW, paras 91–93.

standard and may have a significant effect on the trade of other Members.[77] The decision explicitly clarifies that the obligation is not dependent on the kind of information which is provided on the label, *i.e.*, whether or not it is in the nature of a technical regulation.[78] Similarly, in respect of standards notified under para. L of the Code of Good Practice, the Committee agreed that the notification obligation exists regardless of the kind of information provided on the label.[79] Accordingly, in both instances, PPMs are covered and need to be notified. One should bear in mind that PPMs can be a covert and sophisticated tool of protectionism, yet they can also be a healthy tool of environmental policy. Again, given this danger, one should address the issues and dangers relating to PPMs under the TBT Agreement rather than simply blatantly rejecting any PPM in the first place.

36 In *EC—Trademarks/GIs*, the parties disputed whether a country of origin labelling requirement for a geographical indication which is identical with a Community protected name constitutes a technical regulation under the TBT Agreement.[80] Relying on the above-mentioned decision of the TBT Committee, the Panel held that the issue is not whether the content of the label refers to a product characteristic, since the labelling requirement in its view is itself a product characteristic. Such an approach is questionable as the decision formulation ("whether it is a technical regulation or not") explicitly reveals that there may be product labels which are not covered by the TBT Agreement.[81] In addition, such broad ruling also appears to be unnecessary obiter dicta, as the Panel also found that a country of origin label is a means of identification which is recognized by the Appellate Body as a related product characteristic.[82] Nonetheless, the Panel's reasoning shows that the law on this point is still fluid.

3. In Particular: Environmental Labels

a) Background

37 Within the trade community, the issue of coverage of non-product-related PPMs under the TBT Agreement is mainly discussed in connection with

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[77] Committee on Technical Barriers to Trade, Decisions and Recommendations Adopted by the Committee since 1 January 1995, Note by the Secretariat, Revision, G/TBT/1/Rev.1, 10 August 1995, 16–17.

[78] *Ibid.*

[79] Committee on Technical Barriers to Trade, First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/5, 19 November 1997, para. 12.

[80] *EC—Trademarks and Geographical Indications*, WT/DS290/R, paras 7.426–7.429, 7.435–7.438.

[81] See G/TBT/1/Rev.1.

[82] *EC—Trademarks and Geographical Indications*, WT/DS290/R, para. 7.450, citing *EC—Asbestos*, WT/DS135/AB/R, para. 67; *EC—Sardines*, WT/DS231/AB/R, para. 191; see also para. 18.

environmental labels, although labels do not need to be based on PPMs.[83] Environmental labelling schemes convey information to the consumer on the environmental impact of a given product or its process of production. By declaring products carrying environmental labels to be more environmentally friendly than other products belonging to the same category, environmental labels aim at the improvement of the environment by utilizing and raising consumer awareness of the environmental effects of products and, hence, influence consumer choices as well as modifying the design and production methods of products in favour of environmentally friendly products and technologies.[84] At present, there is no international organization which coordinates the promulgation and administration of environmental labels.[85] The ISO has designed general standards for product labelling in its 14000-series of standards.[86] These standards are, however, process-based and do not address the underlying environmental problem the label focuses on. In general, environmental labels may be classified by the private or public nature of a label's creator and administrator, or depending on the number of features covered by the label.[87]

b) Public and Private Labels

Environmental labelling schemes include those operated by governmental entities as well as those operated by private entities. Those environmental labelling programmes administered by governmental entities can be mandatory (imposing binding rules on the market participants) or voluntary in nature (offering a supposed comparative advantage in the form of a label). Private entities administering environmental labelling programmes include environmental NGOs, self-financing third parties, industry associations, consumer protection organizations or simply corporations offering the service of certification. *38*

[83] *E.g.*, requiring there to be no lead in a product. This would constitute an environmental label not based on a PPM as it relates to the chemical structure of a product.

[84] On eco-labelling, see *Tietje*, JWT 29 (1995) 3, 123–158; *Dawkins*, in: *Wolfrum* (ed.), 501–598; *Ward*, RECIEL 6 (1997), 139–147; *Chang*, JWT 31 (1997) 3, 137–159; *Bartenhagen*, Va. Envt'l L.J. 17 (1997–1998), 51–80; *Driessen*, Eur. Envtl. L. Rev. 8 (1999), 5–15; *Okubo*, Geo. Int'l Envtl. L. Rev. 11 (1999), 599–646; *Subedi*, Brook. J. Int'l L. 25 (1999), 373–405; *Ekroos*, JUTR 62 (2002), 319–343; *Appleton*, in: *Sampson & Chambers* (eds), 235–266; *Motaal*, in: *Sampson & Chambers* (eds), 267; *Joshi*, JWT 38 (2004) 1, 69–92.

[85] See *Droege*, Außenwirtschaft 56 (2001), 99, 117.

[86] See ISO 14024 (eco-seals) or ISO 14021 (self-declaration).

[87] The International Standards Organization (ISO) has taken a somewhat different path in classifying environmental labels. The ISO divides labels into three major categories. Type I labels involve multi-criteria-based programmes which are operated by [third] parties other than the producer. Participation is voluntary. Type II labels are defined as self-declared environmental claims. Type III labels, frequently referred to as "report cards", resemble nutritional labels in providing the consumer with extensive environmental information relating to a product. See *Appleton*, 4; *Joshi*, JWT 38 (2004) 1, 69, 70.

c) Single Issue and Multiple Issues Product Labels

39 Environmental labels are usually categorized according to the number of criteria they examine. **Single issue product labels** convey information to the purchasing consumer about a single attribute of a product but do not provide a general overall analysis of the product's environmental repercussions. They may be mandatory or voluntary. Prominent examples of this label category are the numerous recyclability symbols, product labels stating the average energy or fuel consumption, the labelling of tuna cans as 'dolphin friendly' or shrimp products as 'turtle safe', and labels on aerosols testifying to ozone-friendliness or freedom from CFCs.

40 So-called **eco-labels** are based on the examination of the full life span of a product from production through consumption to final disposal. Such an approach is frequently referred to as "life-cycle-analysis" or the "cradle-to-grave method". Eco-labels are, in practice, generally voluntary.[88] Eco-labels supposedly pursue a complete and accurate expert's assessment of all environmental implications associated with the consumer's decision to buy a particular product whether they are closely related to or rather remote from the product. The consumer, however, is not informed of the exact results of such examination. Thus, eco-labels depend heavily on the consumer's confidence in the accuracy and thoroughness of the eco-label scheme.[89] The first eco-label started in Germany in 1978 with the "Blue Angel" label.[90] It is probably the most elaborate eco-label system. Today, about 3,800 products and services from approximately 710 label users in Germany and abroad are entitled to bear the Blue Angel.[91] Quickly, other countries, predominantly but not exclusively developed countries, followed its example. In 1992, the European Commission introduced a symbol for environmentally friendly products—a Marguerite, the European Eco-Label.[92] Once awarded, the flower-labelled products may be marketed in all 25 EU Member States and in the associated European Economic Area countries. Since 2001, more than 350 products have been awarded the European Environmental Label.[93] Today, products from 17 different product groups can be awarded the European eco-label, from toilet rolls to washing machines.[94] Eco-labels employing product-related and non-product-related PPMs may be judged under the TBT Agreement as regards the product-related PPMs only.

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[88] *Zarilli et al.*, 3.
[89] *Appleton*, 6.
[90] See <www.blauer-engel.de/englisch/navigation/body_blauer_engel.htm>.
[91] See *ibid.*
[92] See <www.eco-label.com/default.htm>.
[93] See *ibid.*
[94] *Ibid.*

VI. Recovery, Re-use, Recycling or Disposal Requirements

1. General

41 It is questionable whether—binding or non-binding—**requirements for recovery, re-use, recycling, or final disposal of products lay down characteristics of a product** and therefore may meet the definition of technical regulation or standard. While from an ecological point of view such requirements may be desirable in providing incentives for producers to develop and employ more environmentally friendly product components or packaging and are largely praised by environmentalists as an inevitable environmental policy instrument, nonetheless, they have been confronted with serious criticism from the economic point of view.[95] The reason for this is that, generally, the cost of recovery is much higher for distant foreign producers than for those nearby established domestic ones.[96] Small and medium-sized enterprises may not reach the economy of scale in their production necessary to allow costly investments in a system of recovery, and participation in the systems of larger market participants may be an option that leads only to disfavorable conditions due to the market power of those few which are in a position to establish such a system.[97] Such concerns were expressed and addressed in the TBT Committee.[98]

2. Products and Product Components

42 As regards (**mandatory**) **requirements for recovery, recycling, or disposal regarding products or product components**, it is difficult to conclude that the elements of the definition of technical regulation in Annex 1.1 are met. The wording of sentence 1 requires the laying down of product characteristics which is not the case when recovery is demanded. And sentence 2 merely expresses the idea that technical regulation may also include packaging requirements.[99] As the obligations imposed in such instances relate to the phase after the product has been used by the consumer or other end-user, it is not possible to interpret "packaging" as encompassing such requirements. The Appellate Body's statement in *EC—Asbestos*, in which it held that while the TBT Agreement is intended to further the objectives of GATT 1994, "it does so through a specialized legal regime

[95] *Petersmann*, 45.
[96] *Ibid.*
[97] *Schick*, 266–267.
[98] See, *e.g.*, Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 6 October 2000, 6 October 2000, G/TBT/M/21, 31 October 2000, paras 56–32 or Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 10 November 2000, G/TBT/M22, 11 December 2000, paras 33–88 concerning the EC Draft Directives on waste from electrical and electronic equipment (WEEE).
[99] See above, para. 15.

that applies solely to a limited class of measures"[100] also rejects a broader trade-restrictive impact reading of Annex 1.1, sentence 2.[101]

3. Packaging

43 The legal situation is less clear if the recovery, re-use, recycling, or final disposal of package material of a traded product is being regulated. In these instances, it is still possible to speak of **"packaging" requirements** under sentence 2. However, the other features covered by sentence 2, *i.e.*, symbols, marking, and labelling requirements, all concern the outer appearance of the product. Accordingly, one can conclude that "packaging" requirements cover only requirements which directly regulate the packaging of a given product and do not encompass rules on the further handling of the package materials once the product has been used by the consumer or other end-user.[102]

E. Relevant Actors Under the TBT Agreement

I. General

44 Annex 1.4 to 1.8 clarifies other essential key actors referred to throughout the TBT Agreement, *i.e.*, international and regional body or system, central government body, local government body, and non-governmental body.

II. International and Regional Body or System (Annex 1.4/5)

1. General

45 By **reference to international**,[103] the TBT Agreement uses the know-how, expertise, and *acquis* of international standardizing bodies without needing to develop standards of its own. Unlike Annex A.3 SPS, the TBT Agreement itself does not contain a list of international standardizing bodies the standards of which are deemed international under the TBT Agreement, nor does it provide for a separate definition of the term "international standard".[104] Annex 1.4 and Annex 1.5 merely describe international stan-

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[100] *EC—Asbestos*, WT/DS135/R, para. 80.

[101] Compare *Schick*, 268. Note, though, that sentence 2 does not contain any sign of non-exclusivity, whereas, *e.g.*, Art. 2.2 TBT explicitly employs the term "inter alia" and Art. 2.4 TBT speaks of "for instance".

[102] Leaving the question open, *Rege*, JWT 28 (1994) 3, 95, 131–132.

[103] See, *e.g.*, Art. 2.4 TBT.

[104] See, however, the definition contained in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Definitions Concerning Standardization and Related Activities, which, sentence 1 of Annex 1 TBT Agreement states that the definitions used in the TBT Agreement shall have the same meaning as given in the Guide, noting that the TBT Agreement does not cover services: "3.2.1 Standard that is adopted by international standardizing/standards organization and made available to the public." Reprinted (as identical to

dardizing institutions as bodies or systems membership of which is open to at least all Members, whereas regional standardizing institutions are described as regional bodies or systems which are open to the relevant bodies of only some of the Members (in the region). The necessity of at least a description results from the TBT Agreement's preference for international or at least, regional solutions in respect of technical regulations, standards, and conformity assessment procedures.[105] The term "bodies" refers to standardizing bodies, whereas the term "systems" refers to networks of conformity assessment.[106] Accordingly, an international standardization body is any international institution "one of whose recognized activities is in the field of standardization".[107] Thus, beyond the "classic" international standardizing bodies, the list of institutions whose standards count as international ones under the TBT Agreement is open and not exclusive.[108] World Standard Services Network (WSSN) lists 49 international standardizing bodies.[109] The

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EN 45020) in *DIN*, 279. See also 4.3.2 Standardizing Organization membership of which is "open to the relevant national body from every country." *Ibid.*, 281.

[105] See, *e.g.*, Art. 9 TBT in respect of conformity assessment.

[106] *Schick*, 115 footnote 426. See also the wording of Art. 9 TBT.

[107] See the definition in Annex 1.9 to the Tokyo Standards Code; *Middleton*, JWTL 14 (1980) 3, 201, 206; *Völker*, in: *Bourgeois*, at 291; *Tietje*, Internationalisiertes Verwaltungshandeln, 342.

[108] See generally *Fischer*, 212–215.

[109] BIPM (Bureau international des poids et mesures), Scope: units, standards and methods of measurement of physical quantities; BISFA (International Bureau for the Standardization of Man-made Fibres), Scope: specification and testing of man-made fibres; CCSDS (Consultative Committee for Space Data Systems), Scope: space-related information technologies, data handling techniques; CIB (International Council for Research and Innovation in Building and Construction), Scope: pre-standardization work in the field of building and construction; CIE (International Commission on Illumination), Scope: metrology in the fields of light, lighting and colour; science, technology and art of light, lighting and colour; CIMAC (International Council on Combustion engines), Scope: acceptance tests for combustion engines, noise, pollution; CODEX (Codex Alimentarius Commission), Scope: specification, sampling and analysis of food products, food additives, food hygiene, pesticide residues, contaminants, labelling, essential composition, nutritional aspects, veterinary drug residues, food import/export inspection, and certification systems; CORESTA (Cooperation Centre for Scientific Research Relative to Tobacco), Scope: analysis and testing of tobacco and tobacco products; FDI (World Dental Federation), Scope: dental materials, dental instruments and equipment, working environment of the dentist; FIATA (International Federation of Freight Forwarders Associations) Scope: freight forwarding services; FIB (International Federation for Structural Concrete), Scope: concrete construction; FSC (Forest Stewardship Council), Scope: forest management; IAEA (International Atomic Energy Agency), Scope: nuclear energy, nuclear and radiation safety, radioisotopes, and documentation; IATA (International Air Transport Association), Scope: procedures for airport and passenger services, procedures for cargo services, including shipping of live animals and dangerous goods, minimum standards for IATA accreditation of cargo and passenger agents and their modus operandi; ICAO (International Civil Aviation Organization), Scope: air transport, air navigation, aviation safety, airports design, airworthiness, aircraft noise, international law, etc; ICC (International Association for Cereal Science and Technology), Scope: testing and analysis of cereals and cereal products; ICDO (International Civil Defence Organisation), Scope: disaster management and prevention; ICID (International Commission on Irrigation and Drainage), Scope: irrigation and drainage, terminology; ICRP (International Commission on Radiological Protection), Scope: radiation hazards and radiation protection; ICRU (International Commission on Radiation Units and Measurements), Scope: radiation units and

list reveals that in today's world any field of standardization which is of socio-economic importance is being covered by an international standardizing body.[110]

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measurements, and radiation dosimetry; ICUMSA (International Commission for Uniform Methods of Sugars Analysis), Scope: methods of sugar analysis; IDF (International Dairy Federation), Scope: milk and milk products (composition, sampling and analyses), milk farm and factory equipment, and disinfectants; IEC (International Electrotechnical Commission), Scope: electrical and electronic engineering; IETF (Internet Engineering Task Force), Scope: internet architecture and operation; IFLA (International Federation of Library Associations and Institutions), Scope: bibliographic control and other aspects of library matters; IFOAM (International Federation of Organic Agriculture Movemenets), Scope: organic agriculture and processing; IGU (International Gas Union), Scope: gas transmission distribution and utilization safety, use of SI units in gas industry; IIR (International Institute of Refrigeration), Scope: tests of thermal performance of insulated vehicles, tests of insulating materials, refrigerated storage and transport of perishable foodstuffs, food freezing, refrigerating equipment, terminology; IIW (International Institute of Welding), Scope: welding and allied processes; ILO (International Labour Office), Scope: working conditions and environment, occupational safety and health, equality of treatment between men and women, non-discrimination, rights of tribal and indigenous peoples, employment; IMO (International Maritime Organization) Scope: maritime safety, prevention of pollution from ships, facilitation of international maritime traffic; IOOC (International Olive Oil Council), Scope: table olives, olive oil, olive-pomace oils; ISO (International Organization for Standardization); Scope: all fields except electrical and electronic engineering; ISTA (International Seed Testing Association), Scope: seed testing; ITU (International Telecommunication Union), Scope: ITU-T: all aspects of telecommunication equipment, systems, networks and voice and non-voice services, all related technical, operating and administrative areas; ITU-R: radiocommunications; IULTCS (International Union of Leather Technologists and Chemists Societies), Scope: analysis and testing of leather; IUPAC (International Union of Pure and Applied Chemistry), Scope: Nnmenclature, terminology, symbols, quantities and units in chemistry; IWTO (International Wool Textile Organization), Scope: Testing of wool textiles; OIE (International Office of Epizootics), Scope: standards for the international trade in animals and animal products, diagnostic techniques, reference reagents, vaccines and procedures for international reporting of transmissible animal diseases; OIML (International Organization of Legal Metrology), Scope: measuring methods and units, measuring devices and instruments, verification and control of measuring devices (from a legal point of view); OIV (International Vine and Wine Office); Scope: methods of wine analysis, oenology, labelling; OTIF (Intergovernmental Organisation for International Carriage by Rail), Scope: international carriage of dangerous goods by rail; RILEM (International Union of Laboratories and Experts in Construction Materials, Systems and Structures) Scope: nomenclature and testing of building materials and structures; UIC (International Union of Railways) Scope: international railway traffic; UN/CEFACT (Centre for the Facilitation of Procedures and Practices for Administration, Commerce and Transport), Scope: trade facilitation and electronic business; UNESCO (United Nations Educational, Scientific and Cultural Organization), Scope: scientific and technological information and documentation, libraries and archives; UPU (Universal Postal Union), Scope: compatible postal operations; WCO (World Customs Organization), Scope: classification, customs valuation, customs procedures, customs applications of computers, harmonization of Rules of Origin; WHO (World Health Organisation), Scope: all matters directly or indirectly related to health, including biological and pharmaceutical and similar products and substances, food additives, pesticides, pesticide residues in food, food safety, air and water quality, diagnostic procedures, terminology, nomenclature and classification; WIPO (World Intellectual Property Organisation), Scope: patents, trademarks, industrial designs, appellations of origin, copyright, neighbouring rights, classification systems; WMO (World Meteorological Organization), Scope: meteorological and hydrological observations, agricultural, aeronautical and marine meteorology, data processing and telecommunications. List available at: <www.wssn.net/WSSN/listings/links_international.html>.

[110] *Tietje*, in: *Berrisch & Prieß*, 281–282.

2. Classic International Standardizing Bodies

46 The classic institutions, the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC), and the International Telecommunication Union (ITU), are the principal ones, the latter two being specialized and the ISO being general. The ISO and the IEC alone together account for 85 per cent of all international standards.[111]

47 The **ISO**, which started after World War II in 1947, is a non-governmental organization with its headquarters in Geneva, Switzerland, and to date has 156 national standards bodies, one per country, as members.[112] The ISO covers everything except electric and electronic engineering, which is dealt with under the auspices of the IEC, and telecommunications, which are the ITU's domain.[113] In practice, work is undertaken in technical committees. In 2005, the ISO had 192 technical committees, 541 subcommittees, 2,188 working groups, and 38 ad hoc study groups.[114] It is the principal standard-setter in the world and the standards it produces are usually referred to as "ISO Standards". It is financed through membership fees, the sale of publications, and the provision of services.[115] While its output covers almost any field, a large number of ISO standards focuses on technologies and materials technologies.[116]

48 The **IEC** devotes it work to electric and electronic engineering and all questions related thereto.[117] Founded in 1906, it is a non-governmental organization also headquartered in Geneva, Switzerland.[118] Currently, it has 65 members, so-called national committees, which are required to be fully representative of their respective countries in respect of interests in the electro-technical field.[119] Some 179 technical committees and subcommittees and 700 working teams are carrying out the work of the IEC.[120] In 2004 alone, the IEC published almost 400 standards and standards-type documents, and its database now contains more than 5,300 standards and standards-type documents covering electricity, electronics, and related technologies.[121]

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[111] *WTO*, World Trade Report 2005, 76.

[112] ISO, ISO in Brief—International Standards for a Sustainable World, <www.iso.org/iso/en/prods-services/otherpubs/pdf/isoinbrief_2005–en.pdf>.

[113] *WTO*, World Trade Report 2005, 76.

[114] *ISO*, ISO in Figures for the Year 2005, available at: <www.iso.org/iso/en/aboutiso/isoinfigures/archives/January2006.pdf>

[115] *Ibid.*

[116] *Ibid.*

[117] About the IEC, see <www.iec.ch/about/mission-e.htm>.

[118] On IEC History, see <www.iec.ch/about/history/>.

[119] On IEC Membership, see <www.iec.ch/about/members-e.htm>. For a list of members, see <www.iec.ch/cgi-bin/procgi.pl/www/iecwww.p?wwwlang=e&wwwprog=membrs3.p>.

[120] IEC, Who Produces the Standards, <www.iec.ch/ourwork/who-e.htm>.

[121] *WTO*, World Trade Report 2005, 77.

49 Unlike the ISO and the IEC, the **ITU** is a specialized agency of the United Nations which also has its headquarters in Geneva, Switzerland.[122] Founded in Paris in 1865 as a reaction to new inventions such as telegraphy and telephone and their speedy proliferation, it is today the world's oldest international organization. The work is conducted by its members, which, by the nature of the organization, are countries, whereas business and other organizations can directly participate in the standardization undertaken on a different status. Given its long standing and history, standards promulgated by the ITU enjoy a high degree of acceptance throughout the world.

3. Open to all Members

50 From the description in Annex 1.4. and 1.5, it follows that any international or regional standardizing body must at least be open to all Members concerned. The TBT Committee has emphasized that the concept of **openness** is broader than just membership, and includes "proposal and acceptance of new work items; technical discussion on proposals; submission of comments on drafts in order that they can be taken into account; reviewing existing standards; voting and adoption of standards; and dissemination of the adopted standards".[123] It has stressed that the opportunity for meaningful participation of all WTO Members is essential for the adoption and elaboration of international standards.[124]

51 In *EC—Sardines*, the Panel considered whether the **CAC** is an international standardizing body within the scope of Annex 1.4. The CAC was established jointly by the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) in 1963 as an institution to develop food standards, guidelines, and related instruments such as codes of good practice under the FAO/WHO Food Standards Programme.[125] Its main objectives are the protection of consumers' health, the establishment of fair trade practices in food, and the promotion of worldwide coordination of all foods standards activities.[126] In recent times, for example, the CAC has issued standards relating to GMO foods.[127] The Panel in its report *EC—Sardines* reiterated that the international body defined in Annex 1.4 is a "body or system whose membership is open to the relevant bodies of at least all members" and, noting that membership of the CAC is open to all WTO Members concluded that the CAC is an international body within the

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[122] *WTO*, World Trade Report 2005, 76.
[123] G/TBT/1/Rev.8, 27.
[124] *Ibid.*, 26.
[125] See <www.codexalimentarius.net/web/index_en.jsp>.
[126] *Ibid.* See generally on the role of the CAO in the protection of health within WTO law, *Sander*, ZEuS 3 (2000), 335–375.
[127] See hereto, *Ostrovski*, Mich. J. Int'l L. 25 (2004), 813 *passim*.

meaning of the TBT Agreement and, thus, its standards are international standards for the purposes of the *Sardines* dispute.[128]

4. Further Requirements?

52 In addition to openness to all Members, there is a question whether additional requirements apply to international standardizing bodies the international standards of which are referred to throughout the TBT Agreement[129] in light of the widespread criticism regarding the **lack of legitimacy** of these standardizing organizations.[130] Without the safeguards of domestic public administrative law such as transparency and the possibility of stakeholder input (by those affected by the norms, such as consumers or environmentalists), the output of such organizations may indeed be critically viewed. And at least in respect of transparency, such minimum requirements could be read into the "openness" required. Indeed, the TBT Committee itself identified in a Decision a number of key principles which should be observed by any international standardizing body. The list includes **transparency, openness, impartiality and consensus, effectiveness and relevance, coherence**, and giving due regard to developing countries' interests.[131] The decision is not technically binding.[132] In *EC—Sardines*, the issue was not even raised. Moreover, most of the legitimacy arguments apply to the WTO itself.[133] Therefore, currently, there are no additional requirements for qualifying as a standardizing body under the TBT Agreement.

III. Central Government Body (Annex 1.6)

53 Central government bodies encompass the "central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question" (Annex 1.6). While the TBT Agreement gives prime importance to the organizational structure of Members, the question of what amounts to a central government is determined by WTO law, not domestic law. As regards the EC, the Explanatory Note clarifies that the EC counts as a central government for the purposes

[128] *EC—Sardines*, WT/DS231/R, para. 7.66. See further Art. 915.1 NAFTA which defines the term international standard as "a standards-related measure, or other guide or recommendation, adopted by an international standardizing body and made available to the public".

[129] *E.g.*, Art. 2.4 TBT.

[130] *Wallach*, U. Kan. L. Rev. 50 (2001–2002) 823, 836–837.

[131] G/TBT/1/Rev.8, 26–29.

[132] See Art. IX:2 WTO Agreement. This can also be seen from the fact that the Appellate Body held that consensus is not required to meet the elements of an international standard under the TBT Agreement, see para. 23.

[133] See generally, *Krajewski*, in: *Bertschi et al.* (eds), 261–298 *passim*.

of the TBT Agreement.[134] However, the Note continues that regional bodies or conformity assessment procedures may be established within the territory of the EC, and in such cases such institutions would be subject to the provisions on regional bodies or conformity assessment systems, and not to the legal regime designed for central governments.

IV. Local Government Body (**Annex 1.7**)

54 In Annex 1.7, local government bodies are defined negatively as a government other than the central government, including subordinated ministries or departments or any body subject to its control. As paradigms, the definition refers to "states, provinces, *Länder*, cantons, municipalities" and reflects the past and continuing difficulties of non-centralized federal states, particularly the United States, in ensuring that all governmental bodies act in compliance with the requirements of international trade law.[135] The explicit separate regulation of local government bodies of Members constitutes a deviation from general international law which treats a nation/state as responsible for any act or omission of its component government units which violates international law, regardless of whether the central government under internal law is entitled to demand compliance by local government bodies with the nation-state's international obligations.[136]

V. Non-Governmental Body (**Annex 1.8**)

55 In Annex 1.8, "Non-Governmental Body" is defined by excluding central or local governmental bodies. It includes a non-governmental body enjoying the legal power to enforce a technical regulation. The definition recognizes the vital role many non-governmental entities (national standardizing institutes are often privately organized and incorporated)[137] play in various countries in shaping, developing, and implementing technical regulations and standards.[138] As with the definition of local government bodies, with the inclusion of the non-governmental body definition, the TBT Agreement attempts to address all key actors in the national and international markets regardless of their status as state or non-state actors. In this regard, it is not unusual in international law to impose responsibility on a state for

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[134] See on the EC/EU in general, Art. X:1 WTO Agreement.

[135] *Stewart* (ed.), 1076.

[136] See Art. 27 VCLT; ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, as approved on second reading in 2001, Art. 4, in: ILC Report on the Work of the Fifty-Third Session (2001), UN Doc. A/56/10 (2001).

[137] A prominent example is the German *Deutsches Institut für Normung e.V.* (DIN). See its website, <www2.din.de/>.

[138] *E.g.*, the German DIN or the US ANSI, see para. 20.

its failure to exercise due diligence in preventing wrongdoing by private actors.[139]

F. Evaluation

Hitherto, WTO Members, Panels, and the Appellate Body have been reluctant to employ the TBT Agreement as a crucial legal instrument in the process of dispute settlement under the auspices of the WTO. Most of the rules and definitions covered by Art. 1 and the corresponding Annex 1 have not been addressed. Since the establishment of the WTO on 1 January 1995, the Appellate Body has interpreted integral parts of the TBT Agreement in two cases: *EC—Asbestos* and *EC—Sardines*. Yet, the ***EC—Sardines*** dispute, which was resolved solely on the basis of the TBT Agreement, confirms that the Agreement's legal regime can be a powerful and effective tool, should be utilized to combat technical barriers to trade and will be likely to. *56*

[139] *E.g.*, *United States Diplomatic and Consular Staff In Teheran (United States v. Iran)* (Merits), Judgement of 24 May 1980, ICJ Reports 1980, 3, 30–31 on Iran's responsibility for its failure to protect the U.S. Embassy against militants not having an official character.

Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO-Technical Barriers and SPS Measures.*
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Article 2 TBT
Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

With respect to their central government bodies:

1. Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.
2. 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 fulfil a legitimate objective, taking account of the risks non-fulfilment 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.
3. 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.
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 fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.
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.
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.
7. Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.
8. Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.
9. Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:
   - 9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;
   - 9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
   - 9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;

9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

10. Subject to the provisions in the lead-in to paragraph 9, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 9 as it finds necessary, provided that the Member, upon adoption of a technical regulation, shall:
    10.1 notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems;
    10.2 upon request, provide other Members with copies of the technical regulation;
    10.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.
11. Members shall ensure that all technical regulations which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.
12. Except in those urgent circumstances referred to in paragraph 10, Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

Case Law

Appellate Body Report, *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R; Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R; Appellate Body Report, *US—Wool Shirts and Blouses*, WT/DS33/AB/R; Panel Report, *Indonesia—Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R; Appellate Body Report, *US—FSC (Article 21.5—EC)*, WT/DS108/AB/RW; Panel Report, *EC—Asbestos*, WT/DS135/R; Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R; Appellate Body Report, *Canada—Autos*, WT/DS139/AB/R, WT/DS142/AB/R; Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R; Panel Report, *EC—Sardines*, WT/DS231/R; Appellate Body Report, *EC—Sardines*, WT/DS231/AB/R.

Documents

Working Party Report, Border Tax Adjustments, BISD 18S/97, 2 December 1970; Committee on Trade and Environment, Committee on Technical Barriers to Trade, Negotiating History of the Coverage of the TBT Agreement with Regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics, Note by the WTO Secretariat, WT/CTE/W/10, G/TBT/W/11, 29 August 1995; Committee on Technical Barriers to Trade, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/9, 13 November 2000; Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Implementation-Related Issues and Concerns, Decision of 14 November 2001, WT/MIN(01)/17, 20 November 2001; Committee on Trade and Environment, GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d) and (g), Note by the Secretariat, WT/CTE/W/203, 8 March 2002; Committee on Technical Barriers to Trade, Decisions and Recommendations Adopted by the Committee since 1 January 1995, Note by the Secretariat, Revision, G/TBT/1/Rev.8, 23 May 2002; Committee on Technical Barriers to Trade, Third Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/13, 11 November 2003; Committee on Technical Barriers to Trade, Transparency Requirements and Procedures, Background Note by the Secretariat, G/TBT/W/250, 16 February 2005; Committee on Technical Barriers to Trade, Eleventh Annual Review of the Implementation and Operation of the TBT Agreement, Note by the Secretariat, G/TBT/18, 17 February 2006.

Cross References

Arts 904–907 and 909 NAFTA.

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A. General

1 Within the TBT Agreement,[1] Art. 2 governs the preparation, adoption and application of technical regulations and intends to ensure that technical regulations do not constitute barriers to international trade. The TBT Agreement generally, and Art. 2 in particular, seek to achieve a balance between Members' right to take regulatory measures for the protection of their legitimate interests and the need to prevent unnecessary trade barriers.

[1] The views expressed are those of the author and are without prejudice to the positions of WTO Members and to their rights and obligations under the WTO.

Derived from the wording of the definition contained in Annex 1.1, a three-pronged test for identifying technical regulations was set out by the Appellate Body in the *EC—Asbestos* case:[2] (i) the document must apply to an identifiable product or group of products for the enforcement of the regulation to be possible;[3] (ii) the document must set out one or more characteristics of the product;[4] and (iii) compliance with the product characteristics must be mandatory.[5] *2*

I. Institutional Coverage of Art. 2

The TBT Agreement applies to a wide range of bodies and systems. Annex 1, paras 4 to 8 contain the definitions of five different levels of organizations: central government, local government and non-governmental bodies, regional and international bodies or systems. Art. 2 applies only to **central governmental bodies**, which are defined in Annex 1.6 as "a central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question".[6] *3*

II. Temporal Scope of Art. 2

In the *EC—Hormones* case, the Appellate Body addressed the temporal scope of the **SPS Agreement**. It stated that absent a provision limiting the temporal application of the SPS Agreement, it could not be assumed that the Agreement did not apply to measures which were enacted before 1995 and continued to be in force.[7] Similarly, an examination of the language of Art. 2 TBT does not reveal any temporal limitations. *4*

To the contrary, the text of several TBT provisions confirms that Art. 2 applies to technical regulations enacted prior to 1995. For instance, in the *EC—Sardines* case, the Panel considered that it was clear that the change of circumstances requirement contained in Art. 2.3 also applied to technical regulations enacted before the TBT Agreement came into force.[8] As regards Art. 2.4, being a "central provision" of the TBT Agreement, the Panel said that it could not be assumed that such a provision did not apply to existing measures in the absence of an explicit statement to that effect in the text.[9] Rather, in the *EC—Sardines* case the Appellate Body was of the *5*

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[2] For more information on the definition of a "technical regulation", see *Koebele*, Article 1 TBT, para. 13 *et seq*.
[3] Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, para. 70.
[4] *Ibid.*, para. 67.
[5] *Ibid.*, para. 68.
[6] See *Koebele*, Article 1 and Annex 1 TBT, para. 53.
[7] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 128.
[8] Panel Report, *EC—Sardines*, WT/DS231/R, para. 7.81.
[9] Appellate Body Report, *EC—Sardines*, WT/DS231/AB/R, para. 208.

view that the use of the present tense suggested a continuing obligation in respect of existing measures, and referred to technical regulations generally and without limitations.[10]

6 Also, Art. 2.5 speaks of "preparing, adopting or applying" a technical regulation. In the view of the Panel in the *EC—Sardines* case, the use of the term "apply" in Arts. 2.4 and 2.5 confirms that the requirements are applicable to existing technical regulations.[11] Finally, Art. 2.6 provides that Members are to participate in the preparation of international standards by the international standardizing bodies for products for which they have either adopted, or expect to adopt technical regulations. It would be contrary to the principle of effectiveness if a Member were to participate in the development of a relevant international standard and then claim that such standard need not be used as a basis for its technical regulation on the ground that it was already in existence before the standard was adopted.[12] In the same case, the Appellate Body also referred to the "general context" of Art. XVI:4 of the Marrakesh Agreement Establishing the WTO, which imposes on all WTO Members a clear obligation to ensure the conformity of existing laws, regulations and administrative procedures.[13]

B. Non-discrimination: National Treatment and MFN Principles (Art. 2.1)

7 In respect of technical regulations, Members are to accord to products originating in the territory of any other Member of the WTO treatment "no less favourable than that accorded to like products of national origin and to like products originating in any other country" (Art. 2.1). The principle of **non-discrimination**, as set out in Art. 2.1, incorporates elements of the **most-favoured-nation** (MFN) principle (Art. I GATT 1994) and the principle of **national treatment** (Art. III GATT 1994).[14] Art. 2.1 may be seen as a combined and shortened version of **Arts I and III GATT 1994**.[15]

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[10] *Ibid*., para. 205. See for another opinion on the temporal scope of Art. 2.4, *Howse*, LIEI, 29 (2002), 247–254.

[11] *EC—Sardines*, WT/DS231/R, para. 7.75.

[12] *Ibid*., para. 7.76.

[13] *EC—Sardines*, WT/DS231/AB/R, para. 213.

[14] See *Hestermeyer*, Article III GATT 1994.

[15] Art. I:1 GATT 1994 reads: "…any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties". And Art. III:4 GATT 1994 is drafted as follows: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations

In examining whether a measure is consistent with Art. 2.1 two steps may be followed:[16] first, the determination of whether the two products, or sets of products, are "like"; secondly, if the two products are like, the establishment of no less favourable treatment between them. *8*

I. Like Products

The non-discrimination principle is closely linked to the determination of likeness between products. Since this principle has never been addressed in the TBT context by panels or by the Appellate Body, a source of inspiration may be found in the GATT case law. Whether two products are "like" is one of the critical legal questions arising under the WTO Agreement. In part, this is because the term "like products" is not defined in the WTO Agreement. Most of the case law in relation to the concept of like products has been developed under Art. III, although this concept is contained in ten different articles of the GATT.[17] Since the concept of "like products" has been tested in a number of dispute settlement **cases under GATT and the WTO**, it is legitimate to expect that the interpretation of the non-discrimination principle and the definition of a like product in the TBT context would be influenced by findings on Arts I and III GATT 1994. The possibility of resorting to interpretations of other, but similar, provisions was acknowledged in the *Indonesia—Autos* case.[18] *9*

However, the Appellate Body made it clear in *Japan—Alcoholic Beverages II*—probably the most important case in relation to "like products"—that the concept of like product may have different meanings in the different provisions in which it is used. The image of an accordion was given to designate the concept of "likeness" as it is a relative one that stretches and squeezes in different places as different provisions of the WTO Agreement are applied.[19] The interpretation of the concept of likeness will vary according to the particular provision in which the term "like" is encountered, as well as by the context of and the circumstances that prevail in any given case to which that provision may apply. In the *EC—Asbestos* case, the Appellate *10*

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and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

[16] This order in the legal analysis is inspired by the approach of the Appellate Body in relation to Art. III. See Appellate Body Report, *Japan—Alcoholic Beverages (II)*, WT/DS/8/AB/R, WT/DS/10/AB/R, WT/DS/11/AB/R, 113.

[17] Arts I (MFN), II (schedules of concessions), III (national treatment), VI (anti-dumping and countervailing duties), VII (valuation for customs purposes), IX (marks of origin), XI and XIII (quantitative restrictions), XVI (subsidies) and XIX (safeguards).

[18] Panel Report, *Indonesia—Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.141.

[19] Appellate Body Report, *Japan—Alcoholic Beverages II*, WT/DS/8/AB/R, WT/DS/10/AB/R, WT/DS/11/AB/R, 114.

Body warned "against the automatic transposition of the interpretation of 'likeness' under the first sentence of Art. III:2 to other provisions where the phrase 'like products' is used".[20] Given, however, that the like product provisions of the **TBT Agreement appear to be a logical extension of the non-discrimination obligations**, and that Art. III:4 GATT 1994 specifically deals with regulatory discrimination, it is likely that GATT non-discrimination disputes, in particular those dealing with Art. III:4 GATT 1994, may provide guidance in the interpretation of the term "like products" appearing in various places in the TBT Agreement, in particular Art. 2.1.

11 Most Panel and Appellate Body rulings on "like products" start their determination of likeness by quoting the report of a 1970 Working Party on *Border Tax Adjustments* (adopted by GATT CONTRACTING PARTIES). The report suggested some **criteria** for determining whether products were "like": "the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality".[21] These criteria were rephrased and completed by the Appellate Body in the *EC—Asbestos* case to comprise four categories of "characteristics" that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive the products as alternative means of performing particular functions; and (iv) the international classification of the products for tariff purposes.[22] However, the Appellate Body also made it clear that these criteria are simply tools to assist in the task of sorting and examining the relevant evidence and are not meant to be a closed list of criteria that will determine the legal characterization of products.[23]

II. No Less Favourable Treatment

12 The term "no less favourable treatment" has not been tested in the TBT context but has been at the centre of a few disputes on the application of Art. III:4 GATT 1994.[24] **Three interpretive elements** may be drawn from these cases. First, in *Korea—Various Measures on Beef*, the Appellate Body established that a formal difference in treatment between like products was not sufficient to show a violation of Art. III:4.[25] Secondly, whether or not

[20] *EC—Asbestos*, WT/DS135/AB/R, footnote 50.
[21] Working Party Report, *Border Tax Adjustments*, BISD 18S/97, para. 18.
[22] *EC—Asbestos*, WT/DS135/AB/R, para. 101.
[23] *Ibid.*, para. 102.
[24] See *Hestermeyer*, Article III GATT 1994, para. 84.
[25] Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 137. See also *EC—Asbestos*, WT/DS135/AB/R, para. 100.

products are treated less favourably should be assessed by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.[26] And, thirdly, in the *US—FSC (Article 21.5—EC)* case, the Appellate Body stated that the examination of whether a measure involves less favourable treatment of imported products within the meaning of Art. III:4 GATT 1994 must be grounded in close scrutiny of the "fundamental thrust and effect of the measure itself" in the market place.[27]

13 In addition, in its interpretation of MFN treatment in the context of Art. I:1, the Appellate Body noted that Art. I:1 covered both ***de jure*** **and** ***de facto*** **discrimination**.[28]

III. Conclusion

14 A notable difference between the principle of non-discrimination in the TBT context and in the GATT is that, in the case of the latter, Members may be exempted from this non-discrimination requirement by Art. XX GATT 1994 on general **exceptions**.[29] However, no such deviation is allowed in respect of the principle of non-discrimination in Art. 2.1. Therefore, *a priori*, if a measure provides more favourable treatment to like products, even if it is with the aim of protecting health, such as Art. XX lit. b GATT 1994, the measure is inconsistent with Art. 2.1. However, several other provisions of the TBT Agreement, such as the Preamble and Arts 2.2 and 2.4, suggest that Members have the right, under certain conditions, to take regulatory measures for legitimate objectives. Therefore, it is likely that in case of a dispute the Panel or the Appellate Body will interpret the concept of "like product" in Art. 2.1 in a narrower sense than under Arts I and III GATT 1994, as the accordion of likeness "stretches and squeezes in different places".[30]

C. Prevention of Unnecessary Obstacles to International Trade (Art. 2.2)

15 Art. 2.2 contains several **requirements**: technical regulations cannot be prepared, adopted or applied with a view to or with the effect of creating

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[26] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 137.
[27] Appellate Body Report, *US—FSC (Article 21.5—EC)*, WT/DS108/AB/RW, para. 215.
[28] *Canada—Autos*, WT/DS139/AB/R, WT/DS142/AB/R, para. 78.
[29] See *Wolfrum*, Article XX GATT 1994 [Introduction].
[30] *Japan—Alcoholic Beverages II*, WT/DS/8/AB/R, WT/DS/10/AB/R, WT/DS/11/AB/R, 114.

unnecessary obstacles to international trade and cannot be more trade-restrictive than necessary to fulfil a legitimate objective; Members must pursue a legitimate objective when preparing, adopting or applying a technical regulation which is trade-restrictive; and Members must take into account the risks non-fulfilment of the legitimate objective would create when assessing the trade-restrictiveness of the regulation.

I. "Unnecessary" and "Less Trade-Restrictive Than Necessary"

16 Art. 2.2 contains two elements related to the "necessity" of a TBT measure: (i) technical regulations cannot be prepared, adopted or applied with a view to or with the effect of creating **unnecessary obstacles** to international trade; and (ii) technical regulations cannot be **more trade-restrictive than necessary** to fulfil a legitimate objective. In fact, the second requirement sets up a mechanism to determine what would be an "unnecessary" obstacle to trade. If a measure is found to be more trade-restrictive than necessary to fulfil a legitimate objective, it will automatically be an "unnecessary" obstacle to trade, and therefore inconsistent with Art. 2.2.

17 The examination of whether or not a measure is "necessary" has proved to be a crucial step in panel practice under **Art. XX** lit. b and d GATT 1994 in particular.[31] The interpretation of the necessity requirement of Art. XX lit. b and d GATT 1994 has evolved from a least-trade restrictive approach to a less-trade restrictive one, supplemented by a proportionality test ("a process of weighing and balancing a series of factors").[32] The definition of the "necessity test" includes consideration of the following: the ambit of the word "necessary" is not limited to what is "indispensable"; and "a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'."[33] In the *Korea—Beef* case, the Appellate Body bifurcated the necessity test as follows: (1.) situations where the claim may be that a measure is indispensable, *i.e.* where the measure is the only one available; and (2.) situations where a Member may be able to justify its measure as "necessary" within the meaning of Art. XX, even if there were other measures available.[34]

18 For the second situation, the Appellate Body ruled that the determination of whether a measure is not indispensable but nevertheless necessary

[31] See *Stoll & Strack*, Article XX lit. b GATT 1994, paras 37 *et seq*.; *Reyes-Knoche & Arend*, Article XX lit. d GATT 1994, para. 17 *et seq*.
[32] WT/CTE/W/203, para. 42.
[33] *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 161.
[34] WT/CTE/W/203, para. 41.

involves in each case **a process of weighing and balancing a series of factors** which include: (i) the contribution made by the measure to the enforcement of the regulation at issue; (ii) the importance of the common interests or values protected by that regulation; and (iii) the impact of the regulation on imports or exports.[35]

This "process of weighing and balancing" was further developed in the *EC—Asbestos* case, where the Appellate Body found that the more vital or important the common values pursued, the easier it would be to accept as necessary measures designed to achieve those ends.[36] This seems to suggest that there may be differing levels of scrutiny applicable to the analysis of the necessity test, depending on the importance of the values it served.[37] In this case, the objective pursued by the measure, which was the preservation of human life and health, was found by the Appellate Body to be a value both "vital" and "important in the highest degree".[38] *19*

This "weighing and balancing" approach seems particularly relevant in the TBT context where Art. 2.2 is really about striking a balance between, on the one hand, the legitimate objectives pursued and, on the other hand, the trade-restrictiveness of the measure. *20*

II. Legitimate Objectives and the Preparation, Adoption or Application of a Trade-restrictive Technical Regulation

Pursuant to Art. 2.2, Members must have a legitimate objective when preparing, adopting or applying a technical regulation which is trade-restrictive. The term "legitimate objectives" is also found in Arts. 2.4 and 2.5. Art. 2.2 contains a non-exhaustive list of legitimate objectives which include: **national security requirements**; the **prevention of deceptive practices**; and the protection of **human health or safety**, **animal or plant life or health**, or the **environment**. When notifying a technical regulation, Members must indicate on the form the objective/rationale of the notified measure. The information contained in the notifications made to date provides a more comprehensive list of objectives that could be understood as falling under the "*inter alia*" clause of Art. 2.2. These objectives could include (in addition to those explicitly mentioned in Art. 2.2): the adoption of new domestic law; consumer information and labelling; quality requirements; harmonization; the lowering or removal of trade *21*

[35] *Korea—Various Measures on Beef* , WT/DS161/AB/R, WT/DS169/AB/R, para. 164.
[36] *EC—Asbestos*, WT/DS135/AB/R, para. 172, referring to *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 162.
[37] WT/CTE/W/203, para. 43.
[38] *EC—Asbestos*, WT/DS135/AB/R, para. 172.

barriers; and trade facilitation.[39] Still other objectives may be proposed and accepted. For instance, in the *EC—Sardines* case, the European Communities had argued that the measure at stake had three objectives, and the complainant acknowledged that these objectives were legitimate: consumer protection, market transparency and fair competition.[40]

22 The list of objectives contained in Art. 2.2 has on a number of occasions been compared to the list of exceptions contained in **Art. XX GATT 1994**. However, there is a fundamental difference between the two provisions. Art. XX, as asserted by the Appellate Body in *US—Wool Shirts and Blouses*, contains "limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves".[41] On the other hand, Art. 2.2 contains positive rules guiding Members' preparation, adoption or application of technical regulations under certain circumstances (*i.e.* certain policy objectives).

23 In terms of **burden of proof**, provisions such as Art. XX GATT 1994 are invoked by the defending party and are considered by the panel only once it has determined a violation of some other provisions. In the case of Art. 2.2, it seems that it is the complaining party who will have the burden of proving that a measure is inconsistent with all elements of that provision.

III. Risk Assessment

24 A final requirement is contained in Art. 2.2: Members must take into account the **risks non-fulfilment of the legitimate objective** would create when assessing the trade-restrictiveness of the regulation. In assessing such risks, relevant elements for consideration are provided in Art. 2.2, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products. This additional requirement seems in fact to be linked to the implementation of the necessity test explained above. It could simply be seen as a legal expression of the "process of weighing and balancing" a series of factors in order to establish whether a trade measure is necessary to fulfil a given objective.

D. Continuation of Technical Regulations (Art. 2.3)

25 Pursuant to Art. 2.3 TBT, there are two different situations in which a technical regulation must not be maintained: (i) where the circumstances or objectives giving rise to its adoption have ceased to exist; and (ii) where

[39] G/TBT/18, para. 12
[40] *EC—Sardines*, WT/DS231/R, para. 7.113.
[41] Appellate Body Report, *US—Wool Shirts and Blouses*, WT/DS33/AB/R, 335.

these circumstances/objectives have changed and may be addressed in a less trade-restrictive manner. Members seem to be under an obligation **periodically to evaluate** their technical regulations and either discontinue them if they no longer serve their purpose or change them if the underlying objectives can be achieved in a less trade-restrictive manner. This explanation is supported by a contextual interpretation of Art. 2.3: Art. 2.8 states that, wherever appropriate, Members are to "specify technical regulations based on product requirements in terms of *performance*". According to the Panel in the *EC—Sardines* case, the performance of products can change and technical regulations governing these products are to reflect these changes.[42]

E. Harmonization (Arts 2.4–2.6)

26 Harmonization may be defined as the adoption by several countries of identical standards on the same subject, where previously each might have had its own set of requirements.[43] Harmonization may involve the creation of an entirely new standard, the adoption of the standard of the most influential participant in the arrangement or the adoption of the most reasonable standard. Historically, the harmonization of many standards evolved out of private efforts that led to one product or system becoming the market leader.

27 The **importance of international standards and international conformity assessment systems** is enshrined in the TBT Agreement and recognized in its Preamble. It is considered important for the following **reasons**: to improve efficiency of production; to facilitate the conduct of international trade; and to contribute to the transfer of technology from developed to developing countries.

28 Harmonization as a central discipline of the TBT Agreement comprises the following **four elements**: (I.) use of international standards as a basis for Members' TBT measures; (II.) justification of technical regulations having a significant effect on trade; (III.) easing the burden of proof under Art. 2.5; and (IV.) participation in international standardizing bodies.[44]

I. Use of International Standards (Art. 2.4)

29 Pursuant to Art. 2.4, Members must use international standards as a basis for their technical regulations except when such international standards would be an **ineffective or inappropriate means of fulfilling the**

[42] *EC—Sardines*, WT/DS231/R, para. 7.81.
[43] See also Annex A:2 SPS.
[44] The parallel provision of the SPS Agreement is Art. 3. See *Landwehr*, Article 3 SPS.

legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.[45] The use of international standards in the context of Art. 2.4 was tested in some detail in the *EC—Sardines* case. The following paragraphs are intended to provide some elements of understanding of Art. 2.4 by reflecting the findings of the Panel and the Appellate Body in the *EC—Sardines* case. In order to establish whether EC technical regulation was consistent with Art. 2.4, the legal analysis addressed four questions: (1.) the burden of proof; (2.) the existence of a relevant international standard; (3.) the obligation to use the relevant international standard as a basis; and (4.) whether the relevant international standard would be an ineffective or inappropriate means of fulfilling the legitimate objective pursued.

1. Burden of Proof Under Art. 2.4

30 According to the Appellate Body in the *EC—Sardines* case the burden of proof for demonstrating that a technical regulation is not based on an international standard rests with the **complaining party** invoking the inconsistency.[46]

31 The European Communities asserted that the burden of proving that the Codex standard was an effective or appropriate means to fulfil the legitimate objectives of the EC technical regulation rested with Peru, as the party claiming that the measure at issue was inconsistent with Art. 2.4. The Panel had concluded that the burden of proof under Art. 2.4 was on the respondent, partly because, in the Panel's view, the complainant could not "spell out" the "legitimate objectives" of the technical regulation and assess the appropriateness of a relevant international standard.[47] The Appellate Body found that this concern was not justified and reversed the Panel's finding that the burden rested with the European Communities.[48] The Appellate Body ruled that the burden of proof should be borne by the complaining party seeking a ruling of inconsistency with Art. 2.4 because the TBT Agreement contains several provisions which provide the complainant with adequate opportunities to obtain information about the objectives of technical regulations.[49] This also applies to the burden of proof that an international standard is not "ineffective" or "inappropriate".

32 In addressing the issue of the burden of proof, the Appellate Body noted the "**strong conceptual similarities**" between the provisions of Art. 2.4 TBT and Arts. 3.1 and 3.3 SPS and found that the standard of proof set

[45] *Koebele*, Article 1 and Annex 1 TBT, paras 22 *et seq*.
[46] *EC—Sardines*, WT/DS231/AB/R, para. 282.
[47] *EC—Sardines*, WT/DS231/R, para. 7.51.
[48] *EC—Sardines*, WT/DS231/AB/R, paras. 277, 282.
[49] *Ibid*., para. 277. See in particular Arts 2.5, 10.1 and 10.2.

out in the *EC—Hormones* case in the context of the SPS Agreement should also be applied in the *EC—Sardines* case:[50] "The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the SPS Agreement before the burden of showing consistency with that provision is taken on by the defending party, is not avoided by simply describing that same provision as an 'exception'."[51]

33 Therefore, in the *EC—Sardines* case, the Appellate Body concluded that the burden of proof under Art. 2.4 was on the complaining party, *i.e.* Peru.[52] This burden included the demonstration that the Codex standard had not been used "as a basis for" the EC Regulation, as well as establishing that the Codex standard was effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities.

34 Despite the fact that the Panel had found that the burden of proof was on the European Communities, the Appellate Body upheld the Panel's finding that Peru had, by itself, adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 was not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation.[53] The reason for this finding by the Panel was that Codex Stan 94 allows Members to provide precise trade description for preserved sardines, and thereby promote market transparency so as to protect consumers and promote fair competition, which was the objective pursued by the European Communities.

2. Existence of a Relevant International Standard

35 In the *EC—Sardines* case, it was argued that the Codex standard was not a ***relevant*** **international standard**[54] because its product coverage was different from that of the technical regulation of the European Communities. The Appellate Body rejected this argument and confirmed the Panel's approach in relying on the dictionary definition of the word "relevant": "the ordinary meaning of the term 'relevant' is 'bearing upon or relating to the matter in hand; pertinent'."[55] Based on this ordinary meaning, the Appellate Body found that the Codex standard "bears upon, relates to, or is pertinent to" the technical regulation of the European Communities, and is therefore a relevant international standard.[56]

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[50] *Ibid.*, paras. 274–275.
[51] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, 135.
[52] *EC—Sardines*, WT/DS231/AB/R, para. 282.
[53] *Ibid.*, para. 291.
[54] For a definition of an "international standard", see *Koebele*, Article 1 and Annex 1 TBT, para. 13.
[55] *EC—Sardines*, WT/DS231/R, para. 7.68.
[56] *EC—Sardines*, WT/DS231/AB/R, para. 231.

3. The Obligation to use International Standards as a Basis

36 In the *EC—Sardines* case, the Appellate Body had to examine whether the Codex standard had been used **"as a basis for"** the EC technical regulation. At the outset, the Appellate Body recalled that in the *EC—Hormones* case it had interpreted the term "based on" in the context of Art. 3.1 SPS. In that case, the Appellate Body stated that the ordinary meaning of the term "based on" was as follows: "A thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter."[57]

37 The Appellate Body noted in the *EC—Sardines* case that the Panel's interpretation of **"as a basis for"** was informed by its ruling in the *EC—Hormones* case.[58] Relying also on the dictionary definition of the term "basis", provided by Webster's New World Dictionary, the Panel had concluded that an international standard was used "as a basis for" a technical regulation, "when it is used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation",[59] which does not mean that Members must conform to or comply with that relevant international standard. The requirement to use the relevant international standard as a basis is therefore not a rigid requirement for bringing the technical regulation into conformity with the relevant international standard.[60] It allows for a certain flexibility in the implementation of the obligation set out in Art. 2.4 and recognizes that there may be various ways in which Members can use the relevant international standard in the formulation of their technical regulations.

38 The Appellate Body further indicated that all these terms (*i.e.* **"principal constituent"**, **"fundamental principle"**, **"main constituent"**, and **"determining principle"**) demonstrate 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,[61] and at a minimum not contradictory.[62] Thus, if the technical regulation and the international standard contradict each other, at the very least, it cannot be concluded that the international standard has been used "as a basis for" the technical regulation.[63] Since

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[57] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 166.

[58] *Ibid.*, para. 242.

[59] In addition, the Appellate Body noted the similar definition of "basis" set out in The New Shorter Oxford English Dictionary: "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". *Ibid.*, para. 244.

[60] This reading of Art. 2.4 TBT is consistent with the Appellate Body's finding in *EC—Hormones* that "based on" does not mean "conform to".

[61] *Ibid.*, para. 245.

[62] *Ibid.*, para. 248.

[63] *Ibid.*, para. 248.

the Appellate Body found that the EC technical regulation and the Codex standard were manifestly contradictory, it confirmed that the Codex standard was not used "as a basis for" the EC technical regulation.[64]

4. Whether the Relevant International Standard Would be an Ineffective or Inappropriate Means to Fulfil the Legitimate Objective Pursued

39 Art. 2.4 provides that Members need not use international standards as a basis for their technical regulations "when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued". In the *EC—Sardines* case, the European Communities contended that the Codex standard was ineffective or inappropriate to fulfil the objectives of consumer protection, market transparency and fair competition. The Appellate Body shared the view of the Panel that this part of Art. 2.4 implies that there must be an examination of and determination on the legitimacy of the objectives of the measure.[65] The legitimate objectives referred to in Art. 2.4 must be interpreted in the context of Art. 2.2.

40 The Appellate Body also upheld the Panel's explanation of the words **"ineffective"** and **"inappropriate"**. In the context of Art. 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 especially suitable for the fulfilment of the legitimate objective pursued.[66] In other words, 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.[67] In the *EC—Sardines* case, the Appellate Body found that Codex Stan 94 was not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation.[68]

II. Justification of Technical Regulations Having a Significant Effect on Trade (Art. 2.5 sentence 1)

41 The first sentence of Art. 2.5 imposes an obligation on a Member preparing, adopting or applying a technical regulation that may have a significant effect on the trade of other Members to provide the justification for that technical regulation. In other words, this provision establishes a **compulsory**

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[64] *Ibid.*, para. 257.
[65] *Ibid.*, para. 286 and *EC—Sardines*, WT/DS231/R, para. 7.122.
[66] *EC—Sardines*, WT/DS231/AB/R, para. 285 and *EC—Sardines*, WT/DS231/R, para. 7.116.
[67] *EC—Sardines*, WT/DS231/AB/R, para. 285 and *EC—Sardines*, WT/DS231/R, para. 7.116.
[68] *EC—Sardines*, WT/DS231/AB/R, para. 291.

mechanism for trade-restrictive technical regulations requiring the supply of information by the regulating Member. For comparison, no such mechanism exists for conformity assessment procedures that have a significant effect on trade. This requirement is in addition to the general transparency provisions and procedures for all technical regulations contained in Art. 2.9–2.10 and in Art. 10.1 and 10.3 which provide for the establishment of an enquiry point to answer all reasonable enquiries regarding any technical regulations adopted or proposed.

III. Alleviating the Burden of Proof (Art. 2.5 sentence 2)

42 The second sentence of Art. 2.5 provides for a **rebuttable presumption** that a technical regulation does not create an unnecessary obstacle to international trade when two conditions are met. First, the technical regulation must be prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in Art. 2.2, *i.e.* national security requirements, the prevention of deceptive practices, the protection of human health or safety, animal or plant life or health, or the environment. Secondly, the technical regulation must be in accordance with relevant international standards, and not just based on them, as in Art. 2.4.

43 To recall, as stated in *US—Wool Shirts and Blouses* the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[69] It is the complaining party who will have to rebut this presumption (and not just establish a *prima facie* case). Pursuant to Art. 2.5, in dispute settlement proceedings the complaining party has the burden of overcoming a presumption of consistency with the TBT Agreement in the case of a measure in accordance with relevant international standards.

44 In the *EC—Hormones* case, the Appellate Body noted concerning a similar provision that the presumption of consistency with relevant provisions of the SPS Agreement that arises under Art. 3.2 in respect of measures that conform to international standards may be an incentive for Members to bring their SPS measures into conformity with such standards.[70]

[69] *US—Wool Shirts and Blouses*, WT/DS33/AB/R, 335.
[70] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 102.

IV. Participation in International Standardizing Bodies (Art. 2.6)

45 Art. 2.6 provides that Members must play a full part, within the limits of their resources, in the **preparation of international standards**, with a view to harmonizing technical regulations. In addition, Art. 2.6 limits Members' obligation to participate in the preparation of international standards to products/matters for which they either have adopted, or expect to adopt, technical regulations. Unlike the SPS Agreement, which includes a direct reference to three international standardizing bodies (Art. 3.4),[71] the TBT Agreement does not contain a precise definition of what an international standardizing body is. Annex 1.4 only contains the definition of an "International body or system": "Body or system whose membership is open to the relevant bodies of at least all Members".[72]

46 Although a list of international standardizing bodies for the purpose of the TBT Agreement does not exist, guidance on the identification of these bodies may be found in a decision adopted in 2000 by the TBT Committee on principles for the development of international standards, guides and recommendations with relation to Arts 2 and 5 of and Annex 3 to the Agreement.[73] The purpose of this decision was to improve the quality of international standards and to clarify and strengthen the concept of international standards under the TBT Agreement. The principles considered important for international standards development relate to transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and developing country interests.

47 Art. 11 on technical assistance and Art. 12 on special and differential treatment contain provisions aimed at improving the participation of **developing country Members** in international standardizing bodies: Arts 11.2 and 12.5 deal with participation in international standardizing bodies; and Art. 12.6 with the preparation of international standards concerning products of special interest to developing country Members.

48 Developing country Members have frequently made the point in the TBT Committee that their ability to take part in international standardizing bodies is somewhat limited. At the First Triennial Review, the TBT Committee reiterated that in the preparation of international standards it was important, *inter alia*, that trade needs were taken into account, along with technical

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[71] The Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention.

[72] Similarly, the ISO/IEC Guide 2: 1991 defines an "International standardizing organization" as follows: "Standardizing organization whose membership is open to the relevant national body from every country".

[73] G/TBT/9, Annex 4.

progress and Art. 12.6 concerning products of special interest to developing country Members.[74] Following a request by Members,[75] the Director-General prepared a report compiling the information received from a number of relevant international standard-setting bodies, intergovernmental organizations, and financial and technical mechanisms on their action to increase the participation of developing country Members in international standards development and their related technical assistance activities.[76]

49 In the 2001 Doha Ministerial Decision on Implementation-Related Issues and Concerns,[77] Ministers took note of the actions taken to date by the **Director-General** to facilitate the increased participation of Members at different levels of development in the work of the relevant international standard-setting organizations as well as his efforts to coordinate with these organizations and financial institutions in identifying TBT-related technical assistance needs and how best to address them. The Director-General was further requested to continue his cooperative efforts with these organizations and institutions, *inter alia* with a view to according priority to the effective participation of least developed countries (LDCs) and facilitating the provision of technical and financial assistance for this purpose. At present, observer international standard-setting organizations report regularly to the TBT Committee on action they are taking to enhance the participation of developing country Members in their work.

F. Equivalence (Art. 2.7)

50 Pursuant to Art. 2.7 Members shall give positive consideration to accepting as equivalent the technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that they adequately fulfil the objectives of their own regulations. Equivalence may also be seen as a less trade restrictive means of fulfilling a legitimate objective. The language used in Art. 2.7, although legally binding ("shall"), contains

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[74] G/TBT/5, para. 20.

[75] General Council, Special Session on Implementation, Minutes of Meeting, Held in the Centre William Rappard on 18 October 2000, WT/GC/M/59, 13 November 2000, paras 11 and 14.

[76] The following organizations provided information to the Director-General: BIPM; FAO and Codex; IAF; IEC; ILAC; ISO; OIML; UNCTAD; UN/ESCAP (Economic and Social Commission for Asia and the Pacific); UNIDO; and the World Bank. "Actions to Increase Participation of Developing Country Members in the Work of Relevant International Standard Setting Organizations", General Council, Special Session on Implementation, Actions to Increase Participation of Developing Country Members in the Work of Relevant International Standard Setting Organizations, Information from International Organizations, Report of the Director-General, WT/GC/48, 24 September 2001 and further circulated as G/TBT/W/172, 27 February 2002.

[77] WT/MIN(01)/17, para. 5.2.

only an obligation of good behaviour: "shall give positive consideration to accepting" and not "shall accept". Moreover, the decision to accept technical regulations of other Members as equivalent is premised on the subjective criteria of satisfaction.

51 Some Members have indicated that they have accepted as equivalent technical regulations from other Members even though the requirements therein differ from their own. In this sense, equivalence can be seen as an element of **good regulatory practice**.[78] The issue of good regulatory practice has been discussed by the TBT Committee since the First Triennial Review as a way to facilitate the avoidance of unnecessary obstacles to trade in the preparation, adoption and application of technical regulations and conformity assessment procedures.

52 In this context, there is one notable distinction between the obligations for technical regulations and conformity assessment: Art. 2 only considers a system of unilateral recognition by Members, while for conformity assessment Art. 6 goes further by also providing for a mutual recognition system.

G. Preference for Performance (Art. 2.8)

53 Another important aspect of technical regulations is contained in Art. 2.8, which provides that wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

54 The objective of this provision is to allow producers to find the most cost-effective way of fulfilling the requirements contained in a technical regulation. What counts is the result, *i.e.* the performance of a product, rather than the way in which this outcome is achieved. For example, for a technical regulation on fire-resistant doors, it seems preferable to require such doors successfully to pass all the relevant tests on fire resistance. Thus, the technical regulation could specify that "the door must be fire resistant with a 30-minute burn-through time"; conversely it should not be prescribed how the product must be made, *e.g.*, that "the door must be made of steel, two centimetres thick".

H. Transparency Procedures (Arts 2.9–2.12)

55 Transparency is a core principle of the WTO and features in many WTO agreements: *e.g.* GATT (Art. X), GATS (Art. III), TRIPS (Art. 63), or

[78] G/TBT/13, para. 13.

SPS Agreement (Art. 7 and Annex B). It is an important tool for ensuring that trade flows as smoothly, predictably and freely as possible. The TBT Agreement contains detailed transparency obligations which, for technical regulations, are contained in Art 2.9 to 2.12. In the TBT Agreement, transparency serves two main objectives: first, to make technical regulations known and publicly available; and, secondly, to provide interested parties with an opportunity to formulate comments on TBT measures.

I. Making Technical Regulations Known and Publicly Available

1. Notifications

56 A notification is the act of reporting to WTO Members measures that may have an impact on trade. Art. 2.9.2 contains the obligation to notify draft technical regulations, while Art. 2.10.1 concerns measures already adopted for urgent reasons. Members must notify technical regulations when the following two conditions apply (introductory part of Art. 2.9): first, a relevant **international standard does not exist** or the measure is not in accordance with the standard; and, secondly, there is the possibility of a **significant effect** on the trade of other Members. With a view to ensuring a consistent approach in determining whether proposed technical regulations are to be notified, the TBT Committee established criteria for the definition of a "significant effect on trade of other Members" (introductory part of Art. 2.9). Accordingly, this concept may refer to the effect on trade:[79] (i) of one technical regulation or conformity assessment procedure only, or of several in combination; (ii) in a specific product, group of products or products in general; and (iii) between two or more Members. When assessing the significance of the effect on trade of technical regulations, the Member concerned is encouraged to take into consideration a number of elements including: the value of imports in respect of the importing and/or exporting Members concerned; the potential growth of such imports; and the difficulties for producers in other Members in complying with the proposed technical regulations.[80]

57 Moreover, the TBT Committee in 1995 adopted a decision specifically relating to notifications of **labelling requirements**.[81] It was decided that pursuant to Art. 2.9, Members were obliged to notify all mandatory labelling requirements that were not based substantially on a relevant international standard and that might have a significant effect on the trade of other Members. The Committee also noted that the obligation was not

[79] G/TBT/1/Rev.8, 15.
[80] *Ibid.*
[81] *Ibid.*, 18.

dependent upon the kind of information which was provided on the label, whether or not it was in the nature of a technical specification.

58 In case of **urgent problems of safety, health, environmental protection or national security** that have arisen or threaten to arise, Art. 2.10.1 provides Members with the right to omit certain steps listed in the general provision on notifications (*i.e.* Art. 2.9). Hence, notification requirements for urgent problems differ from the regular procedure in two important ways: first, the notification has to be made upon adoption of the measure; and, secondly, the notification form must include a mention of the nature of the urgent problem.

59 The TBT Committee, in its early years and again later during the Second Triennial Review in 2000, put in place detailed **notification procedures**.[82] On the **format of a notification**, Art. 2.9.2 provides that it needs to contain information on the products covered together with a brief indication of the objective and rationale of the proposed technical regulation. In several decisions, including during the Second Triennial Review, the TBT Committee elaborated on and expanded these requirements.[83]

60 As regards **timing**, a notification "shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account" (Art. 2.9.2). In addition, the TBT Committee recommended in 1995 that notifications be made when a draft of the complete text of a proposed technical regulation was available and when amendments could still be introduced.[84] As regards technical regulations adopted for urgent reasons notification must be made immediately upon adoption.[85]

61 The importance of **fulfilling notification** provisions has been reiterated regularly by the TBT Committee, as notifications can make an important contribution towards avoiding unnecessary obstacles to trade and provide Members with the opportunity to influence the final requirements of other Members.[86] Between 1995 and 2005, 6,869 notifications of draft technical regulations were submitted, *i.e.* an average of more than 500 notifications per year.[87]

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[82] G/TBT/9, Annex 3, 18.
[83] See G/TBT/1/Rev.8, 11–18.
[84] G/TBT/1/Rev.8, 15.
[85] See Art. 2.10.1
[86] Notifications of technical regulations to the WTO Secretariat must be made in English, French or Spanish (Art. 10.9) and sent to the Central Registry of Notifications (CRN). At the Second Triennial Review, the TBT Committee requested the Secretariat to prepare monthly lists of notifications. They are contained in documents G/TBT/GEN/N/1–65.
[87] G/TBT/W/250, 10.

2. Publication and Provision of Copies

62 Members must also fulfil publication obligations both before the adoption of a technical regulation and thereafter. Pursuant to Art. 2.9.1, Members are required to publish a notice of a draft technical regulation if it may have a significant effect on trade, and whenever an international standard does not exist or the draft measure is not in accordance with it. This step can be waived in case of emergency.[88]

63 The **publication of the notice** must be made at an "early appropriate stage", which is defined in Art. 2.9.1 as allowing sufficient time for interested parties to become acquainted with a proposed technical regulation. At the Third Triennial Review, the TBT Committee noted the usefulness of sharing information, on a voluntary basis, on the future development of draft technical regulations before the relevant notifications were made.[89]

64 Furthermore, pursuant to Art. 2.11, Members are required to **publish promptly all technical regulations adopted**, including those which did not have a significant effect on the trade of other Members or those which were in accordance with an international standard (*i.e.* those not covered by the preamble to Art. 2.9).

65 On the timing of the publication stage, Art. 2.12 provides that Members must leave a **reasonable interval** between the publication of technical regulations and their entry into force, except in case of urgent circumstances. The object of this requirement is to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.[90] In the Ministerial Decision on Implementation-Related Issues and Concerns adopted on 14 November 2001 in Doha, Ministers decided that, subject to the conditions specified in Art. 2.12 on technical regulations, the phrase "reasonable interval" had to be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.[91]

66 Finally, Members are required, upon request, to provide **copies** of proposed technical regulations and conformity assessment procedures (Art. 2.9.3). Moreover, Members must, whenever possible, **identify the parts** of the measure which in substance deviate from relevant international standards. Where there are urgent problems, copies of the adopted measures also need to be provided (Art. 2.10.2).

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[88] See Art. 2.10.
[89] G/TBT/13, para. 17.
[90] See also *Ibid.*, para. 24.
[91] WT/MIN(01)/17, para. 5.2.

II. Comments on Proposed Technical Regulations

67 Pursuant to Art. 2.9.4, prior to the adoption of a technical regulation Members are required to: allow reasonable time for other Members to comment in writing; discuss these comments upon request; and take the written comments and the results of the discussions into account.[92] Art. 2.9.4 also includes a reference to the principle of non-discrimination as the period for comments must be the same for all Members. In 1996, the TBT Committee recommended that the normal **time-limit** for the presentation of comments on notified technical regulations and conformity assessment procedures should be 60 days.[93] At the Second Triennial Review, the TBT Committee encouraged Members which were able to provide a time-limit of more than 60 days, such as 90 days, to do so and to indicate this fact on the notification form.[94] However, the time-limit is still below the recommendation: in 2005, Members allowed an average of 60.5 days for comments for notifications on technical regulations and conformity assessment procedures.[95]

68 In order to clarify the procedures for the **handling of comments** on proposed technical regulations, the Committee agreed in 1995 on a number of procedures.[96] First, each Member must notify the WTO Secretariat of the authority or agency (*e.g.* its enquiry point) which it has designated to be in charge of handling comments received. Secondly, a Member receiving comments through the designated body should without further request: (i) acknowledge the receipt of such comments; (ii) explain within a reasonable time to any Member from which it has received comments how it will proceed in order to take these comments into account; and (iii) provide any Member from which it has received comments with a copy of the corresponding technical regulation as adopted or information that no corresponding technical regulation will be adopted for the time being.

69 At the Third Triennial Review, the TBT Committee noted that insufficient comment periods prevented Members from exercising their right to submit comments, to hold consultations, and to have their comments taken into account.[97] Lack of time was particularly problematic when drafts needed to be requested and/or translated. The Committee observed that, in certain instances, the deadlines for comments had gone beyond the date of the entry

[92] Obligations are identical for technical regulations adopted for urgent reasons, with the exception that no time limit is provided (Art. 2.10.3).
[93] G/TBT/1/Rev.8, 17.
[94] G/TBT/9, 22.
[95] G/TBT/18, para. 13.
[96] G/TBT/1/Rev.8, 17.
[97] G/TBT/13, para. 20.

into force of regulations, which reduced the utility of providing comments.[98] It was also noted that the sharing on a voluntary basis of comments and responses could contribute significantly to other Members' understanding of whether their comments had been taken into account, and could assist Members to benefit from the technical knowledge and legal expertise of their trading partners.[99] And this could be particularly useful for developing country Members.

[98] *Ibid.*, para. 20.
[99] *Ibid.*

Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO-Technical Barriers and SPS Measures.*
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Article 3 TBT
Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies

With respect to their local government and non-governmental bodies within their territories:

1. Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Article 2, with the exception of the obligation to notify as referred to in paragraphs 9.2 and 10.1 of Article 2.
2. Members shall ensure that the technical regulations of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 9.2 and 10.1 of Article 2, noting that notification shall not be required for technical regulations the technical content of which is substantially the same as that of previously notified technical regulations of central government bodies of the Member concerned.
3. Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 9 and 10 of Article 2, to take place through the central government.
4. Members shall not take measures which require or encourage local government bodies or nongovernmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.
5. Members are fully responsible under this Agreement for the observance of all provisions of Article 2. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies.

Case Law

Panel Report, *US—Malt Beverages*, BISD 39S/206; Appellate Body Report, *US—Hot-Rolled Steel*, WT/DS184/AB/R.

Documents

Committee on Technical Barriers to Trade, First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/5, 19 November 1997; Committee on Technical Barriers to Trade, A List of Members whose Local Government Bodies, directly below the Central Government Level, are Authorized to Adopt Technical Regulations or Conformity Assessment Procedures, G/TBT/W/76, 13 July 1998; Committee on Technical Barriers to Trade, A List of Members whose Local Government Bodies, directly below the Central Government Level, are Authorized to Adopt Technical Regulations or Conformity Assessment Procedures, G/TBT/W/76/Add.1, 1 October 1998; Committee on Technical Barriers to Trade, Decisions and Recommendations Adopted by the Committee since 1 January 1995, Note by the Secretariat, Revision, G/TBT/1/Rev.8, 23 May 2002; Committee on Technical Barriers to Trade—Third Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/13, 11 November 2003; Committee on Technical Barriers to Trade, Transparency Requirements and Procedures, Background Note by the Secretariat, G/TBT/W/250, 16 February 2005; Committee on Technical Barriers to Trade, Tenth Annual Review of the Implementation and Operation of the TBT Agreement, Note by the Secretariat, G/TBT/15, 4 March 2005.

Cross References

Art. 902.2 NAFTA.

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A. General

1 Within the TBT Agreement,[1] Art. 3 governs the preparation, adoption and application of **technical regulations by local government bodies and non-governmental bodies** within the territories of Members. Similar provisions on sub-central entities can be found in the GATT (Art. XXIV:12 as complemented by the Understanding on the Interpretation of Art. XXIV of GATT 1994),[2] the SCM Agreement (Art. 1.1 lit. a (l)),[3] the GATS (Art. I:3 lit. a (i))[4] and the DSU (Art. 22.9).[5]

2 The **objective** of Art. 3 is to extend the institutional coverage of the TBT Agreement to two situations in particular: (i) that in which the regulatory framework of a particular sector is developed by the private sector; and (ii) that in which regulatory activity takes place at the local level, especially in countries with a federal structure. To deal with these two situations, the

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[1] The views expressed are those of the author and are without prejudice to the positions of WTO Members and to their rights and obligations under the WTO.

[2] Art. XXIV:12 reads: "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories". The Undestanding on the Interpretation adds the following (para. 13): Each Member is fully responsible under GATT 1994 for the observance of all provisions of GATT 1994, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory".

[3] Art. 1.1 lit. a (1) SCM reads: "For the purpose of this Agreement, a subsidy shall be deemed to exist if: there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as 'government' [...])".

[4] Art. I:3 reads: "For the purposes of this Agreement: (a) 'measures by Members' means measures taken by: (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities; In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory."

[5] Art. 22.9 reads: "The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance [Footnote omitted]."

negotiators of the TBT Agreement provided specific obligations according to which WTO Members have an obligation to ensure, with a particular caveat, compliance by sub-central entities with basic TBT rules relating to technical regulations.[6] Among these rules, Art. 3 places particular emphasis on transparency requirements.

3 It seems that the drafting of Art. 3 strikes a balance between, on the one hand, the fact that Members may need some flexibility in dealing with certain sub-central entities and, on the other hand, the need to ensure that Members do not escape their responsibility for acts done by these entities.

B. Institutional Coverage of Art. 3

4 Art. 3 addresses the **obligations of WTO Members with respect to** three types of sub-central entities: **local government bodies**, local government bodies on the level directly below that of the central government, and non-governmental bodies.

5 Pursuant to Annex 1.7, a local government body is a government other than: a central government, its ministries or departments or any body subject to the control of such a government in respect of the activity in question. Local government bodies as specified by Annex 1.7, includes, among other things, states, provinces, *Länder*, cantons, municipalities and their subdivisions.[7]

6 Art. 3 makes a distinction between two types of local government bodies: (i) those **on the level directly below** that of the central government; and (ii) those **beyond the level directly below** that of the central government. For local government bodies **on the level directly below** that of central government, obligations of Members are more extensive (see Art. 3.2) and include the fulfilment of transparency obligations.

7 Following the First Triennial Review in 1997, Members were requested to specify whether local government bodies in their jurisdiction, directly below the central government level, were authorized to adopt technical regulations.[8] Only a few Members so far have submitted this type of information: these are Austria, Belgium, Canada, Germany, and Switzerland.[9]

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[6] *Steward* (ed.), 1069, 1096–1097.
[7] See *Koebele*, Article 1 and Annex 1 TBT, para. 54.
[8] G/TBT/5, para. 9.
[9] G/TBT/W/76 and G/TBT/W/76/Add.1.

8 A Member is supposed to ensure that **non-governmental bodies** respect, within its territory, the basic rules of the TBT Agreement, except for the provisions relating to notifications (Art. 3.1). This concerns all non-governmental bodies that have legal power to enforce technical regulations, including associations, consortia of industries or any private party which is involved in the elaboration and implementation of technical regulations. A definition of what constitutes a non-governmental body is given in Annex 1.8.[10]

C. Scope of Members' Obligations (Arts 3.1, 3.4 and 3.5)

9 **Rights and obligations under the TBT Agreement vary** according to the type of body concerned. The Agreement draws a distinction between Members' obligations with regard to the conduct of central government bodies on the one hand and local and non-governmental bodies on the other hand. Pursuant to Art. 2, central government bodies are subject to the highest level of obligations under the Agreement in relation to technical regulations.

10 Art. 3 contains **four main types of requirements**: (i) a best endeavours obligation, *i.e.* an obligation to take reasonable measures to ensure that local government and non-governmental bodies comply with the rules set out in Art. 2 governing the treatment of technical regulations (Art. 3.1); (ii) an obligation to refrain from taking measures which would require or encourage sub-central entities to act inconsistently with the TBT Agreement (Art. 3.4); (iii) the full responsibility for the observance of Art. 2 (Art. 3.5) and (iv) a precise course of action to formulate and implement positive measures and mechanisms in support of entities willing to observe the provisions of Art. 2 (Art. 3.5).

I. A Best Endeavours Obligation (Art. 3.1)

11 The legal wording of Art. 3.1 is more akin to a "best endeavours" clause: "shall ensure", contained in the parallel provisions of Art. 2, is replaced by "shall take such reasonable measures as may be available to them to ensure". It seems to recognize that Members may not always be able to coerce certain bodies into taking particular action.

12 Similar wording may be found in Art. XXIV:12 GATT 1994 and Art. 22.9 DSU, which provide that Members must take such **reasonable measures** as may be available to them to ensure the observance of the provisions of

[10] See *Koebele*, Article 1 and Annex 1 TBT, para. 55.

the GATT and the covered Agreements by the regional and local governments and authorities within Members' territories.

13 In the *US—Malt Beverages* case, the GATT panel noted that Art. XXIV:12 GATT 1947 was designed to apply only to measures by regional or local authorities which the central government cannot control under the constitutional distribution of powers.[11] Moreover, the qualification in Art. XXIV:12 GATT 1947 of the obligation to implement the provisions of the GATT seems to grant a special right to federal states without giving an offsetting privilege to unitary states, and, according to the Panel, it has to be construed narrowly so as to avoid undue imbalances in rights and obligations between contracting parties with unitary and federal constitutions.[12]

14 With regard to the interpretation of the term **"reasonable measures"**, the Appellate Body indicated in a different context that notions of flexibility and balance were inherent in the concept of "reasonableness", and should be interpreted in a manner that allows for account of the particular circumstances of each case to be taken.[13]

15 There is **one exception** to the general requirements contained in Art. 3.1: Members are not responsible for taking reasonable measures to ensure that non-governmental bodies and local government bodies beyond the level directly below the central government body comply with the requirement to notify a technical regulation, as provided for in Art. 2.9.2 and 2.10.1.

II. An Obligation to Refrain From Taking Measures Which Would Require or Encourage Sub-Central Entities to act Inconsistently With the TBT Agreement (Art. 3.4)

16 Art. 3.4 contains a negative requirement which provides that 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 similar requirement was already included in Arts 3 and 4 of the Tokyo TBT Code: "Parties shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such local government bodies to act in a manner inconsistent with any of the provisions of Article 2."

[11] Panel Report, *US—Malt Beverages*, BISD 39S/206, para. 5.79.
[12] *Ibid.*, para. 5.79.
[13] Appellate Body Report, *US—Hot-Rolled Steel*, WT/DS184/AB/R, para. 85.

III. Member's Responsibility for the Full Observance of Art. 2 and the Formulation and Implementation of Positive Measures (Art. 3.5)

17 Art. 3.5 covers the observance of TBT provisions by local government **and** non-governmental bodies, given the chapeau of Art. 3 which reads: "With respect to their local government and non-governmental bodies within their territories". While Art. 3.1 seems to give Members a certain flexibility in relation to the conduct of their local and non-governmental bodies, Art. 3.5 provides that Members, nevertheless, are fully responsible for the observance of all provisions of Art. 2. Art. 3.5 also goes further and instructs Members actively to support, through "positive measures and mechanisms", the observance by these entities of the TBT Agreement.

18 This a new feature of the WTO TBT Agreement as the Tokyo TBT Code did not provide for Members' responsibility for the full observance of Art. 2 by local government bodies and non-governmental bodies, nor for the formulation and implementation of positive measures in support of entities willing to observe this provision.

19 The **attribution of responsibility** to Members for the conduct of their sub-central entities is also made clear in Art. 14.4, which provides that the dispute settlement procedures of the TBT Agreement (*i.e.* Art. 14) can also be invoked in respect of actions of local and non-governmental bodies.[14]

20 The distinction between different levels of government as well as non-governmental bodies is an interesting feature of the TBT Agreement. Public international law generally presupposes the unity of the state, making no legal distinction between its different components. Particularly with respect to the responsibility of the state for the conduct of its sub-central entities, there is a general principle of public international law which states that a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (set out in Art. 27 VCLT).

21 The Articles on State Responsibility of the International Law Commission (ILC) have also made it clear that the conduct of territorial entities must be attributed to the state as a whole (Art. 4.1 of the ILC Articles on State Responsibility).[15] Art. 3.5 somehow "crystallizes" in WTO law the customary principle of international law pursuant to which a state cannot invoke

[14] See *Schorkopf*, Article 14 TBT, para. 26.

[15] UN Doc. A/56/10, 21 August 2001. Art. 4.1 of the ILC Articles on State Responsibility reads: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State".

the provisions of its internal law as justification for its failure to perform an obligation.

D. Transparency Procedures (Arts 3.2 and 3.3)

22 Paras 2 and 3 place emphasis on the fulfilment by sub-central entities of transparency procedures, especially with regard to notification requirements and procedures for the exchange of information.

I. Notifications (Art. 3.2)

23 Non-governmental bodies are exempted by Art. 3.1 from the notification obligations contained in paras 9.2 and 10.1 of Art. 2. The same is true for local governmental bodies, with the exception of those at the **level directly below that of Members' central governments**. Indeed, pursuant to Art. 3.2 Members are also required to fulfil the entire gamut of notification obligations contained in Art. 2 for measures of local governments at the **level directly below that of Members' central governments**. However, notification is not required when a technical regulation is "substantially the same" as a measure already notified by the central government body.[16] Although the words "substantially the same" have never been defined by the TBT Committee or any panels, they may simply address possible differences between a general technical regulation adopted by the central government and individual measures taken by local governments to reflect, for instance, the specificities of a particular region. Since 1995, only seven notifications have been submitted pursuant to Art. 3.2 out of the total number 6,098 notifications.[17]

24 At the Third Triennial Review, the Committee reiterated the importance of Members fulfilling their notification obligations under Art. 3.2 at the sub-national level.[18] Members were also encouraged to make greater efforts to raise awareness of these obligations at this level and to ensure their implementation; this could be done, for example, by holding seminars for local government bodies. An example of such **awareness raising** was provided by the United States at the Fourth Special Meeting on Procedures for Information Exchange held by the TBT Committee in November 2004. The enquiry point of the United States explained how it was tracking

[16] When a technical regulation is notified pursuant to Art. 3.2, Members must indicate in the notification form the name of the local government involved. See G/TBT/W/250, paras 13 and 23.

[17] G/TBT/W/250, 10 and G/TBT/15, para. 9.

[18] G/TBT/13, para. 23.

regulations at the sub-federal level, using an electronic tool, *RegAlert*, to monitor all fifty States for changes in technical regulations and conformity assessment procedures.[19]

II. Channels for Exchange of Information (Art. 3.3)

25 Pursuant to Art. 3.3, Members retain the right to require contact to take place through the central government of another Member instead of a local or non-governmental body. This is a particularly important provision for the implementation of transparency procedures by local government bodies **on the level directly below** that of the central government. Where a Member wishes to raise a specific trade concern with respect to a measure adopted by a sub-central entity, that Member is allowed, pursuant to Art. 3.3, to enter into consultations directly with the central authorities of the Member rather than the local or non-governmental body.

26 Art. 3.3 places particular emphasis on the possibility for Members to maintain official contacts through the usual central government channels, especially concerning issues of notification, provision of information and comments on draft and adopted technical regulations.

[19] Committee on Technical Barriers to Trade, Minutes of the Meeting of 4 November 2004, Note by the Secretariat, Annex 2, 5 January 2005, G/TBT/M/34, para. 18.

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Article 4 TBT
Preparation, Adoption and Application of Standards

1. Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the "Code of Good Practice"). They shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.
2. Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement.

Annex 3
Code Of Good Practice For The Preparation, Adoption And Application Of Standards

General Provisions

A. For the purposes of this Code the definitions in Annex 1 of this Agreement shall apply.
B. This Code is open to acceptance by any standardizing body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body; to any governmental regional standardizing body one or more members of which are Members of the WTO; and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO (referred to in this Code collectively as "standardizing bodies" and individually as "the standardizing body").
C. Standardizing bodies that have accepted or withdrawn from this Code shall notify this fact to the ISO/IEC Information Centre in Geneva. The notification shall include the name and address of the body concerned and the scope of its current and expected standardization activities. The notification may be sent either directly to the ISO/IEC Information Centre, or through the national member body of ISO/IEC or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

Substantive Provisions

D. In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.
E. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.
F. Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.
G. With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part, within the limits of its resources, in

the preparation by relevant international standardizing bodies of international standards regarding subject matter for which it either has adopted, or expects to adopt, standards. For standardizing bodies within the territory of a Member, participation in a particular international standardization activity shall, whenever possible, take place through one delegation representing all standardizing bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to which the international standardization activity relates.

H. The standardizing body within the territory of a Member shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. They shall also make every effort to achieve a national consensus on the standards they develop. Likewise the regional standardizing body shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies.

I. Wherever appropriate, the standardizing body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics.

J. At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period. A standard is under preparation from the moment a decision has been taken to develop a standard until that standard has been adopted. The titles of specific draft standards shall, upon request, be provided in English, French or Spanish. A notice of the existence of the work programme shall be published in a national or, as the case may be, regional publication of standardization activities.

The work programme shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis. No later than at the time of publication of its work programme, the standardizing body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva.

The notification shall contain the name and address of the standardizing body, the name and issue of the publication in which the work programme is published, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

K. The national member of ISO/IEC shall make every effort to become a member of ISONET or to appoint another body to become a member as well as to acquire the most advanced membership type possible for the ISONET member. Other standardizing bodies shall make every effort to associate themselves with the ISONET member.

L. Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the comment period, the standardizing body shall publish a notice announcing the period for commenting in the publication referred to in paragraph J. Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards.

M. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

N. The standardizing body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardizing bodies that have accepted this Code of Good Practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary.

O. Once the standard has been adopted, it shall be promptly published.

P. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of its

most recent work programme or of a standard which it produced. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

Q. The standardizing body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardizing bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints.

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A. General

1 The importance of standards in the global markets cannot be overstated. In many instances, standards—although technically non-binding by definition—work as *de facto* market access barriers. Therefore, the issue of standards was heatedly discussed in the Uruguay Round.[1] Yet, despite this strong need for regulation, given that standards are issued not only by government bodies but also by purely private entities, the rules pertaining to technical regulations cannot be translated and applied to standards without deviation. As a consequence, Art. 4 and Annex 3 complement one another in addressing such situation: Annex 3—entitled Code of Good Practice for the Preparation, Adoption and Application of Standards—on the one hand provides a comprehensive legal state-of-the-art framework for the day-to-day operations of standardizing bodies which, in many but not all facets, reiterates or mirrors the solutions found in the TBT Agreement with respect to technical regulations. Art. 4, on the other hand, states how and to what extent WTO Members must implement the Code of Good Practice in their respective territories. Hitherto, no panel or Appellate Body report has directly addressed the interpretation of Art. 4 or Annex 3.

[1] See *Stewart*, 1075.

B. Code of Good Practice (Annex 3)

The **Code of Good Practice** establishes a regulatory framework for the development, setting and administration of standards. The motivation behind the inclusion of a separate legal regime for standards, the norms of which can be accepted by standardizing bodies, was to enhance legal disciplines for the latter.[2] In the Uruguay Round it was believed that its inclusion would constitute a definitive improvement compared to the Tokyo Standard Code which did not contain such a code.[3] As to the content, as a general rule, it can be said that the Code of Good Practice restates the substantive norms and principles of the TBT Agreement (without much adjustment) for the operation of standards and deviates from the former only in respect of the transparency and notification procedures for standardizing bodies. The Code of Good Practice itself differentiates between General Provisions (Sub-Annexes A to C) and Substantive Provisions (Sub-Annexes D to Q). *2*

I. General Provisions (Sub-Annexes A to C)

The basic specifications of the Code of Good Practice are laid down in Sub-Annexes A to C. *3*

1. Incorporation of Definitions of Annex 1 (Sub-Annex A)

Sub-Annex A opens the text of the Code of Good Practice by incorporating the definitions contained in Annex 1 for purposes of the regulation of standard-setting under Annex 3. It thereby lays down a common legal basis for the regulation of standards and technical regulations. *4*

2. Targeted Standardizing Bodies for Acceptance (Sub-Annex B)

Sub-Annex B states that the Code of Good Practice is open to any kind of standardizing body, whether central government, local government, or non-governmental and regional, and thereby strives to bring all standards, regardless of the source of promulgation, within its ambit.[4] It declares these bodies generally to be "standardizing bodies" and, individually, a "standardizing body" in the meaning of the Code of Good Practice.[5] Thus, while the TBT Agreement sticks to the paradigm of international law that only *5*

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[2] See G/TBT/W/11, para. 65.

[3] See *Stewart*, 1077.

[4] International Standardizing Bodies operating on a universal level are not covered; most likely their practice is already in conformity with the spirit of the Code of Good Practice and because, on a global level, the danger of abuse are limited when all countries participate in the process of standardization.

[5] See the explanation in brackets.

States, and not private parties, are regulated,[6] it does however, provide for a text imposing rules which can guide and be followed also by private standardization bodies.

3. Notification of Acceptance or Withdrawal (Sub-Annex C)

6 Sub-Annex C requires that any standardizing body that has either accepted or withdrawn from the Code of Good Practice must notify the ISO/IEC Information Centre in Geneva. The ISO/IEC Information Centre[7] is operated jointly by ISO (the International Organization for Standardization)[8] and IEC (the International Electrotechnical Commission).[9] Its objective is to provide stakeholders with information about standardization, standards and related matters by means of the internet.[10] By 15 January 2006, 161 standardizing bodies from 121 Members had accepted the Code of Good Practice.[11] The ISO/IEC Information Centre annually publishes a list of all standardizing bodies which have accepted the Code of Good Practice with an up-to-date online version.[12] Under Sub-Annex C, notification may be sent directly to the ISO/IEC Information Centre through the national member body of ISO/IEC, preferably through the relevant national member or international affiliate of ISONET. ISONET itself is a network based on an agreement among standardizing bodies to combine their efforts to make information readily available to any interested party.[13] It is premised on the idea that in each country there can be found one body—typically the ISO member—which has a broad and deep knowledge of the standards prevailing in a that country.[14] By joining ISONET, it offers its knowledge and expertise to similar bodies in other countries in exchange for their information.[15]

II. Substantive Framework (Sub-Annexes D to Q)

7 The **core of the substantive obligations** under the Code of Good Practice is contained in Sub-Annexes D to I. By and large, they resemble

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[6] Eminent international law scholar *Brierly* defined the subject of his research "as the body of rules and principles of action which are binding upon civilized states in their relation with one another", 1.

[7] See its website at: <www.standardsinfo.net/isoiec/index.html>.

[8] See *Koebele*, Article 1 TBT, para. 47.

[9] *Ibid*., para. 48.

[10] *Ibid*.

[11] Information available at: <www.standardsinfo.net/isoiec/inttrade.html>.

[12] WTO TBT Standards Code Directory, see <www.standardsinfo.net/isoiec/inttrade.html> (last update: 1 March 2005).

[13] See <www.iso.org/iso/en/prods-services/otherpubs/pdf/informationisonet.pdf>.

[14] *Ibid*.

[15] *Ibid*.

the parallel provisions of the TBT Agreement on technical regulations. Very often, they copy them literally (with the notable exception of the substitution of technical regulations with standards).

1. MFN and National Treatment (Sub-Annex D)

8 For example, Sub-Annex D imposes a national treatment obligation and a most-favoured-nation obligation on standardizing bodies.[16] It is identical to Art. 2.1 addressing technical regulations.[17]

2. Prohibition of Unnecessary Obstacles to Trade (Sub-Annex E)

9 Sub-Annex E requires, as does Art. 2.2 in respect of technical regulations, that standardizing bodies ensure that standards are not prepared, adopted, or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.[18] Unlike Art. 2.2, Sub-Annex E does not clarify that standards shall be "no more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks non-fulfilment would create"[19] and does not provide a list of legitimate objectives.[20] However, the different formulation should not amount to a substantial difference in the determination of what is an unnecessary obstacle to trade. It may however signal flexibility and freedom in the setting of standards as compared to technical regulations.

10 Under Art. 2.2, it is an open question whether it is necessary for the complaining party to demonstrate a trade-restrictive effect to invoke the provision. Whatever the answer may be, for the purposes of Sub-Annex E, the invocation of Sub-Annex E presupposes the **showing of a trade impediment**, given that standards are not mandatory in the sense that compliance with them is a legal precondition for entering the market.[21] However, the threshold for such showing should in practice be not too high in the light of the purpose of Sub-Annex E.

11 The second difference between the regimes of technical regulations in Art. 2 and Sub-Annex E is the lack of an equivalent to the second sentence of Art. 2.5 which contains a rebuttable presumption of legality of technical regulations which comply with international standards. However, given that

[16] See Art. 2.1.
[17] See *Keck-Tamiotti*, Article 2 TBT, paras 7 *et seq*.
[18] See Art. 2.2. However, Art. 2.2 goes on to define when a technical regulation is not more trade restrictive than necessary, including the process for determining when a technical regulation raises an unnecessary barrier to international trade.
[19] See Art. 2.2.
[20] Art. 2.2, sentence 3.
[21] *Schick*, 167.

generally the burden of proof is upon the complaining party, the omission should not result in a practical difference.[22]

12 The third difference can be seen in the absence of an equivalent to Art. 2.3, which imposes a dynamic obligation by declaring that technical regulations shall not be maintained if the circumstances or objectives have changed or can be addressed in a **less trade-restrictive manner**. A possible reason for the omission is the will of the Members not to overburden non-governmental standardizing bodies.[23] Yet, typically, in practice, the most important standardizing bodies are non-governmental, since they are better equipped with know-how and resources than their governmental counterparts.[24] Besides, the term "application" in Sub-Annex E allows for a dynamic interpretation. Therefore, the omission is likely to be due to the fact that the non-binding nature of standards already allows faster adaptation and adjustment to new situations and developments as compared to binding technical regulations, the very reason why the business community favours standards over technical regulations.

3. Use of International Standards (Sub-Annex F)

13 Sub-Annex F restates Art. 2.4 on the use of relevant international standards. Other than Art. 2.4, Sub-Annex F explicitly allows for deviation in instances of "insufficient level of protection" or "fundamental climatic or geographical or fundamental technological problems."[25] An open issue relates to the temporal scope of the application of Sub-Annex F in comparison to that of Art. 2.4, since the former speaks merely of the development of standards. It is therefore questionable whether the obligation to use international standards under Sub-Annex F is limited, other than for Art. 2.4, to standards to be developed and does not govern already existing, adopted standards. Despite the wording, a substantial reason for the different treatment of technical regulations and standards does not exist.[26]

4. Participation in International Standardizing Bodies (Sub-Annex G)

14 The first sentence of Sub-Annex G mandating international harmonization efforts matches the second sentence of Art. 2.6. The fact that in the field of standard-setting, other than in respect of technical regulations, a multiplicity of bodies may be involved in WTO Members' territory creates a need for the coordination of efforts. Accordingly, the second sentence continues

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[22] *Ibid.*, 167–68.
[23] *Ibid.*, 168.
[24] *Ibid.*
[25] *Müller-Graff*, in: *Müller-Graff* (ed.), at 121.
[26] *Schick*, 169–170.

to explain that whenever possible one single delegation shall represent all standardization bodies within a Member's territory.

5. Avoidance of Duplication and Overlap (Sub-Annex H)

15 For the same reason, Sub-Annex H calls upon standardizing bodies within the territory of a WTO Member to avoid duplication or overlap of work with other domestic, regional, and international standardizing bodies. It urges domestic standardizing bodies to achieve a consensus on a national level and demands from regional standardizing bodies the avoidance of duplication or overlap with the work of international standardizing bodies. The aim is to streamline the work of the various standardizing bodies at different levels.

6. Preference for Output Performance (Sub-Annex I)

16 Sub-Annex I reflects Art. 2.8 TBT in requiring that standardizing bodies specify standards based on product requirements in terms of performance rather than design or description characteristics wherever appropriate. The reason for this is that output performance requirements are less trade-distorting.[27]

7. Publication of Work Programme (Sub-Annex J)

17 Sub-Annex J provides that at least once every six months, the standardizing body shall publish a work programme that outlines the standards it is currently preparing and the standards it has adopted over the preceding period.[28] In this respect, Sub-Annex J clarifies that a standard is considered to be under preparation from the moment that a standardizing body decides to develop it until it is adopted. It further requires that the titles of draft standards be made available upon request in English, French or Spanish and that a notice as to the existence of a work programme shall be published in a suitable national or regional publication of standardization activities in which interested parties may look for such information.

18 Moreover, Sub-Annex J stipulates that a work programme for each standard should state the classification relevant to the subject matter, the stage of the process at the end of which a new standard is promulgated and indications as to what existing international standards have been employed as a basis or starting point. In addition, Sub-Annex J prescribes that before or

[27] *Sykes*, 3. An example of an output performance requirement is a decree stating that any door in a public building must withstand open fire for at least 30 minutes. An example of an non-output performance requirement is a decree which prescribes what kind of fire-resistant materials should be used for the production of doors for public buildings. See on Art. 2.8, *Keck-Tamiotti*, Article 2 TBT, paras 53 *et seq*.

[28] Sub-Annexes J to Q strive to make the business of standardization transparent.

simultaneously with the publication of the work programme, its existence must be notified to the ISO/IEC Information Centre, either directly or via the relevant national member or international affiliate. The notification must contain the name and address of the standardizing body, the title and issue of the publication in which the work programme is accessible to a broader forum, its time frame, the price of the publication and the forms in which the publication can be obtained.

8. ISONET Membership (Sub-Annex K)

19 In addition, to allow the smooth functioning of the transparency mechanism as envisaged by the Code, Sub-Annex K provides that the national member of the ISO/IEC shall make every effort to become a member of the ISONET or to appoint another body to become a member of the ISONET and to acquire the most advanced type of membership possible.

9. Possibility of Submitting Comments on Drafts (Sub-Annex L)

20 Sub-Annex L requires that a minimum 60–day period for comment be allowed before a draft standard is adopted. The purpose of this period is to allow interested parties within the territory of a WTO Member to submit comments on the draft standard. The standardizing body is required to publish a notice announcing the period for comment no later than its start. The notice is to be published to the ISO/IEC Information Centre in Geneva. The notice must include, as far as practicable, a description of whether the standard deviates from relevant international standards. By allowing "interested parties" within the territory of a WTO Member to comment, Sub-Annex L allows a range of parties other than WTO Members to make comments so long as they can be defined as "interested parties". In cases where urgent problems of safety, health, or environment arise or threaten to arise, the 60-day comment period can be shortened.

10. Provision of Copies of Draft Standards (Sub-Annex M)

21 Sub-Annex M provides that, upon the request of any interested party within the territory of a WTO Member, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard. It prohibits any form of discrimination by proscribing national treatment and most-favoured nation treatment (excluding costs of delivery). Sub-Annex M is equivalent to Sub-Annex P, which covers completed standards.[29]

[29] See below, para. 24.

11. Consideration of and Reply to Comments (Sub-Annex N)

22 Sub-Annex N requires that the standardizing body take into account comments received during the comment period during its further processing of the standard. Clearly, taking into account refers to a process of considering, weighing and balancing the points raised and interests as expressed in the comments submitted in the mechanism of standard setting. It does not necessarily require the draft to be changed in response to criticism. Given this rather lenient substantive element, a more procedural approach is pursued in addition: under sentences 2 and 3 of Sub-Annex N, standardizing bodies are required to respond as promptly as possible to comments received from standardizing bodies that have accepted the Code of Good Practice if a reply is requested. If applicable, the reply shall include an explanation of why a draft standard has deviated from relevant international standards. This further helps to ensure that the standardizing body actually considers and evaluates the comments received.

12. Publication of Adopted Standards (Sub-Annex O)

23 Sub-Annex O requires that a standard be published promptly once it has been adopted. At the request of any interested party within the territory of a WTO Member, the standardizing body, pursuant to Sub-Annex P, shall promptly provide, or arrange to provide, a copy of its most recent work programme or of a standard that it has produced.

13. Provision of Copies of Adopted Standards (Sub-Annex P)

24 Sub-Annex P is equivalent to Sub-Annex M, which covers draft standards. It provides that, upon the request of any interested party within the territory of a WTO Member, the standardizing body shall promptly provide, or arrange to provide, a copy of the adopted standard. It prohibits any form of discrimination by proscribing national treatment and most-favoured nation treatment (excluding costs of delivery).

14. Coordination with Other Standardizing Bodies (Sub-Annex Q)

25 Sub-Annex Q responds to the multiplicity of standardizing bodies worldwide and accordingly calls for consultation among standardizing bodies. It requires that standardizing bodies afford sympathetic consideration to, and adequate opportunity for, consultation with regard to representations concerning the operation of the Code made by standardizing bodies that have accepted the Code of Good Practice. The standardizing body is required to make an objective effort to resolve any complaints. This provides an additional incentive for standardizing bodies to accept the Code to have an impact on the work of such other bodies.

C. Members' Responsibility in Respect of Standards (Art. 4)

I. General

26 Art. 4 in its current version constitutes a compromise between the limited authority of the central government in some instances to compel local or non-governmental entities on the one hand and maintenance of the balance of rights and obligations under the TBT Agreement on the other. While taking into account the practical needs mainly of federal states, it was at the same time its objective not overly to disadvantage those WTO Members which have a non-federalist constitutional structure or which do have efficient legal instruments to compel private entities. It comes as no surprise that the exact design of Members' responsibility was one of the most debated issues of the negotiation of the TBT Agreement during the Uruguay Round.[30] Art. 4 distinguishes Members' responsibility with regard to acts of central government bodies on the one hand and local, non-governmental, and regional standardizing bodies on the other hand.

II. Attribution of Acts of Central Government Standardizing Bodies (Art. 4.1, Sentence 1, Sentence 4)

27 In accordance with general **international law on state responsibility**,[31] Art. 4.1, sentence 1 attributes the acts of central government bodies to the WTO Member in providing that WTO Members must ensure that their central government standardizing bodies accept and comply with the Code of Good Practice. Accordingly, each Member has full responsibility for its central government bodies. Again, in accordance with general international law, the obligation is neither limited nor otherwise qualified. The meaning of the term "accept" is not restricted to legally binding measures as long as the content of the Code of Good Practice is acknowledged as decisive in the development and administration of standards. The term "comply" means that the bodies' practice conforms to the actual provisions of the Code of Good Practice. Note further that according to Art. 4.1, sentence 4, this obligation is imposed on Members regardless of whether or not the relevant standardizing bodies have accepted the Code of Good Practice.

[30] *Stewart*, 1075.
[31] See below, paras 29–30.

III. Responsibility for Acts of Other Standardizing Bodies (Art. 4.1, Sentence 2, Sentence 4)

1. General

As regards other standardizing bodies, *i.e.* local government, non-governmental and regional standardizing bodies, Art. 4.1, sentence 2 states in this respect that Members—as opposed to Art. 4.1, sentence 1 in respect of central government bodies—must take "such reasonable measures as may be available to them" to ensure the acceptance of and compliance with the Code of Good Practice by local government, non-governmental and regional standardizing bodies of which they are members or one or more bodies within their territories are members". The wording of Art. 4.1, sentence 2, and that of the TBT Agreement's predecessor, the Tokyo Standards Code, as such are derived from Art. XXIV:12 GATT which requires for the purposes of compliance with GATT "such reasonable measures as may be available by the regional and local governments and authorities within its territories". Historically, it had been included in the GATT to accommodate the needs of federal states, such as the United States or Australia, which in some areas may face significant hurdles within their federal structure to the full implementation of international law.[32] Other than the Tokyo Standards Code, the obligation in Art. 4.1, sentence 2 is not limited to the acceptance of the Code of Good Practice but also requires compliance.[33] Other than Art. XXIV:12 GATT, which imposes a best efforts obligation only with respect to public entities such as regional and local authorities, the obligation also encompasses responsibility for non-governmental bodies. Such reach pays tribute to the overwhelming practical importance of private standardization bodies in the world of standardization. *28*

2. General Law on State Responsibility

With respect to local governmental bodies, such result constitutes a deviation from general international law on state responsibility as expressed in Art. 27 VCLT[34] and Art. 4.1 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts[35] which hold a state responsible for any of its governmental actions regardless of the function or the level at which the governmental authority is exercised. For purposes of general international law, out of the principle of unity of *29*

[32] See *Hayes*, NW. J. Int'l L. & Bus. 25 (2004), 21–25.
[33] See *Schick*, 221.
[34] UN Doc. A/Conf.39/27, UNTS 1155 (1969), 331, 23 May 1969.
[35] Reproduced, together with the ILC's final commentaries, printed in: UN Doc. A/56/10 (2001), at 84.

a state flows its responsibility for all acts and omissions of its organs.[36] It is irrelevant in this respect whether the central government in a (federal) State has the authority to compel compliance by the local governmental body within its internal legal system.[37] However, it is also recognized that a treaty, in a so-called federal clause, may provide otherwise.[38] Art. 4.1, sentence 2 constitutes such federal clause.

30 As far as private parties are concerned, international law on state responsibility rests upon the general premise that a State is not responsible for private acts undertaken on its territory.[39] In other words: actions of private parties, such as standardizing bodies to the extent that they are of a private nature,[40] cannot be attributed to the States in which the events occurred by reason of the State's territorial sovereignty alone. In this respect, Art. 4.1, sentence 2 does not provide for special rules on attribution of private acts to WTO Members. It rather imposes a separate and distinct obligation on the WTO Member to interfere. Its liability therefore does not derive from the private actions strictly speaking. Given the *lex specialis* rule, even if the acts of a private standardizing body could be attributed to the state under general international law on state responsibility, this alone would not result in a Member's responsibility under the TBT Agreement without a breach of the duty to employ all reasonable and available instruments to achieve compliance.

3. Qualifications to the Obligation

31 It is clear from the very wording of Art. 4.1, sentence 2 that the requirement to take reasonable measures in relation to local government and non-government standardizing bodies is less stringent than the obligation to ensure compliance under Art. 4.1, sentence 1 with regard to central government bodies. Note further that according to Art. 4.1, sentence 4 this obligation is imposed on Members regardless of whether or not the relevant standardizing bodies have accepted the Code of Good Practice.

a) Limit of Availability

32 According to the wording of Art. 4.1, sentence 2, a Member's obligation is limited to instances where the central government body is actually in a position to direct or at least influence the standardizing bodies at stake. On this assumption, it can be said with sufficient certainty that, normally, any

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[36] *Ibid.*, 85.
[37] *Ibid.*, 89.
[38] *Ibid.*, 90.
[39] See *Wolfrum*, in: *Ragazzi* (ed.), 423, 424.
[40] On the possibility of attribution on various grounds, including, but not limited to, delegation of governmental powers or direct control by state actors, see International Law Commission, Arts 5–11 plus commentaries, at 84–123.

legal means available to force the standardizing entity into compliance is also reasonable in the meaning of Art. 4.1, sentence 2 and therefore must be employed by the WTO Member. If the Member is unable to act for factual or legal reasons, it has not breached its obligation.

b) Limit of Reasonableness

33 The next question which arises is more difficult to resolve: whether the element of "reasonable" as provided for in Art. 4.1, sentence 2 further restricts the obligation of a WTO Member to interfere within its internal legal system. Reasonableness is an indeterminate legal term open to interpretation and concretization by panels and Appellate Body in the future. It is clear though that the obligation is less stringent than that requiring full compliance. Yet, any broad understanding of unreasonableness would result in the further disadvantaging of non-federal WTO members for which legal impediments to implementation on lower stages of their internal hierarchy are usually unknown. Moreover, it should not be forgotten that the mass of standards is promulgated by non-central government bodies. Accordingly, in the interest of reciprocity, *i.e.*, the balance of rights and obligations of WTO Members, which must be preserved, further limitations on the obligations of WTO Members should be applied narrowly under the TBT Agreement. As a consequence, mere political resistance or sensitivity does not influence the obligation. On the other hand, it would be deemed unreasonable to require a constitutional amendment. In this sense, the actual difference between sentences 1 and 2 of Art. 4.1 may be narrower than one may expect after a first reading of its text.

34 Another issue which has not been clarified by GATT jurisprudence because Art. XXIV:12 does not refer to non-governmental bodies is whether the concept of reasonableness is different for private, non-governmental bodies than for local government bodies. In this regard, the argument could be made that the inherent federal difficulties in implementing international law in relation to their state and local authorities do not appear with respect to private standardizing bodies which could be required to accept and comply with the Code of Good Practice more easily. Yet, the wording of Art. 4.1, sentence 2 does not differentiate between the various standardizing bodies and negotiators at the Uruguay Round have envisaged problems with the implementation of the provisions in respect of private bodies, in particular regional standardizing bodies.[41]

[41] Related Attempts of the EC to impose stricter responsibility at least with respect to local government bodies failed. See *Stewart*, 1078.

4. Dispute Settlement

a) Judicial Review

35 Under GATT 1947, panels under Art. XXIV:12 1947 also rejected the view advanced by defending parties that what is reasonable can only be determined by that party alone.[42] This must be even more true for reasonableness under Art. 4.1, sentence 2 under the auspices of the new DSU. This is confirmed by Art. 14 TBT on dispute settlement.[43] Accordingly, what is considered reasonable is fully reviewable by a panel and does not lie within the discretion of a WTO member.

b) Burden of Proof

36 Unlike that under Art. XXIV:12 which forms an exception to the general obligations under GATT, the burden of proof is—in accordance with the general rules—upon the complaining party.[44] Yet, the threshold for a *prima facie* case should be relatively low as the defending party is in a more appropriate position to judge and present its internal legal system in respect of reasonable and available measures.

5. Members' Responsibility

37 Interestingly enough, an equivalent provision to Art. 3.5, which explicitly imposes full Member responsibility for acts of local government bodies and non-governmental bodies in respect of technical regulations, does not exist in Art. 4.[45] The difference in wording from that of Art. 4.1, sentence 4 reveals that the latter is not the equivalent of the former. Its purpose is merely to clarify that the responsibility of WTO Members applies regardless of whether or not the standardizing body which allegedly infringed the Code of Good Practice is alleged to have adopted the Code of Good Practice. Accordingly, the issue posed is whether a WTO Member can be held responsible for acts of non-central governmental bodies although the WTO member has either no possibility to intervene for factual or internal legal reasons or has the possibility to intervene but can only employ unreasonable measures. Given the lack of an equivalent to Art. 3.5, it can be argued that *e contrario* responsibility is of a more limited nature.[46] On the other hand, Art. 14.4 on dispute settlement lists *inter alia* Arts 3 and 4 without further distinction and simply declares that unsatisfactory "results shall be equivalent to those as if the body in question were a Member".

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[42] Panel Report, *Canada—Provincial Liquor Boards (EEC)*, BISD 35S/37. Today, see Understanding on the Interpretation of Art. XXIV GATT, paras 13–14.

[43] See *Schorkopf*, Article 14 TBT, *passim*.

[44] See *Mavroidis*, Article 11 DSU, Max Planck CWTL, Vol. 2, para. 3.

[45] See Art. 3.5.

[46] *Schick*, 225.

Therefore, Art. 4 entails the full Member responsibility even in the absence of available and reasonable measures.

IV. Responsibility for Violations of Abstention (Art. 4.1, Sentence 3)

38 Lastly, Art. 4.1, sentence 3 provides for direct Member responsibility without the need to attribute the conduct of standardizing bodies to WTO Members. It prohibits with respect to all standardizing bodies, be they central government bodies, local government bodies, regional bodies or non-governmental bodies, any WTO Member's measures which have the direct or indirect effect of requiring or encouraging non-compliance with the Code of Good Practice by such standardizing bodies. In other words, Art. 4.1, sentence 3 lays down a general rule of abstention by WTO members which is independent of responsibility by attribution.[47] By complementing obligations arising under Art. 4.1, sentences 1 and 2, Art. 4.1, sentence 3 closes any potential gap in the law on Members' responsibility.

V. Parallelism of TBT Agreement and Code of Good Practice (Art. 4.2)

39 Art. 4.2 provides that standardizing bodies that have accepted and are complying with the Code of Good Practice are acknowledged by WTO Members to be complying with the principles of the TBT Agreement. The background of this paragraph is the potentially arguable relationship between the TBT Agreement as such and the Code of Good Practice in WTO disputes among WTO Members in which the actions of a standardizing body located in the territory of the defending WTO Member is in question. It clarifies that a WTO Member whose standardizing body fulfills these requirements can use such fulfilment as a defence to claims made by other Members that its standardizing body has failed to adhere to the principles of the TBT Agreement. The inclusion of Art. 4.2 was necessary since the Code of Good Practice was designed as a separate legal instrument to be applied by private standardizing bodies.

D. Evaluation

40 In broad terms, the requirements of Annex 3 and Art. 4 for standards are similar to the obligations respecting the preparation, adoption, and

[47] See also the comparable provision in Art. 10.2 ECT.

application of technical regulations set out in Art. 2 TBT, but with important differences that reflect the distinction between mandatory technical regulations and voluntary standards and the difficulty of governing a standardization society which in many countries is dominated by a network of private institutions. By the inclusion of a separate of Code of Good Practice in Annex 3, WTO Members were able to avoid the direct application of TBT law to such private institutions while at the same time increasing the chances of the compliance of such private standard setting with the principles of the TBT Agreement.

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Article 5 TBT
Procedures for Assessment of Conformity by Central Government Bodies

1. Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:
   1.1 conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system;
   1.2 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.
2. When implementing the provisions of paragraph 1, Members shall ensure that:
   2.1 conformity assessment procedures are undertaken and completed as expeditiously as possible and in a no less favourable order for products originating in the territories of other Members than for like domestic products;
   2.2 the standard processing period of each conformity assessment procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the assessment in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the conformity assessment if the applicant so requests; and that, upon request, the applicant is informed of the stage of the procedure, with any delay being explained;
   2.3 information requirements are limited to what is necessary to assess conformity and determine fees;
   2.4 the confidentiality of information about products originating in the territories of other Members arising from or supplied in connection with such conformity assessment procedures is respected in the same way as for domestic products and in such a manner that legitimate commercial interests are protected;
   2.5 any fees imposed for assessing the conformity of products originating in the territories of other Members are equitable in relation to any fees chargeable for assessing the conformity of like products of national origin or originating in any other country, taking into account communication, transportation and other costs arising from differences between location of facilities of the applicant and the conformity assessment body;
   2.6 the siting of facilities used in conformity assessment procedures and the selection of samples are not such as to cause unnecessary inconvenience to applicants or their agents;
   2.7 whenever specifications of a product are changed subsequent to the determination of its conformity to the applicable technical regulations or standards, the conformity assessment procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the technical regulations or standards concerned;
   2.8 a procedure exists to review complaints concerning the operation of a conformity assessment procedure and to take corrective action when a complaint is justified.
3. Nothing in paragraphs 1 and 2 shall prevent Members from carrying out reasonable spot checks within their territories.

4. In cases where a positive assurance is required that products conform with technical regulations or standards, and relevant guides or recommendations issued by international standardizing bodies exist or their completion is imminent, Members shall ensure that central government bodies use them, or the relevant parts of them, as a basis for their conformity assessment procedures, except where, as duly explained upon request, such guides or recommendations or relevant parts are inappropriate for the Members concerned, for, inter alia, such reasons as: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems.
5. With a view to harmonizing conformity assessment procedures 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 guides and recommendations for conformity assessment procedures.
6. Whenever a relevant guide or recommendation issued by an international standardizing body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members, Members shall:
   6.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular conformity assessment procedure;
   6.2 notify other Members through the Secretariat of the products to be covered by the proposed conformity assessment procedure, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
   6.3 upon request, provide to other Members particulars or copies of the proposed procedure and, whenever possible, identify the parts which in substance deviate from relevant guides or recommendations issued by international standardizing bodies;
   6.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.
7. Subject to the provisions in the lead-in to paragraph 6, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 6 as it finds necessary, provided that the Member, upon adoption of the procedure, shall:
   7.1 notify immediately other Members through the Secretariat of the particular procedure and the products covered, with a brief indication of the objective and the rationale of the procedure, including the nature of the urgent problems;
   7.2 upon request, provide other Members with copies of the rules of the procedure;
   7.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.
8. Members shall ensure that all conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.
9. Except in those urgent circumstances referred to in paragraph 7, Members shall allow a reasonable interval between the publication of requirements concerning conformity assessment procedures and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

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A. General

1 The Supervising of the procedures for **assessment of conformity** of goods with technical regulations or standards has become increasingly relevant since the progressive phasing out of quotas and tariff barriers. Technical barriers are therefore becoming more and more important. Conformity assessment is a kind of technical barrier by means of which WTO Members can discourage the entry of goods originating from other Members.

2 Art. 5,[1] together with Arts 7 and 8, does not develop a stringent and detailed mechanism for dealing with conformity assessment, but the Arts. are aimed at transparency and are intended to establish general guidelines. Instead of regulating all implications of the conformity assessment procedure they give companies from other Member countries the opportunity to access conformity assessment procedures.

3 Art. 5 concerns the **procedures** for assessment of the conformity of goods with technical regulations and standards by central government bodies where a positive assurance of conformity with technical regulations or standards is required. The aim of this article is to make sure that products coming from other members of the WTO will not be disadvantaged while being assessed for conformity with national technical regulations or standards.[2]

Art. 5 reflects a twofold approach by the TBT Agreement to avoiding unnecessary obstacles to trade.[3] First it provides for **procedural safeguards** (paras 1 and 2) to ensure that the conformity assessment procedures do not create discriminatory effects. Secondly, the harmonisation of these procedures has to be achieved by the extensive use of **guidelines** and recommendations produced by international standardisation bodies (paras 4 and 5). If these tools are not available, harmonisation has to be achieved through *ex ante* notification of conformity assessment procedures (para. 6).

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[1] There is no panel or Appellate Body jurisprudence regarding this article. While Canada and Argentina presented claims under Art. 5 TBT, the Panel in the recent Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.2524 and 7.2527 argued that the claims under the SPS and TBT were alternative rather than cumulative in character. As the Panel found that the relevant measures where subject to the SPS, recourse to the TBT was deemed to be unnecessary. It should be pointed out that as regards several cases consultations have been requested but no panel has been established: *Argentina—Pharmaceutical Products*, WT/DS233/1; *Mexico—Trade in Live Swine*, WT/DS203/1; *US—Imports of Poultry Products*, WT/DS100/1; *Korea—Testing and Inspection of Agricultural Products*, WT/DS3/1.

[2] G/TBT/1/Rev.8.

[3] *Luff*, 294–315.

B. MFN (Art. 5.1.1)

4 Art. 5.1 applies the two main principles of the WTO Agreement, the **Most Favoured Nation Clause** (Art. I GATT 1994) and the **National Treatment** Principle (Art. III GATT 1994) to conformity assessment procedure.

Currently, there is no jurisprudence whatsoever concerning the interpretation of Art. 5.1. We will therefore extrapolate using the definitions given by the Panels and Appellate Body while dealing with Arts I and III GATT 1994. On the specificity of the TBT Agreement as opposed to the general obligations of the WTO, it is interesting to quote the Appellate Body in the *EC—Asbestos*[4] case which stressed that "We observe that, although the TBT Agreement is intended to 'further the objectives of GATT 1994', it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the TBT Agreement imposes obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994".

5 Art. I GATT 1994 contains the Most Favoured Nation clause. It is one of the cornerstone principles of the GATT. It obliges every Member of the WTO to treat other Members in the same way. This means that if one Member has been granted a right of access to the territory of another member, this right has to be granted to all the members of the WTO. The scope of application of this article is particularly wide and concerns ***de facto* and *de jure* discrimination**.[5]

6 The question is whether differences or deviations are to be expected when applying Art. I to the TBT. Currently, there is no case in which the MNF clause has been applied to Art. 5. However, it is interesting that Art. 5.1.1 aims principally only to "grant access" to the conformity assessment procedure; but this could involve a limitation of the MFN clause to just granting access. The concept of granting access is detailed in Art. 5; it "entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have assessment activities undertaken at the site of facilities and to receive the mark of the system [...]". Therefore, it is clearly limited to certain aspects of the conformity assessment procedure.

However, even if some slight differences may appear it has to be noted that the TBT agreement has to respect GATT rules. The Most Favoured Nation Clause being the core notion of the WTO Agreement, it seems difficult to limit its application. Only those exceptions listed in the Agreement

[4] Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, para. 80.
[5] Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, paras 232–234.

(such as Arts I:2 to 4, Art. XX, Art. XXI, Art. XXIV and specific measures related to developing countries) can be relied on.

7 The second aspect of the analysis will be to compare the wording of Art. 5 TBT with Art. III GATT 1994. Art. III GATT 1994 is meant to ensure that a Member will treat products legally imported from another Member, once customs have been cleared, as if they were national products. The aim is to avoid any national measure which could hinder the trade in imported products. The scope of Art. III GATT 1994 is particularly broad; it encompasses all types of measures.[6]

Art. 5.1.1 forbids Members to "adopt or apply conformity assessment procedures for suppliers of like products coming from exporting member". On the meaning of like products,[7] the approach of the jurisprudence indicates that the content of this notion varies from case to case. To understand this notion, it is essential to refer to the factual background of the case.[8] In addition, the jurisprudence indicated that the concept does not have to be interpreted in the same way every time it is mentioned in different articles of the WTO Agreement.

In the *Asbestos* jurisprudence, the Appellate Body used a very interesting metaphor to explain the impossibility of defining the term like products: "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."[9] Therefore, it is difficult to draw conclusions from case law relating to other articles of the WTO Agreement.

8 Art. 5.1.1 TBT indicates that Members have to **give access to suppliers** under conditions "no less favourable" than those granted to national suppliers and suppliers from other members. The concept of "no less favourable" can be found in Art. III GATT 1994. The jurisprudence relating to this article specifies that the Member is allowed to treat imported products differently, but it has to prove that this difference in treatment will impede imported product in competing with national products. The term "less favourable treatment" expresses the general principle, in Art. III:1, that domestic regulations "should not be applied and so as to afford protection to domestic production". If there is "less favourable treatment" of the group

[6] Appellate Body Report, *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, Section F.

[7] This notion can be found in other articles of the GATT such as Art. I; Panel Report, *Indonesia—Autos*, WT/DS54, para. 14.141.

[8] *Japan—Alcoholic Beverages II*, WT/DS8/AB/R, paras 24–25.

[9] *EC—Asbestos*, WT/DS135/AB/R, paras 88, 89.

of "like" imported products, there is, conversely, "protection" of the group of "like" domestic products.[10]

Finally, the Appellate Body in the *Canada—Periodicals* case[11] indicated that no balancing methods can be used between more favourable treatment of some imported products and less favourable treatment of other imported products. This means that the Panel or the Appellate body will concentrate on the case in point and will not use evidence of more favourable treatment regarding other products. *9*

C. Prevention of Unnecessary Obstacles To Trade (**Art. 5.1.2**)

Art. 5.1.2 entails the obligation to avoid the misuse of conformity assessment procedures by Members as a way to protect national products. Art. 5.1.2. insists that conformity assessment procedures cannot be used in such a way as to create unnecessary obstacles to international trade. Therefore, conformity assessment procedures cannot differ if a product originates from a third country. This means that checks on products from third countries cannot be stricter than those undertaken on national products. *10*

However, this article indicates that Members can balance the application of this obligation. Indeed, if conformity assessment procedures cannot be used in order to create unnecessary obstacles to trade, it is possible for Members to have a stricter approach if it is necessary to ensure that products coming form other Members are safe. This approach means that differences of treatment are possible where the importing State considers that the imported product does not reach the standard of "adequate confidence".

This paragraph limits the rights of exporting States and gives a **potential subjective justification for differential treatment**. What can be asked for by the importing State to ensure "adequate confidence"? This balancing of risks between the non-conformity of the product and the obligation to ensure a non-discriminatory conformity assessment procedure may eventually be compared to the application of the precautionary principle.[12] On the application of this notion to the TBT Agreement, it is possible to refer to the *Asbestos* jurisprudence.[13] In this case it has been stressed that the precautionary principle cannot be used to target a zero risk. During the Panel hearing, the following quotation from *Sir Leon Brittan* was quoted: *11*

[10] *Ibid*., para. 100.
[11] *Canada—Periodicals*, WT/DS31/AB/R, paras 232–236.
[12] *Japan—Agricultural Products II*, WT/DS76/AB/R, and Arts 3.3 and 5.7 SPS.
[13] *EC—Asbestos*, WT/DS135/R.

"Using the precautionary principle to justify action aimed at reducing risks to zero would clearly be excessive. We should therefore distinguish the precautionary principle from a zero risk approach. To try and adopt the latter across the board could bring us to a scientific standstill since there are risks involved in any new venture."[14] Therefore, applying this approach to the interpretation of Art. 5.1.2 could lead to the following conclusion: it is not possible to justify stringent conformity assessment procedures for imported products in order to make sure that those products are 100 % safe.

D. Concretizing Obligations (Art. 5.2)

12 Art. 5.2 describes in detail the checks that members have to perform in order to make sure that Art. 5.1 is correctly implemented. This article aims to ensure: transparency, efficiency, fairness and confidentiality during conformity assessment procedure.

I. Order and Timing (Art. 5.2.1)

13 The conformity assessment procedure has to be efficient. This implies that such procedures have to be performed as quickly as possible. No specific delay can be applied to like products originating from a WTO Member. Where there is no objective justification, it is specifically forbidden to request that conformity assessment of national products be carried out before that for imported products. Indeed, the time needed to perform a conformity assessment varies from one product to another, but it may be lengthy. During the waiting period the imported product does not have access to the national market. Meanwhile if national products are ranked first in the waiting list for conformity assessment, they will be approved to enter the market before imported products and therefore will be the first on the market.

II. Processing Period (Art. 5.2.2)

14 In order to ensure transparency, all the steps of the procedure have to be published so that an applicant may know how much delay it can expect. The text states that if the procedure is not published, the applicant must be informed upon request about the anticipated processing period.[15] In addition, if the application for conformity assessment is not correctly completed,

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[14] *Ibid*., para. 3.475. Message from the European Community to the World Trade Organization, High Level Symposium on Trade and the Environment, Geneva, 15–16 March 1999, available online: DG I, European Commission, <europa.eu.int/comm/dg01> where *Sir Leon Brittan* states that "The principle does not mean [...] that a zero risk option should be pursued."

[15] Art. 5.2.2.

then the conformity assessment body must contact the applicant in order to give it the opportunity to correct its application. This obligation is meant to avoid unnecessary delay. Indeed, if the application does contain all the necessary documentation, the conformity assessment body cannot reject it and require the applicant to go through the whole procedure again. This is meant to ensure that the product will be accepted by the conformity assessment body as quickly as possible in order to have access to the market.

III. Limitation of Information Requirements (Art. 5.2.3)

15 The fairness principle has to be applied during the carrying out of a conformity assessment procedure. As a result, the information required cannot be burdensome. Only information necessary to assess the products can be required. The fees are to be limited to what is necessary in order for the conformity assessment procedure to be carried out. An element of comparison could be the SPS[16] Agreement and the *Salmon* jurisprudence which has given an interpretation of "information requirements". However, these words do not seem to be absolutely equivalent because in the SPS Agreement they are linked to the protection of human and animal life, which is not always the case within the framework of the TBT Agreement.

16 One classical obstacle to trade is the asking for numerous technical and scientific data before issuing a conformity assessment procedure. Indeed, if the procedure is too complex, it may deter imports because the length and cost of the conformity assessment procedure will be too great.

IV. Confidentiality of Information (Art. 5.2.4)

17 Confidentiality has to be respected. Conformity assessment facilities must ensure the necessary confidentiality while processing the assessment of the product. This aspect is important because in the process of the conformity assessment procedure the body carrying out the procedure will receive from the company various data and sometimes confidential information about its product. This documentation could be used by counterfeiters in order to produce identical products. This aspect aims to protect the applicant's intellectual and industrial property rights.

[16] Annex C:1 lit. c SPS: "information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs".

V. Fees (Art. 5.2.5)

18 The fees applied to imported products may differ from those applied to national products. Differences in location between the applicant's premises and the conformity assessment body can give rise to additional costs.

VI. Location and Selection of Samples (Art. 5.2.6)

19 The location of facilities where conformity assessment is carried out cannot constitute an unnecessary burden. The same applies to the collection of samples being used to assess the conformity of the product. For example, conformity assessment facilities cannot be in a remote place inaccessible from airports or harbours.

VII. Subsequent Changes (Art. 5.2.7)

20 If the conformity assessment has to analyse a mere modification of a product which has been already assessed, only the checks necessary to do that will be performed. This means that the whole procedure will not have to be performed again, just because a tiny change has been made to the product. This aims to avoid unnecessary obstacles and to limit delay in assessment.

VIII. Remedy (Art. 5.2.8)

21 Transparency implies that there must be a body with which complaints against the conformity assessment body may be filed. Indeed, it is impossible to avoid divergent views because of the technical matters at stake, but a procedure has to exist to enable corrective action to be taken when a complaint is justified. The obligation to give access to judicial or non-judicial review is necessary in order to ensure the correct application of all the obligations of Art. 5.

E. Spot Checks (Art. 5.3)

22 Art. 5.3 specifies that the obligations imposed on conformity assessment bodies must not deprive Members of the right to carry out reasonable spot checks. This should enable States to carry out quality control on products sold in their territories if they wish to do so. This article reflects the normal approach of the WTO, which allows members to continue to supervise products entering their territory.

F. Harmonization (Arts 5.4–5.5)

I. The Use of International Guides and Recommendations (Art. 5.4)

23 The aim of this article is to ensure that Members use international guides and recommendations whenever possible. International standards being transparent and public, they diminish the risk of obstacles to trade.

24 Indeed, if some relevant guidelines or recommendations issued by international standardising bodies exist, there is an obligation to follow these guidelines in order to facilitate trade. The Secretariat of the Committee on Technical Barrier to Trade annually produces a list of relevant international standards and guides relating to conformity assessment procedures.[17] The document contains revised and additional information provided by the ISO/CASCO on a list of ISO/IEC Standards and Guides relating to conformity assessment procedures by field of application.[18] The second triennial review issued a decision of the Committee on the development of international standards, guides and recommendations.[19]

25 It may be possible to draw a parallel with Art. 2.4 TBT.[20] This article and the notion of "standard" that it contains were interpreted in the *EC—Sardines* case.[21] Peru challenged the trade description of sardines used by the European Communities. The consequence of the new EC legislation was to exclude some Peruvian fish from this trade description. Peru claimed that an international standard adopted by the Codex Alimentarius existed and that, according to this international standard, Peru should be allowed to use the trade description 'sardines' for its fish. The Panel and the Appellate body said that an international standard had to prevail, even if that standard was not adopted by consensus.

The Appellate Body reversed only one aspect of the Panel's finding; it

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[17] A list of relevant international standards and guides relating to conformity assessment procedures is found at G/TBT/W/72/Rev.4.

[18] *Ibid.*

[19] Committee on Technical Barriers to Trade, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/9, 13 November 2000, Annex 4, Decision of the committee on principles for the development of international standards, guides and recommendations with relation to Arts 2, 5 and Annex 3 of the Agreement.

[20] Art. 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 fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems".

[21] Panel Report, *EC—Sardines*, WT/DS231/R; Appellate Body Report, *EC—Sardines*, WT/DS231/R/AB, paras 67–70.

indicated that the burden rested with Peru to prove that this international standard fulfilled all the legitimate objectives pursued by the EC through its Regulation. Therefore, the use of an international standard is compulsory. It may be possible to extend this reasoning to "international guides and recommendations".

26 The obligation to use international guides and recommendations is not without exceptions. If the use of such guides or recommendations can create difficulties regarding "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems", then there is no obligation to use them.[22] By way of example, we can imagine a standard which does not take into consideration the specificities of one country regarding weather conditions. Where temperatures are very high, it may be necessary to adapt the specificities of the national standard in order to integrate this parameter.

II. Participation in International Standardizing Bodies (**Art. 5.5**)

27 Art. 5.5 specifies that States have to participate actively in the development of guides and recommendations at the international level in order to harmonise conformity assessment procedures. The article stresses that this participation can be limited due to the resources needed for participation in such bodies.[23] This approach has been applied to developing countries which cannot follow all the work of standardisation bodies. However, the TBT Committee aims to increase the participation of these countries in the international standardisation bodies. As a general point, it has to be mentioned that the members in collaboration with the Secretariat have decided to launch a detailed analysis of the needs of developing countries in order to help them to apply TBT obligations.[24]

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[22] Similar obligations exist under Art. 2.4 TBT for "Technical Regulations" and under Art. 3.3 SPS.

[23] G/TBT/9, paras 26–36.

[24] Committee on Technical Barriers to Trade, An Analysis of the Priorities Identified by Developing Country Members in their Responses to the Questionnaire for a "Survey to Assist Developing Country Members to Identify and Prioritize their Specific Needs in the TBT-Field, Note by the Secretariat, G/TBT/W/193, 10 February 2003. In addition, there is a specific link at the WTO website regarding technical assistance and the TBT agreement <www.wto.org/english/tratop_e/tbt_e/tbt_tech_link_e.htm>.

G. Transparency (Arts 5.6–5.9)

I. Introduction

28 Where guides or recommendations do not exist or a proposed conformity assessment procedure is not in accordance with an existing guide or recommendation issued by an international standardisation body, Members have to notify their conformity assessment procedure to other members. This notification procedure is similar to the one initiated under Art. 2[25] regarding technical regulations.[26]

29 The notification procedure aims to ensure transparency. Therefore, the obligations attached to it are not meant to supervise closely the work of each Member but it tries to reach a maximum level of openness. In order to develop this notification procedure, the Committee set up specific meetings dealing with notification obligations.[27]

30 In order to grant better access to TBT notifications, the Committee has increased electronic potentialities. It is possible for notifications to be received automatically via e-mail.[28] Finally, the Committee is publishing a complete list of all notifications classified by month.[29]

II. Conformity Assessment Procedures to be Notified (Art. 5.6)

31 Not every conformity assessment procedure needs to be notified. The Members of the TBT agreement have to notify such procedures only if they have a "considerable effect on international trade" and if there are no relevant guides and recommendations issued by international standardizing bodies or if the conformity assessment procedure is contrary to those guides or recommendations.

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[25] *Muñoz*, 4 CYELS (2002), 273–292.

[26] The decisions of the panels and the Dispute Settlement Body concerning Art. 2 may be used as a parallelism regarding notification obligations for conformity assessment procedures.

[27] The Committee on Technical Barriers to Trade (the TBT Committee) agreed in 1995 to hold, on a biennial basis, "regular meetings of persons responsible for information exchange, including persons responsible for enquiry points and notifications". The Fourth such meeting was held on 2-3 November 2004. The Secretariat produced a background paper gathering all factual information regarding the TBT Agreement <www.wto.org/english/tratop_e/tbt_e/meeting_nov04_e/background_note_e.doc>.

[28] <www.wto.org/english/tratop_e/tbt_e/tbt_mailing_list_e.htm>.

[29] Committee on Technical Barriers to Trade, Notifications Issued during the Month of February 2006, Note by the Secretariat, G/TBT/GEN/N/62, 24 March 2006.

32 The concept of "considerable effect on international trade" has been interpreted by the Committee.[30] It has the same meaning under Art. 2.9 and Art. 5.6. When assessing the significance of "the effect on trade of technical regulations", the Member concerned should take into consideration elements such as: the value of the import, the potential growth of such imports, and difficulties for producers in other Members in complying with the proposed technical regulations. The concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant.

33 The only problem will be defining the word "significant". Every Member may have a different definition. Therefore, the decision to notify may be difficult to take. However, the principle of the TBT Agreement is to promote transparency. Thus, in case of doubt, it seems that Members should take the decision to notify to make sure that no transparency obligation has been violated.

III. Notification Framework

1. Publication (Art. 5.6.1)

34 Members have to ensure that a notice is published in order to inform all interested parties that a specific conformity assessment procedure is to be introduced. This publication can be made in specialised reviews or official journals.

2. Notification (Art. 5.6.2)

35 The notification procedure has gained considerable importance in recent years.[31] In total, 5,925 notifications were sent to the Secretariat during the period from 1995 to 2004. This figure includes all notification procedures under the TBT Agreement.[32] Of these 5,925, 541 were based on Art. 5.6.2. In addition, it was decided during the 2nd triennial review[33] that every two years a specific meeting dealing with notification obligations would be held. This meeting brings together the authorities in charge of the notification procedure and is meant to be a forum for discussion of any potential problems encountered by States whilst allowing for the exchange of best practices.[34]

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[30] G/TBT/1/Rev.8, 15.

[31] See <www.wto.org/English/tratop_e/tbt_e/tbt_specialmeeting_note_21march05_e.doc.>.

[32] Arts 2.9.2, 2.10.1, 3.2, 5.6.2., 5.7.1 and 7.2.

[33] G/TBT/9.

[34] Summary Report of the Fourth Special Meeting on Procedures for Information Exchange, 2–3 November 2004, online: <www.wto.org/english/tratop_e/tbt_e/meeting_nov04_e/report_info_exchange_e.htm>.

36 The notification procedure has been framed by the Secretariat of the TBT Agreement by means of different Committee decisions and recommendations. The legal statue of decisions of the TBT Committee was tackled in the *EC—Sardines* Case.[35] The European Communities relied on a Decision of the Committee taken during the 2nd triennial review[36] regarding the interpretation of the term "standards". The Panel and the Appellate Body decided that the text of the TBT should prevail. However, we can ask ourselves whether the position of the Panel and the Appellate Body would have been different if the Decision had been inserted into the core of the text of the triennial review instead of being listed in an annex.

37 The drafting of a notification involves the use of a specific form, which contains standardised details in order to give maximum information regarding the national draft regulation. This form[37] is codified in a WTO document.[38] Since this is the only information that members receive from the WTO Secretariat, any additional information must be requested from the notifying Member. Therefore, the information contained in the notification form should be as complete as possible and no section should be left blank.[39]

38 This information may be grouped into three main topics: the identification of the notifying State, the content of the draft text and the due dates attached to the draft text.

39 One important point is at what stage the text is notified. Notifications should be made at a draft stage, before the adoption of the text and giving sufficient time to enable comments from other states to be taken into account.

40 The Committee on Technical Barrier to Trade indicates that: "When implementing the provisions of Arts 2.9.2, 3.2 (in relation to Art. 2.9.2), 5.6.2 and 7.2 (in relation to Art. 5.6.2), a notification should be made when a draft with the complete text of a proposed technical regulation or procedures for assessment of conformity is available and when amendments can still be introduced and taken into account."[40] If the notification is made at a stage of the legislative process at which it is no longer possible to make changes to the notified text, then no account can be taken of comments from other States. Moreover, it has to be kept in mind that if the notification is made too early the consequence may be that the text is amended during the national process and a second notification may be necessary if

[35] *EC—Sardines*, WT/DS231/R; *EC—Sardines*, WT/DS231/AB/R.
[36] G/TBT/9, Annex 4. Decision of the committee on principles for the development of international standards, guides and recommendations with relation to Arts 2, 5 and Annex 3 of the agreement.
[37] G/TBT/1/Rev.8.
[38] G/TBT/9, 21, in order to have an example of the notification template.
[39] Recommendation by the TBT Committee, G/TBT/1/Rev.8, 11.
[40] G/TBT/1/Rec.8, 15.

the content of the text has been considerably altered as compared with the previous notification.

3. Provision of Copies and Identification of Deviations (Art. 5.6.3)

41 First, States must approach the contact point[41] in order to ask for the text, which is then provided in its original language. Although developed countries should provide a short summary in one of the three official languages of the WTO (French, English or Spanish), developing States cannot be held to such an obligation.[42]

42 The language of the text is a crucial concern. Indeed, a conformity assessment procedure may be notified, but in order to analyse in detail the consequence of the conformity assessment procedure, one may need to have access to the full text. Indeed, we have seen that the notification form contains only limited information. The Committee has issued one recommendation and several decisions concerning this matter.[43]

43 Finally, States should refer to deviations from guides and recommendations issued by international standardizing bodies. This part is not legally binding, States have to comply with it only "whenever possible".

4. Reasonable Time for Comments (Art. 5.6.4)

44 Similarly, if the measure entered into force immediately after its notification, this would be contrary to the principle of co-operation in procedure, as no dialogue would have been possible before the adoption of the text into national law. No case so far has discussed the legal consequences of non-notification of the text.[44]

45 Once a draft measure is notified, States must wait 60 days before adopting their texts in order to give other States time to comment. The Committee has that this period may be extended to 90 days where this is technically

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[41] Art. 10 TBT.

[42] Regarding the definition of developing countries, there are no WTO definitions of "developed" and "developing" countries. Members announce for themselves whether they are "developed" or "developing" countries. However, other members can challenge the decision of a member to make use of provisions available to developing countries. See <www.wto.org/english/tratop_e/devel_e/d1who_e.htm>.

[43] G/TBT/1/Rev.8, 16.

[44] As an element of comparison see the approach at the EC level regarding a similar system of notification (Directive 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, 22 June 1998, OJ 1998 L 204/37. On the legal consequences of non-notification and lack of respect for procedural obligations see cases C-194/94, *CIA Security International SA v. Signalson SA and Securitel Sprl*, [1996] E.C.R. I-2201 and C-443/98, *Unilever Italia SpA v. Central Food SpA*, [2000] E.C.R. I-7535.

possible. Deadlines are not set in the text of the TBT agreement, but arise from the different decisions of the TBT committee.

IV. Information Regarding Adopted Procedures (Art. 5.8)

46 Once the conformity assessment procedures are adopted, they have to be published or made available. Companies need to know the details of the procedure in order to ensure that their products will conform with the requirements. At the same time this publication enables Members to check whether comments under Art. 5.6.4 have been taken into account. In addition, publication of the conformity assessment procedure is the only way to ensure non-discriminatory treatment between like products coming from other Members.

V. Interval Between Publication and Entry Into Force (Art. 5.9)

47 Members have to wait a certain period of time between the publication of requirements concerning conformity assessment procedure and their entry into force. This is to give producers the opportunity to adapt to the new methods of production. This requirement is specifically aimed at helping companies from developing countries which may encounter more difficulties in adapting to such new rules.[45]

VI. Emergency Exception (Art. 5.7)

48 As an exception to the notification procedure a specific procedure exists in case of emergency "where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member". This does not preclude the need to notify the text but implies that the whole procedure is relaxed. Indeed, the Member can omit the step laid down in para. 6.

49 Members still have to notify immediately the text is adopted. The notification must provide all necessary information regarding the conformity assessment procedure. It must explain and justify the use of the emergency procedure. The notifying State must provide copies of the rules of procedure upon request. In addition, despite the emergency procedure, the notifying State must give other Members the opportunity to submit comments, discuss these

[45] Committee on Technical Barriers to Trade, Third Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/13, 11 November 2003.

comments and take them into account. It is after its adoption that comments will be made. Therefore, where numerous comments are received, the only solution that the notifying State has is to amend its legislation. The emergency procedure could lead to potential abuse. But in reality and hitherto it has been carefully used by Members. The emergency procedure has been used 27 times between the 1st of January 1995 and the 30th of June 2004.[46] This represents less than 5 % of cases of notifications based on Art. 5.

H. Evaluation

50 Art. 5 has not been used in the framework of litigation. However, with the disappearance of custom duties technical barriers will become a more important issue.

I. Involvement of Every State and Company

51 Conformity assessment procedures are still not transparent enough. The obligation of notification should be more stringent and more highly developed. Under a new framework, companies should be allowed to refer to the Secretariat problems they encounter with the conformity assessment procedures of some Members.

52 The cost of conformity assessment is an issue with regard to developing countries which consider these procedures as a way to block their importation. In addition, these countries for budgetary reasons have difficulties in following the work of international standardisation bodies. Therefore, they do not have access to international forum where they could try to influence the content of international regulation.

II. The Legal Consequence of Notification

53 The legal consequence of a notification or failure to notify is probably one of the most important legal issues.

54 First, the whole system is based on transparency; so somebody has to check the application of transparency obligations. What happens if a Member does not notify? The only way of developing transparency will be to give some sort of legal recognition to notification.

[46] See <www.wto.org/English/tratop_e/tbt_e/tbt_specialmeeting_note_21march05_e.doc.>.

Secondly, if one or more States send comments on the conformity assessment procedure, the notifying State must respond. Comments are transmitted directly from State to State and are not monitored by the Secretariat of the TBT Committee. This means that other Members are not informed (except in exceptional cases) of written comments received concerning a notification. This may appear awkward, as one of the aims of the procedure is transparency. It would seem desirable that each Member of the WTO be informed of all comments made on a notification. The main argument used is that bilateral contacts make it possible to manage requests by States more diplomatically. However, the EU has decided to publicise the comments that it sends to other countries.[47] *55*

Thirdly, comments sent by a State may be incorporated in the legislative text or discussed with the notifying State in order to explain why they cannot be incorporated into the legislation. Meetings can be held, depending on the response of the notifying state, in order to find common ground. Generally, problematic notifications are discussed at the Committee. It has become common for Members to list the problems they have encountered regarding notifications and/or comments that they have sent during the proceedings of the Committee. *56*

Finally, the whole procedure takes more than 90 days, which includes delays in obtaining the full text of draft legislation, the necessity of having it translated and analysed, together with the bi- or multilateral exchange of letters and meetings which may take several months. Even if the Committee has made recommendations regarding the handling of comments in order to frame the procedure and to ensure respect for transparency principles,[48] it is not enough. It relies only on the "*bon vouloir*" of the States on a case by case basis. *57*

III. The Increasing Role of the Committee

The Committee can also be used to remind a Member of its obligation to notify. The work of the lobby at the national level is important at that stage. If one company working in a specific field knows that a member is on the way to adopting a new conformity assessment procedure and that it has not been notified, it can contact its national government in order to put a question to the Committee. *58*

This aspect is important because meetings are minuted. Therefore, it will be possible to refer to these minutes in case of legal proceedings if a Member *59*

[47] <europa.eu.int/comm/enterprise/tbt/>.
[48] G/TBT/1/Rev.8, 17.

indicates that it did not know that it had to notify. In addition, these debates at the Committee give other Members the opportunity to learn about potential problems, so that they can inform their own companies and possibly formally request notification.

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Article 6 TBT
Recognition of Conformity Assessment by Central Government Bodies

With respect to their central government bodies:

1. Without prejudice to the provisions of paragraphs 3 and 4, Members shall ensure, whenever possible, that results of conformity assessment procedures in other Members are accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures. It is recognized that prior consultations may be necessary in order to arrive at a mutually satisfactory understanding regarding, in particular:
   1.1 adequate and enduring technical competence of the relevant conformity assessment bodies in the exporting Member, so that confidence in the continued reliability of their conformity assessment results can exist; in this regard, verified compliance, for instance through accreditation, with relevant guides or recommendations issued by international standardizing bodies shall be taken into account as an indication of adequate technical competence;
   1.2 limitation of the acceptance of conformity assessment results to those produced by designated bodies in the exporting Member.
2. Members shall ensure that their conformity assessment procedures permit, as far as practicable, the implementation of the provisions in paragraph 1.
3. Members are encouraged, at the request of other Members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures. Members may require that such agreements fulfil the criteria of paragraph 1 and give mutual satisfaction regarding their potential for facilitating trade in the products concerned.
4. Members are encouraged to permit participation of conformity assessment bodies located in the territories of other Members in their conformity assessment procedures under conditions no less favourable than those accorded to bodies located within their territory or the territory of any other country.

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A. General

1 The regulatory framework of Members is based on rules such as technical regulations or standards, as well as on measures aimed to monitor compliance with these rules through conformity assessment procedures.

2 Art. 6 deals with the **recognition of conformity assessment by central government bodies**.

3 The **purpose** of Art. 6 is twofold. On the one hand, it aims to favour the development of recognition of conformity assessment, instead of developing the extensive harmonisation of national technical requirements. Indeed, the recognition of conformity assessment developed in a third country will reduce burdens for companies by avoiding, for example, multiple testing. Where recognition is accepted, the product will not need to be tested a second time, the testing carried out in the exporting country will be recognised, under certain conditions. This will carry with it gains in time and money for importers.

On the other hand, Art. 6 aims to ensure that the recognition of conformity assessment procedures is not used to impose technical barriers to trade. Indeed, it might be tempting for States to use recognition of Conformity Assessment Procedures (thereafter: CAP) to their advantage, for example for banning some countries or operators.

4 In order to develop recognition of CAP, Members may use one of three approaches. The first is harmonisation, but this approach is costly and lengthy. The second possibility is to encourage equivalence; this aspect is developed by Arts 6.1 and 6.2 TBT. In that case, one State may accept other regulatory rules as equivalent to its own providing that they are aimed at the same goal. The State will recognise that the regulatory system of other States is good enough to protect the regulatory goals that it intends to protect, such as public health, consumer protection etc. The last approach is related to mutual recognition, and this aspect is dealt with in Art. 6.3 TBT. As demonstrated by the NILF report 2004,[1] mutual recognition

[1] *Veggeland & Elvestad*.

may be defined in different ways: Mutual recognition either means that "producers that comply with the regulatory requirements of an exporting country automatically should be allowed into an importing country" or that "parties mutually accept each other's conformity assessment requirements". For example, it can entail recognition of the testing procedure between two countries which have harmonised their technical requirements. However, one can have mutual recognition agreements targeted at tackling testing. In that case, there is no need to harmonise before the mutual recognition agreement is entered into.

5 However, it is important to stress that Art. 6 TBT includes a number of limitations concerning the development of the recognition of CAP, and this may be subject to *ex ante* negotiation. Indeed, even if recognition were a tool to avoid harmonisation and to develop trade, due to technical or regulatory differences between Members, prior negotiation for limited harmonisation might be necessary. Therefore, there is no hermetic border between mutual recognition, equivalence and harmonisation. The three methods may be used together.

B. Equivalence of CAPs (6.1–6.2)

6 The first paragraph of Art. 6 aims to develop a framework to ensure that results of conformity assessment procedures in other Members are **accepted** if they offer assurance of conformity with applicable technical regulations or standards equivalent to the respective Member's own procedures. The principle of this paragraph is that the mere fact that procedures are different cannot lead a Member to refuse conformity assessment procedures implemented in other Members. This approach will allow each Member to retain its own regulatory system whilst fostering trade by removing technical barriers in accepting other CAP as equivalent to its own. However, this approach is possible only if there is equivalence.

7 This recognition is not automatic. Conditions are laid down in Art. 6.

8 First, the recognition can be subject to limitations as evidenced by the words "**whenever possible**" in Art. 6.1. These words being subjective by nature, it is difficult to assess them legally. This gives Members many opportunities to avail themselves of these limitations. One Member can decide that recognition of the results of other Members' conformity assessment procedures is not possible. However, it will have to explain why it was not possible to ensure equivalence. Therefore, there is no legal obligation to accept the results of the CAP coming from other countries. The legal obligations of this article for the importing State will be to enter into negotiation and, possibly, to justify its refusal to accept a CAP equivalence. However, the

burden of proof will remain on the exporting State, which required the equivalence of the CAP. It will have to prove that it fulfils all the conditions laid down in Art. 6.1.

9 Secondly, Art. 6.1. indicates that **prior consultation** may be necessary "in order to arrive at a mutually satisfactory understanding". The object of consultations may be twofold: to ensure the technical competence of the conformity assessment bodies in the exporting Member (Art. 6.1.1) and to limit recognition to conformity assessment by designated bodies in the exporting Member (Art. 6.1.2.).

10 Art. 6.1.1 aims to ensure that the foreign procedure offers an assurance of conformity with applicable technical regulations or standards **equivalent** to the procedures of the importing State.[2] This aspect aims to ensure the reliability of conformity assessment results. Indeed, the importing State has to ensure that conformity assessment results have been produced by competent conformity assessment bodies. Therefore, these bodies may be asked to prove their enduring technical competence. Moreover, this ensures that members can choose their level of protection. For example, one Member may choose a very high level of protection, in which case acceptance of equivalence will be possible only if the other member has the same level.

11 The purpose of ensuring the **competence of conformity assessment bodies** of other Members is to increase confidence in the continued reliability of their assessment results. One indication of technical competence is a body's compliance with international standards.[3] Such compliance may be verified, for example, through the accreditation of a conformity assessment body to an international standardizing body, such as ISO and ILAC. However, the mere fact that a competent body follows relevant guidelines or recommendations issued by international standardising bodies does not automatically lead to the recognition of its assessment results, but is one of a number of indications of competence which should be taken into account (staff, technical facilities, experience etc.). Recognition may be withheld by reason of the quality of a test and the procedures used to carry it out. There are various means to establish whether the results of conformity assessment procedures are equivalent to domestic ones. However, apart from ensuring the competence of assessment bodies Art. 6.1. does not specify the tools for assessing equivalence between national results and results from other Members. This leaves Members free to choose the tools and mechanisms they want to use.

[2] See Art. 2.7 TBT, which contains a similar obligation regarding technical regulations.
[3] Art. 6.1.1.

Prior consultations may also be in place in order to limit acceptance to **designated bodies in the exporting Member** (Art. 6.1.2). In this case Members will discuss the bodies that will be considered to fulfil all the obligations concerning the tests to be performed in the conformity assessment procedure. This limits the scope of acceptance under Art. 6.1. Only some bodies will be designated as acceptable. *12*

Finally, the last words of Art. 6.1 "in particular" have to be emphasised. This proves that Members have the opportunity to find other reasons to prolong consultations if necessary before granting unilateral recognition. Once again, this non-exhaustive list may give Members the freedom to ask for numerous controls before accepting unilateral recognition. This will leave unilateral recognition to the goodwill of Members. *13*

On the one hand, we have seen that Members can restrict their acceptance of results of conformity assessment procedures adopted in other Members. However, on the other hand, this freedom is limited by Art. 6.2. Indeed, members may not use their conformity assessment procedures in such a way as to categorically refuse to recognise foreign conformity assessments. They need to ensure that their procedures permit, as far as practicable, the implementation of para. 1. *14*

Therefore, this article can impose on Members three types of obligations, among others. The first is linked to internal rules. Members will have to avoid having any legal obligation in their national legislation stating that only tests performed by their national bodies can be used. The second type is proactive in requiring the conduct of negotiations necessary to permit the development of CAPs. The third is that third country conformity assessment results, once accepted, should have the same effect as national ones, for example by giving access to special labelling possibilities for goods or in case of litigation. *15*

C. Mutual Recognition Agreements[4] (MRAs) (Art. 6.3)

Art. 6.3 aims to encourage Members, if another Member requires them to do so, to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures. *16*

Of course, the conclusion of such agreements is not compulsory; it is only a possibility. Regarding the relationship between Arts 6.1 and 6.3, it can be said that the rule is the acceptance of unilateral recognition. However, *17*

[4] *Mathis*, JWT 32 (1998) 6, 5–31.

it is possible to go further and to develop MRAs. Therefore, irrespective of the fact that Members are encouraged to enter into MRAs, they are to ensure unilateral recognition. Even if there is unilateral recognition, they shall enter into MRA negotiations.

18 Instead of being under a strict legal obligation Members are merely encouraged to enter into negotiations at the request of other Members. The conclusion of agreements is not mandatory. Members may lay down conditions for the conclusion of such agreements. Pursuant to the second sentence of Art. 6.3 Members may require that the MRA fulfil the criteria of Art. 6.1. Secondly, Members may also require that an MRA give mutual satisfaction to all participating Members so that the potential for facilitating trade is evenly balanced.

19 The development of Mutual Recognition Agreements in the WTO raises many concerns regarding the compliance of such agreements with WTO obligations, such as the **most favoured nation clause** (MFN),[5] since recognition will be given only to the participants in the Mutual Recognition Agreements. This article can be considered as an exception to the MFN clause. It aims to encourage the development of such agreements, but not every member of the WTO will be a member of the Agreement. In addition, the participating States will develop a set of rules to fulfil if other States want to become members of the MRA. Therefore, it is comparable to a "club" where membership is possible by request and under certain conditions.

20 One way to limit the consequences of this exception to the MFN clause lies in Art. 10.7 TBT, providing for the notification of MRAs and the potential participation of additional Members. Parties to the MRA are obliged to notify other Members through the Secretariat of the products covered and to include a short description of the agreement.

21 In the third triennial review[6] the Committee stressed that MRAs may be a useful tool for developing trade. However, it pointed out that both their negotiation and implementation might be difficult. Therefore, the Committee has drawn up a list of considerations that need to be taken into account before developing an MRA:

22 The different conditions should be, first, a "sound regulatory system". This means that members of the MRA should be able effectively to implement the content of the Agreement and to ensure the quality of its conformity assessment procedures. Secondly, due to the difficulty linked to the development of a MRA, it has to be used only if "a sufficient volume of trade in

[5] *Benon*, Eur. L. Rev., 28 (2003), 231–249 and *Mathis*, JWT 32 (1998) 6, 5, 16–18.
[6] G/TBT/13, paras 29–39.

specific sectors between the parties involved justifies the high administrative costs". Thirdly, parties to the Agreement have to be aware of the long negotiation procedure that MRAs are subject to. This leads to the fact that a MRA will be effective only if tangible economic benefits can be expected by the different parties. Before entering into negotiations it is necessary to check that stakeholders and key players are ready to commit themselves to such an Agreement. Finally, a MRA can function only if the regulatory systems of the potential parties to the MRA are compatible and comparable. Therefore, the consequence is that MRAs have become a "club" of rich Members having similar regulatory systems able to negotiate and implement obligations arising out of the MRA.[7]

23 It appears, therefore, that MRAs are constructive only if certain conditions are met. Therefore, mechanisms other than MRAs need to be developed in order to develop trade. Currently, the WTO is trying to promote more extensively the development of manufacturer/supplier declarations.[8]

D. Admission of Foreign Conformity Assessment Bodies (Art. 6.4)

24 This article aims to bring the principle of the Most Favoured Nation clause back into Art. 6. Members are encouraged to open their conformity assessment procedures to conformity assessment bodies located in the territories of other Members. They have to apply the same conditions that they apply to their own conformity assessment bodies located within their territories or the territory of any other country.

25 Indeed, the development of bilateral or multilateral MRAs is going against the main principle of the WTO: "Favour one, favour all". Therefore, Art. 6.4 obliges Members to avoid using CAP as a means of excluding certain countries and favouring trade with others.

26 The legal obligations of this article are not clear. Indeed, Members are "encouraged". The limitations laid down in para. 1 apply. Acceptance is not automatic. However, para. 4 aims to ensure that conditions for participation are the same for foreign and national bodies.

27 The legal obligations will be to ensure **transparency** and not to reject demands of AFCAB before analysing the content of demands. Once again, these obligations appear to be limited. Members respecting the principle of transparency can easily evade the legal obligations of Art. 6.

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[7] *Ibid.*, para. 39.

[8] Report (2004) of the Committee on Technical Barriers to Trade, G/L/710, 8 November 2004. See also: <www.wto.org/english/tratop_e/tbt_e/tbt_supplier_prog_21mar05.doc>

28 However, the more stringent the conditions, the less conformity assessment bodies from third countries will be entitled to participate.

E. Approaches to facilitate acceptance of CAPs

29 In practice unilateral and mutual recognition of CAPs has encountered obstacles such as the length of time needed to develop them, the complexity of the agreements, etc.

30 In order to facilitate recognition the TBT Committee developed an indicative list of **approaches to facilitate acceptance of the results of conformity assessment**.[9] The first possibility will be to develop **mutual recognition agreements**, which are defined as "agreements which will result in the acceptance of the results of conformity assessment originating in the territory of either party". Secondly, there are the **cooperative agreements between Domestic and Foreign Conformity Assessment bodies.** These include "agreements among accreditation bodies as well as individual laboratories, between certification bodies, and between inspection bodies".

31 Thirdly, the use of **accreditation** to qualify conformity assessment bodies by which work is done:[10] "Accreditation bodies have been working towards harmonization of international practices for accreditation of conformity assessment bodies. This has resulted in the development of global networks to facilitate the recognition and the acceptance of results of conformity assessment. These networks take the form of multilateral recognition agreements or arrangements (MLAs) whereby each participant undertakes to recognize the accreditation granted or certificates issued by any other party to the agreement or arrangement as being equivalent to that granted by itself and to promote that equivalence throughout its territory of operation."[11] Fourthly, another method can be the government **designation of specific conformity assessment bodies** to undertake conformity assessment work.

32 Fifthly, there is the possibility of **unilateral recognition of results of foreign conformity assessment**. This aspect can be linked to the procedure in Art. 6.1.

There are two possibilities regarding unilateral recognition.

33 First, "the conformity assessment body may be accredited abroad under recognized regional or international accreditation systems. In the absence

[9] G/TBT/9, Annex 5.
[10] *Ibid.*
[11] *Ibid.*

of accreditation, the conformity assessment body may prove its competence by other means. On the basis of equivalent competence of the conformity assessment body, foreign test reports and certificates are recognized unilaterally".[12]

34 The second possibility, regarding unilateral recognition of results of foreign conformity assessments, is a **manufacturer/supplier declaration**, which is "a procedure by which a supplier (as defined in ISO/IEC Guide 22:1996, a supplier is the party that supplies the product, process or service and may be a manufacturer, distributor, importer, assembler, service organization, etc.) provides written assurance of conformity to the specified requirements. The declaration identifies the party responsible for making the declaration of conformity and for the conformity of the product/process/service itself. Under this approach, the manufacturer/supplier, rather than the regulatory authority, takes on the responsibility for ensuring that products entering a market comply with the mandatory technical regulations. Assessment may be undertaken either by the supplier's own internal test facility or by an independent test facility".

35 On the **manufacturer/supplier declaration procedure**, it should be stressed that it must involve four main aspects in order to be efficient: adequate market surveillance, substantial penalties for false or misleading declarations, an appropriate regulatory environment and an appropriate product liability regime.

F. Evaluation

36 The development of recognition of Conformity Assessment procedures raises many concerns which may limit their use in the future.

37 As a general comment, it may be stressed that least developed and developing countries cannot exploit the benefits of this Article. Indeed, equivalence seems to be impossible due to conformity assessment requirements in export markets that are difficult to meet. The reasons for these difficulties can be numerous, for examples limited physical and technical resources for national conformity assessment; an insufficient number of accredited laboratories at the national or regional level, high costs as well as legal difficulties in obtaining foreign accreditation, difficulties in establishing internationally recognized accreditation bodies, difficulties in participating in international conformity assessment systems, as well as difficulties relating to the implementation of ISO/IEC guidelines on conformity assessment procedures.[13]

[12] *Ibid.*
[13] G/TBT/9, Annex 5.

38 Many concerns have been raised on the question of MRAs.

39 First, the cost; Members have indicated that due to the complexity of such agreements it may be very costly to establish an MRA. Indeed, the workload required for entering into this type of agreement may involve a real screening of the regulatory system of each Member wishing to participate. This point has been stressed by different States; it is possible to refer to Canada's contribution to the 2nd TBT triennal review.[14] Therefore, before engaging in a MRA exercise, Canada recommends that one ensure that this reflects the needs of companies involved in foreign trade.

40 Secondly, the European Commission[15] has clearly stated that MRAs could be a tool to facilitate trade, but they are not a panacea. Indeed, each member of the MRA has to have systems close enough to those of the others to make MRAs workable.

41 Thirdly, this long process is not meant to cover important ranges of products or conformity assessment procedures; in general it concerns only certain tests or products. Therefore, the scope of these agreements is limited and the benefit for trade is also limited.

42 Finally, as a consequence of all the remarks that have been made, the development of MRAs has become the "tool" of rich countries only. Indeed, the workload necessary to reach such agreements and the expertise require to ensure that every Member of the MRA respect the Agreement have led to a quasi-automatic exclusion of the least developing countries. Thus, MRAs appear to be a way to bolster trade bilaterally or multilaterally but not a way to ensure the multilateral development of trade.

[14] G/TBT/W/143.
[15] G/TBT/W/173/Add.1.

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Article 7 TBT
Procedures for Assessment of Conformity by Local Government Bodies

With respect to their local government bodies within their territories:

1. Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Articles 5 and 6, with the exception of the obligation to notify as referred to in paragraphs 6.2 and 7.1 of Article 5.
2. Members shall ensure that the conformity assessment procedures of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 6.2 and 7.1 of Article 5, noting that notifications shall not be required for conformity assessment procedures the technical content of which is substantially the same as that of previously notified conformity assessment procedures of central government bodies of the Members concerned.
3. Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 6 and 7 of Article 5, to take place through the central government.
4. Members shall not take measures which require or encourage local government bodies within their territories to act in a manner inconsistent with the provisions of Articles 5 and 6.
5. Members are fully responsible under this Agreement for the observance of all provisions of Articles 5 and 6. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Articles 5 and 6 by other than central government bodies.

Case Law

Panel Report, *Japan—Alcoholic Beverages II*, WT/DS8/R.

Documents

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A. General

1 Art. 7 concerns **conformity assessment procedures performed by Local Government Bodies** and the recognition of their results. In principle it extends the obligations of Arts 5 and 6 with respect to central government bodies to local government bodies. WTO Members in principle have an obligation to ensure compliance by sub-central entities with these basic rules. However, the scope of the obligation to notify under Art. 7 differs from that under Art. 5. By extending Members' obligations with respect to local government bodies, Art. 7 mirrors the provisions of Art. 3 which deals with the preparation, adoption and application of technical regulations by Non-Central Bodies.[1] **Local government bodies** as specified by Annex 1.7 include, among others, states, provinces, *Länder*, cantons, municipalities and their subdivisions.[2]

2 The rationale of this article is to avoid Members escaping TBT obligations if such obligations are meant to be fulfilled by local government. Due to differences in Members' legal orders, the TBT Agreement was intended to stress the potential importance of local measures. Therefore, in contrast to the usual approach of international law, Art. 7 contains an obligation applicable to local government bodies.

B. Historical background

3 The development of the obligation concerning Local government bodies was the result of intense debate and negotiation.[3] Two options were provided for Art. 7,[4] the one in terms of a first level of obligation and the other in terms of a "best efforts" obligation.[5] The final solution was "shall take such reasonable measures as may be available to them to ensure compliance".

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[1] See *Keck-Tamiotti*, Article 3 TBT.
[2] See *Koebele*, Article 1 and Annex 1 TBT, para. 54.
[3] G/TBT/W/11, Section II.
[4] MTN.GNG/NG8/W/83/Add.3/Rev.1.
[5] MTN.GNG/NG8/W/72, develops the EC position and MTN.GNG/NG8/W/60 develops the US position.

C. Scope of Members' Obligations Regarding Local Government Bodies

4 Art. 7 obliges Members to take all reasonable measures to ensure that local government bodies follow TBT obligations. The term "reasonable measures" indicates that this obligation is not strict but is left to the discretion of Members. Therefore, if one Member considers that it has taken all reasonable measures, it is not obliged to take further measures. The difficulty will be to oversee the legal application of this obligation. This could be limited, for example, to checking whether the Member has taken all the measures that could be taken to ensure that local government bodies comply with Art. 7 obligations.

5 However, the obligation under Art. 7.1 has to be analysed in the light of Art. 7.5 which indicates that Members are "fully responsible" for the application of Arts 5 and 6 obligations by other than **central government bodies**. This aspect is coherent with WTO law; only Members are responsible for implementing WTO obligations. Therefore, if an obligation is not fulfilled by one branch of the state only the central government can be sued under the Dispute Settlement Procedure. Then, first, the obligation of the central state is to make sure that national law gives local government bodies the opportunity to implement this obligation. Secondly, it obliges central government to check that local government bodies are observing the obligation contained in the TBT Agreement.

I. Ensuring Compliance Through Reasonable Measures (**Art. 7.1**)

6 Members are required to monitor the behaviour of these bodies by means of adequate procedures to ensure that these bodies will not act contrary to Arts 5 and 6. This obligation is similar to the general one developed in Art. XXIV:12 GATT 1994.[6]

The obligation to monitor raises many questions. The first is how a Member can ensure that these bodies comply with Arts 5 and 6 of the TBT Agreement. This obligation implies close control and possibly the establishment of new mechanisms in order to monitor the application of these obligations.

The second aspect will be how these legal obligations can be enforced by the central government. Indeed, for constitutional reasons it may be impossible for the central state to force local entities to comply with them.

[6] Art. XXIV:12 GATT 1994: "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories."

This difficulty has been raised several times by central states[7]. Central states argue that the consequence is that federal states manage to escape legal obligations by hiding behind national constitutional rules.

7 In the *Japan—Alcoholic Beverages II* case,[8] Japan stressed that Art. III GATT 1994 is not aimed at harmonising national legislation. The same approach can be developed here. The approach obliges Members to act as far as possible in conformity with Art. 7 with respect to local government bodies. There is no obligation to harmonise national constitutional law in order to achieve conformity with Art. 7.1 obligations.

8 In consequence, the question becomes whether non-compliance with Art. 7.1 can lead to the opening of dispute settlement proceedings. According to Art. 14.4,[9] it is possible to begin an action where a Member considers that another Member has not achieved satisfactory results under Arts 3, 4, 7, 8 and 9 and its trade interests are significantly affected. Once again, the problem will be to evaluate these conditions. The first option, "satisfactory results", is a subjective criterion difficult to define legally. To give an example, it is possible to imagine that a Member deliberately breaches Art. 7. In addition, the second criterion, "trade interests are significantly affected", can be linked to Art. 2 obligations also providing for "a significant effect on trade" (Arts 2.5 and 2.9 TBT). This approach develops a "*de minimis* rule" regarding the application of Art. 7 obligations. Indeed, violations of Art. 7 will lead to a dispute settlement only if this violation reaches a certain level of gravity.

II. Formulation and Implementation of Positive Measures (Art. 7.5, Sentence 2)

9 Members have to formulate and implement positive measures to ensure that local entities comply with the obligations set out in Art. 7. As an example of a positive measure, it is possible to envisage the development by the state of seminars for local entities to make them aware of TBT obligations.

10 Regarding potential mechanisms, it is possible to have legal obligations requiring local entities to contact a national body to ascertain whether there is an obligation to notify. Chile's approach was developed in the Communication of Chile at the Fourth Triennal Review of the Agreement on TBT.[10]

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[7] MTN.GNG/NG8/W/8 and MTN.GNG/NG8/W/13.

[8] Panel Report, *Japan—Alcoholic Beverages II*, WT/DS8/R, para. 4.130.

[9] Art. 14.4 TBT: "The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member."

[10] Committee on Technical Barriers to Trade, Fourth Triennial Review of the Agreement

The solution was to develop a National Committee on Technical Barriers to Trade, which coordinates at national level the TBT-related activities of the various regulatory bodies. Chile insists that "even when not backed up by a law, decree or some other legal instrument, these coordination activities are worthwhile inter alia because of the good will shown by the institutions, which feel that they are involved and playing a part". Another example is Canada,[11] which has indicated that "[i]n Canada, relevant seminars had been held with officials from the provincial government of Ontario, and similar dialogue would be conducted with other local governments".

III. Rule of Abstention (Art. 7.4)

11 Members are obliged not to act in a way that will "require or encourage" local government bodies to act in a manner contrary to the obligations laid down in Arts 5 and 6. This paragraph is designed to avoid members acting contrary to TBT obligations. For example, there may be an internal legal obligation forbidding local government entities to follow some legal obligation contained in Art. 5 and 6.

IV. Members' Responsibility for the Full Observance of Art. 2 (Art. 7.5 Sentence 1)

12 Members are fully responsible for the non-compliance of these bodies with the obligations laid down in Arts 5 and 6. This approach is consistent with international law. Indeed, Art. 27 VCLT[12] provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Therefore, once Members belong to a Treaty, they are obliged to ensure the consistency of their national laws with their international obligations.

D. Transparency Procedures

I. Notifications (Arts 7.1 and 7.2)

13 The notification procedure specified in Art. 5 for central government bodies, pursuant to Art. 7.1 applies also with respect to local government bodies but with the exception of paras 6.2 and 7.1 of Art. 5. Thus, there

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on Technical Barriers to Trade, Good Regulatory Practice and Transparency, Communication from Chile, G/TBT/W/268, 12 June 2006, in particular para. 7.

[11] Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 30 March 2001, G/TBT/M/23, 8 May 2001.

[12] Vienna Convention on the Law of Treaties, UNTS 1155 (1969), 331, 23 May 1969.

is **no need to notify other Members through the Secretariat** of proposed conformity assessment procedures by local government bodies or of urgent procedures.[13]

14 However, for local government **bodies on the level directly below that of the central government,** obligations of Members are more extensive (Art. 7.2), and include all transparency obligations contained in Art. 5.[14] It may be difficult for external observers to identify exactly local government bodies which are "directly below that of the central government". Therefore, thorough checking of national notifications concerning local government bodies will require extensive knowledge of national constitutional frameworks.

15 In order to avoid duplication of efforts there is no need to notify the Secretariat in cases where a conformity assessment procedure by local government bodies has "substantially the same" technical content as that of a procedure previously notified by the central government.[15] In these cases it is possible to avoid notification. This aspect may also permit states to justify their non-notification. The legal question, however, is how to interpret the term "substantially". This adds to the difficulty of the concrete application of Art. 7.

II. Centralization of Contacts (Art. 7.4)

16 Central government may serve as a contact point even for conformity assessment by local government bodies. This approach is logical. It has two purposes: first, it is easier for third countries to have only one contact point for each Member Secondly, it is the central government which is responsible for the application of WTO obligations.

17 The contact points are, for example, necessary for the notification, provision of information, comments and discussion mandated by Arts 5.5 and 5.6 during or after the adoption of conformity assessment procedures. The central government may decide to remain in control of these contacts with other Members. The advantage of such decision is that the contact point for TBT notifications and enquiry points remain the same regardless of whether or not a central or local government body is charged with conformity assessment.[16]

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[13] For central government bodies see Arts 5.6.2 and 5.7.1.

[14] See also TBT Committee, Fourth Special Meeting on Procedures for Information Exchange, 2–3 November 2004, Background note from the Secretariat, para. 12. Since 1995, only 3 notification have been made under this Article.

[15] Art. 7.2.

[16] The latest contact point list: Committee on Technical Barriers to Trade, National Enquiry Points, Note by the Secretariat, G/TBT/ENQ/27, 17 February 2006.

E. Evaluation

18 The effectiveness of the procedure laid down in Art. 7 is open to doubt. At the Fourth Special Meeting on Procedures for Information Exchange 2–3 November 2004,[17] the Background Note by the Secretariat indicated that between 1 January 1995 and 30 June 2004, only 3 notifications had been made under Art. 7.2. The reasons for this are the following:

19 First, Art. 7 does not establish any strict obligations for Members. They just have to ensure that "reasonable measures" are taken. Secondly, it is difficult to imagine a dispute brought before a panel only on the basis of the failure to notify local government measures. Thirdly, the link between local and central entities is difficult to understand from the outside. In addition, it appears to be an internal matter because it is bound up in constitutional issues.

20 Nevertheless, the Committee stressed the importance of Art. 7: "The Committee reiterates the importance of Members fulfilling their notification obligations at the sub-national level under Arts 3.2 and 7.2. Members should make greater efforts to raise awareness of these obligations at this level and to ensure their implementation. This could be done, for example, by holding seminars for local government bodies."[18] However, there are no concrete actions being taken or planned to enhance notification from local entities.

21 In order to ensure the application of this obligation, the consequences of non-notification would have to be more serious. Currently, non-notification is merely mentioned by other Members if they have information about national measures contravening the obligation of notification.

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[17] <www.wto.org/english/tratop_e/tbt_e/meeting_nov04_e/info_exchange_nov04_prog_e.htm>, Figure 4.

[18] Committee on Technical Barriers to Trade, Third Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/13, 11 November 2003, para. 23.

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Article 8 TBT
Procedures for Assessment of Conformity by Non-Governmental Bodies

1. Members shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories which operate conformity assessment procedures comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6.
2. Members shall ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures.

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A. General

1 Art. 8 deals with Members' obligations with respect to **conformity assessment procedures by non-governmental bodies** in their territories. It thereby covers all bodies other than central or local government bodies, including non-governmental bodies having legal power to enforce a technical regulation.[1]

2 While Art. 7 TBT extends the obligations concerning central government bodies under Arts 5 and 6 to local government bodies, **Members obligations with respect to non-governmental bodies are limited**. Members are obliged merely to take reasonable available measures to ensure compliance by non-governmental bodies and not to require or encourage them to act inconsistently with those provisions (Art. 8.1).

3 In this respect the scope of Members' obligations concerning conformity assessment under Art. 8 differs from that under Art. 3 which provides for the same obligations in the preparation, adoption and application of Technical Regulations concerning local government and non-governmental bodies. It rather compares to Art. 4.1 with respect to standards set by non-governmental bodies.

[1] Annex 1.8 TBT. See *Koebele*, Article 1 and Annex 1 TBT, para. 55.

Though Members do not have full responsibility for the acts of non-governmental bodies, central government bodies may **rely on conformity assessment procedures** by non-governmental bodies only if the procedures used by non-governmental bodies comply with Arts 5 and 6 (Art. 8.2). There is **no notification** obligation for conformity assessments by such bodies. Nor does Art. 8 provide for the centralization of contacts through the central government.[2] *4*

B. Historical Background

Intensive negotiations took place during the Uruguay round regarding Art. 8. Some Members sought the introduction of a direct obligation on local and non-governmental bodies in a separate code of conduct (as is the situation with standards under Art. 4). However, this proposal was ultimately rejected.[3] *5*

C. Scope of Members' Obligations Regarding Non-Governmental Bodies

I. Ensuring Compliance Through Reasonable Measures (Art. 8.1, Sentence 1)

Members are obliged to take **reasonable available measures** to ensure that non-governmental bodies within their territories comply with Arts 5 and 6 when operating conformity assessment procedures. This obligation does not extend to the notification procedure for proposed conformity assessment procedures pursuant to Art. 5. Everything will depend on the legal framework of each Member. This article aims at ensuring that Members are taking all available measures to make sure that non-governmental bodies are enforcing TBT obligations. *6*

This may imply positive measures, with a legal obligation on NGBs to check compliance with TBT obligations, or it can be done through internal measures decided by the NGBs (such as codes of conduct/internal rules) which oblige it to ensure that its work complies with TBT obligations. *7*

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[2] But see Art. 7.3 for local government bodies.

[3] Committee on Trade and Environment—Committee on Technical Barriers to Trade, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade With Regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics, Note by the Secretariat, G/TBT/W/11, 29 August 1995.

8 These types of obligations can be considered as "second-level obligations". Art. 8 deals with private bodies having no legal link with the State. However, the same wording has been used regarding the obligations set out in Arts 7.1 and 8.1.

9 The legal obligation of Art. 8 can be subject to dispute settlement, but the same limitations as those laid down for Art. 7 apply.[4] For instance, a Member can sue another Member only if it has not achieved satisfactory results under Art. 8. Therefore, the same element of subjectivity is present. The standard to be achieved is not a perfect application of the obligations but merely a "satisfactory application".

10 In addition, dispute settlement procedures can be successful only if a Member's trade interests are significantly affected. Therefore, it will be necessary for the complainant to prove that the unsatisfactory application of Art. 8 obligations has led to the impeding of its trade interest. Finally, Art. 14.4 indicates that "such results shall be equivalent to those as if the body in question were a Member".

II. Rule of Abstention (Art. 8.1, Sentence 2)

11 Members may not require or encourage, either directly or indirectly, non-governmental bodies to act contrary to the obligations laid down in Arts 5 and 6.

12 For example, Members have to ensure that national legislation does not force these NGBs to act in contravention of TBT obligations. In addition, Members have to lay down positive measures such as checking the work of these NGBs and their compliance with national and international law. This positive attitude is emphasised by Art. 8.1 which forbids any measures which have the effect of "directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6". This sentence is aimed at overseeing Members' behaviour regarding NGBs.

III. Reliance by Central Government Bodies (Art. 8.2)

13 The minimum obligation is that Members must ensure, before relying on procedures to assess conformity put into effect by non-governmental bodies, that these bodies **follow the obligation set out in Arts 5 and 6**.

14 This paragraph complements the limited obligations as regards NGBs. On the one hand, NGBs know that Members will not be allowed to count on

[4] See *Muñoz*, Article 7 TBT, para. 8.

any procedures if they do not observe the TBT obligations laid down in Arts 5 and 6. On the other hand, this imposes a legal obligation on Members to check before using procedures established by NGBs that they comply with TBT requirements.

15 This aspect is particularly important following the development of the outsourcing of tasks towards private bodies. Otherwise, it could be a way to escape legal obligations imposed by the TBT.

D. Exemption From Notification

16 Art. 8 does not contain any obligation regarding notification. In comparison, Art. 7 only limited the notification obligation but obliged Members to notify under certain circumstances. This is a conceptual weakness of Art. 8. Indeed, the legal obligations of the TBT are difficult to evaluate. However, this difficulty is eased by transparency.

17 The aim of the TBT Agreement is to inform states and companies about new conformity assessment procedures and technical rules before their adoption in order to give them the opportunity to react, but above all to give companies time to adapt to these new rules.

E. Evaluation

18 The aim of Art. 8 is to oblige private bodies both directly and indirectly to fulfil some TBT obligations. This aspect is important if one considers the current trend of delegating public functions to non-governmental bodies.

19 However, it appears to be a very difficult task to implement. Indeed, these private bodies have the ability to operate outside the supervision of WTO Members. The only type of control which might be developed would be an obligation to notify. This obligation would provide the opportunity to check the contents of documents adopted by these non-governmental bodies. Even if it was not possible to impose a standstill period following notification, it would be helpful to have a legal obligation to notify. The documents notified could be accessed electronically by any person interested. This approach would also help less developed countries which have difficulty in accessing information.

20 Beyond calling for transparency, it seems difficult to find a more stringent way to control procedures by non-governmental bodies. Indeed, the documents adopted by such bodies are not always used by central governments. The obligation imposed on WTO Members to check that acts adopted by theses bodies conform to the legal obligations set out in the TBT Agreement

if they want to rely on them, however, is a good way to force Members to ensure compliance with TBT obligations.

21 However, the final question is how it would be possible to start an action against a Member which is not fulfilling theses obligations. Use of this Art. 8 TBT before a panel should probably be made in the context of a wider case and cannot constitute the central issue in a complaint.

22 Finally, it may be emphasised that the notion of overseeing work done by NGBs is central to the application of WTO obligations. Indeed, more and more activities are farmed out to private bodies. This fact cannot be used by Members as a way to avoid implementing their WTO obligations.

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Article 9 TBT
International and Regional Systems

1. Where a positive assurance of conformity with a technical regulation or standard is required, Members shall, wherever practicable, formulate and adopt international systems for conformity assessment and become members thereof or participate therein.
2. Members shall take such reasonable measures as may be available to them to ensure that international and regional systems for conformity assessment in which relevant bodies within their territories are members or participants comply with the provisions of Articles 5 and 6. In addition, Members shall not take any measures which have the effect of, directly or indirectly, requiring or encouraging such systems to act in a manner inconsistent with any of the provisions of Articles 5 and 6.
3. Members shall ensure that their central government bodies rely on international or regional conformity assessment systems only to the extent that these systems comply with the provisions of Articles 5 and 6, as applicable.

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A. General

Art. 9 serves two purposes. Firstly, it aims to lower the risk of bilateralization of international trade relations posed by the conclusion of agreements for the mutual recognition of the results of each other's conformity assessment procedures (Mutual Recognition Agreements or MRAs) among a few insular developed countries to the detriment of the majority of developing countries by reinforcing the general preference for multinational solutions under the TBT Agreement over bilateral (or even national) ones through common communication, cooperation, and participation of members in *1*

international institutions for conformity assessment.[1] Secondly, Art. 9 aims at the indirect regulation of such international and regional systems for conformity assessment which may also constitute means of arbitrary or unjustifiable discrimination between countries or otherwise erect unnecessary obstacles to trade.

B. Preference for International Systems (Art. 9.1)

2 Art. 9.1 expresses an unequivocal preference for international solutions in respect of conformity assessment. It encourages Members to prepare and adopt international systems for conformity assessment procedures and to participate therein. Such preference is based on the belief that international solutions—while certainly not impeccable—are not open to abuse and protectionism to the same degree as national ones.

3 There is no international conformity assessment organization. However, the **Conformity Assessment Committee of ISO** (**CASCO**) has significantly promoted the international harmonization of conformity assessment procedures by producing joint ISO/IEC publications covering the various facets of conformity assessment activities and the organizations that carry them out.[2] Its guides and recommendations reflect "best practice" currently available in the world markets, inter alia, the code of good practice for conformity assessment, and other output relating to a **supplier's declaration of conformity** (**SDoC**), **accreditation, testing and calibration, inspection, product certification, and system and persons certification**.[3] A complete list of guides and recommendations by field of application is provided by the WTO Secretariat and regularly updated for the information of WTO Members.[4] In addition, coordination among accreditation institutions has proven extremely valuable to the cause of increasing the number of MRAs concluded. Key actors in this regard are the **International Laboratory Accreditation Cooperation** (**ILAC**) and the **International Accreditation Forum** (**IAF**).[5]

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[1] It thereby acts as a check and counterbalance to Art. 6.3 which encourages the negotiation and conclusion of MRAs without the proscription of most-favoured-nation or national treatment in this regard. Such interpretation finds further support in Art. 10.7 which prescribes notification of the MRA to enable consultations with other members. See *Muñoz*, Article 6 TBT, para. 20.

[2] CASCO was established in order to cover all types of conformity assessment practices within the realm of ISO. See on CASCO and conformity assessment, <www.iso.org/iso/en/comms-markets/conformity /iso+ conformity.html>.

[3] See G/TBT/W/72/Rev.4. ISO products are generally available at the ISO shop's website, <www.iso.org/iso/en/prods-services/ISOstore/store.html>.

[4] Last update is available at *ibid*. The document further contains guides which are in the process of preparation and adoption.

[5] See *WTO*, World Trade Report 2005, 103.

C. Members' Responsibility for Central Government Bodies (Art. 9.3)

4 As in other parts of the TBT Agreement,[6] Art. 9.3 imposes a rather stringent (positive) obligation on Members with respect to their central government bodies, the observance of which should not pose significant hurdles for any Member (as opposed to local authorities or non-governmental organizations). It declares that Members shall ensure the compliance of central government bodies with Arts 5 and 6 even if and to the extent that such bodies rely on international or regional conformity assessment systems.[7] Accordingly, Art. 9.3 regulates international or regional conformity assessment systems not directly, but indirectly by imposing liability on WTO Members for the activities of their central government bodies participating in such systems.

D. Members' Responsibility for International and Regional Systems (Art. 9.2)

5 In recognition of the fact that even international or regional solutions to conformity assessment procedures do not suffice by and of themselves to guarantee the smooth flow of international trade, Art. 9.2 positively obliges Members to take **all available and reasonable measures** to ensure that any international or regional system for conformity assessment in which bodies within their territories participate or of which they are Members comply with the legal regime established under Arts 5 and 6 of the TBT Agreement.[8] The approach of "reasonable measures" was already part of the Tokyo Round Standards Code, the wording of which was derived from the so-called "federal clause" contained in Art. XXIV:12 GATT which responded to the perennial difficulty of federal states in ensuring compliance with international law on all levels of government.[9] Parallel thereto, as is true in other parts of the TBT Agreement,[10] the rather gentle wording of Art. 9.2 recognizes the difficulty Members may face in regulating or influencing international or regional systems which may be beyond the reach of a Member's sphere. Again, the formulation clarifies that international or regional solutions to conformity assessment are subject to Arts 5 and 6 not directly but indirectly through the obligation imposed on Members, bodies of which participate in such systems.[11] Nonetheless, the general provisions

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[6] *E.g.*, Art. 4 TBT.

[7] According to Annex 1.6, in the case of the European Communities, the provisions governing central government bodies apply.

[8] See on the concept of reasonableness, *Koebele*, Article 4 and Annex 3 TBT, para. 9.

[9] See generally, *Hayes*, Nw. J. Int'l L. & Bus. 25 (2004), 21–30.

[10] *E.g.*, Art. 4 TBT.

[11] Parallel to the general structure of the TBT Agreement, the obligation is most stringent

of Arts 7 and 8, together with Art. 9.2, impose at least some limitations in this respect and certainly remain applicable. Moreover, the second sentence of Art. 9.2 imposes a negative obligation on Members to refrain from any direct or indirect exercise of influence on international or regional systems with a view to non-compliance with any of the provisions of Art. 5 or 6.

E. Evaluation

6 Art. 9 replicates with few deviations the corresponding article of the Tokyo Round Standards Code.[12] Therefore, given its rather weak language, the step forward for the Uruguay Round in this respect is its uniform application to all WTO Members rather than a deepening or broadening of the law on the point.

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if the central government itself acts through representatives in international standardization organizations.

[12] See Art. 9 of the Standards Code. Tokyo Round Agreement on Technical Barriers to Trade, BISD 26th Supp., 1980, 8.

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Article 10 TBT
Information About Technical Regulations, Standards and Conformity Assessment Procedures

1. Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding:
   1.1 any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce a technical regulation, or by regional standardizing bodies of which such bodies are Members or participants;
   1.2 any standards adopted or proposed within its territory by central or local government bodies, or by regional standardising bodies of which such bodies are Members or participants;
   1.3 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by central or local government bodies, or by non-governmental bodies which have legal power to enforce a technical regulation, or by regional bodies of which such bodies are Members or participants;
   1.4 the Membership and participation of the Member, or of relevant central or local government bodies within its territory, in international and regional standardising bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; it shall also be able to provide reasonable information on the provisions of such systems and arrangements;
   1.5 the location of notices published pursuant to this Agreement, or the provision of information as to where such information can be obtained; and
   1.6 the location of the enquiry points mentioned in paragraph 3.
2. If, however, for legal or administrative reasons more than one enquiry point is established by a Member, that Member shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these enquiry points. In addition, that Member shall ensure that any enquiries addressed to an incorrect enquiry point shall promptly be conveyed to the correct enquiry point.
3. Each Member shall take such reasonable measures as may be available to it to ensure that one or more enquiry points exist which are able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents or information as to where they can be obtained regarding:
   3.1 any standards adopted or proposed within its territory by non-governmental standardising bodies, or by regional standardising bodies of which such bodies are Members or participants; and
   3.2 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by non-governmental bodies, or by regional bodies of which such bodies are Members or participants;
   3.3 the Membership and participation of relevant non-governmental bodies within its territory in international and regional standardising bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; they shall also be able to provide reasonable information on the provisions of such systems and arrangements.
4. Members shall take such reasonable measures as may be available to them to ensure that where copies of documents are requested by other Members or by interested parties in other Members, in accordance with the provisions of this Agreement, they are supplied at an equitable price (if any) which shall, apart from the real cost of delivery, be the same for the nationals[1] of the Member concerned or of any other Member.
5. Developed country Members shall, if requested by other Members, provide, in English, French or Spanish, translations of the documents covered by a specific notification or, in case of voluminous documents, of summaries of such documents.
6. The Secretariat shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members and interested international standardising and conformity assessment bodies, and draw the

attention of developing country Members to any notifications relating to products of particular interest to them.

7. Whenever a Member has reached an agreement with any other country or countries on issues related to technical regulations, standards or conformity assessment procedures which may have a significant effect on trade, at least one Member party to the agreement shall notify other Members through the Secretariat of the products to be covered by the agreement and include a brief description of the agreement. Members concerned are encouraged to enter, upon request, into consultations with other Members for the purposes of concluding similar agreements or of arranging for their participation in such agreements.
8. Nothing in this Agreement shall be construed as requiring:
   8.1 the publication of texts other than in the language of the Member;
   8.2 the provision of particulars or copies of drafts other than in the language of the Member except as stated in paragraph 5; or
   8.3 Members to furnish any information, the disclosure of which they consider contrary to their essential security interests.
9. Notifications to the Secretariat shall be in English, French or Spanish.
10. Members shall designate a single central government authority that is responsible for the implementation on the national level of the provisions concerning notification procedures under this Agreement except those included in Annex 3.
11. If, however, for legal or administrative reasons the responsibility for notification procedures is divided among two or more central government authorities, the Member concerned shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these authorities.

Footnote 1: "Nationals" here shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

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A. General

The lack or unavailability of accurate and prompt information on technical regulations, standards, and conformity assessment procedures adds to their negative ramifications on the international flow of trade.[1] In this situation, **transparency** constitutes one instrument to reduce their trade-distorting impact. At a very practical level, producers and traders need full knowledge of a Member's set of rules and practices in order to profit from the WTO commitments undertaken by WTO Members.[2] At the same time, openness boosts accountability and thereby encourages the establishment of a more internationally trade-friendly management and design of internal policies relating to potential technical barriers to trade. For these reasons, Art. 10 mandates Members to establish enquiry points and national notification authorities in order to respond to demands for information on technical regulations, standards, and conformity assessment procedures from interested parties in other Members on measures to be applied to products entering those markets and, through the Secretariat, to notify other Members of newly adopted or proposed rules or the amendment of existing ones.[3] *1*

[1] *Völker*, in: *Bourgeois et al.* (eds), 281, 304.

[2] Above all, easy, simple and accessable information is especially vital for small and medium-sized enterprises .

[3] Unlike Art. 7 SPS, Art. 10 TBT does not explicitly employ the term "transparency". On transparency under the TBT Agreement, see also Art. 2.9 (technical regulations), Art. 5.6 (conformity assessment procedures), and paras J-Q of the Code of Good Practice (standards). See also Art. X GATT 1947. See generally WT/WGTI/W/109, which states that "[e]nsuring 'transparency' in international commercial treaties typically involves three core requirements: (1) to make information on relevant laws, regulations, and other policies publicly available; (2) to notify interested parties of relevant laws and regulations and changes to them; and (3) to ensure that laws and regulations are administered in a uniform, impartial, and reasonable manner." See further on transparency within the WTO, *Senti*, WTO, 451–460; *Hilf & Oeter*, 122–124. On the role of transparency in promoting compliance and effectiveness in international regimes in general, see *Mitchell*, Int'l Stud. Q. 42 (1998), 109–130.

Hitherto, no Panel or Appellate Body report has substantively addressed the interpretation of Art. 10.[4]

B. Enquiry Points

I. Establishment

2 As a general rule, every Member is required to establish only one single **enquiry point**, the functions of which are fulfilled in many countries by their relevant national standardizing bodies, which compiles all the necessary data in order to ensure responses to reasonable enquiries and the production of the relevant documents.[5] If necessary for legal or administrative reasons, more than one enquiry point is allowed under Art. 10.2, on condition that the Member in question informs other Members of the scope of the responsibilities of the different enquiry points established in a complete and unambiguous manner. Furthermore, if, despite the information on the scope of responsibilities, an enquiry reaches a wrong enquiry point, the enquiry should be forwarded promptly to the correct enquiry point.[6] In this context, it is important that enquiry points coordinate to ensure that all enquiries are responded to. An official list of established enquiry points by country in alphabetical order, including the full address with telephone, fax and, when available, e-mail address, is provided by the Secretariat and updated on a regular basis.[7]

II. Information and Documents Covered

3 Arts 10.1 and 10.3 stipulate the range of the documents and information covered. Under Art. 10.1, Members need to produce information and relevant documents regarding (1.) proposed or existing technical regulations, standards, and conformity assessment procedures by central or local government bodies, by non-governmental bodies carrying enforcement powers or the regional bodies of which such bodies are Members or participants

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[4] However, in respect of its sibling provision, Art. 7, Annex B SPS, the Appellate Body held that the purpose is to "enable interested Members to become acquainted with the sanitary and phytosanitary measures of other Members and thus to enhance transparency regarding these measures". Appellate Body Report, *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 106.

[5] Art. 10.1. For the establishment of enquiry points under the SPS Agreement, see *Böckenförde*, Article 7 SPS, para. 3.

[6] Art. 10.2.

[7] See further last update in G/TBT/ENQ/27. National enquiry points are further published in the WTO's website, <www.wto.org/english/tratop_e/tbt_e/tbt_enquiry_points_e.htm>, 18 March 2006.

and (2.) the involvement and membership of the Member, its central or local government bodies in bilateral and multilateral arrangements within the scope of the TBT Agreement as well as in regional and international standardizing bodies and conformity assessment bodies. In parallel thereto, Art. 10.3 obliges Members to provide information and documents in respect of standards and conformity assessment procedures adopted or proposed by (ordinary) non-governmental bodies and their participation in international organizations and systems.[8]

III. Reasonableness of Requests

4 Enquiry points need to respond only to "reasonable" requests.[9] The Committee on Technical Barriers to Trade stated that an enquiry is deemed "reasonable" when it "is limited to a specific product, or group of products, but not when it goes beyond that and refers to an entire business branch or field of regulations, or procedures for assessment of conformity".[10] The Committee further recommended that where an information request relates to a composite product, the request should define specifically, if possible, the parts or components for which information is sought or the field of use in respect of questions concerning the use of a product.[11]

IV. Those Entitled to Solicit of Information

5 In accordance with its purpose of promoting transparency, requests for information and documents under Art. 10 are not restricted to government bodies.[12] Instead, information may be directly requested by manufacturers, importers, exporters, distributors, retailers, business or consumer associations, scientists, non-governmental organizations or by anyone who is able to or can benefit from the transfer of data. In the experience of national enquiry points, the overwhelming majority of solicitors are private parties, not state actors.

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[8] As regards the provision of information on standards operated by non-governmental bodies which do not carry official authority, the rule is less strict as Members are required to provide only information reasonably available to them. Art. 10.3. Members shall further make available information on the location of or access to notices issued pursuant to the TBT Agreement and the location of enquiry points established. Arts 10.1.5, 10.1.6. Information on enquiry points established pursuant to Arts 10.1 and 10.3 is also available at <www.wto.org/english/tratop_e/tbt_e/tbt_enquiry_points_e.htm>, 18 March 2006.

[9] Arts 10.1, 10.3.

[10] G/TBT/1/Rev.8, 21.

[11] *Ibid.*

[12] Arts 10.1, 10.3, and 10.4 speak of "Members and interested parties in other Members" as potential solicitors of information.

V. Charges (Art. 10.4)

6 Art. 10 does not prohibit the imposition of charges for documents requested. Instead, Art. 10.4 allows charges for document copies at an equitable price and prohibits any form of discrimination by proscribing national treatment and most-favoured nation treatment (excluding costs of delivery).[13]

C. General Framework for Notifications under the TBT Agreement

I. Members' Notification Authority (Arts 10.10–10.11)

7 Art. 10.10 obliges Members to establish a single central government body to be the competent **notification authority** for all notifications under the TBT Agreement except those included in Annex 3.[14] Again, as with national enquiry points, Art. 10.11 allows the division of notification responsibilities between two or more central government authorities for legal and administrative reasons subject to adequate access to information on the scope of allocated responsibilities.

II. Language

8 Art. 10.9 stipulates that notifications, but not the documents to which they relate, should be drafted and circulated in one of the **three working languages** of the WTO (English, French or Spanish). Nonetheless, if translations exist or are planned, a Member must indicate such fact in the notification and upon request for documents, any translated summaries should automatically be sent with the original.[15] In any event, all Members should share already **existing translations**.[16] In addition, Art. 10.5 mandates developed countries, upon the request of other Members, to provide in one of the working languages translations of the documents covered by

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[13] In this respect, according to *footnote 1*, "nationals" are deemed in the case of a separate customs territory WTO Member to encompass natural as well as legal persons, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory. See the equivalent provision in the Code of Good Practice, Sub-Annex L (draft standards) and Sub-Annex P (work programme and standards).

[14] The notification requirements for technical regulations and conformity assessment procedures are contained in Arts 2.9, 2.10, 5.6, and 5.7. For the establishment of notification authorities under the SPS Agreement, see *Böckenförde*, Article 7 SPS, para. 9. In practice, there has been a strong tendency under the SPS Agreement for the notification authority also to be declared the national enquiry point. Under the TBT Agreement, this trend is significantly weaker, as many Members prefer to delegate enquiry point functions to specialized agencies, *i.e.*, the national standards body.

[15] G/TBT/1/Rev.8, 16.

[16] *Ibid.*

a specific notification. Where documents are voluminous, summaries will suffice.[17] In this respect, Art. 10.8 clarifies that Members are not required to publish texts or to provide details or copies of drafts other than in the Member's own language (subject to the exception in Art. 10.5) or to furnish any data the dissemination of which the Member deems inconsistent with its essential security interests.

III. Role of the Secretariat (Art. 10.6)

9

Art. 10.6 establishes the Secretariat as the central intermediary among the Members for any notifications under the TBT Agreement.[18] It requires the Secretariat to furnish any notification obtained under any provision of the TBT Agreement to all Members and international standardizing and conformity assessment bodies concerned and to call the attention of developing countries to notifications relating to products of particular concern to them. In practice, notifications are sent directly to the **Central Registry of Notification**.[19] With the use of a standard format, a notifying Member needs to identify itself, or, if applicable, give the name of the local government involved (Arts 3.2 and 7.2), the name of the agency responsible for handling comments, the provision under which it is notifying (Arts 2.9.2, 2.10.1, 5.6.2, 5.7.1, or another provision of the TBT Agreement), the products covered (HS or CCC nomenclature where applicable; otherwise, national tariff binding), the title, number of pages and language(s) of the notified document, a description of the contents, the objective and rationale, including the nature of urgent problems where applicable, relevant documents, the anticipated dates of adoption and of entry into force, the final date for comments, and where the texts can be obtained (if otherwise than from the national enquiry body).[20] In addition, the Secretariat publishes a monthly list of notifications issued, indicating the Members concerned, the articles notified under, products concerned, objectives, and the due dates for comments (on drafts).[21]

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[17] Art. 10.5.

[18] The Secretariat as such is established under Art. VI:1 WTO Agreement, which declares that there shall be a WTO Secretariat headed by a Director-General.

[19] The notifications can be sent by electronic mail, facsimile, or post. The e-mail address is <crn@wto.org>.

[20] G/TBT/1/Rev.8, 14. On average, the Secretariat needs five days to review and translate incoming notifications. G/TBT/13, para. 13. Accuracy in filling out the form can substantially reduce the time needed. *Ibid.*

[21] G/TBT/1/Rev.8, 18. Last update: G/TBT/ENQ/27.

D. Notification Requirement for Bi- and Plurilateral Agreements (Art. 10.7)

10 Moreover, Art. 10.7 imposes on Members an additional and separate **notification obligation**.[22] Members are required to notify other Members through the Secretariat of any agreement reached with another country or countries relating to the technical barriers to trade, technical regulation, standards, and conformity assessment procedures which may have a significant effect on trade, and in particular mutual recognition agreements (MRAs), in order to give other Members the opportunity to negotiate similar agreements if desired, as envisaged by the last sentence of the paragraph.[23] In practice, Members employ the notification format under Art. 10.7 agreed upon by the Committee on Technical Barriers to Trade.[24] Since 1995, 46 agreements, by and large between developed countries, have been notified under Art. 10.7.[25]

E. Evaluation

11 Today, enquiry points can be considered an integral part of the world economy.[26] This is due not only to Art. 10 but to the fact that countries in competition for foreign direct investment perceive the openness of a market through the proliferation of business-related information as being in their own self-interest.

[22] In addition to Arts 2.9.2, 2.10.1, 5.6.2, 5.7.1.

[23] See Art. 6.3. See on MRAs, *Muñoz*, Article 6 TBT, paras 7–9.

[24] G/TBT/1/Rev.8, 24. The form contains fields on the identification of the notifying Member, the title, parties, and the entry into force of the agreement concluded. It is also compulsory to identify the products covered under the agreement (by HS or CCC nomenclature where applicable; otherwise, national tariff heading), the subject matter, and a brief description of the agreement. Lastly, a contact point for further information has to be submitted.

[25] See G/TBT/15, para. 12; G/TBT/18, para. 14.

[26] For example, the German national enquiry point alone gathers and processes more than 30,000 requests per year.

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Article 11 TBT
Technical Assistance to Other Members

1. Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations.
2. Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies, and participation in the international standardizing bodies, and shall encourage their national standardizing bodies to do likewise.
3. Members shall, if requested, take such reasonable measures as may be available to them to arrange for the regulatory bodies within their territories to advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding:
   3.1 the establishment of regulatory bodies, or bodies for the assessment of conformity with technical regulations; and
   3.2 the methods by which their technical regulations can best be met.
4. Members shall, if requested, take such reasonable measures as may be available to them to arrange for advice to be given to other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of bodies for the assessment of conformity with standards adopted within the territory of the requesting Member.
5. Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers if they wish to have access to systems for conformity assessment operated by governmental or non-governmental bodies within the territory of the Member receiving the request.
6. Members which are members or participants of international or regional systems for conformity assessment shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of the institutions and legal framework which would enable them to fulfil the obligations of membership or participation in such systems.
7. Members shall, if so requested, encourage bodies within their territories which are members or participants of international or regional systems for conformity assessment to advise other Members, especially the developing country Members, and should consider requests for technical assistance from them regarding the establishment of the institutions which would enable the relevant bodies within their territories to fulfil the obligations of membership or participation.
8. In providing advice and technical assistance to other Members in terms of paragraphs 1 to 7, Members shall give priority to the needs of the least-developed country Members.

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Cross References

Art. 911 NAFTA

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A. General Remarks

1 Arts 11 and 12 contain the **special provisions for developing countries** of the TBT Agreement. They are, however, not the only references to the special situation of developing countries in the TBT: In the Preamble, Members recognize that developing countries may encounter difficulties concerning the formulation and application of regulations and standards. Members therefore desire to assist developing countries in this regard. Other provisions, which provide special treatment for developing countries, are Arts 2.12 and 5.9, suggesting special "reasonable time intervals" between the publication and application of technical regulations and standards to producers from developing countries.[1] Furthermore, Art. 10.6 requires the

[1] The Doha Ministerial Conference decided that the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued, see Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Implementation-Related Issues and Concerns, Decision of 14 November 2001, WT/MIN(01)/17, 20 November 2001, para. 5.2. See also *Tamiotti*, Article 2 TBT, para. 65 and *Muñoz*, Article 5 TBT, paras 44 *et seq*.

Secretariat to draw developing countries' attention to notifications relating to products of particular interest to them.[2]

Arts 11 and 12 form part of the general body of special and differential treatment law in the WTO agreements,[3] which has a long tradition in the world trading system.[4] The effects of special and differential treatment and the usefulness of specific provisions are subject to discussions among WTO members and continue to be criticised in parts of the academic literature.[5] However, at the Doha Ministerial Conference, Members reaffirmed that **special and differential treatment is an integral part of the WTO legal order** and agreed to review it.[6] *2*

The **rationales** for special provisions for developing countries concerning technical barriers to trade are manifold: standards and technical regulations often constitute trade barriers for products from developing countries, which do not meet the standards required in developed countries markets. As such, standards and regulations can be used for protectionist purposes.[7] Even if the regulatory purpose is genuine, the trade impact of a technical regulation can be severe for developing countries' exports.[8] Furthermore, developing countries often lack the technical, financial and human resources to develop and implement their own regulations and standards or to adapt to foreign or international standards.[9] The participation of developing countries in the work of international standardizing organizations, such as the ISO, is also limited due to capacity restraints.[10] Furthermore, producers in developing countries often do not know about standards applied elsewhere or do not have the necessary capacities to meet those standards. *3*

B. Historical Background

Like many other provisions of the TBT Agreement, Arts 11 and 12 are based on very similar provisions of the **Tokyo Round Agreement on Technical Barriers to Trade** (the "Standards Code"). In fact, the rel- *4*

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[2] See also *Koebele*, Article 10 TBT, para. 9.

[3] See *e.g.* Arts 9 and 10 SPS, XXV:2 GATS, 66 and 67 TRIPS and 27.2 DSU.

[4] Committee on Trade and Development, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat, WT/COMTD/W/77, 25 October 2000, 3. For an overview of special and differential treatment in the world trading system, see *Trebilcock & Howse*, 471–506.

[5] See *e.g. Hart & Dymond*, JWT 37 (2003) 2, 395–415.

[6] Ministerial Conference, Fourth Session, Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para. 44. See below, para. 25.

[7] See *Wilson*, in: *Hoekman et al.* (eds), 428, 430–434 for some examples.

[8] *Mayeda*, JIEL 7 (2004), 737, 753.

[9] *Stephenson*, 23–33 and *Mayeda*, JIEL 7 (2004), 737, 752.

[10] *Stephenson*, 46–50 and *Mayeda*, JIEL 7 (2004), 737, 752.

evant provisions of the Standards Code—also Arts 11 and 12—are, with the exception of some minor additions and terminological changes (*e.g.* "certification systems" rather than "systems of conformity assessment"), identical to Arts 11 and 12 TBT. It should be noted, however, that the majority of the signatories of the Standards Code were developed countries.[11] Practical experience with these provisions was therefore relatively limited.

C. Rights and Obligations of Members

I. Legal nature

5 Each paragraph of Art. 11 contains **a legally binding requirement** ("shall"). This coincides with provisions such as Art. 67 TRIPS, and Art. XXV:2 GATS, but distinguishes Art. 11 from less obligatory provisions, such as Art. 9.1 SPS, which holds only that "Members agree to facilitate the provision of technical assistance".[12] The legally binding nature of the provisions also means that their breach can be challenged before the dispute settlement mechanism in a violation complaint in accordance with Art. 3.8 DSU.[13] Formally, each paragraph of Art. 11 constitutes a separate legal obligation. In substance, however, the paragraphs describe only different means and objectives of technical assistance.[14]

6 Even though legally binding, the obligations of Art. 11 are not unconditional. Rather, they are subject to two qualifications: generally, Members are required to grant technical assistance only **upon request**. Art. 11 does not contain specifications of that request. Nevertheless, it would be useful for the sake of clarity if the request were to specify the means and objectives of assistance referred to in one of the paragraphs of Art. 11.[15] The request can be addressed to a specific Member, a group of Members (including a Regional Economic Integration Organization) or the WTO membership as a whole.

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[11] *Stephenson*, 38.

[12] *Seibert-Fohr*, Article 9 SPS, paras 4 *et seq*.

[13] It has been argued that making Art. 11 actionable would make the implementation of the provision "a reality rather than a dream", see *Mayeda*, JIEL 7 (2004), 760. However, the problem of Art. 11 is not its non-binding nature, but the conditionality of most of its obligations, see below, paras 6 and 7.

[14] It is, therefore, somewhat misleading when the Secretariat's typology of special and differential treatment provisions counts seven provisions of technical assistance in the TBT compared to only one in the SPS Agreement. The Secretariat lists Arts. 11.1, 11.2, 11.3, 11.4, 11.5, 11.6 and 11.7 as separate provisions, see Committee on Trade and Development, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by the Secretariat, WT/COMTD/W/77, 25 October 2000, 39, but counts Art. 9 SPS as one provision, *ibid*., 31.

[15] See below, paras 10 *et seq*.

In addition to the requirement of a request, granting **technical assistance** is subject to **"mutually agreed terms and conditions"**.[16] Even though Members cannot choose "whether" to provide technical assistance when they are requested to do so, the terms and conditions of "how" these obligations are fulfilled must be mutually agreed. A requested Member can therefore effectively decide on what terms technical assistance is provided. A requesting Member has no right to a specific form, amount or means of delivery of technical assistance. This qualification clearly limits the impact of the binding nature of the paragraphs of Art. 11. *7*

II. Providers and Recipients of Assistance

Each paragraph of Art. 11 is **addressed to "Members"**. The use of the plural term indicates that the obligations are placed on the membership as a whole. This does not, however, mean that the obligations can only be fulfilled through collective actions of all WTO Members. Technical assistance can also be granted through bilateral or regional channels, as the current practice of WTO Members demonstrates. Therefore, Art. 11 places an obligation not only on the membership in general, but also on each Member individually. Hence, the obligations of Art. 11 **require individual and collective activities**.[17] *8*

The **recipients of technical assistance** can be any Members of the WTO ("other Members"). However, all paragraphs emphasize that technical assistance activities should particularly benefit developing countries ("especially the developing country Members"). The discussions in the Committee on Technical Barriers to Trade also show that WTO Members consider Art. 11 as part of the special provisions for developing countries. Least-developed countries should be given priority according to Art. 11.8.[18] *9*

III. Modalities of Assistance

1. Means of Assistance

First, a number of provisions merely require Members to **advise other Members** (Arts 11.1, 11.2, 11.5, 11.6). Giving advice can take different forms ranging from *ad hoc*, small scale and individual advice on specific issues without a formal institutional setting to longer and established processes *10*

[16] Note that this qualification does not apply to the obligation to advise other Members according to the various paragraphs of Art. 11, see *e.g.* Art. 11.1. *Trebilcock & Howse*, state that "assistance and advice is to occur 'on mutually agreed terms and conditions'," see *Trebilcock & Howse*, 496. However, with regard to advice this understanding cannot be based on the wording of the provision.

[17] See generally, *South Centre*, para. 13.

[18] For a definition see *Röben*, Article 14 SPS, para. 6.

of advice often involving the deployment of technical experts and other institutional arrangements.

11 Secondly, the bulk of Art. 11 contains obligations to grant **technical assistance** (Arts. 11.2, 11.3, 11.4, 11.5, 11.6). Unlike other WTO provisions on technical assistance, Art. 11 does not list specific measures which could be taken to fulfil its mandate. However, it can be assumed that the measures mentioned *e.g.* in Art. 9.2 SPS, such as advice, credits, donations and grants for technical expertise, training and equipment, are relevant in the TBT context. More specifically, activities of technical assistance include internships, technical missions, training of in-house experts, and "twinning arrangements" between institutions, as well as workshops and seminars.[19] This non-exhaustive list shows that there is a certain degree of **overlap between advice and technical assistance**. In fact, advising other Members in institutional settings would almost always also count as a form of technical assistance.

12 Thirdly, a number of provisions require the taking of **reasonable measures to arrange for or to encourage advice and assistance by other bodies and institutions** (Arts 11.3, 11.4, 11.7). This obligation is of special interest from a legal perspective. Often regulatory bodies or standardization agencies operate independently of the overall governmental structure (*e.g.* independent regulators or regulatory agencies) or are constituted on a non-governmental basis, in particular if the regulatory regime relies on voluntary approaches or self-regulation. Since such bodies are typically not subject to direct government interference, WTO Members cannot instruct them to pursue a certain course of action, *e.g.* to grant technical assistance. In these circumstances, Art. 11 requires WTO Members only to take "such reasonable measures as may be available to them" or to "encourage" these bodies to give advice or assistance. Members are hence required only to make best endeavour efforts, but cannot be required to provide a particular result. Which measures are "reasonable" for or "available" to WTO Members depends on the circumstances of the domestic legal and regulatory system. In particular, measures which would violate the independence of regulatory agencies cannot be deemed "reasonable".

2. Objectives of Assistance

13 The objectives of assistance mentioned in the various paragraphs correspond to the needs and problems of developing countries *vis-à-vis* technical barriers to trade.[20] Many developing countries lack the capacity and institutions to **develop and adopt their own technical regulations**

[19] G/TBT/9, para. 44.
[20] See above, para. 4.

and standards. Accordingly, Art. 11.1. requires advice on the preparation of technical regulations. Art. 11.2 addresses institutional deficiencies and contains the obligation to advise and grant technical assistance on the establishment of national standardization bodies. Art. 11.3.1 requires measures to arrange for regulatory bodies to advise and grant assistance regarding the establishment of regulatory bodies.

14 Developing countries often also face problems regarding the implementation of regulations and standards, in particular the **assessment of conformity** with them. Hence, Art. 11.3 obliges Members to take measures to arrange for the regulatory bodies to advise and grant assistance regarding bodies for the assessment of conformity with technical regulations and regarding the methods by which technical regulations can be met. Similarly, Art. 11.4 requires such measures regarding bodies for the assessment of conformity with standards.

15 Technical regulations and standards often result in trade barriers for products from developing countries even if the products meet those requirements, because of a lack of access to **conformity assessment procedures in the importing country**. This problem is addressed in Art. 11.5, which contains the obligation to give advice and grant assistance regarding access by producers to systems for conformity assessment operated by governmental or non-governmental bodies in the importing country.

16 Finally, many developing countries lack the capacity to participate effectively in and meet the obligations of **international standardisation bodies and organizations**. Thus, Art. 11.2 includes the general obligation to advise and grant assistance regarding participation in international standardizing bodies. Art. 11.6 requires advice and assistance about the establishment of the institutions and legal framework necessary for the participation in international and regional systems for conformity assessment. Lastly, Art. 11.7 obliges Members to encourage their domestic bodies which participate in such international or regional systems to advise and assist the relevant bodies of the requesting Member to enable them to participate in these systems.

D. Activities of the TBT Committee and the WTO Secretariat

I. Role and Function of the TBT Committee

17 Neither Art. 11 nor Art. 13 provides the Committee on Technical Barriers to Trade or the WTO Secretariat with a specific mandate to decide on or provide technical assistance. Nevertheless, technical assistance is a permanent

item on the TBT Committee's agenda.[21] The Committee's main role and function concerns **information exchange and coordination between WTO members,** as evidenced in the conclusions of the triennial reviews and the decisions taken by the Committee concerning technical assistance. This understanding reflects Art. 13, which provides that the Committee shall afford consultation among Members. However, the limitation of the Committee's role to a forum for information exchange is not required by the wording of Art. 11. Rather, Art. 11 requires "Members" to provide technical assistance, which incorporates the **possibility to provide technical assistance multilaterally**. The TBT Committee could (and should) therefore be involved more directly in granting technical assistance.

1. Technical Assistance in the Triennial Reviews

18 In each of the three **triennial reviews** conducted by the TBT Committee under Art. 15.4,[22] questions of technical assistance and special and differential treatment were addressed. In the First Triennial Review (1997) the Committee **invited Members "on a voluntary basis" to exchange information** regarding the implementation of Art. 11 and requested Members to report to the Committee difficulties they encountered with the implementation and operation of the agreement.[23]

19 In the Second Triennial Review (2000) the Committee stressed that technical assistance programmes should target specific priorities and needs identified by developing countries.[24] Based on a workshop on technical assistance held on 19 and 20 July 2000,[25] the Committee agreed to develop a **demand-driven technical cooperation programme** including assistance to developing countries in identifying and prioritising their needs, consideration of existing programmes and the enhancement of co-operation between donors. In order to fulfil the mandate of this programme, the WTO Secretariat conducted a survey among developing countries to identify and prioritise their specific needs in the TBT field and analysed the responses.[26] Using the results of this survey, the TBT Committee held a special workshop

[21] See *e.g.* G/L/760, para. 2.
[22] On the Triennial Reviews see *Bartels*, Article 15 TBT, paras 10 *et seq*.
[23] G/TBT/5, paras 30 and 31.
[24] G/TBT/9, paras 39–47.
[25] G/TBT/9, Annex 1, para. 4.
[26] Committee on Technical Barriers to Trade, An Analysis of the Priorities Identified by Developing Country Members in their Responses to the Questionnaire for a "Survey to Assist Developing Country members to Identify And Prioritise their Specific Needs in the TBT Field", Note by the Secretariat, G/TBT/W/193, 10 February 2003. The Secretariat identified seven main areas of need in the 45 responses to its survey: infrastructure and capacity building; improved knowledge and awareness of the TBT; effective implementation of the TBT; exchange of experience and bilateral cooperation; national and regional coordination and strategy; participation in the work of the Committee and other organizations; and market access.

on TBT-related technical assistance on 18 March 2003, which concluded that the **main role of the TBT Committee** would continue to be a forum for the identification of needs, facilitation of exchange, and assistance in developing programmes, and would contribute to cooperation and co-ordination between donors and recipients.[27]

20 In the Third Triennial Review (2003) the Committee agreed to consider the **creation of information coordination mechanisms** including an Internet facility and to encourage developing country Members to update their responses to the survey in order to maintain the information on developing countries needs.[28] The Committee also reaffirmed its function as a forum for enhancing co-operation and coordination and for facilitating the exchange of experiences.

2. Decisions of the TBT Committee

21 The first decision of the TBT Committee relating to technical assistance of 20 October 1995 concerns the **circulation and communication of information** about technical assistance activities.[29] Members agreed that needs for assistance and information on programmes of potential donors should be communicated through the Secretariats and circulated to all Members on an informal basis. The Secretariat would reflect the information circulated in the documentation prepared for annual reviews of the implementation and operation of the agreement. While this procedure would **"multilateralize" the information**, technical assistance according to the Committee should continue to be provided on a bilateral basis.[30]

22 Pursuant to the outcome of the Third Triennial Review, the TBT Committee adopted a special format for the **voluntary notification of special technical assistance needs and responses** on a trial basis for two years on 8 November 2005.[31] In the relevant form, Members are asked to identify the technical assistance needed or provided pursuant to the articles of the TBT Agreement and briefly to describe the objective, rationale, nature and timing of the assistance needed or on offer. Until August 2006, three Members (Jamaica, Armenia and Costa Rica) have used these form to notify their needs for technical assistance.[32] Generally the needs concern

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[27] Summaries of the workshop sessions can be found in Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 20 March 2003, G/TBT/M/29, 19 May 2003, Annexes 1 to 5.

[28] G/TBT/13, paras 54–56.

[29] G/TBT/W/26, para. 1. See also Committee on Technical Barriers to Trade, Decisions and Recommendations adopted by the Committee since 1 January 1995, Revision 8, G/TBT/1/Rev.8, 23 May 2002, 22.

[30] *Ibid.*

[31] G/TBT/16.

[32] Committee on Technical Barriers to Trade, Voluntary Notification of Specific Technical Assistance Needs or Responses, Jamaica, G/TBT/TA-1/JAM, 19 Janaury 2006; Committee

awareness raising and skills training and request training workshops and seminars for government officials.

II. Technical Assistance Activities of the WTO Secretariat

23 Apart from its involvement in the activities of the TBT Committee, the WTO Secretariat conducts regional and national **workshops to raise awareness of the agreement** and to facilitate the exchange of information on TBT-related work of importance for developing countries.[33] The Secretariat also provides capacity building on the TBT in its trade-policy courses. The Secretariat also created a **web page dedicated to technical assistance** in the TBT field.[34] This page contains information related to activities of the WTO, other organizations, and WTO Members and databases and documents on TBT-related technical assistance.

E. Reform Proposals

24 At the Doha Ministerial Conference WTO Members recognised the importance of **implementation-related issues and concerns** and agreed on a specific work programme to fulfil this mandate.[35] Relating to Art. 11, one implementation issue was raised and discussed in the Committee on Technical Barriers to Trade.[36] It concerned the proposal to **make Art. 11 obligatory** so that technical assistance and cooperation would be provided effectively.[37] While most members of the TBT Committee shared the view that the provisions of Art. 11 were already legally binding, the proposal aimed at removing the discretionary elements of the qualifications of technical assistance mentioned in Art. 11 ("on mutually agreed terms", "take such reasonable measures").[38] Many Members were sympathetic to this view. However, the Committee did not agree on a specific proposal and only acknowledged that further discussions were necessary.[39]

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on Technical Barriers to Trade, Voluntary Notification of Specific Technical Assistance Needs or Responses, Armenia, G/TBT/TA-2/ARM, 20 Janaury 2006 and Committee on Technical Barriers to Trade, Voluntary Notification of Specific Technical Assistance Needs or Responses, Costa Rica, G/TBT/TA-3/CRI, 9 June 2006.

[33] G/TBT/15, paras 15–19.

[34] <www.wto.org/english/tratop_e/tbt_e/tbt_tech_e.htm>.

[35] WT/MIN(01)/DEC/1, para. 44, and WT/MIN(01)/17, para. 12.

[36] Committee on Technical Barriers to Trade, Report on Outstanding Implementation Issues in Accordance with Paragraph 12 of the Ministerial Declaration, G/TBT/W/191, 23 October 2002.

[37] Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 20–21 July, G/TBT/M/27, 31 July 2002, paras 133–139.

[38] *Ibid.*, para. 136. See also above, para. 7.

[39] Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 20–21

WTO Members also agreed in Doha to **review all special and differential treatment provisions** with a view to strengthening them and making them more precise, effective and operational.[40] The Committee on Trade and Development (CTD), which was entrusted with this particular task,[41] held a special session on the TBT Agreement on 17 October 2002. Only one proposal concerning Art. 11 was tabled. The African Group proposed the **establishment of a fund to assist developing countries to implement the TBT**. According to this proposal, WTO Members proposing new standards required to be notified under the Agreement should, prior to adoption of the standard, deposit sums into the fund. Furthermore, the African Group proposed that technical assistance should always be fully funded and provided to developing countries cost free.[42] These proposals were met with reservation and mostly rejected by developed countries.[43] *25*

F. Evaluation

According to the latest assessment of the utilisation of special and differential treatment provisions provided by the WTO Secretariat for the Committee on Trade and Development on 7 February 2002, the various elements of Art. 11 have not yet been utilised.[44] Art. 11 has also never been invoked in a dispute settlement case. It remains to be seen whether the voluntary notification of special technical assistance needs initiated in November 2005 will be used by a large number of developing countries and increase the importance of Art. 11.[45] So far, the **practical value of Art. 11 remained limited**. This does not deny that developed countries have advised and assisted developing countries in TBT-related matters. However, it is difficult to assess whether the provisions of Art. 11 and the TBT Committee's attempts to facilitate coordination and communication have increased existing activities or made them more effective. It seems that WTO Members provide technical assistance on TBT-related measures to *26*

June 2002, G/TBT/M/27, 31 July 2002, paras 140–147, and Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 17 October 2002, G/TBT/M/28, 19 November 2002, paras 115–120.

[40] WT/MIN(01)/DEC/1, para. 44.

[41] WT/MIN(01)/17, para. 12.

[42] Committee on Trade and Development Special Session, Special and Differential Treatment Provisions, Joint Communication from the African Group in the WTO, TN/CTD/W/3/Rev.2, 17 July 2002, para. 57.

[43] Committee on Trade and Development Eight Special Session, Note on the Meeting of 17 October 2002, TN/CTD/M/8, 18 December 2002, paras 30–43.

[44] Committee on Trade and Development, Information on the Utilisation of Special and Differential Treatment Provisions, Note by the Secretariat, Addendum, WT/COMTD/W/77/Rev.1/Add.4, 7 February 2002, pp. 43–44.

[45] See above, para. 22.

other Members largely autonomously and without formal input from WTO organs or institutions.[46]

27 It has also been shown that the TBT Committee's and the Secretariat's activities concerning technical assistance **cannot be seen as implementation of Art. 11**, because they do not provide the specific technical assistance required in this provision. This is acknowledged by the TBT Committee: "Neither the Committee nor the Secretariat has the capacity to build infrastructure and institutions. These needs could be filled by governments and other relevant regional and international organizations."[47] Nevertheless, nothing in the TBT Agreement precludes the TBT Committee from taking a more pro-active position on technical assistance, if its Members wished to do so.

28 Against this background, it is questionable whether Art. 11 can be seen as an expression of the **"principle of global justice"**, as one commentator argues.[48] Rather, it seems fair to conclude that the TBT Agreement and TBT-related activities in the WTO have not yet adequately responded to the needs of technical assistance for developing countries. This evidences the general reluctance of industrialized countries legally to bind themselves to provide effective assistance to developing countries and to allocate additional resources and funds to finance such assistance.

[46] For a list of EC activities in this field see Committee on Technical Barriers to Trade, EC and EC Member State Technical Assistance Projects/Programmes in the TBT Field, Communication by the European Communities, G/TBT/W/244, 11 October 2004.

[47] G/TBT/13, para. 57.

[48] *Tietje*, in: *Prieß & Berrisch* (eds), 273, 322: "Prinzip globaler Gerechtigkeit".

Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO-Technical Barriers and SPS Measures.*
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Article 12 TBT
Special and Differential Treatment of Developing Country Members

1. Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.
2. Members shall give particular attention to the provisions of this Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreement's institutional arrangements.
3. Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.
4. Members recognize that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognize 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.
5. Members shall take such reasonable measures as may be available to them 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.
6. Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.
7. Members shall, in accordance with the provisions of Article 11, provide 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, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members.
8. It is recognized that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures. It is further recognized 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. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the "Committee") is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.

9. During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development.
10. The Committee shall examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country Members on national and international levels.

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A. General

Art. 12, like Art. 11, addresses the special situation and needs of developing countries in the TBT context.[1] Even though its title suggests otherwise, and with the exception of para. 4, Art. 12 does not provide for special and differential treatment of developing countries *per se*, such as transition periods or other deviations from general obligations of the TBT.[2] Instead, Art. 12 contains mainly **general requirements to take the special situation of developing countries into account** when applying the agreement. *1*

The language of most paragraphs of Art. 12 suggests that they contain legally binding commitments ("Members shall"). However, the wording of the majority of paragraphs is overly broad and general and cannot easily be applied in a strict sense. Most paragraphs of Art. 12 are therefore largely of **political and programmatic character**.[3] Only Art. 12.4 and—to a lesser extend—Art. 12.8 contains substantive rights of developing countries.[4] *2*

B. Rights and Obligations of Members

I. General Obligation (Art. 12.1)

Art. 12.1 contains a general obligation to provide special and differential treatment in accordance with Art. 12 and other relevant provisions of the TBT.[5] Art. 12.1. hence reinforces these provisions, but **does not provide for any additional obligations or rights**. The legal added value of this provision seems negligible. *3*

II. Recognition of Special Needs of Developing Countries (Arts 12.2, 12.3, 12.8 and 12.9)

Art. 12.2 requires Members to give particular attention to the provisions of the TBT concerning developing countries and to take into account the special development, financial and trade needs of developing countries **in the implementation of the TBT**. This obligation applies both nationally *4*

[1] Generally *Krajewski*, Article 11 TBT, paras 1–3.
[2] *Trebilcock & Howse*, 496.
[3] The vagueness of development-related provisions is a general problem of WTO law, see *Qureshi*, JWT 37 (2003) 5, 847, 860.
[4] See below, paras 8 and 9 on Art. 12.4 and paras 13 and 14 on Art. 12.8.
[5] Other provisions referring to developing countries are Arts 2.12, 5.9 and 10.6. See also *Krajewski*, Article 11 TBT, para. 1.

and at the WTO level. Special development, financial and trade needs include all special needs of developing countries as identified by them. The reference to financial and trade needs is of illustrative value and not intended to limit the application of Art. 12 only to specific needs. In line with general WTO law and practice, the TBT respects the autonomy of developing countries to determine their own needs and pursue appropriate policies as long as they do not violate WTO law. The requirement to take these special needs into account is relatively weak. Members need only to recognise and consider these needs, but Art. 12.2 does not require concrete activities or results.

5 Like Art. 12.2, **Art. 12.3** requires Members to take the special needs of developing countries into account in the **preparation and application of technical regulations, standards and conformity assessment procedures** with a view to ensuring that they do not create **unnecessary obstacles** to exports from developing countries. The term "unnecessary obstacles to exports from developing countries" can be understood in a similar way to the general necessity standard in accordance with Art. 2.2,[6] Art. 5.1.2[7] or Annex 3.E.[8] Even though Art. 12.3 places special emphasis on exports from developing countries the scope of the necessity standard of Art. 12.3 does not differ from that of the general standard, because a regulation or standard which creates unnecessary obstacles to exports from developing countries typically also creates unnecessary obstacles to trade in general. Even if one were to assume a different standard, the difference would be irrelevant from a practical perspective, because the **necessity standard of Art. 12.3 is not directly applicable**. Like Art. 12.2 this provision requires the recognition of the special needs of developing countries only "with a view to" ensuring that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles, but does not itself prohibit regulations and standards which create unnecessary obstacles to exports from developing countries. The prohibition of certain standards or regulations can be based only on the general necessity test.

6 **Art. 12.8** recognises that developing countries may face **difficulties concerning the preparation and application of technical regulations, standards and conformity assessment procedures**. These difficulties can be based on a lack of appropriate technology, on insufficient knowledge about these standards and on a lack of time in which to amend to these

[6] See *Keck-Tamiotti*, Art. 2 TBT, paras 16 *et seq*.
[7] See *Muñoz*, Art. 5 TBT, paras 10 *et seq*.
[8] See *Köbele & LaFortune*, Article 4 and Annex 3 TBT, paras 9 *et seq*.

standards.[9] Developed countries are required to take these difficulties "fully into account". As a remedy, the TBT Committee may grant **time-limited exceptions to** the obligations of the TBT.[10]

7 **Art. 12.9** requires recognition of the special difficulties and needs of developing countries "during consultation", which seems to refer to **consultations during dispute settlement proceedings**. Difficulties of developing countries during consultations arise in particular because of strict time frames. Art. 12.9 can therefore serve as a basis for the extension of time periods and hence reinforces the special and differential treatment provision of Art. 12.10 DSU, which also allows an extension of the normal time periods during the consultation phase.[11]

III. Deviation from International Standards (Art. 12.4)

8 Art. 12.4 recognises developing countries' use of regulations, standards and conformity assessment procedures to preserve indigenous technology and production methods and processes compatible with their development needs, even if international standards, guides and recommendations exist. In particular, developing countries are **not expected to use international standards**, which are **not appropriate** to their needs, as a basis for their regulations and standards. Even though the wording of the provision ("should not be expected") is not entirely clear, its context and object, *i.e.* the obligation to provide special and differential treatment, suggest that Art. 12.4 contains a deviation for developing countries from the general obligation to use international standards according to Arts 2.4, 5.6, or Annex 3.D TBT. As *Trebilcock* and *Howse* rightly argue, Art. 12.4 TBT hence contains a **modification of substantive obligations**.[12]

9 The right to deviate from international standards according to Art. 12.4 does not depend on a decision of the TBT Committee or any other WTO body. In a dispute settlement proceeding, a developing country would have to invoke this provision as a **defence to an alleged violation of other TBT provisions** such as Art. 2.4. The burden of proof would thus fall on the defending country. However, in assessing whether an international standard is indeed inappropriate for the development needs of the defendant, panels and the Appellate Body would have to respect the autonomous determination of those needs by the country in question. It seems that only the issue of appropriateness of the standard can be determined by

[9] On the difficulties of developing countries see also *Stephenson*, 23–33.
[10] See below, paras 13 and 14.
[11] For an example of the operation of Art. 10.12 DSU see Panel Report, *India—Quantitative Restrictions*, WT/DS90/R, paras 5.8–5.10.
[12] *Trebilcock & Howse*, 496.

the dispute settlement organs, which should nevertheless exercise judicial restraint in light of the impact of their decision on the autonomy of the developing country to determine its developmental needs.

IV. International Standardisation Organisations (Arts 12.5 and 12.6)

10 Arts 12.5 and 12.6 concern international standardisation organisations and international systems for conformity assessment. Members shall take reasonable measures to facilitate active and representative **participation of developing countries** in these organisations (Art. 12.5) and to ensure that the special needs of developing countries are recognised by these organisations through the **development of standards** for products of special interest to developing countries (Art. 12.6). The implementation of these requirements depends to a great extend on the particularities of the respective international organisation. Moreover, the influence of WTO Members on these organisations may not be direct: For example, if the institutions of the organisation are dominated by independent experts, governments may not exercise direct control over the course of such an organisation. This is why Arts 12.5 and 12.6 requires only "such reasonable measures" which may be available to the Members. This qualification, however, **restricts the practical use** of these provisions. The same is true for the qualification of the requirement to examine and prepare standards for products of special interest to developing countries to the extent that this is "practicable".

V. Technical Assistance (Art. 12.7)

11 Art. 12.7 obliges Members to provide technical assistance to developing countries to ensure that technical regulations, standards and conformity assessment procedures do **not create unnecessary obstacles** to the expansion and diversification of exports from developing countries. The necessity test in Art. 12.7 hence places emphasis on the quantity and quality of developing countries' exports. Expansion and diversification of exports from developing countries occur in particular when developing countries' exports move up the production chain and include **processed goods, manufactures and industry products**. Technical assistance under Art. 12.7 should therefore focus in particular on those regulations, standards and conformity assessment procedures which restrict imports of these goods. It should be kept in mind, however, that Art. 12.7 does not impose a positive obligation on WTO Members to avoid or abandon such standards. Unlike that under Art. 2.2 and like that under Art. 12.3, the necessity standard in Art. 12.7 is not directly applicable.

Technical assistance is to be provided **in accordance with the provisions of Art. 11**. This suggests that technical assistance under Art. 12.7 is also dependant on the qualifications of Art. 11. In particular, technical assistance is available only **upon request** and only on the basis of **mutually agreed terms** and conditions.[13] *12*

C. Role of the TBT Committee (Arts 12.8 and 12.10)

Recognizing the difficulties of developing countries regarding the preparation and application of technical regulations, standards and conformity assessment procedures[14], developing countries may request **specific, time-limited exceptions** to the TBT Agreement in accordance with Art. 12.8. As a consequence, the developing country Member which was granted an exception would not be bound by the provisions in respect of which the exception was granted. The exception therefore serves **a similar function to a waiver** according to Arts IX:3 and 4 WTO Agreement. *13*

Unlike Art. 14 SPS and other WTO provisions on special and differential treatment, the TBT Agreement itself provides no specific transition periods for least-developed and developing countries. Time-limited exceptions are available only upon request and by means of **a decision of the TBT Committee**. The decision to grant exceptions lies within the discretion of the TBT Committee and is hence a political decision. The Committee must pay due regard to the needs of the developing country and to the objectives of special and differential treatment in general. It shall take into account the special problems concerning preparation and application of technical regulations, standards and conformity assessment procedures, the special development and trade needs of the developing country Member and its stage of technological development. Up to the August 2006, **no requests under Art. 12.8** have been made. This seems to suggest that developing countries have in general been able to meet the obligations of the TBT Agreement.[15] *14*

Art. 12.10 requires the TBT Committee periodically to **review special and differential treatment.** Like the decision of the Doha Ministerial Conference to review all special and differential provisions, these reviews are aimed at making the provisions more effective and operational.[16] The reviews of special and differential treatment in the TBT Committee are *15*

[13] On these qualifications see *Krajewski*, Article 11 TBT, paras 6 and 7.
[14] On these difficulties see above, para. 6.
[15] *Stephenson*, 42.
[16] Ministerial Conference, Fourth Session, Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para. 44.

not carried out as separate activities, but are integrated into the annual and triennial reviews of the agreement. In this context, technical assistance in accordance with Art. 11 and special and differential treatment in accordance with Art. 12 are usually considered together. However, it should be noted that the majority of the work of the TBT Committee concerning developing countries relates to technical assistance.[17] The provisions of Art. 12 are of less importance.

D. Reform Proposals

16 One issue under Art. 12 was raised based on the mandate of the Doha Ministerial Conference to address outstanding implementation issues.[18] It concerned the introduction of a provision requiring developed country importers to **accept self-declarations** regarding adherence to standards by developing country exporters (Suppliers Declaration of Conformity, SDoC). While many Members were sympathetic to this proposal, the majority felt that further discussion on this issue was necessary and agreed to continue to study the subject.[19]

17 In the discussions in the Committee on Trade and Development mandated by para. 12 of the Doha Decision on Implementation-Related Issues and Concerns regarding the strengthening of special and differential treatment, two specific proposals concerning Art. 12 were tabled. In a Joint Communication twelve developing countries suggested the following **addition to Art. 12.3**: "If an exporting developing country Member identifies specific problems of inadequate technology and infrastructure in complying with the technical regulations and standards of an importing developed country Member, the latter shall provide the former with relevant technology and technical facilities on preferential and non-commercial term, preferably free of cost."[20] They argued that this would make Art. 12.3 more meaningful and effective. The African Group tabled a proposal according to which Art. 12.8 should be understood as saying that the TBT Committees **"shall" grant time-limited exceptions** from obligations under the TBT Agree-

[17] See *e.g.* G/TBT/13, paras 42–57, and G/TBT/15, paras 15–19.

[18] Committee on Technical Barriers to Trade, Report on Outstanding Implementation Issues in Accordance with Paragraph 12 of the Ministerial Declaration, G/TBT/W/191, 23 October 2002.

[19] Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 17 October 2002, G/TBT/M28, 19 November 2002, paras 115–120.

[20] Committee on Trade and Development Special Session, Special and Differential Treatment Provisions, Joint Communication from Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/CTD/W/2, 14 May 2002, Section III.

ment and that the time period should be not less than three years.[21] Both proposals were by and large rejected by developed countries.[22]

E. Evaluation

18 Unlike technical assistance, the provisions of Art. 12 have not been an important item on the **TBT Committee's agenda**. In particular, as mentioned above, no request for a special transition time period under Art. 12.8 has been made. Even though Art. 12 has been invoked in **dispute settlement proceedings**, its practical use in this context was limited.[23] By the end of 2005, neither the panels nor the Appellate Body had addressed these claims or other arguments based on this provision. It can be concluded that Art. 12 has not so far played an important practical role in the WTO. The provision recognises and reiterates the **general principle of special and differential treatment** of developing countries in the WTO. However, its ten paragraphs remain largely unspecific and create hardly any additional and explicit rights for developing countries in the TBT context. The overall effects of Art. 12 therefore seem even more marginal than those of Art. 11.

[21] Committee on Trade and Development Special Session, Special and Differential Treatment Provisions, Joint Communication from the African Group in the WTO, TB/CTD/W/3/Rev.2, 17 July 2002, para. 57(e).

[22] Committee on Trade and Development Eight Special Session, Note on the Meeting of 17 October 2002, TN/CTD/M/8, 18 December 2002.

[23] See *e.g.* Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.2521, 7.2527. While Argentina presented claims under Art. 12 TBT, the Panel argued that the claims under the SPS and TBT were alternative rather than cumulative in character. As the Panel found that the relevant measures where subject to the SPS, recourse to the TBT was deemed to be unnecessary. See also Panel Report, *EC—Sardines*, WT/DS231/R, para. 1.3. The claim relating to Art. 12 was dropped subsequently, see *ibid.* para. 3.1. See also the compilation of TBT related case law in G/TBT/15, para. 20.

Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO-Technical Barriers and SPS Measures.*
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Article 13 TBT
The Committee on Technical Barriers to Trade

1. A Committee on Technical Barriers to Trade is hereby established, and shall be composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet as necessary, but no less than once a year, for the purpose of affording Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives, and shall carry out such responsibilities as assigned to it under this Agreement or by the Members.
2. The Committee shall establish working parties or other bodies as may be appropriate, which shall carry out such responsibilities as may be assigned to them by the Committee in accordance with the relevant provisions of this Agreement.
3. It is understood that unnecessary duplication should be avoided between the work under this Agreement and that of governments in other technical bodies. The Committee shall examine this problem with a view to minimizing such duplication.

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Cross References

Art. 913 NAFTA; Resolution GMC No. 2/92 MERCOSUR; ASEAN Consultative Committee for Standardization and Quality (ACCSQ).

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A. General

Art. 13 establishes a Committee, drawn from all Members, with the function of reviewing and implementing the TBT Agreement, and carrying out other specific functions related to technical barriers to trade. The Committee is also attended by observers of other international organizations with competence in the formation of product standards. *1*

B. Drafting History

Art. 13 is **virtually identical** to Art. 13 of the 1979 Standards Code, with certain changes discussed below. The new wording however fails to account for the fact that, formally, it is not the WTO Members *per se*, but rather the various WTO organs, that take decisions. Consequently, the term "Members" should be understood as referring to those WTO organs superior to the TBT Committee.[1] *2*

C. Committee on Technical Barriers to Trade (Art. 13.1)

I. Functions

Art. 13.1 establishes the Committee on Technical Barriers to Trade, with the functions of affording Members the opportunity of **consulting on matters relating to the Agreement** and carrying out other responsibilities assigned to it either under the Agreement or by superior WTO organs. The Committee holds regular formal meetings, at which it discusses matters relating to the implementation of the Agreement. The Committee has also organized a number of informal information sessions on matters of particular interest to its Members.[2] In addition, the Committee has **specific functions under Arts 12 and 15**,[3] and has been assigned certain **additional duties** by the Ministerial Conference and the Council on Trade in Goods (CTG), including the conduct of annual reviews of the TBT Standards Code Directory, and the Annual Transitional Review *3*

[1] *Kuijper*, in: *Kennedy & Southwick* (eds), 81, 101.
[2] See below, para. 11.
[3] See below, paras 12–13.

Mechanism (TRM) of China's obligations under the WTO agreements and additional obligations under the Protocol.[4]

II. Status of the Committee within the WTO system

4 Although the Committee is **independently established by the Agreement**, it is generally treated as a subsidiary body established by the CTG under Art. IV:6 WTO.[5] As with other WTO subordinate organs, the powers of the Committee overlap with those of its superior WTO organs. The CTG is mandated to 'oversee the functioning' of the Agreement,[6] and the Ministerial Conference and General Council have the power to take decisions on all matters under the Agreement.[7] Despite the allocation of specific powers to organs such as the Committee, the WTO is most likely a system of **implied and not attributed powers**, and accordingly in such cases the superior organs retain ultimate power to make decisions on these matters.[8]

III. Rules of Procedure

5 At its first meeting the TBT Committee adopted Rules of Procedure[9] which were subsequently approved by the CTG.[10] As with other WTO bodies, these rules are *mutatis mutandis* **identical to the Rules of Procedure adopted by the General Council**.[11]

IV. Formal Meetings

1. Timing

6 Under Art. 13.1 and Rule 1, meetings of the TBT Committee must take place no less frequently than **once a year**. In accordance with General Council Guidelines,[12] as far as possible the calendar for the formal meetings is fixed for the whole year and meetings of bodies that may be attended by

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[4] See below, para. 17.

[5] For example, the Committee's Rules of Procedure were submitted to the CTG for approval under Art. IV:6, and chairpersons of the Committee are elected after consultations with the Chairman of the CTG.

[6] Art. IV:5 WTO Agreement.

[7] Arts IV:1 and IV:2 WTO Agreement.

[8] *Kuijper*, in: *Kennedy & Southwick* (eds), 81, 109.

[9] G/TBT/1/Rev.8, 2–9.

[10] Council for Trade in Goods, Minutes of Meeting, Held in the Centre William Rappard on 1 December 1995, G/C/M/7, 26 January 1996.

[11] Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, WT/L/161, 25 July 1996.

[12] Guidelines on the Arrangements for Scheduling of Meetings of WTO Bodies, Adopted by the General Council on 15 November 1995, WT/L/106, 27 November 1995.

the same experts from capitals of countries are held consecutively. By the end of 2005, the TBT Committee had held 38 regular meetings.[13]

2. Members and Decisions

7 Art. 13.1 states that **all WTO Members are entitled to be represented on the Committee**. Rule 16 states that there is **no quorum** for meetings, but the Chairperson may consider postponing a meeting in the event that he or she feels that doing so may result in a more representative level of participation by WTO Members. According to Rule 33, where a decision cannot be arrived at by **consensus**, the matter at issue shall be referred to the Council for Trade in Goods.[14] Given that Art. IX:2 WTO provides for majority voting, and the TBT Agreement is silent on the issue, it might be thought that decisions under the TBT Agreement should also be taken by majority vote. If so, Rule 33 may be considered to be too restrictive and therefore invalid.[15] However, the Rule can be justified if it is accepted that the higher organs have greater legitimacy than the lower organs, and therefore that the possibility of majority voting provided for in Art. IX:2 WTO should be limited to the former.[16]

3. Observers

8 Under its Rules of Procedure, the Committee may extend **invitations to participate** to representatives of States or separate customs territories.[17] By Decision of the General Council, governments with observer status in the General Council have a right to participate as observers in the Committee.[18] At its first meeting, the Committee agreed that such governments be invited to attend meetings of the Committee, except if or when it was decided by the Committee to hold a closed session attended by Members only.[19]

9 The Rules of Procedure also provide for the participation of representatives of international intergovernmental organizations.[20] The Committee has approved a number of requests for **observer status for intergovernmental**

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[13] G/L/760.

[14] In practice, such referral rarely takes place. See *Ehlermann & Ehring*, in: *Petersmann* (ed.), 497–522.

[15] *Kuijper*, in: *Kennedy & Southwick* (eds), 81, 104.

[16] *Ibid*., arguing that, despite appearances, the WTO does not establish a system of powers attributed to specific organs. See also Art. 12.1 SPS.

[17] Rule 10 of and Annex 1 to the Committee's Rules of Procedure, G/TBT/1/Rev.8, 2–9. The current list of members and observers is contained in: Committee on Technical Barriers to Trade, Eleventh Annual Review of the Implementation and Operation of the TBT Agreement, Note by the Secretariat, G/TBT/18, 17 February 2006.

[18] WT/L/161, Annex 2.

[19] Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 21 April 1995, G/TBT/M/1, 28 June 1995, para. 21.

[20] Rule 11 of and Annex 2 to the Committee's Rules of Procedure, G/TBT/1/Rev.8, 2–9.

organisations, which are considered in accordance with the General Council Guidelines for Observer Status for Governments in the WTO.[21] As of 31 January 2006, 17 intergovernmental organizations enjoyed observer status in the TBT Committee. These include international organizations (ACP, ALADI, EFTA, IMF, ITC, OECD, World Bank), UN agencies (FAO, UNCTAD, UNIDO, WHO) and international standardization bodies (IEC, ISO, OIE, OIML, UN/ECE, and the WHO/FAO Codex Alimentarius Commission).[22] No consensus has been reached on requests from CBD, OIV, BIPM, and GOIC.[23]

10 In 1996, the Committee adopted a Decision stating that representatives of **regional standardizing bodies and systems for conformity assessment** may be invited to address the Committee on their procedures and how they relate to those embodied in the Agreement, on the basis of agreed lists of questions.[24]

V. Informal Meetings

11 Following a 1995 Decision,[25] approximately every three years[26] the Committee has held **special meetings on procedures for information exchange** (the first held jointly with the SPS Committee).[27] The Committee has also held a Special Informal Session jointly with the CTE on ecolabelling, an Information Session of Bodies Involved in the Preparation of International Standards, a Symposium on Conformity Assessment Procedures, two Workshops on Technical Assistance and Differential Treatment,[28]

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[21] *Ibid.*, Annex 3.

[22] Committee on Technical Barriers to Trade, International Intergovernmental Organizations, Observer Status in the Committee on Technical Barriers to Trade, Note by the Secretariat, G/TBT/GEN/2, 4 March 2004. ACP, ALADI, EFTA, OIML and UNIDO have been granted observer status on an *ad hoc* basis: G/TBT/18, Annex A, footnote 32.

[23] Committee on Technical Barriers to Trade, Minutes of the Meeting of 16–17 June 2005, Note by the Secretariat, G/TBT/M/36, 4 August 2005, para. 119.

[24] G/TBT/1/Rev.8, 23.

[25] *Ibid.*, 19.

[26] These meetings are in fact supposed to be held biennially: *Ibid.*

[27] Report of these meetings are in Committee on Technical Barriers to Trade, Special Joint Meeting on Procedures for Information of the Committees on Technical Barriers to Trade and Sanitary and Phytosanitary Measures, Report by the Chairperson, G/TBT/W/16, 22 November 1995; Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 15 September 1998, G/TBT/M/13, 18 November 1998, Annex 2; Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 29 June 2001, G/TBT/M/24, 14 August 2001, Annex 1, and Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 4 November 2004, G/TBT/M/34, 5 January 2005, Annex 2. See also TBT Committee, Fourth Special Meeting on Procedures for Information Exchange 2–3 November 2004, Background Note by the Secretariat, JOB(04)148, 15 October 2004.

[28] Descriptions of the first three of these meetings are in G/L/412, Annex 1. Reports on the Technical Assistance Workshops are in Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 21 July 2000, G/TBT/M/20, 29 August 2000, Annex 1

a Learning Event on Labelling,[29] a Special Meeting Dedicated to Conformity Assessment Procedures,[30] and a Workshop on Supplier's Declaration of Conformity.[31]

VI. Responsibilities under the Agreement

12 Art. 13.1 states that the Committee shall carry out responsibilities assigned to it under the Agreement. Art. 12.8 gives the Committee the power to grant, upon request, specified, time-limited **exceptions in whole or in part to obligations** under the Agreement. No such requests have been made.[32]

13 The Agreement also imposes on the Committee a number of reporting and reviewing obligations. Art. 12.10 requires the Committee periodically to **examine the special and differential treatment laid down in this Agreement**, granted to developing country Members on national and international levels. One such examination was undertaken in 1996.[33] Arts 15.3 and 15.4 require the Committee to undertake both **annual and triennial reviews** of the operation and implementation of the agreement. These have been carried out regularly, and have provided the basis for the Committee to establish its work programme.[34]

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and Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 20 March 2003, G/TBT/M/29, 19 May 2003, Annex A.

[29] Committee on Technical Barriers to Trade, Ninth Annual Review of the Implementation and Operation of the TBT Agreement, Note by the Secretariat, G/TBT/14, 5 March 2003, para. 7.

[30] For a report see Committee on Technical Barriers to Trade, Report of the Special Meeting of the TBT Committee Dedicated to Conformity Assessment Procedures held on 29 June 2004, Addendum to the Minutes of the Meeting of 1 July 2004, Note by the Secretariat, G/TBT/M/33/Add.1, 21 October 2004.

[31] For a report see Committee on Technical Barriers to Trade, Minutes of the Meeting of 22–23 March 2005, G/TBT/M/35, 24 May 2005, Annex 1.

[32] See *Krajewski*, Article12 TBT para. 14.

[33] Committee on Technical Barriers to Trade, Minutes of the meetings held on 16 and 22 October 1996, G/TBT/M/6, 6 December 1996, paras 16–19.

[34] Committee on Technical Barriers to Trade: First Annual Review of the Implementation and Operation of the Agreement, Background Document by the Secretariat, G/TBT/3, 14 February 1996; Second Annual Review, G/TBT/4, 22 January 1997; Third Annual Review, G/TBT/6, 9 February 1998; Fourth Annual Review, G/TBT/7, 3 March 1999; Fifth Annual Review, G/TBT/8, 31 January 2000; Sixth Annual Review, G/TBT/10, 6 February 2001; Seventh Annual Review, G/TBT/11/Rev.2, 13 March 2002; Eighth Annual Review, G/TBT/12, 21 February 2003, and Corr.1, 11 March 2003; Ninth Annual Review, G/TBT/14, 5 March 2004; Tenth Annual Review, G/TBT/15, 4 March 2005; Eleventh Annual Review, G/TBT/18, 18 February 2006; Committee on Technical Barriers to Trade: First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/5, 19 November 1997; Second Triennial Review, G/TBT/9, 13 November 2000 and Corr.1, 20 November 2000; Third Triennial Review, G/TBT/13, 11 November 2003. See also *Bartels*, Art. 15 TBT.

VII. Responsibilities assigned by Members

1. Factual reports

14 Under a 1995 document adopted by the General Council,[35] all bodies constituted under Annex 1A to the Agreements are required to submit an **annual factual report** to the Council for Trade in Goods. Factual reports submitted by the TBT Committee are relatively brief, and give an overview of its work during the year.[36] Exceptionally, a detailed report was drafted by the Committee in preparation for the 1996 Singapore Ministerial Conference.[37]

2. ISO WTO Standards Information Service

15 A WTO Standards Information Service is operated by the ISO to provide information on standardizing bodies under Paras C and J of the Code of Good Practice contained in Annex 3.[38] The ISO/IEC Information Centre publishes an annual **WTO TBT Standards Code Directory**, available to ISONET and WTO Members, based on notifications submitted in accordance with ISO/WTO Guidelines on Notifications.[39] The Directory lists all standardization bodies that have notified acceptance of the Code of Good Practice and contains information relating to the availability of their work programmes.

16 Under a Marrakesh Ministerial Decision,[40] the Committee undertakes **annual reviews of the TBT Standards Code Directory**. These reviews, which are fairly brief, take place at ordinary meetings of the Committee at the same time as the annual reviews that take place under

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[35] Procedures for an Annual Overview of WTO Activities and for Reporting under the WTO, Adopted by the General Council on 15 November 1995, WT/L/105, 24 November 1995.

[36] See list of Reports of the Committee on Technical Barriers to Trade in Documents, above.

[37] Committee on Technical Barriers to Trade, Draft Report of the Committee to the Singapore Ministerial Conference, G/TBT/W/32, 24 September 1996, adopted Committee on Technical Barriers to Trade, Minutes of the meetings held on 16 and 22 October 1996, G/TBT/M/6, 6 December 1996, para. 7.

[38] Committee on Technical Barriers to Trade, WTO Standards Information Services Operated by ISO, Note by the Secretariat, G/L/1, 26 January 1995 (containing text of WTO/ISO, Memorandum of Understanding on WTO Standards Information Service operated by ISO, 14 November 1994). It follows the Ministerial Decision on Proposed Understanding on WTO-ISO Standards Information System, 15 April 1994.

[39] ISO/IEC Information Centre, WTO TBT Standards Code Directory, Tenth Edition, 2006. See Committee on Technical Barriers to Trade, Notification Procedures Related to the Code of Good Practice for the Preparation, Adoption and Application of Standards Contained in Annex 3 of the WTO Agreement on Technical Barriers to Trade, Note by the Secretariat, Revision, G/TBT/W/4/Rev.1.

[40] Ministerial Decision on Review of the ISO/IEC Information Centre Publication, 15 April 1994.

Art. 15.3.[41] In order to facilitate the discussion, this Decision mandates the WTO Secretariat to provide a **list of all standardizing bodies that have accepted the Code**, as well as a list of those standardizing bodies that have accepted or withdrawn from the Code since the previous review.[42]

3. Review of China's implementation of the TBT Agreement

17 The Protocol of Accession of the People's Republic of China provides for an **Annual Transitional Review Mechanism (TRM) of China's obligations** under the WTO agreements and additional obligations under the Protocol.[43] Accordingly, the TBT Committee undertakes an annual review of China's implementation of its obligations under the TBT Agreement and under the Protocol, and reports the results to the Council for Trade in Goods, which in turn reports to the General Council.[44] China also provides information to the Committee concerning its implementation of the Agreement, as required under Annex 1A of the Protocol. Annual transitional reviews have taken place since 2002,[45] and are to continue until 2009, with a final review after ten years or at an earlier date decided by the General Council.[46] In format these reviews resemble the Trade Policy Review Mechanism, in which individual WTO Members raise concerns with the Member under review.

4. Trade Facilitation

18 In 1998 the CTG Chairman requested the Chairpersons of various WTO bodies, including the TBT Committee, to consider requiring these bodies to address those aspects of trade facilitation which they regard as being related to the respective agreements and areas of work, with a view to introducing the results of these discussions into the informal CTG discussions on trade facilitation in March 1999. The Chairman of the TBT Committee responded by noting that the provisions of the TBT Agreement are by their very nature relevant to trade facilitation, and that issues relating to

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[41] See above at footnote 34.

[42] These lists are in the Committee on Technical Barriers to Trade, List of Standardizing Bodies that have Accepted the Code of Good Practice for the Preparation, Adoption and Application of Standards since 1 January 1995, Revision, G/TBT/CS/2/Rev.12, 17 February 2006 and Addendum G/TBT/CS/1/Add.10, 16 February 2006—respectively.

[43] Ministerial Conference, Accession of the People's Republic of China, Decision of 10 November 2001—Annex—Protocol on the Accession of the People's Republic of China, WT/L/432, 23 November 2001.

[44] Committee on Technical Barriers to Trade, Annual Transitional Review Mandated in Para. 18 of the Protocol of Accession of the People's Republic of China, Report (2002), G/TBT/W/192, 25 October 2002; Second Report (2003), G/TBT/W/236, 11 November 2003; Third Report (2004), G/TBT/W/249, 8 November 2004; Fourth Report (2005), G/TBT/17, 9 November 2005.

[45] For references, see Documents section above.

[46] WT/L/432, para. 18.

this matter have therefore been a regular feature of the work of the TBT Committee, referring in particular to **Arts 13.1, 15.2 and 15.4**.[47]

5. Doha Ministerial Declaration

19 Para. 12 of the Doha Ministerial Declaration mandates the Committee to address two open issues: the obligatory nature of Art. 11 and the amendment of Art. 12 to provide for acceptance by developed-country importers of self-declaration on adherence to standards by **developing-country** exporters. Discussions on these issues are continuing.[48]

D. Working Parties (Art. 13.2)

20 Under Art. 13.2, the Committee may establish working parties or other bodies. In 1996, it established a **Technical Working Group on ISO/IEC Guides Relating to Arts 5 and 6 of the Agreement**.[49] The Technical Working Group held four meetings in 1997 before suspending its work.[50] In 1997 the EC proposed the establishment of a Working Party to examine the role of international standards and international guides and recommendations in the application of the Agreement, the means intended to improve the transparency of standardising activities and the procedures for cooperation between regional, national and international standardising bodies,[51] but this suggestion was not implemented.

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[47] Council for Trade in Goods, Trade Facilitation, Contributions Received from other WTO Bodies, Note by the Secretariat, G/C/W/149, 14 April 1999, paras 2 and 5.

[48] The Committee discussed these issues at Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 20–21 June 2002, G/TBT/M/27, 31 July 2002, paras 132–149 and Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 17 October 2002, G/TBT/M/28, 19 November 2002, paras 111–120, and reported to the Trade Negotiations Committee (TNC) in Committee on Technical Barriers to Trade, Report on Outstanding Implementation Issues in Accordance with para. 12 of the Ministerial Declaration, G/TBT/W/191, 23 October 2002. However, the TNC returned the matter to the Committee for further deliberation: see Trade Negotiations Committee, Minutes of Meeting, Held in the Centre William Rappard on 14–15 July 2003, TN/C/M/11, 2 February 2004, 72.

[49] G/TBT/M/6, para. 14. See also Committee on Technical Barriers to Trade, The Relationship Between the Agreement on Technical Barriers to Trade and Relevant ISO/IEC Guides, Secretariat Background Paper, G/TBT/W/38, 9 April 1997.

[50] Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 20 June 1997, G/TBT/M/8, 5 September 1997, paras 8–25; Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 3 October 1997, G/TBT/M/10, 5 January 1998, paras 9–13; G/L/207.

[51] Committee on Technical Barriers to Trade, European Community Working Paper on the First Triennial Review of the Operation and Implementation of the Agreement on technical barriers to trade, Communication from the European Communities, G/TBT/W/53, 18 September 1997, 6–7.

E. Avoidance of Duplication (Art. 13.3)

21 The Committee is mandated under Art. 13.3 to examine the problem of unnecessary duplication between the **work under the Agreement and that of governments in other technical bodies**.[52] This reinforces the Code of Good Practice for the Preparation, Adoption and Application of Standards, which requires central and regional standardizing bodies to avoid duplication of and overlap with the work of relevant international standardizing bodies.[53]

22 This provision is identical to the equivalent Art. 13.3, except that the Code provision listed the Joint FAO/WHO **Codex Alimentarius Commission** as an example of such a 'technical body'.[54] Pursuant to a 1980 GATT Decision, this Commission was invited to transmit copies of notifications to the Code Committee and to participate as an observer in Code Committee meetings.[55] In 1995 the TBT Committee decided that it was unnecessary to update and adopt this Decision within the TBT Committee.[56]

At the end of the Second Triennial Review in 2000, the Committee adopted a Decision which, inter alia, reiterates the need for **coordination between different international standardizing bodies** to avoid the development of conflicting international standards.[57] The EC has referred in this context to agreements reached between ISO/CEN and IEC/CENELEC as a possible model for future coordination.[58] It has been suggested that this obligation applies equally to intergovernmental and private standardizing bodies, as no distinction is drawn between these bodies by the Agreement.[59]

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[52] See Art. 10.6.

[53] Code of Good Practice for the Preparation, Adoption and Application of Standards, para. H.

[54] The single example of a 'technical body' in Art. 13.3 TBT Code is at odds with the Code's broader understanding of an 'international standardizing body' which, like the Agreement, is open-ended.

[55] GATT Decision adopted 19 June 1980, TBT/M/3; text contained in TBT Committee, Decisions and Recommendations Taken by the Tokyo Round Committee on Technical Barriers to Trade, Note by the Secretariat, G/TBT/W/14, 29 September 1995.

[56] Committee on Technical Barriers to Trade, Minutes of the meeting held on 28 June 1996, G/TBT/M/5, 19 September 1996, para. 71.

[57] Committee on Technical Barriers to Trade, Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Arts 2, 5 and Annex 3 of the Agreement, para. E, in G/TBT/1/Rev.8, 26; also contained in G/TBT/9, 13 November 2000.

[58] Committee on Technical Barriers to Trade, European Community Working Paper on the First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, Communications from the European Communities, G/TBT/W/53, 18 September 1997, 7, referring to the ISO/CEN 1991 Vienna Agreement and the IEC/CENELEC 1996 Dresden Agreement.

[59] Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 31 March 1999, G/TBT/M/15, 3 May 1999, para. 97.

F. Outlook

23 The TBT Committee is an important element of the WTO's regulation of technical barriers to trade. It provides an important forum for Members to consult each other on relevant issues, and also to coordinate discussions with other international organizations active in the field.

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Article 14 TBT
Consultation and Dispute Settlement

1. Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall take place under the auspices of the Dispute Settlement Body and shall follow, *mutatis mutandis*, the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.
2. At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.
3. Technical expert groups shall be governed by the procedures of Annex 2.
4. The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member.

Annex 2
The following procedures shall apply to technical expert groups established in accordance with the provisions of Article 14.

1. Technical expert groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.
2. Participation in technical expert groups shall be restricted to persons of professional standing and experience in the field in question.
3. Citizens of parties to the dispute shall not serve on a technical expert group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on a technical expert group. Members of technical expert groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before a technical expert group.
4. Technical expert groups may consult and seek information and technical advice from any source they deem appropriate. Before a technical expert group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by a technical expert group for such information as the technical expert group considers necessary and appropriate.
5. The parties to a dispute shall have access to all relevant information provided to a technical expert group, unless it is of a confidential nature. Confidential information provided to the technical expert group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the technical expert group but release of such information by the technical expert group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.
6. The technical expert group shall submit a draft report to the Members concerned with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be circulated to the Members concerned when it is submitted to the panel.

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Documents

Committee on Technical Barriers to Trade, Eleventh Annual Review of the Implementation and Operation of the TBT Agreement, Note by the Secretariat, G/TBT/18, 17 February 2006.

Cross References

Arts 1118, 2006 NAFTA; Art. 2 ASEAN Protocol of Dispute Settlement Mechanism; Art. 3 in connection with Annex II of the Treaty Establishing a Common Market (MERCOSUR) between Argentina, Brazil, Paraguay and Uruguay; Art. 17 Charter of the Commonwealth of Independent States, Part IV; Art. 24 OAS-Charter; Art. 64 ICSID-Convention.

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A. General

1 The TBT Agreement is—as are all other WTO multilateral trade agreements—subject to the dispute settlement procedures under the DSU. Art. 14 provides for the procedural and substantial linkage between the TBT and the general dispute settlement regime. The provision has its roots in the **Tokyo Round Agreement on Technical Barriers to Trade** (the "Standards Code") (Art. 14) and draws strong parallels with its provisions. Consultations are to be conducted pursuant to Arts XXII and XXIII GATT 1994 in conjunction with Art. 4 DSU (Art. 14.1). Arts 14.2 and 14.3 concern the seeking of evidence by expert review groups for which

Annex 2 to the TBT sets out a detailed procedure. Art. 14.4 extends the scope of the TBT dispute settlement to Members' local governmental and administrative levels and to non-State actors.

B. Consultations and Dispute Settlement (Art. 14.1)

2 Consultations and dispute settlement under the TBT are governed by the DSU (Art. 14.1).[1] Art. 14.1 is the corresponding provision to Art. 4 DSU, the general rule declaring consultations to be a mandatory prerequisite to the establishment of a Panel.[2] Art. 14 will **prevail over the provisions of the DSU to the extent that there is a difference** between the two.[3] In comparison to the parallel provision in the SPS Agreement Art. 14.1 does not include the formulation that Arts XXII and XXIII of GATT 1994 shall apply "except as otherwise specifically provided". Nevertheless, the exception applies in substance because Art. 1.2 DSU explicitly stipulates a reservation in respect of the covered agreements that are listed in Annex 2 DSU. However, a difference between two provisions only exists when they are mutually incompatible, *i.e.* where adherence to the one provision will lead to a violation of the other. In general the provisions of the DSU and the special or additional rules of Annex 2 DSU should be read as complementing each other.[4] In *Guatemala—Cement* the Appellate Body held that an inconsistency or a difference between a provision of the DSU and a special or additional provision of a covered agreement must be identified before concluding that the latter *prevails* and that the provision of the DSU does not apply.[5] If specific dispute settlement provisions, such as Art. 17 of the Antidumping Agreement or Art. 14, were interpreted to replace the provisions of the DSU *in toto*, this would deny the application of the often more detailed provisions of the DSU to anti-dumping disputes and thus disregard the integrated dispute settlement system established in the WTO.

3 Although Art. 14.1 is applied regularly in dispute settlement procedures[6] it did not play any considerable role in the substantial interpretation of DSU or TBT provisions.

4 The **objectives of consultations** are threefold: first, the consultation process can help to clarify the facts of a disputed situation between the

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[1] *Stoll*, Article 1 DSU, Max Planck CWTL, Vol. 2, paras 11 *et seq*.
[2] See *Schorkopf*, Article 4 DSU, Max Planck CWTL, Vol. 2.
[3] See Art. 1.2, Annex 2 DSU. With respect to the relationship between Art. 14.2 and Art. 13 DSU see Panel Report, *EC—Asbestos*, WT/DS135/R, para. 5.18.
[4] Appellate Body Report, *Guatemala—Cement*, WT/DS60/AB/R, paras 65–67.
[5] *Ibid.*, para. 66, italics in the original.
[6] See the overview given by the WTO Secretariat in G/TBT/15, 8 *et seq*.

Members involved. Secondly, consultations may lead to a mutually acceptable solution of the dispute. Thirdly, the information obtained during consultations may enable the complainant to focus the scope of the matter with respect to which it seeks the establishment of a panel.[7]

5 Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall, mutatis mutandis, follow Arts XXII and XXIII GATT 1994, as elaborated and applied by the DSU. The complainant therefore is in a position to **decide on the involvement of a third party** by choosing the legal basis for consultations. Any interference by third parties that may endanger a mutually agreed solution between the parties or will spread confidential information can be "blocked".[8] However, as the DSU entered into force Art. XXIII GATT 1994 lost its function as the legal basis for the panel proceedings. The provision remains a basis for consultations on any matters arising out of the GATT 1994. Art. XXII GATT 1994 is the "corresponding provision" to Art. 14.1 TBT, being identified in Art. 4.11, footnote 4 to the DSU by explicit reference.

C. Technical Expert Group (Arts 14.2 and 3, Annex 2)

I. The Decision to Seek Expert Advice and Information

6 Arts 14.2 and 14.3 contain special rules for the Panel procedure in respect of the collection and evaluation of evidence. Pursuant to Art. 14.3 a Panel at the request of a party to a dispute, or at its own initiative, **may establish** a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts. According to the ordinary meaning of Art. 14.2 a panel has no legal obligation to seek expert advice or information but has discretionary competence to decide on this issue. A **question of a technical nature** can be any matter of fact on which the Panel or the Appellate Body demands information in order to advance a decision on the specific dispute. The use of the word "technical" does not mean that expert advice is restricted to technological issues in a narrow sense; it also embraces scientific information and advice in fields of knowledge which cannot be made accessable by a reasonable person on the basis of the laws of thought and general knowledge. Expert advice was sought for instance in *Japan—Apples*. The Panel sought advice on the question whether the scientific evidence before the Panel supported the assertion that a certain

[7] Panel Report, *Brazil—Aircraft*, WT/DS46/R, para. 7.9; Panel Report, *Korea—Alcoholic Beverages*, WT/DS75/R, para. 10.23.

[8] See the publication by the WTO Secretariat: *WTO*, Dispute Settlement System, 45.

kind of apple can harbour bacteria.[9] In *EC—Asbestos* the Panel wished to obtain information on exposure to chrysotile asbestos and the associated risks, as well as the effectiveness of its controlled use.[10]

7 In several disputes the question arose whether the Panel had the competence to request the opinion of **individual experts** on certain scientific and other technical matters raised by the parties to the dispute, instead of establishing an expert group. In *EC—Asbestos* the Panel's main argument for consulting experts on an individual basis instead of forming a technical expert group was its plan to formulate a consensus position among the experts.[11] The Panel stated that the questioning of individual experts in accordance with Art. 13 DSU would better enable the panel usefully to gather opinions and information on the scientific or technical issues raised by this dispute: "Considering in particular the range of areas of competence that might be required, it is appropriate in this case to gather information and different individual opinions [...]."[12]

8 The Panel rejected the EC's opposition by arguing that Art. 14.2 allows for **discretion** in the establishment of an expert group ("may establish").[13] The provision does not exclusively prescribe the establishment of a technical expert group, and the right to establish a technical expert group under Art. 14.2 is not incompatible with the general authorization given under Art. 13 DSU to consult individual experts.[14] Both options were read as complementing each other. In *EC—Hormones* the Appellate Body, when dealing with the parallel provision of the SPS Agreement affirmed that the determination of whether the establishment of an expert review group is necessary or appropriate was left to the discretion of a panel.[15]

9 Panels and the Appellate Body thereby increased their **judicial autonomy** in respect of the substance of a decision, and also as regards experts as auxiliary personnel in the dispute settlement procedure. Contradicting evidence by experts on specific questions increases the options for reasoning a decision and lowers the threshold for disregarding certain expert statements. A unanimous expert opinion has the tendency to anticipate the outcome of the legal decision making process, transferring the responsibility for the

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[9] Panel Report, *Japan—Apples*, WT/DS/245/R, paras 8.45 *et seq*.
[10] Panel Report, *EC—Asbestos*, WT/DS135/R, paras 5.1 *et seq*.
[11] *EC—Asbestos*, WT/DS135/R, paras 5.17 *et seq*.; see also *EC—Hormones (US)*, WT/DS26/R/US and *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.7–8, as confirmed by the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, paras 146–148.
[12] Panel Report, *EC—Asbestos*, WT/DS135/R, para. 5.19.
[13] Panel Report, *EC—Asbestos*, WT/DS135/R, para. 5.18.
[14] *EC—Asbestos*, WT/DS135/R, para. 5.19.
[15] Appellate Body Report; *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 147. See *Schorkopf*, Article 11 SPS, para. 6.

substance of the decision to a technical or scientific environment. Moreover, if a panel were to disregard a unanimous scientific expert opinion the legitimacy of the decision would be reduced.

II. Selection of Experts

10 Unlike the comparable provision in the SPS Agreement the TBT Agreement provides for detailed rules in respect of the **appointment of technical expert groups**, their mandate and working procedure.[16] Annex 2 parallels the regime set out in Appendix 4 DSU which complements Art. 13.2 DSU. The method of obtaining advice and information from scientific experts was described by the Panels in *EC—Hormones*;[17] *Australia—Salmon*;[18] *Japan—Agricultural Products II*;[19] and *Australia—Salmon (Art. 21.5—Canada)*.[20]

11 With a view to the appointment of **individual experts** under the SPS Agreement the Appellate Body in *EC—Hormones* held that Appendix 4 DSU applies only in situations in which expert review groups have been established.[21] In order consistently to interpret the provisions in the WTO Agreement on expert advice, this ruling should also apply to Art. 14 TBT. If panels seek advice and information from individual experts they are allowed to draw up, in consultation with the parties to the dispute, ***ad hoc* rules** for those particular proceedings.[22]

12 Annex 2 sets out the instrument of collecting technical advice in a detailed manner and concerns a group of experts, which has to prepare a collective report on its findings. The Group is **under the Panel's authority**; the Panel also decides on its terms of reference and working procedures (Annex 2.1). It may consult and seek information and technical advice from any source it deems appropriate (Annex 2.4). The role of experts under the authority of the panel has to be strictly divided from that of the scientists who are members of the delegations of the parties to the dispute. They are members of the delegations and their statements are treated as part of that party's pleadings.[23]

13 A technical expert group is **composed** of persons of professional standing and experience in the field in question (Annex 2.2), serving in their individual capacities and not as government representatives, nor as representatives of any organization. Citizens of parties to the dispute are disqualified except

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[16] See Art. 14 and its Annex 2.
[17] *EC—Hormones (US)*, WT/DS26/R/US, paras 8.8–9.
[18] Panel Report, *Australia—Salmon*, WT/DS18/R, paras 6.4–6.5.
[19] Panel Report, *Japan—Agricultural Products II*, WT/DS76/R, paras 6.2–3.
[20] Panel Report, *Australia—Salmon (Art. 21.5—Canada)*, WT/DS18/RW, paras 6.3–4.
[21] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 148.
[22] *Ibid*. See also *Schorkopf*, Article 11 SPS, para. 10.
[23] See *EC—Hormones (US)*, WT/DS26/R/US, para. 8.9.

with the agreement of the parties or if the expert evidence cannot otherwise be obtained. Government officials of parties are without exception disqualified (Annex 2.3).

14 In *Australia—Salmon (Art. 21.5)* the Panel, after making its decision to seek advice from experts, invited the **parties** to comment on its suggestions; in particular they were required to state any compelling objections they might have with regard to any individual, or to suggest other experts. The Panel selected three individuals and, in consultation with the parties, prepared specific questions which it submitted to each expert individually. The parties agreed that their written submissions to the Panel, including the written versions of their oral statements, be provided to each of the selected experts. Pursuant to Annex 2.5 the parties to a dispute are to have access to all relevant information provided to a technical expert group, unless it is of a confidential nature.

III. Expert Report

15 The technical expert group is to submit a **draft report** to the Members concerned with a view to obtaining their comments, and to take them into account, as appropriate, in the final report to the Panel (Annex 2.6). In *EC—Hormones* the Panel expressly stated, that it did not seek consensus among the experts.[24] The experts in *Australia—Salmon (Art. 21.5)* were requested to provide their responses, in writing, to those questions they felt qualified to address. The experts' written responses were provided to the parties, and they were given the opportunity to comment on them. At a later stage the experts were invited to meet the Panel and the parties to discuss their written responses to the questions and to provide further information.[25]

16 As to the value of the **final expert report**, Appendix 4.6 to Art. 13.2 DSU which is otherwise almost identical to Annex 2 No. 6 TBT includes the additional sentence: "The final report of the expert review group shall be **advisory** only." With a view to the task of an expert group, *i.e.* to assist in questions of a technical nature (Art. 14.2), any binding effect of the expert report is excluded, although a sentence comparable to Appendix 4.6 DSU is not included in Annex 2.6 TBT.[26]

[24] *EC—Hormones (Canada)*, WT/DS26/R/CAN, para. 8.9.
[25] *Australia—Salmon (Art. 21.5)*, WT/DS18/RW, paras 6.2–4.
[26] For further details see *Arend*, Appendix 4 DSU, Max Planck CWTL, Vol. 2, para. 10.

D. Burden of Proof

17 The burden of proof under the TBT Agreement follows the general rule for dispute settlement under the WTO: it **rests upon the party**, whether complaining or defending, who **asserts** the affirmative of a particular claim or defence. If that party adduces sufficient evidence to raise a presumption that what is claimed is true (*prima facie* case), the burden shifts to the other party, who will fail to discharge it unless it adduces sufficient evidence to rebut the presumption.[27]

18 In order to successfully present a ***prima facie* case** the party that initiated the dispute settlement proceedings has to put forward factual and legal arguments that, if unrebutted, would demonstrate a violation of the Agreement. The nature and scope of evidence required to establish such a *prima facie* case "will necessarily vary from measure to measure, provision to provision, and case to case."[28]

19 The Appellate Body rejected the allegation that this general rule is altered by describing a provision as **exception**. "[M]erely characterizing a treaty provision as an exception does not by itself justify a stricter or narrower interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation."[29]

20 This principle was explicitly expanded to the question of the allocation of the **burden of proof under Art. 2.4.** The Appellate Body in *EC—Sardines* reversed the Panel's opinion that under certain circumstances it was the respondent's task to demonstrate that an international standard was ineffective or inappropriate to fulfil the legitimate objectives pursued by a national measure.[30]

21 The competence to seek information and **advice from experts shall not circumvent** the basic procedural rule on the burden of proof. Although panels have a "significant investigative authority", this authority cannot be used by a panel to rule in favour of a complaining party which has not

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[27] Appellate Body Report; *US—Wool Shirts and Blouses*, WT/DS33/AB/R, 14. With repect to the SPS Agreement see *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 98. See also Appellate Body Report, *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 122.

[28] *US—Wool Shirts and Blouses*, WT/DS33/AB/R, 14.

[29] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 109.

[30] Appellate Body Report, *EC—Sardines*, WT/DS231/AB/R, paras 271; so the respective arguments by the Panel see Panel Report on *EC—Sardines*, WT/DS231/R, para. 7.50–7.52.

established a *prima facie* case of inconsistency based on specific legal claims asserted by it.

E. Standard of Review and Evidence

22 The TBT Agreement does not contain any provision on the appropriate **standard of review**. In fact, among the WTO Agreements only the Anti-Dumping Agreement prescribes a particular standard of review in its Art. 17.6 (i).[31] However, according to the Appellate Body in *EC—Hormones* the Members lacked the intent to transfer the specific standard of the Anti-Dumping Agreement to any other WTO Agreement.[32]

23 The standard of review must reflect the balance established in the TBT Agreement between the jurisdictional competences conceded by the WTO Members and the jurisdictional competences retained by the Members for themselves. Art. 11 DSU articulates "with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements".[33] The applicable **factual standard of review** by panels is neither a *de novo* review nor "total deference", but rather the "objective assessment of the facts" as stated by Art. 11 DSU. A panel must examine whether the competent authority has evaluated all relevant factors, whether the competent authority has examined all the pertinent facts and whether an adequate explanation has been provided of how those facts support the determination. The panel must also consider whether the competent authority's explanation fully addresses the nature and complexities of the data and responds to other plausible interpretations of the data.[34]

24 Concerning the **legal standard of review**, *i.e.* consistency or inconsistency of a Member's measure with the provisions of the applicable agreement, panels and the Appellate Body are obliged to apply the customary rules of interpretation of public international law. Additionally, Art. 11 DSU requires one to "make an objective assessment of the matter before it, including an

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[31] The provision reads as follows: "17.6 In examining the matter referred to in paragraph 5: (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; […]."

[32] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 114.

[33] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 116.

[34] Appellate Body Report, *US—Cotton Yarn*, WT/DS192/AB/R, para. 74.

objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".[35]

25 Neither the DSU nor the TBT Agreement establishes time limits for the submission of evidence to a panel. Although the Working Procedures in Appendix 3 to the DSU set out precise deadlines for the **presentation of evidence** by a party to the dispute, the Working Procedures do not prohibit submission of additional evidence after the first substantive meeting between a panel and the parties. The Appellate Body allows panels a considerable amount of discretion in admitting or refusing evidence.[36] In *EC—Sardines* the Appellate Body ruled that the interim review stage is an inappropriate time to submit new evidence.[37] The ruling was based on Art. 15 DSU which permits parties, during that stage of the proceedings, to submit comments on the draft report issued by the panel, and to make requests "for the panel to review precise aspects of the interim report". The interim review stage cannot properly include an assessment of new and unanswered evidence.[38]

F. Dispute Settlement Concerning Non-governmental and Local Government Bodies (Art. 14.4)

26 The dispute settlement provisions of the TBT Agreement can also be invoked in cases where a Member considers that another Member's organs have not achieved satisfactory results under Arts 3, 4, 7, 8 and 9 and its trade interests are significantly affected. The regulatory framework of the TBT Agreement addresses not only measures taken by a central government, but also by **local governmental bodies** (provinces, municipalities, cantons, *Länder*), by bodies subject to governmental control (see Annex 1) or even by non-state actors like non-governmental standardizing bodies mentioned in Arts 3, 4 and 8. If such entities violate the obligations under the TBT, their acts are treated as central government conduct. Art. 14.4 bridges the gap between the WTO Member, which on the level of public international law ratified the TBT Agreement, and the acting regional or local body, which autonomously enacts the measure complained of.[39]

27 In deviation from the ordinary standard of nullification or impairment[40] the conduct of a responsible actor on the sub-State level must **significantly affect the trade interests** of the complaining Member. The exact thresh-

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[35] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, paras 114–118.
[36] Appellate Body Report, *Argentina—Textiles*, WT/DS56/AB/R, para. 79.
[37] *EC—Sardines*, WT/DS231/AB/R, para. 301.
[38] *Ibid*.
[39] See *Palmeter & Mavroidis*, 177.
[40] See *Stoll*, Article XXIII GATT 1994, Max Planck CWTL, Vol. 2, paras 20 *et seq*.

old of significance can be determined by Panels and the Appellate Body only within specific disputes. However, Art. 14.4 allows for a *de minimis* standard which separates out cases with only negligible economic relevance.[41]

G. Evaluation

28 Art. 14 is important in that it addresses the sensitive question of expert advice in dispute settlement. The mere existence of the detailed rules in Annex 2 stresses that the Members were concerned about the role of independent individuals in a dispute settlement procedure dominated by States and their governmental resources. An expert opinion creates a strong argument for the proposition it supports and raises the intellectual effort needed for a decision making body to disregard such information. However, the Appellate Body has upheld the view that panels may also seek information from individual experts. Thus, the application of the Annex 2 procedure is **at the discretion of the dispute settlement organs**.

29 The provision is not subject to the DSU review process that has been taking place since 1998—the last as part of the Doha Round negotiations—to improve and clarify the DSU. As questions like the standard of review and the submission of evidence are in substance governed by Art. 11 DSU, any alteration in its interpretation will also affect the scope and application of Art. 14. By the **acceptance of individual experts** panels and the Appellate Body have developed a special regime in parallelism to the procedure outlined in Annex 2 and Art. 13.2, Appendix 4 DSU. One might criticize this approach as circumventing the Treaty provisions ratified by the WTO Members. The practice of individual experts giving advice, however, does not mean that these rules are unreasonable or even create new obligations.

[41] See Art. 5.8 AD Agreement and Art. 11.9 SCM.

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Article 15 TBT
Final Provisions

Reservations

1. Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

Review

2. Each Member shall, promptly after the date on which the WTO Agreement enters into force for it, inform the Committee of measures in existence or taken to ensure the implementation and administration of this Agreement. Any changes of such measures thereafter shall also be notified to the Committee.
3. The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof.
4. Not later than the end of the third year from the date of entry into force of the WTO Agreement and at the end of each three-year period thereafter, the Committee shall review the operation and implementation of this Agreement, including the provisions relating to transparency, with a view to recommending an adjustment of the rights and obligations of this Agreement where necessary to ensure mutual economic advantage and balance of rights and obligations, without prejudice to the provisions of Article 12. Having regard, inter alia, to the experience gained in the implementation of the Agreement, the Committee shall, where appropriate, submit proposals for amendments to the text of this Agreement to the Council for Trade in Goods.

Annexes

5. The annexes to this Agreement constitute an integral part thereof.

Case Law

Appellate Body Report, *Korea—Dairy*, WT/DS98/AB/R.

Documents

Committee on Technical Barriers to Trade, Decisions and Recommendations Adopted by the Committee since 1 January 1995, Note by the Secretariat, Revision, G/TBT/1/Rev.8, 23 May 2002; Committee on Technical Barriers to Trade, Implementation and Administration of the Agreement on Technical Barriers to Trade, G/TBT/2, Add.1– and Add.1–/Supp.1–, 29 January 1996; Committee on Technical Barriers to Trade, First Annual Review of the Implementation and Operation of the Agreement, Background Document by the Secretariat, G/TBT/3, 14 February 1996; Second Annual Review, G/TBT/4, 22 January 1997; Third Annual Review, G/TBT/6, 9 February 1998; Fourth Annual Review, G/TBT/7, 3 March 1999; Fifth Annual Review, G/TBT/8, 31 January 2000; Sixth Annual Review, G/TBT/10, 6 February 2001; Seventh Annual Review, G/TBT/11/Rev.2, 13 March 2002; Eighth Annual Review, G/TBT/12, 21 February 2003; Eight Annual Review, Corrigendum, G/TBT/12/Corr.1, 11 March 2003; Ninth Annual Review, G/TBT/14, 5 March 2004; Tenth Annual Review, G/TBT/15, 4 March 2005; Eleventh Annual Review, G/TBT/18, 17 February 2006; Committee on Technical Barriers to Trade, First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/5, 19 November 1997; Second Triennial Review, G/TBT/9, 13 November 2000, Second Triennial Review, Corrigendum, G/TBT/9/Corr.1, 20 November 2000; Third Triennial Review, G/TBT/13, 11 November 2003.

Cross References

Art. 913 NAFTA.

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A. General

Art. 15 contains "final" provisions with a variety of different functions. Arts 15.1 and 15.5 establish respectively that no reservations are possible to the TBT Agreement except by consent and that the Annexes are an integral part of the Agreement. Art. 15.2 requires WTO Members to notify the TBT Committee of general measures taken to implement the Agreement. And Arts 15.2 and 15.3 provide for a system of annual and triennial reviews of the Agreement by the Committee, leading where necessary to recommendations to the Council for Trade in Goods for amendments to the Agreement. *1*

B. Drafting History

Except for the substitution of "Members" for "Parties", Art 15.1 and 15.2 replicate Art. 15.5 and 15.7 of the **Tokyo Round Agreement on Technical Barriers to Trade** (the "Standards Code") respectively. Similarly, Art. 15.3 replicates Art. 15.8, sentence 1 Standards Code, and Art. 15.4, sentence 1 replicates the initial clauses of Art. 15.9. Art. 15.4, sentence 2 modifies the final clause of Art. 15.9 Standards Codes, providing now that proposals for amendments are to be made to the Council for Trade in Goods. Art. 15.5 replicates Art. 15.13. *2*

C. Reservations (Art. 15.1)

Reservations to the Agreement are **prohibited unless they have the consent of all other Members**. This provision should be read together with Art. XVI:5 WTO Agreement, which provides that reservations in respect of any of the provisions of the Multilateral Trade Agreements may be made to the extent provided for in those Agreements.[1] Nevertheless, under Art. XIII WTO Agreement a Member may refuse to apply the TBT Agreement, along with the WTO Agreement itself, to another Member at the time at which either becomes a WTO Member.[2] *3*

[1] Art. 19 lit. a VCLT provides that reservations are permitted unless prohibited by the treaty.

[2] Clauses providing for the non-application of a treaty after the treaty has entered into

D. Notifications (Art. 15.2)

4 Art. 15.2 imposes on Members a general transparency obligation to submit a **statement on the measures in existence** or taken to ensure the implementation and administration of the Agreement, including the provisions on transparency. Furthermore, Members must also provide a revised statement indicating any changes to the information contained in the statement.[3]

5 Such statements, to be made promptly after the date on which the WTO Agreement enters into force for Members, give a brief overview of how individual Members implement the TBT Agreement. The preparation and submission of these statements is also meant to assist Members in meeting their obligations under the Agreement, by enabling them to **take stock** of their existing legislation and institutional structure for the implementation and administration of the Agreement.[4]

6 The TBT Committee decided in 1995 that these statements should include information on the **legislative, regulatory and administrative action** taken as a result of the negotiation of the Agreement or currently in existence, to ensure that its provisions are applied.[5] This should include information on whether the Agreement has been incorporated into domestic law or, if not, the content of the relevant laws, regulations and administrative orders. In addition, the statements should include information on the following: the **names of the publications** used to announce that work is proceeding on draft TBT measures and in which the texts of these measures are published; the **length of time allowed for comments in writing** on TBT measures; detailed information on the **enquiry point(s)** provided for in Art. 10.1 and 10.3; the names and addresses of any **other agencies** that have specific functions under the Agreement, including those provided for in Art. 10.10 and 10.11; and measures to ensure that national and sub-national authorities preparing technical regulations or conformity assessment procedures provide early information on their proposals.[6]

7 At the end of 2005, a total of 103 Members (approximately two-thirds of the WTO Membership) had submitted at least one such statement.[7] The

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force for a party are most likely not to be considered as reservations. See International Law Commission, Fifth Report on Reservations to Treaties, by Mr Alain Pellet, Special Rapporteur, Addendum, 1 May 2000, A/CN.4/508.Add.1, paras 173–178.

[3] These statements are in the series: G/TBT/2, Add.1– and Add.1–/Supp.1–.

[4] G/TBT/9, para. 6.

[5] G/TBT/1/Rev.8, 10.

[6] *Ibid*.

[7] Committee on Technical Barriers to Trade, Statements on Implementation and Administration of the Agreement under Article 15.2, Note by the Secretariat, Revision, G/TBT/GEN/1/Rev.3, 16 February 2006.

relatively **low level of compliance** with Art. 15.2 has been a matter of concern for some Members[8] and the Committee.[9] However, the Committee has also recognized the particular problems faced by developing country Members in fulfilling their obligations under Art. 15.2, in part as a result of difficulties in implementing the Agreement.[10] The Committee has repeatedly invited Members to share their knowledge and experience concerning both the submission of the statement and the implementation of the Agreement.[11]

E. Annual Reviews (Art. 15.3)

8 Under Art. 15.3 the Committee undertakes an annual review of the **implementation and operation of the Agreement** over the course of the previous calendar year. The annual reviews take place at ordinary meetings of the Committee and take the form of the discussion and adoption of reports prepared by the Secretariat.[12] The Committee simultaneously undertakes its annual review of the Code of Good Practice in Annex 3 to the Agreement pursuant to the 1994 Ministerial Decision on Review of the ISO/IEC Information Centre Publication.[13]

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[8] *E.g.* Committee on Technical Barriers to Trade, Note from the European Community, First Three-Year Review of the Operation and Implementation of the Agreement of Technichal Barriers to Trade annexed to the Marrakesh Agreement establishing the World Trade Organization, G/TBT/W/36, 25 March 1997, para. 6; Committee on Technical Barriers to Trade, First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade of the Operation and Implementation of the World Trade Organization, Communication from Mexico, G/TBT/W/50, 5 August 1997, para. 6; Committee on Technical Barriers to Trade, Philippine Paper on the First Triennial Review, Communication from the Philippines, G/TBT/W/54, 30 September 1997, para. 3; Committee on Technical Barriers to Trade, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, Note from the European Community, G/TBT/W/133, 11 April 2000, para. 5; Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 3 October 1997, G/TBT/M/10, 5 January 1998, paras 18–26; Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 1 October 1999, G/TBT/M/17, 12 November 1999, paras 47–49; Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 25 February 2000, G/TBT/M/18, 5 April 2000, paras 93–95; Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 16–17 June 2005, G/TBT/M/36, 4 August 2005, paras 60–61.

[9] G/TBT/5, para. 6, G/TBT/9, para. 8, G/TBT/13, para. 7.

[10] G/TBT/5, para. 6, G/TBT/9, para. 10. Responses by developing countries to a Secretariat survey are set out in: Committee on Technical Barriers to Trade, A Compilation and Summary of the Responses Received to the Questionnaire for a Survey to Assist Developing County Members to identify and prioritise their specific needs in the TBT field, Note by the Secretariat, G/TBT/W/186, 14 October 2002, and Add.1, 13 March 2003.

[11] G/TBT/5, para. 7, G/TBT/9, para. 9, G/TBT/13, para. 7.

[12] For references, see Documents, above.

[13] See *Bartels*, Article 13 TBT, para. 14.

9 The content of the Secretariat's reports has evolved,[14] and the 2006 report included the following **items**: Committee meetings and activities; transparency procedures, comprising statistical information on notifications; technical assistance and special and differential treatment, giving information on workshops and other technical assistance; disputes involving provisions of the Agreement; as well as lists of Committee members and observers, documents issued, trade concerns raised, notifications, objectives and rationales set out in notifications,[15] Members' observation of the recommended comment period, and technical assistance rendered by the Secretariat.[16]

F. Triennial Reviews (Art. 15.4)

10 Art. 15.4 mandates the Committee to undertake a triennial review of the **operation and implementation of the Agreement**. These reviews are undertaken during ordinary meetings of the Committee, taking into account submissions made by Members, and lead to the adoption of a report.[17] A recent innovation was the development of a "roadmap", now a work programme,[18] in preparation for the fourth annual review.[19]

11 Triennial reviews have important functions. It is primarily, though not exclusively, in the context of triennial reviews that the Committee adopts

[14] The first annual review was conducted on the basis of the format contained in W/TBT/W/12, 22 September 1995. For discussion of the format, see Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 14 July 1995, G/TBT/M/2, 4 October 1995, paras 9–16; Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 20 October 1995, G/TBT/M/3, 5 January 1996, para. 28; Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 14 February 1997, G/TBT/M/7, 10 April 1997, paras 17–24; Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 20 March 2003, G/TBT/M/29, 19 May 2003, paras 6–10; Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 2 July 2003, G/TBT/M/30, 19 August 2003, para. 24; Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 23 March 2004, G/TBT/M/32, 19 April 2004, paras 16–19 and 101.

[15] Not all the objectives and rationales set out in notifications made by Members are included in the list of 'legitimate objectives' in Art. 2.2. See query in Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 1 March 1996, G/TBT/M/4, para. 6, and information concerning objectives and rationales in Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 20 October 1995, Notifications Made Under the Tokyo Round Agreement on Technical Barriers to Trade, Note by the Secretariat, G/TBT/W/18, 26 January 1996.

[16] Committee on Technical Barriers to Trade, Eleventh Annual Review of the Implementation and Operation of the TBT Agreement, Note by the Secretariat, G/TBT/18, 17 February 2006.

[17] For references, see Documents, above.

[18] See Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 2 November 2005, G/TBT/M/37, 22 December 2005, Annex 1.

[19] G/TBT/M/32, 19 April 2004, paras 111–115.

decisions and recommendations.[20] It is also on the basis of the triennial review that the **work programme** of the Committee is established.

12 The reviews undertaken to date have covered broadly the same **topics**. The report of the third triennial review grouped the following under these headings: implementation and administration of the Agreement, good regulatory practice, transparency procedures, conformity assessment procedures, technical assistance and special and differential treatment and other elements. Annexed to the report is a list of submissions related to the review, a list of Members' enquiry points, as notified under Art. 10, and a list of notifications made under Art. 15.2.[21] As mentioned, not all WTO Members have complied with these notification obligations.[22]

G. Proposals for Amendment (Art. 15.4)

13 The second sentence of Art. 15.4 provides that the Committee may make proposals to the Council for Trade in Goods for amendments to the text of the Agreement. The implication is that such proposals should be discussed in the triennial review. No such proposals have been made by the Committee.

H. Annexes (Art. 15.5)

14 Article 15.5 states that the annexes to the Agreement constitute an **integral part** thereof. This is very similar to the wording of Art. II:2 WTO Agreement, which states that "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 [...] are integral parts of this Agreement, binding on all Members". In *Korea—Dairy*, the Appellate Body stated that, in light of this provision, the WTO Agreement and its annexes must be interpreted as a whole.[23] Similarly, these annexes are to be read with the TBT Agreement as a whole.

I. Outlook

15 The obligation of WTO Members under Art. 15.2 to notify their implementation of the Agreement acts as a "barometer" of their compliance

[20] Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 20 November 1998, G/TBT/M/14, 10 February 1999, paras 43–47.
[21] G/TBT/13.
[22] See above, para. 7.
[23] Appellate Body Report, *Korea—Dairy*, WT/DS98/AB/R, para. 81.

with the substantive obligations of the Agreement.[24] At the same time, the annual and triennial reviews of the Agreement mandated under Arts 15.3 and 15.4 provide an opportunity for Members to discuss difficulties with implementation. The low level of compliance with Art. 15.2 is a matter of serious concern, and the reviews under Arts 15.3 and 15.4 have evidently not adequately addressed the reasons for this. One would hope that this will change in the near future.

[24] G/TBT/M/36, paras 60.

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AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

Preamble SPS

Members,

Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade;

Desiring to improve the human health, animal health and phytosanitary situation in all Members;

Noting that sanitary and phytosanitary measures are often applied on the basis of bilateral agreements or protocols;

Desiring the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade;

Recognizing the important contribution that international standards, guidelines and recommendations can make in this regard;

Desiring to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including the Codex Alimentarius Commission, the International Office of Epizootics, and the relevant international and regional organizations operating within the framework of the International Plant Protection Convention, without requiring Members to change their appropriate level of protection of human, animal or plant life or health;

Recognizing that developing country Members may encounter special difficulties in complying with the sanitary or phytosanitary measures of importing Members, and as a consequence in access to markets, and also in the formulation and application of sanitary or phytosanitary measures in their own territories, and desiring to assist them in their endeavours in this regard;

Desiring therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b);[1]

Hereby agree as follows:

Footnote 1: In this Agreement, reference to Article XX(b) includes also the chapeau of that Article.

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H. Outlook

A. General

1 Like most WTO agreements, the SPS Agreement begins with a Preamble. A treaty's preamble has recognized status under the Vienna Convention on the Law of Treaties which states that the preamble and annexes of a treaty are part of its context for the purpose of treaty interpretation.[1] In

[1] Art. 31.2 VCLT.

US—Shrimp, the Appellate Body drew insights from the Preamble of the WTO Agreement to determine that Art. XX lit. g GATT 1994 is "by definition, evolutionary," rather than merely "static" in its content and reference.[2] This holding demonstrates that preambles of WTO agreements can exert significant influence on the interpretation of provisions in those agreements. In *EC—Hormones (US)*, the Appellate Body twice drew upon the text of the SPS Preamble in interpreting SPS provisions.[3] This jurisprudence demonstrates the relevance of the SPS Preamble.

B. Relationship to Art. XX GATT 1994 (Recs 1 and 8)

2 Rec. 1 reaffirms "that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health", and this affirmation is subject to the requirement that such measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade". This recital should be read in conjunction with Rec. 8, which states the intention of the drafters as "*[d]esiring* therefore to elaborate rules for the application of the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b)", including its Chapeau. In *Australia—Salmon*, the Appellate Body noted that Rec. 1 of the SPS Preamble reflects the Chapeau of Art. XX GATT 1994.[4]

3 Although Rec. 8 seemingly suggests that the SPS Agreement is merely an elaboration of rules for the application of Art. XX GATT 1994,[5] that limited view has not animated the application of SPS, especially after the first SPS decision *EC—Hormones*. In that dispute, the Panel rejected the EC's claim that the SPS Agreement does not impose substantive requirements **additional** to those already contained in GATT Art. XX lit. b GATT 1994.[6] In addition, the panel held that recourse to the SPS Agreement does not require a prior showing of a GATT violation.[7] In the Panel's view, many SPS provisions impose substantive obligations that "go significantly beyond

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[2] Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, paras 129–130. See also para. 155 (stating that the Preamble to the WTO Agreement gives colour, texture, and shading to the rights and obligations of WTO Members).

[3] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R.

[4] Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R, para. 251.

[5] One former member of the WTO Appellate Body has written that the provisions of the SPS Agreement are an elaboration of Art. XX lit. b GATT 1994. *Matsushita*, in: *Cottier & Mavroidis* (eds), 193–212.

[6] Panel Report, *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.38.

[7] *Ibid.*, para. 8.41.

and are additional to the requirements for invocation of Article XX(b)".[8] Thus, the panel held that the SPS Agreement imposes obligations that are different from those in the GATT.[9]

4 The relationship between GATT and SPS is that they are separate agreements relating to trade in goods. Of course, like all of the other Annex 1A agreements, the SPS Agreement would prevail over the GATT if there were a conflict between the GATT and the SPS Agreement.[10] A review of the negotiating history suggests Rec. 8 of the SPS Preamble is simply an inelegantly drafted artifact of convoluted SPS negotiation.[11] If one were trying to impart meaning to Rec. 8, it would be that the SPS has substantially **narrowed the benefit of the Art. XX lit. b GATT 1994 exception** for challenges to sanitary or phytosanitary measures, while leaving Art. XX lit. b GATT 1994 unaffected for challenges to measures that do not have a sanitary or phytosanitary purpose. The negotiations that drafted the SPS Agreement began as part of the agriculture talks and were imagined as a way of minimizing the impact that unnecessary SPS measures have on trade in agriculture.[12] Attempts to discipline such measures had from the 1920s been pursued by the international community with only limited success.[13] Thus, the SPS Agreement establishes new rules that can be violated in many ways that do not transgress any GATT rule (for which a justification may be sought under Art. XX GATT 1994).

5 Commentators have occasionally posited that conformity with the GATT might be a defence against an SPS violation. Such an interpretation would seem to contradict the purpose of the SPS Agreement, which was to establish disciplines **for trade-restrictive measures that were not in violation of the GATT.**

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[8] *Ibid.*, para. 8.38.

[9] *Ibid.*, para. 8.40.

[10] See WTO Agreement, General Interpretative Note to Annex 1A: "In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the 'WTO Agreement'), the provision of the other agreement shall prevail to the extent of the conflict." In addition, the use of an international SPS standard may support a defence to an alleged violation of the GATT. See Art. 3.2 SPS and *Landwehr*, Article 3 SPS, paras 27–29.

[11] One commentary suggests that because of the recital, a panel might interpret ambiguous provisions in the SPS Agreement to accord with the GATT. *Marceau & Trachtman*, in: *Ortino & Petersmann* (eds), 275, 335.

[12] *Croome*, 111, 117, 237–38, 241, 387. See Agreement on Agriculture, Preamble, Rec. 4, UNTS 1867 (1995), 410. See <www.wto.org/english/tratop_e/agric_e/agric_e.htm>.

[13] One success was the League of Nations Convention concerning the Export and Import of Animal Products (other than Meat, Meat Preparations, Fresh Animal Products, Milk and Milk Products), 20 Feb. 1935, LNTS 193, 59.

6 The WTO jurisprudence on the SPS Agreement has influenced the jurisprudence on Art. XX.[14] Rec. 1 is seemingly a restatement of Art. XX lit. b GATT 1994 in the context of Art. XX's Chapeau. The one major difference is that Art. XX GATT 1994 appears to be more obligatory (by using the word "shall") than the SPS Preamble which uses the word "should." Yet in *Canada—Aircraft*, the Appellate Body interpreted the term **"should"** in Art. 13.1 DSU as **"normative"** rather than "exhortative," and therefore conferring a duty.[15] The question thus arises whether a reaffirmation that "no Member" should be prevented from adopting or enforcing measures necessary to protect life or health (subject to listed requirements) could be directly invocable as a defence by a WTO Member. In my view, it is one thing to use a preamble to interpret a particular obligation; it is quite another to treat a preamble as an obligation or an exception. Thus, **the Appellate Body would not elevate Rec. 1 to a freestanding defence.**

7 This analysis leads to a conclusion that despite Rec. 1, the SPS Agreement can render nugatory measures by Member governments that are objectively necessary to protect human, animal or plant life or health, even when those measures are not applied through arbitrary or unjustifiable discrimination and are not a disguised restriction on international trade.[16] A hypothetical example might be an otherwise valid SPS measure for which the regulating government cannot point to a risk assessment fulfilling the extensive requirements of the SPS Agreement.[17]

8 In *Australia—Salmon*, the Appellate Body noted that the fundamental importance of Art. 2.3 is reflected in Rec. 1.[18] One can also see Rec. 1 reflected in Arts 2.1 and 2.2.

9 Rec. 1 refers to the requirement that SPS measures not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination. This provision highlights the fact that the SPS Agreement aims to prevent discrimination (see arts. 2.3, 5.5). But it is important to recognize that the SPS Agreement goes well beyond the goal of preventing discrimination. To quote Prof. *Hudec*, the SPS Agreement embodies "post-discriminatory" WTO law.[19]

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[14] *Goh*, JWT 40 (2006), 655, 668.

[15] Appellate Body Report, *Canada—Aircraft*, WT/DS70/AB/R, para. 187. See *Behboodi*, JIEL 3 (2000), 563–592.

[16] In *EC—Sardines*, the panel examined Rec. 6 of the TBT Preamble, which has a similar syntax and substance to Rec. 2. The Panel found that this provision, as well as Art. 2 TBT, imposes some limits on the regulatory autonomy of WTO Members. Panel Report, *EC—Sardines*, WT/DS231/R, adopted as modified by Appellate Body Report, *EC—Sardines*, WT/DS231/AB/R, paras 7.119–7.120. The Panel did not appear to consider the recital as a possible defence.

[17] *See Australia—Salmon*, WT/DS18/AB/R, paras. 127–135.

[18] *Ibid.*, para. 251.

[19] *Hudec*, B. C. Int'l & Comp. L. Rev. 26 (2003), 185–195.

C. Improving Health (Rec. 2)

10 The SPS Agreement clearly has a trade purpose, but whether it also has a health purpose is not as clear. Rec. 2 of the Preamble to the SPS Agreement memorializes the desire of Members "to improve the human health, animal health and phytosanitary situation in all Members." Rec. 2 therefore suggests that improving human, animal and plant health is one of the aims of the WTO Agreement. In *EC—Hormones*, the Appellate Body took note of the "right *and duty* of Members to protect the life and health of their people".[20] Indeed, the WTO Secretariat echoes that position in contending: "Consumers in all countries benefit. The SPS Agreement helps ensure, and in many cases enhances, the safety of their food as it encourages the systematic use of scientific information in this regard, thus reducing the scope for arbitrary and unjustified decisions."[21] It is interesting to note, however, that a leading health law scholar argues that the WTO is merely "reactive to health policies" and can only "say no to such policies," and that "the WTO can neither formulate its own health policies nor instruct members to do so."[22]

11 Rec. 2 has relevance for all of the SPS Agreement and particularly for the scope of Art. 9 regarding technical assistance. WTO efforts to promote food safety were slow in starting, but the Standards and Trade Development Facility (a joint venture of international organizations) shows the potential for cooperation. Recently, several international organizations, including the WTO, established the International Portal on Food Safety, Animal & Plant Health, which has a wealth of information on health issues. The portal says that its purpose is to facilitate trade in food and agriculture products and to support the implementation of the SPS Agreement.

12 The term "phytosanitary situation" in Rec. 2 is not defined, and one might infer the meaning of plant health.

D. Bilateral Agreements (Rec. 3)

13 Rec. 3 notes that sanitary and phytosanitary measures are often applied on the basis of bilateral agreements or protocols.[23] This recital should be read in conjunction with Art. 4.2, which states that Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral

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[20] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 177 (emphasis added).

[21] *WTO*, Understanding the SPS Agreement, para 17, See <www.wto.org/english/tratop_e/sps_e/spsund_e.htm>.

[22] *Bloche*, JIEL 4 (2002), 825, 845.

[23] See, *e.g.*, *Aritake*, BNA Int'l Trade Rep. 21 (2004), 1758.

agreements on recognition of the equivalence of specified SPS measures. Also relevant is Art. 12.2 on the role of the SPS Committee in encouraging negotiations. The question whether a bilateral agreement could serve as a defence to an SPS challenge at the WTO has not arisen.

E. Minimizing Negative Trade Effects (Recs. 4 and 5)

14 Rec. 4 states the desire to establish a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of SPS measures in order to minimize their negative effects on trade. This recital should be read with Art. 5.6 which implements the goal of minimizing the negative effects of SPS measures on trade. The multilateral framework of rules in the SPS Agreement is strengthened considerably by the continuous incorporation of international standards. Rec. 5 recognizes the important contribution that international standards, guidelines and recommendations can make in this regard, that is, in helping to achieve the goal of minimizing the negative trade effects of SPS measures. Art. 12.4 directs the SPS Committee to establish a list of international standards relating to national measures that have a "major trade impact." Annex B:5 calls for notification when SPS regulations may have a significant effect on trade.

15 In *EC—Approval and Marketing of Biotech Products*, the Panel suggested that its interpretation of Annex C:1 lit. a was supported by the object and purpose of the SPS Agreement as evidenced by Rec. 4 which refers to minimizing negative trade effects.[24]

F. Harmonization and the Precautionary Principle (Rec. 6)

16 Rec. 6 states the desire to further the use of harmonized SPS measures on the basis of international standards, guidelines and recommendations developed by the relevant international and regional organizations "without requiring Members to change their appropriate level of protection of human, animal or plant life or health." This phrase was added to the draft SPS Agreement toward the end of the negotiation.[25]

17 A Member's **appropriate level of protection** is a concept referred to in Art. 3.3 (and many other provisions) and defined in Annex A:5. Although Rec. 6 might be taken to mean that the harmonization requirements of SPS could not require a Member to change its appropriate level of

[24] Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras. 7.1499, 7.1502.

[25] *Stewart* (ed.), Vol. IV, at 41, 44.

protection, the actual discipline in Art. 3.3 makes it clear that a Member has to determine its own level of protection in accordance with Art. 5. Furthermore, regardless of a Member's appropriate level of risk, if an SPS measure would result in a level of protection different from that dictated by an international standard, that measure must not be inconsistent with any provision of the SPS Agreement.[26]

18 **The goal of furthering use of harmonized measures** is promoted through the disciplines in Art. 3 (Harmonization). In *EC—Hormones*, the Appellate Body referred to Rec. 6 in reversing the Panel's interpretation of Art. 3.1.[27] At issue was whether the Panel was correct that the requirement in Art. 3.1 that measures be based on international standards meant that measures had to "conform to" international standards. The Appellate Body held that the harmonization of SPS measures on the basis of international standards was a goal of the SPS **Agreement to be realized in the future** rather than obliged "in the here and now".[28] The Appellate Body marshalled several arguments to reach this conclusion, including that Rec. 6 records the desire by Members "to further the use" of harmonized measures rather than to mandate conformity.[29]

19 The **precautionary principle** counsels preemptive action or inaction in the absence of scientific information about potentially irreversible risks.[30] The principle has proved difficult to put into practice for many reasons, including the fact that it has become imbued with transcendental and cultural values. In *EC—Hormones*, the Appellate Body held that the "precautionary principle" is "reflected" in Arts 3.3 and 5.7, and in Rec. 6, which recognize the right of Members to establish their own level of sanitary protection that "may be higher (*i.e.*, more cautious) than that implied" in existing international standards.[31] Although comprehensible with regard to Art. 5.7, this holding is puzzling with regard to Art. 3.3 and the Preamble. A choice to be more risk averse than implied in an international standard has little to do with the precautionary principle, which is about decision-making in the absence of scientific information. When sufficient scientific data is available to make rational decisions in the presence of uncertainty, then the precautionary principle has little relevance. The principle becomes relevant, however,

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[26] See Art. 3.3.

[27] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 165. In *EC—Sardines*, the Appellate Body referred to Rec. 3 of the TBT Preamble as recognizing the contribution of international standards. *EC—Sardines*, WT/DS231/AB/R, para. 215.

[28] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 165.

[29] *Ibid*. See *Landwehr*, Article 3 SPS, para. 18.

[30] For the precautionary principle see: *Boutillon*, Mich. J. Int'l L. 23 (2002), 429–469; *Wiener*, Duke J. Comp. & Int'l L. 13 (2003), 207–262; *Gehring*, in: *Koufa* (ed.), 583–599; *Salmon*, 138–155; *Victor*, Transnat'l Law. 14 (2001), 295–321; *Bohanes*, Colum. J. Transnat'l L. 40 (2002), 323–389.

[31] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 124.

when there is not enough scientific information to make such decisions. Normally when an international standard exists, it was written because there was scientific information available. Thus, a decision by a government to seek a higher level of protection than provided in an international standard would typically not need to stand on the precautionary principle. Rather, it would be a normal exercise by a government of its regulatory autonomy, to be more protective of individuals than the level agreed upon in the international process.

20 In *EC—Hormones*, the Appellate body explained that the precautionary principle "has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement".[32]

21 The WTO Secretariat has opined that Members "can to some extent apply the 'precautionary principle', a kind of 'safety first' approach to deal with scientific uncertainty".[33]

22 Many **international SPS standards** have been adopted by the Codex Alimentarius Commission, the International Office of Epizootics and the Secretariat of the International Plant Protection Convention.[34]

G. Developing Countries (Rec. 7)

23 Rec. 7 refers to the challenges faced by developing countries. In particular, this recital recognizes that developing country Members may encounter **special difficulties** in complying with the SPS measures of importing countries, and also in the formulation and application of SPS measures in their own territories. The recital expresses a desire to assist, and that goal is pursued in Arts 9, 10, and 14.[35]

H. Outlook

24 The SPS Preamble is a roadmap to the future dualistic course of the SPS Agreement. Certainly, the expectations of the drafters will play out of using the Agreement to rigorously supervise national SPS measures. Yet on

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[32] *Ibid.*

[33] *WTO*, Standards and Safety, availabale at <www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm.

[34] G/SPS/W/18 and Corr.1 (Codex); G/SPS/W/21 and G/SPS/W/23. For updated information, see *e.g.* G/SPS/W/107/Rev.1, G/SPS/GEN/177, G/SPS/GEN/185, G/SPS/GEN/266, G/SPS/GEN/271, and G/SPS/GEN/282.

[35] See *Seibert-Fohr*, Article 9 SPS, paras 1 *et seq.; Seibert-Fohr*, Article 10 SPS, paras 1 *et seq.; Röben*, Article 14 SPS, paras 1 *et seq.*

the other hand, public opinion will continue to drive WTO Members to broaden the work of the WTO Secretariat and the SPS Committee so as to embrace normative and technical assistance activities in favour of promoting public health.[36] Improvements in public health could also occur if a government tightens regulation against particular risks in order to achieve the "consistency" mandated in Art. 5.5 SPS.

[36] See *Charnovitz*, in: *Sampson & Chambers* (eds), 207, 225–227.

Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO-Technical Barriers and SPS Measures.*
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Article 1 SPS
General Provisions

1. This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.
2. For the purposes of this Agreement, the definitions provided in Annex A shall apply.
3. The annexes are an integral part of this Agreement.
4. Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement.

Annex A
Definitions[4]

1. *Sanitary or phytosanitary measure*—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 labelling requirements directly related to food safety.
2. *Harmonization*—The establishment, recognition and application of common sanitary and phytosanitary measures by different Members.
3. *International standards, guidelines and recommendations*
   a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;
   b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;
   c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and
   d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.
4. *Risk assessment*—The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.
5. *Appropriate level of sanitary or phytosanitary protection*—The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.

NOTE: Many Members otherwise refer to this concept as the "acceptable level of risk".

6. *Pest- or disease-free area*—An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur.
   NOTE: A pest- or disease-free area may surround, be surrounded by, or be adjacent to an area—whether within part of a country or in a geographic region which includes parts of or all of several countries—in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question.
7. *Area of low pest or disease prevalence*—An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease occurs at low levels and which is subject to effective surveillance, control or eradication measures.

Footnote 4: For the purpose of these definitions, "animal" includes fish and wild fauna; "plant" includes forests and wild flora; "pests" include weeds; and "contaminants" include pesticide and veterinary drug residues and extraneous matter.

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Cross References

Arts 709, 710, 724 NAFTA.

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A. Application of the SPS Agreement (Art. 1.1)

I. Direct or Indirect Effect on Trade

1 Art. 1.1 states that the SPS Agreement applies to sanitary and phytosanitary measures that "may, directly or indirectly, affect international trade". In *EC—Hormones (US)*, the panel parsed this provision and explained that it set the two requirements for the Agreement to apply—namely, that there is an SPS measure and that it affects trade.[1] SPS measures are defined in Annex A as elaborated below. With regard to affecting trade, the panel pointed to Art. 1.1 and noted that it cannot be contested that the import ban at issue affects international trade.[2] The phrase "directly or indirectly" is contained in 11 WTO covered agreements. The phrase "affecting trade in services" appears in Art. I:1 GATS (Scope and Definition).

2 The term of "**affecting**" in Art. 1.1. is not defined, but past GATT and WTO practice suggests that this term would be given a broad play. Thus, the term "affecting" does not seem to require showing a quantifiable impact on trade. In *EC—Bananas III*, the Appellate Body stated that the term "affecting" in Art. I:1 GATS reflects the intent of the drafters to give a broad reach to the GATS, and is reinforced by conclusions of previous panels that the term "affecting" in the context of Art. III GATT 1994 is wider in scope than such terms as "regulating" or "governing".[3] In an influential early GATT case, *Italy—Agricultural Machinery*, the panel found that the word "affecting" implies that the drafters intended to cover not only the laws and regulations that directly govern the conditions of sale or purchase, but also any laws or regulations that might adversely modify the conditions of competition between domestic and imported products on the internal market.[4]

3 In *EC—Approval and Marketing of Biotech Products*, the panel explained that for an SPS measure to affect international trade, it is not necessary that there be a demonstration that the measure "has an actual effect on trade".[5] The panel also emphasized that trade could be affected in a direct or indirect way.

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[1] Panel Report, *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.36.
[2] *Ibid.*, para. 8.23.
[3] Appellate Body Report, *EC—Bananas III*, WT/DS27/AB/R, para. 220.
[4] Panel Report, *Italy—Agricultural Machinery*, BISD 7S/60, para. 12.
[5] Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.435.

II. Trade in Goods

4 SPS measures often apply equally to imported and internally made products. Thus, SPS measures will regularly be manifestations of domestic policy, not trade policy. Sometimes, SPS measures are applied exclusively to imported products or to products whose importation is being attempted.

5 Art. 1.1 does not specify trade in goods, but because SPS is an Annex 1A covered agreement, its scope is limited to **trade in goods**. Thus, a measure affecting a sanitary or phytosanitary service presumably is not covered by the SPS Agreement.

III. Obligation to Develop SPS Measures

6 Art. 1.1 states that SPS measures "**shall be developed** and applied in accordance with the provisions of this Agreement". The concept of development is reflected in Rec. 4 of the SPS Preamble which states that SPS rules guide the *development*, adoption, and enforcement of SPS measures. The issue whether the phrase "shall be developed" is itself an obligation has not been litigated in WTO dispute settlement. In *EC—Hormones*, the question ensued as to whether there were "procedural requirements" in SPS Art. 5.1 for the regulator to actually take the risk assessment into account in developing an SPS regulation. The Appellate Body characterized as an "error in law" the panel's holding that there was a "minimum procedural requirement" in Art. 5.1 for some "subjectivity" to be present in particular individuals.[6] The Appellate Body's ruling seems to suggest that regulators do not have to develop an SPS measure by using a risk assessment so long as a defendant government can show that a measure is substantively based on a risk assessment by the time that the matter goes before a WTO panel. Perhaps that issue will be reconsidered by the Appellate Body in a future case. There may also be consideration in the future as to whether Art. 1.1 requires Members to proactively develop SPS measures.

IV. Obligations Regarding Subnational Measures

7 As with WTO covered agreements generally, a Member's obligations extend not only to measures of the central government, but also to measures of **subnational governments**. In the compliance phase of the *Australia—Salmon* case, the panel, noting Art. 13 SPS and Art. 22.9 DSU, held that

[6] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 189. Rather than a subjective requirement, the Appellate Body declared that Art. 5.1 referred to an objective relationship between the challenged SPS measure and a risk assessment.

a measure taken by the state of Tasmania fell under the responsibility of Australia even if Australia objected to the measure.[7]

V. Temporal Application

8 The question of the temporal application of the SPS Agreement arose in *EC—Hormones*. The Appellate Body held that the Agreement applies to **measures enacted before 1995** that continue to be in force.[8] Furthermore, the Appellate Body stated that Arts 2.2, 2.3, 3.3 and 5.6 expressly contemplate their applicability to SPS measures existing before 1 January 1995.

VI. Relationship to Accession Protocols

9 The relationship of SPS rules to the additional disciplines in individual Protocols of Accession has yet to be determined. Many accession protocols contain applicant WTO-plus SPS obligations.

B. Definition of Treaty Terms (Art. 1.2 and Annex A)

10 Art. 1.2 states that the definitions in Annex A shall apply. Art. 1.3 states that all of the SPS Annexes are an integral part of the SPS Agreement.

I. Scope of SPS Measures (Annex A, Para. 1)

11 SPS measures are defined in Annex A:1. In *EC—Approval and Marketing of Biotech Products*, the Panel opined that in determining whether the measure in dispute is an SPS measure (rather than a non-SPS measure), "regard must be had to such elements as the **purpose of the measure**, its **legal form** and its **nature**".[9]

1. Purpose

12 Annex A:1 provides definitions of the **purposes of measures that come within the scope of the SPS Agreement**. If a measure does not have a purpose listed in para. 1, then that measure is not covered by the SPS Agreement. Para. 1 begins by listing four purposes, lit. a–d, broadly related

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[7] Panel Report, *Australia—Salmon (Article 21.5—Canada)*, WT/DS18/RW, paras 7.12–7.13, 7.162.

[8] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, paras 128, 130.

[9] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.149.

to human, animal or plant life or health or to the prevention of other damage from pests. Nevertheless, in an SPS dispute, no shorthand description can substitute for a careful examination of the contested measure to see if it matches one or more of the enumerated risks that come under the terms of the Agreement.[10] In all of the SPS cases decided up to November 2006, the panel or Appellate Body noted that the measure was aimed at least one of the lit. a—d purposes.[11]

13 In *Japan—Apples*, the Panel noted that the Annex A:1 definitions do not consider the **trade effect** of a given measure as a factor to determine whether such a measure is or is not a phytosanitary measure.[12] The Panel further stated that the definition does not require SPS measures to be mandatory or legally enforceable.[13]

14 A particular SPS measure—for example, one aimed at pests—can come within the scope of three of the subparagraphs. In *Australia—Salmon*, the Panel seemed to select the subparagraph by which the measure was more "appropriately covered".[14]

15 Each of the lit. a—c refers to a distinct range of beneficiaries**.** Thus, lit. a is aimed at the protection of "animal or plant life or health". Lit. b is aimed at the protection of "human or animal life or health". Lit. c is aimed at the protection of "human life or health". Lit. d does not specify a beneficiary. In *EC—Approval and Marketing of Biotech Products*, the Panel held that the purpose for which a measure was adopted is not conclusive on whether the measure is an SPS measure; rather, a panel has to look at whether the measure is being "applied" for one of the enumerated purposes.[15] In doing so, the purpose is to ascertained "on the basis of objective considerations", not just the purposes articulating by the defendant government.[16]

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[10] See *Echols*, 97; *Wolff*, in: *Meléndez-Ortiz & Sánchez* (eds), 223.

[11] In three of the cases, the purpose was found in lit. a. Those were: Panel Report, *Australia—Salmon*, WT/DS18/R, para. 8.37; Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R, para. 172; Panel Report, *Japan—Agricultural Products II*, WT/DS76/R, para. 8.12; Panel Report, *Japan—Apples*, WT/DS245/R, para. 8.13. In the fourth case, the purpose was found in lit. b. *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.22. In the fifth case, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, the purpose was found in all four subparagraphs.

[12] *Japan—Apples*, WT/DS245/R, para. 8.24.

[13] *Ibid.*, para. 8.111. The Appellate Body did not review this holding. In an earlier case, the Appellate Body found that a non-legally-enforceable instrument that was applicable generally is within the scope of Annex B. Appellate Body Report, *Japan—Agricultural Products II*, WT/DS76/AB/R, paras 104–105.

[14] *Australia—Salmon*, WT/DS18/R, para. 8.34; *Pauwelyn* (1999), JIEL 2 (1999), 641, 644.

[15] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.167.

[16] *Ibid.*, para. 7.2558.

16 Not all regulatory measures relating to food fall into one of these categories.[17] For example, measures that would restrict the entry of junk food, non-Kosher food, non-organic food, food that violates cultural taboos, or food from animals treated inhumanely appear to be **outside the terms of the SPS Agreement**. Risks from bioterrorism in food appear to be covered by lit. b. This is the author's analysis; no such issues have come through WTO dispute settlement as of November 2006.

17 All four subparagraphs of para. 1 describe measures as being aimed at the protection or prevention of damage **"within the territory"** of the Member imposing the measure. Thus, the geographic domain of the SPS Agreement does not extend to measures to protect humans, animals or plants outside the territory of the regulating government. For example, a measure preventing the export of animals with certain diseases would presumably not be covered by the SPS Agreement. When a measure is not covered by the SPS Agreement, such a measure cannot violate the SPS Agreement.

18 With regard to the **proper interpretative approach to ascertaining the existence of an SPS measure**, the Panel in *EC—Approval and Marketing of Biotech Products* held that the "general definition" in Annex A:1 "must not be applied in mechanistic fashion" and that "account should also be taken of the specific context" within the SPS Agreement.[18] As with everything in this Panel Report, this holding (or dicta) was not reviewed by the WTO Appellate Body.

19 The degree to which the **environment** comes within the scope of the SPS Agreement has been the subject of considerable scholarly commentary.[19] Certainly, some environmental measures are SPS measures. This can be seen in several ways in the text of the SPS Agreement: The named beneficiaries in Annex A—namely, animals, plants, and humans—are part of the environment. The listed risk agents, such as pests, diseases, organisms, additives, toxins, etc., come within the terms of environmental policymaking. The Annex A:1 definitions define "animal" to include fish and wild fauna, "plant" to include forests and wild flora, and "contaminants" to include pesticide and veterinary drug residues. Art. 5.2 states that in the assessment of risks, a Member shall take into account a number of factors, including "relevant ecological and environmental conditions." Art. 6.2 states that

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[17] The Uruguay Round Draft Final Act of December 1991 states that most participants in the negotiation were of the view that only some aspects of consumer concerns related to health were within the scope of the draft Decision by Contracting Parties on the Application of Sanitary and Phytosanitary Measures. Draft Final Act Embodying the Results of the Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA,20 December 1991, Section L, Part C.

[18] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.1337.

[19] See, *e.g, Roberts*, JIEL 1 (1998), 377, 382.

determination of areas that are pest-free, low-pest, or disease-free "shall be based on factors such as geography, ecosystems, epidemiological surveillance", and the effectiveness of SPS controls.

20 In *EC—Approval and Marketing of Biotech Products*, the Panel explained that measures to protect the environment are "not *a priori* excluded from the scope of application of the *SPS Agreement*" if the measure is covered by one of the purposes in Annex A:1.[20] Although some measures to protect the health of humans, animals, and plants are, *ipso facto*, environmental measures, not all environmental measures are aimed at protecting humans, animals, and plants. In particular, the Panel ruled that Annex A:1 lit. d encompasses "certain damage to the environment other than damage to the life or health of animals or plants".[21] The Panel also offered a converse hypothetical example of an environmental measure that is excluded from the SPS scope. The example is a measure to reduce air pollution in order to protect the life or health of animals and plants.[22] In reaching these conclusions, the Panel addressed some aspects of the preparatory work on SPS.[23]

21 A horizontal issue for the interpretation of Annex A:1 is the **meaning of "pests"** In *EC—Approval and Marketing of Biotech Products*, the Panel endowed this term with a broad meaning, perhaps broader than was intended or anticipated by the drafters of the SPS Agreement in the early 1990s. Using as an informative aid the International Standard for Phytosanitary Measure No. 11 adopted in 2004 by the IPPC,[24] the Panel held that pests include any animal or plant that is "destructive" or that is a "troublesome or annoying" animal or plant.[25] Thus, genetically modified plants that "grow where they are undesired" are "pests" within the scope of Annex A:1, as are "cross-breeds" exhibiting "undesired introduced traits".[26] For this reason, governmental measures to avoid to invasiveness of genetically modified plants are SPS measures.[27]

22 The meaning of the **Annex A:1 lit. a purpose** was explicated in *EC—Approval and Marketing of Biotech Products.* With respect to the term "animal or plant life or health", the Panel held that it was "meant to be comprehensive in coverage", and encompasses macro and micro fauna and flora as well as

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[20] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.207.

[21] *Ibid.*, para. 7.209. The Panel further stated that a measure to "avoid adverse effects of GMOs on the environment other than adverse effects on animal or plant life or health" is covered by Annex A:1 lit. d. *Ibid.*, para. 7.2583.

[22] *Ibid.*, para. 7.210.

[23] See *ibid.*, paras 7.208, 7.211.

[24] *Ibid.*, paras 7.233, footnote 390, 7.253, footnote 406.

[25] *Ibid.*, para. 7.240.

[26] *Ibid.*, paras 7.247, 7.255, 7.2581.

[27] *Ibid.*, paras 7.2579, 7.2580.

soil and aquatic micro-organisms. [28] With respect to the term "risks arising from the entry, establishment or spread of pests" the Panel held that the term includes risks "which might arise" from pests.[29] In addition, the Panel said that measures taken to protect against risks "that arise indirectly or in the longer term" lie within the scope of Annex A:1 lit. a.[30] Thus, for example, risks from a change in pesticide or herbicide use could arise indirectly from the entry of a pest.[31] With respect to the terms "disease-carrying organisms" and "disease-causing organisms," the Panel referenced World Health Organization definitions that define the former as a "vector" and the latter as a "pathogen."[32] Thus, a pathogen that develops resistance to an antibiotic qualifies as a disease-causing organism under Annex A:1 lit. a.[33]

The meaning of the **Annex A:1 lit. b purpose** was explicated in *EC— Approval and Marketing of Biotech Products.* With respect to the term "human [. . .] life or health", the Panel held that a requirement that food "not be nutritionally disadvantageous for the consumer" lies outside the meaning of human health.[34] With respect to the term "additives", the panel held that genes can be additives when they are intentionally added to plants that will be used as an input into processed foods.[35] This includes antibiotic resistance marker genes. With respect to the term "contaminants," the Panel held that "proteins produced through the *unintended* expression of modified genes in agricultural crops" are additives if they "infect or pollute" the food product.[36] With respect to the term "toxins", the Panel held that a "poisonous substance which is produced during the metabolism or growth" of a genetically modified crop could be a toxin.[37] Having noted that the Annex text is silent on the question of whether an allergen is a toxin, the Panel held that the SPS term "toxins" encompasses "food allergens which might be produced by GMOs".[38] With respect to the term "food, beverages or feedstuffs", the Panel held that genetically modified seeds for sowing purposes are "food" for animals, and a genetically modified crop that is eaten by an animal also constitutes animal "food" even when the crop is not intended for that purpose.[39] In addition, the term "food" encompasses genetically modified plants that are processed into products that are eaten.[40] *23*

[28] *Ibid.*, para. 7.219.
[29] *Ibid.*, para. 7.225.
[30] *Ibid.*, para. 7.226.
[31] *Ibid.*, paras 7.266, 7.2582.
[32] *Ibid.*, para. 7.277, citing a 1997 document.
[33] *Ibid.*, para. 7.282.
[34] *Ibid.*, para. 7.414.
[35] *Ibid.*, para. 7.301.
[36] *Ibid.*, para. 7.313.
[37] *Ibid.*, para. 7.323.
[38] *Ibid.*, paras 7.333, 7.337.
[39] *Ibid.*, para. 7.292.
[40] *Ibid.*, para. 7.299.

24 The meaning of the **Annex A:1 lit. c purpose** was explicated in *EC—Approval and Marketing of Biotech Products*. With respect to the term "pests", the Panel found no legal requirement for "pests" to be living.[41] In other words, dead pests can still be "pests".

25 The meaning of the **Annex A:1 lit. d purpose** was explicated in *EC—Approval and Marketing of Biotech Products*. With respect to the term "other damage", the Panel held that this term means damage "other than damage to the life or health of plants, animals or humans" and that lit. d is a "residual category".[42] The Panel noted that this residual category is "potentially very broad," and could include damage to "property" and "infrastructure".[43]

2. Legal Form

26 In *EC—Approval and Marketing of Biotech Products*, the Panel explained that the second paragraph of Annex A:1 ("laws, decrees, regulations") addresses both the **"legal form"** and the **"nature of measures"**.[44] This interpretation was not reviewed by the WTO Appellate Body and has been criticized by some commentators. The Panel also explained that Annex A:1 "should not be taken to prescribe a particular legal form".[45]

3. Nature of Measures

27 The final sentence of Annex A:1 states that SPS 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 labelling requirements directly related to food safety". The use of the term "*inter alia*" suggests that the list is an open one. In *EC—Approval and Marketing of Biotech Products*, the Panel explained that the listing is "by way of example".[46]

28 The meaning of **"requirements and procedures including**" was explicated in *EC—Approval and Marketing of Biotech Products*. The Panel held that the term "requirements" is "broad in scope" and can include an "authorization to market a particular product" and "a ban on the marketing of a

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[41] *Ibid*., para. 7.351.
[42] *Ibid*., paras 7.369, 7.370.
[43] *Ibid*., para. 7.370. Such damage can be physical harm or economic harm. *Ibid*. (noting Art. 5.3).
[44] *Ibid*., para. 7.149.
[45] *Ibid*., para. 7.422.
[46] *Ibid*., para. 7.1334.

particular product."[47] The Panel also opined that the omission of the term "application" of a requirement suggests that although the requirement as such is an SPS measure, the application of such a requirement is not an SPS measure.[48] Furthermore, the Panel held that the term "requirements" includes requirements that are either "generally applicable" or are specifically applicable.[49]

The meaning of the **"packaging"** has not yet been addressed by a panel.[50] *29*
The meaning of **"labelling requirements directly related to food safety"** in Annex A:1 was to some extent explicated in *EC—Approval and Marketing of Biotech Products*. The Panel held that such a label would have to "clearly and unambiguously" serve one of the four purposes in Annex A:1.[51] The Panel also opined that labels "to provide quality assurance, volume of contents, or to reflect consumer preferences or moral considerations" would not be subject to the SPS Agreement.[52] With respect to labelling requirements on "novel foods" aimed at avoiding labels that "mislead the consumer," the Panel held that such concerns, such an "nutritional value," are "unrelated to food safety".[53]

With regard to the interpretation of **"certification and approval procedures"**, see the discussion in this volume regarding Art. 8 (Control, Inspection and Approval Procedures) and Annex C.[54] Footnote 7 in Annex C states that "[c]ontrol, inspection and approval procedures include, *inter alia*, procedures for sampling, testing and certification." In *Japan—Apples*, the Panel noted that the contested measure "falls within the definition" of SPS measures in Annex A:1 "which includes certification and approval procedures".[55] In *EC—Approval and Marketing of Biotech Products*, the Panel held that "approval procedures" can be understood as "encompassing procedures applied to check and ensure the fulfillment of one or more substantive SPS requirements the satisfaction of which is a prerequisite for the approval to place a product on the market".[56] *30*

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[47] *Ibid.*, para. 7.1334.
[48] *Ibid.*, para. 7.1335.
[49] *Ibid.*, para. 7.1336. This holding further addresses the requirements for a risk assessment.
[50] The WTO Secretariat has opined that "quality and packing regulations are generally not considered to be sanitary or phytosanitary measures and hence are normally subject to the TBT Agreement." *WTO*, Understanding the SPS Agreement, at 8.
[51] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.390, footnote 527.
[52] *Ibid.* Some of this holding, especially the Panel's irrelevant reference to "moral" considerations, is dicta.
[53] *Ibid.*, paras 7.411, 7.412.
[54] *Böckenförde*, Article 8 SPS.
[55] *Japan—Apples*, WT/DS245/R, para. 8.24.
[56] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.424.

31 The reference to **"processes and production methods"**,[57] known as PPMs, needs to be read in conjunction with the geographic limitation in lit. a–d. Thus, a PPM designed to protect foreign country health would not come within the terms of the SPS Agreement. The term **"relevant"** as a modifier to "transport of animals and plants" is thought by analysts to generally exclude government measures regarding the mishandling and mistreatment of animals.[58]

32 The SPS Committee has noted that the SPS Agreement uses the terms "measures" and "regulations" interchangeably in connection to Annex A:1.[59]

II. Definition of Harmonization (Para. 2)

33 Harmonization among WTO Members is the establishment, recognition and application of common SPS measures.[60]

III. Definition of International Standards (Para. 3)

34 The term "International standards, guidelines, and recommendations" is defined according to the type of measure.[61] Three international standard-setting mechanisms are specifically listed.[62] For food safety, the UN Codex Alimentarius Commission (**CAC**) is identified. For animal health and zoonoses, the International Office of Epizootics is identified. This body is now called the World Organisation for Animal Health (**OIE**). For plant health, the bodies operating within the framework of the International Plant Protection Convention (**IPPC**) are identified. For matters not covered by these organizations, Paragraph 3 points to appropriate standards promulgated by "*other* relevant international organizations open for membership to all Members, as identified by the [SPS] Committee". None has been identified as of November 2006.

35 Only one of the multilateral organizations listed in para. 3 permit full participation by all WTO Members. That is the OIE. The others refuse to admit Taiwan.

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[57] This term also appears in Art. 5.2 SPS and Annex 1 TBT.

[58] The WTO Secretariat has opined that measures "[…] for the welfare of animals are not coverd by the SPS Agreement." *WTO*, Understanding the SPS Agreement, at 6.

[59] Committee on Sanitary and Phytosanitary Measures, Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures, Report of the Committee, G/SPS/36, 11 July 2005, para. 92.

[60] See *Landwehr*, Article 3 SPS, para. 5.

[61] Relevant SPS documents can be found at <www.wto.org/english/tratop_e/sps_e/sps_e.htm>.

[62] See *Victor*, N.Y.U. J. Int'l L. & Pol'y 32 (2000), 865, 884–894 for an overview of these three mechanisms.

In *EC—Hormones (US)*, the Panel stated that it was not required to consider whether an international standard had been adopted by **consensus**, or by a wide or narrow **majority**.[63] Indeed, Annex A contains no minimum prerequisites for when the outputs of listed international standard-setting entities can attain lawmaking force within the WTO. Such standards so far have been deemed legitimate under SPS law.[64] *36*

IV. Definition of Risk Assessment (Para. 4)

Para. 4 defines a "risk assessment" and this term has been interpreted in WTO dispute settlement in conjunction with Art. 5.1.[65] The Appellate Body has explained that a risk assessment must: "(1) **identify** the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases; (2) **evaluate the likelihood** of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and (3) evaluate the likelihood of entry, establishment or spread of these diseases **according to the SPS measures which might be applied**."[66] *37*

The concept of risk has been clarified to some extent by the Appellate Body. In *EC—Hormones*, the Appellate Body explained that a risk assessment need not establish "a minimum quantifiable magnitude of risk" and need not *exclude* "factors which are not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences".[67] Furthermore, it explained that the risk to be evaluated includes "risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die".[68] In *Australia—Salmon*, the Appellate Body explained that the risk "must be an **ascertainable risk**" and cannot be merely "theoretical uncertainty".[69] Furthermore, the Appellate Body held that a WTO Member may determine its own appropriate level of risk to be "zero risk".[70] *38*

In *Australia—Salmon*, in ruling that Australia's risk assessment was inadequate, the Appellate Body held that a risk assessment must evaluate "the" **likelihood** *39*

[63] *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.69.
[64] *Pauwelyn*, in: *Joerges & Petersmann* (eds), 199, 212.
[65] See *Stoll & Strack*, Article 5 SPS, paras 12 *et seq*.
[66] *Australia—Salmon*, WT/DS18/AB/R; para. 121 (emphasis in the original).
[67] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 253(j).
[68] *Ibid.*, para. 187.
[69] *Australia—Salmon*, WT/DS18/AB/R, para. 125. See *Trebilcock & Soloway*, in: *Kennedy & Southwick* (eds), 537, 564 *et seq*.
[70] *Australia—Salmon*, WT/DS18/AB/R, para. 125.

of entry and spread of diseases, and that, in an assessment, merely "some" evaluation is not enough.[71] Relatedly, the Appellate Body explained that the likelihood may be expressed either quantitatively or qualitatively.[72]

40 The Appellate Body has held that Members have a "right" to adopt "any appropriate 'methodology' consistent with the definition of 'risk assessment'" in SPS Annex 4.[73] Nevertheless, the Appellate Body has also held that a risk assessment should not be limited to an examination of the measure already in place or favoured by the importing government. In other words, the evaluation contemplated in para. 4, according to the Appellate Body, "should **not be distorted by preconceived views** on the nature and the content of the measure to be taken; nor should it develop into an exercise tailored to and carried out for the purpose of justifying decisions *ex post facto*".[74] Furthermore, in *Japan—Apples*, the Appellate Body has made clear that under Art. 2.2, a panel is not obliged "to give precedence to the importing Member's approach to scientific evidence and risk when analyzing and assessing scientific evidence".[75]

41 In *EC—Hormones*, the Appellate Body held that a risk assessment need not come to a "monolithic conclusion".[76] Rather it could set out both the mainstream scientific opinion as well as the opinion of scientists taking a diverging view.

42 In *Japan—Apples (Article 21.5—US)*, the Panel held that the issue of whether there is a valid risk assessment is not separable from the issue of whether there is a rational relationship between the disputed measure and the risk assessment.[77]

V. Definition of Appropriate Level of Protection (Para. 5)

43 The appropriate level of protection (ALOP) is the level "deemed appropriate by the Member" applying the SPS measure. The ALOP concept is referred to in Arts 3.3, 4.1, 5.3, 5.4, 5.5, 5.6, 9.1, 10.2, 12.4, and Annex B:3(c) of the SPS Agreement. An ALOP is a government's choice regarding its values and its tolerance of specific risks. The ALOP can differ from one government to another. Thus, it seems that an SPS measure could be WTO-consistent in one country, while the same measure is WTO-inconsistent in another country.

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[71] *Ibid.*, paras 124, 134.
[72] *Ibid.*, para. 124.
[73] *Japan—Apples*, WT/DS245/AB/R, para. 205.
[74] *Ibid.*, para. 208.
[75] *Japan—Apples*, WT/DS245/AB/R, para. 167.
[76] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 194.
[77] *Japan—Apples (Article 21.5—US)*, WT/DS245/RW, para. 8.129. This decision was not reviewed by the appellators.

A WTO Member's ability to determine its own ALOP is **not unlimited.** *44*
In *EC—Hormones*, the Appellate Body stated that the "right of a Member to establish its own level of protection "is an important right".[78] But then the Appellate Body hastened to add that this right "is not, however, an absolute or unqualified right".[79] This leads to the obvious question of what exactly a "right" of a Member means in the context of the SPS Agreement. Does it have any meaning independent from being a beneficiary of a WTO discipline? The Appellate Body has taken note of what it calls the "carefully negotiated balance in the *SPS Agreement* between the shared, but sometimes competing, interests of promoting international trade and protecting the life and health of human beings".[80] This statement too suggests that the Appellate Body sees limits to the so-called "right" of a Member to establish its own level of health protection.

Arts 5.4 and 5.5 of the SPS Agreement impose disciplines on a Member's *45*
choice of ALOP, and therefore those disciplines may conceivably infringe a Member's choice.

Noting that Japan had described its ALOP as equivalent to what would *46*
result from an import ban on commercial apples, the Panel in *Japan—Apples (Article 21.5—US)* stated that it was for Japan to determine its ALOP and "we should not question it".[81] Then the Panel went on to hold that since there was no evidence that mature, symptomless apples would spread fire blight to Japan, a less restrictive measure permitting the importation of such apples "theoretically meets" Japan's ALOP.[82]

The SPS Agreement seems to contain an **implicit obligation** for a Mem- *47*
ber to determine its own ALOP.[83] This determination logically precedes a Member's decision to adopt an SPS measure.[84] If a Member does not choose its own ALOP with sufficient precision, then the ALOP may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied.[85] In 2004, the WTO's SPS Committee adopted a decision on Art. 4 stating that "[t]he importing Member should indicate the appropriate level of protection which its sanitary or phytosanitary measure

[78] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 172. In addition, the Appellate Body held "that the right of a Member to establish its own level of sanitary protection under Article 3.3 of the SPS Agreement is an autonomous right"; *Ibid*. Presumably this means that the "right" inures from state sovereignty.
[79] *Ibid*., para. 173 (referring to Art. 3.3).
[80] *Ibid*., para. 177.
[81] *Japan—Apples (Article 21.5—US)*, para. 8.193.
[82] *Ibid*.
[83] Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R, paras 205–206. See also *ibid*., para. 200 (stating that the ALOP is the government's objective).
[84] *Ibid*., para. 201.
[85] *Ibid*., para. 207.

is designed to achieve".[86] According to WTO Director-General Pascal Lamy, this decision "has positively added to the WTO in adopting more detailed and specific rules to implement broad treaty provisions."[87]

VI. Pest-/Disease-Free and Low-Pest or Disease Prevalence Area (Paras 6–7)

48 Pest or disease-free areas are referred to in Arts 5.2, 6.2, and 6.3.[88] Areas of low pest or disease prevalence are referred to in Arts 6.2 and 6.3.

C. Relationship to the TBT Agreement (Art. 1.4)

49 Art. 1.4 states: "Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement." This provision should be read in conjunction with Art. 1.5 TBT which states that the provisions of the TBT Agreement do not apply to SPS measures as defined in Annex A of the SPS Agreement. Thus, a government's **SPS measures are governed by the SPS Agreement, not by the TBT Agreement**, even though all SPS measures will be technical barriers, as that term is normally used. (A government's SPS measures will also be governed by the GATT.) Commentators have suggested that a particular law or regulation could have distinctive aspects, some of which could be governed by the SPS Agreement and some by the TBT Agreement.[89] In *EC—Approval and Marketing of Biotech Products*, the Panel took this view.[90]

50 **Food labelling** is an issue that could come within the terms of either the SPS or the TBT agreements, depending on the purpose of the label. Measures regarding consumer or nutritional labelling not aimed at providing information about one of the listed Annex A:1 lit. a–d risks would come under the supervision of the TBT Agreement.[91] Measures regarding consumer or nutritional labelling aimed at providing information about one of the listed risks would come under the supervision of the SPS Agreement.

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[86] Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures, G/SSP/19/Rev.1 (2 Apr. 2004), para. 2 (footnote omitted).

[87] *Lamy*, The WTO in the Archipelago of Global Governance, 14 March 2006, available on WTO website.

[88] See the definition in the explanatory note to Annex A:6.

[89] For example, see *Marceau & Trachtman*, in: *Ortino & Petersmann* (eds), 275, 328.

[90] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.167, 7.2524.

[91] See *Josling et al.*, 158 (detailing discussions in TBT Committee on process attribute labels).

D. Outlook

51 The **SPS Agreement** will remain one of the **most controversial of the WTO covered agreements** because it supervises the application of governmental measures to protect public health. All of the risk of WTO panel error is allocated to the regulating country. For example, in a case like *Japan—Apples* or *Australia—Salmon*, the WTO offers no indemnity to those countries if they change their regulations in order to comply with recommendations of the Dispute Settlement Body and then suffer damaging consequences from the introduction of a new disease into an island environment.

52 The issue of the **definition of SPS measures** is likely to remain contested in the years ahead as the WTO dispute system clarifies these terms. Because the most rigorous supervision of domestic policy in the WTO occurs in the SPS Agreement, there is much at stake in whether a disputed measure comes under the supervision of the SPS Agreement. The decision of the Panel in *EC—Approval and Marketing of Biotech Products* stakes out a greater scope for the SPS Agreement than what might have been anticipated.

53 Further developments can be expected with respect to the **policies of the international standard-setting organizations** responsible for food safety and animal health. Some commentators have seen these developments as demonstrating a "hegemonic" attitude by the WTO in seeming to dictate to other international organizations and entities what policies are acceptable or unacceptable in the global economy. The term "hegemonic" may be too pejorative, but there can be no doubt that SPS rules are having an ongoing normative effect on the work of standard-setting organizations.

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Article 2 SPS
Basic Rights and Obligations

1. Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement.
2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.
3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.
4. Sanitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Article XX(b).

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A. General

Art. 2 as the general provision on the rights and duties of Members under the Agreement sets out the **basic principles of the SPS Agreement**, permitting Members to adopt SPS measures provided they are necessary for the protection of human, animal or plant life or health and comply with the requirements set out in Arts 3 to 6 of the Agreement. The fundamental importance of Art. 2 is emphasised by Rec. 1 of the Preamble.[1] Both provisions reflect the chapeau of Art. XX GATT 1994.[2] The objective is to avoid *1*

[1] With respect to Art. 2.3 see Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R, para. 251. See also *Charnovitz*, Preamble SPS, para. 8.

[2] For Rec. 1 as a reflection of the Chapeau of Art. XX GATT 1994 see *Australia—Salmon*, WT/DS18/AB/R, para. 251.

unnecessary and disguised restrictions on international trade resulting from sanitary and phytosanitary measures.[3] Therefore, such measures need to be based on scientific principles (para. 2) and may not be arbitrary or result in unjustifiable discrimination between Members with similar conditions (para. 3). Once the requirements of the SPS Agreement are met, SPS measures are presumed to be in accordance with GATT 1994 (para. 4).

2 Though Art. 2 merely sets out the basic rights and obligations under the SPS Agreement which are specified by subsequent provisions, it is **autonomous**. It informs the interpretation of Art. 5[4] and has been subject to analysis in several dispute settlement cases.[5] Even in case where Arts 3 and 5 were at issue, panels decided also to address Art. 2.[6] This interpretation is persuasive. Otherwise it would have been sufficient for Art. 2 to allow SPS measures provided they complied with the rest of the Agreement (para. 1) without elaborating on the general obligations in paras 2–3.

3 As evidenced by *Japan—Apples* Art. 2 has gained importance independently of Art. 5.[7] Despite their close **relationship**, a violation of **Art. 5** does not presuppose a violation of **Art. 2**. Even if a measure is imposed in the light of sufficient scientific evidence in accordance with Art. 2.2 it may be more trade-restrictive than necessary in violation of Art. 5.6.[8] A violation of Art. 5.1, that is a failure to base SPS measures on an appropriate risk assessment, implies an inconsistency with Art. 2.2 which requires Members to base such measures on scientific principles.[9] But there is no guarantee that measures flowing from an appropriate risk assessment will be upheld under Art. 2.2.[10] As indicated in *EC—Hormones* the exact relationship between Arts 2 and 5 remains to be further analysed.[11]

4 The **order of analysis** has varied. In *EC—Hormones* the Appellate Body, in contrast to the Panel, favoured an analysis beginning with Art. 2.[12] In other cases the panel's decision to commence its analysis under Art. 5 has

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[3] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 177.

[4] *Ibid*., para. 250; *Stoll & Strack*, Article 5 SPS, paras 5, 40.

[5] According to the Appellate Body Art. 2.2. informs and provides context to Art. 5.1. *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 250.

[6] See *e.g.* Panel Report, *Japan—Agricultural Products II*, WT/DS76/R, para. 8.14.

[7] Panel Report, *Japan—Apples*, WT/DS245/R. See below, para. 21.

[8] *Japan—Agricultural Products II*, WT/DS76/R, para. 8.102.

[9] *Australia—Salmon*, WT/DS18/AB/R, para. 138. See also below, para. 21.

[10] *Goh*, JWT 40 (2006), 655, 663. See also *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 250. The Appellate Body took note of the necessity to analyse a measure under Art. 2.2 even if it is in line with Art. 5.1.

[11] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 250.

[12] *Ibid*., para. 250. In *Japan—Agricultural Products II* the Panel, however, began its examination with Art. 2. See *Japan—Agricultural Products II*, WT/DS76/R, para. 8.26.

gone unchallenged by the Appellate Body.[13] In any event, an analysis under Arts 3 and 5 does not automatically absolve the panel from an examination of Art. 2.[14] But a panel for reasons of judicial economy may refrain from analysing whether a measure meets Art. 2.2 and 2.3 once a violation of Art. 5.1 is established.[15]

B. Historical Background

5 Before the adoption of the SPS Agreement, sanitary and phytosanitary measures which were not in line with Arts III and XI GATT 1947 were subject to analysis under Art. XX lit. b and lit. g GATT 1947, providing for a justification without, however, setting up freestanding obligations. In the Uruguay Round it was felt that non-tariff barriers such as SPS measures were not adequately dealt with under GATT and the Standards Code which already incorporated the principle of non-discrimination and the necessity test, and encouraged harmonization and resort to international standards.[16] There had been no successful challenge of an SPS measure after the Tokyo Round.[17] One objective of the Uruguay Round was therefore to minimize the adverse effects of SPS regulations on international trade.[18] In 1988 a Working Group was established to draft a separate Agreement for SPS measures. The SPS Agreement established a specific regime for such measures by elaborating and refining the GATT obligations (Rec. 8 of the Preamble) and by adding new substantive and procedural obligations for Members.

6 With the adoption of the SPS Agreement the drafters sought to preserve the rights of WTO members to set their own standard of protection and to adopt measures for the protection of health and life without, however, unnecessarily restricting trade or misusing these rights to create disguised trade restrictions. Art. 2 with its scientific evidence test and non-discrimination clause sets out the core criteria for SPS measures. The latter clause is a variant of GATT's MFN and National Treatment principles, taking due

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[13] In *Australia—Salmon* the Panel first dealt with Canada's claims under Art. 5 because of the "more specific and detailed rights and obligations" in comparison to the broad wording of Art. 2. See Panel Report, *Australia—Salmon*, WT/DS18/R, para. 8.48. See also Panel Report, *Australia—Salmon (Article 21.5—Canada)*, WT/DS18/RW, para. 7.38. See also Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.1409, 71422.

[14] *Australia—Salmon*, WT/DS18/R, para. 8.47.

[15] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.3394, 7.3405.

[16] Tokyo Round Agreement on Technical Barriers to Trade, BISD 26th Supp., 1980.

[17] *Stanton*, in: *Orden & Roberts* (eds.) 75–78.

[18] For the negotiating history, see *Roberts*, JIEL 1 (1998), 377, 379–382.

account of the exigencies of SPS measures. The basic rights and obligations later adopted in Art. 2 were already included in a draft of 1990.[19] While the science test originally required states not to adopt SPS measures "against available scientific evidence",[20] it was later replaced by the more demanding exigency that such measures need to be *based on* scientific principles and *not maintained without* sufficient scientific evidence.[21]

C. The Right to Take SPS Measures (Para. 1)

7 Art. 2.1 as a general rule allows members to adopt sanitary or phytosanitary measures in order to protect human, animal or plant life or health on the condition that they comply with the basic procedural and substantive requirements of the SPS Agreement.

I. Measures for the Protection of Human, Animal or Plant Life or Health

8 The protection of human, animal or plant life or health[22] must be the **objective** of any SPS measure. Though the SPS Agreement concerns predominately agricultural products, the protection of wild fauna, fish, forests and wild flora is included irrespective of their economic value.[23] The Agreement covers the protection of goods (*e.g.* crops, livestock) as well as matters with no commercial value (such as human health).[24]

9 While the protection of human, animal and plant life and health is related to the **protection of the environment**, it is less comprehensive.[25] As evidenced by the definition of SPS measures in Annex A:1 the focus is to prevent the spread of pests, diseases and other health risks. Even measures combatting the risks arising from harmful non-indigenous species are covered.[26]

10 **Examples** of measures for the protection of human, animal or plant life or health are measures taken to prevent food-borne risks, arising for example from contaminants (such as hormone residues), additives and toxins

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[19] Uruguay Round, Group of Negotiations on Goods, Negotiating Group on Agriculture, Working Group on Sanitary and Phytosanitary Regulations and Barriers, Draft Text on Sanitary and Phytosanitary Measures, MTN.GNG/NG5/WGSP/7, 20 November 1990.

[20] *Ibid.*, para. 6.

[21] Art. 2.2 SPS.

[22] For the definition of human, animal or plant life or health see also *Stoll & Strack*, Article XX lit. b GATT 1994, paras 17 *et seq.*

[23] Annex A:1 SPS and corresponding footnote.

[24] *Roberts*, JIEL 1 (1998), 377, 382.

[25] This is due to the fact that the SPS Agreement is concerned only with animal and plant life and health while environmental protection also covers other areas, such as climate etc.

[26] *Roberts*, JIEL 1 (1998), 377, 382.

in food, beverages or feedstuffs.[27] Also covered are measures which seek to combat diseases, pests and disease-carrying organisms affecting human, animal or plant life or health. For example, in *Australia—Salmon* the ban on importation of salmon from Canada sought to protect Australian fish against the introduction of salmon diseases. In *Japan—Agricultural Products II*, the respondent tried to protect its plants from a pest (codling moth) by banning fruit from the United States. Similarly, *Japan—Apples* concerned quarantine restrictions on imported apples aimed at protecting fruit against the introduction of a bacterial disease (fire blight). In *EC—Marketing and Approval of Biotech Products* however, the procedural decision of the European Communities to delay final approval decisions was considered not to constitute an SPS measure within the meaning of Art. 2.2 because it was merely a decision relating to the application, or operation, of the existing EC approval procedures.[28]

11 SPS measures may be adopted for the protection of life and health only within the borders of a Member.[29] The **territorial scope** of protection is, therefore, limited and does not extend to measures seeking the protection of life and health outside the country adopting the measure.

II. Necessity

12 A measure is necessary for the protection of health and life if it is suitable and required.[30] The measure should not be more trade-restrictive than necessary for this purpose. The definition in footnote 3 to Art. 5.6 provides valuable guidance on what is meant by **not more trade-restrictive than required**. There is a violation of the SPS Agreement only if the complaining party[31] proves that there is an alternative SPS measure which (1.) is reasonably available taking into account technical and economical feasibility; (2.) achieves a similar level of protection of human, animal or plant life; and (3.) is significantly less restrictive of trade than the contested measure.[32] *De minimis* differences in levels of trade restriction are irrelevant.

13 In general, if a measure is indispensable for health protection is it presumed to be necessary. If a measure only contributes to this end, the Appellate Body

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[27] See Annex A:1 SPS.

[28] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.1434, 7.1438. See Annex A:1 SPS.

[29] See Annex A lit. b which limits the scope of the Agreement to measures applied "to protect human life or health within the territory of the Member".

[30] *Makatsch*, 166.

[31] With respect to Art. 5.6 see Appellate Body Report, *Japan—Agricultural Products II*, WT/DS76/AB/R, paras 121 *et seq*.

[32] With respect to Art. 5.6 see *Australia—Salmon*, WT/DS18/AB/R, para. 194; *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 123. See also *Stoll & Strack*, Article 5 SPS, paras 64–72.

looks at the significance of the objective, the contribution to this end and the negative effects on trade.[33] The higher the value of the objective, the higher the contribution to the protection of health and the less significant the implication on free trade, the more likely a measure will be found to be necessary.[34]

III. No Inconsistency With SPS Agreement

14 The adoption, content and application of SPS measures need to **comply with** Arts 3 to 6 and Art. 10:[35] Members are called upon to base their SPS measures on international standards (Art. 3.1) and not to exceed these standards without scientific justification (Art. 3.3), to accept SPS measures of other Members as equivalent in case of identical levels of protection (Art. 4.1), to base SPS measures on an appropriate risk assessment (Art. 5.1), to ensure regulatory consistency (Art. 5.5) and least trade-restrictiveness (Art. 5.6), to adapt SPS measures to the characteristics of the area of origin and destination (Art. 6.1) and to take into account the needs of developing countries (Art. 10).

D. Duties (Para. 2)

15 Art. 2.2 sets out substantive obligations with respect to the **adoption, maintenance and application** of SPS measures. Since Art. 2.2. refers to the maintenance of SPS measures it does not apply only to measures adopted after the entry into force of the Agreement, but also to pre-existing measures which remain in force thereafter.[36] The term "ensure" indicates that there is an ongoing obligation to review SPS measures.[37] Art. 2.2 applies to any SPS measure; not just to definitive measures but also to provisional measures.[38] It also extends to the adoption of SPS measures because as a

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[33] Appellate Body Report, *Korea—Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, paras 161–164.

[34] *Saito*, Jean Monnet Working Paper 14/2001, 76. Though there are parallels to the principle of proportionality, the Appellate Body so far has not applied a strict proproportionality test, thereby leaving the Members with a margin of appreciation in the adoption of SPS measures. It is for the Members to decide on the level of protection, and they are subjected only to a necessity test. *Hilf & Hörmann*, AVR 43 (2005), 397, at 411–412. According to *Makatsch*, SPS measures should not be analysed to see whether they are disproportionate for health protection. It would run counter to the object and purpose of the SPS Agreement to have an objective risk assessment on the basis of scientific evidence. *Makatsch*, 165.

[35] Further procedural requirements with respect to SPS measures can be found in Art. 7 (Transparency) and Art. 8 (Control, Inspection and Approval Procedures).

[36] See *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, paras 128–130.

[37] *Stoll & Strack*, Article 5 SPS, para. 23.

[38] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R; para. 7.2945. For Art. 5.7, as a qualified exemption of Art. 2.2, see below, paras 34–35.

matter of logic if a measure cannot be maintained without sufficient evidence it may not be adopted in the first place.[39]

Members have to ensure that they are (a) applied only to the **extent necessary** to protect human, animal or plant life or health (b) **based on scientific principles** and (c) not maintained without **sufficient scientific evidence** with an exemption for provisional measures pursuant to Art. 5.7. These three obligations in Art. 2.2 are more general expressions of the obligations found in Art 5.1, 5.2 and 5.6 SPS.[40] *16*

I. Application to the Extent Necessary

Para. 2 requires Members to apply SPS measures only to the extent necessary to protect human, animal and plant life or health.[41] The term **"applied"** is also to be found in the chapeau of Art. XX GATT 1994. As the Appellate Body in *US—Shrimp* and *US—Gasoline* indicated, it does not relate to the substance of the measure but to the way in which it is applied.[42] While the adoption of an SPS measure may be necessary in general, its application in a specific case may go beyond the extent necessary. *17*

Measures may be applied only to the **extent necessary**. There is a violation of Art. 2.2 if (1.) there is another application of an SPS measure which is reasonably available; (2.) it achieves a similar level of protection of human, animal or plant life; and (3.) it is significantly less restrictive to trade than the contested application.[43] *18*

II. Scientific Basis

Para. 2 further requires SPS measures to be based on scientific principles and not to be maintained without sufficient evidence. This requirement mirrors the overall concept of the SPS Agreement to achieve a **balance** between the promotion of international trade on the one hand and the protection of life and health on the other.[44] By requiring a sufficient scientific basis for SPS measures which have the potential of limiting free trade, Art. 2.2 makes room for such measures genuinely seeking to protect life and health but at the same time limits their scope by subjecting them to scientific *19*

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[39] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.3252.

[40] *Ibid.*, at paras 7.1433, 7.1439.

[41] For the definition of human, animal and plant life or health, see above, paras 8–10.

[42] Appellate Body Report, *US—Shrimp*, WT/DS58/AB/R, para. 115; Appellate Body Report, US—Gasoline, WT/DS2/AB/R, at 22. See also *Howse*, Mich. L. Rev. 98 (2000), 2329, at 2354.

[43] For a more detailed definition of the term "necessary" see above, paras 12–13. With respect to Art. 5.6. see *Australia—Salmon*, WT/DS18/AB/R, para. 194.

[44] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 177.

scrutiny. Art. 2.2 is supplemented by Art. 3.3 which commands a scientific justification for SPS measures resulting in a higher level of protection than those based on international standards.[45]

20 With the science test Art. 2.2 tries to introduce an objective standard of scrutiny.[46] The hypothesis that a certain measure is necessary to protect human, animal or plant life or health needs to be proven by **scientific evidence**.[47] This requires a quantitative analysis by empirical or experimental laboratory methods of physical sciences.[48] It has to withstand a rationality test that follows the rules of logic and consistency.

21 The scientific basis requirement is further specified in Art. 5.1 which mandates an **appropriate risk assessment**.[49] A violation of Art. 5.1 implies an inconsistency with Art. 2.2.[50] If a Member is unable to demonstrate a potential risk to health resulting from a substance there is no room for it to adopt an SPS measure.[51] However, after *Japan—Apples* Art. 5.1 is no longer considered to be the sole *locus* of the science test.[52] Art. 2.2 may even be violated if a risk assessment is in line with Art. 5.1.

22 Non-scientific factors, like mere **consumer concerns, cultural or moral preferences and societal value judgements**, being highly subjective, do not qualify as scientific grounds. Whether they can be considered in the risk assessment as an additional factor is a strongly debated issue, as evidenced in *EC—Hormones*.[53] According to the Appellate Body scientific evidence is only the beginning of the analysis under Art. 5.2 and there are other factors to be considered, such as risks as they exist in the real world outside laboratories.[54] On the other hand it has been argued that taking into account factors other than science would water down the science test in violation of Art. 2.2, and that those factors could not provide a basis for the adoption and application of SPS measures.[55]

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[45] Art. 2.2 should be read in context with Art. 3.3. Appellate Body Report on *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 74. The footnote to Art. 3.3 defines "scientific justification" as an "examination and evaluation of available scientific information in conformity with relevant provisions of this Agreement […]".

[46] For an evaluation of the science test see *Makatsch*, 97–111, 137–143; *Goh*, JWT 40 (2006), 655, 676–680.

[47] See *Japan—Apples*, WT/DS245/R, para. 8.93.

[48] See *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 187. In *Japan—Apples* the Panel asked for "evidence gathered through scientific methods". See *Japan—Apples*, WT/DS245/R, para. 8.92.

[49] In *EC—Hormones* the Appellate Body explained that Art. 2.2 informs Art. 5.1. See *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 250.

[50] *Australia—Salmon*, WT/DS18/AB/R, para. 138.

[51] *Makatsch*, at 172.

[52] *Goh*, JWT 40 (2006), 655, 663.

[53] For the debate see *Stoll & Strack*, Article 5 SPS, paras 33–34.

[54] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 187.

[55] *Quick & Blüthner*, JIEL 2 (1999), 603, 618–619.

1. Sufficiency of Evidence

What constitutes sufficient scientific evidence depends on a case-by-case analysis which takes into account the particular circumstances of the case, including the characteristics of the measure at issue.[56] The term "sufficient", according to the Appellate Body, is a **relational concept** requiring an "adequate relationship" between the SPS measure and the scientific evidence.[57] The characteristics of the measures as well as the quality and quantity of the scientific evidence need to be taken into account in this analysis.[58] The quantity, extent and scope of the scientific evidence need to be adequate to the object and purpose of the measure.[59] *23*

The rational relationship test is not limited to procedural scrutiny (*i.e.* whether the handling of scientific evidence was reasonable, unbiased and objective), but in fact has been interpreted by the Appellate Body as a **substantive test**.[60] What exactly is meant by a **"rational or objective relationship"** between the SPS measure and the scientific evidence[61] has not been specified by the Appellate Body. A contextual reading of Art. 2.2 reveals that there needs to be scientific evidence supporting the assumption that the measure is necessary for the protection of life or health. The evidence needs to be objective, that is verifiable.[62] The existence of significant data which are representative and reproducible is essential. Contradictory data weaken the evidence. However, the rational relationship standard does not require strict adherence and is thus less stringent than a strict scientific necessity test.[63] With respect to the evaluation of the data even minority scientific opinions could provide a sufficient scientific basis for the adoption of SPS measures in the sense of a rational relationship between the SPS measure and the scientific evidence.[64] After all, even science does *24*

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[56] *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 84; *Japan—Apples*, WT/DS245/R, para. 8.180.

[57] *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 73.

[58] *Ibid.*, para. 84.

[59] *Ibid.*, para. 73.

[60] Appellate Body Report, *Japan—Apples*, WT/DS245/AB/R, para. 84; *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 193. See *Trebilcock & Howse*, at 209. *Winickoff* advocates a proceduralist approach when reviewing science-based decision-making by national authorities. *Winickoff et al.*, Yale J. Int'l L. 30 (2005), 81–123. But see Art. 11 DSU.

[61] Appellate Body Report, *Japan—Apples*, WT/DS245/AB/R, para. 84. Such a rational relationship is also required between the SPS measure and the risk assessment. *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 193. See *Stoll & Strack*, Article 5 SPS, para. 22.

[62] In *Australia—Salmon* the Art. 21.5 Panel required a "minimum standard of scientific objectivity" for the risk assessment which is not met if studies are biased or flawed. See Panel Report, *Australia—Salmon (Article 21.5—Canada)*, WT/DS18/RW, paras 7.47, 7.51.

[63] *Goh*, JWT 40 (2006), 655, 669.

[64] See the interpretation of the Appellate Body in *EC—Hormones* with respect to the requirement that SPS measures need to be based on an appropriate risk assessment (Art. 5.1). *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 194. See also *Pauwelyn*, JIEL 2 (1999), 641, 649.

not provide for an absolute objective standard leading to incontestable answers.[65]

25 Art. 2.2 is not violated merely in cases where the scientific evidence is *patently* insufficient to demonstrate the necessity of a SPS measure. According to the Appellate Body in *Japan—Agricultural Products II* the scope of Art. 2.2 is more comprehensive, so that it is violated in **any case where there is insufficient scientific evidence**.[66] The standard of review, thus, exceeds the level of patent insufficiency so that a case may be evaluated under Art. 2.2—not just under Art. 5.1—even if the insufficiency of scientific evidence is not obvious.[67]

26 The extent—in other words the required quality and quantity—of scientific evidence depends on the nature and implications of the measure. In my view it will vary depending on the level of risk to life or health. Though the **precautionary principle** does not override the necessity of scientific evidence precautionary motives may become relevant in the interpretation of what constitutes "sufficient scientific evidence".[68] In *EC—Hormones* the Appellate Body held that a panel evaluating whether there is sufficient scientific evidence for the maintenance of an SPS measure should "bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damages to human health are concerned".[69] Thus in the case of irreversible risk to human life and health panels may be more readily prepared to accept that the evidence submitted is sufficient pursuant to Art. 2.2 than in cases of less serious risks.[70] At the same time, taking into account that the sufficient scientific evidence requirement seeks a balance between life and health protection and free trade, the implications on trade of the SPS measure need to be taken into account. The higher the obstacle to free trade the more stringent the scientific justification needs to be, especially if there is no irreversible, high risk to life and health.

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[65] This also has implications for the standard of review (especially in case of scientific uncertainty) and for the scope for political responses by WTO Members. See below, para. 48. According to *Goh*, scientific justification under the SPS Agreement does not mean strict positivist or empirical science or consensus of scientific opinion. *Goh*, JWT 40 (2006), 655, 669.

[66] *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 82.

[67] *Ibid*.

[68] In *Japan—Agricultural Products II* the Appellate Body did not answer the question whether the precautionary principle was reflected in Art. 2. It merely repeated that the precautionary principle finds reflection in the Preamble, Art. 3.3 and Art. 5.7 SPS. See *ibid*., WT/DS76/AB/R, para. 81.

[69] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 124.

[70] *Trebilcock & Howse*, at 210.

27 So far, except for the revised quarantine measures in *Australia—Salmon*[71] the science test has not been met in any of the relevant disputes. In *Japan—Agricultural Products II*, for example, Japan tried to avoid the introduction of a pest by requiring a test of quarantine treatment for every variety of apples imported from the United States. These tests were time-consuming and expensive. Since evidence suggested that varietal differences were irrelevant to the effectiveness of quarantine,[72] the Panel and Appellate Body held that this varietal test requirement[73] lacked sufficient scientific evidence.[74] In *Japan—Apples*, the Appellate Body upheld the Panel's findings that Japan's import ban on apples from orchards with fire blight was maintained without sufficient scientific evidence[75] because the possible presence of the bacteria in mature, symptomless apples was "not generally established" and "extremely rare"[76] and, even if apples were infected, transmission through imported fruit was deemed unlikely and characterized as a "negligible risk", had not even been experimentally established at that point.[77] In *Australia—Salmon* the ban on importation of salmon from Canada was held to be in violation of Art. 2.2 because it had not been based upon an appropriate risk assessment in accordance with 5.1.[78]

28 Given the negligible risk identified on the basis of the scientific evidence and the nature of the SPS measure, the Panel in *Japan—Apples* concluded that the measure was "**clearly disproportionate to the risk**".[79] This finding has been criticized as introducing the notion of proportionality into Art. 2.2 which requires only the sufficiency of evidence but not a sufficient risk to regulate.[80] The Appellate Body, however, read the Panel's reference to clear disproportion as an expression of the "rational relationship" test, and considered the method of identifying the risk and comparing it with the measure to be appropriate in this case.[81]

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[71] The Art. 21.5 Panel upheld all but one of the measures (evisceration, removal of the head) in a subsequent challenge by Canada. See *Australia—Salmon (Article 21.5—Canada)*, WT/DS18/RW.

[72] *Japan—Agricultural Products II*, WT/DS76/R, para. 8.42.

[73] As appplied to different varieties of apples, cherries, nectarines and walnuts.

[74] *Japan—Agricultural Products II*, WT/DS76/R, paras 8.42–8.43; *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 85.

[75] *Japan—Apples*, WT/DS245/AB/R, para. 243.

[76] *Japan—Apples*, WT/DS245/R, paras 8.128, 8.171.

[77] *Ibid.*, paras 8.153, 8.169, 8.171. Japan's revised restrictions (annual inspection and a changed buffer zone requirement) was also considered not to be supported by sufficient scientific evidence. Panel Report, *Japan—Apples (Article 21.5—US)*, WT/DS245 RW, para. 8.89.

[78] *Australia—Salmon*, WT/DS18/AB/R, paras 123–124.

[79] *Japan—Apples (Article 21.5—US)*, WT/DS245/RW, paras 8.181, 8.198. Emphasis added.

[80] *Trebilcock & Howse*, at 209.

[81] *Japan—Apples*, WT/DS245/AB/R, paras 163–164.

2. The Introduction and Review of Scientific Evidence in the Dispute Settlement

29 The **burden of proof** initially lies with the complaining party which has to make a *prima facie* case that an SPS measure is based or maintained on the basis of insufficient scientific evidence.[82] Otherwise a panel will refuse to find a violation of Art. 2.2.[83] In order to raise a presumption that there are no relevant studies or reports which support the disputed SPS measure[84] the complaining party may request the defending party to explain the reasons for the measure pursuant to Art. 5.8. The failure to provide scientific studies upon request is a strong indication that such evidence does not exist.[85] Further options for the purpose of making a *prima facie* case are to ask the panel's experts specific questions about the existence of relevant scientific studies or to submit additional expert advise.[86]

30 With respect to the **standard of review** the Appellate Body in *Japan-Apples* pointed out that the "rational relationship" test does not require deference to national authorities (even where their handling of evidence seems reasonable) but allows for a closer review of the scientific evidence.[87] A panel is called upon to conduct a detailed inquiry into the underlying scientific basis for and justification of an SPS measure.[88] In analysing the sufficiency of the evidence for the adoption and maintenance of an SPS measure it is, however, not the task of the panel to conduct its own *de novo* risk assessment. The Panel will refer to the opinions of the experts advising the Panel (Art. 11.2).[89] The assessment is to be based on the evidence introduced by the parties.[90]

31 However, it is not for the dispute settlement body to substitute the evaluation by national organs with its own.[91] The standard of review[92] should not entirely eliminate the **political discretion of Members** to adopt health protection measures. It needs to reflect the balance between Member's right

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[82] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 98; *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 122. See also *Schorkopf*, Article 11 SPS, paras 17–18.

[83] *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 137.

[84] *Ibid.; Japan—Apples*, WT/DS245/R, para. 8.108.

[85] *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 137.

[86] *Ibid.*

[87] *Japan—Apples*, WT/DS245/R, paras 165, 167. See also *Japan—Agricultural Products II*, WT/DS76/R, paras 8.32, 8.42. For the criticism, *Trebilcock & Howse*, at 209.

[88] *Goh*, JWT 40 (2006), 655, 668.

[89] For the role of expert advice see *Schorkopf*, Article 11 SPS, para. 5.

[90] *Japan—Agriculatural Products II*, WT/DS76/AB/R, para. 129.

[91] The standard of review currently exercised by the panel in *Japan—Apples* is that of an "objective assessment of facts" pursuant to Art.11 DSU, which in practice lies somewhere between *de novo* review and a deferential reasonableness standard. See *Japan—Apples*, WT/DS245/AB/R, para. 165. For the role of the dispute settlement bodies in SPS cases and the margin of appreciation left to the Members see also *Makatsch*, 166–201.

[92] See *Schorkopf*, Article 11 SPS, paras 20–21.

to adopt SPS measures and the competence to review these measures on the basis of scientific evidence.[93] To subject a Member's choice to complete judicial and factual review would be inadequate.[94] The science test, though an objective standard also provides scope for subjective considerations.[95]

3. Art. 5.7 as a Qualified Exemption From Art. 2.2

32 In cases where scientific evidence is insufficient Art. 5.7 allows members to adopt **provisional SPS measures**.[96] Art. 5.7 operates as a qualified exemption from Art. 2.2.[97] In other words, the adoption of provisional measures in accordance with Art. 5.7 is an alternative to the maintenance of SPS measures on the basis of sufficient scientific evidence.[98] Whether the phrase "except as provided for in paragraph 7 of Article 5" relates only to the obligation not to maintain SPS measures without sufficient scientific evidence (the third obligation of Art. 2.2) or to all three obligations laid down in Art. 2.2, including the requirement that SPS measures may be applied only to the extent necessary to protect human, animal or plant life or health, has been left open.[99]

33 Art. 2.2 needs to be construed so that the right to adopt provisional measures absent sufficient scientific evidence is not jeopardized. An overly broad and flexible interpretation, according to the Appellate Body, would render Art. 5.7 meaningless.[100] On the other hand, Art. 5.7 needs to be **construed narrowly** in order not to jeopardize the general rule that SPS measures in principle require a sufficient scientific basis. It is therefore clearly limited to provisional measures.[101]

34 Absent sufficient scientific evidence a panel needs to scrutinize a measure under Art. 5.7 if the defending party invokes this exemption. The Panel in *EC—Marketing and Approval of Biotech Products* described Art. 5.7 as a **qualified right** rather than a qualified exception (in the nature of an affirmative defence).[102] It argued that the use of the term *exemption*, rather than the term *exception*, by the Appellate Body in *Japan—Agricultural Products II* indicated that it was not about the inapplicability of an obligation in the

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[93] *Hilf & Hörmann*, AVR 43 (2005), 397, at 407.
[94] *Charnovitz*, Int'l Law. 32 (1998), 901, at 913; *Ehlermann & Lockhart*, JIEL 7 (2004), 491, at 495 *et seq.*; *Goh*, JWT 40 (2006), 655, 678–680.
[95] *Goh*, JWT 40 (2006), 655, 671.
[96] See *Stoll & Strack*, Article 5 SPS, paras 74–95.
[97] *Japan—Agriculatural Products II*, WT/DS76/AB/R, para. 80.
[98] *Japan—Agricultural Products II*, WT/DS76/R, para. 8.27.
[99] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.2970.
[100] *Japan—Agricultural Products II*, WT/DS76/AB/R. para. 80.
[101] See *Stoll & Strack*, Article 5 SPS, para. 75.
[102] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.2969, 7.2974.

sense of a qualified exception.[103] As a consequence, once all four cumulative requirements of Art. 5.7 are met, the obligation in Art. 2.2 not to maintain SPS measures without sufficient scientific evidence is not applicable to the challenged measure.[104] On the other hand, if a provisional measure is adopted or maintained in violation of Art. 5.7 there is automatically a violation of Art. 2.2.[105]

35 The assessment of Art. 5.7 as a qualified right is relevant for the allocation of the **burden of proof**. In accordance with the general test set out in *EC—Tariff Preferences*[106] the Panel in *EC—Marketing and Approval of Biotech Products* held that, since Art. 5.7 constituted a right, the complaining party bore the burden of establishing that a challenged SPS measure was inconsistent with at least one of the four requirements set out in Art. 5.7.[107] Only if such non-compliance was demonstrated did the relevant obligation in Art. 2.2 apply to the challenged SPS measure.[108] It was thus incumbent on the complaining party to establish a *prima facie* case of inconsistency with both Arts 2.2 and 5.7.[109] In contrast, in *Japan—Apples* the Panel had determined that the burden was on the party invoking Art. 5.7 to make a *prima facie* case.[110] But the Appellate Body's statement in this case that the assignment of the burden of proof was not challenged on appeal[111] was interpreted in the *EC—Approval and Marketing of Biotech Products* dispute as a reservation to the Panel's allocation of burden of proof.[112]

E. Non-discrimination (Para. 3)

36 Para. 3 incorporates the principle of non-discrimination. SPS measures need to be adapted to the **sanitary and phytosanitary conditions in a given area**.[113] As a general rule, identical or similar conditions need

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[103] *Ibid.*, para. 7.2972.

[104] *Ibid.*, para. 7.2974. All four requirements of Art. 5.7 need to be met. See *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 90. See also *Stoll & Strack*, Article 5 SPS, para. 77. If this is the case there is no violation of Art. 2.2. *Japan—Agricultural Products II*, WT/DS76/R, para. 8.48.

[105] *Stoll & Strack*, Article 5 SPS, para. 74. According to the Panel in *EC—Approval and Marketing of Biotech Products* Art. 2.2 is applicable if the challenged measure is not consistent with one of the four requirements of Art. 5.7. *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.2974.

[106] Appellate Body Report, *EC—Tariff Preferences*, WT/DS246/AB/R, para. 88.

[107] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.2976.

[108] *Ibid.*

[109] *Ibid.*, para. 7.2979.

[110] *Japan—Apples*, WT/DS245/R, para. 8.212.

[111] *Japan—Apples*, WT/DS245/AB/R, footnote 316.

[112] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.2988.

[113] See Art. 6 SPS.

to be treated equally irrespective of borders. This applies not only to the treatment of SPS measures between different foreign Members but also to those applying domestically. If a Member deems SPS measures sufficient with respect to its own territory, the same should apply to those with respect to countries with identical or similar conditions. The SPS Agreement thereby incorporates the principle of national treatment corresponding to Art. III GATT 1994 and the most-favoured-nation principle corresponding to Art. I GATT 1994. A violation of Art. 2.3 depends on three factors: there must be (a) a discrimination (b) which is arbitrary or unjustifiable and (c) identical or similar conditions prevail.[114]

I. Discrimination

37 Discrimination requires a **difference in treatment**. The discrimination must be **between WTO Members**. There is no like products analysis or product-process distinction (such as under Art. III GATT 1994), but a comparison of situations under the SPS Agreement.[115] Given the reference to similar conditions in a country, discrimination in the sense of Art. 2.3 covers not only different treatment of similar products, but also different treatment of distinct products under similar conditions. For example, a comparison of the treatment of Canadian salmon and Australian fish in *Australia—Salmon* revealed discrimination.[116]

II. Arbitrary or Unjustifiable

38 The prohibition of Art. 2.3 applies only to arbitrary and unjustifiable distinctions. If there is difference in treatment it must be based on a **rational ground**. Though there are evident parallels to the chapeau of Art. XX GATT 1994 which prohibits "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and the national treatment principle of Art. III GATT 1994, it is questionable whether the case law developed under these provisions can be applied with respect to Art. 2.3 SPS given the structural differences between these provisions.[117]

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[114] Panel Report, *Australia—Salmon (Article 21.5—Canada)*, WT/DS18/RW, para. 7.111.

[115] *Marceau & Trachtman*, JWT 36 (2002), 811, 824.

[116] *Australia—Salmon (Article 21.5—Canada)*, WT/DS18/RW, para. 7.112

[117] The main structural difference lies in the absence of a like product analysis under Art. 2.3. That structural differences are an obstacle to applying similar legal reasonings was explained in *EC-Hormones*. In *EC—Hormones* the Appellate Body denied that its reasoning in *US—Gasoline* could be imported into a case involving Art. 5.5 SPS due to the structural differences between the standards of the Chapeau of Art. XX GATT 1994 and the elements of Art. 5.5 SPS. See *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 239. Its reluctance to apply the case law under Art. III:2 GATT 1994 was explained by the fact that there was no clear and linear relationship between different levels of protection as with respect to tax differentials. *Ibid*., footnote 251. See also *Stoll & Strack*, Article 5 SPS, paras 57–58.

39 A specific application of the general non-discrimination rule of Art. 2.3 is to be found in **Art. 5.5**, which requires Members to avoid arbitrary or unjustifiable differences **in the levels of protection**.[118] This, however, does not mean that such arbitrary or unjustifiable differences in the levels of protection automatically lead to a violation of Art. 2.3.[119] According to the Appellate Body in *EC—Hormones* such difference is only "an element of (indirect) proof" of a prohibited discrimination in international trade in violation of Art. 2.3.[120] There needs to be a separate analysis in the individual case of whether the SPS measure embodying an arbitrary or unjustifiable difference in levels of protection in effect results in such discrimination.[121] Furthermore, Art. 2.3 is broader in scope, not just limited to arbitrary and unjustifiable distinctions in the levels of protection and, therefore, can also be established without Art. 5.5 needing to be examined.[122]

III. Identical or Similar Conditions

40 Art. 2.3 applies only in cases where identical or similar conditions prevail in the territory of the Members being compared. The focus is on the **conditions** prevailing in the territory of origin or the territory of destination, not on the products. There is a need to look at the factors which have an impact on health and life protection. Relevant conditions are, for example, the occurrence of the same substance carrying a food-borne risk, the existence of a disease or pest in a given territory, factors having adverse health effects and all other biological consequences resulting from import.[123]

41 The prevailing conditions must be **identical or similar**.[124] Even if the conditions do not have to be identical there need to be elements which render them comparable in terms of health and life protection. This is not the case if there is a different disease rate in the territories being compared.

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[118] For the term "arbitrary or unjustifiable" in Art. 5.5 see *Stoll & Strack*, Article 5 SPS, paras 54–55. For the relationship between Art. 2.3 and Art. 5.5, see *ibid*. para. 63.

[119] But see *Australia—Salmon*, WT/DS18/AB/R, para. 240.

[120] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 240. According to the Panel and Appellate Body in *Australia—Salmon* a violation of Art. 5.5 is *presumed* to constitute a violation of Art. 2.3 as well. See *Australia—Salmon*, WT/DS18/R, paras 8.109 and 8.160; *Australia—Salmon*, WT/DS18/AB/R, paras 178 and 240.

[121] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 240.

[122] *Ibid*., para. 252.

[123] With respect to the term "situation" in Art. 5.5, the Appellate Body in *Australia—Salmon* referred to diseases, biological and economic consequences involved. WT/DS18/AB/R, para. 146.

[124] For the interpretation of the term "different situations" in Art. 5.5, see *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 217; *Stoll & Strack*, Article 5 SPS, para. 53.

IV. Prohibition of Disguised Restrictions

42 Even if an SPS measure formally meets the requirements set out in paras 1 to 3, it may not be applied in a manner which would constitute a disguised restriction on international trade pursuant to Art. 2.3, sentence 2. This is the case where a measure is not really concerned with the protection of health or life but is a trade-restrictive measure taken in the guise of an SPS measure.[125] Measures which are in fact designed to pursue a **protectionist and trade-restrictive objective are prohibited**.[126] In order to establish such aim or motive it is necessary to consider the design, architecture and structure of a measure.[127] For example, the fact that an SPS measure was adopted without or on the basis of an insufficient risk assessment may be taken as an indication that health protection was not really its object.[128]

43 In the *Salmon* dispute Australia had applied more restrictive measures to imports of salmon than to imports of live ornamental fish, despite the fact that the latter posed higher risks. This was held to constitute an **arbitrary or unjustifiable difference in the levels of SPS protection** for measures in different situations,[129] resulting in a disguised restriction on international trade in violation of Arts 2.3 and 5.5.[130]

F. Presumption of Consistency (Para. 4)

44 Pursuant to Art. 2.4 SPS measures conforming to the SPS Agreement shall be presumed to be in accordance with the provisions of **GATT 1994** relating to SPS measures. Among them are Art. III:4 (National Treatment),[131] Art. XI (General Elimination of Quantitative Restrictions)[132] and in particular Art. XX lit. b.[133] Art. 2.4 needs to be read in the context of Rec. 8 of the Preamble according to which the SPS Agreement seeks to elaborate the GATT rules in respect of SPS measures. The presumption of consistency is a logical consequence of this undertaking. This, however, does not mean that the requirements under the SPS Agreement and GATT 1994 were identical. The SPS Agreement imposes substantive obligations going beyond Art. XX lit. b and the other GATT provisions.[134]

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[125] *Australia—Salmon*, WT/DS18/R, para. 166.
[126] With respect to the term disguised restriction on international trade in Art. XX GATT 1994. See Appellate Body Report, *EC—Asbestos*, WT/DS135/AB/R, para. 8.236.
[127] *Ibid.*, para. 8.236 points into this direction.
[128] *Australia—Salmon*, WT/DS18/AB/R, para. 166.
[129] *Australia—Salmon*, WT/DS18/R, paras 8.137, 8.160.
[130] *Australia—Salmon*, WT/DS18/AB/R, paras 85–86, 93, 124.
[131] See *Hestermeyer*, Article III GATT 1994, paras 66 et seq.
[132] See *Wolfrum*, Article XI GATT 1994.
[133] See *Stoll & Strack*, Article XX lit. b GATT 1994.
[134] See Panel Report, *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.38. This was

45 Once there is an SPS measure which meets the substantive requirements of the SPS Agreement, consistency with GATT is presumed. For example, SPS measures conforming to international standards pursuant to Art. 3.2. in principle do not constitute unjustified trade restrictions under Art. XI:1 GATT 1994.[135] Art. 2.4 provides for a **rebuttable presumption** of GATT consistency, shifting the burden of proof to the complaining party.[136] In practice there is little scope for a rebuttal.[137] Unless there is a discrepancy between the SPS Agreement and GATT[138] or specific circumstances are not adequately addressed by the Agreement, there is no need to analyse an SPS measure under the relevant GATT provisions once its compliance with the SPS Agreement is established. It is, therefore, appropriate first to examine the SPS Agreement.[139]

46 While Art. 2.4 is silent on the **consequences of a violation of the SPS Agreement** with respect to GATT 1994,[140] for reasons of judicial economy there is no need for a panel to examine an SPS measure under GATT once a violation of the SPS Agreement has been found.[141]

G. Outlook

47 Art. 2, as the basic rule of the SPS Agreement, gives WTO Members leeway to adopt trade restrictive SPS measures provided they are necessary for health protection and objectively justifiable. The margin of appreciation is necessarily limited by the requirement of scientific evidence. The exercise of political discretion by Members is subject to scrutiny on the basis of these

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explained as an implication of the presumption of consistency. *Ibid.* para. 8.40. For the relationship between GATT and SPS see also *Charnovitz*, Preamble SPS, paras 2–9; *Stoll & Strack*, Article XX lit. b GATT 1994, paras 67–70; *Hestermeyer*, Article III GATT 1994, para. 109; *Wolfrum*, Article XI GATT 1994, paras 25–26.

[135] *Wolfrum*, Article XI GATT 1994, para. 26.

[136] *Marceau & Trachtman*, JWT 36 (2002), 811, 871.

[137] But see *Wolfrum*, Article XI GATT 1994, para. 26.

[138] Such a discrepancy arises if Art. XX GATT 1994 is interpreted as calling for a balancing test while the necessity test under the SPS Agreement (Arts 5.6, 2.1), so far, has not been interpreted as demanding strict proportionality. See above at note 34. In such a case an SPS measure could be in compliance with Art. 5.6, but violate Art. XX GATT 1994. Compliance with the SPS Agreement would not provide for a defence. *Marceau & Trachtman*, JWT 36 (2002), 811, at 871, 877.

[139] This order was the one adopted by the Panels in *Australia—Salmon* and *EC—Hormones*.

[140] In *EC—Hormones* the Appellate Body explained that a presumption cannot be interpreted as also indicating the converse. *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 101–102. See also *Marceau & Trachtman*, JWT 36 (2002), 811–881, 871–872.

[141] *EC—Hormones (US)*, WT/DS26/R/USA, paras 8.31 *et seq*., 8.272 *et seq*.; see also *Wolfrum*, Article XI GATT 1994, para. 26; *Marceau & Trachtman*, JWT 36 (2002), 811, 873.

legal and scientific requirements.[142] Given the increased role of Art. 2.2 as central for the scientific evidence test since *Japan—Apples*, future cases will probably give more prominence to the interpretation of Art. 2.[143]

Though it would be wrong to eliminate the science test as an objective standard, the limits of science should be taken into account, especially in cases of scientific uncertainty.[144] The exact **scope of judicial scrutiny** remains to be seen. While so far SPS measures which were adopted for predominantly economic concerns have been invalidated by the dispute settlement bodies on the basis of Art. 2, future cases will reveal whether panels are prepared to adopt a more deferential approach in cases of grave health hazards.[145] Especially where irreversible risks to human health are at stake an adequate balance should be struck between health concerns and free trade. *48*

[142] *Hilf & Hörmann*, AVR 43 (2005), 397, at 406.
[143] *Goh*, JWT 40 (2006), 655, 666.
[144] For the issue of scientific uncertainty see *e.g. Walker*, Cornell Int'l L.J. 31 (1998), 251–320.
[145] *Trebilcock & Howse*, at 210.

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Article 3 SPS
Harmonization

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3
2. Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.
3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Art. 5.[2] Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.
4. Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within theseorganizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures.
5. The Committee on Sanitary and Phytosanitary Measures provided for in paragraphs 1 and 4 of Art. 12 (referred to in this Agreement as the "Committee") shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations.

Footnote 2: For the purposes of paragraph 3 of Art. 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

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Cross References

Arts 28, 30 ECT; Arts 712, 713, 714, 716 NAFTA.

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A. General

1 The aim of Art. 3 is to further the **international harmonization** of SPS measures.[1] Art. 3.1 obliges Members to base their SPS measures on international standards, guidelines or recommendations. Pursuant to Art. 3.2, measures which conform to these standards are presumed to be consistent with WTO law. But in accordance with Art. 3.3, Members can deviate from the standards if there is a scientific justification for so doing.

I. The Significance of Art. 3

2 **Art. 3** contains one of the most controversial principles of the SPS Agreement. This is because the article has lent some degree of indirect, or rather ***de facto***[2] **effect** to **international standards**, guidelines and recommendations. Deviation from these international standards[3] now requires scientific justification in the form of a risk assessment, while compliance is "rewarded" by a presumption of consistency. Moreover, the Agreement has effectively changed the **nature** of these standards: while the standards were originally developed as minimum standards, they are now used in dispute settlement proceedings as *ceilings* which—in principle—have to be observed.

3 Nevertheless, the **practical significance** of Art. 3 seems to have declined considerably since the Appellate Body's *interpretation* of Art. 3 in *EC—Hormones (US)*,[4] where it held that para. 3 contained an "autonomous right", but declined to impart any independent meaning to the first alternative in para. 3 ("scientific justification"). Consequently, in cases after *EC—Hormones (US)*, even where international standards existed, the Panels decided to examine Arts 5 and 2 first and, for reasons of judicial economy, declined to make findings on Art. 3.[5] In *Australia—Salmon*, where Arts 2, 3 and 5 were at issue, the Panel decided to commence its analysis under Art. 5 because, even if it were to start by examining Art. 3, it would still need to address Arts 2 and 5.[6]

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[1] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 177.

[2] On this distinction and the Appellate Body's assertions to the contrary, see below, para. 26.

[3] Hereinafter "standards" is used as shorthand for "international standards, guidelines and recommendations".

[4] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R.

[5] See *e.g.* the Panel Report *Australia—Salmon*, WT/DS18/R, para. 8.184.

[6] *Ibid.*

II. Harmonization

There are several ways of addressing non-tariff barriers to trade (**NTBs**): non-discrimination rules, necessity tests, harmonization and mutual recognition. Traditionally, GATT law has relied on the first[7] and, to some extent, the second[8] technique. The TBT and SPS Agreements have broken new ground by including some provisions on **harmonization** and **mutual recognition** of standards. *4*

Harmonization is defined in Annex A:2 as "[t]he establishment, recognition and application of common sanitary and phytosanitary measures by different Members". The **object and purpose** of Art. 3 are to promote the **harmonization** of national SPS measures on as wide a basis as possible by urging members to comply with existing international standards and to cooperate in the development of new ones. At the same time, the sovereign right and duty of Members to establish their appropriate level of protection and to protect the life and health of their population is recognized and preserved.[9] This purpose is explicitly recognized in the Rec. 6 of the Preamble. Harmonization is a powerful technique for striking a **balance between protection and protectionism**. *5*

B. Scope and Applicability of Art. 3

Art. 3 applies to situations where SPS measures are adopted and relevant international standards exist. *6*

I. International Standards, Guidelines or Recommendations

The SPS Agreement itself does not contain any international standards, nor does it provide for the development of such standards by the WTO. Instead Annex A:3 defines international standards, guidelines and recommendations by referring to the work of existing specialized organizations. Accordingly, they comprise (i) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission (**CAC** or Codex); (ii) for animal health, the standards developed under the auspices of the International Office of Epizootics (**OIE**); and (iii) for plant health, the standards developed under the auspices of the Secretariat of the International Plant Protection Convention (**IPPC**).[10] These three organizations (sometimes *7*

[7] *E.g.* Art. III:4 GATT 1994.
[8] *E.g.* the use of "necessary" in the Chapeau of Art. XX GATT 1994 and in Art. XX lit. b GATT 1994.
[9] See *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 177.
[10] See *Charnovitz* Article 1 SPS, paras 34–36.

referred to as the **"Three Sisters"**) have provided the SPS Committee with lists of international standards they have adopted.[11] For matters not covered by the above organizations, appropriate standards promulgated by other relevant international organizations, as identified by the SPS Committee, are also covered. According to the General Principles of the CAC, Codex recommendations are **not binding** upon Codex Members. The same is true for the other organizations.

8 Criticism has been levelled at the way these—democratically unaccountable—organizations adopt their standards. In particular the decision by Codex to adopt maximum residue levels (MRLs)[12] for growth hormones[13] by majority vote caused great controversy in the context of the *EC—Hormones* dispute. Nevertheless, the Panels have held that they need not consider the circumstances under which these standards were adopted.[14]

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[11] Committee on Sanitary and Phytosanitary Measures, Existing International Standards: Codex Alimentarius Commission, Note by the Secretariat, G/SPS/W/18, 16 June 1995 and Committee on Sanitary and Phytosanitary Measures, Existing International Standards: Codex Alimentarius Commission, Corrigendum; G/SPS/W/18/Corr.1, 29 June 1995; Committee on Sanitary and Phytosanitary Measures, Existing International Standards, Office International des Epizooties (OIE), G/SPS/W/21, 21 June 1995 and Committee on Sanitary and Phytosanitary Measures, International Standards for Phytosanitary Measures, International Plant Protection Convention Secretariat (IPPC), G/SPS/W/23, 22 June 1995 and the respective updates: Committee on Sanitary and Phytosanitary Measures, Procedure to Monitor the Process of International Harmonization, Draft Second Annual Report, Revision, G/SPS/W/107/Rev.1, 24 August 2000; Committee on Sanitary and Phytosanitary Measures, Status of International Standards for Phytosanitary Measures, Submission by the International Plant Protection Convention Secretariat (IPPC), G/SPS/GEN/177, 5 May 2000; Committee on Sanitary and Phytosanitary Measures, International Animal Health Code, Submission by the Office International des Epizooties (OIE), G/SPS/GEN/185, 20 June 2000; Committee on Sanitary and Phytosanitary Measures, Decisions Relevant to the SPS Agreement Taken by the OIE International Committee at the 69th General Session, Communication from the Office international des épizooties (OIE), G/SPS/GEN/266, 10 July 2001; Committee on Sanitary and Phytosanitary Measures, Matters of Interest Arising from the Work of Observer Organizations, Statement by the International Plant Protection Convention (IPPC) at the Meeting of 10–11 June 2001, G/SPS/GEN/271, 27 July 2001 and Committee on Sanitary and Phytosanitary Measures, List of Standards and Related Texts Adopted or Revoked by the Twenty-Fourth Session of the Codex Alimentarius Commission, Part 1. Standards and Related Texts Adopted as Final Texts, G/SPS/GEN/282, 5 October 2001.

[12] The Maximum residue limit (MRL) is a value estimated for pesticides or veterinary drug residues in food. Estimates are usually made by comparing the acceptable daily intake (ADI) with a calculation of the total intake of the residue based on the MRLs and food intake data of these commodities for which MRLs have been established. MRLs are usually expressed in μg/kg.

[13] The decision by Codex formally to adopt the five Codex standards at issue in *EC—Hormones (US)*, WT/DS26/R was taken by a majority of only 33 votes in favour, 29 votes against and 7 abstentions. Such a close vote is unusual in Codex practice in which proposals are normally adopted by consensus; see Rule XI:2 of the Rules of Procedure of the CAC.

[14] Panel Report, *EC—Hormones (US)*, WT/DS26/R/USA and Panel Report, *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.72. Hereinafter only the—slightly more comprehensive—Report on the complaint by Canada will be cited. Also see Panel Report, *Australia—Salmon*, WT/DS18/R, para. 7.10.

Art. 3 is applicable only where international standards exist. In the absence of international standards, Members are free to adopt their own standards. The resulting measures must, however, comply with the other provisions of the Agreement, including Art. 5. *9*

The standards must be **relevant** to the dispute. In *EC—Hormones (Canada)*, the EC argued that there were no Codex standards for the *use* of hormone growth promoters, only Codex standards for Maximum Residue Levels (MRLs), and that, since the EC measures in dispute did not set MRLs, there were no Codex standards relevant to the dispute on which the EC measures needed to be based.[15] The Panel correctly rejected such a narrow interpretation. As long as a standard exists for the substance and/or product at issue, it will be unlikely that such a challenge will succeed.[16] *10*

II. SPS Measures, Standards and the Level of Protection

Art. 3 applies to **SPS measures**.[17] In brief, SPS measures can be summed up as measures for protection against food-borne risks, and against animal and plant-borne diseases and pests. However, it is not entirely clear from the Agreement how the terms "SPS measure", "international standard" and "level of protection" relate to each other. In *EC—Hormones (Canada)* the question arose whether Codex Standards for Maximum Residue Levels (MRLs) are SPS measures, or whether they are merely, as the EC argued, **"levels of protection"**, without being measures in themselves.[18] The Panel held that while ADIs[19] or MRLs merely *reflect* a level of protection (without *stricto sensu being* a level of protection), this did not rule out "that an ADI or MRL can also be a sanitary *measure* in the sense of the SPS Agreement."[20] *11*

Thus, a Member State first has to determine the appropriate level of protection, or **"acceptable level of risk"** as it is otherwise known. According to Annex A:5, the level of sanitary or phytosanitary protection is "[t]he level of protection *deemed appropriate by the Member* establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory".[21] This makes it clear that Members' **discretion** in determining the acceptable level of risk has not been limited by the *12*

[15] *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.69.
[16] For the issue of applicability in case of disease see *Australia—Salmon*, WT/DS18/R, para. 8.46, Corr. 1.
[17] For a definition, see Annex A:1.
[18] See *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.69.
[19] Acceptable daily intake.
[20] *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.77. Italics in the original.
[21] Italics added.

Agreement. In fact, Members can even adopt a "**zero risk**" approach.[22] In a second step the Member State will then try to achieve that level of protection by introducing suitable SPS **measures**.

13 The first determination (level of protection) involves a political value judgement, *i.e.* a non-scientific exercise. It is usually called **risk *management***, as distinct from the purely scientific **risk *assessment***.[23] Risk assessment is the basis for risk management, and thus for the determination of the appropriate level of protection. The Appellate Body, however, has rejected this terminology as having no textual basis in the Agreement, and only speaks of risk assessment.[24]

14 Neither Art. 5 nor Art. 3 explicitly requires WTO Members to **determine** an appropriate level of protection. But the above analysis shows that Art. 3.3 can be applied only if the Member in question has made this determination. Therefore, the Appellate Body has held that, implicitly, the SPS Agreement contains such a **duty**.[25] However, the determination need not be quantitative; it may be expressed purely in qualitative terms.[26]

C. The Structure of Art. 3: Does it Contain a Rule/Exception Relationship?

15 The characterization of the **relationship between paras 1, 2 and 3** was one of the core interpretative issues of the first SPS case, the *EC—Hormones (Canada)* dispute. According to the Panel's interpretation in *EC—Hormones (Canada)*,[27] para. 1 lays down a **general rule** (obligation to harmonize national regulations on the basis of international standards). Para. 2 then provides for the **legal consequence** if the rule is complied with (presumption of necessity and consistency). Finally, para. 3 contains an **exception** to the rule and prescribes legal requirements that need to be fulfilled in order lawfully to deviate from the standards. The Appellate Body, however, ruled that para. 3 enshrined, not an exception, but an **"autonomous right"** and Art. 3 therefore comprised three independent options: (i) merely "basing" a measure on international standards, (ii) fully incorporating the standards, and (iii) rejecting the standards. The correct view, it is submitted, would lie

[22] Appellate Body Report, *Australia—Salmon*, WT/DS/18/AB/R, para. 125.
[23] *Wirth*, Cornell Int'l L. J. 27 (1994), 817, 817; *Landwehr*, 65.
[24] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 181.
[25] *Australia—Salmon*, WT/DS18/AB/R, para. 205.
[26] *Ibid*., para. 206.
[27] *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.89.

somewhere in between: Art. 3 does contain a rule/exception relationship, but para. 2 does not merely contain a legal consequence for para. 1 but rather a complete rule for a **special case**.[28]

D. Measures "based on" International Standards (Art. 3.1)

16 In describing the relationship between international standards and national SPS measures Art. 3 employs two terms: "based on" and "conform to".

I. The Meaning of "based on"

17 Two possible readings can be given to the term "based on" in Art. 3.1: It can either be **equated with "conform to"** as used in Art. 3.2 (thus creating a rule/exception relationship) **or** it can be given an **independent meaning**. The Panel in *EC—Hormones (Canada)* chose the first interpretation.[29] Without giving any explanation of how it arrived at this far-reaching assumption, the Panel thus effectively turned the obligation in Art. 3.1 to base SPS measures on international standards into an obligation that Members' SPS measures *shall conform to* international standards. Furthermore, the Panel went on to hold that Art. 3.3 provides an exception to the general obligation contained in Art. 3.1.

18 The **Appellate Body** strongly disagreed with the Panel's conclusion and ruled that Art. 3 comprised three **independent options**.[30] It reached this conclusion by analysing the wording, the context and the object and purpose of Art. 3. Citing the Oxford English Dictionary, it found that "the ordinary meaning of 'based on' is quite different from the plain or natural import of 'conform to'."[31] Secondly, the Appellate Body noted that the two terms are used in different articles, as well as in different paragraphs of the same article. Thus, it stood to reason that the choice of words is deliberate and that different words are designed to convey different meanings.[32] Finally, the Appellate Body concluded that the object and purpose of Art. 3 runs counter to the Panel's interpretation because harmonization of SPS measures on the basis of international standards is a goal to be realized in the future. The SPS Agreement was not designed to require Members fully to harmonize their SPS measures by making them conform to international standards. This would, according to the Appellate Body, vest international

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[28] See below, para. 19.
[29] *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.75.
[30] See above, para. 15.
[31] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 163.
[32] *Ibid.*, para. 164.

standards with obligatory force they did not previously possess, and would transform them into binding norms.[33]

19 It is difficult to argue with the Appellate Body's conclusions regarding the semantic, grammatical and systematic methods of interpretation. Nevertheless, it must be noted that the creation of a **third option** actually pre-determines the interpretation of "scientific justification" in Art. 3.3 in a way that runs counter to most principles of treaty interpretation and the interests of Members' sovereignty.[34] Moreover, it will be seen that the artificial creation of an "autonomous right" is, in fact, largely pointless because it is quite difficult to come up with any meaningful examples of measures that could be described as being "based on" international standards without conforming to them. Finally, it seems that the Appellate Body simply went too far when it completely discarded the rule/exception relationship found by the Panel. After all, Art. 3.3 itself uses the term "**justification**".

II. Measures "based on" but not "conforming to" International Standards

20 The Appellate Body explained that a measure based on a standard might not conform to that standard, "as where **only some, not all, of the elements** of the standard are incorporated into the measure".[35] It did not elaborate on what such a measure could look like, but two possibilities can be imagined.

21 The example described by the Appellate Body could be termed **"partial incorporation"**. But MRLs and some other Codex standards most likely to give rise to trade disputes have **numerical values**. Arguably, a measure (*e.g.* a ban on products exceeding a certain MRL) can only adopt that value or deviate from it. It is difficult to see how a measure could incorporate "some, not all, elements of the standard". Therefore, partial incorporation seems to be a viable option only where a standard does not consist of a single numerical value, *i.e.* the Codex standards *stricto sensu*[36] or the Recommended Codes of Practice.[37] But at least the former are more concerned with product characteristics and have less relevance for health issues.

22 Secondly, it is conceivable that a Member State in adopting a national SPS measure is guided by the Codex standard, but decides to **modify** it. This may be due to a different methodology *e.g.* in calculating the ADI from the MRL. If such a factor were applied uniformly to the Codex standards, it

[33] *Ibid.*, para. 165.
[34] This is explained in greater detail in footnote 52.
[35] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 163.
[36] *E.g.* CODEX STAN C-1 for Cheddar.
[37] *E.g.* CAC/RCP 2 for Canned Fruit and Vegetable Products.

might well be argued that the resulting values were "based on" the international standard in the sense of the Appellate Body's interpretation.

III. The Law Applicable to Measures Under Art. 3.1

If one accepts the Appellate Body's interpretation in *EC—Hormones (Canada)* that Art. 3 offers three independent alternatives (or "autonomous rights"), another fundamental problem remains: what is the **legal consequence** for measures merely based on international standards? So far, the Appellate Body has provided no answer to this question. *23*

It is clear that Art. 3.1 measures do not benefit from the presumption in para. 2. Accordingly, they have to comply with Art. 5. This means, however, that there is no practical difference between measures based on international standards and those which are not: While Art. 3.3 measures require a **risk assessment** because of the reference in that paragraph to Art. 5, Art. 3.1 measures also have to be based on a risk assessment because they do not benefit from the presumption in para. 2. Thus the whole point of creating the third option (measures merely based on standards) is largely gratuitous.[38] *24*

Finally, an advantage of basing national SPS measures on international standards might relate to the **burden of proof**. But the Appellate Body has ruled that Art. 3.3 measures are not "penalized" by the imposition of a reversed burden of proof.[39] If there is no presumption against measures *not* based on international standards, then, *a fortiori*, there can be no presumption against measures which are at least *based on* such standards.[40] *25*

Thus, in theory, the reading given to Art. 3.1 by the Appellate Body has created an additional, third option: basing national SPS measures on international standards as opposed to fully incorporating or completely rejecting them. In reality, however, **no advantage** can be gained from doing so. Art. 5 has to be satisfied even if a measure is based on a standard. The four SPS cases to date have shown that it is exceedingly difficult to produce a risk assessment that complies with Art. 5. The only way to escape that obligation is fully to incorporate international standards into national SPS measures pursuant to Art. 3.2. Consequently, the pressure to harmonize *26*

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[38] *Pauwelyn*, JIEL 2 (1999), 641–664, comes to the same conclusion. The only way to escape this conclusion would be to argue that Art. 3 is in its entirety *lex specialis* to Art. 5. In the absence of an explicit reference to Art. 5, as in Art. 3.3, the article would thus exclude the application of Art. 5. Given the complete textual absence of any indication of such a relationship between Art. 3 and Art. 5, however, this proposition seems quite untenable. It would make Art. 3.2 redundant, and Art. 5 contains no qualification of its obligation to subject all SPS measures to a risk assessment.

[39] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 102.

[40] *Ibid.*, para. 171.

remains, and in the light of the possibilities of enforcing the SPS Agreement through the dispute settlement mechanism, the **international standards** have been vested with a new form of ***de facto* effect**.

E. Measures "conforming to" International Standards (**Art. 3.2**)

27 Art. 3.2 has not yet given rise to interpretative problems in dispute settlement proceedings. At the same time, it is the only paragraph which actually goes beyond rights and obligations already laid down in other provisions of the Agreement. In order for a measure to conform to an international standard, it must **completely embody** the standard and transpose it into domestic law.[41] It seems to be generally accepted that "conform to" means "full compliance", "adoption" or "incorporation".[42]

28 A national SPS measure that conforms to international standards benefits from a **presumption** of necessity and consistency with WTO law. The presumption, like the one in Art. 2.4, is a **rebuttable** one.[43] This follows from the non-binding nature of the standards. Accordingly, the effect of para. 2 is a reversal of the burden of proof. In practice, however, it seems unlikely that a Member could ever successfully challenge the presumption because usually the standards reflect a consensus shared by the international scientific community.

29 The conforming measure is presumed to be "necessary to protect human, animal or plant life or health". This is a requirement both of Art. 2.2 and Art. XX lit. b GATT 1994. **Necessary** means that no other, less trade-restrictive measure is available that would achieve the same objective of health protection. The **presumption of consistency** goes beyond that by providing that the measure will be deemed not to infringe any other provision of the SPS Agreement or the GATT. In theory, a measure might still infringe other provisions of WTO law, especially the TBT Agreement. But since the SPS and TBT Agreements are mutually exclusive, a measure that comes under the SPS Agreement cannot be appraised under the TBT Agreement.[44]

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[41] *Ibid*., para. 170.

[42] If, however, one were to follow the Panel's position in *EC—Hormones (Canada)*, WT/DS48/R/CAN and equate the terms "based on" and "conform to", it could make sense to give the latter a slightly broader meaning in order to make the equalization more convincing.

[43] The Appellate Body mentions this point in parenthesis without giving any explanation, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 170.

[44] Art. 1.5 TBT. For further details see *Charnovitz*, Article 1 SPS, paras 49–50.

F. Measures Not "based on" International Standards (Art. 3.3)

30 Para. 3 upholds, subject to a justification requirement, the right to introduce or maintain SPS measures which result in a **higher level of protection** than would be achieved by measures based on the relevant international standards. Consequently, it applies to measures *not* (even) based on international standards. In *EC—Hormones* the Appellate Body held that the "right of a Member to establish its own level of sanitary protection under Article 3.3 of the SPS Agreement is an autonomous right and not an 'exception' from a 'general obligation' under Article 3.1".[45] According to case law, any measure not based on international standards has to **comply with a risk assessment** in accordance with Art. 5. Members cannot escape this obligation by relying on a "scientific justification", if that concept is meant to be different from carrying out a risk assessment.

I. Measures Resulting in a Higher Level of Protection

31 According to the Panel, *all* measures achieving a different level of protection from that reflected in the standard are measures within the meaning of Art. 3.3.[46] The Appellate Body expressly left open the exact relationship between the concepts but noted that it was based on a wrong premise.[47] In my view, a measure can no longer be said to be based on a standard if it achieves a level of protection which is **significantly different** from the one reflected in the international standard. As a matter of fact, the Panel actually employed the "significantly different" test itself: It held: "[s]ince the EC measures in dispute do not allow the presence of any residues of these two hormones [...] (imposing what it calls a 'no residue' level), the level of protection reflected in the EC measures is *significantly different* from the level of protection set by the Codex standards (a 'no residue' level as opposed to [...] an MRL of 2 and 10 μg/kg [...])."[48]

II. Does Art. 3.3 Contain Two Alternatives?

32 According to the wording of Art. 3.3, measures resulting in a higher level of protection (*i.e.* measures not based on international standards) can be introduced or maintained (i) if there is **scientific justification**; or (ii) if

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[45] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 172.

[46] *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.75. Italics in the original.

[47] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 168. By proceeding to appraise the EC measures under Art. 3.3, it implicitly confirmed that they were not based on international standards Moreover, this concurrence with the Panel means that the elaborations on the meaning of "based on" were actually *obiter dicta*.

[48] *EC—Hormones (Canada)*, WT/DS48/R/CAN para. 8.78. Italics added.

they are the result of the level of protection a Member determines to be appropriate pursuant to Art. 5. In fact, the second alternative almost seems tautological.[49] What it means is that the measure must be based on that **risk assessment** (Art. 5.1).

33 The text of Art. 3.3 seems to indicate quite clearly that, apart from carrying out a risk assessment, a second option for justification is available for measures not based on international standards. An official footnote even explains the meaning of scientific justification.[50] Despite the clear wording and the use of the disjunction "or", however, both the Panel **and** the Appellate Body agreed that scientific justification has **no independent meaning**. SPS measures have to comply with Art. 5. The Appellate Body gave two reasons for this conclusion. First, the last sentence of Art. 3.3 requires that *all* measures which result in a higher level of protection shall not be inconsistent with any other provision of the SPS Agreement, thus including Art. 5. Secondly, the footnote to Art. 3.3 defining "scientific justification" was held to partake of the nature of the risk assessment required in Art. 5.1.[51] In other words the definition paraphrases nothing other than the process of risk assessment.

34 The **problem** with the Appellate Body's interpretation is not only that it abolishes the clear distinction between two situations. The "or" has effectively been turned into "and". As a consequence, it also deprives Art. 3.3 of any independent meaning (*effet utile*): Art. 5 needs to be complied with anyway since Art. 3.3 measures do not benefit from the presumption in Art. 3.2.[52]

III. The Burden of Proof

35 According to the Appellate Body, the burden of proof of demonstrating that measures not based on international standards are in breach of the

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[49] The Appellate body has stated very rightly that "Article 3.3 is evidently not a model of clarity in drafting and communication", *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 175.

[50] In Appellate Body Report, *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 79, the Appellate Body explained that scientific justification requires a "rational relationship between the SPS measure at issue and the available scientific information".

[51] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 175.

[52] On the other hand, even though the Appellate Body does not mention it, given its interpretation of "based on", the Appellate Body had no choice but to deny independent meaning to the concept of scientific justification. Otherwise, it would have created the paradoxical situation where measures *not* based on international standards could escape the requirements of a risk assessment, while measures based on these standards (due to the lack of mention of "scientific justification" in Art. 3.1) would have to comply with Art. 5. Nonetheless, if the Appellate Body had wanted to mitigate the strictness of the SPS Agreement, it would have been much more effective to accept the equation of "based on" and "conform to", but to uphold the first alternative as an independent way of justification.

SPS Agreement rests with the **party invoking the infringement**.[53] Thus it reversed the Panel's ruling which had placed the burden on the party relying on Art. 3.3 because it had characterized the provison as an "exception".[54]

36 While the two rulings seem to be diametrically opposed, the **practical difference** may not be very substantial. This is because the Appellate Body itself has clouded the issue by mingling the concepts of burden of proof and burden of presenting evidence.[55] By allowing the burden of proof (as opposed to the burden of producing evidence) to **"shift"** to the defendant, once the appellant has made a mere *prima facie* case,[56] the Appellate Body has effectively qualified its assertion that the party invoking Art. 3.3 does not bear the burden of proof. How small the difference has become in reality can be gleaned from the fact that the Appellate Body made a ruling on whether the burden of proof had been satisfied (albeit in the context of Art. 5.1) in a footnote.[57]

G. Cooperation in International Standard-Setting Organizations (Art. 3.4)

37 According to Art. 3.4, Members "shall" take part in the work of the relevant international organizations to promote the development of international standards. There is no case law on the provision yet, but it would seem too far reaching to construe it as a legal obligation to join or actively participate in the work of these organizations.[58]

38 Art. 3.4 explicitly mentions three "relevant international organizations" (**CAC**, **OIE** and **IPPC**). One could add **FAO** and **WHO**, the parent organizations of the CAC. Further relevant institutions concerning the trade in genetically modified (or: living) organisms (GMOs/LMOs) are those established under the Convention on Biological Diversity (**CBD**), and the

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[53] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 102.
[54] *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.89.
[55] See *Pauwelyn*, JIEL 1 (1998), 227–258.
[56] See *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 109; Appellate Body Report, *United States—Wool Shirts and Blouses*, WT/DS33/AB/R, 14–16.
[57] In footnote 180 (*EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R) it held: "[…] we conclude that the Panel mistakenly required that the European Communities take on the burden of proof that its measures […] are based on a risk assessment. We determine that the United States and Canada have to make a *prima facie* case that these measures are not based on a risk assessment. However, after careful consideration of the panel record, we are satisfied that the United States and Canada, although not required to do so by the Panel, did, in fact, make this *prima facie* case […]".
[58] See *Kamann*, in: *Prieß* & *Berrisch* (eds), 211, 230.

Cartagena Protocol on Biosafety.[59] The CBD is not an international organization *stricto sensu*, but it does have a secretariat and the Cartagena Protocol has established a Biosafety Clearing-House to assist Parties to implement its provisions and to facilitate sharing of information on, and experience with, LMOs.

H. Procedures for Monitoring the Process of International Harmonization (Art. 3.5)

39 Pursuant to Art. 3.5, the SPS Committee[60] shall develop a procedure to monitor the process of international harmonization. In 1997, the SPS Committee adopted a **provisional procedure** for monitoring the use of international standards.[61] Para. 10 of the provisional procedure provides for the preparation by the Secretariat of an **annual report** to the Committee on the list of standards, guidelines or recommendations established under para. 8, the major trade impacts identified by Members and their comments regarding the use or non-use of the identified international standards and of those cases identified where there was no international standard. The first such report was adopted by the Committee in 1999.[62] The report listed a number of standards-related trade issues which had been considered by the Committee on the basis of proposals by Members. The operation of the provisional monitoring procedure has been regularly modified and extended.[63]

I. Outlook

40 The Appellate Body's ruling in *EC—Hormones*[64] has changed Art. 3 almost beyond recognition. On the one hand, large parts of the article have been

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[59] Cartagena Protocol on Biosafety to the Convention on Biological Diversity of 29 January 2000, ILM 39 (2000), 1027.

[60] For detailed comment on the SPS Committee and its work, see *Röben*, Article 12 SPS.

[61] G/SPS/11.

[62] G/SPS/13. The latest annual report is the sixth annual report: Committee on Sanitary and Phytosanitary Measures, Procedure to Monitor the Process of International Harmonization, Sixth Annual Report Adopted by the Committee on 23 June 2004, G/SPS/31, 24 June 2004.

[63] The Committee decided in June 2003 to extended the provisional procedure for a further 36 months and to review its operation by July 2006, with a view to deciding then whether to continue with the same procedure, to amend it or to develop another one; Committee on Sanitary and Phytosanitary Measures, Decision to Modify and Extend the Provisional Procedure to Monitor the Process of International Harmonization, Adopted by the Committee on 25 June 2003, G/SPS/25, 1 July 2003.

[64] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R.

made **redundant**: Members are encouraged by para. 1 to base their SPS measures on international standards, but if they do they still have to comply with Art. 5. They also have the "autonomous right" not to base their measures on international standards, in which case they also have to undertake a risk assessment pursuant to Art. 3.3. At the end of the day, only para. 2 has been left with any meaning at all.

Art. 3 has played **no further role** in dispute settlement proceedings since *EC—Hormones*. In the light of the above analysis, the proposition can be ventured that Art. 3 is unlikely to play any great role in dispute settlement proceedings again. Given its ambitious and useful objective, this may come as a surprise. But it owes as much to bad draftsmanship as to the old adage that "hard cases make bad law". *41*

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Article 4 SPS
Equivalence

1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.
2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.

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Cross References

Art. 28, 30 ECT; Art. 714 NAFTA.

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A. General

Art. 4 is designed to further and facilitate mutual recognition of SPS measures by defining the concept of "equivalence" and providing some procedural rules for its operation in practice. *1*

I. The Concept of Equivalence/Mutual Recognition

Importing and exporting Members often use different SPS measures,[1] *i.e.* regulatory regimes, which incorporate **different technical requirements** (*e.g.* maximum residue levels for chemicals or rules on quality control, conformity assessment or labelling). The reasons for these differences may lie in the historical development of food control systems and different choices on risk management, but also in the varying prevalence of particular food safety hazards in the respective countries. *2*

Non-discrimination rules alone are not an effective way of abolishing the resulting trade barriers because the exporter would still be left with the dual burden of having to comply with two different regulatory regimes: that of the country of origin and that of the destination country. In principle, there are two solutions to this problem. The first is the introduction of globally uniform standards. This approach is called harmonization and is dealt with under Art. 3.[2] Alternatively, importing Members can accept the standards used by the exporting Member. This concept, which goes beyond non-discrimination and is known as **"mutual recognition"** in EC law, is codified in Art. 4 under the heading of "equivalence". *3*

Given the huge differences in the regulatory frameworks of WTO Members, it is obvious that there can be **no general obligation to accept equivalence** under WTO law. Art. 4 obliges Members to accept other Members' SPS measures as equivalent, if (and only if) the exporting Member is able objectively to demonstrate that its measures achieve the level of protection which the importing Member has determined to be appropriate. It thus recognizes that there may be more than one way to reach a given level of protection and that different measures may be equally effective in achieving the same result.[3] Therefore, as long as the exporting Member is able to prove that its measures result in the **same level of protection** as that chosen by the importing Member, there is no reason why the latter should *4*

[1] For a definition of SPS measures see Annex A:1 and *Charnovitz*, Article 1 SPS, paras 10–32.

[2] See *Landwehr*, Article 3 SPS.

[3] For example heat treatment of dairy products may be as effective as quarantine in preventing the introduction of foot and mouth disease (FMD), see below, para. 23.

be allowed to ban products on grounds of health protection. Accordingly, it has to accept these measures as equivalent to its own.

5 Mutual recognition is arguably the most **effective way to abolish obstacles** to international trade resulting from the application of different SPS measures. The simple acceptance of other Members' standards requires no harmonization legislation and avoids all forms of indirect discrimination. At the same time, its consensual, negotiated character avoids conflict and controversy. Therefore, it is not surprising that there has been no DSB jurisprudence on Art. 4 to date.

6 The **advantages** of mutual recognition are obvious: it avoids a trend towards downward harmonization, it does not require the drafting of comprehensive implementation legislation, and it allows national distinctions to flourish rather than be jettisoned for the sake of internationally uniform products.

7 But as obvious as the advantages are the **problems** of mutual recognition: recognition requires a considerable degree of trust between the exporting and the importing Member. In all likelihood, it will be a viable concept only where standards are already broadly similar. In other words mutual recognition presupposes some degree of "natural" (endogenous) harmonization. As long as Members feel that acceptance of foreign regulations (which are usually perceived as being lower or inferior) would seriously compromise *e.g.* the health of their population, they will not be willing to submit to a rule of mutual recognition.

8 Under **EU law** (Art. 28 ECT) as interpreted by the European Court of Justice in the landmark cases of *Dassonville*[4] and *Cassis de Dijon*[5] there is a presumption in favour of equivalence. Member States can invoke Art. 30 ECT to rebut the presumption, but in doing so they bear the **burden of proof**. By contrast, Art. 4 SPS does not establish such a presumption. It merely contains rules to facilitate mutual recognition. The burden of proof rests with the exporting Member.[6]

9 As shown above, mutual recognition and harmonization are **complementary** concepts: In the absence of comprehensive harmonization, Members can always forge ahead by accepting each other's standards on a bilateral or multilateral basis.

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[4] C-8/74, *Procureur du Roi v. Benoit and Gustave Dassonville*, [1974] E.C.R. 837.

[5] C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1978] E.C.R. 649.

[6] See below, para. 18.

II. Significance and Implementation of Art. 4

10 Art. 4 could be especially valuable for **developing country Members**, which often claim that their products are rejected by developed Members even though their measures provide the same level of health protection.[7] Reacting to these concerns, the General Council in October 2000 requested the SPS Committee "to examine the concerns of developing countries regarding the equivalence of SPS measures and to come up with concrete options as to how to deal with them".[8]

11 In October 2001, the SPS Committee adopted a "**Decision on the Implementation** of Article 4 of the SPS Agreement".[9] This Decision provides guidance for governments negotiating the recognition of equivalent measures or products, for example regarding information exchange. In March 2002, the SPS Committee adopted a work programme for this purpose.[10]

12 Outside the WTO, the FAO/WHO Joint Codex Alimentarius Commission (**CAC**) elaborates guidelines for food import and export systems through its Codex Committee on Food Import and Export Certification and Inspection (CCFICS). It has produced "Guidelines on the Judgement of Equivalence of Sanitary Measures Associated with Food Inspection and Certification Systems".[11] A similar paper has been produced by the International Office of Epizooties (OIE) and the International Plant Protection Convention (IPPC).[12]

B. Acceptance of Equivalence (Art. 4.1)

13 The main question regarding mutual recognition is how to establish that an exporting country's measures are equivalent to those used by the importing Member. To that end, Art. 4.1 contains a substantive rule in sentence 1 and a procedural rule in sentence 2.

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[7] See in this respect the Rec. 7 of the Preamble.
[8] G/SPS/19/Rev.2, Rec. 2.
[9] G/SPS/19 and G/SPS/19/Rev.2.
[10] G/SPS/20.
[11] The CAC adopted the Guidelines at its 26th Session held in Rome, Italy, from 30 June to 7 July 2003.
[12] The International Committee of the OIE adopted the Guidelines for Reaching a Judgement on Equivalence of Sanitary Measures at its 71st General Session held in Paris, from 18 to 23 May 2003. The IPPC adopted ISPM No. 24: Guidelines for the determination and recognition of equivalence of phytosanitary measures (appendix to the report of ICPM-7).

I. The Appropriate Level of Protection

14 The wording of Art. 4.1 makes it very clear that the **"appropriate" level** of sanitary or phytosanitary protection which the exporting Member strives to achieve is exclusively **defined by the importing Member**. For the purpose of Art. 4, it is not enough to aim at a "reasonable" level of protection, or a level consistent with standards set by international organizations.[13] In theory, there is no limitation on the importing Member's discretion to determine the goal to be achieved by its trading partners. In practice, however, there seem to be a few qualifications.

15 First, the importing Member will have to **quantify** its acceptable level of risk. Admittedly, in *Australia—Salmon*, the Appellate Body held that the determination of the level of protection need *not* be quantitative and that it may be expressed purely in qualitative terms.[14] It is difficult to see, however, how equivalence could be assessed without expressing the health objective in quantifiable terms. In any event, the assessment of equivalence can take place only once the importing Member has determined its appropriate level of sanitary or phytosanitary protection **in accordance with Art. 5**. This requires, above all, a risk assessment. As past experience shows, this is no easy task for the importing Member.

16 Secondly, the acceptable level of risk must be **published**, *i.e.* made available to the exporting Member. While both issues are not expressly addressed in the article, these obligations follow from other provision of the Agreement[15] and are logical prerequisites which prevent the importing Member from relying on some vague, unspecified notions of health hazards. The SPS Committee seems to be slightly more reserved about the binding nature of these obligations. According to its "Decision on the Implementation of Article 4 of the SPS Agreement" the importing Member should make this information available.[16]

II. The Requirement *objectively* to *demonstrate* Equivalence

17 There is no definition of this term in the Agreement. In the light of the Agreement taken as a whole, "objectively demonstrate" means to supply **scientific evidence** that the measure used by the exporting member achieves the **same level of protection**.

18 It follows that the **burden of proof** of demonstrating that the same level of protection is achieved lies with the exporting Member. This is corroborated

[13] See *Landwehr*, Article 3 SPS.
[14] Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R, paras 205 *et seq*.
[15] See Annex B on transparency of SPS regulations.
[16] See G/SPS/19/Rev.2, para. 2.

by an *obiter dictum* in *EC—Hormones (Canada)*, where the Panel noted that "[t]wo provisions of the SPS Agreement do, however, explicitly confer the burden of proof upon the exporting Member (i.e., the Member contesting the sanitary or phytosanitary measure), namely Article 4.1 on equivalence and [Art. 6.3]".[17]

III. Acceptance

19 According to the SPS Committee, equivalence can be accepted for a specific SPS measure or measures related to a certain product or category of products, or on a system-wide basis.[18] Usually acceptance will take the **form** of an Agreement between the Members concerned (see Art. 4.2). However, there is no reason why Members should not be able unilaterally to accept equivalence. This unilateral acceptance would not even have to be binding in international law; it could be provided for in simple domestic legislation.

20 The imperative language of Art. 4.1 (**"shall accept"**) clearly indicates that there is no discretion left to the importing Member to refuse acceptance once the test has been met. The provision thus contains an **entitlement** for the exporting Member once it has satisfied the condition. Equivalence can be established only if the importing Member is granted **access** to the inspection, testing and other relevant procedures of the exporting Member. Therefore, the latter "shall" be given "reasonable access" to these procedures pursuant to the second sentence of Art. 4.1. Since it is in the interest of the exporting Member to convince the other party to recognize its measures as equivalent, this provision should not pose many problems in practice.

21 Art. 4.1, like the other provisions of the Agreement, is subject to the binding **dispute settlement** procedure provided for in the DSU. Accordingly, it would be for a Panel to make this finding in the case of a dispute. Since it is a factual determination, there seems to be little room for an appeal to the Appellate Body on this point.

C. Agreements (Art. 4.2)

22 Art. 4.2 deals with international agreements as one form of accepting equivalence. It does not contain an obligation to conclude such agreements, but merely to enter into **consultations**. The three sister organizations are working on guidelines to help Members negotiate equivalence agreements.

[17] Panel Report, *EC—Hormones (Canada)*, WT/DS48/R/CAN, footnote 355.
[18] G/SPS/19/Rev.1, para. 1.

23 An **example** of such an Agreement is the 1998 Agreement between New Zealand and the EC on dairy products from countries which are not entirely free from foot and mouth disease (FMD). New Zealand had previously accepted dairy products only from countries that had been free from FMD for at least 12 months. The EC, however, was able to demonstrate that heat treatment of the milk was an equally effective measure because it destroyed the virus.

D. Outlook

24 It has been noted above that equivalence and harmonization are complementary concepts. Harmonization is an inherently multilateral concept, while equivalence can be implemented on a bilateral basis. The current reluctance of major trading powers vis-à-vis multilateral approaches, in combination with a "weakening" of Art. 3 by the Appellate Body in *EC—Hormones*, may lead to an enhanced role for Art. 4. Despite the advantages of mutual recognition, however, such a development also has its downsides: it can produce a fragmented legal "playing field" and create legal uncertainty. Moreover, the bilaterally negotiated character of equivalence agreements tends to favour big Members—thus reducing the WTO's achievement of moving from a power-based to a rules-based world trade system.

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Article 5 SPS
Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection

1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.
2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.
3. In assessing the risk to animal or plant life or health and determining the measure to be applied for achieving the appropriate level of sanitary or phytosanitary protection from such risk, Members shall take into account as relevant economic factors: the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.
4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.
5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.
6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.[3]
7. In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.
8. When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports and the measure is not based on the relevant international standards, guidelines or recommendations, or such standards, guidelines or recommendations do not exist, an explanation of the reasons for such sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure.

Footnote 3: For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

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A. General

1 Art. 5 contains important requirements for SPS measures, especially for distinguishing between legitimate SPS measures and those implemented for protectionist purposes. The provision contains science-based principles and is guided by modern approaches to **risk policies**. It establishes **four "core" disciplines** of the SPS Agreement: the requirements of a risk assessment (paras 1–3), of regulatory consistency (para. 5), of least-trade restrictiveness (para. 6), and the possibility of adopting provisional SPS measures (para. 7).

2 In the **context of the SPS Agreement**, Art. 5 builds on the basic obligations contained in **Art. 2.**[1] **By virtue of Art. 3.2**, Art. 5 will be rendered largely inapplicable if a harmonization effort under Art. 3 results in the adoption of an "international standard, guideline or recommendation" (Annex A:3). Nevertheless, there is a link between Arts 3 and 5, as compliance with Art. 3.3 requires compliance with Art. 5.[2]

3 The relationship of Art. 5 to **other international agreements and rules** of international law, and particularly a **principle of precaution,** has been intensively debated. In *EC—Approval and Marketing of Biotech Products* the applicability of the Convention on Biological Diversity (CBD) and its Cartagena Protocol on Biosafety was at issue, as well as the relevance of a more general international law principle of precaution, which had already been put forward in *EC—Hormones*.[3]

B. Historical Development

4 Art. 5 for the first time in 1995 introduced the concepts of "risk" and "risk assessment" into the GATT/WTO legal order. But these are not totally new

[1] See *Seibert-Fohr*, Article 2 SPS, para. 2 and below, paras 5 and 73.
[2] See *Landwehr*, Article 3 SPS, para. 33.
[3] See below, paras 97–99.

concepts, moreover, they were widely used in such diverse fields as environmental protection or health regulation.[4] **Risk assessment** is a common decision-making tool; it can be described as a rational and systematic way of gathering, evaluating and recording information which would lead to recommendations, positions or actions in response to an identified risk or hazard. The approach that governments should retain the right to assess risk and risk levels in a new WTO legal framework but should take into account and assess the relevant consequences is based on the proposals by the EC, US and Cairns Group, as continued in the newly established Working Group on Sanitary and Phytosanitary Regulations and Barriers to develop parameters for acceptable health and sanitary measures.[5] Already at an early stage in the negotiations, the Working Group agreed that risk assessment should, *inter alia*, consider the available scientific evidence, the relevant methods of process, production, inspection, sampling, testing and the relative costs and effectiveness of alternative approaches to limiting risks.[6] The Draft Text on Sanitary and Phytosanitary Measures of November 1990 already included the main concepts of the current Art. 5 including the requirement to minimize negative trade effects and to avoid arbitrary or unjustifiable distinctions and discrimination, the possibility of adopting provisional measures and the right to receive an explanation in cases in which a Member does not apply an international standard, or such standard does not exist. The elaboration of the "Dunkel Draft" and the adoption of the actual wording of Art. 5 merely introduced minor editorial alterations.[7]

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[4] In particular by invoking a justification under the general exception of Art. XX lit. b GATT 1947/1994.

[5] See, *e.g.*, Uruguay Round, Negotiating Group on Agriculture, Summary of the Main Points Raised at the Second Meeting of the Working Group on Sanitary and Phytosanitary Regulations and Barriers (3 November 1988), Note by the Secretariat, MTN.GNG/NG5/WGSP/W/2, 14 November 1988; Uruguay Round, Group of Negotiations on Goods, Negotiating Group on Agriculture, Communication from the European Communities, Working Paper, Drafting of an Appropriate Framework of Rules for Sanitary and Phytosanitary Regulations, MTN.GNG/NG5/W/56, 20 April 1988; Uruguay Round, Group of Negotiations on Goods, Negotiating Group on Agriculture, Communication from the United States on Health and Sanitary Measures, MTN.GNG/NG5/W/76, 13 September 1988; Uruguay Round, Group of Negotiations on Goods, Negotiating Group on Agriculture, Communication from the United States on a Health and Sanitary Working Group MTN.GNG/NG5/W/77, 13 September 1988; Uruguay Round, Group of Negotiations on Goods, Negotiating Group on Agriculture, Time for Action, A Proposal for a Framework Approach for Agriculture, Submission by the Cairns Group Comprising Argentina, Australia, Brazil, Canada, Chile, Colombia, Hungary, Indonesia, Malaysia, New Zealand, Philippines, Thailand and Uruguay, MTN.GNG/NG5/W/69, 13 July 1988.

[6] Uruguay Round, Negotiating Group on Agriculture, Draft Text on Sanitary and Phytosanitary Measures, MTN.GNG/NG/WGSP/7, 20 November 1990, paras 15 *et seq*.

[7] Trade Negotiations Committee, General Agreement on Tariffs and Trade, "The Dunkel Draft" from the GATT Secretariat, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA, 20 December 1991, collected and edited by the Institute for International Legal Information, 1992, L.38 *et seq*.

C. Obligation to Base Measures on a Risk Assessment (Para. 1)

Art. 5.1 may be viewed as a **specific application** of the basic obligations contained in Art. 2.2.[8] This means that a violation of Art. 5.1 automatically implies a violation of Art. 2.2. Consequently, both provisions should constantly be read together.[9] Nevertheless, Art. 5.1 does not exhaust the whole meaning of Art. 2.2. The Appellate Body in *EC—Hormones* noted that "[t]he requirements of a risk assessment under Article 5.1, as well as of 'sufficient scientific evidence' under Article 2.2, are essential for the maintenance of the delicate and carefully negotiated balance in the SPS Agreement between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings".[10] *5*

I. Scope of Art. 5—SPS Measures, Including those Adopted Before but Maintained After the Entry Into Force of the Agreement

As the wording clearly indicates in pointing to "sanitary and phytosanitary measures", Art. 5.1 is applicable only to **SPS measures** as such as defined by Annex A:1,[11] but not to the "application" of "requirements and procedures". In particular, decisions to delay approval procedures, such as the "moratorium" on the approval of biotech products which was at stake at *EC—Approval and Marketing of Biotech Products*, do not constitute such an SPS measure, if they neither impose substantive requirements for approval nor lay down a procedure for such approval.[12] *6*

In the absence of any indications to the contrary in the text of the SPS Agreement, its rules also **apply to measures which were adopted prior to its entry into force**. Some of its provisions, such as Arts 2.2, 3.3, 5.6, 5.8 and 14, even imply such application to measures which were adopted before the entry into force and are maintained thereafter.[13] Such application is in accordance with Art. 27 VCLT,[14] which addresses the *7*

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[8] Panel Report, *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.93; Panel Report, *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.96. The Appellate Body referred to an "obligation to conduct an assessment of 'risk'", Appellate Body Report, *Japan—Apples*, WT/DS245/AB/R, para. 202.

[9] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 180. See also, Appellate Body Report, *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 75; Panel Report, *Japan—Apples (Article 21.5—US)*, WT/DS245/RW, para. 8.124.

[10] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 177.

[11] See *Charnovitz*, Article 1 SPS, paras 10–32.

[12] Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.1339 *et seq*., 7.1391 *et seq*.

[13] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, paras 126 *et seq*.

[14] The provision reads: "Unless a different intention appears from the treaty or is otherwise

principle of non-retroactivity of treaties insofar as SPS measures continue to exist after 1 January 1995, as they have not "ceased to exist before the date of the entry into force of the treaty" as envisaged by Art. 27 VCLT.

8 As, furthermore, the SPS Agreement does not draw any distinction between pre-existing and **newly adopted measures**, its provisions apply equally to those two types of measures. Thus, the requirement that SPS measures be based on a risk assessment applies to pre-existing measures in the same way as it does to ones adopted after the entry into force of the SPS Agreement. Taking into account that Art. XVI:4 of the WTO Agreement requires Members to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements", there may be the need to undertake a **risk assessment** which conforms to the requirements of Art. 5 regarding such **pre-existing measures**. However, some **flexibility** may exist at this point, as Art. 5.1 calls for a risk assessment, *which is "appropriate to the circumstances".*[15]

II. Risks to Human, Animal or Plant Life or Health

9 **"Risk"** is a term which is applied in various circumstances. Furthermore, its definition may vary. Generally, a "risk" is the probability (that is the chance) of a harm or damage to a certain good or substance as a result of certain circumstances ("hazard" is commonly used in a broader sense and describes any product or procedure capable of having an adverse effect). The magnitude and seriousness of the potential harm or loss in relation to the probability may be considered in order to determine the level of the risk at hand. The use of "risk" presupposes an idea or hypothesis about possible factors or causes of such harm. Additionally, the notion of "risk" implies some level of **uncertainty** about the probability and the consequences of the adverse event. Nevertheless, "uncertainty that theoretically always remains since science can *never* provide *absolute* certainty that a given substance will not *ever* have adverse health effects" is not the kind of risk which, under Art. 5.1, is to be assessed.[16] Such "theoretical uncertainty" is inherent in the scientific method and stems from the intrinsic limits of experiments, methodologies, or instruments deployed by scientists to explain a given phenomenon.

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established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

[15] Italics added. See *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 129: "It is pertinent here to note that Article 5.1 stipulates that SPS measures must be based on a risk assessment, as appropriate to the circumstances, and this makes clear that the Members have a certain degree of flexibility in meeting the requirements of Article 5.1."

[16] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 186. Italics in the original.

As far as the SPS Agreement is concerned, what can potentially be harmed is **human, animal or plant life or health**.[17] Other objects (*e.g.*, environment, biodiversity) are not explicitly mentioned in the text of Art. 5. *10*

According to the SPS Committee (Art. 12), **"risk"** in the context of the SPS Agreement "refers to the *likelihood* that an adverse event (pest or disease) will occur ***and*** the *magnitude of the associated potential consequences* on plant or animal life or health of the adverse event, or to the *potential for adverse effects* on human or animal life or health from food-borne risks".[18] *11*

III. Risk Assessment

1. Definition of Risk Assessment

Risk assessment is described as "a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinions".[19] The purpose of a risk assessment is to serve as a basis for regulatory actions and to provide information necessary for rational decision-making. Annex A:4 provides **two substantially different definitions of risk assessment**, which apply depending on whether "disease- or pest-related risks", or "food/feed-borne risks" are at stake. *12*

In *Australia—Salmon*, the Appellate Body identified three aspects of a risk assessment for **"disease- or pest-related risks"** pursuant to the first part of Annex A:4: "(1) *identify* the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases; (2) *evaluate the likelihood* of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and (3) evaluate the likelihood of entry, establishment or spread of these diseases *according to the SPS measures which might be applied*."[20] The last requirement refers to the wide range of measures that *might* be applied, in addition to the measures actually applied. *13*

A risk assessment concerning **"food/feed-borne risks"** pursuant to the second part of Annex A:4 is a two-step process: (1.) *identify* the *adverse effects* on human health (if any), and (2.) if any such adverse effects exist, *evaluate* the *potential* or probability of occurrence of these effects.[21] In *EC—Hormones*, *14*

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[17] See *Seibert-Fohr*, Article 2 SPS, paras 7 *et seq*.
[18] G/SPS/15, footnote 2. Italics in the original.
[19] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 187.
[20] Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R, para. 121. Italics in the original.
[21] *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.98; *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.101. Italics in the original.

the Appellate Body dismissed the idea of equating the terms "potential" and "probability" because the latter would imply "a higher degree or a threshold of potentiality or possibility", and, thus, "introduces a quantitative dimension to the notion of risk".[22]

15 Annex A:4 contains **different thresholds of risk**: while the second type of risk assessment requires "only" the evaluation of the **potential** for adverse effects on human or animal health, the first type of risk assessment demands an evaluation of the **likelihood** of entry, establishment or spread of a disease, and of the associated potential biological and economic consequences.[23] Therefore, it is not sufficient if a risk assessment for disease- or pest-related risks concludes that there is a "potentiality" or "possibility" of harm. According to the Appellate Body, "likelihood" has the same meaning as "probability".[24]

16 The Appellate Body was of the opinion that "some" evaluation of the likelihood or probability was not enough; it referred to the experts' opinions that an **evaluation and expression of likelihood or probability, either quantitative or qualitative,** was crucial to a risk assessment.[25]

2. Appropriate to the Circumstances

17 The phrase "as appropriate to the circumstances" provides for a certain degree of **flexibility** in meeting the requirements of Art. 5.1.[26] But it does not exempt from the duty to base an SPS measure on a risk assessment; rather, it relates to the way in which such risk assessment has to be carried out.[27] Moreover, a change in relevant circumstances over time could in some cases render a completed risk assessment no longer "appropriate to the circumstances".

18 The Panel in *Australia—Salmon* reasoned that the "circumstances" include the source of the risk (*e.g.*, an animal pathogen or a chemical contaminant) and the subject of the risk (*i.e.*, whether it is to human, animal or plant life or health). Furthermore, the phrase "as appropriate to the circumstances" confers a right and obligation on Members "to assess the risk, on a case by case basis, in terms of product, origin and destination, including, in particular, country specific situations".[28]

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[22] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 184.
[23] *Australia—Salmon*, WT/DS18/AB/R, footnote 69. Emphasis in the original.
[24] *Ibid.*, para. 123.
[25] *Ibid.*, paras 124 and 128.
[26] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 129. Notably, the phrase is unqualified as far as its temporal scope is concerned.
[27] *Australia—Salmon*, WT/DS18/R, para. 8.57.
[28] *Ibid.*, para. 8.71.

3. Risk Assessment Techniques Developed by the Relevant International Organizations

19 Members should take into consideration risk assessment techniques developed by the relevant **international organizations**. While Art. 5 does not further specify any such organizations, they mostly include the Codex Alimentarius Commission (CAC), the International Office of Epizootics (OIE), and the organizations operating within the framework of the International Plant Protection Convention (IPPC); these organizations are specifically mentioned in Art. 3, which deals with harmonization, Annex A:3, which deals with international standards, and Art. 12.3, which deals with the SPS Committee. Art. 5.1 also encourages the standard-setting bodies to develop and publish, *inter alia*, "harmonized" methodologies and criteria for risk assessment to ensure that SPS measures are based on **adequate risk assessment procedures**. However, in case of relatively new technologies, risk assessment techniques themselves may neither be available nor standardized by the relevant international organizations.

20 The Panel in *Japan—Apples* noted that Art. 5.1 merely requires that such risk assessment techniques be **"taken into account"**, rather than that a risk assessment be "based on" or "in conformity with" them.[29] Thus, the Panel found that although such techniques should be considered relevant, a failure to respect each and every aspect of them would not necessarily, *per se*, signal a violation of the requirements of Art. 5.1.[30] Nevertheless, "reference to these risk assessment techniques can provide very useful guidance as to whether the risk assessment at issue constitutes a proper risk assessment within the meaning of Article 5.1".[31]

21 For example, in *Australia—Salmon* the Panel examined the OIE Code, in particular its Section 1.4 on "Import Risk Analysis" which, *inter alia*, provides "Guidelines for Risk Assessment".[32] In *Japan—Apples*, the Panel examined relevant standards set by the IPPC: the two International Standards for Phytosanitary Measures (ISPM) developed for Quarantine Pests, namely ISPM 11 on Pest Risk Analysis for Quarantine Pests, and ISPM 2 on Guidelines for Pest Risk Analysis.[33]

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[29] Panel Report, *Japan—Apples*, WT/DS245/R, para. 8.241.
[30] *Ibid.*
[31] *Ibid.*
[32] *Australia—Salmon*, WT/DS18/R, paras 8.49 and 8.78 *et seq.*
[33] *Japan—Apples*, WT/DS245/R, paras 8.242 *et seq.*, see also *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, footnote 1903.

IV. Ensuring that Measures are "Based on" a Risk Assessment

22 Members "shall ensure" that an SPS measure has to be "based on" (founded on) a risk assessment.[34] The results of the risk assessment must "sufficiently warrant" or "reasonably support" the SPS measure at stake; this is a substantive (and not simply a formal) requirement that there be a **rational relationship** between the measure and the risk assessment.[35] Similarly, a rational or objective relationship is also required in the more general provision of Art. 2.2, when determining whether an SPS measure is "maintained without sufficient scientific evidence".[36] Such a rational relationship can be established only by means of a **case-by-case analysis** and will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence.[37]

23 The obligation should not to be understood as a singular act of assessment prior to the adoption of a measure. When looking at Art. 2.2, it becomes clear that "ensure" has a sense of continuation. While certainly mandating a **permanent or periodic review**, Members have at least to react if new circumstances or scientific findings become known, which would suggest considering the measure anew. Science changes rapidly, with the effect that the risk assessment on which a Member relied when taking an SPS measure may become outdated, mandating a new assessment.

24 In *EC—Hormones*, the Appellate Body dismissed the notion of a **"minimum procedural element"** because this is not rooted in the wording of Art. 5.[38] This rejection would permit the consideration of available scientific evidence, which is particularly important for the large group of pre-existing SPS measures which were adopted before the entry into force of the SPS Agreement.[39] This interpretation recognizes the fact that science is never static and opens the door for *ex post facto* justification of SPS measures.[40] The risk assessment need not have existed, nor the regulating Member has been aware of it at the time the SPS measure was imposed. In practice,

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[34] For an interpretation of "based on" in the context of Art. 3.1 see *Landwehr*, Article 3 SPS, para. 17.

[35] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 193.

[36] See *Seibert-Fohr*, Article 2 SPS, paras 19 *et seq*. The Appellate Body also stated that "scientific justification" in Art. 3.3 requires that there is "a rational relationship between the SPS measure at issue and the available scientific information." See *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 79.

[37] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 194. See also *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 84.

[38] *Ibid*., para. 189.

[39] *Ibid*., para. 190.

[40] *Hurst*, EJIL 9 (1998), 182–183.

only the (updated) evidence submitted at the time of the dispute settlement proceedings matters, not the evidence submitted when the SPS measure was enacted or maintained.[41] However, risk assessments completed after the time of establishment of a panel would not assist the defending party in rebutting the complaining parties' claims and will be rejected.

V. Burden of Proof and Standard of Review

25 With respect to the burden of proof under Art. 5.1, the complaining party must make out a ***prima facie* case** that there exists *no* risk assessment for the substance at issue, or that, if a risk assessment exists, the SPS measure at stake is *not* "based on" this assessment. Once such a *prima facie* case is established, the burden moves to the defending party to counter the claimed inconsistency. Regardless of who officially bears the burden of proof, in practice the Member establishing the SPS measure will be forced to submit evidence of a risk and of a risk assessment to which the measure bears a rational relationship. If no such scientific evidence is introduced, the complaining party may simply assert that it found no evidence of a risk assessment, and therefore the Member could not have based its measure on a risk assessment.[42]

26 As to the role of panels in reviewing whether an SPS measure is based on a risk assessment, the Panel in *EC—Hormones*, in a finding not addressed by the Appellate Body, stated: "[I]t is for the European Communities to submit evidence before the Panel that its measures are based on a risk assessment; it is not for the Panel itself to conduct its own risk assessment on the basis of scientific evidence gathered by the Panel or submitted by the parties during the Panel proceedings."[43] As regards fact-finding by panels and the appreciation of scientific evidence, total deference to the findings of the national authorities would not ensure an **"objective assessment of the facts"** as required by Art. 11 DSU.

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[41] *Pauwelyn*, JIEL 2 (1999), 641, 649.
[42] *Hurst*, EJIL 9 (1998), 182–183.
[43] *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.101; *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.104.

D. Risk Assessment—Methods and Factors to Take Into Account (Paras 2 and 3)

I. Methods of Risk Assessment

27 The SPS Agreement is silent on the exact methods of risk assessment. However, the following principles have so far been developed by the dispute settlement bodies:[44] first, a risk assessment must be **specific**. This may entail more stringent requirements than those supported by the text of the SPS Agreement. For example, studies must focus on particular hormones rather than categories or classes of hormones,[45] *i.e.*, a separate risk assessment must be conducted for each substance. Additionally, the studies cannot just focus on residues in meat, but in particular on hormones used to promote growth in general, *i.e.*, the studies must address the particular kind of risks at stake.

28 Secondly, the risk assessment must meet a certain standard of **objectivity** so that Members can have reasonable confidence in the evaluation made.[46] This requirement is indicated by the wording of Art. 5.7, sentence 2.

29 Thirdly, **all risks** must be included in a risk assessment, which needs to be carried out **for each individual substance**.[47]

30 Fourthly, no **minimum magnitude or threshold level of risk** is required before a risk assessment can be considered to comply with Art. 5.1. This recognizes that a panel may not judge the substantive merits of an SPS measure. However, an unquantifiable or theoretical amount of risk, stemming from the possibility of unknown factors, is not enough. The risk, however small, must be "identifiable" or "ascertainable",[48] a mere assertion or assumption is not enough. The exact borderline between "ascertainable risk" and "theoretical risk" remains unclear. A "theoretical risk" would be a suspicion which is not subject to scientific enquiry and could not be verified or falsified.

31 Fifthly, the Member that implemented an SPS measure does **not necessarily** need to conduct its **own risk assessment**. In fact, this would be a punitive condition for many Members. Risk assessments carried out by another Member or an international organization may provide sufficient

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[44] *Pauwelyn*, JIEL 2 (1999), 641, 646.
[45] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 201.
[46] Panel Report, *Australia—Salmon (Article 21.5—Canada)*, WT/DS18/RW, para. 7.47.
[47] *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.257; *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.260.
[48] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 186.

objective justification for the measure.[49] This clarification is important to show especially developing countries that risk assessments (which can be very complex, expensive and time-consuming) do not necessarily require overly-sophisticated systems and tremendous amounts of resources.

32 Finally, **qualified minority or non-mainstream opinions of the relevant scientific community** may be used to support risk assessments.[50] However, whether a minority viewpoint is a "respected source" and sufficient to support a risk assessment remains to be determined on a case-by-case basis. In *EC—Hormones*, the Appellate Body reasoned that the divergent opinions used by the EC to justify its measure were outweighed by the majority of the evidence, which indicated that the hormones at stake were "safe" when used as growth promoters.[51]

II. Factors to Take Into Account

33 Art. 5.2 imposes an obligation according to its wording ("shall") and contains a long list of **risk factors** to be examined in the context of a risk assessment. The SPS Agreement itself is silent on whether this is a closed list, which leads to the question whether, for example, **consumer concerns,**[52] **cultural or moral preferences** and **societal value judgements** that are not based on scientific evidence may be taken into account in assessing risks.[53]

34 It was made clear by the Appellate Body in *EC—Hormones* that "available scientific evidence" is only the beginning of the list in Art. 5.2. The Appellate Body agreed with the Panel's emphasis on the **scientific nature of risk assessment**, but added a qualification on the nature of the "risk":

> However, to the extent that the Panel purports to exclude from the scope of a risk assessment in the sense of Article 5.1, all matters not susceptible of quantitative analysis by the empirical or experimental laboratory methods commonly associated with the physical sciences, we believe that the Panel is in error. Some of the kinds of factors listed in Article 5.2 such as 'relevant processes and production methods' and 'relevant inspection, sampling

[49] *Ibid.*, para. 190.

[50] *Ibid.*, para. 194. According to the Panel in the *EC—Approval and Marketing of Biotech Products* case, the divergent view must be in the same risk assessment in order to warrant the measures. See *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.3059.

[51] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, paras 196–197. It remains unclear if the scientific expert (who testified that one in a million women would get breast cancer out of eating meat produced with growth promoters) was deemed speculative or the risk unimportant. *Ibid.*, footnotes 181 and 182.

[52] See *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.105; *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.108.

[53] *Pauwelyn*, JIEL 2 (1999), 641, 648.

> and testing methods' are not necessarily or wholly susceptible of investigation according to laboratory methods of, for example, biochemistry or pharmacology.[54]

The Appellate Body emphatically rejected any narrow conceptions in stating:

> Furthermore, there is nothing to indicate that the listing of factors that may be taken into account in a risk assessment of Article 5.2 was intended to be a closed list. It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.[55]

According to this broad interpretation by the Appellate Body, a risk is contingent upon particular social contexts and a risk assessment is not only a scientific exercise; Art. 5.2 does not appear to contain an exhaustive enumeration. It is worth noting that the possibility of taking into account **factors other than "sound science"** would water down the strict "science test" and is, thus, incompatible with the very wording of Art. 2.2 which requires that SPS measures be based on sufficient scientific evidence.[56]

35 As a consequence, the Appellate Body in *EC—Hormones* rejected the distinction between **"risk assessment"** and **"risk management"** used by the original Panel in its findings under Art. 5.1 as having no textual basis.[57] The Panel had adopted a narrow interpretation of "risk assessment" and described it as being a strict *scientific* evaluation to be distinguished from a *non-scientific* "risk management" as a social value judgment made by political bodies. The Appellate Body refused to recognize such a legal demarcation and to separate science-based decision-making into a purely technical phase and a political phase.

36 Moreover, the Appellate Body took an integrated and much more differentiated approach in its interpretation. For instance, risks arising from **difficulties of control of compliance** with certain requirements could be taken into account in the context of a risk assessment.

> We note also that Article 8 requires Members to 'observe the provisions of Annex C in the operation of control, inspection and approval procedures…'. The footnote in Annex C states that 'control, inspection and approval procedures include, *inter alia*, procedures for sampling, testing and certification'. We consider that this language is amply sufficient to authorize the taking into

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[54] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 187.
[55] *Ibid.*
[56] *Quick & Blüthner*, JIEL 2 (1999), 603, 618–619.
[57] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 181.

> account of risks arising from failure to comply with the requirements of good veterinary practice in the administration of hormones for growth promotion purposes, as well as risks arising from difficulties of control, inspection and enforcement of the requirements of good veterinary practice.[58]

37 Risks arising from potential abuse in the administration of controlled substances and from control problems need not necessarily be taken into account in each and every case. But such types of risk should not be excluded *a priori* from the scope of application of Arts 5.1 and 5.2.[59]

38 The Appellate Body on *Australia—Salmon* held that the presence of **unknown and uncertain elements** did not affect the requirements of Arts 5.1, 5.2 and 5.3, read together with Annex A:4, for a risk assessment.[60]

39 Art. 5.3 sums up relevant **economic factors** to be taken into account in assessing risks. This seems to constitute a kind of **cost-benefit analysis**. Nevertheless, the fact that the measure's cost exceeds its benefits would not constitute a violation of the SPS Agreement. Since the scope of Art. 5.3 is **limited only to issues of animal and plant life** or health, it is not applicable to issues of human life or health. An *a contrario* interpretation is that the SPS Agreement does not allow economic factors such as costs to play any role in deciding whether an SPS measure to protect life or health of *humans* is justified.

E. The Concept of Appropriate Level of Protection and its Application (Paras 4 to 6)

40 Arts 5.4 to 5.6 may be viewed as **specific applications** of the basic obligations provided for in Arts 2.2 and 2.3.[61] The common element of these provisions is the concept of appropriate level of protection.

I. The Concept of Appropriate Level of Protection

41 After a proper risk assessment has been conducted there comes a point in the regulatory process where the analytical work is completed and a judgement must be made about whether or not the risk is acceptable. This is where the SPS Agreement's concept of appropriate level of protection becomes

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[58] *Ibid.*, para. 205.
[59] *Ibid.*, para. 206.
[60] *Australia—Salmon*, WT/DS18/AB/R, para. 130.
[61] *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.96; *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.99.

relevant. Annex A:5 defines the **appropriate level of protection**, or the equivalent term **acceptable level of risk**, in a not really useful manner as "[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory".

42 Under Art. 3.3, a Member may decide to set for itself a level of protection different from that implicit in an international standard.[62] The Member's appropriate level of protection may be higher than that implied in the international standard. The **right of a Member to determine its own appropriate level of protection** is an important one.[63] Para. 6 of the Preamble confirms in the context of harmonization (Art. 3) that Members should not be forced "to change their appropriate level of protection of human, animal or plant life or health". However, the right of a Member to define its own appropriate level of protection is **not an absolute or unqualified right**.[64]

43 The Appellate Body in *Australia—Salmon* emphasized the distinction between the evaluation of "risk" in a risk assessment under Art. 5.1 and the determination by a Member of its own appropriate level of protection.[65] While a risk assessment cannot be premised on the concept of "zero risk",[66] a Member can determine its own appropriate level of protection to be **"zero risk"** (*i.e.*, the total elimination of a risk).[67] In other words, Members may be required to conduct a risk assessment, but once this is done and if some ascertainable risk has been found, it is completely up to the Member concerned to decide whether it can accept that risk (even if the risk identified is minute or minimal).[68] If the Member can accept the risk, no SPS measure is required. In most countries, the decision concerning whether a risk is acceptable and what could be done to reduce or eliminate risks is taken at a political level, and depends on the best allocation of resources and the specific circumstances of every case. Judgements about the same risk, based on the same scientific evidence, do not always lead to the same estimates of possible harm in different national regulatory systems.

44 Furthermore, the appropriate level of protection established by a Member and the SPS measure itself have also to be clearly distinguished. It was made clear by the Appellate Body in the *Australia—Salmon* case that they "are not one and the same thing. The first is an *objective*, the second is an

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[62] See *Landwehr*, Article 3 SPS, para. 30.
[63] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 172.
[64] *Ibid.*, para. 173.
[65] *Australia—Salmon*, WT/DS18/AB/R, para. 125.
[66] *Australia—Salmon*, WT/DS18/R, para. 8.81, and see above, para. 30.
[67] *Australia—Salmon*, WT/DS18/AB/R, para. 125.
[68] *Pauwelyn*, ZLR 27 (2000), 843, 849.

instrument chosen to attain or implement that objective".[69] The establishment of the appropriate level of protection logically precedes the establishment or decision on maintenance of an SPS measure.[70]

45 The appropriate level of protection "is a *prerogative* of the Member concerned and not of a panel or of the Appellate Body".[71] Therefore, an explicit statement by a Member about its level of protection **could not be questioned** by a panel or the Appellate Body even under a standard of reasonableness. A panel or the Appellate Body would not be entitled to substitute its own reasoning about an implied level of protection for that chosen by a Member.

46 Although the SPS Agreement does not contain any explicit **obligation to determine the appropriate level of protection**, this obligation is **implicitly contained** in several of its provisions, in particular, in Annex B:3, Arts 4.1, 5.4 and 5.6. In practice, and for various reasons, Members are not always able to indicate precisely their appropriate level of protection. In such cases where a Member fails to determine its appropriate level of protection, this level of protection can be established by a panel on the basis of existing relevant SPS measures:

> Otherwise, a Member's failure to comply with the implicit obligation to determine its appropriate level of protection—with sufficient precision—would allow it to escape from its obligations under this Agreement and, in particular, its obligations under Articles 5.5 and 5.6.[72]

II. Minimizing Negative Trade Effects (Para. 4)

47 The Panel on *EC—Hormones*, in a finding not reviewed by the Appellate Body, held that Art. 5.4 was only of a hortatory nature. Because of its wording, in particular the words "should" (not "shall") and "objective", Art. 5.4 **does not impose an obligation**. However, this objective of minimizing negative trade effects has nonetheless to be taken into account in the interpretation of other provisions of the SPS Agreement."[73]

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[69] *Australia—Salmon*, WT/DS18/AB/R, para. 200 (Italics in the original).
[70] *Ibid.*, para. 201.
[71] *Ibid.*, para. 199 (Italics in the original).
[72] *Ibid.*, para. 207.
[73] *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.166; *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.169.

II. Regulatory Consistency (Para. 5)

48 Members are supposed to be **consistent** in applying SPS measures[74] to various products in different situations. If a Member is particularly strict in regulating only the risks from a few products while accepting similar risks in other cases, this can be a signal of protectionism. Art. 5.5 is the most controversial rule of the SPS Agreement and the one that intrudes most into national decision-making processes because it focuses on the "level" of protection.[75] Indirectly, the freely defined "appropriate level of protection" is limited by a rigid test of national regulatory consistency.

49 In *EC—Hormones*, the Appellate Body considered Art. 5.5 to be a programmatic provision and held that "the desired consistency is defined as **a goal to be achieved in the future**", and this statement did not establish a legal obligation of consistency of appropriate levels of protection.[76] Rather, only certain types of incoherence and inconsistencies were to be avoided:

> We think, too, that the goal set is **not absolute or perfect consistency**, since governments establish their appropriate levels of protection frequently on an *ad hoc* basis and over time, as different risks present themselves at different times. It is only arbitrary or unjustifiable inconsistencies that are to be avoided.[77]

Art. 5.5 aims at avoiding situations where a Member may apply a (very) strict level of protection to one specific product and a much more lenient level to another, even though the actual potential for harm is very similar for the two products. To avoid violations of Art. 5.5 Members have the choice upwardly or downwardly to "harmonize" their chosen level of protection.[78]

50 In *EC—Hormones*, the Appellate Body considered the **three elements** of Art. 5.5:

> The first element is that the Member imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations. The second element to be shown is that those *levels of protection* exhibit arbitrary or unjustifiable differences ("distinctions" in the language of Article 5.5) in their treatment of different situations. The last element requires that the arbitrary or unjustifiable differences result in discrimination or a disguised restriction of international trade. We understand the last element to be referring to the *measure* embodying or

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[74] Although para. 5 does not explicitly say so, it is understood by implication that it refers to SPS measures, see above, para. 6, and *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.1415 *et seq*.

[75] *Charnovitz*, in: *Sampson & Chambers* (eds), 171, 180.

[76] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 213.

[77] *Ibid*.

[78] *Charnovitz*, in: *Sampson & Chambers* (eds), 171, 181.

implementing a particular level of protection as resulting, in its application, in discrimination or a disguised restriction on international trade.[79]

These three elements are **cumulative** in nature, *i.e.*, all three elements have to be present for a violation to be found.[80] Furthermore, all three elements of Art. 5.5 need to be distinguished and addressed separately.[81] *51*

1. The First Element of Art. 5.5

The first element of an Art. 5.5 violation is the existence of **differences** in appropriate levels of protection. In a rather detailed comparison of the products at stake, the Panel in *EC—Hormones* found that the **"different situations"** which are to be compared under Art. 5.5 are those "where the same substance or the same adverse health effect is involved".[82] The Appellate Body held that situations exhibiting different levels of protection must, of course, be **comparable**: unless they present some common elements sufficient to render them comparable, then they will meet the first element of Art. 5.5. If the products are totally different from one another, they will not be rationally comparable.[83] In *Australia—Salmon*, the Appellate Body held that comparable situations under Art. 5.5 were those where either the same or a similar disease, or where the same biological and economic consequences, were involved.[84] *52*

This broad interpretation of the first element ("like situations") is in sharp contrast to the "like products" standard under GATT.[85] There, a comparison is made only once "likeness" or "direct competitiveness or substitutability" between products has been established.[86] *53*

2. The Second Element of Art. 5.5

The second element is that the (substantial) differences in the government's intended level of protection must not be **"arbitrary or unjustifiable"**. A violation will be found if the risks are similar but the level of protection is different. *54*

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[79] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 214. Italics in the original.
[80] *Ibid.*, para. 215.
[81] *Ibid.*, para. 238.
[82] *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.176; *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.179.
[83] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 217. For example, the use of *non-hormonal* growth promoters in *pig* production was considered "comparable" to the use of *hormones* in *beef* production. *Ibid.*, paras 218 *et seq.*, and 226 *et seq.*
[84] *Australia—Salmon*, WT/DS18/AB/R, para. 146.
[85] *Pauwelyn*, JIEL 2 (1999), 641, 654.
[86] See *Hestermeyer*, Article III GATT 1994, para. 80.

55 The Panel in *EC—Hormones* found arbitrary or unjustifiable differences in the level of protection in the EC's regulation in that, while the EC prohibited added natural hormones with respect to beef ("no-residue" level), it did not attempt to limit naturally occurring hormones in food ("unlimited-residue" level). The Appellate Body disagreed because "there is a fundamental distinction between added hormones (natural or synthetic) and naturally-occurring hormones in meat and other foods". Such kind of comparison would be "an absurdity".[87]

3. The Third Element of Art. 5.5

56 The most important element in the "consistency test" is the last.[88] The second element, concerning *the levels of protection*, alone would not suffice; moreover, *the SPS measure* itself needs to be examined and appraised.[89] Art. 5.5 would only be violated if the differences in the levels of protection *resulted in* discrimination or a disguised restriction of international trade.

57 The Panel in *EC—Hormones* considered pertinent, in its analysis of the alternative ("or") terms **"discrimination" and "disguised restriction on international trade"**, the Appellate Body's jurisprudence under Arts III and XX of GATT 1994. The Appellate Body disagreed with this finding on two points:

> First, in view of the structural differences between the standards of the *chapeau* of Article XX of the GATT 1994 and the elements of Article 5.5 of the *SPS Agreement*, the reasoning in our Report in *United States—Gasoline*, quoted by Panel, cannot be casually imported into a case involving Article 5.5 of the *SPS Agreement*. Secondly, in our view, it is similarly unjustified to assume applicability of the reasoning of the Appellate Body in *Japan—Alcoholic Beverages* about the inference that may be drawn from the sheer size of a tax differential for the application of Article III:2, second sentence, of the GATT 1994, to the quite different question of whether arbitrary or unjustifiable differences in levels of protection against risks for human life or health, 'result in discrimination or a disguised restriction on international trade'.[90]

The Appellate Body explained its reluctance to apply its jurisprudence under Art. III:2 GATT 1994 to Art. 5.5 by noting that while there was a "clear and linear relationship" between a tax differential and protection given to domestic products, no such clear relationship existed between different levels of protection of human health and protection given to domestic products.[91]

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[87] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 221.
[88] *Ibid.*, para. 240.
[89] *Ibid.*, para. 215.
[90] *Ibid.*, para. 239.
[91] *Ibid.*, footnote 251.

Consequently, the test under Art. 5.5 is **different from that of Art. III and of the chapeau of Art. XX GATT 1994**, even though their language is quite similar. Similar wording is contained in Art. 2.3. *58*

The dispute settlement bodies elaborated **"warning signals"** and "other factors more substantial in nature" with respect to the issue whether there was a disguised restriction on trade arising from the distinct levels of protection. For instance, the arbitrary or unjustifiable character of the differences in levels of protection or the rather substantial difference in levels of protection are (separate) "warning signals".[92] *59*

4. Guidelines to Further the Practical Implementation of Art. 5.5

At its meeting of 21–22 June 2000, the SPS Committee (Art. 12) adopted the Guidelines to Further the Practical Implementation as referred to in Art. 5.5, sentence 2.[93] These Guidelines expressly provide that they do not add to or detract from rights and obligations. However, they may play an important role in the future application of the SPS Agreement as they contain detailed and extensive elaborations of what Members are supposed to do under Art. 5.5. *60*

The last sentence of Art. 5.5 recognizes situations which a Member considers justifies its exceptional acceptance of a **lower level of protection** for human health specifically with respect to risks to which people voluntarily expose themselves. Reasons for a significant difference in a proposed or accepted level of protection for human health may, in exceptional circumstances, include a risk which humans voluntarily accept. Such circumstances may arise with respect to traditional foods or some other products for which consumers knowingly accept a higher risk than that generally considered to be appropriate for food products. Examples which were identified during the negotiation of Art. 5.5 include the consumption of alcoholic beverages, or substantial consumption of traditional foods such as smoked fish, or of varieties of fish known to be toxic.[94] *61*

5. Relationship of Art. 5.5 to Other SPS Provisions

On the relationship of Art. 5.1 (risk assessment) and Art. 5.5 (regulatory consistency) the Panel in *Australia—Salmon* stated that these obligations are complementary, not mutually exclusive. Therefore, a WTO Member cannot justify inconsistency with one article on the ground that such inconsistency avoids an additional inconsistency with another article.[95] *62*

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[92] *Australia—Salmon*, WT/DS18/AB/R, paras 162 *et seq*.
[93] G/SPS/15.
[94] *Ibid*., para. A.8.
[95] *Australia—Salmon*, WT/DS18/R, para. 8.126.

63 In *EC—Hormones*, the Appellate Body noted the close relationship between Arts 2.3 and 5.5. These two provisions complement each other, but each acts in a different way although they working towards the same goal: "When read together with Article 2.3, Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3."[96]

IV. Not More Trade-Restrictive Than Required (Para. 6)

64 Art. 5.6 prohibits SPS measures[97] that are more trade-restrictive than required to achieve a Member's appropriate level of sanitary or phytosanitary protection. Members should thus attempt to minimize negative effects on international trade.

65 This obligation seems to be similar to the "least-trade restrictive" requirement as part of the so-called "necessity test" under Art. XX lit. b GATT 1994. The examination of whether or not a measure is "necessary" under Art. XX lit. b GATT 1994 has proved to be a crucial step in GATT panel practice.[98] Additionally, the "least-trade restrictive" requirement seems to be quite similar to the **proportionality principle** in EC Law.

66 The criteria set forth in Art. 5.6 do not provide much guidance. The Appellate Body in *Australia—Salmon* identified, mainly on the basis of the footnote to this provision, **three separate elements** establishing a violation of Art. 5.6: An SPS measure is more trade restrictive than necessary if there is another SPS measure that (1.) is reasonably available, taking into account technical and economic feasibility; (2.) achieves the Member's appropriate level of sanitary or phytosanitary protection; and (3.) is significantly less restrictive to trade than the SPS measure contested.[99]

67 These three elements of this negative test are **cumulative** in nature. If any of these elements is not fulfilled, the SPS measure in dispute is consistent with Art. 5.6.[100] Furthermore, the complaining party bears the **burden of proving** that those three elements are met.[101]

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[96] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, paras 212 and 238.

[97] As is true for Art. 5.1, Art. 5.6 explicitly refers to SPS measures, see above, para. 6, and *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.1402 *et seq*.

[98] WT/CTE/W/203, para. 42. See also *Stoll & Strack*, Article XX lit. b GATT 1994, paras 37 *et seq*.

[99] *Australia—Salmon*, WT/DS18/AB/R, para. 194.

[100] *Ibid*.

[101] *Japan—Agricultural Products II*, WT/DS76/AB/R, paras 118–131.

1. The First Element of Art. 5.6

68 As to the first element, a panel or the Appellate Body may find that there is an **alternative SPS measure** (which can involve private operators and not exclusively public authorities); or the complaining party must show that an alternative SPS measure exists. In other words, a panel may not itself posit the alternative measure based on the advice of experts. By stipulating that alternatives must be reasonably available taking into account **technical and economic feasibility**, the risk of incorrect enforcement and the domestic regulatory costs of an SPS measure can be accounted for.

69 The Panel in *Australia—Salmon* found that there existed alternatives to the Australian measure, as evidenced by the Australian report at issue, and found that nothing implied that any of these four alternatives would be technically or economically unfeasible.[102] The Appellate Body reversed this finding by the Panel, because it had previously found that the Panel had examined the wrong measure.[103] The Appellate Body went on to complete the Panel's analysis, but ultimately held that it could not do so because of the lack of a factual background established by the Panel.[104]

2. The Second Element of Art. 5.6

70 In order to establish whether or not an SPS measure achieves the appropriate level of protection chosen by a Member, it must first be determined what the appropriate level of protection in question is.

71 The second element seems to be the most problematic, as it invites panels to judge whether alternative measures are equally effective in achieving the protection level chosen by a Member. In *Australia—Salmon*, the Appellate Body emphasised that assessing the second element of Art. 5.6 involves no interference with the appropriate level of sanitary or phytosanitary protection chosen by the Member.

3. The Third Element of Art. 5.6

72 The third element of Art. 5.6 requires an examination of whether the SPS measure at issue meets the requirement that there is no alternative measure which is "significantly less restrictive to trade". Obviously, several measures (like fumigation treatment, labelling or quarantine requirement) are less trade-restrictive than an outright prohibition or import ban. But, by adding **"significantly"** to "less trade-restrictive", it is ensured that a slightly more trade-restrictive measure will not fail the test.

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[102] *Australia—Salmon*, WT/DS18/R, para. 8.171.
[103] *Australia—Salmon*, WT/DS18/AB/R, para. 204.
[104] *Ibid.*, paras 211 *et seq.*

4. Relationship of Art. 5.6 to Art. 2.2

73 There exists a close relationship between Arts 2.2 and 5.6. In *Japan—Agricultural Products II*, the Panel noted that its "findings under Article 5.6 would stand even if the measure in dispute were not in violation of Article 2.2".[105] It added that "even if we were to have found that Japan's measure is maintained with sufficient scientific evidence in accordance with Article 2.2, we would then be called upon to examine whether the measure is consistent with Article 5.6".[106]

F. Provisional SPS Measures and Precaution (Para. 7)

74 Art. 5.7 allows for the adoption of provisional measures in a situation where **relevant scientific information is insufficient**. In this regard, it refers to Art. 2.2, which mandates that SPS measures shall not be maintained "without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5". Any violation of Art. 5.7 is, consequently, always a violation of Art. 2.2.

75 As the latter provision clearly indicates ("except as"), Art. 5.7 can be characterized as an **exception**, the wording of which requires a **narrow interpretation**. As the Appellate Body stated in *Japan—Agricultural Products II*, "Article 5.7 operates as a *qualified* exemption from the obligation under Article 2.2[…]. An overly broad and flexible interpretation of that obligation would render Article 5.7 meaningless".[107] Irrespective, it seems that Arts 2.3, 5.5 and 5.6 are fully applicable to provisional measures adopted under Art. 5.7; the exact relationship between Arts 5.7 and 5.1 (as a specific application of Art. 2.2) remains unclear.

76 Art. 5.7 recognises the fact that situations may arise where Members need to act (promptly) to eliminate suspected risks without waiting for conclusive scientific evidence confirming the existence and extent of a risk. In a peculiar way, it reflects elements of the notion of **precaution**,[108] which is an inherent and a highly controversial aspect of risk regulation. Precaution is

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[105] Panel Report, *Japan—Agricultural Products II*, WT/DS76/R, para. 7.4.

[106] *Ibid*., para. 8.102.

[107] *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 80 (Italics in the original). However, the *EC—Approval and Marketing of Biotech Products* Panel disagreed with that finding: "Article 5.7 should be characterized as a right and not an exception from a general obligation under Article 2.2.", see *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.2969.

[108] See for more details below, paras 97 *et seq*. In the *Hormones* case the Appellate Body stated "that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned". See *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 124. Usally, in risk regulation there is a distinction between the terms "precaution" and "prevention".

a technique of anticipation to the extent that it attempts to regulate events which have not occurred and which may in fact never occur.

The reference in Art. 2.2 addresses not only the first sentence of para. 7, but the whole paragraph.[109] Consequently, a measure may be adopted and maintained under Art. 5.7 only to the extent that **four conditions** are met, which are stipulated in the provision. These are (1.) that the measure is imposed in respect of a situation in which "relevant scientific information is insufficient"; and (2.) adopted "on the basis of available pertinent information". Furthermore, the measure may be maintained only while the Member (3.) seeks to "obtain the additional information necessary for a more objective assessment of risk" and (4.) reviews the measure accordingly "within a reasonable period of time".[110] *77*

I. Insufficiency of Scientific Evidence and Available Pertinent Information

In applying the notion of insufficient scientific evidence, the SPS Agreement allows for the adoption and maintenance of provisional measures in the event of a lack of the preconditions which are generally imposed on such measures by Art. 2.2 and other provisions. However, the **authority granted by Art. 5.7 is fairly limited** and cannot be described as a "safe harbour". It certainly does not absolve a Member from the requirement that **a measure has to be based on an adequate risk assessment** in accordance with Art. 5.1. This follows from Arts 5.1, 5.2 and ultimately from para. 7, sentence 2, which states that measures based on Art. 5.7 shall be accompanied by a search for obtaining "additional information necessary *for a more objective assessment of risk*".[111] *78*

Furthermore, according to the very wording of para. 7, the provision addresses a situation in which scientific evidence is incomplete or **insufficient** (in quantitative or qualitative terms), but clearly does not cover cases where it is lacking altogether. The application of Art. 5.7 is *79*

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[109] In *Japan—Agricultural Products II* Japan maintained that "the wording 'except as provided for in paragraph 7 of Article 5' in Article 2.2 refers only to the first sentence of Article 5.7, and that a Member should, therefore, be allowed to claim exemption from the obligation under Article 2.2 when it fulfils the requirements of the first sentence." The Appellate Body rejected this view by stating that "Japan's proposition… is without basis in the text of either Article 2.2 or Article 5.7." See *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 90.

[110] *Ibid.*, para. 89. The Appellate Body highlighted: "These four requirements are clearly cumulative in nature and are equally important for the purpose of determining consistency with this provision. Whenever *one* of these four requirements is not met, the measure at issue is inconsistent with Article 5.7." (Italics in the original).

[111] Italics added. See also *Japan—Apples*, WT/DS245/AB/R, para. 179, and *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.3236 *et seq*.

triggered not by the existence of scientific uncertainty, but by the insufficiency of scientific evidence. "Insufficiency" should not exclude cases where the available evidence is more than minimal in quantity, but has not led to reliable or conclusive results. A number of **minimum requirements** follow from this point. First of all, scientific evidence presupposes a question or **hypothesis**, which is to be proven by reliable or conclusive evidence and which has to **stand a test of rationality**, which is basically one of consistency and logic.

80 Furthermore, there must be some **real world basis for such hypothesis**. At this point, the further requirement of **"available pertinent information"** comes into play. It is worth noting that the wording of Art. 5.7, sentence 1 clearly differentiates "available pertinent information" from "relevant scientific evidence", implying the former is a broader category than the latter.

81 **Information** can be considered the very basis of evidence, which in addition requires a process of evaluation. The "available pertinent information" thus can be considered to represent the minimum factual basis that Art. 5.7 requires in the absence of sufficient scientific evidence. In this perspective, it becomes clear that the kind of information required by para. 7, sentence 1 is that which fits into the context of the evidence sought, or, more generally, into the context of the risk assessment. As the Appellate Body stated in *Japan—Agricultural Products II*, in view of the additional information required in sentence 2, but which is also valid in this context, the information "must be germane" to the scientific evidence.[112]

82 This conclusion is further supported by the requirement that such information be **pertinent**. "Pertinent" can be considered to involve a notion of significance or relevance in view of the scientific evidence and risk assessment in question.

83 Para. 7, sentence 1 further requires that such information be **available**. Obviously, the information has to be available to the competent authority of the Member taking a measure. Furthermore, availability clearly involves the ability of such competent authority freely to use such information, in the sense that it can be forwarded or disclosed to other entities, where needed, in the course of proceedings within the WTO.

[112] *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 92, see also below, para. 86. Of course, this does not imply that the "available pertinent information" in sentence 1 is necessarily in any respect equivalent to "the additional information necessary for a more objective assessment of risk" in para. 7, sentence 2.

II. Additional Information and Review

84 In order for a measure to be consistent with it, Art. 5.7, sentence 2 requires a Member to fulfil two obligations, namely (1.) to seek to obtain additional information and (2.) to review the measure within a reasonable period of time. These two obligations highlight the very concept of Art. 5.7, which is to allow for provisional measures at the forefront of sufficient scientific evidence. On the basis of this understanding, the provision requires the Member to take action to achieve greater certainty.

1. Duty to Seek to Obtain Additional Information

85 In this vein, Art. 5.7 requires a Member to seek to obtain the additional information necessary for a more objective and complete assessment of risk, *i.e.*, an *ex post* risk assessment. In some respects, the provision parallels the notion of "pertinent information" in sentence 1.[113] In both cases it is **information** that is required rather than an evaluation in the sense of a risk assessment or scientific evidence.

86 As the Appellate Body stated in *Japan—Agricultural Products II*, the "additional **information** necessary" to be obtained **must be "germane" to the conduct of a more objective risk assessment**.[114]

87 Furthermore, the information must be **additional**. This obviously means that it must add to the information base available to the competent authority of the Member at hand. Consequently, additional information can hardly be considered to imply that the information is objectively new in the sense of a new discovery.

88 The duty under sentence 2 is to **seek to obtain** such information. This can be understood as requiring a plausible effort to obtain such information. In applying the term "to obtain", the provision clearly includes a number of ways and means. *Inter alia*, the provision may be considered to include searches in scientific literature and databases and the consultation of in-house or external experts. Certainly, the provision **does not amount to a duty to undertake own research** or to commission such research to be undertaken by third parties.

89 As the Appellate Body observed in *Japan—Agricultural Products II*, "[n]either Article 5.7 nor any other provision of the SPS Agreement sets out explicit prerequisites regarding the additional information to be collected or a specific collection procedure. Furthermore, Article 5.7 **does not specify**

[113] See above, para. 81.
[114] *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 92, see also above, para. 81.

what actual results must be achieved; the obligation is to 'seek to obtain' additional information".[115]

90 This, however, does not mean that "half-hearted" efforts in this regard will not have legal **consequences**. If they result in a lack of additional information, the duty to review will at some point require the Member to admit that efforts to produce sufficient scientific evidence and a more objective risk assessment have failed and that, consequently, the measure has to be repealed.[116]

2. Duty to Review the Measure Within a Reasonable Period of Time

91 Art. 5.7, sentence 2, furthermore requires Members to "review the sanitary or phytosanitary measure accordingly within a reasonable period of time". This obligation reflects the concept of Art. 5.7 and the provisional character of measures. As the word "accordingly" indicates, such **review builds on "a more objective assessment of risk"** which is considered to be achieved by the outcome of efforts called for by the duty to seek to obtain additional information.

92 Art. 5.7, sentence 2 **does not specify the procedures and possible outcomes** of such review. However, it can easily be assumed that such review may result in a decision to repeal or maintain the measure. If **efforts to seek to obtain additional information** are **not successful**, a Member can **hardly resist eventually repealing the measure** at hand. This can be concluded from the concept of Art. 5.7 and the provisional character of measures (as a kind of "interim measures").

93 As regards the **"reasonable period of time"** the Appellate Body stated in *Japan—Agricultural Products II* that such period had "to be established on a case-by-case basis and depends on the specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review *and* the characteristics of the provisional SPS measure".[117] Furthermore, the Appellate Body made it clear that the "reasonable period of time" starts only after the entry into force of the SPS Agreement.[118]

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[115] *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 92.
[116] See below, para. 98.
[117] *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 93. Italics in the original.
[118] *Ibid*. The original Panel found that three years were too long and that additional information would have been relatively easy for Japan to supply. See *Japan—Agricultural Products II*, WT/DS76/R, paras 8.56 *et seq*.

III. Formal Requirements for Provisional SPS Measures

94 Art. 5.7 does not require a Member formally and explicitly to indicate that a measure is taken under Art. 5.7. However, in dispute settlement, it became quite common for defending parties to make a statement as to whether such party intended to rely on Art. 5.7. In the *EC—Hormones* case, the EC explicitly made it clear that it did not rely on Art. 5.7 and that the import prohibition was not a provisional measure.[119] Australia acted in the same manner in the *Salmon* case.[120] On the contrary, Japan relied on the provision in *Agricultural Products II*.[121] **Statements regarding the intention not to rely on Art. 5.7** may be useful to prevent the dispute settlement institutions from addressing Art. 5.7 and its prerequisites in depth in cases where compliance with such requirements meets serious doubts.

95 The conformity of provisional (*i.e.*, temporary) SPS measures with Art. 5.7 has been questioned because of their amount of time and **long duration**. In *Australia—Salmon*, the Panel stated in an *obiter dictum*: "In this dispute Australia has not invoked Article 5.7. Nor do we consider that this provision applies to the measure in dispute, given the fact that it was imposed more than 20 years ago and can thus hardly be seen as a measure 'provisionally' adopted."[122]

IV. Burden of Proof

96 Art. 5.7 establishes a form of affirmative defence, *i.e.*, an alleged justification to non-compliance with SPS obligations. Contrary to the approach of the Panel in *Japan—Agricultural Products II*, the Panel in the subsequent *Apples* case assigned the burden of proof to the defending party, *i.e.*, the Member imposing the provisional SPS measure, to make a *prima facie* case in support of its position under Art. 5.7, a finding explicitly not reviewed by the Appellate Body.[123]

V. Para. 7 and the Principle of Precaution

97 In allowing for measures in situations of insufficient scientific evidence, Art. 5.7 appeals to the idea of precaution. In the *EC—Hormones* case, the

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[119] *EC—Hormones (US)*, WT/DS26/R/USA, para. 8.157; *EC—Hormones (Canada)*, WT/DS48/R/CAN, para. 8.252.

[120] *Australia—Salmon*, WT/DS18/R, para. 8.57.

[121] *Japan—Agricultural Products II*, WT/DS76/AB/R, paras 86 *et seq*.

[122] *Australia—Salmon*, WT/DS18/R, para. 8.57. This part of the findings of the Panel was not subject to appeal. See also *Japan—Agricultural Products II*, WT/DS76/R, para. 8.57.

[123] *Ibid*., paras 8.58 *et seq*.; *Japan—Apples*, WT/DS245/R, para. 8.212; *Japan—Apples*, WT/DS245/AB/R, footnote 316. See also *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.2976 *et seq*.

Appellate Body explicitly indicated that "the **precautionary principle** indeed **finds reflection in Article 5.7** of the SPS Agreement."[124] Furthermore, the SPS Agreement may be considered to address the principle in other provisions as well (which do not exhaust the relevance of the principle), like, for instance, para. 6 of the Preamble, Art. 3.3[125] and even such technical provisions as Annex C:1 lit. a.[126]

98 However, as compared with other international, regional and national legal developments, Art. 5.7 appears to be much more rigid, as it is confined to provisional measures in situations of insufficient scientific evidence. Moreover, it explicitly imposes a duty on the Member at hand actively to seek additional and "better" information and to review the measure accordingly. This may even imply that the measure has to be repealed if no additional information necessary for a more objective assessment of risk can be obtained. Due to these explicit constraints, Art. 5.7 is more restrictive than Principle 15 of the 1992 Rio Declaration on Environment[127] and preambular para. 9 of the Convention on Biological Diversity[128] as well as Art. 10.6 of the Cartagena Protocol on Biosafety[129] which more generally state that a lack of scientific certainty shall not prevent States from taking measures.[130] This language allows for the persistence of scientific uncertainty as opposed to the questionable assumption of the SPS Agreement

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[124] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 124. This finding has been endorsed in *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.87.

[125] As the Appellate Body stated in *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 124: "These [provisions] explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations."

[126] As the Panel in *EC—Approval and Marketing of Biotech Products* clearly stated, "Annex C(1)(a), first clause, does not preclude the application of a prudent and precautionary approach to identifying, assessing and managing risks to human health and the environment arising from GMOs and GMO-derived products." See *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.1522.

[127] Principle 15 of the Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26, 14 August 1992, reads: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

[128] Para. 9 of the Preamble reads: "Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat."

[129] The provision reads: "Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question as referred to in paragraph 3 above, in order to avoid or minimize such potential adverse effects."

[130] See also *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.88 and footnote 263.

that scientific certainty is always obtainable within a certain period of time that all Members would consider "reasonable".

99 Because of these inherent limitations, the EC in the *Hormones* case defended its (permanent) measures by reference to more general concepts of precaution rather than relying on Art. 5.7. However, in *EC—Hormones*, the Appellate Body found it "less than clear" whether the **precautionary principle** had been "widely accepted by Members as a principle of general or customary international law".[131] The Appellate Body furthermore considered it "unnecessary, and probably imprudent" to make a ruling on "this important, but abstract, question", and stated that the precautionary principle "at least outside the field of international *environmental* law, still awaits authoritative formulation".[132] The Panel and the Appellate Body have made it very clear that these **more general legal developments**, sometimes characterized as "approaches" or "principles", **cannot be considered to apply in parallel to or even to supersede the clear wording of Arts 5.1 and 5.7**.[133] The evolution of the precautionary principle actually suffered a setback in *EC—Approval and Marketing of Biotech Products*; this ruling makes it probably more difficult for an importing Member to justify an SPS measure in case of scientific uncertainty.

G. Procedure for Undue Constraints of Exports (Para. 8)

100 Art. 5.8 establishes the right to receive an **explanation** in cases in which a Member does not apply an international standard (Annex A:3) or such standard does not exist. This SPS measure must also, in the view of the requesting Member, have at least the potential to constrain its exports. But this does not require statistical data and seems to be rather a low threshold by the fact that nearly all SPS measures affecting international trade and global competition.

101 The Appellate Body in *EC—Hormones* reversed the Panel's finding on allocating the burden of proof in general and found that:

> Article 5.8 does not purport to address burden of proof problems; it does not deal with a dispute settlement situation. To the contrary, a Member seeking to exercise its right to receive information under Article 5.8 would, most likely, be in a **pre-dispute situation**, and the information or explanation it receives may well make it possible for that Member to proceed to dispute settlement

[131] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 123.
[132] *Ibid.* (italics added). The Panel in *EC—Approval and Marketing of Biotech Products* judged the precautionary principle to be still too controversial and unsettled in international law to resolve this complex issue, particularly if it is not necessary to do so. See *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.89.
[133] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, paras 122 *et seq*.

> proceedings and to carry the burden of proving on a prima facie basis that the measure involved is not consistent with the SPS Agreement.[134]

102 Like Art. 5.8, **Art. 12.4, sentence 4** refers to cases in which a Member does not apply an international standard as a condition for import. In this respect the Member should provide an indication of the reason therefore, and, in particular, whether it considers that the international standard is not stringent enough to provide the appropriate level of protection. Contrary to Art. 5.8, Art. 12.4, sentence 4 does not impose a strict obligation according to its wording ("should" not "shall").

H. Outlook

103 Art. 5—as the "core piece" of the SPS Agreement—establishes a rigid control system for national SPS measures taken by individual Members. Contrary to the *multilateral* method of harmonization (Art. 3) and the *bilateral* method of equivalence (Art. 4), this *unilateral* method of dealing with risks is closely limited to adherence to clearly and narrowly defined preconditions, which will be met in only a very limited number of cases. The dispute settlement bodies take a strict view of the requirements for a proper risk assessment. Hitherto, the **"science test"** of Art. 5 in conjunction with the corresponding Art. 2 has been passed in none of the relevant disputes.

104 It is still an unanswered question whether, and as the case may be which, **non-scientific factors** could be examined in a risk assessment. At this point further clarification is needed, preferably by the SPS Committee instead of the *ad hoc* established dispute settlement bodies. Indeed, the idea that "sound science" could ever justify an SPS measure is itself an highly questionable conception of the regulatory process. Scientific techniques can only result in the identification of risks and the determination of their magnitude with varying degrees of uncertainty and error in the evidence itself. But whether any given regulatory intervention is justified will depend on "the real world where people live and work and die".

105 The **"appropriate level of protection"** is a crucial part in determining whether an SPS measure is WTO consistent. In the future, the strict discipline of national regulatory consistency (Art. 5.5) will become "the 'real bite' of the SPS Agreement",[135] defining the "regulatory freedom" of national governments. Contrary to EC Law, the "least-trade restrictive" requirement (Art. 5.6) has not so far played a significant role in SPS case law. "Precautionary SPS measures" will probably become more and more

[134] *Ibid.*, para. 102.
[135] *Pauwelyn*, ZLR 27 (2000), 843, 850 *et seq.*

relevant and, thus, the dispute settlement bodies have to clarify, once again and definitively, the relationship to the emerging **precautionary principle**. So far, the *Approval and Marketing of Biotech Products* case does not help in this context, nor bridge the gap between the SPS Agreement and the Cartagena Protocol on Biosafety.

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Article 6 SPS
Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence

1. Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area—whether all of a country, part of a country, or all or parts of several countries—from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, inter alia, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.
2. Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.
3. Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

Case Law

Panel Report, *Australia—Salmon*, WT/DS18/R; Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R; Panel Reports, *EC—Hormones*, WT/DS26/R and WT/DS48/R; Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R.

Documents

Secretariat of the International Plant Protection Convention, Publication No. 4, Requirements for the Establishment of Pest Free Areas, February 1996; Committee on Sanitary and Phytosanitary Measures, Draft Decision on the Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, Proposal by Chile, Revision, G/SPS/W/140/Rev.2, 18 June 2004; Committee on Sanitary and Phytosanitary Measures, Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures, Report adopted by the Committee on 30 June 2005, G/SPS/36, 11 July 2005; Secretariat of the International Plant Protection Convention, ICPM-7 (2005), Report, April 2005; WTO, SPS Agreement Training Module, <www.wto.org/english/tratop_e/sps_e/ sps_agreement_cbt_e/signin_e.htm>

Cross References

Arts 28, 30 ECT; Art. 716 NAFTA.

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A. General

Art. 6 recognizes that health hazards do not respect political frontiers and thus promotes so-called **"regionalization"** (sometimes called "zoning") by, most notably, introducing the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.[1] It requires Members to recognize these concepts and lays down criteria for their application in practice. *1*

Traditionally, public international law treats countries as monolithic entities, regardless of their internal structure. But exporting countries have often complained about SPS measures that other governments have taken against products from anywhere in their territories even though problems were localized in certain parts of the country only.[2] Art. 6 requires Members to abandon their traditional perspectives and **differentiate between different areas**, according to the actual sanitary or phytosanitary situation in those areas. If a product originates in a region which is free from a particular pest or disease, SPS measures can no longer be based on that health hazard, even though it may still exist elsewhere in the country. *2*

In 2003, after a number of WTO Members, mainly from Latin America, proposed that the SPS Committee consider developing **guidelines** for its practical implementation, the SPS Committee started to work on a draft decision on the implementation of Art. 6. The SPS Committee discussed practical problems based on the experiences of Members with regard to recognition of their plant and animal health status. The **SPS Committee** has not yet adopted a final Decision on the implementation of Art. 6. There are, however, several proposals by Members.[3] The SPS Committee *3*

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[1] For the definition see Annex A:6.

[2] *E.g.* Canada complained in 2005 that all its chicken products had been banned in some countries even though avian flu had broken out only in a small part of British Columbia which was separated from the rest of the country by the Rocky Mountains. See <www.wto.org/english/news_e/news05_e/sps_march05_e.htm>.

[3] Proposal by Chile: G/SPS/W/140/Rev.2, and by Canada: Decision on the Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, Proposal by Canada, G/SPS/W/145, 16 March 2004. Chile proposed a form to enable countries to notify that they have recognized (or rejected) pest- or disease-free zone: Committee on Sanitary and Phytosanitary Measures, Notification of Recognition of Pest- and Disease-Free Zones, Communication by Chile, G/SPS/W/181, 8 December 2005. Argentina identified "critical points of delay" in attempts to get zones recognized: Committee on Sanitary and Phytosanitary Measures, Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, Communication from Argentina, G/SPS/GEN/606), 5 December 2005 and Colombia proposed a flow chart of necessary steps in an attempt to make recognition easier: Committee on Sanitary and Phytosanitary Measures, Procedures for Recognition of Pest- or Disease-Free Areas or Areas of Low Pest or Disease Prevalence under Article 6 of the SPS Agreement, on Regionalization, Communication from Colombia, G/SPS/GEN/611, 12 December 2005. A "Compendium of Documents Regarding Article 6", dated 21 February 2006, can be found under Committee on Sanitary and Phytosanitary Measures, Compendium of Documents Regarding Article 6,

has agreed further to pursue this issue. Recently, however, it has become clear that some Members are not convinced of the need to develop such guidelines on the ground that there could be problems of duplication with the two international scientific reference organizations. For example, Japan wants to see the OIE and IPPC develop technical and administrative guidelines first and says WTO members should review these guidelines based on their experiences.[4] Accordingly, subsequent meetings of the SPS Committee have failed to agree on a work programme.

4 The second review of the operation and implementation of the SPS Agreement[5] also devoted a chapter to regionalization. The report notes that the Committee initiated substantive discussion of problems linked with the implementation of the provisions for the recognition of pest- and disease-free areas at various meetings. So far, these discussions have focused on two aspects of regionalization: the establishment by exporters of pest- or disease-free areas[6] and the recognition of pest- or disease-free status by importing countries.

5 There is also **no case law** on Art. 6. In *Australia—Salmon*, the Panel made a short reference to Art. 6.1 in a footnote. Australia maintained that, by so doing, the Panel had exceeded its terms of reference which did not include a claim of violation of Art. 6. The Appellate Body, however, rightly observed that the Panel had merely quoted excerpts from the text of the article and had not, as Australia claimed, made an implicit finding of inconsistency of the Australian measure with Art. 6.[7]

B. Adaptation to Regional Conditions (Art. 6.1)

6 The existence or spread of pests and diseases is often **determined by geographic and ecological conditions** rather than political borders. Art. 6.1 requires Members to adapt their SPS measures to the actual sanitary and phytosanitary situation of the "area" from which the product originated and to which the product is destined, instead of applying them uniformly to the whole country. According to Art. 6.1, sentence 1, the relevant area can

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(Regionalization), Note by the Secretariat, G/SPS/GEN/636 (with Corrigendum in G/SPS/GEN/636/Corr.1).

[4] Committee on Sanitary and Phytosanitary Measures—The Implementation of Article 6 (Regionalization) of the Agreement on the Application of Sanitary and Phytosanitary Measures—Submission by Japan, G/SPS/GEN/605, 5 December 2005.

[5] G/SPS/36, paras 75–82.

[6] See for example the notification by Mexico on the establishment of certain Mexican States as a fruit fly-free areas: Committee on Sanitary and Phytosanitary Measures, Regionalization, Information for the recognition of fruit fly-free areas, Communication by Mexico, G/SPS/GEN/440, 28 October 2003.

[7] Appellate Body Report, *Australia—Salmon*, WT/DS/18/AB/R, para. 110.

be all of a country, part of a country, or all or parts of several countries. This seems to be a legal definition of the term **"region"** which is used instead in the following sentence. The practical value of Art. 6 lies in the fact that such a region can be smaller than a country and that it may cover the territory of several countries. The borders of the region can thus be completely different from those of the country.

7 This leads to the new question of how the borders of such a region are to be defined. A region must be a clearly defined part of a country. The various zones can be delineated by rivers, mountain ranges, major roads or railway lines. **Buffer zones** must be erected between the infected zones and the free zones along these natural borders. Apart from natural/geographic circumstances, the efficiency of control measures and epidemiological surveillance are important factors in determining such areas. That point is implicitly addressed in Art. 6.1, sentence 2, which provides for a list of **factors to be taken into account** when assessing the SPS status of a region. As testified to by the use of the phrase "*inter alia*", this list is not exhaustive. It comprises (i) the level of prevalence of specific diseases or pests; (ii) the existence of eradication or control programmes; and (iii) appropriate criteria or guidelines which may be developed by the relevant international organizations.

I. Obligations on Members

8 Since there is as yet no case law and no decision on the implementation of Art. 6, it is not entirely clear how the terms **"adapted to"** and **"take into account"** are to be interpreted. It could be noted that both terms are similar to the phrase "based on"—a term that has been analysed at length by the Panels and the Appellate Body in *EC—Hormones*. In that case the Appellate Body concluded that the requirement that an SPS measure be "based on" a risk assessment was a substantive requirement that there be a **rational relationship** between the measure and the risk assessment.[8] For a number of reasons, however, this comparison is not very convincing. First, it will be remembered that the Appellate Body rejected the Panel's finding of a **minimum procedural requirement**, *i.e.* that the Member imposing a sanitary measure needed to "take into account" a risk assessment when it enacted the measure. Conversely, the express use of this phrase in Art. 6.1, sentence 2 implies not only that there has to be a rational relationship between the relevant factors and the assessment of the SPS characteristics of a region, but that these factors must be taken into consideration during the actual assessment procedure. Likewise, pursuant to Art. 6.1, sentence

[8] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 193.

1, Members' SPS measures must reflect the SPS characteristics of the area by taking them into consideration during the procedure that leads to the adoption of the measure. Adaptation thus clearly goes beyond a mere "rational relationship".

II. The Relevant International Organizations

9 The relevant international bodies referred to in Art. 6.1 are, above all, the Office International des Epizooties (**OIE**) and the International Plant Protection Convention (**IPPC**). Both the IPPC and the OIE have provided guidance for countries seeking to establish, or to be recognized as having, pest- or disease-free status. The OIE and the Commission on Phytosanitary Measures (formerly Interim Commission on Phytosanitary Measures, ICPM)[9] of the IPPC are working on international standards for disease- or pest-free areas.

10 The IPPC currently has three standards addressing regionalization: ISPM 4 on requirements for the establishment of pest-free areas; ISPM 10 on the establishment of pest-free places of production and production sites; and ISPM 22 on requirements for the establishment of areas of low pest prevalence. At the seventh ICPM in April 2005, agreement was reached that it was necessary urgently to develop a concept standard on "Guidelines for the recognition of the establishment of pest free areas and areas of low pest prevalence". In addition, the IPPC has a number of supporting standards such as guidelines for surveillance.[10]

11 The OIE Terrestrial Animal Health Code describes the requirements for obtaining disease-free status, including requirements for surveillance and monitoring based on the concept of geographic zones. The OIE also evaluates Members' status with respect to foot-and-mouth disease, rinderpest, and bovine spongiform encephalopathy (BSE). So far, the IPPC has not conducted similar evaluations of phytosanitary status among its members.[11]

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[9] The ICPM governed the implementation of the IPPC until the new revised text of the IPPC that provides for the establishment of a permanent Commission on Phytosanitary Measures (Art. XI) came into force on 2 October 2005.

[10] Committee on Sanitary and Phytosanitary Measures, Pest and Disease Free Areas, Article 6, Update of Activities of the International Plant Protection Convention (IPPC), June 2005–January 2006, Statement by the IPPC at the Informal Meeting on Region, G/SPS/GEN/626, 24 January 2006.

[11] G/SPS/W/140/Rev.2, 2.

C. Recognition of the Relevant Concepts (Art. 6.2)

12 In order to substantiate the obligations laid down in Art. 6.1, the second paragraph of the article requires Members in principle to recognize the concepts of **pest- or disease-free areas** (PDFAs) and **areas of low pest or disease prevalence** (ALPDPs). Accordingly, Members may be required to accept that their SPS measures are not "adapted to" parts of a country because that area is pest- or disease-free. Low pest or disease prevalence can occur **naturally or be established through** the development and application of **phytosanitary measures**. These may consist of removing alternative hosts; applying pesticides; releasing biological control agents; or using high-density trapping techniques. Art. 6.2, sentence 2 contains a non-exhaustive list of **factors to be taken into account** for the determination of PDFAs and ALPDPs. Art. 6.2 mentions (i) geography, (ii) ecosystems, (iii) epidemiological surveillance, and (iv) the effectiveness of sanitary or phytosanitary controls.

13 Obviously, the recognition in principle of the concepts does not entail an obligation on the **importing Member** automatically to award PDFA status to all regions in an exporting Member that are claimed to be disease-free. The latter will still have to provide evidence for this claim.[12] But the importing Member can no longer justify a blanket import ban by pointing out that a disease has occurred *anywhere* within that country if the exporting Member argues that its territory also comprises PDFAs or ALPDPs.

14 **Annex A:6** defines **PDFAs** as "[areas], whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur". An official note to this definition further explains that "[a] pest- or disease-free area may surround, be surrounded by, or be adjacent to an area—whether within part of a country or in a geographic region which includes parts of or all of several countries—in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question". In principle, PDFAs should be delimited in close relation with the occurrence of the pest. In practice, however, PDFAs are generally delimited by readily recognizable boundaries, considered to coincide acceptably with biological limits. These may be administrative (*e.g.* country, province or commune borders), physical features (*e.g.* rivers, seas, mountain ranges, roads) or property boundaries which are clear to all parties.[13]

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[12] See below, paras 18 *et seq*.

[13] See Secretariat of the IPPC, ISPM No. 4 (1995), "Requirements for the Establishment of Pest Free Areas", para. 1.1.

15 The establishment of an **ALPDP** is a pest and disease management option used to maintain or reduce a pest population or disease below a specified level in an area. The main difference between an ALPDP and a PDFA is that the presence of the pest or disease below a specified level is accepted in an ALPDP, whereas it is absent from a PDFA. According to **Annex A:7**, an ALPDP is "[a]n area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease occurs at low levels and which is subject to effective surveillance, control or eradication measures".

16 The **IPPC** has published **"Requirements for the Establishment of Areas of Low Pest Prevalence"** Accordingly, the competent national plant protection organization should *inter alia* describe the ALPDP with supporting maps demonstrating the boundaries of the area. Where appropriate, the description should also include the places of production, the host plants in proximity to commercial production areas, as well as the natural barriers and/or buffer zones which isolate the area and indicate how the size and configuration of the natural barriers and buffer zones contribute to the exclusion or management of the pest, or why they serve as a barrier to the pest.[14]

17 **Advantages** to be gained from establishing PDFAs and ALPDPs include the removal of the need for post-harvest treatment when the specified pest level is not exceeded; reduction of pesticide use; facilitation of market access for products from areas that were previously excluded; and less restrictive movement controls on commodities.

D. Evidence and Access for Inspection (Art. 6.3)

18 The status of a pest- or disease-free area is not accorded automatically when a list of criteria is fulfilled. In practice, the importing Member has to award such status to the exporting Member. As with the provisions for equivalence, the burden is on the exporting Member to prove the disease-free status that it claims for the region. In the past, exporting Members have complained that they encountered difficulties in their attempt to obtain **recognition** by importing Members of their SPS status.[15] For example, some developed countries are reluctant to accept official OIE recognition of disease-free zones for foot-and-mouth disease, rinderpest and contagious bovine pleuropneumonia within OIE Member Countries as being an inter-

[14] Secretariat of the IPPC, ISPM No. 22 (Appendix VII to the Report of ICPM-7) (2005), "Requirements for the Establishment of Areas of Low Pest Prevalence", para. 3.1.2.

[15] See G/SPS/W/140/Rev.2, 1.

national standard.[16] This issue has been contested before the SPS Committee, but without success. Developed countries still insist on conducting a risk assessment to confirm the compliance of the free zone with their own appropriate level of disease control protection. In order to facilitate the implementation of Art. 6, developed Members should therefore support developing country Members by granting appropriate technical assistance (see Art. 9 SPS).[17]

19 According to Art. 6.3, it is for the exporting Member to provide the **necessary evidence** in order "objectively [to] demonstrate"[18] to the importing Member that it has areas which are, and are likely to remain, pest- or disease-free (or areas of low pest or disease prevalence). This will include scientific and technical information, accompanied by an official declaration from the national regulatory body attesting to the status of the area. To facilitate the implementation of Art. 6, importing Members should explain their requirements for obtaining recognition and should take into account the standards, guidelines and recommendations developed by the relevant international organizations. The latter include relevant risk analyses, risk management processes, systems in place to establish and maintain SPS measures, and surveillance and monitoring programmes.

20 **Access for Inspection**. This provision mirrors Art. 4.1, sentence 2. The exporting Member is required to grant access to the importing Member for investigation of the claim that a region is pest- or disease-free.

E. Outlook

21 In contrast to the situation under Art. 4, Members have not yet been able to agree on a Decision on the Implementation of Art. 6. While this may be regrettable, the practical consequences are probably limited. Regionalization is essentially a bilateral procedure, depending on cooperation between the exporting and the importing Member. The potential of Art. 6 lies in the paradigm shift it has codified: Members can no longer treat each other as "black boxes" (*i.e.* ignore existing differences within one country) and think along political borders, but have to rewrite their maps according to the actual SPS situation on the ground.

[16] *Brückner*, Rev. sci. tech. OIE 23 (2000), 95, 100.
[17] See G/SPS/W/145, 2.
[18] On the meaning of "objectively demonstrate", also refer to Art. 4, which uses the same language.

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Article 7 SPS
Transparency

Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

Annex B
Transparency of Sanitary and Phytosanitary Regulations

Publication of regulations

1. Members shall ensure that all sanitary and phytosanitary regulations[5] which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them.
2. Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.

Enquiry points

3. Each Member shall ensure that one enquiry point exists which is responsible for the provision of answers to all reasonable questions from interested Members as well as for the provision of relevant documents regarding:
   a) any sanitary or phytosanitary regulations adopted or proposed within its territory;
   b) any control and inspection procedures, production and quarantine treatment, pesticide tolerance and food additive approval procedures, which are operated within its territory;
   c) risk assessment procedures, factors taken into consideration, as well as the determination of the appropriate level of sanitary or phytosanitary protection;
   d) the membership and participation of the Member, or of relevant bodies within its territory, in international and regional sanitary and phytosanitary organizations and systems, as well as in bilateral and multilateral agreements and arrangements within the scope of this Agreement, and the texts of such agreements and arrangements.
4. Members shall ensure that where copies of documents are requested by interested Members, they are supplied at the same price (if any), apart from the cost of delivery, as to the nationals[6] of the Member concerned.

Notification procedures

5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:
   a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;
   b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;
   c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;
   d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.
6. However, where urgent problems of health protection arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 5 of this Annex as it finds necessary, provided that the Member:

a) immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);
b) provides, upon request, copies of the regulation to other Members;
c) allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

7. Notifications to the Secretariat shall be in English, French or Spanish.
8. Developed country Members shall, if requested by other Members, provide copies of the documents or, in case of voluminous documents, summaries of the documents covered by a specific notification in English, French or Spanish.
9. The Secretariat shall promptly circulate copies of the notification to all Members and interested international organizations and draw the attention of developing country Members to any notifications relating to products of particular interest to them.
10. Members shall designate a single central government authority as responsible for the implementation, on the national level, of the provisions concerning notification procedures according to paragraphs 5, 6, 7 and 8 of this Annex.

General reservations

11. Nothing in this Agreement shall be construed as requiring:
a) the provision of particulars or copies of drafts or the publication of texts other than in the language of the Member except as stated in paragraph 8 of this Annex; or
b) Members to disclose confidential information which would impede enforcement of sanitary or phytosanitary legislation or which would prejudice the legitimate commercial interests of particular enterprises.

Footnote 5: Sanitary and phytosanitary measures such as laws, decrees or ordinances which are applicable generally.
Footnote 6: When "nationals" are referred to in this Agreement, the term shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

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Cross References

Directive 98/34/EG; Arts 718, 719 NAFTA

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A. General: The Notion of Transparency

1 The word "transparency" is not specifically defined in the SPS Agreement. The **purpose** of transparency is described by the Committee on Sanitary and Phytosanitary Measures as "to achieve a greater degree of clarity, predictability and information about trade policies, rules and regulations of Members".[1]

2 The issue of non-discrimination requires not just that national measures do not discriminate with regard to their content between foreign and domestic goods. In addition, fair competition presupposes easy access to national trade regulating measures among WTO members. Foreign traders need to have the option smoothly to acquire the same level of knowledge as domestic traders with regard to the legal instruments applicable in their country. Hence, a **lack of transparency is considered a barrier to trade** since it contributes to distorting the price of imports.[2] Art. 7 SPS provides for the standards of transparency WTO members have to implement in order to avoid the allegation of discriminatory action. The SPS Agreement regulates the different aspects of transparency exclusively in Art. 7/Annex B SPS. It thereby differs from the approach of the TBT Agreement, where relevant provisions are spread throughout the document.[3] However, with regard to the substance, the content of both agreements is very similar.

[1] G/SPS/7/Rev.2, para. 1.
[2] Appellate Body Report, *Chile—Price Band System*, WT/DS207/AB/R, para. 234.
[3] See Arts 2.9–2.12 TBT; Arts 5.6–5.9 TBT; Art. 10 TBT.

The concept of transparency under Art. 7 SPS in conjunction with Annex B applies at **different stages** within the genesis of an SPS measure. Already at the level of drafting (specific) national SPS regulations, a Member has to inform other Members thereof (Annex B:5 lit. a). Once a measure is adopted, it has to be published (Annex B:1) some time before it enters into force (Annex B:2). Enquiry points have to ensure that requests for information are answered throughout the drafting period (Annex B:3). In addition, Annex B also includes participatory rights of other WTO members within the drafting process of certain national SPS measures.[4] Annex B:5 lit. d requires the notifying Member to discuss comments of other Members with them and to take the comments and results of those discussions "into account" before promulgating a relevant regulation. *3*

In 2002, the WTO Secretariat prepared a **handbook** on "How to apply the Transparency Provisions of the SPS Agreement" which instructs Members on the different steps that are to be taken in order successfully to implement and apply the obligations under Art. 7 SPS.[5] The SPS Committee has adopted and repeatedly revised its recommended procedures for implementing the transparency obligations of the SPS Agreement.[6] *4*

B. Publication of Regulation Upon Adoption (Annex B:1–2)

Pursuant to Annex B:1 SPS regulations need to be published promptly in order to enable other Members to become acquainted with them. *5*

I. The Meaning of "regulations" (Annex B:1)

Annex B focuses on SPS regulations which are considered a sub-category of SPS measures as defined in Annex A.[7] Footnote 5 specifies the meaning of "regulation" as "sanitary or phytosanitary measures **such as laws, decrees or ordinances** which are applicable generally". All the three mentioned instruments have in common that they are legally enforceable. It is therefore questionable whether the scope of para. 1 is restricted to the mandatory character of instruments, thereby excluding unenforceable ones like guidelines or declarations. As indicated by the words "such as", the list of instruments contained in the footnote is not exhaustive in nature. Those *6*

[4] Only those SPS measures that qualify for the notification requirement of Annex B:5 are concerned.

[5] The handbook is available on the WTO homepage under <www.wto.org/english/tratop_e/sps_e/spshand_e.pdf>.

[6] G/SPS/7/Rev.2 and G/SPS/7/Rev.2/Add.1.

[7] Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R; WT/DS293/R, para. 7.1455.

words, however, do not inform the reader whether or not they refer to the mandatory character of the listed instruments.

7 In *Japan—Agricultural Products II*, the Appellate Body (AB) argued in the latter sense, focusing on the **actual impact of the non-mandatory varietal testing requirement** on exporting countries.[8] The AB found that this requirement was similar in character to laws, decrees and ordinances, the instruments explicitly referred to in the footnote to Annex B:1. As already stated by GATT and WTO panels, the crucial point for **potentially adverse effects on competitive conditions** of market access is not whether a provision is binding in nature but whether it includes sufficient incentives or disincentives for private parties to act in a particular manner.[9] Hence, in this respect, the difference between an SPS measure as defined in Annex A and an SPS regulation according to Annex B is primarily a semantic one. In *Japan—Apples*, the panel had to decide what kind of "change" in a regulation was required to qualify for the notification procedures of Annex B:5.[10]

8 The **administration or operation of an SPS measure does not constitute an SPS regulation** in itself and therefore does not have to be published. This view is supported by Article 18.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and Art. 32.6 of the Agreement on Subsidies and Countervailing Measures, which parallel Art. 7 SPS and provide that "[e]ach Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the *administration* of such laws and regulations".[11] Through the explicit inclusion of the administration of a regulation in these provisions it has to be assumed that the administration is not considered a regulation in itself since that inclusion otherwise would be redundant.[12] Consequently, the panel in *EC—Marketing and Approval of Biotech Products* held that the *de facto* general moratorium on approvals in EC Member States was not an SPS measure in the context of Annex B:1 and Art. 7 SPS.[13]

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[8] *Japan—Agricultural products II*, WT/DS76/AB/R, paras 102 *et seq.; Kamann*, in: *Prieß & Berrisch* (eds), 211, 250.

[9] Panel Report, *Japan—Film*, WT/DS44/R, para. 10.49; Panel Report, *Japan—Semi-Conductors*, BISD 35S/116, para. 109, Panel Report, *EEC—Parts and Components*, BISD 37S/132, para. 5.21.

[10] Panel Report, *Japan—Apples*, WT/DS245/R, paras 8.305 *et seq*.

[11] Italics added.

[12] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R; WT/DS293/R, para. 7.1460.

[13] *Ibid*., paras. 7.1449 *et seq*., in particular para. 7.1462.

II. The Timeframe for Publication and Entry Into Force (Annex B:1 and 2)

9 Adopted regulations have to be published promptly. That means **without undue delay**.[14] The "publication" is to be done in a manner that enables interested Members and especially their exporting producers to become acquainted with the regulation. Hence, as the panel correctly found in *Japan—Agricultural Products II*, the requirement of being "published" cannot be substituted by an informal distribution to relevant foreign authorities.[15] The adopted regulations do not have to be published in one of the three WTO languages.[16]

10 In general, in accordance with Annex B:2, the adopted and published regulation shall not enter into force without allowing producers in exporting Members a **reasonable interval to adapt** their products and methods of production accordingly. This provision is meant to compensate for the lower level of awareness of foreign traders with regard to legal changes in a country. At the Doha Ministerial conference, Members decided that "reasonable interval" should normally be understood as a period of not less than six months, and that the entry into force of measures contributing to the liberalization of trade should not be unnecessarily delayed.[17]

C. Enquiry Points (Annex B:3–4)

11 Pursuant to Annex B:3, each Member is obliged to set up one enquiry point in its country.[18] The enquiry point is the **single contact point** to which any relevant enquiries can be made as listed in Annex B:3 lit. a–d. The enquiry point system was created so that countries could easily obtain information about SPS and related issues without having to identify and directly contact the agency responsible for any given function in another country.[19] It has the responsibility of obtaining answers from the relevant

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[14] The term "undue delay" was broadly interpreted by the Panel in *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R; WT/DS293/R, paras 7.1490 *et seq*. with regard to Annex C:1 lit. a. See *Böckenförde*, Article 8 SPS para. 6.

[15] *Japan—Agricultural Products II*, WT/DS76/R, para. 8.115.

[16] Annex B:8 applies only for the notification procedure.

[17] Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Implementation-Related Issues and Concerns, Decision of 14 November 2001, WT/MIN(01)/17, 20 November 2001, para. 3.2.

[18] The enquiry points are listed in the G/SPS/ENQ document series of the WTO; as of December 2005, 140 countries, Hong Kong, and the European Community have been listed. See Committee on Sanitary and Phytosanitary Measures, National Enquiry Points, Note by the Secretariat, G/SPS/ENQ/19, 25 January 2006.

[19] See *WTO*, Transparency Provisions, para. 19.

bodies and replying to the country making the enquiry.[20] The enquiry point neither has to be a government office nor does it have to be staffed with officials who can themselves answer all requests made by other Members.

12 The scope of a member's obligation under Annex B:3 was under scrutiny in *Australia—Salmon*. The issue in question was whether Annex B:3 lit. c itself imposes on Members a substantive **obligation to identify or quantify their "appropriate level of protection"** upon another Member's request. The panel held in the negative[21] but its finding was reversed by the AB.[22] The AB argued that the SPS Agreement as such contains the implicit obligation to determine the appropriate level of protection within the SPS Agreement, logically preceding, being separate and to be distinguished from the establishment or maintenance of the SPS measure itself.[23] Hence, once a Member has complied with this implicit substantive obligation, it has upon request to share this information with other Members pursuant to Annex B:3 lit. c.[24]

13 Pursuant to Annex B:3 lit. c, Members also have to provide relevant documents regarding risk assessment procedures, including the factors that have been taken into account. Thereby, exporting Members gain the opportunity to reassess whether relevant aspects (*e.g.* scientific principles) were considered, enabling them to request additional explanations in accordance with Art. 5.8 SPS or to take appropriate action against the regulation.[25]

D. Notification Procedures (Annex B:5–10)

I. Organizational Structure (Annex B:9–10)

14 For any notifications under the SPS Agreement, Annex B:9 establishes the **Secretariat** as the central intermediary among the members. It is responsible for the circulation of incoming notifications and draws the attention

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[20] *Ibid.*, para. 15.

[21] Panel Report, *Australia—Salmon*, WT/DS18/R, para. 7.15: "[…] paragraph 3(c) of Annex B imposes a mainly procedural obligation to provide 'answers to all reasonable questions from all interested members' […]" since "any sanitary measure applied to a given situation inherently reflects and achieves a certain level of protection with respect to that situation and that this level of protection—implied in the sanitary measure selected by a Member—can be presumed to be at least as high as the level of protection considered to be appropriate by that Member". *Ibid.*, para. 8.107.

[22] Appellate Body Report, *Australia—Salmon*, WT/DS18/AB/R, paras. 196 *et seq.* See also *WTO*, Sanitary and Phytosanitary Measures, para. 173.

[23] *Ibid.*, para. 201.

[24] *Ibid.*, para. 205.

[25] *Wiemer*, 175.

of developing countries to notifications relating to products of particular interest to them. Up to the end of 2005 around 6,000 notifications had been registered at the WTO Secretariat.[26]

According to Annex B:10, the Members' counterpart of the Secretariat, the **notification authority**, is to be allocated at the national level and concentrated on a single central government authority.[27] The first requirement may challenge federal structures in which the SPS-relevant competences are given to sub-national entities, the second asks for coordination among the pertinent ministries to agree on which one takes the lead. The authority for notification should then be attached to the lead ministry. *15*

II. Notification Prior to Adoption (Annex B:5)

The core element of Annex B is the notification procedure, requiring prior notification for certain proposed SPS measures.[28] The **function** of this procedure is mainly a threefold one: it facilitates trade by allowing some lead time before new measures have to be complied with; it makes consultation international, by allowing other countries to comment on proposed measures; it contributes to reinforcing domestic transparency where a national consultation system does not exist.[29] *16*

1. Preconditions for Prior Notification

As a **precondition** for falling under the notification procedure pursuant to para. 5, an SPS measure has to meet three cumulative preconditions: first, it has to be an SPS regulation;[30] secondly, either an international standard, guideline or recommendation does not yet exist in the relevant area or does exist but the regulation in question does not have substantially the same content; thirdly, the regulation needs to have the potential for a significant effect on trade. If such a measure contains both SPS and TBT *17*

[26] Report (2005) on the Activities of the Committee on Sanitary and Phytosanitary Measures, G/L/755, 1 November 2005, para. 7.

[27] G/SPS/NNA/9. In this document, 108 Members are listed as having established a national notification authority. However, with regard to the 25 EU Members, only the central authority in Brussel is listed. In about 50% of the Member states, the enquiry point and the national notification authority are in the same agency See Committee on Sanitary and Phytosanitary Measures, Special Meeting of the SPS Committee on the Operation of Enquiry Points Held on 31 October 2003, Presentations by Participants, G/SPS/GEN/458, 12 December 2003, 8.

[28] In order to implement the provisions of the notification procedure on a national level, Members have to designate a single central government authority. The National Notification Authorities are listed in the G/SPS/NNA document series of the WTO; as of December 2004, 101 countries, Hong Kong and the European Community were listed (G/SPS/NNA/9).

[29] See *WTO*, Transparency Provisions, para. 25.

[30] See above, para. 5.

elements, it should be notified to both agreements, indicating which parts of the measure fall under which agreement.[31]

a) No International Standard or Regulations With a Similar Content

18 Pursuant to Annex A:3 SPS, international **standards, guidelines and recommendations** are predominantly those developed under the Codex Alimentarius Commission, the World Organization for Animal Health (formerly the International Office of Epizootics) or the International Plant Protection Convention.[32] However, some restrictions are made with regard to the Codex Alimentarius. For food safety, only the codex standards, guidelines and recommendations listed in Annex A:3 lit. a are relevant.[33] Hence, the codex principles and guidelines with regard to modern biotechnology and genetically modified organisms,[34] as well as the codex standards on food labelling,[35] may not be included, since they do not fit into the mentioned categories. Consequently, even national measures that are in line with these principles and guidelines may need to be notified.

19 A notification may also be required although an international standard, guideline or recommendation exists if the relevant **regulation is not substantially the same**. Whether this is the case has to be decided with regard to the content of both.[36] At what degree of similarity the content is "substantially the same" is open for interpretation. Substantial ordinarily means "being largely but not wholly that which is specified".[37] Additional guidance may be given through a comparative analysis of "substantially the same" with "conform to international standards" and "based on international standards" in Art. 3 SPS. According to the AB's interpretation of the two latter terms, "substantially the same" is slightly less than "conform to"[38] but considerably more than "based on". In other words, the regulation may deviate in its approach to realizing the intended aim without altering the substantial elements of it.

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[31] See G/SPS/7/Rev. 2, para. 35; *WTO*, Transparency Provisions, para. 34. *Böckenförde*, 304.

[32] See *Charnovitz*, Article 1 SPS, paras 34–36.

[33] Standards, guidelines and recommendations are to be related to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice.

[34] Principles for the Risk Analysis of Foods Derived from Modern Biotechnology (CAC/GL 44–2003) and Guidelines for the Conduct of Food Safety Assessment of Foods Derived From Recombinant-DNA Plants (CAC/GL 45–2003).

[35] See *FAO/WHO*, 2001.

[36] Since the degree of the trade distorting effect of a measure is addressed separately, the "content" of a measure seems to be composed of other elements such as the respective procedure etc.

[37] *F. Mish* (ed.), Merriam-Webster's Collegiate Dictionary, 11th ed., 2006, 1245.

[38] See Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 163: "The reference of 'conform to' is to 'correspond in form or manner', to 'compliance with' or 'Acquiescence', to 'follow[ing] in form or nature'."

b) Significant Effect on Trade of Other Members

In order to be notified, the regulation must further have the potential to cause a significant effect on the trade of other countries. The effect on trade comprises both **significant import-enhancing and import-reducing effects**.[39] This means that an SPS regulation that facilitates trade must also be notified.[40] The trade effect may be caused by only one regulation or by various ones in combination.[41] It may refer to a specific product, a group of products or products in general and can arise between two or more Members.[42] Hence, even strictly bilateral SPS regulations must still be notified if the other criteria are met.[43] *20*

When assessing whether the SPS regulation may have a **significant** effect on trade, the SPS Committee recommends the consideration of the following **elements**:[44] (1.) the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively; (2.) the potential development of such imports; (3.) difficulties for producers in other Member countries, particularly in developing countries, to comply with the proposed SPS regulations. *21*

2. The Timing of a Notification (Annex B:5 lit. a–b)

According to Annex B:5 lit. a and b, a notification of a proposed regulation to the WTO Secretariat shall be made at "**an early stage**". With regard to the provision's purpose, the notification has to be made as soon as a draft of the complete text of the regulation is available, well before its entry into force and at a time when amendments can still be introduced.[45] Otherwise, the right of Members to make comments that have to be taken into account becomes meaningless. The SPS Commitee suggests a period of at least **60 days** for comments, subject to a 30-day extension in exceptional circumstances.[46] *22*

3. Emergency Procedures (Annex B:6)

However, where **urgent problems of health protection** arise or threaten to arise, immediate action is permitted, as long as Annex B:6 lit. a–c are *23*

[39] G/SPS/7/Rev.2, para. 7.
[40] *Ibid.*; *WTO*, Transparency Provisions, para. 37.
[41] G/SPS/7/Rev.2, para. 6.
[42] *Ibid.*
[43] See *WTO*, Transparency Provisions, para. 38.
[44] G/SPS/7/Rev.2, at para. 7.
[45] See *Ibid.*, at paras 8 and 9.
[46] An extension should be granted, especially if of particular interest to developing countries, where there have been delays (longer than five working days, G/SPS/7/Rev.2, para. 14) in receiving and translating the relevant documents or where there is need for further clarification of the measure notified (G/SPS/7/Rev.2, para. 26).

respected. Considering the aim and purpose of comments, the period for receiving comments may also be reduced or eliminated if the proposed SPS measure unambiguously facilitates trade.[47]

4. The Content and Language of Notification (Paras 5, 7–8)

24 A notification needs to include the products to be covered by the **proposed regulation** together with a brief indication of the **objective and rationale** of the proposed regulation (para. 5 lit. b). It shall also identify those parts of the regulation which in substance deviate from international standards, guidelines or recommendations (para. 5 lit. c).[48] Again, the routine consultation process can be reduced or eliminated in genuine emergencies (para. 6 lit. a–c). The notification has to be written in one of the three WTO languages (**English, French, Spanish**) (para. 7). Upon request, the notifier must provide copies of the proposed regulation (para. 5 lit. c). Developed countries need to include a copy written in one of the WTO languages, or at least a summary of it (para. 8). As Annex B:11 lit. a clearly states, this is the only exception where Members may have to provide information or copies of drafts or the publication of texts in a foreign language.

5. The Relevance of Comments Made by Other Members

25 Annex B:5 lit. d obliges the notifier to discuss comments from other Members and take the comments and the results of the discussions into account. Hence, it allows other Members to influence national legislation through an international procedure. This concept is well known in international environmental treaties.[49] A comment is regarded to have been **taken into account** if it was introduced and discussed within the drafting process of a regulation. If a suggestion included in a comment has not been considered in the final draft, the reasons for its rejection should be comprehensible.[50] Otherwise, WTO dispute settlement bodies may decide that the requirements of Annex B:5 lit. d have not been met.

E. Outlook

26 The commitment of Members to improve the transparency of their SPS measures is doubtful. There are complaints that Members are hesitant in implementing the notification procedure, and in particular that informa-

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[47] See *WTO*, Transparency Provisions, para. 45.

[48] The SPS Committee has adopted forms to be used for routine and emergency notifications that are available from the WTO Secretariat in electronis format or in document G/SPS/7/Rev.2.

[49] See Art. 6.1 of the Convention on Environmental Impact Assessment in a Transboundary Context (EIA).

[50] G/SPS/7 Rev.2, para. 25.

tion concerning future SPS regulations is only reluctantly provided. On the other hand, Members are eager to improve transparency even beyond the obligations laid down in Art. 7/Annex B SPS.[51] In any case, the justiciability of Art. 7 SPS provides an effective tool to enhance transparency and strengthen its implementation.

[51] Committee on Sanitary and Phytosanitary Measures, Unofficial Translations, Note by the Secretariat, G/SPS/GEN/487, 23 April 2004.

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Article 8 SPS
Control, Inspection and Approval Procedures

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.

Annex C
Control, Inspection and Approval Procedures[7]

1. Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:
   a) such procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products;
   b) the standard processing period of each procedure is published or that the anticipated processing period is communicated to the applicant upon request; when receiving an application, the competent body promptly examines the completeness of the documentation and informs the applicant in a precise and complete manner of all deficiencies; the competent body transmits as soon as possible the results of the procedure in a precise and complete manner to the applicant so that corrective action may be taken if necessary; even when the application has deficiencies, the competent body proceeds as far as practicable with the procedure if the applicant so requests; and that upon request, the applicant is informed of the stage of the procedure, with any delay being explained;
   c) information requirements are limited to what is necessary for appropriate control, inspection and approval procedures, including for approval of the use of additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs;
   d) the confidentiality of information about imported products arising from or supplied in connection with control, inspection and approval is respected in a way no less favourable than for domestic products and in such a manner that legitimate commercial interests are protected;
   e) any requirements for control, inspection and approval of individual specimens of a product are limited to what is reasonable and necessary;
   f) any fees imposed for the procedures on imported products are equitable in relation to any fees charged on like domestic products or products originating in any other Member and should be no higher than the actual cost of the service;
   g) the same criteria should be used in the siting of facilities used in the procedures and the selection of samples of imported products as for domestic products so as to minimize the inconvenience to applicants, importers, exporters or their agents;
   h) whenever specifications of a product are changed subsequent to its control and inspection in light of the applicable regulations, the procedure for the modified product is limited to what is necessary to determine whether adequate confidence exists that the product still meets the regulations concerned; and
   i) a procedure exists to review complaints concerning the operation of such procedures and to take corrective action when a complaint is justified.

   Where an importing Member operates a system for the approval of the use of food additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs which prohibits or restricts access to its domestic markets for products based on the absence of an approval, the importing Member shall consider the use of a relevant international standard as the basis for access until a final determination is made.
2. Where a sanitary or phytosanitary measure specifies control at the level of production, the Member in whose territory the production takes place shall provide the necessary assistance to facilitate such control and the work of the controlling authorities.
3. Nothing in this Agreement shall prevent Members from carrying out reasonable inspection within their own territories.

Footnote 7: Control, inspection and approval procedures include, inter alia, procedures for sampling, testing and certification.

CASE LAW

Panel Report, *Australia—Salmon (Article 21.5—Canada)*, WT/DS18/RW; Panel Report *EC—Hormones (US)*, WT/DS26/R; Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R; Panel Report, *Japan—Agricultural Products II*, WT/DS76/R; Appellate Body Report, *Japan—Agricultural Products II*, WT/DS76/AB/R; Panel Report, *EC—Asbestos*, WT/DS135/R; Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R.

CROSS REFERENCES

Arts 28, 30 ECT; Art. 717 NAFTA

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A. Scope and Relevance of Art. 8

1 Trade barriers may arise not only as a result of the overly restrictive or discriminatory content of an SPS measure, but also through the procedure applying them. The purpose of Art. 8 SPS therefore is to guarantee that control, inspection and approval procedures **neither discriminate** against foreign traders **nor unduly disturb international trade**. Hence, coming under the scrutiny of Art. 8 SPS are those procedures that have been implemented to ensure the fulfilment of SPS measures (conformity assessment procedures), but not the substantive measures themselves.[1]

2 Although Art. 8 SPS emphasizes its relevance for "national systems for approving the use of additives" and "for establishing tolerances for contaminants in foods, beverages or feedstuffs", it is not limited to those, but refers to any pertinent procedure.[2] Central parts of Art. 8/Annex C derive from Art. 5 of the Tokyo Round Standards Code,[3] but the rudiments can also be found in Art. VIII:4 lit. f–h GATT 1994.[4]

3 National provisions that implement risk assessment procedures of the relevant international environmental or health agreements are to be tested on the basis of the detailed requirements of Annex C,[5] even if they are in conformity with international standards, guidelines or recommendations

[1] Panel Report, *Australia—Salmon (Article 21.5—Canada)*, WT/DS18/RW, paras 7154–7.157.
[2] Art. 8 "includes" only the explicitly mentioned systems in its scope, Annex C:1 refers to "any procedure". See submission of Canada in: *Australia—Salmon (Article 21.5—Canada)*, WT/DS18/RW, para. 4.354.
[3] *Kennedy*, Wm. & Mary Envtl. L. & Pol'y Rev. 22 (1998), 375, 405.
[4] *Böckenförde*, 351.
[5] *Ibid.*, 367.

referred to in Annex A:3. The presumption of consistency of Art. 3.2 SPS is refuted if the detailed specifications of Annex C are not met.

4 Hitherto,[6] the non-conformity of a measure with Art. 8 has been challenged in three WTO cases. In *Australia—Salmon* the Panel discussed Art. 8 and Annex C in substance while determining the scope of Annex C:1 lit. c.[7] In *EC—Marketing and Approval of Biotech Products* the Panel further defined the meaning of "without undue delay" in Annex C:1 lit. a.[8] In the remaining case judicial economy restrained both dispute settlement organs from elaborating on the issue.[9] Another evolving dispute within the scope of Art. 8 was avoided by timely adjustment of the measure in question.[10]

B. Annex C

5 Annex C:1 lit. a requires Members to **undertake and complete**[11] the procedures, first, **without undue delay** and, secondly, in a **no less favourable manner** for imported products than for like domestic products.

6 The term "without undue delay" was interpreted extensively by the Panel in *EC—Marketing and Approval of Biotech Products*, in which the United States and Canada claimed that the EC had failed to undertake and complete its approval procedures for biotech products without undue delay, as a result of the adoption and application of the general *de facto* moratorium on approvals. Guided by the French version of the text which uses the term "*retard injus-*

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[6] May 2006.

[7] *Australia—Salmon (Article 21.5—Canada)*, WT/DS18/RW, paras 7.154–7.157.

[8] Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, paras 7.1490 *et seq*.

[9] Panel Report, *Japan—Agricultural Products II*, WT/DS76/R; Appellate Body Report, *Japan—Agricultural Products II*, WT/DS76/AB/R.

[10] In 1998, a number of WTO Members raised objections to inspection procedures contained in a proposed EU regulation concerning several agricultural products, including milk products. After notification of the WTO Secretariat, Argentina, Australia, and India contended that the sampling methods required by the EU's proposed regulation would be costly, over-burdensome, and thus trade-distorting, and would exceed what is necessary to protect human health, thereby violating Art. 8 and Annex C:1 lit. e SPS. The EU took these comments into consideration, and at a meeting of the WTO's SPS Committee, it announced that it would relax its proposed sampling requirements. See in detail: *Stewart & Johanson*, Food & Drug L.J. 54 (1999), 55, 61.

[11] According to the Panel in *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, at para. 7.1494, "the phrase 'undertake and complete' covers all stages of approval procedures and should be taken as meaning that, once an application has been received, approval procedures must be started and then carried out from beginning to end."

tifié" [12] and supported by the dictionary's definition of "undue" as "[g]oing beyond what is warranted [...]" and "unjustifiable",[13] the Panel considered that the phrase "without undue delay" requires approval procedures to "be undertaken and completed with no unjustifiable loss of time".[14] The Panel emphasizes that not the length of a delay as such matters but whether there is a legitimate reason for a given delay.[15] One indicator of an invalid reason for a delay is the continuous postponement of a substantive decision for lack of available scientific information: The purpose of Annex C:1 lit. a is precisely to prevent a situation where Members avoid the substantive disciplines which Arts 2 and 5 SPS impose with respect to substantive SPS decisions by not reaching a decision on marketing approval. In the case of insufficient scientific evidence, Art. 5.7 SPS provides Members with the opportunity provisionally to adopt an SPS measure on the basis of available pertinent information.[16] Hence, Annex C:1 lit. a does not preclude the application of a prudent and precautionary approach to identifying, assessing and managing pertinent risks, but it obliges Members to do so within the structure of the SPS Agreement.

7 The **non-discrimination clause** in Annex C:1 lit. a is imported from Art. III:4 GATT 1994.[17] Thus, the determination whether or not two products are alike follows the same criteria that have been developed by dispute settlement organs with regard to Art. III:4 GATT 1994.

8 Annex C:1 lit. b reads like an instruction on how to implement Annex C:1 lit. a in a transparent and accelerated manner. Transparency is guaranteed through the Member's obligation to state the anticipated processing period or the stage of the procedure upon the applicant's request. Furthermore, the competent body for the application procedure is required to act "promptly" with regard to the examination of the completeness of the documentation. Deficiencies have to be reported to the applicant "as soon as possible" so that corrective action may be taken.

9 Annex C:1 lit. d, f and g contain specific non-discrimination provisions with regard to confidentiality of information, fees imposed for procedures and criteria in the siting of facilities used in the procedures and the selection

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[12] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, at para. 7.1495.

[13] New Shorter Oxford English Dictionary, Vol. II, L. Brown (ed.), 1993, 3480.

[14] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, at para. 7.1495.

[15] *Ibid.*, at para. 7.1496.

[16] *Ibid.*, at para. 7.1525. As the Panel rightly put it, it is important to note that the SPS Agreement nowhere states that substantive decisions on applications need to give a straight yes or no answer to applicants (at para. 1527).

[17] See *Hestermeyer*, Article III GATT, paras 66 *et seq*.

of samples. The treatment between domestic and foreign products has to be "no less favourable" (para. 1 lit. d) or "equitable in relation to" (para. 1 lit. f) or "the same" (para. 1 lit. g). The term "no less favourable" is again imported from Art. III:4 GATT 1994, but also appears in Art. 2.1 TBT and has to be interpreted accordingly.[18] The notion "equitable in relation to" is used in the same context in Art. 5.2.5 TBT and refers to the imposition of fees. It allows for the charging of unequal fees either between foreign and domestic products or between foreign products from different Members, but enjoin it from doing so if this is not justified by different costs arising, *e.g.*, from differences between location of facilities of the applicant and the national assessment body (communication, transportation, etc.). In contrast, the term "same" is strict and does not allow for any deviation, especially since no adjective such as "substantially"[19] is added.[20]

10 Annex C:1 lit. c, h and e confine several actions "to what is necessary", thereby introducing the **necessity test**. Even while taking into account the fact that the concept of necessity has its specific meaning in each provision in which it is applied (*e.g.* Art. 2.2 TBT, Art. 2.2 SPS, Annex C SPS), two factors are generally to be considered: on the one hand, the risks that the absence of a measure would create and, on the other, the existence of a less trade-restrictive alternative measure that would make it possible to fulfil the stated objective.[21]

11 In Annex C:1 lit. e the necessity test is to be applied with regard to the control, inspection and approval of individual specimens of a product, thereby assuming that specific examinations for individual specimens are the exception rather than the rule.

12 Annex C:1 lit. h does not permit Members *per se* to require the entire approval procedure for those products the specifications of which changed only subsequent to its control and inspection. Instead, as an effect of the requirement of necessity, the first assessment undertaken by the approving Member has to evaluate whether adequate confidence exists that the product still meets the regulations concerned. The burden of proof is on that Member.

13 Annex C:1 lit. c introduces the test of necessity with regard to the requirements concerning information needed for appropriate control, inspection and approval procedures. As indicated by the chapeau of Annex C:1, only "procedures to check and ensure the fulfilment of sanitary or phytosanitary

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[18] See *Keck-Tamiotti*, Article 2 TBT, para. 12.

[19] See, *e.g.*, Art. 7.2 TBT: "the technical content of which is substantially the same as that of previously notified conformity assessment procedures".

[20] However, it has to be noted that the provision in itself is not strict but only requires that the same criteria "should" be used, thereby softening the obligation as such.

[21] Panel Report, *EC—Asbestos*, WT/DS135/R, para. 8.197.

measures" fall within its scope. It therefore does not directly attach additional information requirements to the substantive provisions of the SPS Agreement.[22] However, substantial provisions may be indirectly affected by the degree of efficiency of the control, inspection and approval procedures. While a risk assessment in accordance with Art. 5.2 SPS is being conducted, risks arising from difficulties of inspection and controlling (*e.g.*, ensuring the observance of good practice) may be taken into account.[23] Consequently, gaps in the ability to implement a certain SPS measure may require additional safeguards in its substantial parts.

14 According to Annex C:1 lit. i, each Member has to establish a mechanism for reviewing complaints concerning the operation of the procedures that allows them to take corrective action. This mechanism should facilitate the settlement of disagreements at an early stage and may be regarded as a preliminary and specific consultation procedure before reference to Art. XXII GATT 1994/4 DSU is made.

15 The second sentence of Annex C:1 provides for an interim solution if **specific approval procedures** apply, such as the advanced informed agreement or the prior informed consent mechanism,[24] with regard to the approval of the use of food additives or the establishment of tolerances for contaminants in food, beverages or feeding stuffs. In those cases, where import is prohibited in the absence of approval, it suggests one should **consider the use of relevant international standards** as the basis for access until a final determination is made. But as Members are obliged only to consider this option, the impact of this provision seems rather weak. Art. 4 SPS offers other approaches to overcoming this hurdle. Instead of relying on existing international standards, Art. 4.2 SPS requires Members to enter into consultations with the aim of achieving bilateral or multilateral agreements on recognition of the equivalence of specified SPS measures. Even more promising in this respect may be Art. 4.1 SPS, to which Art. 8, sentence 2 refers by obliging Members to ensure that their procedures are not inconsistent with the other provisions of the SPS Agreement.[25] According to Art. 4.1 SPS Members shall accept the SPS measures of other Members as

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[22] In *Australia—Salmon (Article 21.5—Canada)*, WT/DS18/RW, para. 7156, the Panel found that all three Australian requirements referred to were substantive sanitary measures in their own right, and not procedures or information requirements. Unclear: *Taylor*, Pac. Rim L. & Pol'y J. 9 (2000), 473, 501, who summarizes that the Australian requirements were consistent with Art. 8 and Annex C.

[23] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 205. With this decision, the Appellate Body overturned the ruling of the Panel which had stated that "these non-scientific factors should, therefore, not be taken into account into risk assessment but in risk management" (Panel Report *EC—Hormones (US)*, WT/DS26/R, para 8.146).

[24] *Stoll*, YIEL 10 (1999), 82, 112.

[25] *Wiemer*, 178.

equivalent, even if these measures differ from their own (here: the approval of an imported product by the exporting Member). However, Art. 4.1, sentence 2, allows the importing Member to verify whether the conditions of approval in the exporting country meet its own level of protection.

16 Annex C:2 acknowledges that SPS measures of the country of import may already include control at the level of production in the exporting country. However, considering that an SPS measure applies only within the territory of the respective Member,[26] the provision is not meant to abrogate the well established product/process doctrine.[27] Instead, it applies only in those cases where the legitimate implementation of an SPS measure may be more easily achieved through controls in the exporting country. Under these circumstances, the exporting Member shall assist in facilitating such control.

17 Annex C:3 only emphasises the implication that Members are free to carry out reasonable inspection within their own territory in order to achieve their legitimate level of protection. The term "reasonable" indicates that the inspection must not discriminate unjustifiably and must not be more restrictive than necessary.

C. Outlook

18 The Panel's reasoning in *EC—Marketing and Approval of Biotech Products* emphasized the importance of Art. 8 SPS/Annex C in achieving the Agreement's desire for "the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade".[28]

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[26] See the definition of an SPS measure in Annex A:1 lit. a–d which only refers to measures of protection "within the territory of the Member".

[27] The "product-process doctrine" differentiates between a product sphere on the one hand and a production process sphere on the other hand. Oversimplified, the doctrine accepts trade-related measures to protect human health or the environment based on the characteristics of a product, but does not do so for trade-related human health or environmental measures based on processes and production methods. The doctrine is based on the idea of the territorial integrity of WTO Members. They are permitted to establish a level of protection within their own territories in order to protect their population/environment, but do not have the right to impose restrictions on production methods in other Members. The strict product-process doctrine is not explicitly contained in the WTO agreements, but may be deduced from their aim and purpose. It was established in two famous Panel decisions concerning the US—Tuna case. The consequences of the product-process doctrine are well known and have been exhaustively discussed. See *Böckenförde*, 263 et seq.

[28] Preamble SPS, Rec. 4.

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Article 9 SPS
Technical Assistance

1. Members agree to facilitate the provision of technical assistance to other Members, especially developing country Members, either bilaterally or through the appropriate international organizations. Such assistance may be, inter alia, in the areas of processing technologies, research and infrastructure, including in the establishment of national regulatory bodies, and may take the form of advice, credits, donations and grants, including for the purpose of seeking technical expertise, training and equipment to allow such countries to adjust to, and comply with, sanitary or phytosanitary measures necessary to achieve the appropriate level of sanitary or phytosanitary protection in their export markets.
2. Where substantial investments are required in order for an exporting developing country Member to fulfil the sanitary or phytosanitary requirements of an importing Member, the latter shall consider providing such technical assistance as will permit the developing country Member to maintain and expand its market access opportunities for the product involved.

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A. General

1 Health standards weigh heavily on low-income country producers and due to a lack of technical expertise are often insurmountable obstacles for exports. Furthermore, compliance with the SPS Agreement requires technical and legal expertise which developing countries lack. The **special difficulties and needs** of developing countries in complying with and implementing the SPS Agreement are acknowledged by Rec. 7 of the Preamble. In response the Agreement provides for technical assistance (Art. 9) and special and differential treatment (Art. 10) in favour of developing countries. The purpose of technical assistance is to support these countries in complying with the SPS measures adopted by developed countries with the aim of gaining market access and assisting them in the formulation of their own SPS measures. What is needed is not only an understanding of the obligations under the Agreement but also the technical and scientific capacity to carry them out.

2 There is neither a **definition** of the term "developing country" in the SPS Agreement, nor has such a definition been adopted by the WTO Members. However, Art. XVIII:1 GATT 1994, which refers to developing countries as those economies which "can only support low standards of living and [are] in the early stages of development", can be used as guidance. In practice, classification as a developing country is predominantly a matter of self-identification.

B. Historical Background

Technical assistance has traditionally been one of the main elements of special and differential treatment,[1] together with market access and market protection.[2] Technical assistance aims to allow developing countries to accept the same commitments as their developed counterparts in recognition of their needs and difficulties. This is a concept which has been rooted in the world trade order since the 1954–55 GATT Review Session and has been included in several WTO Agreements.[3] A provision on technical assistance was part of the **Tokyo Round Agreement on Technical Barriers to Trade.**[4] In comparison with Art. 11, the parallel provision of the TBT Agreement, Art. 9 SPS is more general. *3*

C. The Legal Nature of the Undertaking

A contextual reading of Art. 9 reveals that it is not a strictly legally binding provision. In contrast to the provisions setting out the main disciplines of the Agreement, which use the term "shall", **Art. 9.1** merely provides that the Members *agree to facilitate* the provision of technical assistance in the sense of a **"best endeavours" clause**. The choice of means and area of assistance is left to the countries providing technical assistance, as indicated by the word "may". *4*

Pursuant to **Art. 9.2** importing Members "shall consider" providing technical assistance where substantial investments are required to meet their health standards. Though para. 2 uses the term "shall", the undertaking to *consider* the provision of technical assistance makes it a rather vague obligation. The outcome of this consideration is left open. There is **no legally binding obligation** actually to provide assistance, let alone to grant specified means of assistance.[5] But the fact that the difficulties faced by developing countries have their origin in the adoption of SPS measures by developed countries makes it at least morally binding to give some kind of assistance as a matter of compensation for these difficulties. *5*

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[1] See *e.g.* Arts 11 and 12 TBT, Art. XXV:2 GATS, Arts 66 and 67 TRIPS and Art. 27.2 DSU.

[2] *Garcia*, B.C. Int'l & Comp. L. Rev. 27 (2004), 291–317, 292.

[3] See *e.g.* Arts 11 and 12 TBT, Art. XXV:2 GATS, Arts 66 and 67 TRIPS and Art. 27.2 DSU. See also Committee on Trade and Development, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, WT/COMTD/W/77/Rev.1/Add.1/Corr.1, 4 February 2002, 3.

[4] See Art. 11 Standards Code.

[5] *R. Adhikari*, in: *Macrory et al.* (eds), 343, 356.

D. Areas and Forms of Technical Assistance

6 The main **areas** in which technical assistance and cooperation are needed are human resource development, national capacity building, transfer of technology and information.[6] Art. 9.1 specifies the following matters for which assistance is particularly needed, although the list is not exclusive: processing technologies, research and infrastructure and the establishment of national regulatory bodies.

7 Technical assistance is a broad term, and is not limited to the transfer of scientific expertise, as evidenced by the list in sentence 2. Assistance may take the **form** of advice, credits, donations and grants, and includes training and equipment upon request. In order to provide effective assistance it is necessary to identify the needs of developing countries[7] and to work out how best to address them. Apart from "soft" infrastructure (training, information and the development of national regulatory bodies) there is a need for "hard" infrastructure.[8] The latter includes the establishment of laboratories, equipment and veterinary services and the creation of disease free areas.

8 The **purpose** of technical assistance is twofold. It seeks to enable developing countries to develop their own health standards and to comply with the standards of foreign countries for the purpose of exports. In order to assist developing countries to elaborate adequate SPS measures developed members could, for example, share with their developing counterparts information on the use of risk analysis techniques.[9]

9 Apart from technical and scientific expertise there is also a need to improve the legal **understanding of the obligations under the Agreement**. For this purpose regional seminars, workshops and training sessions have been launched by the Secretariat, and the international standard-setting bodies have organized special sessions on such specific aspects as risk analysis.[10]

10 In order for developing countries to gain **access to foreign markets** their products need to comply with sometimes highly sophisticated sanitary

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[6] Committee on Sanitary and Phytosanitary Measures, Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures, Report of the Committee, G/SPS/12, 11 March 1999, para. 9.

[7] The Secretariat circulated a questionnaire on technical assistance needs (Committee on Sanitary and Phytosanitary Measures, Questionnaire on Technical Assistance, Note by the Secretariat, G/SPS/W/113, 15 October 2001). The responses to this questionnaire are contained in attachments to the document: G/SPS/GEN/295.

[8] G/SPS/GEN/206.

[9] G/SPS/W/93, para. 2.

[10] G/SPS/36, paras 47–57.

or phytosanitary requirements of importing, mainly developed countries. This necessitates investment which is often substantial and exceeds developing countries' capabilities. With the aim of assisting developing countries in this undertaking, importing Members pursuant to **Art. 9.2** shall consider providing such technical assistance which is necessary for developing countries to maintain and expand their market access. Apart from financial assistance the provision of information about how to comply with the health standards and the transfer of technology are provided for by para. 2. Such assistance serves as a trade-off for the obstacle to free trade posed by SPS measures.

E. Addressees

11 The immediate addressees of Art. 9.1 are all **WTO Members**, namely the developed countries, individually and collectively. They agree to provide technical assistance either bilaterally or through the appropriate international organizations. The SPS Committee has encouraged developed Members to report on specific assistance activities and developing countries to identify their technical assistance needs.[11] In practice technical assistance has usually been provided bilaterally and on a rather *ad hoc* basis,[12] but there are efforts by the European Union to provide such assistance to all ACP (African, Caribbean and Pacific) countries.[13]

12 In order to enhance compliance with Art. 9 by making state practice transparent the SPS Committee adopted a **consultation and notification procedure**. Importing countries shall consider any requests for technical assistance made in response to their notification of a new measure and notify the SPS Committee of any subsequent action.[14]

13 Upon request by the **WTO Secretariat** Members have submitted information on technical assistance which has been provided and on technical assistance needs.[15] The WTO Secretariat also prepared a typology of technical

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[11] G/SPS/W/113; G/SPS/GEN/295; G/SPS/GEN/332.

[12] G/SPS/12, para. 9.

[13] Committee on Sanitary and Phytosanitary Measures, Summary of the Meeting of 24 October 2005, Resumed on 1–2 February 2006, Note by the Secretariat, G/SPS/R/39, 21 March 2006, paras 159–162.

[14] G/SPS/33.

[15] For the questionnaire see Committee on Sanitary and Phytosanitary Measures, Questionnaire on Technical Assistance, Note by the Secretariat, G/SPS/W/101, 23 July 1999. A summary of the responses is contained in: Committee on Sanitary and Phytosanitary Measures, Summary of the Replies to the Questionnaire on Technical Assistance, Note by the Secretariat, Revision, G/SPS/GEN/143/Rev.1, 8 March 2000 and Addenda. See also the responses by Australia (G/SPS/GEN/472, 10 March 2004); the US (G/SPS/GEN/181, 15 June 2000 and Add. 1–5); and New Zealand (G/SPS/GEN/352, 28 October 2002 and

assistance.[16] In order to improve developing countries' understanding of the Agreement the Secretariat has developed handbooks and CD-ROMs and organized several workshops and seminars.

14 Since **international organisations** are not parties to the SPS Agreement there is only an indirect obligation on WTO Members to exercise their influence within these organizations in order to initiate assistance projects. Cooperation by the WTO with other organisations, especially with the financial institutions, is a valuable means of identifying the needs of developing countries.[17] Technical assistance has also been provided by the WHO, FAO and the International Trade Center (ITC).[18] The standard-setting international organizations are best equipped to provide the necessary technical expertise. The Codex Alimentarius Commission, the Secretariat of the International Plant Protection Convention (IPPC) and the International Office of Epizootics (OIE) have long provided technical assistance to developing countries to help them address SPS threats.

15 In September 2002, the **Standards and Trade Development Facility** (STDF) was established through a concerted effort by the WHO, FAO, WTO, OIE and the World Bank. Its purpose is to enhance the capacity of developing countries in the standards area through co-operation between the relevant institutions with respect to SPS activities, to develop joint projects, and to provide funding for projects in developing countries.[19] The STDF maintains a database which provides information on SPS-related technical assistance and capacity building projects.[20]

F. The Doha Ministerial Conference

16 Developing countries' need for technical assistance was re-emphasised by the Implementation Decision adopted at the Doha Ministerial Conference and members were urged to provide, to the extent possible, the financial and technical assistance necessary to enable these countries to respond adequately

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G/SPS/GEN/352/Rev.1, 25 February 2005); and the EC (G/SPS/GEN/244, 27 April 2001). The second questionaire on special assistance needs is contained in G/SPS/W/113 and the responses were circulated as addenda to G/SPS/GEN/295.

[16] G/SPS/GEN/206.

[17] Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Implementation-Related Issues and Concerns, Decision of 14 November 2001, WT/MIN(01)/17, 20 November 2001, para. 3.5.

[18] See *e.g. FAO*, Technical Assistance. For further information on efforts by international organisations see G/SPS/36, paras 55–58.

[19] G/SPS/GEN/523.

[20] Available at <http:/stdfdb.wto.org>.

to new SPS measures having a significant negative effect on their trade.[21] It also acknowledged the special problems of least-developed countries in implementing the SPS Agreement and urged members to ensure that technical assistance responds to these needs.[22] A Doha Development Agenda Trust Fund was established to receive money from donor countries. The Director-General was urged to continue his efforts with the standard-setting organizations to facilitate technical and financial assistance.[23]

G. Evaluation and Outlook

17 Though Art. 9 calls upon Members to provide technical assistance, developing countries have made the criticism that in practice their needs have not been adequately taken into account by developed countries.[24] The endeavour to provide technical assistance to developing countries has been criticized as largely failing as a result of the non-binding nature of the technical assistance provision.[25] Technical assistance has been sporadic and under-funded. The Integrated Framework was adopted with the aim of streamlining and rationalizing technical assistance,[26] but this programme has also received **criticism**.[27] Efforts to identify special technical assistance needs should be continued and re-emphasized. Proposals for the implementation of the provisions on technical assistance which have been referred to the SPS Committee by the General Council have been discussed in the Committee.[28]

18 In order to improve technical assistance a **justiciable, precise, operational standard** would be desirable.[29] A concerted effort going beyond

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[21] Ministerial Conference, Fourth Session—Doha, 9–14 November 2001, Implementation-Related Issues and Concerns, Draft Decision, WT/MIN(01)/W/10, para. 3.6 (i).

[22] *Ibid.*, para. 3.6 (ii).

[23] WT/MIN(01)/17, para. 3.5 (ii).

[24] Committee on Sanitary and Phytosanitary Measures, Special and Differential Treatment, Note by the Secretariat, G/SPS/W/105, 9 May 2000.

[25] *Garcia*, B.C. Int'l & Comp. L. Rev. 27 (2004), 291, 309.

[26] Sub-Committee on Least-Developed Countries, Report of the Review of the Integrated Framework, WT/LDC/SWG/IF/1, 29 June 2000; Review of standards related issues identified in the integrated framework diagnostic trade integration studies, G/SPS/GEN/545, 28 February 2005.

[27] *Garcia*, B.C. Int'l & Comp. L. Rev. 27 (2004), 291, 309.

[28] See Committee on Sanitary and Phytosanitary Measures, Proposals and Progress on Special And Differential Treatment, Note by the Secretariat, G/SPS/GEN/543, 28 February 2005; Committee on Sanitary and Phytosanitary Measures, Report on Proposals for Special and Differential Treatment, Adopted by the Committee on 30 June 2005, G/SPS/35, 7 July 2005.

[29] Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Ministerial Declaration, Adopted on 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001, para. 44.

the narrowly defined trade agreement rules is needed.[30] One option would be to establish a multilateral facility which coordinates and expands financial and technical support for developing countries.[31] This would have the advantage that technical assistance was not provided selectively and without strings attached.

19 Technical assistance is only one aspect of helping developing countries to gain market access. It must be **complemented by other measures**, such as longer time frames and other means of special and differential treatment (Art. 10), as well as by the promotion of harmonised standards worldwide and by specifying the terms of the SPS Agreement.[32] Despite the necessity of health protection SPS measures may not be used by developed countries to impose unjustified measures which pose an insurmountable trade barrier for developing countries. The flexibility inherent in some provisions of the Agreement should not be misused to this end.

[30] *Hoekman*, JIEL 8 (2005), 405, 420.

[31] *Ibid*. Others have called for administration by the WTO. *Prévost & Matthee*, LIEI 29 (2002), 43, 56.

[32] The Committee on Sanitary and Phytosanitary Measures identified special needs of developing countries and made several proposals in response to these needs. G/SPS/W/93. For reform proposals see *Prévost & Matthee*, LIEI 29 (2002), 43–59.

Rüdiger Wolfrum, Peter-Tobias Stoll and Anja Seibert-Fohr (eds), *WTO-Technical Barriers and SPS Measures.*
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Article 10 SPS
Special and Differential Treatment

1. In the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members.
2. Where the appropriate level of sanitary or phytosanitary protection allows scope for the phased introduction of new sanitary or phytosanitary measures, longer time-frames for compliance should be accorded on products of interest to developing country Members so as to maintain opportunities for their exports.
3. With a view to ensuring that developing country Members are able to comply with the provisions of this Agreement, the Committee is enabled to grant to such countries, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement, taking into account their financial, trade and development needs.
4. Members should encourage and facilitate the active participation of developing country Members in the relevant international organizations.

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A. General

1 Though the disciplines of the SPS Agreement apply to all countries equally, the Agreement takes into account the technical and financial constraints faced by **developing countries** (Rec. 7 of the Preamble). Apart from technical assistance (Art. 9) provision is made for special and differential treatment in favour of developing countries. The purpose of such treatment is to allow developing countries to accept the same commitments as their developed counterparts, although under more flexible terms. The main focus of special and differential treatment (S & D) is on **transitional periods and exceptions** for developing countries with respect to the implementation of the agreement (paras 2 and 3). Furthermore, developed countries are called upon to **implement the Agreement in a manner favourable to developing countries** (para. 1) and to assist their participation in the relevant **international organizations** (para. 4).

There is no **definition** of the term "developing country" in the SPS Agreement, nor has such a definition been adopted by the WTO Members. Art. XVIII:1 GATT 1994 which refers to developing countries as those economies which "can only support low standards of living and [are] in the early stages of development" can be used as guidance. In practice classification as a developing country is predominantly a matter of self-definition. *2*

Art. 10 is complemented by **other provisions** which are also of advantage for developing countries, such as reasonable adaptation periods between the publication of SPS measures and their entry into force (Annex B:2), transitional time periods for compliance with the Agreement for least-developed countries (Art. 14) and special provisions on notification (Annex B:8 and 9). There are elements of flexibility which can also be used by developing countries. Examples are Art. 5.1 which requires a risk assessment "as appropriate to the circumstances" and Art. 5.6 allowing economic feasibility to be taken into account in the choice of SPS measures. *3*

B. Historical Background

Although the idea of granting developing countries favourable treatment goes back to the 1947 Havana Conference[1] developing countries between 1948 and 1955 participated in GATT activities as equal partners, being subject to the same rules as developed countries. Special rights and obligations entered the regime at the 1954–55 GATT Review Session. The term "special and more favourable" treatment was introduced in 1979 in the Tokyo Round.[2] The **Standards Code** explicitly provided for special and differential treatment.[3] While the early focus was on non-reciprocity apart from preferential access to markets of developed countries the "single undertaking" approach was revived in the Uruguay Round. Nonetheless the WTO Agreements incorporated a considerable number of Special and Differential Treatment provisions,[4] including Art. 10 SPS, in order to respond to special adjustment difficulties of developing countries in the implementation of the Agreements. By allowing for transitional time periods and providing for technical assistance, the focus of the S & D regime shifted from non-reciprocity to allowing developing countries to accept *4*

[1] Havana Charter for an International Trade Organization, 24 March 1948, CTS No. 32, 3; UN Doc. E/CONF. 2/78 (1948).

[2] Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979, GATT, BISD 26S/203, L/4903, 12 April 1979.

[3] See Art. 12 Tokyo Round Agreement on Technical Barriers to Trade.

[4] For a detailed analysis of the S & D concept see *Garcia*, B.C. Int'l & Comp. L. Rev. 27 (2004), 291–317.

the same commitments as developed countries, although under more flexible terms.[5]

C. Recognition of Special Needs of Developing Countries (**Para. 1**)

I. Special Needs

5 Since SPS measures impose a considerable burden on developing countries which seek to gain market access, importing Members are obliged to take account of the **special needs** of developing country Members, and in particular of **least-developed countries**. Para. 1, as the general provision, together with the more specific provision on longer time-frames (para. 2) encourages especially developed Members to grant developing countries more flexibility in meeting their health standards. Among the special needs are financial and trade needs as well the need for technical and scientific understanding. In practice, however, there have been few efforts to grant such technical assistance to developing countries in gaining market access.

II. Area of Application

6 Art. 10.1 applies only to the **preparation and application of sanitary or phytosanitary measures**. In the *Approval and Marketing of Biotech Products* case Argentina had claimed that the EC's *de facto* moratorium on approvals, having the effect of preventing Argentina's biotech products from having access to the EC market, violated Art. 10.1.[6] But the Panel held that the *de facto* moratorium did not constitute an SPS measure within the meaning of Art. 10.1 and therefore did not give rise to a violation of this provision.[7] Taking note of the fact that Art. 10.1 is a provision on differential and more favourable treatment for developing country Members, the Panel, however, read Argentina's claims more broadly. It therefore also analysed the application of the EC approval legislation (as an SPS measure) for its consistency with Art. 10.1.[8]

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[5] Development Since the Fourth WTO Ministerial Conference, DOHA ROUND BRIEFING SERIES, Vol. 1, No. 1/13, 2003.

[6] Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 4.273.

[7] *Ibid.*, para. 7.1623.

[8] *Ibid.*, para. 7.1619.

III. The Obligation to "take account of"

Members are mandated to take the needs of developing countries **into account**. There is an obligation only to recognise and consider such needs. As the Panel in the *Biotech* case explained, Art. 10.1 does not provide for a right to special and differential treatment.[9] To "take account of" is defined as considering "along with other factors before reaching a decision".[10] How this is actually to be done is left open.[11] Despite the term "shall", which signals a legally binding obligation, the undertaking to take account of the special needs of developing country Members is better characterized as a **"best endeavours" obligation**.[12] There is no obligation to adapt SPS measures to developing countries' needs or to grant exceptions even if these measures have negative effects on their exports.[13] Importing Members may also take account of other legitimate interests, for example those of their own consumers and of their environment.[14] There is no obligation to give priority to developing countries' needs.[15] The problem with para. 1 thus is not the fact that it is not mandatory but its vague language which creates loopholes enabling Members to evade special and differential treatment. *7*

The **burden of proof** is on the complaining party which needs to adduce sufficient evidence to raise a presumption that the importing country failed to take the special needs of developing Members into account.[16] The fact that favourable treatment is not granted to developing countries does not of itself constitute ***prima facie*** **evidence** of a failure to take account of their special needs, nor does the absence of any reference to such needs in the relevant legislation.[17] According to the Panel in the *Biotech* case it is not enough for a developing country merely to assert that there is no evidence that its needs have been taken into account without specifying what efforts it has made to collect such evidence.[18] However, such evidence emanating from the decision-making processes of importing countries is regularly beyond the reach of developing countries. The strict application of the burden of proof would undermine the underlying idea of S & D treatment. A feasible *8*

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[9] *Ibid.*, para. 7.1627.
[10] *Ibid.*, with reference to *Pearsall* (ed.), The Concise Oxford Dictionary, 10th ed., 1999, 8.
[11] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.1627.
[12] *Adhikari*, in: *Macrory et al.* (eds), 343, 358. *Garcia* qualifies Art. 10.1 as a "fake mandatory" provision. *Garcia*, B.C. Int'l & Comp. L. Rev. 27 (2004), 291, 312.
[13] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.1627.
[14] *Ibid.*, para. 7.1628.
[15] *Ibid.*
[16] *Ibid.*, para. 7.1629.
[17] *Ibid.*, paras 7.1628, 7.1630.
[18] *Ibid.*, 7.1631.

solution to this problem would be to develop a public procedure for taking account of developing countries' special needs. Failure to comply with this procedure would at least give rise to a *prima facie* case of a violation of Art. 10.1. An effort to develop such a procedure has already been undertaken by the SPS Committee with the adoption of the consultation procedure.[19] Alternatively the burden of proof could be shifted if an importing Member did not respond to a developing country's request for information on how the developing country complied with its obligation under Art. 10.1.

9 In order to improve the implementation of Art. 10.1 the SPS Committee followed a Canadian proposal providing for a **consultation procedure** which members should follow whenever a developing country identified a problem relating to a notified SPS measure.[20] Though Art. 10.1 does not explicitly require the importing Member to document how it has complied with its duty to take developing countries' special needs into account,[21] the procedure calls upon importing countries to consider any requests for special and differential treatment in response to their notification of a new measure, to enter into consultations and to notify the SPS Committee of any subsequent action.[22]

D. Longer Time-Frames for Compliance (Para. 2)

10 Art. 10.2 concerns the gradual introduction of new SPS measures. Members are encouraged to accord longer time-frames for compliance with their SPS measures to developing countries if the appropriate level of protection allows scope for such phased introduction. The purpose is to give developing countries time to adapt so as to maintain export opportunities. As the phrase "should be accorded" indicates, there is **no legally binding obligation** actually to grant such longer compliance periods. Art. 10.2 complements Annex B:2 which obliges Members to allow a reasonable period between the publication and entry into force of SPS measures.

11 The **Implementation Decision** adopted at the Doha Ministerial Conference established a **time frame** for developing countries' compliance with new SPS measures: "normally a period of not less than 6 months" if there is scope for the phased introduction.[23] For situations where the appropriate

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[19] See below, para. 9.

[20] G/SPS/W/127.

[21] *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.1631.

[22] Resolution of the concern identified could include one of the following, or a combination thereof: (1.) a change in the measure to be applied on a MFN basis; (2.) the provision of technical assistance to the exporting Member; or (3.) the provision of special and differential treatment. G/SPS/33.

[23] *Ibid.*, para. 3.1.

level of protection does not allow phased introduction but where developing countries identify specific problems with immediate adaptation to new measures the Decision adds a consultation obligation. In such cases Members "shall upon request enter into consultations [...] with a view to finding a mutually satisfactory solution to the problem while continuing to achieve the importing Member's appropriate level of protection".[24]

E. Time-Limited Exceptions (Para. 3)

12 While the first two paragraphs of Art. 10 are concerned with the ability of developing countries to meet the health standards of other countries in order to gain market access to them, para. 3 is about the ability of developing countries to meet the **obligations under the SPS Agreement** when elaborating their own SPS measures. In order to enable developing countries gradually to comply with the Agreement the SPS Committee is empowered to grant time-limited exceptions to the treaty obligations. This gradual introduction of the Agreement complements Art. 14 which allowed least-developed countries and developing countries to delay the application of the Agreement after its entry into force. The individualized exception under Art. 10.3 is comparable to a waiver pursuant to Arts IX:3 and 4 WTO Agreement.

13 The **purpose** of Art. 9.3 is to compensate for the disadvantages developing countries encounter with the SPS Agreement. Since the requirements for the elaboration and maintenance of SPS measures can be very burdensome, developing countries may be given extra time to adjust to these new obligations. This concerns, for example, the creation of infrastructure, such as the establishment of a National Notification Authority and of Enquiry Points, and very costly obligations, like the duty to publish and notify new SPS measures. Pursuant to Annex B:8 developing countries are already exempted from the duty to provide copies. Time-limited exceptions together with technical assistance (Art. 9) are to assist developing countries to develop health standards, like their developed counterparts. Otherwise the SPS Agreement with its demanding requirements would pose an obstacle for developing countries to the adoption of SPS measures while developed countries have the necessary resources to elaborate such standards for their own markets.

14 While Art. 14 gave developing countries the right unilaterally to delay the application of the Agreement, Art. 10.3 empowers them only to request an exception and leaves the decision to the **SPS Committee**. These

[24] *Ibid.*

time-limited exceptions may be from all or merely some of the treaty obligations and need to be specified. Financial, trade and development needs, such as technical expertise, appropriate technology, technical facilities and sufficient knowledge about the relevant standards must be taken into account. A request by the developing country concerned is essential. Though many developing countries are unable to meet the requirements of the entire SPS Agreement there has so far been no such request.[25] This is detrimental not only to developing countries but also to the integrity of the agreement. Gradual implementation of the Agreement is undoubtedly better than complete failure to comply with the disciplines.

F. Participation in International Organizations (Para. 4)

15 Since harmonization has a substantial impact on Members' scope to develop health standards all Members should be able to contribute to the standard-setting process. This requires not only financial resources but also scientific and technical expertise, which developing countries often lack. In order to compensate for this disadvantage and to put developing countries on an equal footing in the long run, Art. 10.4 calls upon Members to encourage and facilitate the active participation of developing country Members in the relevant international organizations. Participation in the **standard-setting organisations**, such as the **Codex Alimentarius Commission**, the **International Plant Protection Convention** (IPPC) and the **International Office of Epizootics** (OIE) is envisaged. Despite the fact that developing countries' delegates are increasingly attending meetings of these organizations there remains much to be done actually to guarantee equality.[26] Financial aid and training are valuable means of facilitating developing countries' participation in the relevant organs. However, the wording "Members should encourage and facilitate" indicates that this is not a legally binding obligation.

16 The FAO, the OIE, the WHO, the World Bank and the WTO during the **Doha Ministerial Conference** committed themselves to enhancing the capacity of developing countries to participate effectively in the development and application of international standards.[27] **Funds** have been established

[25] G/SPS/36, para. 73.

[26] *Adhikari*, in: *Macrory et al.* (eds), 343, 358, with reference to Codex Alimentarius Commission, Report of the 24th Session, 2001, ALINORM 01/41, Appendix II, 16.

[27] Ministerial Conference, Fourth Session, Doha, 9–13 November 2001, Participation of Developing Countries in the Development and Application of International Standards, Guidelines and Recommendations on Food Safety, Animal and Plant Health, Joint Statement Circulated by the Directors-General of the Food and Agriculture Organization of the United Nations, the Office International des Epizooties, the World Health Organization,

by the FAO, IPPC and OIE to improve the participation of developing countries in the standard-setting organisations. Financial support has been provided to fund the participation of Latin American, Central American and Caribbean countries in meetings of the SPS Committee.

G. The Doha Ministerial Conference

17 The Implementation Decision adopted at the Doha Ministerial Conference sought to **strengthen the special and differential treatment regime** by specifying its terms.[28] It provides for longer time-frames and for consultations.[29] The Director-General was urged to continue his efforts with the standard-setting organizations to guarantee the effective participation of least-developed countries and to facilitate technical and financial assistance for this purpose.[30] In response to the Doha mandate to review all special and differential treatment provisions, with a view to strengthening them and making them more precise, effective and operational, the General Council referred several proposals to the SPS Committee relating to Art. 10.1 and 4 which have since been discussed in the Committee.[31]

H. Evaluation and Outlook

18 S & D gained renewed prominence with the Doha Ministerial Declaration. Whether special and differential treatment really serves the integration of developing countries into the world trading system is debatable.[32] Some developing countries have successfully made use of this concept in order to enter the global economy. Nonetheless, there has been a **gap between**

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the World Trade Organization and the President of the World Bank, WT/MIN(01)/ST/97, 11 November 2001.

[28] Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Implementation-Related Issues and Concerns, Draft Decision, WT/MIN(01)/W/10, 14 November 2001, para. 12.

[29] See above, para. 11.

[30] WT/MIN(01)/W/10, para. 3.5 (ii).

[31] For the proposals see Committee on Trade and Development, Special Session, Special and Differential Treatment Provisions, Joint Communication from Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe, TN/CTD/W/2, 14 May 2002; Committee on Trade and Development, Special Session, Special and Differential Treatment Provisions, Joint Communication from the African Group in the WTO, Revision, TN/CTD/W/3/Rev.2, 17 July 2002; Committee on Trade and Development, Special Session, Special and Differential Treatment Provisions, Communication from India, TN/CTD/W/6, 17 June 2002. For the most recent Committee report see G/SPS/35.

[32] For this discussion see *e.g. Adhikari* in: *Macrory et al.* (eds.), 343, 363; *Ewelukwa*, N.D.L. Rev. 79 (2003), 831–878, 862–864, 871–878.

the aim to facilitate market access and reality. This is partly due to the fact that S & D provisions are vaguely formulated, and as such not taken seriously enough by developed countries. The Special Session of the Committee on Trade and Development is asked to search for ways of making the special and differential treatment provisions in WTO agreements more effective.

19 The discussion about making the provisions **mandatory** is continuing.[33] The Committee on Trade and Development was instructed at the Doha Ministerial Conference to identify binding and non-binding S & D provisions and to consider the implications of converting these measures into mandatory provisions.[34] There is a need to make special and differential treatment more effective. To specify the rather vague undertakings under Art. 10 by spelling out the concrete steps to be taken by Members and by fixing minimum time frames[35] for the gradual introduction of new SPS measures is a first step. Under the current regime there is little opportunity for developing countries successfully to challenge the SPS measures of their developed counterparts in dispute settlement cases. Developing countries should be assisted to make better use of the S & D provisions.[36]

[33] For such proposals see Committee on Agriculture, Special Session, WTO African Group: Joint Proposal on the Negotiations on Agriculture, G/AG/NG/W/142, 23 March 2001, 3; Group of Seven Implementation Paper, 3 (2001) See <www.ictsd.org/ministerial/doha/docs/g7implem.pdf>.

[34] WT/MIN(01)/W/10, para. 12.1.

[35] For a critique of fixed time frames for all new SPS measures see *Prévost & Matthee*, LIEI 29 (2002), 43, 56. They advocate an extended time limited exemption coupled with the shifting of the burden of proof for developed countries to indicate reasons why such extention could not be allowed.

[36] To identify ways of assisting developing countries in making better use of the S & D provisions is among the tasks the Committee on Trade and Development was entrusted with by the Doha Ministerial Conference. See WT/MIN(01)/W/10, para. 12.1 (ii).

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Article 11 SPS
Consultations and Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.
2. In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.
3. Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.

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Documents

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Cross References

Arts 1118, 2006, 2014, 2015 NAFTA; Art. 2 ASEAN Protocol of Dispute Settlement Mechanism; Art. 3 in connection with Annex II of the Treaty Establishing a Common Market (MERCOSUR) between Argentina, Brazil, Paraguay and Uruguay; Art. 64 ICSID Convention.

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A. General

1 The SPS Agreement is—as are all other WTO multilateral trade agreements—subject to the dispute settlement procedures under the **DSU**.[1] Art. 11 provides for the procedural and substantial link between the SPS Agreement and the general dispute settlement regime. Consultations are to be conducted pursuant to Arts XXII and XXIII GATT 1994 in conjunction with Art. 4 DSU (Art. 11.1). Art. 11.2 concerns the seeking of information from experts; Art. 11.3 makes it clear that the SPS Agreement does not interfere with the Members' rights and obligations derived from other international agreements, including alternative dispute settlement mechanisms.

B. Consultations and Dispute Settlement (Art. 11.1)

2 Consultations and dispute settlement under the SPS Agreement are governed by the DSU (Art. 11.1).[2] Art. 11.1 is the corresponding provision to Art. 4 DSU, the general rule declaring consultations to be a mandatory prerequisite to the establishment of a Panel.[3] **Art. 11 will prevail** over the provisions of the DSU **to the extent that there is a difference** between the two.[4] Such difference is acknowledged only when the two provisions are mutually incompatible, *i.e.* where adherence to the one provision will lead to a violation of the other. In general the provisions of the DSU and the special or additional rules of Annex 2 DSU should be read

[1] *Stoll*, Article 1 DSU, Max Planck CWTL, Vol. 2, paras 11 *et seq*.

[2] An overview of disputes invoking the SPS Agreement is compiled by the WTO Secretariat, Committee on Sanitary and Phytosanitary Measures, Review of the Operation and Implementation of the SPS Agreement, Background Document, Note by the Secretariat, G/SPS/GEN/510, 20 September 2004, 15.

[3] See *Schorkopf*, Article 4 DSU, Max Planck CWTL, Vol. 2.

[4] Art. 1.2 DSU, Annex 2 DSU. On the relationship between the corresponding consultation provision Art. 14.2 TBT and Art. 13 DSU see Panel Report, *EC—Asbestos*, WT/DS135/R, para. 5.18.

as complementing each other.[5] In *Guatemala—Cement I* the Appellate Body held that an interpreter must identify an *inconsistency* or a *difference* between a provision of the DSU and a special or additional provision of a covered agreement *before* concluding that the latter *prevails* and that the provision of the DSU does not apply.[6]

The **objectives of consultations** are threefold: first, the consultation process can help to clarify the facts of a disputed situation between the Members involved. Secondly, consultations may lead to a mutually acceptable solution of the dispute. Thirdly, the information obtained during consultations may enable the complainant to narrow down the scope of the matter with respect to which he seeks establishment of a panel.[7] *3*

Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall, *mutatis mutandis*, follow Arts XXII and XXIII GATT 1994, as elaborated and applied by the Dispute Settlement Understanding. The complainant therefore is in a position to decide on the involvement of a third party by choosing the legal basis for consultations. Whereas Art. XXIII GATT 1994 restricts consultations exclusively to the complainant and the respondent, Art. XXII GATT 1994 allows for the **participation of a third party**.[8] Any interference by third parties—which may endanger a mutually agreed solution between the parties or will publish confidential information—can be "blocked".[9] In contrast to the special dispute settlement provisions under the TBT[10] the general rules apply.[11] *4*

C. Advice from Experts or International Organizations (Art. 11.2)

I. Obtaining Expert Advice and Information

Art. 11.2 contains special rules for the Panel procedure in respect of the collection and evaluation of evidence. In a dispute under the SPS over a sanitary or phytosanitary trade measure involving **scientific or technical issues**, a Panel should seek advice from experts chosen by it in consultation *5*

[5] Appellate Body Report, *Guatemala—Cement I*, WT/DS60/AB/R, paras 65–66.
[6] *Guatemala—Cement I*, WT/DS60/AB/R, para. 66, italics in the original.
[7] Panel Report, *Brazil—Aircraft*, WT/DS46/R, para. 7.9; Panel Report, *Korea—Alcoholic Beverages*, WT/DS75/R, para. 10.23.
[8] See *Schorkopf*, Article XXII GATT 1994, Max Planck CWTL, Vol. 2, para. 5.
[9] See *WTO*, Dispute Settlement System, 45.
[10] *Schorkopf*, Article 14 TBT, paras 2 *et seq*.
[11] For expert advice on scientific questions see below, para. 6.

with the parties to the dispute. The formulation "should seek" emphasises that the SPS Agreement encourages panels to resort to outside advice and information. The Appellate Body described the role of panels with reference to Art. 13 DSU and Art. 11.2 as having **significant investigative authority**.[12] However, to this end a Panel, at the request of a party to a dispute or on its own initiative, may establish an advisory technical experts' group or consult international organizations.[13] Therefore, a panel has no legal obligation to seek expert advice or information but has discretionary competence to decide on this issue.

1. Experts' Groups as Individual Experts

6 Art. 11.2 stipulates *inter alia* that the panel may establish an advisory *technical experts' group*.[14] In *EC—Hormones* the question arose whether the Panel had the competence to request the opinion of **individual experts** on certain scientific and other technical matters raised by the parties to the dispute, instead of establishing an experts' review group. The Panel considered it more useful to leave open the possibility of receiving a range of opinions from the experts in their individual capacity. Neither Art. 11.2, nor Art. 13.2 DSU would limit its right to seek information from individual experts, as provided for in Art. 11.2, sentence 1, and Art. 13.1 and Art. 13.2, sentence 1 DSU.[15] The Appellate Body concurred, pointing out that "the SPS agreement and the DSU leave to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate".[16]

7 Panels and the Appellate Body thereby strengthened their **judicial autonomy** in respect of the substance of a decision, and also in respect of experts as auxiliary personnel in the dispute settlement procedure. Inconsistent responses by experts to specific questions increase the scope for argument because such experts' statements are questionable in their rationale. A unanimous experts' opinion has the tendency to anticipate the outcome

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[12] Appellate Body Report *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 129.

[13] The WTO and the Office International des Epizooties in 1998 concluded an Agreement (Agreement between the World Trade Organization and the Office international des épizooties, WT/L/272, 8 July 1998), in which they *inter alia* agreed upon on administrative arrangements for designating scientific and technical experts with a view to the application of Art. 11.2 to dispute settlement. For consultations with international organizations see Panel Report, *EC—Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, para. 7.31.

[14] Compare Art. 14.2 TBT, which reads as follows: "At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts", see also below, para. 7.

[15] Panel Report, *EC—Hormones (US)*, WT/DS26/R/US, Panel Report, *EC—Hormones (Canada)*, WT/DS48/R/CAN, paras 8.6–8.

[16] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 147.

of the legal decision-making process transferring the responsibility for the substance of the decision to a technical or scientific environment. Moreover, if a panel were to disregard a unanimous scientific expert opinion the legitimacy of the decision would be called into question.

2. Procedure for Technical Experts' Groups

8 While the TBT Agreement provides for detailed rules in respect of the appointment of technical experts' groups, their mandate and working procedure (see Art. 14 TBT and its Annex 2), the **SPS Agreement does not lay down similar guidelines**. A reason for this remarkable difference between comparable provisions may be that the DSU itself, with Art. 13.2 DSU and Appendix 4 DSU, contains detailed rules for the inclusion of scientific advice and information in a specific dispute settlement case.[17] However, this argument would not explain the existence of specific rules under the TBT Agreement. As the wording of Appendix 4 DSU and Art. 14 TBT is the same, although the latter agreement is based on the Tokyo Standards Code,[18] the TBT regime was the blueprint for the DSU provisions on expert advice. The existence of Annex 2 in the TBT Agreement could therefore indicate a lack of coherence between the WTO Agreements, as all other agreements make use of the general—in substance comparable—regime under Art. 13.2 DSU.

3. Procedure for Individual Experts

9 The regime set out in Appendix 4 DSU applies only in situations in which experts' review groups have been established.[19] Since the panels are able to seek advice and information from individual experts,[20] Appendix 4 DSU does not apply. Thus, the panels are allowed, in consultation with the parties to the dispute, to draw up ***ad hoc* rules** for those particular proceedings.[21] Nevertheless, some rules can be derived from the ruling of the Appellate Body in *EC—Hormones* for the framing of an *ad hoc* procedure: the panel has to draw up the *ad hoc* rule in consultation with the parties who have also to be consulted on the selection and appointment of experts. In addition the Appellate Body noted that among the experts consulted by the Panel in the cited decision, there had been nationals of each of the parties to the dispute.[22]

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[17] See *Arend*, Art. 13 DSU, Max Planck CWTL, Vol. 2, paras 18. *et seq.; Arend*, Appendix 4 DSU, Max Planck CWTL, Vol. 2.

[18] See *Schorkopf*, Article 14 TBT, para. 1.

[19] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 148.

[20] See paras 6–7.

[21] *Ibid.*

[22] *Ibid.*; for an example of *ad hoc* rules see Panel Reports, *Japan—Apples*, WT/DS245/R, para. 6.3.

II. Selection of Experts

10 The **procedures for the selection of scientific experts** were described by the Panels in *EC—Hormones*,[23] *Australia—Salmon*,[24] *Japan—Agricultural Products II*,[25] and *Australia—Salmon (Article 21.5—Canada)*.[26] In *EC- Hormones* the Panel invited the parties to nominate one expert each, not necessarily from the list provided by the Panel. The Panel then selected three additional individuals from the list, taking into account the comments of the parties.[27] In *Australia—Salmon*, and other cases[28] the Panel did not give the parties the right to nominate any expert at all.

11 These different levels of **participation by the parties** are justified by the wording of Art. 11.2 and its object and purpose. The expert shall provide the panel with information and advice on technical and scientific questions in order to help it to understand and evaluate the evidence submitted and the arguments of the parties. The experts belong to the decision-making body and improve its analytical capacity. On the basis of the right to be heard the parties are entitled only to comment on the submitted information and advice. The participation of parties in the selection process is useful as increasing willingness to accept the decision given.

12 In *Japan—Apples* the Panel asked for suggestions about possible experts from the Secretariat of the International Plant Protection Convention (IPPC),[29] and, subsequently, from the parties. The Secretariat sought a brief *curriculum vitae* from each individual proposed. These *curricula vitae* were sent to the parties, which had the opportunity to comment on and to make known any compelling objections to any particular expert under consideration. The number of experts the Panel selected was determined by the number and types of issues on which advice was sought, as well as by the different areas in which each expert could provide expertise. The Panel appointed the experts on the basis of their **qualifications** and the **need for specialized scientific expertise** and informed the parties which experts it had selected.

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[23] *EC—Hormones (US)*, WT/DS26/R/US, *EC—Hormones (Canada)*, WT/DS48/R/CAN, paras 6.6–7.

[24] Panel Report, *Australia—Salmon*, WT/DS18/R, paras 6.2–3.

[25] Panel Report, *Japan—Agricultural Products II*, WT/DS76/R, para. 6.2.

[26] Panel Report, *Australia—Salmon (Art. 21.5—Canada)*, WT/DS18/RW, para. 6.2.

[27] *EC—Hormones (US)*, WT/DS26/R/US, para. 8.8.

[28] *Australia—Salmon (Art. 21.5—Canada)*, WT/DS18/RW; See also *Japan—Agricultural Products II*, WT/DS76/R.

[29] International Plant Protection Convention of 6 December 1951, UNTS 150 (1951), 67 (as amended on 17 November 1997).

III. Method of Obtaining Advice and Information

The method for obtaining advice and information from scientific experts was described by the Panels in *EC—Hormones (US)*;[30] *Australia—Salmon*;[31] *Japan—Agricultural Products II*;[32] and *Australia—Salmon (Art. 21.5—Canada)*.[33] *13*

In *Australia—Salmon (Art. 21.5—Canada)*, after the Panel had decided to seek advice from experts the parties were invited to comment on the Panel's suggestions. In particular they were summoned to make any compelling objections they might have with regard to any individual, or to suggest other experts. The Panel selected three individuals and, in consultation with the parties, prepared specific questions which it submitted to each expert individually. The experts were requested to answer in writing those questions they felt qualified to address. The parties agreed that their written submissions to the Panel, including the written versions of their oral statements, be provided to each of the selected experts. The written responses of the experts were given to the parties, and the parties were given the opportunity to comment on these. At a later stage the experts were invited to meet with the Panel and the parties to discuss their written responses to the questions and to provide further information.[34] In *EC—Hormones (Canada)* the Panel expressly stated that it did not seek a consensus position among the experts.[35] *14*

The role of experts under the authority of the panel has to be strictly differentiated from that of **scientists who are part of the delegations** of the parties to the dispute. As members of the delegations their statements are treated as party submissions.[36] *15*

D. Burden of Proof

The SPS Agreement serves the aim of minimizing negative effects on trade and imposes on its Members the duty to use SPS-relevant measures only to the extent necessary to protect human, animal or plant life or health. Since measures should in general be based on scientific principles and may not be maintained without sufficient scientific evidence, the question arises which side bears the risk of uncertainty. From the perspective of *16*

[30] *EC—Hormones (US)*, WT/DS26/R/US, paras 8.8–9.
[31] *Australia—Salmon*, WT/DS18/R, paras 6.4–6.5.
[32] *Japan—Agricultural Products II*, WT/DS76/R, paras 6.2–3.
[33] *Australia—Salmon (Art. 21.5—Canada)*, WT/DS18/RW, paras 6.3–4.
[34] *Australia—Salmon (Art. 21.5)*, WT/DS18/RW, paras 6.2–4. For similar proceedings see *Japan—Apples*, WT/DS245/R, paras. 6.1–3.
[35] *EC—Hormones (Canada)*, WT/DS26/R/CAN, para. 8.9.
[36] See *EC—Hormones (US)*, WT/DS26/R/US, para. 8.9.

procedural law this question is addressed by the burden of proof. Under the SPS Agreement the general rule applies: the **burden of proof rests upon the party**, whether complaining or defending, which **asserts** a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, which will fail unless it adduces sufficient evidence to rebut the presumption.[37] In the words of the Appellate Body in *EC—Hormones*: "The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency."[38]

17 In order to present a *prima facie* case the party that initiated the dispute settlement proceedings has to put forward factual and legal arguments that, if not rebutted, would demonstrate a violation of the Agreement. The nature and scope of the evidence required to establish such a ***prima facie* case** "will necessarily vary from measure to measure, provision to provision, and case to case."[39]

18 The competence to seek information and **advice from experts** is not to **circumvent** this basic procedural rule. Although the panels have a "significant investigative authority",[40] this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it. A panel is entitled to seek information and advice from experts and from any other relevant source it chooses to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party. In *Japan—Agricultural Products II* the Appellate Body held that the Panel had erred when it used the gathered information and advice as the basis for a finding of inconsistency with Art. 5.6, since the complainant did not establish a *prima facie* case of inconsistency with that provision. The complainant had not even argued for what the Panel later found to be an alternative measure which met the three elements under Art. 5.6.[41]

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[37] Appellate Body Report on *US—Wool Shirts and Blouses*, WT/DS33/AB/R, 14. See on burden of proof also *Mavroidis*, Article 11 DSU, Max Planch CWTL, Vol. 2, paras 3 *et seq*.

[38] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 98; *Japan—Agricultural Products II*, WT/DS76/AB/R, para. 122.

[39] *US—Wool Shirts and Blouses*, WT/DS33/AB/R, 14.

[40] See above, para. 5.

[41] *Japan—Agricultural Products II*, WT/DS76/AB/R, paras 129–130.

E. Standard of Review and Evidence

19 The SPS Agreement is silent on the matter of an appropriate standard of review for panels deciding upon SPS measures of a Member. In fact, among the WTO Agreements only the **Anti-Dumping Agreement** prescribes a particular standard of review in Art. 17.6 lit. i.[42] However, the Appellate Body in *EC—Hormones* rejected the argument that this standard was applicable to the SPS Agreement. The decisive argument was a lack of intent on the part of the Members to transfer the specific standard of the Anti-Dumping Agreement to any other WTO Agreement.[43]

20 The standard of review must reflect the balance established in the SPS Agreement between the jurisdictional competences conceded by the WTO Members and those retained by the Members for themselves.[44] Art. 11 DSU, according to the Appellate Body in *EC—Hormones*, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements."[45] The applicable **factual standard of review** by panels under Art. 11 DSU is neither a *de novo* review nor "total deference", but rather the "objective assessment of the facts".[46] A panel must examine whether the competent authority has evaluated all relevant factors, whether it has examined all the pertinent facts and whether an adequate explanation has been provided of how those facts support the determination. The panel must also consider whether the competent authority's explanation fully addresses the nature and complexities of the data and responds to other plausible interpretations of them.[47]

21 Concerning the **legal standard of review**, *i.e.* consistency or inconsistency of a Member's measure with the provisions of the applicable agreement, panels and the Appellate Body are obliged to apply the public international law customary rules of interpretation.[48] Additionally, Art. 11 DSU requires a panel to "make an objective assessment of the matter before it, including

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[42] The provision reads as follows: "17.6 In examining the matter referred to in paragraph 5: (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; […]."

[43] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 114.

[44] *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 115.

[45] *Ibid.*, para. 116.

[46] *Ibid.*, para. 117.

[47] Appellate Body Report, *US—Cotton Yarn*, WT/DS192/AB/R, para. 74.

[48] Appellate Body Report, *EC—Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, para. 114.

an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".[49]

22 Neither the DSU nor the SPS Agreement lays down time limits for the submission of evidence to a panel. Although the Working Procedures in Appendix 3 DSU set out precise deadlines for the **presentation of evidence** by a party to the dispute, the Working Procedures do not prohibit submission of additional evidence after the first substantive meeting between a panel and the parties. The Appellate Body allows panels a considerable amount of discretion in admitting or refusing evidence.[50]

23 In *EC—Sardines* the Appellate Body ruled that the **interim review stage is an inappropriate time** to introduce new evidence. The ruling was based on Art. 15 DSU, which permits parties, during that stage of the proceedings, to submit comments on the draft report issued by the panel, and to make requests "for the panel to review precise aspects of the interim report". The interim review stage cannot properly include an assessment of new and unanswered evidence.[51] This general rule on the submission of new evidence also applies to the SPS Agreement.

24 In *Japan—Apples* the Panel argued that assessment of the **subsequent evolution of the scientific evidence** is not only acceptable, but is also necessary, if only to monitor the development of any new evidence which might require a revision of the risk assessment. In that case Japan had argued that no information subsequent to the completion of the risk assessment, which was almost four years old the time of its review, should have been taken into consideration by the Panel. However, according to the panel, "[o]ne must not lose sight of the purpose of a risk assessment, which is to serve as a basis for regulatory actions. If the scientific evidence evolves, this may be an indication that the risk assessment should be reviewed or a new assessment undertaken. It would be also legally inconsistent to require, on the one hand, that phytosanitary measures not be maintained without sufficient scientific evidence pursuant to Article 2.2 while, on the other and, accepting that risk assessments not be renewed in the face of new scientific evidence."[52]

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[49] *Ibid.*, para. 118, with reference to Panel Report, *US—Underwear*, WT/DS24/R; Panel Report, *Korea—Resins*, BISD 40S/205; Panel Report, *US—Norwegian Salmon AD*, BISD 41/S/I/229; Panel Report, *US—Softwood Lumber I*, BISD 34S/194.

[50] Appellate Body Report, *Argentina—Textiles an Apparel*, WT/DS56/AB/R, para. 79.

[51] Appellate Body Report, *EC—Sardines*, WT/DS231/AB/R, para. 301.

[52] *Japan—Apples*, WT/DS245/R, para. 7.12, footnotes ommitted.

F. Alternative Dispute Settlement Mechanism (Art. 11.3)

25 The SPS Agreement does not fetter the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement (Art. 11.3). In Art. 11.3, the SPS Agreement confirms the right of governments to use other dispute settlement procedures in the SPS area. Members of a regional organization, such as NAFTA, could choose to take SPS-related matters to that organization's dispute settlement mechanisms instead. Some **international standard-setting organizations**, such as the International Plant Protection Convention (IPPC), have their own procedures through which countries can settle their differences.

26 The provision thereby deviates to a certain extent from Art. 23.1 DSU, which states that Members shall have recourse to and abide by the rules and procedures of the DSU. The relationship with other dispute settlement mechanism cannot be considered satisfactory because no general rules of conflict exist.[53]

G. Evaluation

27 Art. 11 is important in that it addresses the sensitive question of expert advice in dispute settlement. An expert's opinion creates a strong argument for the proposition being supported, and it will raise the intellectual effort needed for a panel to construct reasonable arguments if it decides not to follow the expert. However, as the Appellate Body has upheld the view that panels may also seek information from individual experts, the independent position of the dispute settlement organs is strengthened in comparison to the Member-oriented procedure in general.

28 The provision is not subject to the DSU review process. As questions like the standard of review and the submission of evidence are in substance governed by Art. 11 DSU, any alterations in its interpretation will also affect the scope and application of Art. 11.

[53] This question is discussed by *Stoll & Schorkopf*, Max Planck CWTL, Vol. 1, para. 54.

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Article 12 SPS
Administration

1. A Committee on Sanitary and Phytosanitary Measures is hereby established to provide a regular forum for consultations. It shall carry out the functions necessary to implement the provisions of this Agreement and the furtherance of its objectives, in particular with respect to harmonization. The Committee shall reach its decisions by consensus
2. The Committee shall encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues. The Committee shall encourage the use of international standards, guidelines or recommendations by all Members and, in this regard, shall sponsor technical consultation and study with the objective of increasing coordination and integration between international and national systems and approaches for approving the use of food additives or for establishing tolerances for contaminants in foods, beverages or foodstuffs.
3. The Committee shall maintain close contact with the relevant international organizations in the field of sanitary and phytosamitary protection, especially with the Codex Alimentarius Commission, the International Office of Epizootics, and the Secretariat of the International Plant Protection Convention, with the objective of securing the best available scientific and technical advice for the administration of this Agreement and in order to ensure that unnecessary duplication of effort is avoided.
4. The Committee shall develop a procedure to monitor the process of international harmonization and the use of international standards, guidelines or recommendations relating to sanitary or phytosanitary measures which the Committee determines to have a major trade impact. The list should include an indication by Members of those international standards, guidelines or recommendations which they apply as condition for import or on the basis of which imported products conforming to these standards can enjoy access to their markets. For those cases in which a Member does not apply an international standard, guideline or recommendation as a condition for import, the Member should provide an indication of the reason therefor, and, in particular, whether it considers that the standard is not stringent enough as a condition for import, it should provide an explanation for its change and so inform the Secretariat, unless such notification is given according to the procedures of Annex B.
5. In order to avoid unnecessary duplication, the Committee may decide, as appropriate, to use the information generated by the procedures, particularly for notification, which are in operation in the relevant international organizations.
6. The Committee may, on the basis of an initiative from one of the Members, through appropriate channels invite the relevant international organizations or their subsidiary bodies to examine specific matters with respect to a particular standard, guideline or recommendation, including the basis of explanations for non-use given according to paragraph 4.
7. The Committee shall review the operation and implementation of this Agreement three years after the date of entry into force of the WTO Agreement, and thereafter as the need arises. Where appropriate, the Committee may submit to the Council for Trade in Goods proposals to amend the text of this Agreement having regard, inter alia to the experience gained in its implementation.

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Cross References

Arts 211 *et seq*. ECT; Art. 1202 NAFTA; Arts 16 *et seq*. Protocol of Ouro Preto (MERCOSUR)

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A. General

1 The executive activities of the WTO take place in the various Councils, Bodies, and Committees.[1] The SPS Agreement institutionalises the Committee on Sanitary and Phytosanitary Measures as a **subsidiary body** of the Council for the Trade in Goods, which is competent for the GATT 1994 and for the SPS Agreement.[2]

2 The **structure** of Art. 12 is as follows: para. 1 deals with the organization of the Committee and its overall mandate. The following paragraphs concentrate on the function of the Committee in monitoring the process of international SPS standardization and in rendering the use of the international SPS standards by Members effective and transparent. In this context, the provision spells out—albeit in hortatory language—cooperative obligations for Members (paras 2, 4). In its second para., Art. 12 is concerned with organizing coordination and cooperation between the Committee and other international organizations active in the field of SPS standardization and the control of the use of such standards by States (paras 3, 5 and 6). Finally, Art. 12 defines a role for the Committee in the progressive development of the Agreement (para. 7).

B. Historical Background

3 During the Uruguay Negotiating Round, the developing countries strongly advocated the removal of sanitary and phytosanitary measures that act as non-tariff barriers to trade. In order to prevent such abuse, they argued that the international standards be closely monitored and applied to prevent developed countries from imposing arbitrarily strict standards.[3] By the time of the mid-term review, discussion on the subject had advanced sufficiently for ministers to agree on the long-term goal of harmonization of national SPS regulation. In particular, adopting well-tested principles familiar from many other GATT agreements, they wanted notification and consultation arrangements to ensure that national SPS measures were generally known, could be discussed with other countries, and could be properly reviewed in case of dispute.

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[1] Art. IV:6 and 7 WTO Agreement.

[2] Art. IV:5 WTO Agreement.

[3] Uruguay Round, Group of Negotiations on Goods, Negotiating Group on Agriculture, GATT, Uruguay Round, Agriculture, Elements for a Proposal by Developing Countries, Communication from Jamaica, MTN.GNG/NG5/W/68, 11 July 1988, 5.

C. The Committee on Sanitary and Phytosanitary Measures (Para. 1)

Art. 12.1 establishes the Committee on Sanitary and Phytosanitary Measures (sentence 1) and defines its mandate (sentences 1 and 2) and its decision-making powers (sentence 3). *4*

I. Composition of the Committee

Since no restrictions apply, the general rule on membership of WTO organs applies: the SPS Committee consists of representatives of **all WTO Members** which may send representatives of their choice.[4] Members often send capital-based food safety and animal and plant health experts to attend meetings. *5*

As a consequence of the status of the Committee as a subsidiary organ, **observer status** is granted to Non-Member governments that have observer status in higher WTO bodies, such as in the General Council. Importantly, the SPS Committee grants observer status to certain **international intergovernmental organizations**. The relevant Committee decision specifies that observer status is granted on the basis of functional criteria, namely the mandate, scope and area of work of the applicant organization, and of reciprocity with regard to the grant of observer status to the WTO.[5] Observer status has been granted not only to the Office International des Epizooties (OIE), the joint FAO/WHO Codex Alimentarius Commission (Codex), the International Plant Protection Convention (IPPC), and the International Standards Organization (ISO) but also to other intergovernmental organizations active in this area, including the World Health Organization (WHO), the Food and Agriculture Organization of the United Nations (FAO), the United Nations Conference on Trade and Development (UNCTAD), the International Trade Centre (ITC), the World Bank and the International Monetary Fund (IMF).[6] *Ad hoc* observer status is granted on a meeting-by-meeting basis.[7] *6*

[4] See Rules 8 and 9 of the General Coundvil Rules of Procedure.

[5] Committee on Sanitary and Phytosanitary Measures, Consideration of Requests for Observer Status, Note by the Secretariat, G/SPS/GEN/229, 23 January 2001.

[6] The list of intergovernmental organizations which currently have observer status in the SPS Committee, or have requested such status, is contained in: Committee on Sanitary and Phytosanitary Measures, International Intergovernmental Organizations, Requests for Observer Status in the Committee on Sanitary and Phytosanitary Measures, Revision, G/SPS/W/78/Rev.1 (2000).

[7] The list of intergovernmental organizations which currently have *ad hoc* observer status is contained in G/L/755 para. 14.

7 The SPS Committee has not hitherto organized consultations with **non-governmental organisations** (**NGOs**) any more than any of the other WTO organs. Yet Art. V:2 WTO Agreement provides authority for holding such consultations. Until the WTO General Council agrees to do so, the chair of the SPS Committee can and should meet with interested NGOs on a regular basis pursuant to the authority in the current ECOSOC NGO Guidelines.

II. Secretariat, Meetings and Chair

8 The SPS Committee is served by the **Agriculture and Commodities Division** of the WTO Secretariat.

9 The Committee holds three regular **meetings** per year on which it issues summary reports. The Committee may convene informal meetings as appropriate.

10 Meetings are chaired by a **chairperson** who is appointed on an annual basis.[8] The chairperson is selected by the Council for Trade in Goods, in consultation with the Committee. The chairperson shall not normally participate in the proceedings as the representative of a Member but may request permission to do so.[9] The chairperson reports to the Council for Trade in Goods on work of the committee.[10]

III. Mandate and Activities of the Committee

11 Art. 12.1 defines the overall mandate of the SPS Committee to be a forum for consultation (Art. 12.1.1) and to carry out those functions necessary to implement the Agreement and to further its objectives (Art. 12.1.2).

1. Forum for Consultation

12 The general mandate of the Committee is to be a forum for regular **consultation** on all issues arising under the SPS Agreement (Art. 12.1.1). This reflects the fact that the SPS Agreement first and foremost relies on coordination and cooperation between Members them, in line with the understanding of the WTO as a member-driven organisation.

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[8] At the June 2005 meeting, Mr. Gregg Young (USA) was reappointed Chairperson for the period 2005/2006, G/L/755.

[9] See Rule 15 Rules of Procedure for the General Council.

[10] See, *e.g.*, the Committee report on the tansitional review under para. 18 of the Protocol of Accession of the People's Republic of China, Committee on Sanitary and Phytosanitary Measures, Special and Differential Treatment, Report by the Chairman to the General Council, G/SPS/39, 8 November 2005.

Consultation is to be understood in its **broadest sense** and covers any interaction that is aided by an official body. The consultation among Members may cover any issues arising under the Agreement, including disputes concerning the interpretation or application of the Agreement. *13*

2. Implementation of the Provisions of the Agreement and Furtherance of its Objectives

Under para. 1.2 the Committee is also competent to carry out any action necessary to implement the agreement and to further its objectives. *14*

Implementation is to be understood broadly. It encompasses both international action that interprets and details the provisions of the Agreement and national action taken by Members to comply with their obligations under the Agreement. *15*

One main task of the Committee is to assist in the implementation of the **regulatory approach** of the SPS Agreement, namely with respect to harmonization (Art. 3), the equivalence of Members' measures (Art. 4), ensuring that SPS measures are based on appropriate risk assessment (Art. 5.1) and are applied consistently (Art. 5.5), and the notification of SPS measures (Art. 7). *16*

With respect to **harmonization** the Committee supports the relevant external **harmonization** processes already in place rather than engage in harmonization itself. Pursuant to Arts. 3.5 and Art. 12.4, the Committee's task is to monitor the process of international harmonization and to coordinate harmonization efforts with relevant international organizations.[11] The bulk of the provisions of Art. 12 is concerned with defining the role of the Committee with respect to the actual process of harmonization and the effective use of harmonized standards, including the encouragement of ad hoc consultations between Members and the use of international standards (para. 2), the monitoring of international harmonization and the use of international standards by Members (paras 4, 5), and the initiation of harmonization action by international organizations (para. 6). *17*

However, Art. 12.1.2 also covers the role of the Committee in the implementation of **provisions** of the Agreement other than those concerned with the use of international standards. *18*

In order to further the consistent application of the appropriate **level of risk,** Art. 5.5 asks the Members to cooperate in the Committee to develop implementation guidelines. The Committee therefore adopted the **Guidelines** to Further the Practical Implementation of Art. 5.5.[12] The Guidelines *19*

[11] See *Landwehr*, Article 3 SPS, para. 39.
[12] G/SPS/15. See *Stoll & Strack*, Article 5 SPS, para. 60.

on consistency are not legally binding but "are intended as tools to help officials" implement the SPS Agreement "when they make decisions on levels of health protection, and adopt and implement measures on food safety, or animal… health". The Guidelines suggest means for officials to employ in dealing with difficulties in implementing consistent measures.

20 The SPS Committee has also developed guidelines and recommended procedures to assist Members in the implementation of the provisions concerning **equivalence**,[13] and **notification**.[14]

21 The Committee reviews Members' implementation of the SPS Agreement based on the **transparency** requirement of the Agreement. It periodically receives updates on new or proposed sanitary and phytosanitary regulations and procedures. It considers information provided by Members regarding their national regulatory procedures and their institutional infrastructures. The Committee is also informed of the initiatives undertaken by Members to negotiate equivalency agreements on sanitary and phytosanitary matters with their trading partners.

22 The SPS Committee pursuant to Art. 10.3 may grant developing country members specific, time-limited **exceptions** to some or all obligations of the SPS Agreement to **developing country members**.[15] In making such decision upon request it should take into account the financial, development and trade needs of the country in question.

23 Furthermore, it is for the Committee to identify **international organizations** open for membership to all WTO Members other than those enumerated in Annex A;[16] such a decision is binding.

24 The Committee may also go beyond the implementation of the provisions of the Agreement and fulfil other functions necessary for furthering the Agreement's objectives. It is for the Committee to determine which functions are in this sense **necessary**.[17]

IV. Decision-making: Procedures and Powers

25 The Committee pursuant to Art. 12.1.3 decides by **consensus**, *i.e.* a decision is agreed if there is no formal objection from a Member present at

[13] The Decision on the Implementation of Art. 4 SPS, G/SPS/19 and G/SPS/19/Rev.2 instructed the Committee "to develop expeditiously the specific programme to further the implementation of Article 4" SPS; see G/SPS/20. See *Landwehr*, Article 4 SPS, para. 11.

[14] G/SPS/7/Rev.1 and Rev.2.

[15] See *Seibert-Fohr*, Article 10 SPS, paras 12 *et seq*.

[16] See Annex A:3 lit. d.

[17] See *Certain Expenses of the UN*, Advisory Opinion of 20 July 1962, ICJ Reports 1961, 151.

the meeting.[18] The exceptional voting procedures provided for under Art. IX and X WTO Agreement do not apply.

The Committee has adopted its own working procedures. The Rules of Procedure of the General Council[19] apply subject to the Committee's own Working Procedures adopted in 1995[20] and the Rules of Procedure adopted by the Committee in 1997.[21] *26*

The SPS Committee may take **decisions** on all matters falling within its ambit. With respect to the legal status of such Committee acts, one needs to distinguish between the object of the decision in question. Decisions concerning the internal procedure of the Committee are binding. Decisions addressed to Members may flesh out and define the legal obligations incumbent on Members by force of the SPS Agreement and, to that extent, indirectly enjoy legally binding status. Furthermore, they may gain legally binding status pursuant to Art. 12 or other provisions of the SPS Agreement as a matter of interpretation of such provisions. In particular, given the mandatory language that Art. 12.4 employs the Committee could adopt a decision on a monitoring procedure which was binding on Members. Furthermore, SPS Committee decisions may become legally binding by reference, for example a Committee decision may be the object of a Ministerial decision pursuant to Art. IX: 2 WTO Agreement and share in the legal status of such Ministerial decision. Whether a Committee decision aspires to such legal status is first and foremost a matter of interpretation of the decision's wording.[22] The bulk of the Committee's normative practice, to be discussed infra, is, however, couched in acts entitled guidelines, which employ quite deferential language, but which nevertheless have the potential to be indirectly binding by virtue of their defining a treaty provision. *27*

D. The Committee's Functions of Consultation and Furthering the Use of International Standards by Members (Para. 2)

Para. 2 details the two **central functions** of the Committee in ensuring implementation of the Agreement by Members. In furtherance of its consultative forum capacity (Arts 12.1.1 and 12.2.1), the SPS Committee shall ensure regular consultation and negotiation among Members, and, specifically, increased use of international standards by Members. *28*

[18] Art. IX: 1 WTO Agreement, footnote 1.
[19] WT/L/161.
[20] G/SPS/1.
[21] G/L/170.
[22] Hitherto, the Committee has adopted the two decisions on transparency and equivalence, the language of the latter being notably deferential.

I. Consultation (Para. 2.1)

29 The Agreement designs the Committee primarily as a forum for consultation among Members (Art. 12.1.). ***Ad hoc* consultation** and negotiation (Art. 12.1.1.) are to be understood broadly both as to the means and to the subjects open for consultation. They include, but are not limited to, discussion, information exchange and resolution of sanitary and phytosanitary issues.

30 The provision envisages that the Committee identifies needs for consultation and negotiations, persuades Members to take them up ("encourage"), and assumes an active, expertise-based role in consultations and negotiations ("facilitate").

31 The provision encourages Members to bring **specific trade concerns** to the attention of the Committee. These concerns may be related to specific notifications or trade measures and sometimes serve as signals warning of potential disputes. The Secretariat provides a summary of all specific trade-related concerns raised in the SPS Committee, together with an indication of the resolution of the issue, if notified.[23] The use of the SPS Committee can in practice be an effective means of satisfactorily resolving problems[24] that is of particular relevance for developing country Members.

32 The SPS Committee may also consider issues of **general concern**. Standing items on the Committee's agenda relate to technical assistance, and special and differential treatment for developing countries and the use of international standards. The Committee has also discussed the information exchange procedures of Members, and procedures commonly followed in the establishment of maximum residue levels.

II. Use of International Standards (Para. 2.2)

33 As part of its consultative forum capacity, the SPS Committee shall encourage the **use** of international standards by Members. Para. 2.2 provides for the "vertical" situation of the use of standards that have been "horizontally" harmonized, which process is the subject of paras 4 and 6.

34 The provision identifies **integration**, or at least coordination between international standards and national approaches and systems, as a key instrument for the effective use of international standards by Members. The broad terminology of "systems and approaches" directs the Committee not just to focus on standards but to take a broader view that includes the

[23] They are summarized in revisions of Specific Trade Concerns: G/SPS/GEN/204/Rev.5. See previous reports G/SPS/GEN/204/Rev.1, Rev.2, Rev.3 and Rev.4.

[24] G/SPS/12, para. 24.

underlying rationales, for example, the conception that Members have of consumer information and protection. Approval of the use of food additives and establishment of tolerances for contaminants in foods, beverages or feedstuffs are the most important SPS measures without being limited to them.

35 One of the means available to the Committee in this respect is sponsoring **technical studies**. The Committee may resort to external expert evidence in this regard.

36 More generally, para. 2.2 empowers the Committee to provide **compliance assistance**, which is not limited to the technical studies referred to in Art. 12.2.2, but includes the more general provision of technical expertise.[25]

E. Contact with Standard-setting Organizations (Para. 3)

37 Art. 12.3. mandates the Committee to both cooperate and coordinate with the most relevant international technical organisations that are active in the field of the SPS Agreement, and in particular with the so-called Three Sisters. The list is not exhaustive, however.

38 Art. 12.3 aims at the administration of the Agreement by the Committee, which is the term that the heading of Art. 12 uses and which thus comprises the entire mandate of the Committee. The Committee shall draw on externally available technical expertise both for its function of facilitating consultation and negotiations among Members (para. 2.1) and for its work in harmonization.

39 The Committee has a margin of discretion in deciding on the "best technical and scientific advice" available. The same applies to deciding which effort is an "unnecessary duplication" of existing work.

40 Members of the SPS Agreement are under an obligation to ensure that the relevant technical advice be made available by such other organisations.

41 Under Art. 12.3, the Committee may formalize its cooperation by entering into memoranda of understanding with these organizations, which are a generally accepted means of coordinating the action of international bodies with overlapping remits in international law.

[25] G/SPS/GEN/344.

F. Monitoring Harmonization and National Application (**Para. 4**)

42 Para. 4 further details the tasks of the Committee under its implementation function, mandating and empowering it to monitor the **process of international harmonization** and **the use of the resulting international standards by Members**.

43 The SPS Committee is specifically mandated to develop a **procedure** to monitor the use of international standards, guidelines and recommendations.[26] In 1997, the Committee agreed, on a provisional basis, to examine those international norms which Members identify as of particular importance. The Committee has adopted a preliminary *Procedure to monitor the process of international harmonization and the use of international standards, guidelines or recommendations*.[27] This procedure was extended.[28] At present, the monitoring procedure operates only in relation to the standards developed by the "three sister organisations" on the basis of lists made available to the Committee by these organisations,[29] and is limited to standards with a major impact on trade.

44 Art. 12.4.3 adds a procedural obligation for Members to **justify the failure to use any identified standards** to the Committee to the general substantive obligation on Members to base their SPS measures on available international standards (Art. 3.1). Art. 12.4 thus gives the Committee an effective tool to ensure compliance with Arts 3 and 5. Furthermore, under Art. 12.4.3, the Member is required specifically to take a position on the (in)adequacy of the identified standard to achieve the level of protection that the Member envisages. This strengthens the international harmonization process. For that purpose, the Committee needs to identify relevant standards for each Member, which identification obliges any Member in turn to justify its decision not to base its SPS measures on the standard identified. Also, the Committee will be able to feed back the information obtained in the process, as provided for in para. 6.

45 In accordance with this procedure, the SPS Committee draws up **annual reports** based on information and comments from Members and international standard-setting organizations regarding the use of existing international standards, the need for new international standards and work on the adoption of such standards.

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[26] See also Art. 3.5.

[27] G/SPS/11. See also *Landwehr*, Article 3 SPS, para. 39.

[28] See last: Committee on Sanitary and Phytosanitary Measures, Decision to Modify and Extend the Provisional Procedure to Monitor the Process of International Harmonization, Adopted by the Committee on 25 June 2003, G/SPS/25, 1 July 2003.

[29] G/SPS/GEN/512 (OIE), G/SPS/GEN/513 (IPPC), G/SPS/GEN/514 (Codex).

If the discussions provided for in para. 4 make a Member change position and base itself on the relevant standard, that Member needs to **notify** the change. Such specific notification serves as a gauge for the effectiveness of the discussion held and proves to the interested Members that a potential dispute has been solved. *46*

G. Cross-use of Information (Para. 5)

In line with the general approach of Art. 12 to avoid duplication of effort by the SPS Committee and other organisations active in the field of sanitary and phytosanitary measures, Art. 12.5 specifies that the Committee may use the information that Members generate for these organizations for the administration of the Agreement. *47*

Art. 12.5 mentions specifically the **notification procedures** instituted by several international organizations. Information provided by a Member under such procedure is not protected from use by the Committee, and a Member may not object to the Committee relying on it in fulfilling its mandate. *48*

H. Invitation of Harmonization Action by Other Organizations (Para. 6)

As a corollary to the power of the Committee to use externally generated information for its work (para. 5), the Committee may feed its own relevant information into the international SPS harmonization process. In particular the Committee's power under Art. 12.4 to monitor the use of international standards by Members will generate such information. *49*

While the Committee does not have the power itself to undertake or initiate any harmonizing efforts, Art. 12 somewhat compensates for that by providing that it may **invite** the relevant standardization organizations to examine concrete problems relating to the usability of particular international standards. *50*

The Committee may do so only on the basis of an initiative from one of its Members but not on its own motion. *51*

The Committee is empowered to direct a thematically specific invitation to the external organisation ("examine"). It may use this power much in the way that the European Commission uses its own powers under the Directive 83/189 formula, where it lays down only the central requirements a standard needs to meet while delegating its technical elaboration to (private) standardisation organisations. *52*

53 In particular, the Committee may bring any problem identified through its **monitoring task** under para. 4 to the attention of the relevant standard-setting body. Such information is not protected.

54 Although the invited organizations are not formally bound by the SPS Agreement, the SPS Committee's request will carry with it a procedural obligation genuinely to examine the issue raised under general international law.[30]

I. Review of Operation and Implementation of the SPS Agreement (Para. 7)

55 The third function of the SPS Committee is the review of the SPS Agreement. The Committee is obliged to **review the operation and implementation** of the SPS Agreement three years after its entry into force, and thereafter as appropriate. The Committee has established a **procedure** for this review.[31] The Committee conducted its first review under the procedure in 1998,[32] and it concluded the second review of the operation of the SPS Agreement in 2005 and adopted a report on this review, including recommendations for future work.[33] The **Doha Ministerial Decision on Implementation** instructed the SPS Committee to review the operation and implementation of the SPS Agreement at least once every four years.[34]

56 Where appropriate, the SPS Committee may make **proposals** to the Council for Trade in Goods regarding amendments to the SPS Agreement.[35]

J. Evaluation and Outlook

57 The substantive provisions of the SPS Agreement resemble on various issues the law and the rules applicable to sanitary and phytosanitary regulations and standards within the framework of the European Community. In the context of the WTO, which is both less homogenous and institutionally less

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[30] See *Röben*, in: *Wolfrum & Röben* (eds), 511–536.

[31] Committee on Sanitary and Phytosanitary Measures, Procedure to Review the Operation and Implementation of the Agreement, Decision of the Committee, G/SPS/10, 21 October 1997.

[32] G/SPS/12.

[33] G/SPS/36.

[34] Ministerial Conference, Fourth Session, Doha, 9–14 November 2001, Implementation-Related Issues and Concerns, Decision of 14 November 2001, WT/MIN(01)/17, 20 November 2001, para. 3.4.

[35] Committee on Sanitary and Phytosanitary Measures, Proposals and Progress on Special And Differential Treatment, Note by the Secretariat, G/SPS/GEN/543, 28 February 2005.

binding, the Committee is designed to pursue the same central objectives as the European Commission: harmonization and compliance control.

58 It is welcome that the Committee has understood its mandate under Art. 12 broadly and attempted to implement all of the relevant provisions of the Agreement. However, since the core of the Committee's mandate is to be found in Art. 12.2 and 12.4, the Committee needs to concentrate on enhancing the quality and practical relevance of international standards and Members' compliance with them.

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Article 13 SPS
Implementation

Members are fully responsible under this Agreement for the observance of all obligations set forth herein. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of this Agreement by other than central government bodies. Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement.

Documents

Committee on Sanitary and Phytosanitary Measures, Implementation: Management of Quarantine Systems by Competent Regional Institutions, Communication from RIOPPAH, G/SPS/GEN/262, 6 July 2001.

Cross References

Art. 10 ECT; Art. 105 NAFTA; Art. 38 Protocol of Ouro Preto (Mercosur).

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A. General

1 The focus of this provision is on effective compliance with the Agreement by Members. Art. 13 provides clarification on what measures Members must take to ensure such compliance with respect to two scenarios: where a Member is a federal state or at least substantially decentralized according to constitutional law (Art. 13.2); and where private (non-governmental) organisations assume important roles within the scope of application of the SPS Agreement (Arts 13.3–13.5).

B. Historical Background

As part of the general thrust to ensure that the liberalisation of trade in agriculture is not negated by SPS measures, Art. 13 was inserted to ensure the Agreement's effectiveness. *2*

C. Responsibilty of Members (Sentence 1)

In conformity with **general public international law**, the overall responsibility of the particular sovereign state for compliance with its obligation regardless of its domestic organisation is confirmed. The sovereign Member alone is the addressee of the obligations enshrined in the Agreement. Importantly, the clear wording of Art. 13.1 precludes any Member from invoking its domestic organisation as a defence against fulfilment of its obligations under the SPS Agreement, regardless of the actual intimate familiarity of the Members with each other's internal structures. *3*

Being fully responsible means for Members that they ensure that they **effectively** meet the obligations they assume under the detailed provisions of the Agreement. In particular, this comprises the need to take the requisite positive or negative domestic action to ensure the effective operation of the Agreement. Taking the reduced institutional and political strength of the WTO system into consideration, Art. 13.1 may serve as the starting point for inserting some of the *effet utile* jurisprudence of the European Court of Justice into the SPS Agreement, at least in the longer term. But it also comprises the international obligation on Members to cooperate in the appropriate institutions both internal and external to the SPS Agreement. *4*

Failure to meet the requirements of the Agreement entails the **international responsibility** of a Member under the WTO and SPS Agreements, which may be enforced in accordance with the provisions of the Dispute Settlement Understanding.[1] *5*

D. Positive Measures Regarding Bodies Other Than Central Government (Sentence 2)

Art. 13.2 takes account of the constitutional law of the several federal or decentralized Members. However, it provides the classic international law response of essentially holding the sovereign State responsible for the fulfilment of its international obligations. The SPS Agreement thus does not *6*

[1] See Art. 11 SPS; Art. 1 DSU, Art. 1 Annex 1.

follow the example set by the TBT Agreement, which contains differentiated obligations for Members' central government bodies and somewhat lesser obligations for local government bodies. This is in line with the overall stricter character of the SPS Agreement as compared with the TBT Agreement. The differentiation between the possible layers of government thus serves the **objective** of setting up an effective compliance regime that assists States in taking the right domestic measures. While the TBT and the SPS Agreements thus differ as to object and purpose, the terminology employed in both agreements and their interpretation should still be identical as far as possible for reasons of the overall coherence of the GATT system.

7 Art. 13.2 distinguishes between central government bodies and other government bodies. The central government is considered to be identical to the sovereign Member, which is responsible within the meaning of sentence 1. **Central government** is the addressee of the obligation under Art. 12.2. The SPS Agreement does not define the term 'central government body'. However, **Annex 1.6, 7 TBT** contains definitions of central government and local government. These definitions are also relevant for the SPS Agreement. Both the SPS and the TBT Agreements implement the GATT. The presumption therefore applies that, under the general principle of interpretation, terms of art carry the same meaning when used in one and the same treaty. **Annex 1.6 TBT** defines **central government body** as the central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question. In the context of the SPS Agreement, the relevant activity is the formulation and implementation of sanitary and phytosanitary standards. As provided for in the explanatory note in **Annex 1.6 TBT**, in the case of the European Communities the provisions governing central government bodies apply.

8 In Art. 13, bodies other than central government bodies includes **local government**, as provided for in national constitutional law. **Annex 1.7 TBT** defines the term 'local government' broadly as any 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.

9 Members' obligations under Art. 13.2 are **functional,** not formal. Members need to put in place **effective instruments**—measures and mechanisms—to ensure compliance with the Agreement by such non-central government bodies irrespective of their legal and formal status in national constitutional law.

10 Members are under the obligation not just to formulate such instruments but also to **implement** them. Implementation includes exercising the

relevant administrative supervision and taking administrative as well as judicial enforcement action if necessary.

11 In particular, Art. 13.2 does not cater for any limit to the competences of central government that many Members' constitutions provide for with respect to (self-)government at the local level. In particular, no qualification such as that provided for in Art. 13.3 applies in the sense that only the measures reasonably available need to be taken.

E. Positive Obligations Regarding non-Governmental Entities (**Sentence 3**)

12 In respect of non-governmental (*i.e.* private) entities, **general international law,** as formulated in the Articles on State Responsibility of the International Law Commission, provides that while private action cannot generally be imputed to a State, States are under a positive obligation to ensure that their treaty obligations are in fact respected, and that failure to meet this obligations entails a state's international responsibility for unlawfulness. Arts 13.3–13.5, carefully identifying Members' obligations towards non-governmental entities, indicates that the Agreement generally accepts this general international law premise that private conduct cannot generally be imputed to a Member. However, much in line with the jurisprudence of the European Court of Justice on this issue, Art. 13.3 and 13.5 mitigates the consequences of this doctrinal premise by identifying obligations incumbent on Members with regard to non-governmental organisations within their jurisdiction and falling within the ambit of the Agreement. A violation of its thus defined obligations by a Member will entail its international responsibility under the Agreement.

13 **Annex 1.8 TBT** defines **non-governmental body** as any body other than a central government body or a local government body, and includes non-governmental bodies which have the legal power to enforce a sanitary or phytosanitary measure. In line with the principle of coherent interpretation of the two Agreements, every organization that is not public falls within Art. 13.3. The fact that Art. 13.5 contains a specific imputability provision concerning this situation does not force one to exempt them such organisations from the ambit of Art. 13.3. For paras 3 and 5 of Art. 13 are cumulatively applicable. The sole qualification is that the action of a non-governmental body needs to be relevant to the purposes of the SPS Agreement and in particular the sanitary and phytosanitary measures to be adopted thereunder. The bodies thus included are not limited to the organizations that are specifically active in the field of sanitary and phytosanitary standardisation. Under its remit may also come trade unions the actions

of which may be relevant under the SPS Agreement. Only non-governmental organizations within the territory of a Member come under Art. 13. 'Within their territory' is to be read as being under their jurisdiction, which is primarily territorial, but may include extraterritorial and personal jurisdiction. This interpretation is in line with the object of Art. 13.3 to ensure the effective application of the Agreement and to prevent its being circumvented by private action.

14 The obligation to take positive compliance measures with regard to non-governmental entities extends to the **regional bodies** that they form. According to **Annex 1.5 TBT**, a regional body or system is a Body or system the membership of which is open to the relevant bodies of only some of the Members. Strictly speaking, regional systems are not subject to the jurisdiction of any single Member. Art. 13.3 therefore translates into an obligation on Members to cooperate in the interest of ensuring that the SPS provisions are observed.

15 **Local government** is not included in Art. 13.3, for the positive compliance assurance measures that Members have to take in this respect are dealt with in Art. 13.2.

16 Sentence 3 is concerned specifically with the positive obligations a Member has to take *vis-à-vis* the non-governmental entities under its jurisdiction. The positive obligation according to sentence 3 is qualified, encompassing only those **reasonable** measures which are available. The concept of reasonableness in international law, rightly understood, encompasses an element of proportionality of the measures employed, measured against the object pursued and their possible negative effects. In particular, Members are not obliged to take measures that disproportionately affect any individual rights that the organisation may be able to invoke in the particular instance. While such rights may be found in Members' constitutional law, it is ultimately a matter of autonomous determination and supervision on the international plane whether the measure a Member has employed satisfies the reasonableness test of Art. 13.3.

F. Negative Obligations Regarding non-governmental organisations (Sentence 4)

17 Art. 13.4 identifies negative obligations incumbent on a Member regarding non-governmental organisations that are complementary to the positive obligations under Art. 13.3.

18 The **negative** obligation on Members to abstain from any measures that may encourage the violation of a Member's obligations under the Agreement is phrased very broadly. It suffices that the measure has that effect ("indi-

rectly"). Since private persons technically are not caught by the Agreement and thus cannot violate it, Art. 13.4 consistently requires that the action in question or its results be objectively inconsistent with the Agreement, or, in other words, such action taken by a government body would constitute a violation of the Agreement. In essence, Art. 13.4 prohibits Members from circumventing the Agreement by relying on private action.

19 As is the case under Art. 13.3, this negative obligation **encompasses** private and regional organisations.

20 However, unlike Art. 13.3, Art. 13.4 also includes any form of decentralized government, including local government.

G. Non-Governmental Entities Providing Services for a Member (Sentence 5)

21 Art. 13.5 contains a special provision for non-governmental entities of which a Member makes use in order to implement the SPS Agreement. Non-governmental entities is the same term defined *supra* and used throughout Art. 13. It may be argued that action by such entities is imputable to the Member in question under general international law, and thus under the Agreement. However, Art. 13.5 renders this an academic question academic by identifying **special obligations** that the Member needs to meet with regard to any such entity.

22 **Servicing implementation** purposes is to be understood broadly. Implementation comprises both the setting and the enforcement of standards. Servicing occurs whenever a Member actually delegates its standard-setting activities under the Agreement. The delegation need not be formal, but may be factual in nature. A Member makes use of a non-governmental entity also if it includes it in its national delegation for the competent international organizations and commissions within the meaning of Art. 3.4.

23 In such a case, the Member has to satisfy itself that the entity actually complies with the obligations of the Agreement. The Member—delegator—is under a continuous obligation to supervise. Art. 13.5 contains **no qualification** to reasonably available measures. If this cannot be ensured under national law, then the Member may not use the non-governmental entity in question.

H. Evaluation

24 Art. 13 takes account of the fact that much SPS standard-setting and implementation is, in particular in developed countries, entrusted to private

(non-governmental) organisations. It is worth considering whether to follow, under the SPS Agreement, the approach of the TBT Agreement which contains a special Code of Good Practice for the Preparation, Adoption and Application of Standards that is open for acceptance by non-governmental bodies, even though the TBT Agreement is not primarily concerned with standardisation.

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Article 14 SPS
Final provisions

The least-developed country Members may delay application of the provisions of this Agreement for a period of five years following the date of entry into force of the WTO Agreement with respect to their sanitary or phytosanitary measures affecting importation or imported products. Other developing country Members may delay application of the provisions of this Agreement, other than paragraph 8 of Article 5 and Article 7, for two years following the date of entry into force of the WTO Agreement with respect to their existing sanitary or phytosanitary measures affecting importation or imported products, where such application is prevented by a lack of technical expertise, technical infrastructure or resources.

Documents

Sub-Committee on Least Developed Countries, Enhancing Least Developed Countries' Participation in International Trade: Food Safety and Quality, Standards and Technical Regulations, WT/LDC/SWG/IF/10, 1 May 2001; Committee on Sanitary and Phytosanitary Measures, Proposals and Progress on Special and Differential Treatment, Note by the Secretariat, G/SPS/GEN/543, 28 February 2005; Committee on Sanitary and Phytosanitary Measures, Report on Proposals for Special and Differential Treatment, Adopted by the Committee on 30 June 2005, G/SPS/35, 7 July 2005.

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A. General

Art. 14 forms part of the **special and differential treatment** (S & D) for developing country Members under the SPS Agreement. In line with the general approach of the WTO Agreement on special and differential treatment, the SPS Agreement in the interest of developing countries distinguishes between the longer time frame for implementation of the SPS Agreement (Arts 10.3, 14), the recognition of special interests (Arts 10.1, 10.2. and Annex B:2), technical assistance accorded to developing country Members (Art. 9), the power of the SPS Committee to grant least developed country Members time-limited exceptions to obligations under the Agreement (Art. 10.3), and the specifics of each accession agreement entered into by developing countries, each of which implements certain aspects of special and differential treatment for the new developing country Member.[1] *1*

Art. 14 covers only **States** that were **Members** at the time of the entry into force of the WTO Agreement (1997). *2*

[1] For an overview of the WTO accession process in practice see: Technical Note on the Accession Process, Note by the Secretariat, Revision, WT/ACC/10/Rev.3, 28 November 2005.

3 Since the extended implementation periods for developing country Members set out in Art. 14 have by now expired, the provision is **obsolete**.

4 Currently, there are **no concrete proposals** to interpret afresh or to modify Art. 14 under consideration by the SPS Committee as part of its work on special and differential treatment under the SPS Agreement.[2]

B. Historical Background

5 The Uruguay Round was intended to strengthen the position of developing country Members. The several S & D provisions contained in the SPS Agreement reflect the view prevalent at the MTN that the application of sanitary and phytosanitary measures constitutes a special burden for developing countries.

C. Least-Developed Country Members (Sentence 1)

6 Regarding the least-developed country Members (LDCs), Art. XI:2 WTO accepts the **UN designation** of a country as least developed for purposes of the WTO Agreement. The criteria are: (1.) a low income, as measured by per capita gross domestic product (GDP) (the current maximum is US $ 900) (2.) weak human resources, as measured by a composite index called the Augmented Physical Quality of Life Index that is based on indicators of life expectancy at birth, per capita calorie intake, combined primary and secondary school enrolment, and adult literacy; and (3.) a low level of economic diversification, as measured by a composite index called the Economic Diversification Index that is based on the share of manufacturing in GDP, the share of the labour force in industry, annual per capita commercial energy consumption, and UNCTAD's merchandise export concentration index.[3] The list is revised every three years by ECOSOC. Different thresholds are used for inclusion in, and graduation from, the LDC list. This definition also applies to Art. 14.

7 Least-developed Members enjoyed a **general, unqualified but time-limited exemption** from compliance with the SPS Agreement. Under Art. 14, LDCs were allowed to delay until 2000 the application of all provisions of this agreement relating to **measures affecting imports**.

8 Since the expiry of the exemption period (2000), all relevant sanitary and phytosanitary measures have to comply with the provisions of the Agree-

[2] G/SPS/GEN/543.
[3] UN Doc. E/2004/33 (2004).

ment. Art. 14 does **not grandfather in** least-developed country Members' sanitary and phytosanitary measures applicable at the expiry of the exemption period.

9 However, the **Uruguay Round Agreement's Decision on Measures in Favour of Least-Developed Countries** provides that LDCs, while complying with the general rules set out in the WTO instruments, will be required to undertake commitments and concessions only to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities: "The rules and transitional provisions resulting from the Round should be applied in a flexible and supportive manner with regards to the LDC members. This includes any determinations and authorizations that might be made by WTO Councils and Committees in different situations involving LDCs (such as extensions of transition periods, time-limited exemptions etc)."[4] Neither the SPS Committee nor the Councils have, however, taken such measures under Art. 14.

10 According to the **Doha Declaration**, accession by LDCs remains a **priority** for the Membership. Ministers agree that all special and differential treatment provisions—and thus Art. 14 SPS—shall be reviewed with a view to strengthening them and making them more precise, effective and operational. In this connection, Ministers endorse the programme of work on special and differential treatment set out in the **Decision on Implementation-Related Issues and Concerns**.[5]

D. Other Developing Country Members (Sentence 2)

11 The WTO divides its membership into three varieties: developed countries, developing countries and least developed countries. Although no formal definition of the term "developing country" has ever been adopted by the GATT Contracting Parties or the WTO Members, **Art. XVIII:1 GATT** 1994 contains a rough definition of a developing country Member as one the economy of which "can only support low standards of living and [is] in the early stages of development." This concerns the regular situation of a country.[6] The difference between a developed country and a developing country has traditionally been a matter of **self-selection.**

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[4] Decision on Measures in Favour of Least-Developed Countries, LT/UR/D-1/3, 15 April 1994, para. 2(iii).

[5] WT/MIN(01)/17.

[6] Art. XVIII Annex 1 GATT 1994.

12 The question whether **China** qualifies as a developing country is of little relevance under Art. 14 since China joined the WTO only in 2000, that is five years after the entry into force of the WTO Agreement.[7]

13 Under Art. 14.2, developing country Members other than least-developed country Members could delay application until 1997, which was two years after the date of entry of the WTO Agreement.

14 The two year-exemption that these developing Members enjoyed was—unlike those of the LDCs—**qualified**. Under the specific requirement of Art. 14.2., such Members had to demonstrate specific reasons, *i.e.* a lack of technical expertise, technical infrastructure or resources, which prevented them from fulfilling their obligations under the SPS Agreement.

15 Moreover, upon request, Members had to explain on these grounds why particular SPS measures existed (Art. 5.8) and had to notify and provide information on all such measures (Art. 7). Developing country Members were not exempt from these essentially procedural requirements.

16 Since the expiry of the exemption period (1997), all relevant sanitary and phytosanitary measures have to comply with the provisions of the Agreement. Art. 14.2 does **not grandfather in** developing country Members' sanitary and phytosanitary measures applicable at the expiry of the exemption period.

17 Under **Art. 10.3**, developing country Members can still request further time-limited exceptions with respect to any obligation under the Agreement, taking into account their financial, trade and development needs.[8] The SPS Committee's *Report on the Review of the operation and implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures* of 1999 notes that, although there had been suggestions to extend the period for application of the agreement by all developing country Members, no specific requests were submitted under Art. 10.3.[9]

E. Outlook/Evaluation

18 Art. 14 has been obsolete since 2000 (for least-developed country Members) or 1997 (for developing country Members). However, the concept of granting extended time-periods for full compliance with SPS requirements

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[7] Working Party on the Accession of China, Report of the Working Party on the Accession of ChinaWT/ACC/CHN/49, 1 October 2001, para. 200.

[8] See *Seibert-Fohr*, Article 10 SPS, paras 12 *et seq*.

[9] Committee on Sanitary and Phytosanitary Measures, Review of the Operation and Implementation of the Agreement on the Application of Sanitary and Phytosanitary Measures, Report of the Committee, G/SPS/12, 11 March 1999.

to developing country Members as part of their special and differential treatment is still relevant. Short of a formal amendment of the provision and taking into account Art. 10.2, the General Council should nevertheless consider granting longer time limits for implementation generally to developing and least-developed country Members taking into account the differentiated provisions of Art. 14.

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