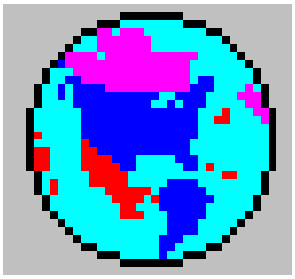
# THE LAW OF
# REGIONAL ECONOMIC INTEGRATION
# IN THE AMERICAN HEMISPHERE



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## Unit VII

## Technical Barriers to Trade (TBT)

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## Guiding Questions

*Reflect on the following questions while and after reading the material:*

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    b. *How would such "equivalency" provision be different from the principle of "mutual recognition" under the ECJ trade jurisprudence?*

2. *Asbestos*
    a. *Was it in the interest of the EC to argue that the TBT Agreement does not apply?*
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    c. *Consider context and purpose. Does the panel's reasoning convince you?*
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    b. *According to this case law would the Codex standards be de facto binding? Could this line of jurisprudence contribute to a higher degree of harmonization in the field of technical regulation? Any backfire?*

# 1. Introduction

## 1-1. OVERVIEW

### 1-1-1. NAFTA Standard-Related Measures (Summary)

*From the SICE of the OAS Web-site*

**Chapter Nine: Standards-Related Measures**

http://www.sice.oas.org/summary/nafta/nafta9.asp

The GATT requires that countries not discriminate between domestic and imported goods in applying standards and technical regulations nor use such regulations as disguised barriers to trade. The 1979 GATT Agreement on Technical Barriers to Trade provides detailed rules of procedure to help countries resolve disputes that could arise in the application of standards. It is based on the principle that no country should be prevented from taking standards-related measures so long as such measures are not applied so as to cause arbitrary or unjustifiable discrimination between imported and domestic goods.

The NAFTA recognizes the crucial role of standards and technical regulations in promoting safety and protecting human, animal and plant life and health, the environment and consumers and provides a framework of rules and cooperative mechanisms for enhancement and compatibility of such measures and for ensuring that they do not operate as unnecessary obstacles to trade within the free-trade area.

Chapter nine expands upon both GATT and FTA experience, in particular by adding coverage with respect to telecommunications and land transportation services, by extending obligations to measures of provincial and state governments and non-governmental standards bodies as well as by strengthening obligations on equivalence, the use of international standards, conformity assessment, transparency and notification.

Article 901 provides that the provisions of the chapter apply to "standards-related measures" (defined to mean voluntary standards, mandatory technical regulations and conformity assessment procedures used to determine that these standards and regulations are met) that may directly or indirectly affect trade in goods or certain services, except for sanitary and phytosanitary measures which are dealt with under chapter seven. Additionally, technical specifications prepared by governmental bodies for government procurement purposes are governed exclusively under chapter ten. The only services to which chapter nine applies are telecommunications and land transportation services, although this could be expanded by agreement of the Parties.

Article 902 requires the Parties to "seek through appropriate measures" to ensure that provincial and state governments and non-governmental standards bodies observe the provisions of chapter

nine, a requirement that is somewhat less stringent than the requirement in Article 105 to ensure that all necessary measures are taken. It goes beyond FTA chapter six, however, which did not apply to provinces, states or private-sector bodies.

Article 903 affirms rights and obligations of the Parties under the GATT Agreement on Technical Barriers to Trade and other international agreements, including environmental and conservation agreements.

Article 904 affirms each Party's right to adopt, apply and enforce standards-related measures, to choose the level of protection it wishes to achieve through such measures and to conduct assessments of risk to ensure that those levels are achieved, including measures to prohibit the importation of a good or service that do not comply with the applicable requirements.

Article 904 also sets out certain disciplines on the use of standards-related measures, with a view to facilitating trade throughout the free-trade area. For example, under Article 904(3), each country must ensure that its standards-related measures provide both national treatment and most-favoured-nation treatment. Article 904(4) prohibits any Party from adopting, maintaining or applying any standards-related measure in a maimer that creates an unnecessary obstacle to trade. The meaning is specifically elaborated: a standards-related measure will not be considered an unnecessary obstacle if its demonstrable purpose is to achieve a legitimate regulatory objective, and it does not operate to exclude goods which meet that objective. Among those legitimate objectives are health, safety and environmental protection.

Each Party will use international standards as a basis for its standards-related measures, if those standards are an effective and appropriate means to fulfill its objectives, but retains the right to adopt, apply and enforce standards-related measures that result in a higher level of protection than would be achieved by measures based on international standards (Article 905).

The Parties will work jointly to enhance safety, health, environmental protection and consumer protection and endeavour to make their standards-related measures more compatible, taking into account international standards-setting activities, so as to facilitate trade and to reduce the additional costs that arise from having to meet different requirements in each country (Article 906). This provision is specifically qualified by the requirement that compatibility be sought "without reducing the level of safety ... or health, the environment or consumers." In effect, therefore, there will be no "downward harmonization" of the Parties' standards and Parties will neither be prevented from introducing new standards nor required to change existing standards.

Article 907 affirms the right of each Party to conduct risk assessments, taking into account scientific, production and environmental factors. It imposes certain disciplines when a Party establishes a level of protection and conducts an assessment of risk. The Party should avoid arbitrary or unjustifiable distinctions between similar goods or services in the level of protection it considers appropriate where such distinctions would result in a disguised restriction or would discriminate between similar goods or services for the same use under conditions that pose the same level of risk and provide similar benefits. Where available information is insufficient to

complete an assessment, a Party may adopt a provisional technical regulation on the basis of available relevant information, but shall, within a reasonable period after sufficient information becomes available, complete its assessment, and review and revise the provisional measure.

Conformity assessment procedures are used to determine that the requirements set out in technical regulations or standards are fulfilled. Paragraph I of Article 908 requires the Parties to endeavour to make compatible their conformity assessment procedures. Paragraph 2 requires each party to accredit conformity assessment bodies of the other Parties on a non-discriminatory basis, but that obligation is subject to the qualification that the "mutual advantage" to the Parties be taken into account. This was in recognition of the different nature of the standards systems of any two Parties concerned and thereby the need to balance the different consequences that accreditation could have in each Party. Additionally, Article 908(3) sets out specific obligations on application of conformity assessment in three main areas:

- non-discriminatory accreditation of bodies in other NAFTA countries under accreditation systems of a Party which are mutually advantageous to the Parties concerned;
- timely, efficient and transparent administrative procedures for processing applications for conformity assessment from other Parties; and
- consideration of requests from other Parties to negotiate mutual recognition agreements.

Article 909 requires public notice in most cases prior to the adoption or modification of standards-related measures that may affect trade within the free-trade area. The notice must identify the goods or services to be covered, the objectives of and reasons for the measure and provide opportunity for comment by other Parties and anyone interested in a particular standards-related measure. Each Party will ensure that designated inquiry points are established to respond to questions and provide information regarding standards-related measures, membership in standards organizations, risk assessment procedures and related matters (Article 910) but Article 912 protects certain categories of information from disclosure.

Article 911 encourages cooperation between the standardizing bodies of the NAFTA countries and requires that each Party, on request, provide to another Party technical advice, information and assistance on mutually agreed terms and conditions to enhance their standards-related measures.

A Committee on Standards-Related Measures will monitor the implementation and administration of provisions in this chapter, facilitate the attainment of compatibility, enhance cooperation on developing, applying and enforcing standards-related measures and facilitate consultations regarding disputes in this area (Article 913). Subcommittees and working groups created to deal with specific issues may invite the participation of scientists and representatives of interested non-government organizations from the three countries.

## 1-1-2. WTO Technical Barriers to Trade

(http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto03/wto3_2.htm)

# TBT: The problem

### *1. TBT: Why an Agreement?*

**High number of technical regulations and standards**

In recent years, the number of technical regulations and standards adopted by countries has grown significantly. Increased regulatory policy can be seen as the result of higher standards of living worldwide, which have boosted consumers' demand for safe and high-quality products, and of growing problems of water, air and soil pollution which have encouraged modern societies to explore environmentally-friendly products.

**Impact on international trade**

Although it is difficult to give a precise estimate of the impact on international trade of the need to comply with different foreign technical regulations and standards, it certainly involves significant costs for producers and exporters. In general, these costs arise from the translation of foreign regulations, hiring of technical experts to explain foreign regulations, and adjustment of production facilities to comply with the requirements. In addition, there is the need to prove that the exported product meets the foreign regulations.

The high costs involved may discourage manufacturers from trying to sell abroad. In the absence of international disciplines, a risk exists that technical regulations and standards could be adopted and applied solely to protect domestic industries.

**From the Tokyo Round Standards Code to the WTO TBT Agreement**

The provisions of the GATT 1947 contained only a general reference to technical regulations and standards in Articles III, XI and XX. A GATT working group, set up to evaluate the impact of non-tariff barriers in international trade, concluded that technical barriers were the largest category of non-tariff measures faced by exporters.

After years of negotiations at the end of the Tokyo Round in 1979, 32 GATT Contracting Parties signed the plurilateral Agreement on Technical Barriers to Trade (TBT). The Standards Code, as the Agreement was called, laid down the rules for preparation, adoption and application of technical regulations, standards and conformity assessment procedures. The new WTO Agreement on Technical Barriers to Trade, or TBT Agreement, has strengthened and clarified the provisions of the Tokyo Round Standards Code. The TBT Agreement, negotiated during the Uruguay Round is an integral part of the WTO Agreement. Before examining the Agreement in detail, it is necessary to define the meaning of "technical regulations", "standards" and "conformity assessment procedures".

### *2. TBT: Definitions*

**Technical regulations and standards in the TBT Agreement**

Technical regulations and standards set out specific characteristics of a product - such as its size, shape, design, functions and performance, or the way it is labelled or packaged before it is put on sale. In certain cases, the way a product is produced can affect these characteristics, and it may then prove more appropriate to draft technical regulations and standards in terms of a product's process and production methods rather than its characteristics *per se*. The TBT Agreement makes allowance for both approaches in the way it defines technical regulations and standards (Annex 1).

**Difference between a technical regulation and a standard**

The difference between a standard and a technical regulation lies in compliance. While conformity with standards is voluntary, technical regulations are by nature mandatory. They have different implications for international trade. If an imported product does not fulfil the requirements of a technical regulation, it will not be allowed to be put on sale. In case of standards, non-complying imported products will be allowed on the market, but then their market share may be affected if consumers' prefer products that meet local standards such as quality or colour standards for textiles and clothing.

**Conformity assessment procedures**

Conformity assessment procedures are technical procedures - such as testing, verification, inspection and certification - which confirm that products fulfil the requirements laid down in regulations and standards. Generally, exporters bear the cost, if any, of these procedures. Non-transparent and discriminatory conformity assessment procedures can become effective protectionist tools.

## *3. TBT: Objectives*

**Protection of human safety or health**

The largest number of technical regulations and standards are adopted to aim at protecting human safety or health. Numerous examples can be given. National regulations that require that motor vehicles be equipped with seat belts to minimise injury in the event of road accidents, or that sockets be manufactured in a way to protect users from electric shocks, fall under the first category. A common example of regulations whose objective is the protection of human health is labelling of cigarettes to indicate that they are harmful to health.

**Protection of animal and plant life or health**

Regulations that protect animal and plant life or health are very common. They include regulations intended to ensure that animal or plant species endangered by water, air and soil pollution do not become extinct. Some countries, for example require that endangered species of fish reach a certain length before they can be caught.

**Protection of the environment**

Increased environmental concerns among consumers, due to rising levels of air, water and soil pollution, have led many governments to adopt regulations aimed at protecting the environment. Regulations of this type cover for example, the re-cycling of paper and plastic products, and levels of motor vehicle emissions.

**Prevention of deceptive practices**

Most of these regulations aim to protect consumers through information, mainly in the form of labelling requirements. Other regulations include classification and definition, packaging requirements, and measurements (size, weight etc.), so as to avoid deceptive practices.

**Other objectives**

Other objectives of regulations are quality, technical harmonization, or simply trade facilitation. Quality regulations - e.g. those requiring that vegetables and fruits reach a certain size to be marketable - are very common in certain developed countries. Regulations aimed at harmonizing certain sectors, for example that of telecommunications and terminal equipment, are widespread in economically integrated areas such as the European Union and EFTA.

### *4. TBT: Divergent regulations - costs for exporters*

**Loss of economies of scale**

If a firm must adjust its production facilities to comply with diverse technical requirements in individual markets, production costs per unit are likely to increase. This imposes handicap particularly on small and medium enterprises.

**Conformity assessment costs**

Compliance with technical regulations generally needs to be confirmed. This may be done through testing, certification or inspection by laboratories or certification bodies, usually at the company's expense.

**Information costs**

These include the costs of evaluating the technical impact of foreign regulations, translating and disseminating product information, training of experts, etc.

**Surprise costs**

Exporters are normally at a disadvantage vis-à-vis domestic firms, in terms of adjustments costs, if confronted with new regulations

# TBT: The Agreement (1)

### *1. TBT: Principles*

Avoidance of unnecessary obstacles to trade

Non-discrimination and national treatment

Harmonization

Equivalence of technical regulations

Mutual recognition of conformity assessment procedures

Transparency

### *2. TBT: Avoidance of unnecessary obstacles to trade*

**What are the sources of technical barriers to trade?**

Technical barriers to trade generally result from the preparation, adoption and application of different technical regulations and conformity assessment procedures. If a producer in country A wants to export to country B, he will be obliged to satisfy the technical requirements that apply in country B, with all the financial consequences this entails. Differences between one country and another in their technical regulations and conformity assessment procedures may have legitimate origins such as differences in local tastes or levels of income, as well as geographical or other factors. For example, countries with areas prone to earthquakes might have stricter requirements for building products; others, facing serious air-pollution problems might want to impose lower tolerable levels of automobile emissions. High levels of per capita income in relatively rich countries result in higher demand for high-quality and safe products.

**TBT provisions on technical regulations**

The TBT Agreement takes into account the existence of legitimate divergences of taste, income, geographical and other factors between countries. For these reasons, the Agreement accords to Members a high degree of flexibility in the preparation, adoption and application of their national technical regulations. The Preamble to the Agreement states that "no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal, and plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate". However, Members' regulatory flexibility is limited by the requirement that technical regulations "are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to trade". (Article 2.2).

**Avoidance of unnecessary obstacles to trade**

For a government, avoiding unnecessary obstacles to trade means that when it is preparing a technical regulation to achieve a certain policy objective - whether protection of human health, safety, the environment, etc - the negotiations shall not be more trade-restrictive than necessary to fulfil the legitimate objective. According to the TBT Agreement, specifying, whenever appropriate, product regulations in terms of performance rather than design or descriptive characteristics will also help in avoiding unnecessary obstacles to international trade (Article 2.8). For example, a technical regulation on fire-resistant doors should require that the door passes successfully all the necessary tests on fire resistance. Thus it could specify that "the door must be fire resistant with a 30-minute burn through time"; it should not specify how the product must be made, e.g., that "the door must be made of steel, one inch thick". Avoidance of trade obstacles means also that if the circumstances that led a country to adopt technical regulations no longer exist or have changed, or the policy objective pursued can be achieved by an alternative less trade-restrictive measure, they should not be maintained.

**When is a technical regulation an unnecessary obstacle to trade?**

Unnecessary obstacles to trade can result when (i) a regulation is more restrictive than necessary to achieve a given policy objective, or (ii) when it does not fulfil a legitimate objective. A regulation is more restrictive than necessary when the objective pursued can be achieved through alternative measures which have less trade-restricting effects, taking account of the risks non-fulfillment of the objective would create. Elements that Members can use for risk assessment are: available technical and scientific information, technology or end-uses of the products. Article 2.2 of the Agreement specifies that legitimate objectives include *inter alia*: national security requirements, prevention of deceptive practices, protection of human health or safety, protection of animal and plant life or health or the environment.

**TBT provisions on conformity assessment procedures**

The obligation to avoid unnecessary obstacles to trade applies also to conformity assessment procedures. An unnecessary obstacle to trade could result from stricter or more time-consuming procedures than are necessary to assess that a product complies with the domestic laws and regulations of the importing country. For instance, information requirements should be no greater than needed, and the siting of facilities to carry out conformity assessment, and the selection of samples should not create unnecessary inconvenience to the agents (Articles 5.2.3 and 5.2.6).

### *3. TBT: Non-discrimination and national treatment*

**Technical regulations**

Like many other WTO Agreements, the TBT Agreement includes the GATT's Most Favoured Nation (MFN) and national treatment obligations. Article 2.1 of the Agreement states that "in respect of their technical regulations, products imported from the territory of any Member be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country".

**Conformity Assessment Procedures**

The MFN and national treatment provisions also apply to conformity assessment procedures. Procedures for conformity assessment shall be applied to products imported from other WTO Members "in a manner no less favourable then that accorded to like products of national origin and to like products originating in any other country" (Article 5.1.1). This means that imported products must be treated equally with respect to any fees charged to assess their conformity with regulations. Similarly, Members must respect the confidentiality of information about the results of conformity assessment procedures for imported products in the same way as for domestic products so that commercial interests are protected (Articles 5.2.4 and 5.2.5).

### *4. TBT: Harmonization (1)*

**Producers' benefits**

The arguments for harmonization of technical regulations are well-known. Harmonization is necessary for the connection and compatibility of parts of products, i.e. telecommunications equipment or car parts. Lack of technical compatibility might otherwise generate barriers to international trade. For example, television sets suitable for the US market would be unsaleable in Europe due to divergences in colour broadcasting formats (NTSC vs PAL or SECAM). Similarly, in order to be marketable in the United Kingdom, French or German motor vehicles need to be adjusted to right-hand drive. The costs of designing, manufacturing, and delivering the same product in various configurations may be high.

**Consumers' benefits**

Technical harmonization may increase consumer welfare. Within a harmonized regulatory environment, competition ensures that consumers have a wide and economically attractive choice of products. This presupposes, however, that harmonized standards do not go beyond fulfilling their legitimate regulatory objective, i.e. that they do not stifle innovation or otherwise discourage producers from introducing new products or product variants

### *5. TBT: Harmonization (2)*

**Introduction**

For many years, technical experts have worked towards the international harmonization of standards. An important role in these efforts is played by the International Standardization Organization (ISO), the International Electrotechnical Commission (IEC) and the International Telecommunication Union (ITU). Their activities have had major impact on trade, especially in industrial products. For example, ISO has developed more than 9,600 international standards covering almost all technical fields.

**Harmonization and the TBT Agreement**

The Agreement encourages Members to use existing international standards for their national regulations, or for parts of them, unless "their use would be ineffective or inappropriate" to fulfil a given policy objective. This may be the case, for example, "because of fundamental climatic and geographical factors or fundamental technological problems" (Article 2.4). As explained previously, technical regulations in accordance with relevant international standards are rebuttably presumed "not to create an unnecessary obstacle to international trade". Similar provisions apply to conformity assessment procedures: international guides or recommendations issued by international standardizing bodies, or the relevant parts of them, are to be used for national procedures for conformity assessment unless they are "inappropriate for the Members concerned for, *inter alia*, such reasons as national security requirements, prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or protection of the environment; fundamental climatic or other geographical factors; fundamental technological or infrastructural problems" (Article 5.4).

**Participation in international standardizing bodies**

Widespread participation in international standardizing bodies can ensure that international standards reflect country-specific production and trade interests. The TBT Agreement encourages Members to participate, within the limits of their resources, in the work of international bodies for the preparation of standards (Article 2.6) and guides or recommendations for conformity assessment procedures (Article 5.5).

**Special and differential treatment**

Implementing and enforcing international standards may require technical and financial resources beyond the capabilities of developing countries. The TBT Agreement eases the impact of certain provisions whose full application would not be compatible with developing country Members' development, financial and trade needs. Moreover, in view of their particular technological and socio-economic conditions, developing country Members may adopt technical regulations, standards or test methods aimed at preserving indigenous technologies and production methods and processes compatible with their development needs (Article 12.4). Finally, developing country Members may request international standardizing bodies to examine the possibility of, and if practicable, prepare international standards for products of special trade interest to them

## *6. TBT: Equivalence*

**What is equivalence?**

The process leading to the preparation of an international standard can be lengthy and costly. Reaching consensus on technical details can take several years. The time gap between the adoption of an international standard and its implementation by national regulators can also be significant. For these reasons, negotiators introduced in the TBT Agreement a complementary approach to technical harmonization,

known as equivalence. Technical barriers to international trade could be eliminated if Members accept that technical regulations different from their own fulfil the same policy objectives even if through different means. This approach, based on the European Community's 1985 "new approach" to standardization, is contained in Article 2.7 of the TBT Agreement.

**How does equivalence work?**

Let us assume that country A, wishing to protect its environment from high auto emission levels, requires that cars be equipped with a catalytic converter. In country B, the same objective is achieved through the use of diesel engines in motor vehicles. Since environmental concerns are identical in the two countries - to reduce the levels of pollutants in the air - A and B can agree that their technical regulations are essentially equivalent. Thus, if car manufacturers in country A want to export to B, they will not be obliged to satisfy country B's requirement to fit diesel engines, and vice versa. This will eliminate the costs of adjusting production facilities to fulfil foreign regulations

# TBT: The Agreement (2)

## *1. TBT: Mutual recognition*

**Costs of multiple testing**

As explained in the previous section, demonstrating compliance with technical regulations may impede international trade. In particular, if products are to be exported to multiple markets, multiple testing may be required. Manufacturers can have difficulties in securing approval for their products on foreign markets, for instance because testing experts disagree on optimal testing procedures, from bureaucratic inertia, or even from manipulation of the testing process by protectionist groups. Whatever the reason might be, such diversity of procedures and methods significantly increases the costs of producers who sell in multiple markets.

**What is mutual recognition of conformity assessment procedures?**

One of the main difficulties exporters face is costly multiple testing or certification of products. These costs would be drastically reduced if a product could be tested once and the testing results be accepted in all markets.

**How does mutual recognition work?**

In practice, countries would agree to accept the results of one another's conformity assessment procedures, although these procedures might be different.

**Mutual recognition and the TBT Agreement**

Article 6.3 of the TBT Agreement strongly encourages WTO Members to enter into negotiations with other Members for the mutual acceptance of conformity assessment results. The presence of a high degree of confidence in testing and certification bodies is, in fact, a prerequisite for the good functioning of an MRA. For this reason, Article 6.1 of the TBT Agreement recognizes that prior consultations may be necessary to arrive at a mutually satisfactory understanding regarding the competence of the conformity assessment bodies. It also points out that compliance by conformity assessment bodies with relevant guides or recommendations issued by international standardizing bodies can be regarded as an indication of adequate technical competence.

## *2. TBT: Transparency (1)*

**Notifications**

**Technical regulations and conformity assessment procedures**

Members must notify when two conditions apply: (1) whenever a relevant international standard or guide or recommendation does not exist, or the technical content of a proposed or adopted technical regulation or procedure is not in accordance with the technical content of relevant international standards or guides of recommendations; and (2) if the technical regulation or conformity assessment procedure may have a significant effect on the trade of other Members (Articles 2.9 and 5.6). Draft regulations should be notified to the WTO Secretariat, if possible sixty days prior to their formal adoption so as to allow time for other Members to make comments. Regulations can also be notified ex-post whenever urgent problems of safety, health, environment protection arise (Articles 2.10 and 5.7). Local Governments at the level directly below central government are required to notify technical regulations and conformity assessment procedures which have not been previously notified by their central government authorities (Article 3.2 and 7.2).

**Statements on the implementation and administration of the Agreement**

Each WTO Member must, promptly after the Agreement enters into force for it, notify Members of the measures in existence or taken to ensure the implementation and administration of the Agreement and of any subsequent changes to them (Article 15.2). This written statement has to include, *inter alia*, all relevant laws, regulations, administrative orders, etc., to ensure that the provisions of the Agreement are applied; the names of the publications where draft and final technical regulations, standards and conformity assessment procedures are published; the expected length of time for the presentation of written comments on technical

regulations, standards or conformity assessment procedures; and the name and address of the enquiry points established under Article 10.

**Bilateral or plurilateral agreements**

Under Article 10.7, a Member who 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 must notify other Members through the WTO Secretariat of the products to be covered by the agreement, and provide a brief description of the agreement.

**Code of good practice**

The Code of Good Practice for the Preparation, Adoption and Application of Standards lays down disciplines in respect of central government, local government, non-governmental and regional standardizing bodies developing voluntary standards. The Code is open for acceptance by any of these standardizing bodies. Central government standardizing bodies must accept and comply with the provisions of the Code. A standardizing body wishing to adhere to, or withdraw from, the Code has to notify its acceptance of, or withdrawal from, the Code using the appropriate notification format (paragraph C of the Code). Standardizing bodies which have accepted the Code must notify at least twice a year the existence of their work programme, and where details of this programme can be obtained (paragraph J). Notifications have to be sent either directly to the ISO/IEC Information Centre in Geneva, or to the national member of ISO/IEC or, preferably, to the relevant national member or international affiliate of ISONET.

### *3. TBT: Transparency (2)*

**Enquiry points**

As a complement to the obligation to notify, each WTO Member must set up a national enquiry point. This acts as a focal point where other WTO Members can request and obtain information and documentation on a Member's technical regulations, standards and test procedures, whether impending or adopted, as well as on participation in bilateral or plurilateral standard-related agreements, regional standardizing bodies and conformity assessment systems (Article 10). Enquiry points are generally governmental agencies, but the relevant functions can also be assigned to private agencies. The obligation to set up enquiry points is particularly important for developing countries. On the one hand, it is the first step by a developing country Member towards implementation of the TBT Agreement. On the other, developing countries can acquire information from other Members' enquiry points on foreign regulations and standards affecting products in which they have a trade interest.

**The Committee on Technical Barriers to Trade**

Finally, transparency is also ensured through the existence of a TBT Committee. This allows WTO Members the possibility of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The Committee holds on average two to three meetings a year and, if necessary, can establish working parties to carry out specific functions.

## *4. TBT: The Code of Good Practice*

### Why a Code of Good Practice?

Product standards can be prepared by governmental or non-governmental standardizing bodies. Over the years there has been a proliferation of private standardizing bodies. The Code of Good Practice, contained in Annex 3 of the WTO TBT Agreement provides disciplines, including those related to transparency, for the preparation, adoption and application of standards by all central governmental, local government, non-governmental and regional standardizing bodies.

### Who can accept the Code?

The Code is open for acceptance to any standardizing bodies, whether central government, local government or non-governmental and regional standardizing bodies. The Code of Good Practice contained in Annex 3 of the WTO TBT Agreement seeks to bring all standards within its purview and provides for [and gives] transparency in the preparation, adoption and application of standards.

### What does membership entail?

Members of the TBT Agreement are responsible for the acceptance and compliance with the Code of Good Practice by their central government standardizing bodies. Furthermore, they are required to take such reasonable measures as may be available to them to ensure also that local government and non-governmental standardizing bodies within their territories, and regional standardizing bodies of which they are members, accept and comply with the Code.

## *5. TBT: Technical assistance*

### Who has the right to technical assistance?

Any Member, and especially developing country Members, can request technical assistance from other Members or from the WTO Secretariat, on terms and conditions to be agreed by the Members concerned (Article 11). Requests for technical assistance received from least-developed Members have priority.

### What type of assistance?

The coverage of technical assistance ranges from the preparation of technical regulations and the establishment of national standardizing bodies to the participation in international standardizing bodies and the steps to be taken by developing country Members to gain access to regional international conformity assessment systems. Technical assistance can help firms in developing country Members to manufacture products in accordance with the technical requirements existing in an importing country, thus ensuring that the products are accepted on the importing Member's market.

### WTO Secretariat's technical assistance activities

The WTO Secretariat's assistance to developing and least-developing countries on TBT matters often takes the form of regional or sub-regional seminars. Recently, technical assistance seminars have been organized jointly with other international and regional organizations.

## 1-2. LEGAL TEXT

Read in the Primary Sources:

NAFTA Chapter 9, Arts. 901-913;
Preamble of the TBT Agreement and Arts. 1, 2, 4-6, 9, 13, 14 and Annex. 1

## 2. Asbestos (2000)

*Reading this case, compare the different interpretative approaches of the panel and the Appellate Body, in particular the weight expressly or implicitly attributed to the text. Also consider the broader systemic implications for the TBT Agreement beyond this immediate case. More generally, look at the extent to which the Appellate Body is able and willing to go beyond the review of legal findings by a panel and to address new legal questions in order to complete the legal assessment.*


**WORLD TRADE ORGANIZATION**

**WT/DS135/R**
18 September 2000

(00-3353)


# EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS – CONTAINING PRODUCTS

## *Report of the Panel*

*To download the original report, visit [http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm)*

(…)

**D. Applicability of the TBT Agreement to the Decree**

1. Arguments of the parties and approach adopted by the Panel

*Arguments of the parties concerning the applicability of the TBT Agreement to the Decree*[1]

8.18 Canada considers that the Decree is a "technical regulation" within the meaning of the definition given in Annex 1 to the TBT Agreement. The EC consider that the Decree does not come under the definition of a technical regulation in the TBT Agreement.

8.19 The following is the definition of "technical regulation" in Annex 1.1 to the TBT Agreement:

> "1. *Technical regulation*
> Document which lays down product characteristics or the 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."

8.20 Canada contends that the Decree considers that all asbestos fibres and all materials, products or devices containing such fibres pose risks for people's health. The Decree is a "technical regulation" in particular because it lays down a characteristic of a product, a process and a production method, as well as administrative provisions applicable to a product.

8.21 Referring to the definition of "technical regulation" in Annex 1 to the TBT Agreement, Canada considers that the ordinary meaning of the word "characteristic" is "that which constitutes a recognizable distinctive feature". The Decree describes a recognizable distinctive feature because it bans asbestos fibre, particularly chrysotile, in the manufacturing and processing of materials, products or devices placed on the French market. The characteristic of these materials, products and devices is the absence of asbestos fibres. (…) Moreover, the Decree stipulates that manufacturing activities are subject to the standards governing exposure to asbestos dust in places of business and this imposes a manufacturing process. (…) Lastly, the Decree also deals with labelling requirements and its principal provisions are binding.

8.22 The EC claim that the Decree cannot be construed as a "technical regulation" within the meaning of the TBT Agreement because the latter does not cover general prohibitions on the use of a product for reasons to do with the protection of human health, which come under the GATT 1994. It follows from the preamble, from the background to the TBT Agreement and from the actual wording of several of its provisions that the fundamental objective of the Agreement is to monitor the adoption and application of the "standards" and "technical regulations" that relate to the detailed characteristics of products or their methods of production (e.g. the minimum resistance level for seat-belts). (…)

8.23 For the EC, any other approach would be equivalent to nullifying the effect of certain provisions of the GATT 1994, for example, Articles I and III, which apply to general prohibitions. The TBT Agreement must be considered as the specific application of the principles of the GATT 1994 to technical regulations. The Decree prohibits asbestos fibres at all stages. It does not specify the characteristics, the processes or production methods for asbestos fibres and asbestos-containing products or the products exempt from the prohibition measure. (…)

[1] The parties' arguments are set out in detail in Section III above.

8.24 In Canada's view, including a general prohibition within the scope of the TBT Agreement is contrary neither to its object nor its purpose. The distinction made by the EC between prohibitions that apply to all products without distinction and measures aimed particularly at a specific product is not supported by the TBT Agreement. The EC's interpretation is contrary to the principle of effectiveness: it would suffice to give a measure the form of a general prohibition in order to allow it to evade the disciplines of the TBT Agreement. Canada also considers that, in order to determine whether the Decree satisfies the criteria for the definition of a "technical regulation", its provisions on both asbestos and exceptions must be examined.

8.25 For the EC, the fact that the definition of "technical regulation" is narrow is not a matter of chance, but signifies that the authors intended to limit the scope of the Agreement. The object and purpose of the TBT Agreement is to deal with technical regulations and standards, not to resolve market access problems associated with general prohibitions. This does not result in a legal vacuum because the general prohibitions continue to be covered by other provisions, in particular Articles I and III of the GATT 1994. The general prohibition eliminates these products from the market. A technical regulation, on the other hand, means that the products affected by the regulation can still be placed on the market. (…)

8.26 Canada claims that the fact that the Decree qualifies as a "technical regulation" is confirmed by France's notification to the Committee on Technical Barriers to Trade. According to Canada, France thereby recognized the applicability of the TBT Agreement in to the Decree. (…)

8.27 According to the EC, the fact that the Decree was notified to the Committee on Technical Barriers to Trade in no way prejudges the applicability of the Agreement. The notification was made in good faith for the sake of transparency. (…)

2. Is the Decree a technical regulation within the meaning of the TBT Agreement?

(…)

*(ii) Analysis*

Ordinary meaning of the terms in the definition in Annex 1 to the TBT Agreement

8.36 The Panel notes first of all that the definition of "technical regulation" relates to the characteristics of a product or its processes or production methods. The Panel notes that the definition uses the word *product*. Applying the principle of effectiveness[2], we must assume that there was a specific purpose underlying the use of the word "product" in the definition in Annex 1.1 to the TBT Agreement and that it does not appear by chance.[3]

8.37 An initial explanation might be that the authors wished to indicate that this definition related to products rather than services, for example. However, as the TBT Agreement is in Annex 1A to the WTO Agreement, which deals with trade in goods, specifying that the definition applies to products was not necessary.[4] (…)

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[2] See footnote 22 above on application of the principle of interpretation *ut res magis valeat quam pereat*.

[3] See the Report of the Appellate Body in *European Communities – Hormones*, op. cit., para. 164.

[4] Although the title of Annex 1A is "Multilateral Agreements on Trade in Goods" (emphasis added), we note that the Agreement on Agriculture uses the word "products", as do the Agreement on Textiles and Clothing and other Agreements in Annex 1A. The scope of Annex 1A therefore covers trade in "products". See also the Report of the Panel in *United States – Restrictions on Imports of Tuna*, unadopted, DS21/R, 3 September 1991, para. 5.11: "…

8.38 Another interpretation would be that the purpose sought by introducing the word "product" was to create a link between the technical characteristics and one or more given products. In other words, the product(s) to which the characteristics refer must be clearly identifiable in the document in question. If, in the document, the characteristics described do not refer to an identifiable *product*, the document does not meet the criteria in Annex 1.1 to the TBT Agreement.[5] We consider that this interpretation is better able to give a proper meaning to the word "product" in the definition of "technical regulation" in Annex 1.1 to the TBT Agreement.

8.39 We therefore conclude that a technical regulation is a regulation which sets out the specific characteristics of one or more identifiable products in comparison with general characteristics that may be shared by several unspecified products.

(…)

8.41 (…) The ordinary meaning of "characteristic" is "that which constitutes the distinctive feature, is typical of a person or thing"[6], "a recognizable distinctive feature".[7] There is thus a link between the characteristics of a product and the product itself. Nevertheless, the "characteristics" must be differentiated from the identification of the product itself. It is indeed possible to describe technical characteristics without specifically identifying the product(s) to which they relate. Likewise, the identification of a product does not suffice to show its characteristics. The Panel notes that the reference to "characteristics" is the special feature of the definition of "technical regulation" in Annex 1.1 to the TBT Agreement. The measure must not only relate to one or more given products, but its *purpose* must be to define the characteristics, i.e. the criteria or elements which the product(s) concerned must satisfy in order to be introduced into the territory of the Member that adopted the measure.

8.42 By adding the word "product" before "characteristics", the authors of Annex 1.1 therefore wished to specify the circumstances in which the TBT Agreement applied. In order purely and simply to ban the import of a product, it is not absolutely necessary to define its characteristics. In the same way, if it is desired to exclude certain raw materials as such, it is not necessary to specify the products in which they can be incorporated. On the other hand, if the *characteristics of a given product* are identified – even those which mean that import is not allowed – at the same time the characteristics of products which can be introduced into the territory of the country applying the measure are identified.

8.43 The Panel therefore concludes that, taking into account the ordinary meaning of the words "characteristics" and "product", the definition of "technical regulation" in Annex 1.1 to the TBT Agreement applies to the measures which define the technical specifications that one or more given products must meet in order to be authorized for marketing in a Member.

(…)

Object and purpose

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Article III covers only measures affecting products as such".

[5] In relation to the foregoing, we also note that the standard notification forms under the TBT Agreement contain a section to be completed by a description of the product affected by the notification, which in our view seems to confirm the second meaning we have given for the word "product".

[6] Petit Larousse illustré (1986), p. 162.

[7] Le Nouveau Petit Robert (1994), p. 304.

(…)

8.48 (…) The TBT Agreement thus aims to improve market access by encouraging *inter alia* the use of international standards, while at the same time exercising control over the development and use of standards at the national level. The reference in the preamble to packaging, marking and labelling[8] appears to confirm that the object and purpose of the Agreement relate to the criteria for marketing these products.[9]

8.49 (…), if the Members had agreed that the TBT Agreement also applied to general bans, they would undoubtedly have mentioned it. It would appear that the purpose of the TBT Agreement is to prevent much more complex situations than a straightforward unconditional ban on a product, which is covered by the very strict provisions in Article XI:1 of the GATT 1994. In the Panel's view the purpose of adopting the TBT Agreement was to control the development and application of standards - situations in which protectionist aims can be better disguised and for which the existing disciplines within the GATT appeared to be inadequate. (…)

Context

8.53 The Panel notes that the provisions of the TBT Agreement are situated within the broader context of Annex 1A to the WTO Agreement. The EC emphasize in this connection that an interpretation reaffirming the applicability of the TBT Agreement to a general prohibition measure would be equivalent to nullifying the effect of Articles I, III, and XI of the GATT. Canada considers that, if the ban in the Decree is not deemed to be a "technical regulation", there is a risk of circumventing the disciplines of the TBT Agreement by introducing "horizontal" prohibitions instead of technical regulations in the strict sense. We consider that these matters should be examined more specifically in the light of the context of the TBT Agreement because it is by taking into account the content of the obligations in the provisions that form part of the context of the TBT Agreement that we will be able to determine the scope of the definition of "technical regulation" in the TBT Agreement.

(…)

8.57 The Panel therefore concludes that, taking into account the terms of the definition considered within their context and in the light of the object and purpose of the TBT Agreement, a measure constitutes a "technical regulation" if:

(a) the measure affects one or more given products;

(b) the measure specifies the technical characteristics of the product(s) which allow them to be marketed in the Member that took the measure[10];

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[8] "*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;".

[9] Although technically these are additional ways of interpreting Article 32, we note that the *preparatory work* confirms this objective. Document TRE/W/21 of 17 January 1994 notes that the draft Code (Spec(72)3) elaborated in the course of the preparatory work for the Tokyo Round refers to the preparation and adoption of "mandatory standards". The use of the words "mandatory *standards*" (one of the definitions of the word "standard" in English is "a document specifying nationally or internationally agreed properties for manufactured goods, principles for procedure, etc.". The New Shorter Oxford English Dictionary (1993), p. 3028) implies that the purpose of the Agreement was to ensure a product's conformity with the characteristics of other products marketed.

[10] According to the definition in Annex 1.1 to the TBT Agreement, the criteria for placing a product on the market must concern its characteristics or the related processes or production methods, including the applicable

(c) compliance is mandatory.

8.58 In the light of the above, we provisionally conclude that the part of the Decree dealing with the general prohibition on marketing asbestos and asbestos-containing products does not constitute a "technical regulation" within the meaning of the definition in Annex 1.1 to the TBT Agreement.

Additional arguments by Canada

8.59 The Panel notes that Canada puts forward two additional arguments that must be examined before coming to a definite conclusion on this matter. Firstly, in Canada's view, the EC recognized that the TBT Agreement applied by notifying the Decree to the Committee on Technical Barriers to Trade and during the consultations relating to this dispute.

8.60 From a legal point of view, the question seems to be whether there is *estoppel* on the part of the EC because they notified the Decree or because of their statements, including those during the consultations. This would be the case if it was determined that Canada had legitimately relied on the notification of the Decree and was now suffering the negative consequences resulting from a change in the EC's position.[11] In this case, however, it does not appear that Canada was able legitimately to rely on a notification to the Committee on Technical Barriers to Trade or on a statement made during the consultations. We consider that notifications under the TBT Agreement are made for reasons of transparency.[12] It has been recognized that such notifications do not have any recognized legal effects.[13] Furthermore, notification under the TBT Agreement is one of the few ways of notifying this type of measure for a Member who wishes to show transparency in good faith. Lastly we consider that both the notification and the comments made by the EC during the consultations or in another context constitute observations on the legal characterization of the Decree. Claims regarding the legal characterization of a fact by the parties, however, cannot bind the Panel.

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administrative provisions.

[11] See the decision by the International Court of Justice in the *North Sea Continental Shelf* case, Reports of Judgements 1969, p. 26, para. 30. Regarding the procedural aspect of the use of the word "estopppel", see also Daillier & Pellet: Droit International Public (1994), p. 834, citing Guggenheim, Traité de Droit international public, volume II, p. 158.

[12] See the preamble to the Decision on Notification Procedures, adopted by the Trade Negotiations Committee on 15 December 1993.

[13] See the second paragraph in Section I of the Decision on Notification Procedures, adopted by the Committee on Trade Negotiations on 15 December 1993, as annexed to the Final Act embodying the results of the Uruguay Round of multilateral trade negotiations, done at Marrakesh on 15 April 1994.

> "Members recall their undertakings set out in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance adopted on 28 November 1979 (BISD 26S/210). With regard to their undertaking therein to notify, to the maximum extent possible, their adoption of trade measures affecting the operation of the GATT 1994, such notification itself being without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, Members agree to be guided, as appropriate, by the annexed list of measures. Members therefore agree that the introduction or modification of such measures is subject to the notification requirements of the 1979 Understanding." (Emphasis added)

Paragraph 3 of the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted on 28 November 1979 (BISD 26S/210) provides that:

> "Contracting parties moreover undertake, to the maximum extent possible, to notify the CONTRACTING PARTIES of their adoption of trade measures affecting the operation of the General Agreement, it being understood that such notification would of itself be without prejudice to views on the consistency of measures with or their relevance to rights and obligations under the General Agreement."

(…)

8.63 We therefore conclude that the part of the Decree dealing with the general ban on the marketing of asbestos and asbestos-containing products does not constitute a "technical regulation" within the meaning of the definition in Annex 1.1 to the TBT Agreement.

(b) Analysis of exceptions and the effect of the type of exceptions on the findings concerning prohibitions

(*i*) *The exceptions in the Decree constitute technical regulations*

(…)

8.65 First of all, we note that the EC contend that exceptions are transitional measures limited by their purpose and temporary by nature. Consequently, they should not be covered by the TBT Agreement. We do not consider that the "transitional" nature of a measure suffices to exclude it from the scope of the TBT Agreement. The Agreement does not distinguish between measures according to whether or not they are transitional or temporary.

8.66 We also note the EC's arguments on the ancillary nature of the exceptions.[14] (…) The measures before us do not relate to application of the ban in the strict sense but to an exception which in practice allows chrysotile asbestos to enter the French market. In such a context, we hesitate to consider the exceptions in the Decree as ancillary to the ban on asbestos.

8.67 We note that the part of the Decree concerning exceptions to the general ban on importing asbestos or asbestos-containing products (Articles 2-4) does not define the products benefiting from such exceptions. Article 2.II, however, covers the identification of the materials, products or devices shown in an exhaustive list drawn up by decree by the Ministers for Labour, Consumption, the Environment, Industry, Agriculture and Transport. We therefore consider that the applicable French regulation (i.e. the Decree as implemented by the above-mentioned Decree) identifies the products benefiting from an exception.

8.68 We also note that Article 2 of the Decree sets out the criteria for marketing the products identified in the Decree and not solely the criteria for excluding products from the market. The second sentence in Article 3.I of the Decree completes these criteria.

8.69 In our view, the marketing criteria in Article 2.I of the Decree relate to the characteristics of one or more given products or processes or production methods relating to them. This is particularly true of the second subparagraph on the technical guarantees of safety appropriate to the use, which has to be read in conjunction with the second paragraph of Article 3.I of the Decree. (…)

8.70 We thus conclude that the part of the Decree concerning exceptions to the ban on asbestos comes within the scope of the definition of technical regulation in Annex 1.1 to the TBT Agreement.

(ii) Effect of the legal characterization of the exceptions on the legal characterization of the prohibitions

[14] See the reply by the EC to question 2 in the questions by the Panel at the second substantive meeting, paras. 220-221.

8.71 The Panel notes that Canada considers that the regime applicable to exceptions proves that the Decree as a whole is a technical regulation. We are of the opinion that there is no legal reason why certain parts of the Decree should not come under one of the WTO Agreements and other parts under another Agreement. (…)

8.72 In any event, as the legal characterization of the exceptions does not affect that of the general ban and even though Canada contests the legality of the Decree as a whole, the Panel should not go further than the question of the legal characterization of the exceptions. (…)

3. Conclusion

> (a) The TBT Agreement does not apply to the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products because that part does not constitute a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement.
> (b) The TBT Agreement applies to the part of the Decree relating to exceptions to the ban on imports of asbestos and asbestos-containing products because that part constitutes a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement. This legal characterization, however, does not affect the legal characterization of the part of the Decree banning asbestos nor our consideration of the rest of this case because Canada did not make any specific claims regarding the exceptions to the general ban.[15]

(…)

[15] For example, Canada did not claim that the WTO Agreement had been violated by the way in which France administered the exceptions. Moreover, the Panel notes that they are exceptional and temporary exemptions. They will disappear as and when reliable and effective substitute products are developed.

# WORLD TRADE ORGANIZATION

**WT/DS135/AB/R**
12 March 2001

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**EUROPEAN COMMUNITIES – MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS**

**AB-2000-11**

***Report of the Appellate Body***

To download the original report, visit *http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm*

(…)

**IV. Issues Raised in this Appeal**

(…)

58. This appeal raises the following issues:

(a) whether the Panel erred in its interpretation of the term "technical regulation" in Annex 1.1 of the *TBT Agreement* in finding, in paragraph 8.72(a) of the Panel Report, that "the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products" does not constitute a "technical regulation";(…)

(…)

**V. TBT Agreement**

(…)

60. In addressing this threshold issue, the Panel examined the nature and structure of the measure to assess how the *TBT Agreement* might apply to it. For this examination, the Panel decided that it would be appropriate to examine the measure in two stages. First, the Panel examined "the part of the Decree prohibiting the marketing of asbestos and asbestos-containing products"; next, the Panel analyzed the "exceptions" in the Decree. [16] The Panel concluded that the part of the Decree containing the prohibitions is *not* a "technical regulation", and that, therefore, the *TBT Agreement* does not apply to this part of the Decree. [17] However, the Panel also concluded that the part of the Decree containing the exceptions does constitute a "technical regulation", and that, therefore, the *TBT Agreement* applies to that part of the Decree. On this basis, the Panel decided not to examine Canada's claims under the *TBT Agreement* because, it said, those claims relate solely to the part of the Decree containing the prohibitions, which, in the Panel's view, does not constitute a "technical regulation", and, therefore, the *TBT Agreement* does not apply. [18]

61. In concluding that the part of the Decree containing the prohibitions is not a "technical regulation", the Panel found that:

> a measure constitutes a "technical regulation" if:
>
> (a) the measure affects one or more given products;
>
> (b) the measure specifies the technical characteristics of the product(s) which allow them to be marketed in the Member that took the measure;

[16]Panel Report, heading (a) on p. 404 and heading (b) on p. 411.

[17]*Ibid*., para. 8.72(a).

[18]*Ibid*., para. 8.72.

(c) compliance is mandatory. [19]

62. Canada appeals the Panel's finding that the *TBT Agreement* does not apply to the part of the Decree relating to the prohibitions on imports of asbestos and asbestos-containing products. According to Canada, the Panel erred in considering the part of the Decree relating to those prohibitions *separately* from the part of the Decree relating to the exceptions to those prohibitions, and, therefore, the Panel should have examined the Decree as a *single*, unified measure. Furthermore, Canada argues that the Panel erred in its interpretation of a "technical regulation", as defined in Annex 1.1 to the *TBT Agreement*, because, in Canada's view, a general prohibition can be a "technical regulation".

(…)

64. In our view, the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole. Article 1 of the Decree contains broad, general prohibitions on asbestos and products containing asbestos. However, the scope and generality of those prohibitions can only be understood in light of the exceptions to it which, albeit for a limited period, *permit, inter alia*, the use of certain products containing asbestos and, principally, products containing chrysotile asbestos fibres. (…)

65. Accordingly, we reverse the Panel's two-stage interpretive approach of examining, first, the application of the *TBT Agreement* to the prohibitions contained in the measure and, second and separately, its application to the exceptions contained in the measure.

66. We turn now to the term "technical regulation" and to the considerations that must go into interpreting the term. Article 1.2 of the *TBT Agreement* provides that, for the purposes of this Agreement, the meanings given in Annex 1 apply. Annex 1.1 of the *TBT Agreement* defines a "technical regulation" as a:

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

67. The heart of the definition of a "technical regulation" is that a "document" must "lay down" – that is, set forth, stipulate or provide – "product *characteristics*". (…) In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product. (…)

68. The definition of a "technical regulation" in Annex 1.1 of the *TBT Agreement* also states that "*compliance* " with the "product characteristics" laid down in the "document" must be "*mandatory* ". A "technical regulation" must, in other words, regulate the "characteristics" of products in a binding or compulsory fashion. (…)

69. "Product characteristics" may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products *must possess* certain "characteristics", or the document may require, negatively, that products *must not possess* certain "characteristics". In both cases, the legal result is the same: the document "lays down"

[19] *Ibid.*, para. 8.57.

certain binding "characteristics" for products, in one case affirmatively, and in the other by negative implication.

70. A "technical regulation" must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. (…) However, in contrast to what the Panel suggested, this does not mean that a "technical regulation" must apply to "*given*" products which are actually *named*, *identified* or *specified* in the regulation. [20] (emphasis added) Although the *TBT Agreement* clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a "technical regulation". (…)

71. With these considerations in mind, we examine whether the measure at issue is a "technical regulation". Decree 96-1133 aims primarily at the regulation of a named product, asbestos. The first and second paragraphs of Article 1 of the Decree impose a prohibition on asbestos *fibres*, as such. This prohibition on these *fibres* does not, *in itself*, prescribe or impose any "characteristics" on asbestos fibres, but simply bans them in their natural state. Accordingly, if this measure consisted *only* of a prohibition on asbestos *fibres*, it might not constitute a "technical regulation".

72. There is, however, more to the measure than this prohibition on asbestos *fibres*. It is not contested that asbestos fibres have no known use in their raw mineral form. [21] Thus, the regulation of asbestos can *only* be achieved through the regulation of *products that contain asbestos fibres*. This, too, is addressed by the Decree before us. An integral and essential aspect of the measure is the regulation of "*products containing asbestos fibres*", which are also prohibited by Article 1, paragraphs I and II of the Decree. It is important to note here that, although formulated *negatively* – products containing asbestos are prohibited – the measure, in this respect, effectively prescribes or imposes certain objective features, qualities or "characteristics" on *all* products. (…)

75. Viewing the measure as an integrated whole, we see that it lays down "characteristics" for all products that might contain asbestos, and we see also that it lays down the "applicable administrative provisions" for certain products containing chrysotile asbestos fibres which are excluded from the prohibitions in the measure. Accordingly, we find that the measure is a "document" which "lays down product characteristics … including the applicable administrative provisions, with which compliance is mandatory." For these reasons, we conclude that the measure constitutes a "technical regulation" under the *TBT Agreement*.

76. We, therefore, reverse the Panel's finding, in paragraph 8.72(a) of the Panel Report, that the *TBT Agreement* "does not apply to the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products because that part does not constitute a 'technical regulation' within the meaning of Annex 1.1 to the TBT Agreement."

77. We note, however – and we emphasize – that this does not mean that *all* internal measures covered by Article III:4 of the GATT 1994 "affecting" the "sale, offering for sale, purchase, transportation, distribution or use" of a product are, necessarily, "technical regulations" under the *TBT Agreement*. Rather, we rule

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[20]Panel Report, para. 8.57. We note that the Panel stated that a "technical regulation" must apply to "*identifiable*" products (Panel Report, para. 8.38; emphasis added). However, the Panel went on to state that a "technical regulation" must apply to "*given*" products (Panel Report, para. 8.57; emphasis added). The Panel also noted that the measure does not "identify *by name* nor even by function or category" the products covered by the measure (Panel Report, para. 8.40; emphasis added). Thus, in parts of the Panel Report, the Panel appears to require that a "technical regulation" apply to *given* products rather than *identifiable* products.

[21]Canada asserted that "chrysotile fibre has no use in its raw form; it serves as an input in the production of chrysotile materials" (Panel Report, paras. 3.418 and 3.439). This assertion is not contested by the European Communities.

only that this particular measure, the Decree at stake, falls within the definition of a "technical regulation" given in Annex 1.1 of that Agreement.

78. As we have reached a different conclusion from the Panel's regarding the applicability of the *TBT Agreement* to the measure, we now consider whether it is appropriate for us to rule on the claims made by Canada relating to the *TBT Agreement*. In previous appeals, we have, on occasion, completed the legal analysis with a view to facilitating the prompt settlement of the dispute, pursuant to Article 3.3 of the DSU. [22] However, we have insisted that we can do so only if the factual findings of the panel and the undisputed facts in the panel record provide us with a sufficient basis for our own analysis. If that has not been the case, we have not completed the analysis. [23]

79. The need for sufficient facts is not the only limit on our ability to complete the legal analysis in any given case. In *Canada – Periodicals*, we reversed the panel's conclusion that the measure at issue was inconsistent with Article III:2, first sentence, of the GATT 1994, and we then proceeded to examine the United States' claims under Article III:2, second sentence, which the panel had not examined at all. However, in embarking there on an analysis of a provision that the panel had not considered, we emphasized that "the first and second sentences of Article III:2 are *closely related* " and that those two sentences are "part of a *logical continuum*." [24] (emphasis added)

80. In this appeal, Canada's outstanding claims were made under Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement*. 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

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[22]See, for instance, Appellate Body Report, *United States – Gasoline*, *supra*, footnote 15, at 18 ff; Appellate Body Report, *Canada – Certain Measures Concerning Periodicals* ("*Canada – Periodicals*"), WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, at 469 ff; Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*European Communities – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 222 ff; Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, paras. 156 ff; Appellate Body Report, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/AB/R, adopted 6 November 1998, paras. 117 ff, 193 ff and 227 ff; Appellate Body Report, *United States – Shrimp*, *supra*, footnote 14, paras. 123 ff; Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, paras. 112 ff; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, paras. 133 ff; Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, paras. 43 ff; and Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*United States – Wheat Gluten*"), WT/DS166/AB/R, adopted 19 January 2001, paras. 80 ff and 127 ff.

In addition, after modifying the panel's reasoning, we have, on occasion, applied our interpretation of the legal provisions at issue to the facts of the case (see, for instance, Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted 22 April 1998, paras. 48 ff; Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 October 1999, paras. 138 ff; Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, paras. 109 ff).

[23]See Appellate Body Report, *Australia – Salmon*, *supra*, footnote 48, paras. 209 ff, 241 ff and 255; Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, paras. 91 ff and 102 ff; Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, paras. 133 ff and 144 ff; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("*Korea – Beef*"), WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paras. 128 ff.

[24]*Supra*, footnote 48, at 469.

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.

81. As the Panel decided not to examine Canada's four claims under the *TBT Agreement*, it made no findings, at all, regarding any of these claims. Moreover, the meaning of the different obligations in the *TBT Agreement* has not previously been the subject of any interpretation or application by either panels or the Appellate Body. Similarly, the provisions of the Tokyo Round *Agreement on Technical Barriers to Trade*, which preceded the *TBT Agreement* and which contained obligations similar to those in the *TBT Agreement*, were also never the subject of even a single ruling by a panel.

82. In light of their novel character, we consider that Canada's claims under the *TBT Agreement* have not been explored before us in depth. As the Panel did not address these claims, there are no "issues of law" or "legal interpretations" regarding them to be analyzed by the parties, and reviewed by us under Article 17.6 of the DSU. We also observe that the sufficiency of the facts on the record depends on the reach of the provisions of the *TBT Agreement* claimed to apply – a reach that has yet to be determined.

83. With this particular collection of circumstances in mind, we consider that we do not have an adequate basis properly to examine Canada's claims under Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement* and, accordingly, we refrain from so doing.

(…)

## 3. EC – Sardines (2002)


# WORLD TRADE ORGANIZATION

**WT/DS231/AB/R**
26 September 2002

(02-5137)

Original:


## European Communities – Trade Description of Sardines

## AB-2002-3

***Report of the Appellate Body***

WORLD TRADE ORGANIZATION
APPELLATE BODY

**European Communities – Trade Description of Sardines**

European Communities, *Appellant*
Peru, *Appellee*

Canada, *Third Participant*
Chile, *Third Participant*
Ecuador, *Third Participant*
United States, *Third Participant*
Venezuela, *Third Participant*

AB-2002-3

Present:

Bacchus, Presiding Member
Abi-Saab, Member
Baptista, Member

## I.Introduction

1.The European Communities appeals from certain issues of law and legal interpretations in the Panel Report, *European Communities – Trade Description of Sardines* (the "Panel Report").[25]

2.This dispute concerns the name under which certain species of fish may be marketed in the European Communities. The measure at issue is Council Regulation (EEC) 2136/89 (the "EC Regulation"), which was adopted by the Council of the European Communities on 21 June 1989 and became applicable on 1 January 1990.[26] The EC Regulation sets forth common marketing standards for preserved sardines.

3.Article 2 of the EC Regulation provides that:

> Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:
>
> – they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
>
> – *they must be prepared exclusively from fish of the species "Sardina pilchardus Walbaum"*;
>
> – they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
>
> – they must be sterilized by appropriate treatment. (emphasis added)

4.*Sardina pilchardus* Walbaum ("*Sardina pilchardus*"), the fish species refered to in the EC Regulation, is found mainly around the coasts of the Eastern North Atlantic Ocean, in the Mediterranean Sea, and in the Black Sea.[27]

5.In 1978, the Codex Alimentarius Commission (the "Codex Commission"), of the United Nations Food and Agriculture Organization and the World Health Organization, adopted a world-wide standard for preserved sardines and sardine-type products, which regulates matters such as presentation, essential

[25]WT/DS231/R, 29 May 2002, WT/DS231/R/Corr.1, 10 June 2002.
[26]OJ No L 212, 22.07.1989, reproduced as Annex 1 to the Panel Report, pp. 79–81.
[27]Panel Report, para. 2.2.

composition and quality factors, food additives, hygiene and handling, labelling, sampling, examination and analyses, defects and lot acceptance. This standard, CODEX STAN 94–1981, Rev.1–1995 ("Codex Stan 94"), covers preserved sardines or sardine-type products prepared from the following 21 fish species:

– *Sardina pilchardus*

– *Sardinops melanostictus, S. neopilchardus, S. ocellatus, S. sagax*[,] *S. caeruleus*

(…)

6.Section 6 of Codex Stan 94 provides as follows:

> 6. LABELLING
>
> In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 3-1999) the following special provisions apply:
>
> 6.1 NAME OF THE FOOD
>
> The name of the product shall be:
>
> 6.1.1 (i) *"Sardines" (to be reserved exclusively for Sardina pilchardus (Walbaum)); or*
>
> (ii) *"X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.*
>
> 6.1.2 The name of the packing medium shall form part of the name of the food.
>
> 6.1.3 If the fish has been smoked or smoke flavoured, this information shall appear on the label in close proximity to the name.

> 6.1.4 In addition, the label shall include other descriptive terms that will avoid misleading or confusing the consumer. [28] (emphasis added)

7.Peru exports preserved products prepared from *Sardinops sagax sagax* ("*Sardinops sagax*"), one of the species of fish covered by Codex Stan 94. This species is found mainly in the Eastern Pacific Ocean, along the coasts of Peru and Chile. [29]

(…)

9.The Panel in this dispute was established on 24 July 2001. Before the Panel, Peru argued that the EC Regulation is inconsistent with Articles 2.4, 2.2 and 2.1 of the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement* ") and Article III:4 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). [30]

10.In the Panel Report circulated to Members of the World Trade Organization (the "WTO") on 29 May 2002, the Panel found that the EC Regulation is inconsistent with Article 2.4 of the *TBT Agreement*, and exercised judicial economy in respect of Peru's claims under Articles 2.2 and 2.1 of the *TBT Agreement* and III:4 of the GATT 1994. [31] The Panel, therefore, recommended that the Dispute

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[28]We note, however, that the text of Codex Stan 94, published in the print version of the Codex Alimentarius, presents certain differences in respect to the version used by the Panel and submitted by Peru to the Panel as Exhibit PERU-3. Section 6 published in the print version of the Codex Alimentarius reads as follows:

> 6. LABELLING
>
> In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, *Rev. 1-1991*) the following *specific* provisions apply:
>
> 6.1 NAME OF THE FOOD
>
> The name of the product shall be:
>
> 6.1.1 (i) "Sardines" (to be reserved exclusively for Sardina pilchardus (Walbaum)); or
>
> (ii) "X sardines" *where "X" is the name of* a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.
>
> 6.1.2 The name of the packing medium shall form part of the name of the food.
>
> 6.1.3 If the fish has been smoked or smoke flavoured, this information shall appear on the label in close proximity to the name.
>
> 6.1.4 In addition, the label shall include other descriptive terms that will avoid misleading or confusing the consumer. (emphasis added)

(Codex Alimentarius (Secretariat of the Joint FAO/WHO Food Standards Programme, 2001), Volume 9A, Fish and Fishery Products, pp. 75–81)

[29]Panel Report, para. 2.2.

[30]*Ibid*., para. 3.1.

[31]*Ibid*., paras. 8.1 and 7.152.

Settlement Body (the "DSB") request the European Communities to bring its measure into conformity with its obligations under the *TBT Agreement*.[32]

(…)

## III.Issues Raised in this Appeal

134.This appeal raises the following issues:

> (…)
>
> (c) whether the Panel erred by finding that Council Regulation (EEC) 2136/89 (the "EC Regulation") is a "technical regulation" within the meaning of Annex 1.1 of the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*");
>
> (d) whether the Panel erred by finding that Article 2.4 of the *TBT Agreement* applies to existing measures, such as the EC Regulation;
>
> (e) whether the Panel erred by finding that CODEX STAN 94–1981, Rev.1–1995 ("Codex Stan 94") is a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*;
>
> (f) whether the Panel erred by finding that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the *TBT Agreement*;
>
> (g) whether the Panel correctly interpreted and applied the second part of Article 2.4 of the *TBT Agreement*, which allows Members not to 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";
>
> (…)

## V.The Characterization of the EC Regulation as a "Technical Regulation"

171.We now turn to whether the Panel erred by finding that the EC Regulation is a "technical regulation" for purposes of Article 2.4 of the *TBT Agreement*. We recall that we have described the measure at issue—the EC Regulation—earlier in this Report.[33]

172.The Panel found that:

> … the EC Regulation is a technical regulation as it lays down product characteristics for preserved sardines and makes compliance with the provisions contained therein mandatory.[34]

173.The European Communities does not contest that the EC Regulation is a "technical regulation" *per se*.[35] Instead, on appeal, the European Communities reiterates two arguments that the Panel rejected.

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[32]*Ibid.*, para. 8.3.
[33]*Supra*, paras. 2–3.
[34]Panel Report, para. 7.35.
[35]European Communities' appellant's submission, paras. 21 and 23; European Communities' statement at the oral hearing.

First, the European Communities argues that the product coverage of the EC Regulation is limited to preserved *Sardina pilchardus*. The European Communities contends that the EC Regulation does not regulate preserved fish made from *Sardinops sagax* or from any other species, and that, accordingly, *Sardinops sagax* is not an *identifiable* product under the EC Regulation.[36] The European Communities concludes that, in the light of our ruling in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("*EC – Asbestos*")[37] that a "technical regulation" must apply to *identifiable* products, the EC Regulation is not a "technical regulation" for *Sardinops sagax*.[38]

174. Second, the European Communities contends that a "naming" rule is distinct from a labelling requirement. The European Communities argues that, "[t]he requirement to state a certain name on the label … involves not only a labelling requirement but also a substantive naming rule, which is not subject to the TBT Agreement."[39] Thus, according to the European Communities, even if it were determined that the EC Regulation relates to *Sardinops sagax*, the "naming" rule set out in Article 2 of the EC Regulation—the provision challenged by Peru—is not a product characteristic.[40] On this basis, the European Communities argues that Article 2 of the EC Regulation—which the European Communities contends sets out a "naming" rule and not a labelling requirement—does not meet the definition of the term "technical regulation" provided in the *TBT Agreement*.[41]

175. As we explained in *EC – Asbestos*, whether a measure is a "technical regulation" is a threshold issue because the outcome of this issue determines whether the *TBT Agreement* is applicable.[42] If the measure before us is not a "technical regulation", then it does not fall within the scope of the *TBT Agreement*.[43] The term "technical regulation" is defined in Annex 1.1 to the *TBT Agreement* as follows:

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[36] European Communities' response to questioning at the oral hearing.
[37] Appellate Body Report, *supra*, footnote.
[38] European Communities' appellant's submission, para. 49.
[39] European Communities' statement at the oral hearing.
[40] Article 2 of the EC Regulation reads as follows:

> Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:
>
> – they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
>
> – they must be prepared exclusively from fish of the species "*Sardina pilchardus* Walbaum";
>
> – they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
>
> – they must be sterilized by appropriate treatment.

[41] European Communities' statement at the oral hearing.
[42] Appellate Body Report, *supra*, footnote, para. 59.
[43] The *TBT Agreement* covers also "standards" and "conformity assessment procedures". However, none of the participants has alleged that the measure at issue in this dispute is either a "standard" or a "conformity assessment procedure".

*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.

176.We interpreted this definition in *EC – Asbestos*.[44] In doing so, we set out *three criteria* that a document must meet to fall within the definition of "technical regulation" in the *TBT Agreement*. *First*, the document must apply to an identifiable product or group of products. The *identifiable* product or group of products need not, however, be expressly *identified* in the document. *Second*, the document must lay down one or more characteristics of the product. (…) *Third*, compliance with the product characteristics must be mandatory. (…)

178.We begin with the European Communities' contention that the EC Regulation is a "technical regulation" only for preserved *Sardina pilchardus*, and that preserved *Sardinops sagax* is not an identifiable product under the EC Regulation.

179.The Panel rejected this argument because, in the Panel's view, it:

> … disregards the notion that a document may prescribe or impose product characteristics in either a positive or negative form — that is, by inclusion or by exclusion.[45] (footnote omitted)

The Panel then concluded that:

> … by requiring the use of only the species *Sardina pilchardus* as preserved sardines, *the EC Regulation in effect lays down product characteristics in a negative form*, that is, by excluding other species, such as *Sardinops sagax*, from being "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. *It is for this reason that we do not accept the European Communities' argument that the EC Regulation is not a technical regulation for preserved Sardinops sagax*. This argument would be persuasive only if technical regulations were to lay down product characteristics in a positive form.[46] (emphasis added)

This excerpt from the Panel Report suggests that the Panel examined the European Communities' argument on this issue in the light of the *second* criterion, which requires that a document lay down product characteristics.[47] In our view, the European Communities' argument, as presented on appeal, relates rather

[44]Appellate Body Report, *supra*, footnote, paras. 66–70.
[45]Panel Report, para. 7.44.
[46]*Ibid.*, para. 7.45.
[47]Before examining this argument, the Panel had concluded that the EC Regulation applies to an identifiable product because it *identifies* preserved sardines. (*Ibid.*, para. 7.26)

to the *first* criterion: the European Communities is claiming that preserved *Sardinops sagax* is not an identifiable product under the EC Regulation.[48]

180.In *EC – Asbestos*, we made the following observations about the requirement that a document apply to identifiable products:

> A "technical regulation" must, of course, be applicable to an *identifiable* product, or group of products. (…) However, in contrast to what the Panel suggested, this does not mean that a "technical regulation" must apply to "*given*" products which are actually *named*, *identified* or *specified* in the regulation. (emphasis added) Although the *TBT Agreement* clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a "technical regulation". Moreover, there may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the "characteristic" that is the subject of regulation.[49] (original emphasis; footnote omitted)

Thus, a product does not necessarily have to be mentioned *explicitly* in a document for that product to be an *identifiable* product. *Identifiable* does not mean expressly identified.

181.(…) The European Communities is of the view that preserved *Sardina pilchardus* and preserved *Sardinops sagax* are not like products. The European Communities reasons that preserved *Sardinops sagax* can neither be an identified nor an identifiable product under the EC Regulation.[50]

182.In our view, the Panel correctly found that the EC Regulation is applicable to an identified product, and that the identified product is "preserved sardines". (…)

183.This alone, however, does not dispose of the European Communities' argument, as the European Communities reproaches the Panel for failing to acknowledge that the EC Regulation uses the term "preserved sardines" to mean—exclusively—preserved *Sardina pilchardus*. We observe that the EC Regulation does not expressly identify *Sardinops sagax*. However, this does not necessarily mean that *Sardinops sagax* is not an *identifiable* product. As we stated in *EC – Asbestos*, a product need not be expressly identified in the document for it to be *identifiable*.[51]

184.Even if we were to accept, for the sake of argument, the European Communities' contention that the term "preserved sardines" in the EC Regulation refers exclusively to preserved *Sardina pilchardus*, the EC Regulation would still be applicable to a range of *identifiable* products beyond *Sardina pilchardus*. This is because preserved products made, for example, of *Sardinops sagax* are, by virtue of the EC Regulation, *prohibited* from being identified and marketed under an appellation including the term "sardines".

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[48]European Communities' appellant's submission, paras. 43–47.

[49]Appellate Body Report, *supra*, footnote, para 70.

[50]*Ibid.*, para. 49.

[51]Appellate Body Report, *EC – Asbestos*, *supra*, footnote, para. 70.

185.As we explained in *EC – Asbestos*, the requirement that a "technical regulation" be applicable to *identifiable* products relates to aspects of compliance and enforcement, because it would be impossible to comply with or enforce a "technical regulation" without knowing to what the regulation applied.[52] As the Panel record shows, the EC Regulation has been enforced against preserved fish products imported into Germany containing *Sardinops sagax*.[53] This confirms that the EC Regulation is applicable to preserved *Sardinops sagax*, and demonstrates that preserved *Sardinops sagax* is an *identifiable product* for purposes of the EC Regulation. Indeed, the European Communities admits that the EC Regulation is applicable to *Sardinops sagax*, when it states in its appellant's submission that "[t]he only legal consequence of the [EC] Regulation for preserved *Sardinops sagax* is that they may not be called 'preserved sardines'."[54]

186.Therefore, we reject the contention of the European Communities that preserved *Sardinops sagax* is not an identifiable product under the EC Regulation.

187.Next, we examine whether the EC Regulation meets the second criterion of a "technical regulation", which is that it must be a document that lays down product characteristics. According to the European Communities, Article 2 of the EC Regulation does not lay down product characteristics; rather, it sets out a "naming" rule. The European Communities argues that, although the definition of "technical regulation" in the *TBT Agreement* covers labelling requirements, it does not extend to "naming" rules. Therefore, the European Communities asserts that Article 2 of the EC Regulation is not a "technical regulation".[55]

188.The Panel rejected this assertion for two reasons. First, the Panel stated:

> … even if it were determined that the EC Regulation does not contain a labelling requirement, it cannot detract from our conclusion that the EC Regulation constitutes a technical regulation because that conclusion is based on our finding that it lays down certain product characteristics we have already identified. (…)[56]

The Panel continued:

> Second, we fail to see the basis on which a distinction can be drawn between a requirement to "name" and a requirement to "label" a product for the purposes of the TBT Agreement. (…)[57] (footnotes omitted)

(…)

190.We do not find it necessary, in this case, to decide whether the definition of "technical regulation" in the *TBT Agreement* makes a distinction between "naming" and labelling. This question is irrelevant to the issue before us. (…)

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[52]*Ibid.*
[53]Letter from German importer submitted as Exhibit PERU-13 by Peru to the Panel. Reference to this is also found in Peru's first submission to the Panel, paras. 5–7; Peru's second submission to the Panel, para. 12; Peru's appellee's submission, para. 60; and Peru's response to questioning at the oral hearing.
[54]European Communities' appellant's submission, para 43.
[55]European Communities' statement at the oral hearing.
[56]Panel Report, para. 7.39.
[57]*Ibid.*, paras. 7.40–7.41.

191.In any event, as we said in *EC – Asbestos*, a "means of identification" *is* a product characteristic.[58] A name clearly identifies a product; indeed, the European Communities concedes that a name is a "means of identification".[59] (…)

193.For all these reasons, we agree with the Panel's conclusion that the EC Regulation lays down product characteristics.

194.The third and final criterion that a document must fulfil to meet the definition of "technical regulation" in the *TBT Agreement* is that compliance must be mandatory. The European Communities does not contest that compliance with the EC Regulation is mandatory.[60] We also find that it is mandatory.[61]

195.We, therefore, uphold the Panel's finding, in paragraph 7.35 of the Panel Report, that the EC Regulation is a "technical regulation" for purposes of the *TBT Agreement*, because it meets the three criteria we set out in *EC – Asbestos* as necessary to satisfy the definition of a "technical regulation" under the *TBT Agreement*.

## VI.The Temporal Scope of Application of Article 2.4 of the TBT Agreement

196.We turn now to the European Communities' claim that Article 2.4 of the *TBT Agreement* does not apply to pre-existing technical regulations because it deals only with the *preparation* and *adoption* of technical regulations and not with their continued application. On this issue, we begin by recalling that the EC Regulation and Codex Stan 94 came into effect before the entry into force of the *TBT Agreement* on 1 January 1995.

197.The Panel found that:

> …the EC Regulation is a "situation or measure that did not cease to exist" and the TBT Agreement does not reveal a contrary intention to limit the temporal application of the TBT Agreement to measures adopted after 1 January 1995.
>
> Therefore, Article 2.4 of the TBT Agreement applies to measures that were adopted before 1 January 1995 but which have not ceased to exist.[62]

(…)

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[58]Appellate Body Report, *supra*, footnote, para. 67.
[59]European Communities' response to questioning at the oral hearing. The European Communities argues that the distinction between a labelling requirement and a "naming" rule is similar to the difference between, on the one hand, requirements relating to markings indicating the origin of a product, and, on the other hand, rules used to determine the origin of a product. We are not persuaded by this analogy. A "naming" rule bears no similarity to a rule of origin. A name is a clear means of identifying a product. Furthermore, as the facts of this case illustrate, affixing a name to the label of a product is a highly practical way of identifying a product when goods are marketed. Indeed, Codex Stan 94 includes the provisions relating to the name of the product—that is, section 6.1—within the section dealing with labelling generally.
[60]European Communities' response to questioning at the oral hearing.
[61]Article 9 of the EC Regulation states in relevant part that "[t]his Regulation shall be binding in its entirety and directly applicable in all Member States."
[62]Panel Report, paras. 7.59–7.60.

200.We recall that Article 28 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")[63] provides that treaties generally do not apply retroactively. Article 28 provides:

*Non-retroactivity of treaties*

> Unless a different intention appears from the treaty or is otherwise 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. (emphasis added)

As we have said in previous disputes[64], the interpretation principle codified in Article 28 is relevant to the interpretation of the covered agreements.

201.In the European Communities' view, both the text and the context of Article 2.4 make plain that the scope of application of Article 2.4 is limited to the *preparation* and *adoption* of technical regulations, and not to their *maintenance*.[65] (…)

202.The text of Article 2.4 of the *TBT Agreement* provides as follows:

TECHNICAL REGULATIONS AND STANDARDS

*Article 2*

*Preparation, Adoption and Application of Technical Regulations by Central Government Bodies*

With respect to their central government bodies:

…

> 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.

(…)

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[63]*Supra*, footnote.

[64]Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167, at 179–180; Appellate Body Report, *Canada – Term of Patent Protection*, WT/DS170/AB/R, adopted 12 October 2000, paras. 71–72; Appellate Body Report, *EC – Hormones*, *supra*, footnote, para. 128.

[65]European Communities' appellant's submission, paras. 66–83.

204.The Panel took a contrary view, and concluded that a textual reading does not support the European Communities' assertion because:

> Article 2.4 of the TBT Agreement starts with the language "where technical regulations are required". We construe this expression to cover technical regulations that are already in existence as it is entirely possible that a technical regulation that is already in existence can continue to be required. … Moreover, we note that the first part of the sentence of Article 2.4 is in the present tense ("exist") and not in the past tense — "[w]here technical regulations are required and relevant international standards *exist or their completion is imminent*", Members are obliged to use such international standards as a basis. (…)

205.We concur with the Panel's view that the text of Article 2.4 of the *TBT Agreement* does not support the European Communities' contention. (…)

207.Like the sanitary measure in *EC – Hormones*, the EC Regulation is currently in force. The European Communities has conceded that the EC Regulation is an act or fact that has not "ceased to exist".[66] Accordingly, following our reasoning in *EC – Hormones*, Article 2.4 of the *TBT Agreement* applies to existing measures unless that provision "reveals a contrary intention".[67] As we have said, we see nothing in Article 2.4 which would suggest that the provision does not apply to existing measures.

208.Furthermore, like Articles 5.1 and 5.5 of the *SPS Agreement*, Article 2.4 is a "central provision" of the *TBT Agreement*, and it cannot just be assumed that such a central provision does not apply to existing measures. Again, following our reasoning in *EC – Hormones*, we must conclude that, if the negotiators had wanted to exempt the very large group of existing technical regulations from the disciplines of a provision as important as Article 2.4 of the *TBT Agreement*, they would have said so explicitly.[68] (…)

210.Having considered the European Communities' arguments based on the text of Article 2.4, we turn to examine the arguments of the European Communities that are based on the context of that provision. The European Communities argues that Article 2.5 of the *TBT Agreement* demonstrates that, when a provision is intended to cover the *application* of technical regulations, the provision says so explicitly. The European Communities finds similar contextual support in Article 12.4 of the *TBT Agreement*, which uses the word "adopt", and in paragraph F of the Code of Good Practice for the Preparation, Adoption and Application of Standards, included as Annex 3 to the *TBT Agreement*, which uses the word "develops".[69]

211.In discussing what it considered the relevant context of Article 2.4, the Panel looked first to Article 2.5 of the *TBT Agreement*:

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[66]European Communities' response to questioning at the oral hearing.
[67]Appellate Body Report, *supra*, footnote, para. 128.
[68]*Ibid*.
[69]European Communities' appellant's submission, paras. 75–78; European Communities' statement at the oral hearing. We note that, although the European Communities refered, in its statement at the oral hearing, to paragraph B of the Code of Good Practice for the Preparation, Adoption and Application of Standards as including the word "develops", this word is found in paragraph F.

> There is contextual support for the interpretation that Article 2.4 applies to technical regulations that are already in existence. The context provided by Article 2.5, which explicitly refers to Article 2.4, speaks of "preparing, adopting or *applying*" a technical regulation and is not limited to, as the European Communities claims, to preparing and adopting. A technical regulation can only be applied if it is already in existence. (…) The use of the term "apply", in our view, confirms that the requirement contained in Article 2.4 is applicable to existing technical regulations. [70] (original emphasis)

The Panel also looked to Article 2.6 of the *TBT Agreement*:

> Article 2.6 provides another contextual support. It states that Members are to participate in preparing international standards by the international standardizing bodies for products which they have either "*adopted*, or expect to adopt technical regulations." (…) Article 2.6 would be redundant and it would be contrary to the principle of effectiveness, which is a corollary of the general rule of interpretation in the Vienna Convention, if a Member is 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. Such reasoning would allow Members to avoid using international standards as a basis for their technical regulations simply by enacting preemptive measures and thereby undermine the object and purpose of developing international standards. [71] (original emphasis)

212.We agree with the Panel's analysis. Thus, we find no support for the European Communities' claim in the context of Article 2.4 of the *TBT Agreement*. Rather than supporting the European Communities' argument, Articles 2.5 and 2.6 of the *TBT Agreement* provide support for the argument advanced by Peru that Article 2.4 of the *TBT Agreement* regulates measures adopted before the date of the entry into force of the *TBT Agreement*. (…)

213.Moreover, as general context for all the covered agreements, Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* is of great significance. Article XVI:4 reads:

> Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

This provision establishes a clear obligation for all WTO Members to ensure the conformity of their existing laws, regulations, and administrative procedures with the obligations in the covered agreements.

[70]Panel Report, para. 7.75.
[71]*Ibid.*, para. 7.76.

214.In our view, the European Communities' reading of Article 2.4 also flies in the face of the object and purpose of the *TBT Agreement*. In several of its provisions, the *TBT Agreement* recognizes the important role that international standards play in promoting harmonization and facilitating trade. For example, Article 2.5 of the *TBT Agreement* establishes a rebuttable presumption that technical regulations that are in accordance with relevant international standards do not create unnecessary obstacles to trade. Article 2.6, for its part, encourages Members to participate in international standardizing bodies with a view to harmonizing technical regulations on as wide a basis as possible.

215.The significant role of international standards is also underscored in the Preamble to the *TBT Agreement*. The third recital of the Preamble recognizes the important contribution that international standards can make by improving the efficiency of production and facilitating the conduct of international trade. The eighth recital recognizes the role that international standardization can have in the transfer of technology to developing countries. In our view, excluding existing technical regulations from the obligations set out in Article 2.4 would undermine the important role of international standards in furthering these objectives of the *TBT Agreement*. Indeed, it would go precisely in the opposite direction.

216.For all these reasons, we uphold the Panel's finding, in paragraph 7.60 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to measures that were adopted before 1 January 1995 but which have not ceased to exist, such as the EC Regulation. We also uphold the Panel's finding, in paragraph 7.83 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to existing technical regulations, including the EC Regulation.

## VII.The Characterization of Codex Stan 94 as a "Relevant International Standard"

217.We proceed to the European Communities' claim that the Panel erred in finding that Codex Stan 94 is a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*.

218.The Panel found that "Codex Stan 94 is a relevant international standard".[72] The European Communities challenges this finding for two reasons. The European Communities asserts, first, that only standards adopted by international bodies by consensus are "relevant international standards" under Article 2.4 of the *TBT Agreement*.[73] The European Communities argues that the Panel assumed "that Codex Stan 94 … was adopted by consensus … without undertaking positive steps to verify the accuracy of the conflicting statements made in this respect by the parties".[74] Second, the European Communities asserts that, even if Codex Stan 94 were considered an international standard, it is not a "*relevant* international standard" because its product coverage is different from that of the EC Regulation. The European Communities contends that the EC Regulation covers only preserved sardines, while Codex Stan 94 covers that product as well as "sardine-type" products.[75] We will address each of these arguments in turn.

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[72]Panel Report, para. 7.70.

[73]European Communities' appellant's submission, para. 123.

[74]*Ibid.*, para. 134.

[75]This argument is based on the European Communities' interpretation of Codex Stan 94, which differs from that of the Panel. The European Communities explains that when Codex Stan 94 was in draft form, and particularly when it was at Step 7 of the elaboration procedures of the Codex Commission, it provided three naming options: (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus*); (ii) "X Sardines", where "X" is the name of a country, a geographic area, or the species; and (iii) the common name of the species. The European Communities claims that the first two options—"Sardines" and "X Sardines"—apply to sardine products, while the third option—the common name of the species—was envisaged as a separate option for "*sardine-type products*". Given that only editorial changes are allowed between Steps 7 and 8 of the elaboration procedures, when the second and third options were

A.The European Communities' Argument that Consensus is Required

(…)

220.(…), in our view, the European Communities' contention is essentially related to whether Codex Stan 94 meets the definition of a "standard" in Annex 1.2 of the *TBT Agreement*. The term "standard", is defined in Annex 1.2 as follows:

> *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*. (emphasis added)

(…)

222.The Panel interpreted the last two sentences of the Explanatory note as follows:

> The first sentence reiterates the norm of the international standardization community that standards are prepared on the basis of consensus. The following sentence, however, acknowledges that consensus may not always be achieved and that international standards that were not adopted by consensus are within the scope of the TBT Agreement.[86] This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a relevant international standard.

[86] The record does not demonstrate that Codex Stan 94 was not adopted by consensus. In any event, we consider that this issue would have no bearing on our determination in light of the explanatory note of paragraph 2 of Annex 1 of

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merged, the European Communities alleges that the draft standard at Step 7 should guide the interpretation of Codex Stan 94, even though the text approved at Step 8 includes the common name of the species in the same subsection as "X Sardines". (European Communities' appellant's submission, paras. 135–148; European Communities' response to questioning at the oral hearing) The Panel's interpretation of Codex Stan 94 focuses on its final version. The Panel is of the view that the "common name of the species" is part of the "X Sardines" option. (See *infra*, paras. 235–239)

> the TBT Agreement which states that the TBT Agreement covers "documents that are not based on consensus". [76]

We agree with the Panel's interpretation. In our view, the text of the Explanatory note supports the conclusion that consensus is not required for standards adopted by the international standardizing community. (…)

224.The Panel's interpretation, moreover, gives effect to the chapeau of Annex 1 to the *TBT Agreement*, which provides:

> 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 …
>
> For the purpose of this Agreement, *however*, the following definitions shall apply … (emphasis added)

Thus, according to the chapeau, the terms defined in Annex 1 apply for the purposes of the *TBT Agreement* only if their definitions *depart* from those in the ISO/IEC Guide 2:1991 (the "ISO/IEC Guide"). [77] This is underscored by the word "however". The definition of a "standard" in Annex 1 to the *TBT Agreement* departs from that provided in the ISO/IEC Guide precisely in respect of whether consensus is expressly required.

225.The term "standard" is defined in the ISO/IEC Guide as follows:

> Document, established by *consensus* and approved by a recognized *body*, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context. [78] (original emphasis)

Thus, the definition of a "standard" in the ISO/IEC Guide expressly includes a consensus requirement. Therefore, the logical conclusion, in our view, is that the *omission* of a consensus requirement in the definition of a "standard" in Annex 1.2 of the *TBT Agreement* was a deliberate choice on the part of the drafters of the *TBT Agreement*, and that the last two phrases of the Explanatory note were included to give effect to this choice. Had the negotiators considered consensus to be necessary to satisfy the definition of "standard", we believe they would have said so explicitly in the definition itself, as is the case in the ISO/IEC Guide. Indeed, there would, in our view, have been no point in the negotiators adding the last sentence of the Explanatory note.

(…)

[76]Panel Report, para. 7.90 and footnote 86 thereto.
[77]ISO/IEC Guide (6th edition, 1991), submitted as Exhibit EC-1 to the European Communities' appellant's submission.
[78]*Ibid.*, subclause 3.2.

227.Therefore, we uphold the Panel's conclusion, in paragraph 7.90 of the Panel Report, that the definition of a "standard" in Annex 1.2 to the *TBT Agreement* does not require approval by consensus for standards adopted by a "recognized body" of the international standardization community. We emphasize, however, that this conclusion is relevant only for purposes of the *TBT Agreement*. (…)

B.The European Communities' Argument on the Product Coverage of Codex Stan 94

228.We turn now to examine the European Communities' argument that Codex Stan 94 is not a "*relevant* international standard" because its product coverage is different from that of the EC Regulation.

(…)

230.We do not disagree with the Panel's interpretation of the ordinary meaning of the term "relevant". Nor does the European Communities.[79] Instead, the European Communities argues that, although the EC Regulation deals *only* with preserved sardines—understood to mean exclusively preserved *Sardina pilchardus*—Codex Stan 94 *also covers* other preserved fish that are "sardine-type".[80]

231.We are not persuaded by this argument. First, even if we accepted that the EC Regulation relates only to preserved *Sardina pilchardus*, which we do not, the fact remains that section 6.1.1(i) of Codex Stan 94 also relates to preserved *Sardina pilchardus*. Therefore, Codex Stan 94 can be said to bear upon, relate to, or be pertinent to the EC Regulation because both refer to preserved *Sardina pilchardus*.

232.Second, we have already concluded that, although the EC Regulation expressly mentions only *Sardina pilchardus*, it has legal consequences for other fish species that could be sold as preserved sardines, including preserved *Sardinops sagax*.[81] Codex Stan 94 covers 20 fish species in addition to *Sardina pilchardus*.[82] These other species also are legally affected by the exclusion in the EC Regulation. Therefore, we conclude that Codex Stan 94 bears upon, relates to, or is pertinent to the EC Regulation.

233.For all these reasons, we uphold the Panel's finding, in paragraph 7.70 of the Panel Report, that Codex Stan 94 is a "relevant international standard" for purposes of Article 2.4 of the *TBT Agreement*.

## VIII.Whether Codex Stan 94 Was Used "As a Basis For" the EC Regulation

234.We turn now to whether Codex Stan 94 has been used "as a basis for" the EC Regulation. It will be recalled that Article 2.4 of the *TBT Agreement* requires Members to use relevant international standards "as a basis for" their technical regulations under certain circumstances. The Panel found that "the relevant international standard, i.e., Codex Stan 94, was not used as a basis for the EC Regulation".[83] The European Communities appeals this finding.

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[79]European Communities' response to questioning at the oral hearing.
[80]*Ibid.*
[81]See *supra*, paras. 184–185.
[82]The fish species covered by Codex Stan 94 are listed in section 2.1.1 thereto. (*Supra*, footnote) See also, *supra*, para. 5.
[83]Panel Report, para. 7.112.

235.The starting point of the Panel's analysis was the interpretation of section 6.1.1(ii) of Codex Stan 94, which reads as follows:

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

236.Two interpretations of section 6.1.1(ii) of Codex Stan 94 were submitted to the Panel. The European Communities argued that the phrase "the common name of the species in accordance with the law and custom of the country in which the product is sold", found in section 6.1.1(ii) of Codex Stan 94, is intended as a self-standing option for "naming", independent of the formula "X sardines", and that, under this section, "each country has the option of choosing between 'X sardines' and the common name of the species". [84]

237.For its part, Peru contended that, under section 6.1.1(ii), the species other than *Sardina pilchardus* to which Codex Stan 94 refers may be marketed as "X sardines" where "X" is one of the four following alternatives: (1) a country; (2) a geographic area; (3) the species; or (4) the common name of the species. [85] Thus, in Peru's view, "the common name of the species" is not a stand-alone option for naming, but rather is one of the qualifiers for naming sardines that are not *Sardina pilchardus*. (…)

238.The Panel was of the view that a textual reading of section 6.1.1(ii) favoured the interpretation advocated by Peru, adding that:

> We consider that paragraph 6.1.1(ii) of Codex Stan 94 contains four alternatives and each alternative envisages the use of the term "sardines" combined with the name of a country, name of a geographic area, name of the species or the common name of the species in accordance with the law and custom of the country in which the product is sold. [86]

239.We agree with Peru and with the Panel that section 6.1.1(ii) permits the marketing of non-*Sardina pilchardus* as "sardines" with one of four qualifiers. The French version of section 6.1.1(ii) supports this approach. It provides:

> "Sardines X", "X" désignant un pays, une zone géographique, l'espèce ou le nom commun de l'espèce en conformité des lois et usages du pays où le produit est vendu, de manière à ne pas induire le consommateur en erreur.

The French language is one official language of the Codex Commission. The French and English versions are equally authentic. The French version is drafted in a manner that puts all four qualifiers on an equal

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[84]*Ibid.*, para. 7.101. See also, *supra*, footnote 75, explaining why the European Communities interprets this as a stand-alone option.
[85]Panel Report, para. 4.43.
[86]Panel Report, para. 7.103.

footing. In the French version, there is no comma after the word "espèce". The use of the term "'X' désignant" to introduce the enumeration in section 6.1.1(ii) of Codex Stan 94 makes clear that the common name of the species is *one* of the qualifiers that may be attached to the term "sardines" when marketing preserved sardines.[87]

240.With this understanding of this international standard in mind, we turn to the requirement that relevant international standards must be used "as a basis for" technical regulations. We note that the Panel interpreted the word "basis" to mean "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge".[88] In applying this interpretation of "basis" to the measure in this dispute, the Panel contrasted its interpretation of section 6.1.1(ii) of Codex Stan 94 as setting forth "four alternatives for labelling species other than *Sardina pilchardus*" that all "require the use of the term 'sardines' with a qualification"[89], with the fact that, under the EC Regulation, "species such as *Sardinops sagax* cannot be called 'sardines' even when … combined with the name of a country, name of a geographic area, name of the species or the common name in accordance with the law and custom of the country in which the product is sold."[90] In the light of this contrast, the Panel concluded that Codex Stan 94 was *not* used "as a basis for" the EC Regulation.

241.On appeal, the European Communities contends that the Panel erred in finding that Codex Stan 94 was not used "as a basis for" the EC Regulation. The European Communities submits that the EC Regulation is "based on" Codex Stan 94 "because it used as a basis paragraph 6.1.1(i) of the Codex standard", and because this paragraph reserves the term "sardines" exclusively for *Sardina pilchardus.*[91] (…)

242.The question before us, therefore, is the proper meaning to be attributed to the words "as a basis for" in Article 2.4 of the *TBT Agreement*. In *EC – Hormones,* we addressed a similar issue, namely, the meaning of "based on" as used in Article 3.1 of the *SPS Agreement,* which provides:

*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. (emphasis added)

In *EC – Hormones,* we stated that "based on" does not mean the same thing as "conform to".[92] In that appeal, we articulated the ordinary meaning of the term "based on", as used in Article 3.1 of the *SPS Agreement* in the following terms:

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[87]Our interpretation is also consistent with the English print version of section 6.1.1(ii) of Codex Stan 94. See *supra*, footnote 5.
[88]Panel Report, para. 7.110, quoting *Webster's New World Dictionary*, *supra*, footnote, p. 117.
[89]Panel Report, para. 7.111.
[90]*Ibid.*, para. 7.112.
[91]European Communities' appellant's submission, para. 150.
[92]Appellate Body Report, *supra*, footnote, para. 166.

> 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.[150]

[150] L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press), Vol. I, p. 187. [93]

The Panel here referred to this conclusion in its analysis of Article 2.4 of the *TBT Agreement*. In our view, the Panel did so correctly, because our approach in *EC – Hormones* is also relevant for the interpretation of Article 2.4 of the *TBT Agreement*. [94]

(…)

246.The European Communities, however, seems to suggest the need for something different. The European Communities maintains that a "rational relationship" between an international standard and a technical regulation is sufficient to conclude that the former is used "as a basis for" the latter. [95] (…)

247.Yet, we see nothing in the text of Article 2.4 to support the European Communities' view, nor has the European Communities pointed to any such support. (…)

248.(…) In our view, it can certainly be said—at a minimum—that something cannot be considered a "basis" for something else if the two are *contradictory*. Therefore, under Article 2.4, if the technical regulation and the international standard *contradict* each other, it cannot properly be concluded that the international standard has been used "as a basis for" the technical regulation.

(…)

250.In making this determination, we note at the outset that Article 2.4 of the *TBT Agreement* provides that "Members shall use [relevant international standards], *or the relevant parts of them*, as a basis for their technical regulations". (emphasis added) In our view, the phrase "*relevant parts of them*" defines the appropriate focus of an analysis to determine whether a relevant international standard has been used "as a basis for" a technical regulation. In other words, the examination must be limited to those parts of the relevant international standards that relate to the subject-matter of the challenged prescriptions or requirements. In addition, the examination must be broad enough to address *all* of those relevant parts; the regulating Member is not permitted to select only *some* of the "relevant parts" of an international standard. If a "part" is "relevant", then it must be one of the elements which is "a basis for" the technical regulation.

251.This dispute concerns the WTO-consistency of the requirement set out in Article 2 of the EC Regulation that only products prepared exclusively from the species *Sardina pilchardus* may be marketed in the European Communities as preserved sardines. Consequently, the "relevant parts" of Codex Stan 94 are those elements of Codex Stan 94 that bear upon or relate to the marketing of preserved fish products under the name "sardines". The term "relevant parts of them", as used in Article 2.4, implies two things for the case before us. First, the determination whether Codex Stan 94 has been used "as a basis for" the EC Regulation must stem from an analysis that is limited to those "parts" of Codex Stan 94 relating to the use of the term "sardines" for the identification and marketing of preserved fish products. Those parts include not only sections 6.1.1(i) and 6.1.1(ii), but also section 2.1.1 of Codex Stan 94, which sets out the various species that may be given the names contemplated in sections 6.1.1(i) and 6.1.1(ii). Second, this

[93] *Ibid.*, para. 163 and footnote 150 thereto.
[94] Panel Report, para. 7.110.
[95] European Communities' appellant's submission, para. 155.

analysis must address *all* of those relevant provisions of Codex Stan 94, and must not ignore any one of them.

(…)

253.As we have said, the European Communities contends that Codex Stan 94 was used "as a basis for" the EC Regulation "because it used as a basis paragraph 6.1.1(i) of the Codex standard" [96], which stipulates that only *Sardina pilchardus* may have the name "sardines", and that our examination as to whether Codex Stan 94 has been used "as a basis for" the EC Regulation must be limited to section 6.1.1(i). [97] This contention stems from the European Communities' proposition that the scope of the EC Regulation and that of Codex Stan 94 are different: the European Communities considers that the EC Regulation lays down prescriptions and technical requirements for *Sardina pilchardus* only, whereas Codex Stan 94 has a broader scope, as it also addresses other species, namely "sardine-type" products. In the view of the European Communities, section 6.1.1(ii) is not a "relevant part" of Codex Stan 94 for our determination of whether that standard has been used "as a basis for" the EC Regulation, because section 6.1.1(ii) concerns species other than *Sardina pilchardus*, a subject-matter the EC Regulation does not address.

254.We are not persuaded by this line of reasoning. Article 2 of the EC Regulation governs the use of the term "sardines" for the identification and marketing of preserved fish products. Section 6.1.1(ii) of Codex Stan 94 also relates to this same subject. Therefore, section 6.1.1(ii) is a "relevant part" of Codex Stan 94 for the purpose of determining whether Codex Stan 94 was used "as a basis for" the EC Regulation. As we stated earlier, the analysis must address *all* of the parts of Codex Stan 94 that relate to the use of the term "sardines" for the identification and the marketing of preserved fish products, and not only to selected parts. Moreover, the European Communities' argument that the EC Regulation does not relate to species other than *Sardina pilchardus* is simply untenable. It is tantamount to saying that a regulation stipulating 16 years as the age at which one may obtain a driver's licence, does not relate to persons that are under 16 years of age. Consequently, contrary to what the European Communities suggests, the "as a basis for" analysis cannot be restricted to section 6.1.1(i) of Codex Stan 94; it must, in addition, also encompass both section 6.1.1(ii), and section 2.1.1 of Codex Stan 94.

255.In the light of all this, we ask now whether there is a *contradiction* between the EC Regulation and Codex Stan 94 in the use of the term "sardines" for the identification and marketing of preserved fish products.

(…)

257.The effect of Article 2 of the EC Regulation is to prohibit preserved fish products prepared from the 20 species of fish other than *Sardina pilchardus* to which Codex Stan 94 refers—including *Sardinops sagax*—from being identified and marketed under the appellation "sardines", even with one of the four qualifiers set out in the standard. Codex Stan 94, by contrast, permits the use of the term "sardines" with any one of four qualifiers for the identification and marketing of preserved fish products prepared from 20 species of fish other than *Sardina pilchardus*. Thus, the EC Regulation and Codex Stan 94 are manifestly contradictory. To us, the existence of this contradiction confirms that Codex Stan 94 was not used "as a basis for" the EC Regulation.

258.We, therefore, uphold the finding of the Panel, in paragraph 7.112 of the Panel Report, that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the *TBT Agreement*.

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[96]European Communities' appellant's submission, para. 150.
[97]European Communities' response to questioning at the oral hearing.

## IX.The Question of the "Ineffectiveness or Inappropriateness" of Codex Stan 94

259.We turn now to the second part of Article 2.4 of the *TBT Agreement*, which 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".

260.In interpreting this part of Article 2.4, the Panel, first, addressed the question of the burden of proof, and made the following finding:

> … the burden of proof rests with the European Communities, as the party "assert[ing] the affirmative of a particular claim or defence", to demonstrate that the international standard is an ineffective or inappropriate means to fulfil the legitimate objectives pursued by the EC Regulation.[98] (footnote omitted)

261.Regarding the substance of the phrase "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued", the Panel began by examining the meaning of the terms "ineffective" and "inappropriate". The Panel said:

> Concerning the terms "ineffective" and "inappropriate", we note that "ineffective" refers to something which is not "having the function of accomplishing", "having a result", or "brought to bear",[91] whereas "inappropriate" refers to something which is not "specially suitable", "proper", or "fitting".[92] Thus, in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued. An inappropriate means will not necessarily be an ineffective means and vice versa. (…)
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> [91] *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), p. 786.
>
> [92] *Ibid.*, p. 103.[99] (original emphasis)

262.Second, the Panel addressed the meaning of the phrase "legitimate objectives pursued". The Panel stated that the " 'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2", which provides an illustrative, open list of objectives considered "legitimate".[100] Also, the Panel indicated that Article 2.4 of the *TBT Agreement* requires an examination and a determination whether the objectives of the measure at issue are "legitimate".[101]

263.The Panel took note of the three "objectives" of the EC Regulation identified by the European Communities, namely market transparency, consumer protection, and fair competition.[102] The Panel also

[98]Panel Report, para 7.50. See also, Panel Report, paras. 7.52 and 7.114.
[99]*Ibid.*, para. 7.116 and footnotes 91–92 thereto.
[100]*Ibid.*, para. 7.118.
[101]*Ibid.*, para. 7.122.
[102]Panel Report, para. 7.123.

noted Peru's acknowledgement that those "objectives" are "legitimate", and the Panel saw "no reason to disagree with the parties' assessment in this respect."[103] During questioning at the oral hearing, Peru confirmed that it does see these three objectives pursued by the European Communities as "legitimate" within the meaning of Article 2.4.

264.The Panel then examined whether Codex Stan 94 is "ineffective" or "inappropriate" for the fulfilment of the three objectives pursued by the European Communities through the EC Regulation in the light of the definitions that the Panel articulated for those two terms. The Panel noted that the three objectives were founded on the factual premise that consumers in the European Communities associate "sardines" exclusively with *Sardina pilchardus*. (…) However, after reviewing the evidence adduced by the parties, the Panel stated that "it has not been established that consumers in most member States of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus* and that the use of 'X sardines' would therefore not enable the European consumer to distinguish preserved *Sardina pilchardus* from preserved *Sardinops sagax*."[104] The Panel also found that, by establishing a precise labelling requirement "in a manner not to mislead the consumer"[105], "Codex Stan 94 allows Members to provide [a] precise trade description of preserved sardines which promotes market transparency so as to protect consumers and promote fair competition."[106] On this basis, the Panel concluded that Codex Stan 94 is *not* "ineffective or inappropriate" to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

(…)

266.The European Communities appeals the Panel's assignment of the burden of proof under Article 2.4 of the *TBT Agreement*. (…) The European Communities maintains that the burden of proof rests rather with Peru, as Peru is the party claiming that the measure at issue is inconsistent with WTO obligations.

267.The European Communities also appeals the finding of the Panel that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation. (…)

A.The Burden of Proof
(…)

272.In *EC – Hormones*, the panel assigned the burden of showing that the measure there was justified under Article 3.3 to the respondent, reasoning that Article 3.3 provides an exception to the general obligation contained in Article 3.1. The panel there was of the view that it was the *defending* party that was asserting the *affirmative* of that particular defence. We reversed the panel's finding.[107] In particular, we stated:

> 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". In much the same way, 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

[103]*Ibid.*, para. 7.122.
[104]*Ibid.*, para. 7.137.
[105]Codex Stan 94, *supra*, footnote, section 6.1.1(ii).
[106]Panel Report, para. 7.133.
[107]Appellate Body Report, *supra*, footnote, para. 109.

> context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.[108] (original emphasis)

273.The Panel in this case acknowledged our finding in *EC – Hormones*, but concluded that it "does not have a direct bearing" on the question of the allocation of the burden of proof under the second part of Article 2.4 of the *TBT Agreement*.[109] (…)

274.We disagree with the Panel's conclusion that our ruling on the issue of the burden of proof has no "direct bearing" on this case. The Panel provides no explanation for this conclusion and, indeed, could not have provided any plausible explanation. For there are strong conceptual similarities between, on the one hand, Article 2.4 of the *TBT Agreement* and, on the other hand, Articles 3.1 and 3.3 of the *SPS Agreement*, and our reasoning in *EC – Hormones* is equally apposite for this case. The heart of Article 3.1 of the *SPS Agreement* is a requirement that Members base their sanitary or phytosanitary measures on international standards, guidelines, or recommendations. Likewise, the heart of Article 2.4 of the *TBT Agreement* is a requirement that Members use international standards as a basis for their technical regulations. Neither of these requirements in these two agreements is absolute. Articles 3.1 and 3.3 of the *SPS Agreement* permit a Member to depart from an international standard if the Member seeks a level of protection higher than would be achieved by the international standard, the level of protection pursued is based on a proper risk assessment, and the international standard is not sufficient to achieve the level of protection pursued. Thus, under the *SPS Agreement*, departing from an international standard is permitted in circumstances where the international standard is ineffective to achieve the objective of the measure at issue. Likewise, under Article 2.4 of the *TBT Agreement*, a Member may depart from a relevant international standard when it would be an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" by that Member through the technical regulation.

275.(…) Accordingly, as with Articles 3.1 and 3.3 of the *SPS Agreement*, there is no "general rule-exception" relationship between the first and the second parts of Article 2.4. Hence, in this case, it is for Peru — as the complaining Member seeking a ruling on the inconsistency with Article 2.4 of the *TBT Agreement* of the measure applied by the European Communities — to bear the burden of proving its claim. This burden includes establishing that Codex Stan 94 has not been used "as a basis for" the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

(…)

282.We, therefore, reverse the finding of the Panel, in paragraph 7.52 of the Panel Report, that, under the second part of Article 2.4 of the *TBT Agreement*, the burden rests with the European Communities to demonstrate that Codex Stan 94 is an "ineffective or inappropriate" means to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation. Accordingly, we find that Peru bears the burden of demonstrating that Codex Stan 94 is an effective and appropriate means to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

283.We turn now to consider whether Peru effectively discharged its burden of proof under the second part of Article 2.4 of the *TBT Agreement*.

B.Whether Codex Stan 94 is an Effective and Appropriate Means to Fulfil the "Legitimate Objectives" Pursued by the European Communities Through the EC Regulation

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[108]*Ibid.*, para. 104.

[109]Panel Report, footnote 70 to para. 7.50.

284.We recall that the second part of Article 2.4 of the *TBT Agreement* reads as follows:

> … except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued …

Before ruling on whether Peru met its burden of proof in this case, we must address, successively, the interpretation and the application of the second part of Article 2.4.

## 1.The Interpretation of the Second Part of Article 2.4

285.The interpretation of the second part of Article 2.4 raises two questions: first, the meaning of the term "ineffective or inappropriate means"; and, second, the meaning of the term "legitimate objectives". As to the first question, we noted earlier the Panel's view that the term "ineffective or inappropriate means" refers to two questions—the question of the *effectiveness* of the measure and the question of the *appropriateness* of the measure—and that these two questions, although closely related, are different in nature. [110] The Panel pointed out that the term "ineffective" "refers to something which is not 'having the function of accomplishing', 'having a result', or 'brought to bear', whereas [the term] 'inappropriate' refers to something which is not 'specially suitable', 'proper', or 'fitting' ". [111] (…) We agree with the Panel's interpretation.

286.As to the second question, we are of the view that the Panel was also correct in concluding that "the 'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2", which refers also to "legitimate objectives", and includes a description of what the nature of some such objectives can be. [112] Two implications flow from the Panel's interpretation. First, the term "legitimate objectives" in Article 2.4, as the Panel concluded, must cover the objectives explicitly mentioned in Article 2.2, namely: "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment." Second, given the use of the term "*inter alia*" in Article 2.2, the objectives covered by the term "legitimate objectives" in Article 2.4 extend beyond the list of the objectives specifically mentioned in Article 2.2. Furthermore, we share the view of the Panel that the second part of Article 2.4 implies that there must be an examination and a determination on the legitimacy of the objectives of the measure. [113]

## 2.The Application of the Second Part of Article 2.4

(…)

289.We share the Panel's view that the terms "ineffective" and "inappropriate" have different meanings, and that it is conceptually possible that a measure could be effective but inappropriate, or appropriate but ineffective. [114] This is why Peru has the burden of showing that Codex Stan 94 is both

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[110]See *supra*, para. 261.
[111]Panel Report, para. 7.116.
[112]Panel Report, para. 7.118.
[113]*Ibid.*, para. 7.122.
[114]Panel Report, para. 7.116.

*effective* and *appropriate*. We note, however, that, in this case, a consideration of the *appropriateness* of Codex Stan 94 and a consideration of the *effectiveness* of Codex Stan 94 are interrelated—as a consequence of the nature of the objectives of the EC Regulation. The capacity of a measure to accomplish the stated objectives—its *effectiveness*—and the suitability of a measure for the fulfilment of the stated objectives—its *appropriateness*—are *both* decisively influenced by the perceptions and expectations of consumers in the European Communities relating to preserved sardine products .[115]

290.We note that the Panel concluded that "Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation."[116] We have examined the analysis which led the Panel to this conclusion. We note, in particular, that the Panel made the factual finding that "it has not been established that consumers in most member States of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus*".[117] We also note that the Panel gave consideration to the contentions of Peru that, under Codex Stan 94, fish from the species *Sardinops sagax* bear a denomination that is distinct from that of *Sardina pilchardus*[118], and that "the very purpose of the labelling regulations set out in Codex Stan 94 for sardines of species other than *Sardina pilchardus* is to ensure market transparency".[119] We agree with the analysis made by the Panel. Accordingly, we see no reason to interfere with the Panel's finding that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 meets the legal requirements of effectiveness and appropriateness set out in Article 2.4 of the *TBT Agreement*.

291.We, therefore, uphold the finding of the Panel, in paragraph 7.138 of the Panel Report, that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation. Our finding on this issue is, however, subject to our examination of whether the Panel acted consistently with Article 11 of the DSU. We turn to that issue now.

(…)

## XIII.Findings and Conclusions

315.For the reasons set out in this Report, the Appellate Body:

(…)

(c) upholds the Panel's finding, in paragraph 7.35 of the Panel Report, that the EC Regulation is a "technical regulation" under the *TBT Agreement*;

(d) upholds the Panel's findings, in paragraph 7.60 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to measures that were adopted before 1 January 1995 but which have not "ceased to exist", and, in paragraph 7.83 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to existing technical regulations, including the EC Regulation;

(e) upholds the Panel's finding, in paragraph 7.70 of the Panel Report, that Codex Stan 94 is a "relevant international standard" under Article 2.4 of the *TBT Agreement*;

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[115]We note that the Panel observed "that the European Communities has used the terms 'ineffective' and 'inappropriate' interchangeably throughout its oral and written statements." (*Ibid.*, footnote 93 to para. 7.117)
[116]*Ibid.*, para. 7.138.
[117]*Ibid.*, para. 7.137. In response to questioning at the oral hearing, the European Communities and Peru agreed that this statement of the Panel was a factual finding.
[118]*Ibid.*, para. 4.88.
[119]*Ibid.*, para. 4.86.

(f) upholds the Panel's finding, in paragraph 7.112 of the Panel Report, that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the *TBT Agreement*;

(g) reverses the Panel's finding, in paragraph 7.52 of the Panel Report, that, under the second part of Article 2.4 of the *TBT Agreement*, the burden of proof rests with the European Communities to demonstrate that Codex Stan 94 is an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" by the European Communities through the EC Regulation, and finds, instead, that the burden of proof rests with Peru to demonstrate that Codex Stan 94 is an effective and appropriate means to fulfil those "legitimate objectives", and, upholds the Panel's finding, in paragraph 7.138 of the Panel Report, that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation; (…)

## Optional Reading

AGREEMENT ON MUTUAL RECOGNITION BETWEEN THE UNITED STATES OF AMERICA AND THE EUROPEAN COMMUNITY

*(The full text of this agreement can be found in the USTR web-site at* www.ustr.gov/agreements/index.html*)*

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**6. Pharmaceutical Good Manufacturing Practice (GMP's)**

**7. Medical Devices**

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## AGREEMENT ON MUTUAL RECOGNITION

## BETWEEN THE UNITED STATES OF AMERICA AND

## THE EUROPEAN COMMUNITY

The Government of the United States of America and the European Community, hereinafter referred to as "the Parties",

Considering the traditional links of friendship that exist between the United States of America (U.S.) and the European Community (EC);

Desiring to facilitate bilateral trade between them;

Recognizing that mutual recognition of conformity assessment activities is an important means of enhancing market access between the Parties;

Recognizing that an agreement providing for mutual recognition of conformity assessment activities is of particular interest to small and medium-sized businesses in the U.S. and the EC;

Recognizing that any such mutual recognition also requires confidence in the continued reliability of the other Party's conformity assessments;

Recognizing the importance of maintaining each Party's high levels of health, safety, environmental and consumer protection;

Recognizing that mutual recognition agreements can positively contribute in encouraging greater international harmonization of standards;

Noting that this Agreement is not intended to displace private sector bilateral and multilateral arrangements among conformity assessment bodies or to affect regulatory regimes allowing for manufacturers' self-assessments and declarations of conformity.

Bearing in mind that the Agreement on Technical Barriers to Trade, an agreement annexed to the Agreement establishing the World Trade Organization (WTO), imposes obligations on the Parties

as Contracting Parties to the WTO, and encourages such Contracting Parties to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment;

Recognizing that any such mutual recognition needs to offer an assurance of conformity with applicable technical regulations or standards equivalent to the assurance offered by the Party's own procedures;

Recognizing the need to conclude an Agreement on Mutual Recognition (MRA) in the field of conformity assessment with sectoral annexes; and

Bearing in mind the respective commitments of the Parties under bilateral, regional and multilateral environment, health, safety and consumer protection agreements.

Have agreed as follows:

**Article 1**

*DEFINITIONS*

1. The following terms and definitions shall apply to this Agreement only:

- Designating Authority means a body with power to designate, monitor, suspend, remove suspension of, or withdraw conformity assessment bodies as specified under this Agreement.

- Designation means the identification by a Designating Authority of a conformity assessment body to perform conformity assessment procedures under this Agreement.

- Regulatory Authority means a government agency or entity that exercises a legal right to control the use or sale of products within a Party's jurisdiction and may take enforcement action to ensure that products marketed within its jurisdiction comply with legal requirements.

2. Other terms concerning conformity assessment used in this Agreement shall have the meaning given elsewhere in this Agreement or in the definitions contained in Guide 2 (1996 edition) of the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC). In the event of an inconsistency between ISO/IEC Guide 2 and definitions in this Agreement, the definitions in this Agreement shall prevail.

**Article 2**

*PURPOSE OF THE AGREEMENT*

This Agreement specifies the conditions by which each Party will accept or recognize results of conformity assessment procedures, produced by the other Party's conformity assessment bodies or authorities, in assessing conformity to the importing Party's requirements, as specified on a sector-specific basis in the Sectoral Annexes, and to provide for other related cooperative activities. The objective of such mutual recognition is to provide effective market access throughout the territories of the Parties with regard to conformity assessment for all products covered under this Agreement. If any obstacles to such access arise, consultations will promptly be held. In the absence of a satisfactory outcome of such consultations, the Party alleging its market access has been denied, may, within 90 days of such consultation, invoke its right to terminate the Agreement in accordance with Article 21.

**Article 3**

*GENERAL OBLIGATIONS*

1. The United States shall, as specified in the Sectoral Annexes, accept or recognize results of specified procedures, used in assessing conformity to specified legislative, regulatory, and administrative provisions of theUnited States, produced by the other Party's conformity assessment bodies and/or authorities.

2. The European Community and its Member States shall, as specified in the Sectoral Annexes, accept or recognize results of specified procedures, used in assessing conformity to specified legislative, regulatory and administrative provisions of the European Community and its Member States, produced by the other Party's conformity assessment bodies and/or authorities.

3. Where sectoral transition arrangements have been specified in Sectoral Annexes, the above obligations will apply following the successful completion of those sectoral transition arrangements, with the understanding that the conformity assessment procedures utilized assure conformity to the satisfaction of the receiving Party, with
applicable legislative, regulatory and administrative provisions of that Party, equivalent to the assurance offered by the receiving Party's own procedures.

**Article 4**

*GENERAL COVERAGE OF THE AGREEMENT*

1. This Agreement applies to conformity assessment procedures for products and/or processes and to other related cooperative activities as described in this Agreement.

2. Sectoral Annexes may include:

a) a description of the relevant legislative, regulatory and administrative provisions pertaining to the conformity assessment procedures and technical regulations;

b) a statement on the product scope and coverage;

c) a list of Designating Authorities;

d) a list of agreed conformity assessment bodies or authorities or a source from which to obtain a list of such bodies or authorities and a statement of the scope of the conformity assessment procedures for which each has been agreed;

e) the procedures and criteria for designating the conformity assessment bodies;

f) a description of the mutual recognition obligations;

g) a sectoral transition arrangement;

h) the identity of a sectoral contact point in each Party's territory; and

i) a statement regarding the establishment of a Joint Sectoral Committee.

3. This Agreement shall not be construed to entail mutual acceptance of standards or technical regulations of the Parties and, unless otherwise specified in a Sectoral Annex, shall not entail the mutual recognition of the equivalence of standards or technical regulations.

**Article 5**

*TRANSITIONAL ARRANGEMENTS*

The Parties agree to implement the transitional commitments on confidence building as specified in the Sectoral Annexes.

1. The Parties agree that each sectoral transitional arrangement shall specify a time period for completion.

2. The Parties may amend any transitional arrangement by mutual agreement.

3. Passage from the transitional phase to the operational phase shall proceed as specified in each Sectoral Annex, unless either Party documents that the conditions provided in such Sectoral Annex for a successful transition are
not met.

**Article 6**

*DESIGNATING AUTHORITIES*

The Parties shall ensure that the Designating Authorities specified in the Sectoral Annexes have the power and competence in their respective territories to carry out decisions under this Agreement to designate, monitor, suspend, remove suspension of, or withdraw conformity assessment bodies.

**Article 7**

*DESIGNATION AND LISTING PROCEDURES*

The following procedures shall apply with regard to the designation of conformity assessment bodies and the inclusion of such bodies in the list of conformity assessment bodies in a Sectoral Annex:

a) The Designating Authority identified in a Sectoral Annex shall designate conformity assessment bodies in accordance with the procedures and criteria set forth in that Sectoral Annex;

b) A Party proposing to add a conformity assessment body to the list of such bodies in a Sectoral Annex shall forward its proposal of one or more designated conformity assessment bodies in writing to the other Party with a view to a decision by the Joint Committee;

c) Within 60 days following receipt of the proposal, the other Party shall indicate its position regarding either its confirmation or its opposition. Upon confirmation, the inclusion in the Sectoral Annex of the proposed conformity assessment body or bodies shall take effect; and

d) In the event that the other Party contests on the basis of documented evidence the technical competence or compliance of a proposed conformity assessment body, or indicates in writing that it requires an additional 30 days to more fully verify such evidence, such conformity assessment body shall not be included on the list of conformity assessment bodies in the applicable Sectoral Annex. In this instance, the Joint Committee may decide that the body concerned be verified. After the completion of such verification,
the proposal to list the conformity assessment body in the Sectoral Annex may be resubmitted to the other Party.

**Article 8**

*SUSPENSION OF LISTED CONFORMITY ASSESSMENT BODIES*

The following procedures shall apply with regard to the suspension of a conformity assessment body listed in a Sectoral Annex:

a) A Party shall notify the other Party of its contestation of the technical competence or compliance of a conformity assessment body listed in a Sectoral Annex and the contesting Party's intent to suspend such conformity assessment body. Such contestation shall be exercised when justified in an objective and reasoned manner in writing to the other Party;

b) The conformity assessment body shall be given prompt notice by the other Party and an opportunity to present information in order to refute the contestation or to correct the deficiencies which form the basis of the cotestation;

c) Any such contestation shall be discussed between the Parties in the relevant Joint Sectoral Committee. If there is no Joint Sectoral Committee, the contesting Party shall refer the matter directly to the Joint Committee. If agreement to suspend is reached by the Joint Sectoral Committee or, if there is no Joint Sectoral Committee, by the Joint Committee, the conformity assessment body shall be suspended;

d) Where the Joint Sectoral Committee or Joint Committee decides that verification of technical competence or compliance is required, it shall normally be carried out in a timely manner by the Party in whose territory the body in question is located, but may be carried out jointly by the Parties in justified cases;

e) If the matter has not been resolved by the Joint Sectoral Committee within 10 days of the notice of contestation, the matter shall be referred to the Joint Committee for a decision. If there is no Joint Sectoral Committee, the matter shall be referred directly to the Joint Committee. If no decision is

reached by the Joint Committee within 10 days of the referral to it, the conformity assessment body shall be suspended upon the request of the contesting Party;

f) Upon the suspension of a conformity assessment body listed in a Sectoral Annex, a Party is no longer obligated to accept or recognize the results of conformity assessment procedures performed by that conformity assessment body subsequent to suspension. A Party shall continue to accept the results of
conformity assessment procedures performed by that conformity assessment body prior to suspension, unless a Regulatory Authority of the Party decides otherwise based on health, safety or environmental considerations or failure to satisfy other requirements within the scope of the applicable Sectoral Annex;
and

g) The suspension shall remain in effect until agreement has been reached by the Parties upon the future status of that body.

**Article 9**

*WITHDRAWAL OF LISTED CONFORMITY ASSESSMENT BODIES*

The following procedures shall apply with regard to the withdrawal from a Sectoral Annex of a conformity assessment body:

a) A Party proposing to withdraw a conformity assessment body listed in a Sectoral Annex shall forward its proposal in writing to the other Party;

b) Such conformity assessment body shall be promptly notified by the other Party and shall be provided a period of at least 30 days from receipt to provide information in order to refute or to correct the deficiencies which form the basis of the proposed withdrawal;

c) Within 60 days following receipt of the proposal, the other Party shall indicate its position regarding either its confirmation or its opposition. Upon confirmation, the withdrawal from the list in the Sectoral Annex of the conformity assessment body shall take effect;

d) In the event the other Party opposes the proposal to withdraw by supporting the technical competence and compliance of the conformity assessment body, the conformity assessment body shall not at that time
be withdrawn from the list of conformity assessment bodies in the applicable Sectoral Annex. In this instance, the Joint Sectoral Committee or the Joint Committee may decide to carry out a joint verification of
the body concerned. After the completion of such verification, the proposal for withdrawal of the conformity assessment body may be resubmitted to the other Party; and

e) Subsequent to the withdrawal of a conformity assessment body listed in a Sectoral Annex, a Party shall continue to accept the results of conformity assessment procedures performed by that conformity

assessment body prior to withdrawal, unless a Regulatory Authority of the Party decides otherwise based on health, safety and environmental considerations or failure to satisfy other requirements within the scope
of the applicable Sectoral Annex.

**Article 10**

*MONITORING OF CONFORMITY ASSESSMENT BODIES*

The following shall apply with regard to the monitoring of conformity assessment bodies listed in a Sectoral Annex:

a) Designating Authorities shall assure that their conformity assessment bodies listed in a Sectoral Annex are capable and remain capable of properly assessing conformity of products or processes, as applicable, and as covered in the applicable Sectoral Annex. In this regard, Designating Authorities shall maintain, or cause to maintain, ongoing surveillance over their conformity assessment bodies by means of regular audit or assessment;

b) The Parties undertake to compare methods used to verify that the conformity assessment bodies listed in the Sectoral Annexes comply with the relevant requirements of the Sectoral Annexes. Existing systems for
the evaluation of conformity assessment bodies may be used as part of such comparison procedures;

c) Designating Authorities shall consult as necessary with their counterparts, to ensure the maintenance of confidence in conformity assessment procedures. With the consent of both Parties, this consultation may
include joint participation in audits/inspections related to conformity assessment activities or other assessments of conformity assessment bodies listed in a Sectoral Annex; and

d) Designating Authorities shall consult, as necessary, with the relevant Regulatory Authorities of the other Party to ensure that all technical requirements are identified and are satisfactorily addressed.

**Article 11**

*CONFORMITY ASSESSMENT BODIES*

Each Party recognizes that the conformity assessment bodies listed in the Sectoral Annexes fulfill the conditions of eligibility to assess conformity in relation to its requirements as specified in the Sectoral Annexes. The Parties shall specify the scope of the conformity assessment procedures for which such bodies are listed.

**Article 12**

*EXCHANGE OF INFORMATION*

1. The Parties shall exchange information concerning the implementation of the legislative, regulatory, and administrative provisions identified in the Sectoral Annexes.

2. Each Party shall notify the other Party of legislative, regulatory and administrative changes related to the subject matter of this Agreement at least 60 days before their entry into force. Where considerations of safety, health or environmental protection require more urgent action, a Party shall notify the other Party as soon as practicable.

3. Each Party shall promptly notify the other Party of any changes to its Designating Authorities and/or conformity assessment bodies.

4. The Parties shall exchange information concerning the procedures used to ensure that the listed conformity assessment bodies under their responsibility comply with the legislative, regulatory, and administrative provisions outlined in the Sectoral Annexes.

5. Regulatory Authorities identified in the Sectoral Annexes shall consult as necessary with their counterparts, to ensure the maintenance of confidence in conformity assessment procedures and to ensure that all technical requirements are identified and are satisfactorily addressed.

**Article 13**

*SECTORAL CONTACT POINTS*

Each Party shall appoint and confirm in writing contact points to be responsible for activities under each Sectoral Annex.

**Article 14**

*JOINT COMMITTEE OF THE PARTIES*

1. The Parties hereby establish a Joint Committee consisting of representatives of each Party. The Joint Committee shall be responsible for the effective functioning of the Agreement.

2. The Joint Committee may establish Joint Sectoral Committees comprised of appropriate Regulatory Authorities and others deemed necessary.

3. Each Party shall have one vote in the Joint Committee. The Joint Committee shall make its decisions by unanimous consent. The Joint Committee shall determine its own rules and procedures.

4. The Joint Committee may consider any matter relating to the effective functioning of this Agreement. In particular it shall be responsible for:

a) listing, suspension, withdrawal and verification of conformity assessment bodies in accordance with this Agreement;

b) amending transitional arrangements in Sectoral Annexes;

c) resolving any questions relating to the application of this Agreement and its Sectoral Annexes not otherwise resolved in the respective Joint Sectoral Committees;

d) providing a forum for discussion of issues that may arise concerning the implementation of this Agreement;

e) considering ways to enhance the operation of this Agreement;

f) coordinating the negotiation of additional Sectoral Annexes; and

g) considering whether to amend this Agreement or its Sectoral Annexes in accordance with Article 21.

5. When a Party introduces new or additional conformity assessment procedures affecting a Sectoral Annex, the Parties shall discuss the matter in the Joint Committee with a view to bringing such new or additional procedures within the scope of this Agreement and the relevant Sectoral Annex.

**Article 15**

*PRESERVATION OF REGULATORY AUTHORITY*

1. Nothing in this Agreement shall be construed to limit the authority of a Party to determine, through its legislative, regulatory and administrative measures, the level of protection it considers appropriate for safety; for protection of human, animal, or plant life or health; for the environment; for consumers; and otherwise with regard to risks within the scope of the applicable Sectoral Annex.

2. Nothing in this Agreement shall be construed to limit the authority of a Regulatory Authority to take all appropriate and immediate measures whenever it ascertains that a product may: (a) compromise the health or safety of persons in its territory; (b) not meet the legislative, regulatory, or administrative provisions within the scope of the applicable Sectoral Annex; or (c) otherwise fail to satisfy a requirement within the scope of the applicable Sectoral Annex. Such measures may include

withdrawing the products from the market, prohibiting their placement on the market, restricting their free movement, initiating a product recall, and preventing the recurrence of such problems, including through a prohibition on imports. If the Regulatory Authority takes such action, it shall inform its counterpart authority and the other Party within fifteen days of taking such action, providing its reasons.

**Article 16**

*SUSPENSION OF RECOGNITION OBLIGATIONS*

Either Party may suspend its obligations under a particular Sectoral Annex, in whole or in part, if:

a) a Party suffers a loss of market access for the Party's products within the scope of the Sectoral Annex as a result of the failure of the other Party to fulfill its obligations under the Agreement;

b) the adoption of new or additional conformity assessment requirements as referenced in Article 14(5) results in a loss of market access for the Party's products within the scope of the Sectoral Annex because conformity
assessment bodies designated by the Party in order to meet such requirements have not been recognized by the Party implementing the requirements; or (…)

**AGREED MINUTES ON THE AGREEMENT ON MUTUAL RECOGNITION BETWEEN THE UNITED STATES OF AMERICA AND THE EUROPEAN COMMUNITY**

This is to reflect our understanding that the attached Agreement on Mutual Recognition between the United States of America and the European Community represents the text we commit to submit to our respective authorities with a view to completing the necessary procedures for approval and implementation.

Signed : Charlene Barshefsky Signed : Leon Brittan

6/20/97 20th June 1997

For the United States of America For the European Community

**Letter of intent between the United States and the European Community regarding the negotiation of additional sectoral annexes to the EU-U.S. Mutual Recognition Agreement**

We, the undersigned, agree that the United States and the European Community should complete their negotiations of additional sectoral annexes covering veterinary biologics and industrial

fasteners. Our objective is to conclude the negotiations by the end of 1997 and to add these annexes to the EU-U.S.Agreement on Mutual Recognition.

| | |
|---|---|
| Signed : Ralph Ives | Signed : K.F. Falkenberg |
| For the United States of America | For the European Community |