Unit VIII: Technical Barriers to Trade (TBT)
International and Regional Trade Law:
The Law of World Trade Organization

Unit VIII: Technical Barriers to Trade (TBT)

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Supplementary Reading


1. Introduction

1-1. OVERVIEW

TECHNICAL BARRIERS TO TRADE: TECHNICAL EXPLANATION

Technical Information on Technical barriers to trade

http://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm

The problem

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”.

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.

**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.

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.

The Agreement (1)

Principles

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-fulfilment 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).

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).

**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.

**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.

**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.

**The Agreement (2)**

**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.

**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.

**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.

**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.

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 the TBT Agreement.*

Ask yourself why the TBT and SPS Agreements have been concluded. Why were Art. III and XX GATT not considered sufficient?

*Is there an obligation to mutually recognize equivalent foreign standards under Art. 2.7 TBT Agreement? What about Art. 2.2 TBT Agreement?*

**AGREEMENT ON TECHNICAL BARRIERS TO TRADE**

*Members,*

*Having regard* to the Uruguay Round of Multilateral Trade Negotiations;

*Desiring* to further the objectives of GATT 1994;

*Recognizing* the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;

*Desiring* therefore to encourage the development of such international standards and conformity assessment systems;

*Desiring* however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

*Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;

*Recognizing* that no country should be prevented from taking measures necessary for the protection of its essential security interest;

*Recognizing* the contribution which international standardization can make to the transfer of technology from developed to developing countries;

*Recognizing* that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavours in this regard;
Hereby agree as follows:

**Article 1**

*General Provisions*

1.1 General terms for standardization and procedures for assessment of conformity shall normally have the meaning given to them by definitions adopted within the United Nations system and by international standardizing bodies taking into account their context and in the light of the object and purpose of this Agreement.

1.2 However, for the purposes of this Agreement the meaning of the terms given in Annex 1 applies.

1.3 All products, including industrial and agricultural products, shall be subject to the provisions of this Agreement.

1.4 Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.

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

1.6 All references in this Agreement to technical regulations, standards and conformity assessment procedures shall be construed to include any amendments thereto and any additions to the rules or the product coverage thereof, except amendments and additions of an insignificant nature.

**TECHNICAL REGULATIONS AND STANDARDS**

**Article 2**

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

With respect to their central government bodies:

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

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

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

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.

2.5 A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4. Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

2.6 With a view to harmonizing technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.

2.7 Members shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.

2.8 Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

2.9 Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:

2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;

2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;

2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

2.10 Subject to the provisions in the lead-in to paragraph 9, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 9 as it finds necessary, provided that the Member, upon adoption of a technical regulation, shall:

2.10.1 notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems;

2.10.2 upon request, provide other Members with copies of the technical regulation;

2.10.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

2.11 Members shall ensure that all technical regulations which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

2.12 Except in those urgent circumstances referred to in paragraph 10, Members shall allow a reasonable interval between the publication of technical regulations and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

Article 3

Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies

With respect to their local government and non-governmental bodies within their territories:

3.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Article 2, with the exception of the obligation to notify as referred to in paragraphs 9.2 and 10.1 of Article 2.

3.2 Members shall ensure that the technical regulations of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 9.2 and 10.1 of Article 2, noting that notification shall not be required for technical regulations
the technical content of which is substantially the same as that of previously notified technical regulations of central government bodies of the Member concerned.

3.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 9 and 10 of Article 2, to take place through the central government.

3.4 Members shall not take measures which require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.

3.5 Members are fully responsible under this Agreement for the observance of all provisions of Article 2. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2 by other than central government bodies.

Article 4

Preparation, Adoption and Application of Standards

4.1 Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the "Code of Good Practice"). They shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.

4.2 Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement.

CONFORMITY WITH TECHNICAL REGULATIONS AND STANDARDS

Article 5

Procedures for Assessment of Conformity by Central Government Bodies

5.1 Members shall ensure that, in cases where a positive assurance of conformity with technical regulations or standards is required, their central government bodies apply the following provisions to products originating in the territories of other Members:
5.1.1 Conformity assessment procedures are prepared, adopted and applied so as to
grant access for suppliers of like products originating in the territories of other
Members under conditions no less favourable than those accorded to suppliers of
like products of national origin or originating in any other country, in a
comparable situation; access entails suppliers' right to an assessment of
conformity under the rules of the procedure, including, when foreseen by this
procedure, the possibility to have conformity assessment activities undertaken at
the site of facilities and to receive the mark of the system;

5.1.2 Conformity assessment procedures are not prepared, adopted or applied with a
view to or with the effect of creating unnecessary obstacles to international trade.
This means, inter alia, that conformity assessment procedures shall not be more
strict or be applied more strictly than is necessary to give the importing Member
adequate confidence that products conform with the applicable technical
regulations or standards, taking account of the risks non-conformity would create.

5.2 When implementing the provisions of paragraph 1, Members shall ensure that:

5.2.1 Conformity assessment procedures are undertaken and completed as
expeditiously as possible and in a no less favourable order for products
originating in the territories of other Members than for like domestic products;

5.2.2 The standard processing period of each conformity assessment procedure is
published or that the anticipated processing period is communicated to the
applicant upon request; when receiving an application, the competent body
promptly examines the completeness of the documentation and informs the
applicant in a precise and complete manner of all deficiencies; the competent
body transmits as soon as possible the results of the assessment in a precise and
complete manner to the applicant so that corrective action may be taken if
necessary; even when the application has deficiencies, the competent body
proceeds as far as practicable with the conformity assessment if the applicant so
requests; and that, upon request, the applicant is informed of the stage of the
procedure, with any delay being explained;

5.2.3 Information requirements are limited to what is necessary to assess conformity
and determine fees;

5.2.4 The confidentiality of information about products originating in the territories of
other Members arising from or supplied in connection with such conformity
assessment procedures is respected in the same way as for domestic products and
in such a manner that legitimate commercial interests are protected;

5.2.5 Any fees imposed for assessing the conformity of products originating in the
territories of other Members are equitable in relation to any fees chargeable for
assessing the conformity of like products of national origin or originating in any
other country, taking into account communication, transportation and other costs.
arising from differences between location of facilities of the applicant and the 
conformity assessment body;

5.2.6 the siting of facilities used in conformity assessment procedures and the selection 
of samples are not such as to cause unnecessary inconvenience to applicants or 
their agents;

5.2.7 whenever specifications of a product are changed subsequent to the 
determination of its conformity to the applicable technical regulations or 
standards, the conformity assessment procedure for the modified product is 
limited to what is necessary to determine whether adequate confidence exists that 
the product still meets the technical regulations or standards concerned;

5.2.8 a procedure exists to review complaints concerning the operation of a conformity 
assessment procedure and to take corrective action when a complaint is justified.

5.3 Nothing in paragraphs 1 and 2 shall prevent Members from carrying out reasonable spot checks 
within their territories.

5.4 In cases where a positive assurance is required that products conform with technical regulations 
or standards, and relevant guides or recommendations issued by international standardizing bodies exist 
or their completion is imminent, Members shall ensure that central government bodies use them, or the 
relevant parts of them, as a basis for their conformity assessment procedures, except where, as duly 
explained upon request, such guides or recommendations or relevant parts are inappropriate for the 
Members concerned, for, inter alia, such reasons as: national security requirements; the prevention of 
deceptive practices; protection of human health or safety, animal or plant life or health, or the 
environment; fundamental climatic or other geographical factors; fundamental technological or 
infrastructural problems.

5.5 With a view to harmonizing conformity assessment procedures on as wide a basis as possible, 
Members shall play a full part, within the limits of their resources, in the preparation by appropriate 
international standardizing bodies of guides and recommendations for conformity assessment procedures.

5.6 Whenever a relevant guide or recommendation issued by an international standardizing body does 
not exist or the technical content of a proposed conformity assessment procedure is not in accordance 
with relevant guides and recommendations issued by international standardizing bodies, and if the 
conformity assessment procedure may have a significant effect on trade of other Members, Members 
shall:

5.6.1 publish a notice in a publication at an early appropriate stage, in such a manner as 
to enable interested parties in other Members to become acquainted with it, that 
they propose to introduce a particular conformity assessment procedure;

5.6.2 notify other Members through the Secretariat of the products to be covered by the 
proposed conformity assessment procedure, together with a brief indication of its 
objective and rationale. Such notifications shall take place at an early 
appropriate stage, when amendments can still be introduced and comments taken 
into account;
5.6.3 upon request, provide to other Members particulars or copies of the proposed procedure and, whenever possible, identify the parts which in substance deviate from relevant guides or recommendations issued by international standardizing bodies;

5.6.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

5.7 Subject to the provisions in the lead-in to paragraph 6, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 6 as it finds necessary, provided that the Member, upon adoption of the procedure, shall:

5.7.1 notify immediately other Members through the Secretariat of the particular procedure and the products covered, with a brief indication of the objective and the rationale of the procedure, including the nature of the urgent problems;

5.7.2 upon request, provide other Members with copies of the rules of the procedure;

5.7.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

5.8 Members shall ensure that all conformity assessment procedures which have been adopted are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.

5.9 Except in those urgent circumstances referred to in paragraph 7, Members shall allow a reasonable interval between the publication of requirements concerning conformity assessment procedures and their entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products or methods of production to the requirements of the importing Member.

**Article 6**

**Recognition of Conformity Assessment by Central Government Bodies**

With respect to their central government bodies:

6.1 Without prejudice to the provisions of paragraphs 3 and 4, Members shall ensure, whenever possible, that results of conformity assessment procedures in other Members are accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures. It is recognized that prior consultations may be necessary in order to arrive at a mutually satisfactory understanding regarding, in particular:
6.1.1 adequate and enduring technical competence of the relevant conformity assessment bodies in the exporting Member, so that confidence in the continued reliability of their conformity assessment results can exist; in this regard, verified compliance, for instance through accreditation, with relevant guides or recommendations issued by international standardizing bodies shall be taken into account as an indication of adequate technical competence;

6.1.2 limitation of the acceptance of conformity assessment results to those produced by designated bodies in the exporting Member.

6.2 Members shall ensure that their conformity assessment procedures permit, as far as practicable, the implementation of the provisions in paragraph 1.

6.3 Members are encouraged, at the request of other Members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other’s conformity assessment procedures. Members may require that such agreements fulfil the criteria of paragraph 1 and give mutual satisfaction regarding their potential for facilitating trade in the products concerned.

6.4 Members are encouraged to permit participation of conformity assessment bodies located in the territories of other Members in their conformity assessment procedures under conditions no less favourable than those accorded to bodies located within their territory or the territory of any other country.

Article 7

Procedures for Assessment of Conformity by Local Government Bodies

With respect to their local government bodies within their territories:

7.1 Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Articles 5 and 6, with the exception of the obligation to notify as referred to in paragraphs 6.2 and 7.1 of Article 5.

7.2 Members shall ensure that the conformity assessment procedures of local governments on the level directly below that of the central government in Members are notified in accordance with the provisions of paragraphs 6.2 and 7.1 of Article 5, noting that notifications shall not be required for conformity assessment procedures the technical content of which is substantially the same as that of previously notified conformity assessment procedures of central government bodies of the Members concerned.

7.3 Members may require contact with other Members, including the notifications, provision of information, comments and discussions referred to in paragraphs 6 and 7 of Article 5, to take place through the central government.

7.4 Members shall not take measures which require or encourage local government bodies within their territories to act in a manner inconsistent with the provisions of Articles 5 and 6.
Members are fully responsible under this Agreement for the observance of all provisions of Articles 5 and 6. Members shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Articles 5 and 6 by other than central government bodies.

Article 8

Procedures for Assessment of Conformity by Non-Governmental Bodies

8.1 Members shall take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories which operate conformity assessment procedures comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6.

8.2 Members shall ensure that their central government bodies rely on conformity assessment procedures operated by non-governmental bodies only if these latter bodies comply with the provisions of Articles 5 and 6, with the exception of the obligation to notify proposed conformity assessment procedures.

Article 9

International and Regional Systems

9.1 Where a positive assurance of conformity with a technical regulation or standard is required, Members shall, wherever practicable, formulate and adopt international systems for conformity assessment and become members thereof or participate therein.

9.2 Members shall take such reasonable measures as may be available to them to ensure that international and regional systems for conformity assessment in which relevant bodies within their territories are members or participants comply with the provisions of Articles 5 and 6. In addition, Members shall not take any measures which have the effect of, directly or indirectly, requiring or encouraging such systems to act in a manner inconsistent with any of the provisions of Articles 5 and 6.

9.3 Members shall ensure that their central government bodies rely on international or regional conformity assessment systems only to the extent that these systems comply with the provisions of Articles 5 and 6, as applicable.

INFORMATION AND ASSISTANCE

Article 10

Information About Technical Regulations, Standards and
Conformity Assessment Procedures

10.1 Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding:

10.1.1 any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce a technical regulation, or by regional standardizing bodies of which such bodies are members or participants;

10.1.2 any standards adopted or proposed within its territory by central or local government bodies, or by regional standardizing bodies of which such bodies are members or participants;

10.1.3 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by central or local government bodies, or by non-governmental bodies which have legal power to enforce a technical regulation, or by regional bodies of which such bodies are members or participants;

10.1.4 the membership and participation of the Member, or of relevant central or local government bodies within its territory, in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; it shall also be able to provide reasonable information on the provisions of such systems and arrangements;

10.1.5 the location of notices published pursuant to this Agreement, or the provision of information as to where such information can be obtained; and

10.1.6 the location of the enquiry points mentioned in paragraph 3.

10.2 If, however, for legal or administrative reasons more than one enquiry point is established by a Member, that Member shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these enquiry points. In addition, that Member shall ensure that any enquiries addressed to an incorrect enquiry point shall promptly be conveyed to the correct enquiry point.

10.3 Each Member shall take such reasonable measures as may be available to it to ensure that one or more enquiry points exist which are able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents or information as to where they can be obtained regarding:

10.3.1 any standards adopted or proposed within its territory by non-governmental standardizing bodies, or by regional standardizing bodies of which such bodies are members or participants; and
10.3.2 any conformity assessment procedures, or proposed conformity assessment procedures, which are operated within its territory by non-governmental bodies, or by regional bodies of which such bodies are members or participants;

10.3.3 the membership and participation of relevant non-governmental bodies within its territory in international and regional standardizing bodies and conformity assessment systems, as well as in bilateral and multilateral arrangements within the scope of this Agreement; they shall also be able to provide reasonable information on the provisions of such systems and arrangements.

10.4 Members shall take such reasonable measures as may be available to them to ensure that where copies of documents are requested by other Members or by interested parties in other Members, in accordance with the provisions of this Agreement, they are supplied at an equitable price (if any) which shall, apart from the real cost of delivery, be the same for the nationals\(^1\) of the Member concerned or of any other Member.

10.5 Developed country Members shall, if requested by other Members, provide, in English, French or Spanish, translations of the documents covered by a specific notification or, in case of voluminous documents, of summaries of such documents.

10.6 The Secretariat shall, when it receives notifications in accordance with the provisions of this Agreement, circulate copies of the notifications to all Members and interested international standardizing and conformity assessment bodies, and draw the attention of developing country Members to any notifications relating to products of particular interest to them.

10.7 Whenever a Member has reached an agreement with any other country or countries on issues related to technical regulations, standards or conformity assessment procedures which may have a significant effect on trade, at least one Member party to the agreement shall notify other Members through the Secretariat of the products to be covered by the agreement and include a brief description of the agreement. Members concerned are encouraged to enter, upon request, into consultations with other Members for the purposes of concluding similar agreements or of arranging for their participation in such agreements.

10.8 Nothing in this Agreement shall be construed as requiring:

10.8.1 the publication of texts other than in the language of the Member;

10.8.2 the provision of particulars or copies of drafts other than in the language of the Member except as stated in paragraph 5; or

10.8.3 Members to furnish any information, the disclosure of which they consider contrary to their essential security interests.

10.9 Notifications to the Secretariat shall be in English, French or Spanish.

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\(^1\) "Nationals" here shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.
10.10 Members shall designate a single central government authority that is responsible for the implementation on the national level of the provisions concerning notification procedures under this Agreement except those included in Annex 3.

10.11 If, however, for legal or administrative reasons the responsibility for notification procedures is divided among two or more central government authorities, the Member concerned shall provide to the other Members complete and unambiguous information on the scope of responsibility of each of these authorities.

Article 11

Technical Assistance to Other Members

11.1 Members shall, if requested, advise other Members, especially the developing country Members, on the preparation of technical regulations.

11.2 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of national standardizing bodies, and participation in the international standardizing bodies, and shall encourage their national standardizing bodies to do likewise.

11.3 Members shall, if requested, take such reasonable measures as may be available to them to arrange for the regulatory bodies within their territories to advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding:

11.3.1 the establishment of regulatory bodies, or bodies for the assessment of conformity with technical regulations; and

11.3.2 the methods by which their technical regulations can best be met.

11.4 Members shall, if requested, take such reasonable measures as may be available to them to arrange for advice to be given to other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment of bodies for the assessment of conformity with standards adopted within the territory of the requesting Member.

11.5 Members shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the steps that should be taken by their producers if they wish to have access to systems for conformity assessment operated by governmental or non-governmental bodies within the territory of the Member receiving the request.

11.6 Members which are members or participants of international or regional systems for conformity assessment shall, if requested, advise other Members, especially the developing country Members, and shall grant them technical assistance on mutually agreed terms and conditions regarding the establishment
of the institutions and legal framework which would enable them to fulfil the obligations of membership or participation in such systems.

11.7 Members shall, if so requested, encourage bodies within their territories which are members or participants of international or regional systems for conformity assessment to advise other Members, especially the developing country Members, and should consider requests for technical assistance from them regarding the establishment of the institutions which would enable the relevant bodies within their territories to fulfil the obligations of membership or participation.

11.8 In providing advice and technical assistance to other Members in terms of paragraphs 1 to 7, Members shall give priority to the needs of the least-developed country Members.

Article 12

Special and Differential Treatment of Developing Country Members

12.1 Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

12.2 Members shall give particular attention to the provisions of this Agreement concerning developing country Members' rights and obligations and shall take into account the special development, financial and trade needs of developing country Members in the implementation of this Agreement, both nationally and in the operation of this Agreement's institutional arrangements.

12.3 Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

12.4 Members recognize that, although international standards, guides or recommendations may exist, in their particular technological and socio-economic conditions, developing country Members adopt certain technical regulations, standards or conformity assessment procedures aimed at preserving indigenous technology and production methods and processes compatible with their development needs. Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations or standards, including test methods, which are not appropriate to their development, financial and trade needs.

12.5 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies and international systems for conformity assessment are organized and operated in a way which facilitates active and representative participation of relevant bodies in all Members, taking into account the special problems of developing country Members.

12.6 Members shall take such reasonable measures as may be available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility
of, and, if practicable, prepare international standards concerning products of special interest to developing country Members.

12.7 Members shall, in accordance with the provisions of Article 11, provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members. In determining the terms and conditions of the technical assistance, account shall be taken of the stage of development of the requesting Members and in particular of the least-developed country Members.

12.8 It is recognized that developing country Members may face special problems, including institutional and infrastructural problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures. It is further recognized that the special development and trade needs of developing country Members, as well as their stage of technological development, may hinder their ability to discharge fully their obligations under this Agreement. Members, therefore, shall take this fact fully into account. Accordingly, with a view to ensuring that developing country Members are able to comply with this Agreement, the Committee on Technical Barriers to Trade provided for in Article 13 (referred to in this Agreement as the "Committee") is enabled to grant, upon request, specified, time-limited exceptions in whole or in part from obligations under this Agreement. When considering such requests the Committee shall take into account the special problems, in the field of preparation and application of technical regulations, standards and conformity assessment procedures, and the special development and trade needs of the developing country Member, as well as its stage of technological development, which may hinder its ability to discharge fully its obligations under this Agreement. The Committee shall, in particular, take into account the special problems of the least-developed country Members.

12.9 During consultations, developed country Members shall bear in mind the special difficulties experienced by developing country Members in formulating and implementing standards and technical regulations and conformity assessment procedures, and in their desire to assist developing country Members with their efforts in this direction, developed country Members shall take account of the special needs of the former in regard to financing, trade and development.

12.10 The Committee shall examine periodically the special and differential treatment, as laid down in this Agreement, granted to developing country Members on national and international levels.

INSTITUTIONS, CONSULTATION AND DISPUTE SETTLEMENT

Article 13

The Committee on Technical Barriers to Trade

13.1 A Committee on Technical Barriers to Trade is hereby established, and shall be composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet as necessary, but no less than once a year, for the purpose of affording Members the opportunity of consulting on any matters relating to the operation of this Agreement or the furtherance of its objectives, and shall carry out such responsibilities as assigned to it under this Agreement or by the Members.
13.2 The Committee shall establish working parties or other bodies as may be appropriate, which shall carry out such responsibilities as may be assigned to them by the Committee in accordance with the relevant provisions of this Agreement.

13.3 It is understood that unnecessary duplication should be avoided between the work under this Agreement and that of governments in other technical bodies. The Committee shall examine this problem with a view to minimizing such duplication.

**Article 14**

*Consultation and Dispute Settlement*

14.1 Consultations and the settlement of disputes with respect to any matter affecting the operation of this Agreement shall take place under the auspices of the Dispute Settlement Body and shall follow, *mutatis mutandis*, the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding.

14.2 At the request of a party to a dispute, or at its own initiative, a panel may establish a technical expert group to assist in questions of a technical nature, requiring detailed consideration by experts.

14.3 Technical expert groups shall be governed by the procedures of Annex 2.

14.4 The dispute settlement provisions set out above can be invoked in cases where a Member considers that another Member has not achieved satisfactory results under Articles 3, 4, 7, 8 and 9 and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member.

**FINAL PROVISIONS**

*Article 15*

*Final Provisions*

*Reservations*

15.1 Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.

*Review*

15.2 Each Member shall, promptly after the date on which the WTO Agreement enters into force for it, inform the Committee of measures in existence or taken to ensure the implementation and administration of this Agreement. Any changes of such measures thereafter shall also be notified to the Committee.

15.3 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof.
15.4 Not later than the end of the third year from the date of entry into force of the WTO Agreement and at the end of each three-year period thereafter, the Committee shall review the operation and implementation of this Agreement, including the provisions relating to transparency, with a view to recommending an adjustment of the rights and obligations of this Agreement where necessary to ensure mutual economic advantage and balance of rights and obligations, without prejudice to the provisions of Article 12. Having regard, *inter alia*, to the experience gained in the implementation of the Agreement, the Committee shall, where appropriate, submit proposals for amendments to the text of this Agreement to the Council for Trade in Goods.

Annexes

15.5 The annexes to this Agreement constitute an integral part thereof.

ANNEX 1

TERMS AND THEIR DEFINITIONS FOR THE PURPOSE OF THIS AGREEMENT

The terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement.

For the purpose of this Agreement, however, the following definitions shall apply:

1. *Technical regulation*

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

   *Explanatory note*

   The definition in ISO/IEC Guide 2 is not self-contained, but based on the so-called "building block" system.

2. *Standard*

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

   *Explanatory note*
The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.

3. **Conformity assessment procedures**

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

*Explanatory note*

Conformity assessment procedures include, *inter alia*, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

4. **International body or system**

Body or system whose membership is open to the relevant bodies of at least all Members.

5. **Regional body or system**

Body or system whose membership is open to the relevant bodies of only some of the Members.

6. **Central government body**

Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.

*Explanatory note:*

In the case of the European Communities the provisions governing central government bodies apply. However, regional bodies or conformity assessment systems may be established within the European Communities, and in such cases would be subject to the provisions of this Agreement on regional bodies or conformity assessment systems.

7. **Local government body**

Government other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.

8. **Non-governmental body**
Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.

ANNEX 2

TECHNICAL EXPERT GROUPS

The following procedures shall apply to technical expert groups established in accordance with the provisions of Article 14.

1. Technical expert groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in technical expert groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on a technical expert group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on a technical expert group. Members of technical expert groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before a technical expert group.

4. Technical expert groups may consult and seek information and technical advice from any source they deem appropriate. Before a technical expert group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by a technical expert group for such information as the technical expert group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to a technical expert group, unless it is of a confidential nature. Confidential information provided to the technical expert group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the technical expert group but release of such information by the technical expert group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The technical expert group shall submit a draft report to the Members concerned with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be circulated to the Members concerned when it is submitted to the panel.

ANNEX 3

CODE OF GOOD PRACTICE FOR THE PREPARATION, ADOPTION AND APPLICATION OF STANDARDS
General Provisions

A. For the purposes of this Code the definitions in Annex 1 of this Agreement shall apply.

B. This Code is open to acceptance by any standardizing body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body; to any governmental regional standardizing body one or more members of which are Members of the WTO; and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO (referred to in this Code collectively as "standardizing bodies" and individually as "the standardizing body").

C. Standardizing bodies that have accepted or withdrawn from this Code shall notify this fact to the ISO/IEC Information Centre in Geneva. The notification shall include the name and address of the body concerned and the scope of its current and expected standardization activities. The notification may be sent either directly to the ISO/IEC Information Centre, or through the national member body of ISO/IEC or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

SUBSTANTIVE PROVISIONS

D. In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.

E. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

F. Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.

G. With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part, within the limits of its resources, in the preparation by relevant international standardizing bodies of international standards regarding subject matter for which it either has adopted, or expects to adopt, standards. For standardizing bodies within the territory of a Member, participation in a particular international standardization activity shall, whenever possible, take place through one delegation representing all standardizing bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to which the international standardization activity relates.

H. The standardizing body within the territory of a Member shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. They shall also make every effort to achieve a national consensus on the standards they develop. Likewise the regional standardizing body shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies.
I. Wherever appropriate, the standardizing body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics.

J. At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period. A standard is under preparation from the moment a decision has been taken to develop a standard until that standard has been adopted. The titles of specific draft standards shall, upon request, be provided in English, French or Spanish. A notice of the existence of the work programme shall be published in a national or, as the case may be, regional publication of standardization activities.

The work programme shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis. No later than at the time of publication of its work programme, the standardizing body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva.

The notification shall contain the name and address of the standardizing body, the name and issue of the publication in which the work programme is published, the period to which the work programme applies, its price (if any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.

K. The national member of ISO/IEC shall make every effort to become a member of ISONET or to appoint another body to become a member as well as to acquire the most advanced membership type possible for the ISONET member. Other standardizing bodies shall make every effort to associate themselves with the ISONET member.

L. Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the comment period, the standardizing body shall publish a notice announcing the period for commenting in the publication referred to in paragraph J. Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards.

M. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

N. The standardizing body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardizing bodies that have accepted this Code of Good Practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary.

O. Once the standard has been adopted, it shall be promptly published.
P. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of its most recent work programme or of a standard which it produced. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.

Q. The standardizing body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardizing bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints.
2. European Communities -- Measures Affecting Asbestos and Asbestos-Containing Products

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.

Was it in the interest of the EC to argue that the TBT Agreement does not apply?  
Consider context and purpose. Does the panel’s reasoning convince you?

Should and could the Appellate Body have completed the legal analysis in relation to the TBT-consistency of the asbestos ban? How can Canada get a ruling on that matter?

Editorial note: The footnote numbering differs from the numbering in the original reports.

2-1. PANEL REPORT

WT/DS135/R, 18 September 2000

Chairman: Mr. Adrian Macey; Members: Mr. William Ehlers; Mr. Åke Lindén.

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm

(...)

II. Factual Aspects

(...)

2.3 On 24 December 1996, the French Government adopted Decree No. 96-1133 banning asbestos, issued pursuant to the Labour Code and the Consumer Code (décret no. 96-1133 relatif à l’interdiction de l’amiante, pris en application du code de travail et du code de la consommation) (hereinafter “the Decree”). The Decree entered into force on 1 January 1997. The following are its principal provisions:

2.4 Article 1 provides for a ban on asbestos in the following terms:

“I. – For the purpose of protecting workers, [...] the manufacture, processing, sale, import, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres shall be prohibited, regardless of whether these substances have been incorporated into materials, products or devices.

II. – For the purpose of protecting consumers, [...] the manufacture, import, domestic marketing, exportation, possession for sale, offer, sale and transfer under any title whatsoever of all varieties of asbestos fibres or product containing asbestos fibres shall be prohibited [...].”

2.5 Article 2 of the Decree allows some exceptions to the ban in Article 1.

2 Journal officiel of 26 December 1996. See Annex I to this report.
“I. – On an exceptional and temporary basis, the bans instituted under Article 1 shall not apply to certain existing materials, products or devices containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre is available which:

- On the one hand, in the present state of scientific knowledge, poses a lesser occupational health risk than chrysotile fibre to workers handling those materials, products or devices;

- on the other, provides all technical guarantees of safety corresponding to the ultimate purpose of the use [...]”

(…)

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 Decree³

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.

³ The parties' arguments are set out in detail in Section III above.
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. (…)

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 prejudices 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?

(…)

35
Analysis

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, 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.

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.

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. 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", "a recognizable distinctive feature". 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

(...)

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 appears to confirm that the object and purpose of the Agreement relate to the criteria for marketing these products.11

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

10 "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;".

11 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.
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;\(^{12}\);
(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.\(^{13}\) 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

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\(^{12}\) 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 administrative provisions.

transparency.\textsuperscript{14} It has been recognized that such notifications do not have any recognized legal effects.\textsuperscript{15} 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.

\[\ldots\]

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.

\[\text{(b) Analysis of exceptions and the effect of the type of exceptions on the findings concerning prohibitions} \]

\[\text{(i) The exceptions in the Decree constitute technical regulations} \]

\[\ldots\]

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.\textsuperscript{16} \[\ldots\]\(\text{i.e.} \) The measures before us do not relate to application of the ban in the strict sense but to an exception which in practice

\textsuperscript{14} See the preamble to the Decision on Notification Procedures, adopted by the Trade Negotiations Committee on 15 December 1993.

\textsuperscript{15} 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."

\textsuperscript{16} See the reply by the EC to question 2 in the questions by the Panel at the second substantive meeting, paras. 220-
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

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

221.
rest of this case because Canada did not make any specific claims regarding the exceptions to the general ban.\textsuperscript{17}

(…)

\textsuperscript{17} 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.
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. 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. 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.

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;

Panel Report, heading (a) on p. 404 and heading (b) on p. 411.
Ibid., para. 8.72(a).
Ibid., para. 8.72.
(b) the measure specifies the technical characteristics of the product(s) which allow them to be marketed in the Member that took the measure;

(c) compliance is mandatory. 21

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. The measure is, therefore, not a total prohibition on asbestos fibres, because it also includes provisions that permit, for a limited duration, the use of asbestos in certain situations. Thus, to characterize the measure simply as a general prohibition, and to examine it as such, overlooks the complexities of the measure, which include both prohibitive and permissive elements. In addition, we observe that the exceptions in the measure would have no autonomous legal significance in the absence of the prohibitions. We, therefore, conclude that the measure at issue is to be examined as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it.

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:

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". The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the

21Ibid., para. 8.57.
"characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, inter alia, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. 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. In addition, according to the definition in Annex 1.1 of the TBT Agreement, a "technical regulation" may set forth the "applicable administrative provisions" for products which have certain "characteristics". Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements". (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a "technical regulation" may be confined to laying down only one or a few "product characteristics".

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. It follows that, with respect to products, a "technical regulation" has the effect of prescribing or imposing one or more "characteristics" — "features", "qualities", "attributes", or other "distinguishing mark".

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" 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. This consideration also underlies the formal obligation, in Article 2.9.2 of the TBT Agreement, for Members to notify other Members, through the WTO Secretariat, "of the products to be covered" by a proposed "technical regulation". (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. 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.

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

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22Panel 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.
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. 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. That is, in effect, the measure provides that *all* products must not contain asbestos fibres. Although this prohibition against products containing asbestos applies to a large number of products, and although it is, indeed, true that the products to which this prohibition applies cannot be determined from the terms of the measure itself, it seems to us that the products covered by the measure are *identifiable*: all products must be asbestos free; any products containing asbestos are prohibited. We also observe that compliance with the prohibition against products containing asbestos is mandatory and is, indeed, enforceable through criminal sanctions.

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 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. However, we have insisted that we can do so only if the factual findings of the panel and

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21Canada 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.

24Article 5 of the Decree characterizes a contravention of any aspect of Articles 1.1 or 1.1.II as a "5th class offence".

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.  

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."  

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 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.


27Supra, footnote 48, at 469.
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.

(…)

47
3. EC – Trade Description of Sardines

Editorial note: The footnote numbering differs from the numbering in the original report.
Appellate Body Report, WT/DS231/AB/R, 26 September 2002

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

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm

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").

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. 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 referred 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.

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 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:

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30Panel Report, para. 2.2.
– *Sardina pilchardus*
– *Sardinops melanostictus, S. neopilchardus, S. ocellatus, S. sagax[,] S. caeruleus*
– *Sardinella aurita, S. brasiliensis, S. maderensis, S. longiceps, S. gibbosa*
– *Clupea harengus*
– *Sprattus sprattus*
– *Hyperlophus vittatus*
– *Nematalosa vlaminghi*
– *Etrumeus teres*
– *Ethmidium maculatum*
– *Engraulis anchoita, E. mordax, E. ringens*
– *Opisthonema oglinum*.  

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.  

31Codex Stan 94, as reproduced in Annex 2 to the Panel Report, section 2.1.1.
32We 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
7. Peru exports preserved products prepared from *Sardinops 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.  

8. *Sardina pilchardus* and *Sardinops sagax* both belong to the *Clupeidae* family and the *Clupeinae* subfamily. As their scientific name suggests, however, they belong to different genus. *Sardina pilchardus* belongs to the genus *Sardina*, while *Sardinops sagax* belongs to the genus *Sardinops*.  

Additional factual aspects of this dispute are set forth in paragraphs 2.1–2.9 of the Panel Report.

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*"").  

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. The Panel, therefore, recommended that the Dispute Settlement Body (the

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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)

Panel Report, para. 2.2.
Panel Report, para. 2.3.
"DSB") request the European Communities to bring its measure into conformity with its obligations under the TBT Agreement.\textsuperscript{37}

(…)

**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.\textsuperscript{38}

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.\textsuperscript{39}

173. The European Communities does not contest that the EC Regulation is a "technical regulation" per se.\textsuperscript{40} Instead, on appeal, the European Communities reiterates two arguments that the Panel rejected.

\textsuperscript{37Ibid., para. 8.3.}
\textsuperscript{38Supra, paras. 2–3.}
\textsuperscript{39Panel Report, para. 7.35.}
\textsuperscript{40European 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. 41 The European Communities concludes that, in the light of our ruling in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("EC – Asbestos") 42 that a "technical regulation" must apply to identifiable products, the EC Regulation is not a "technical regulation" for *Sardinops sagax*. 43

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." 44 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. 45 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*. 46

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. 47 If the measure before us is not a "technical regulation", then it does not fall within the scope of the *TBT Agreement*. 48 The term "technical regulation" is defined in Annex 1.1 to the *TBT Agreement* as follows:

41European Communities' response to questioning at the oral hearing.
42Appellate Body Report, supra, footnote.
43European Communities' appellant's submission, para. 49.
44European Communities' statement at the oral hearing.
45Article 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.

46European Communities’ statement at the oral hearing.
47Appellate Body Report, supra, footnote, para. 59.
48The *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*. 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. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. Third, compliance with the product characteristics must be mandatory. As we stressed in *EC – Asbestos*, these three criteria are derived from the wording of the definition in Annex 1.1. At the oral hearing, both participants confirmed that they agree with these criteria for determining whether a document is a "technical regulation" under the *TBT Agreement*.  

177. The European Communities concedes that the EC Regulation is a "technical regulation" *per se*. All the same, the European Communities argues that the EC Regulation is not a "technical regulation" for the purposes of this dispute because—in relation to *Sardinops sagax*—it does not fulfil two of the criteria that a document must meet to be considered a "technical regulation" under the *TBT Agreement*. The European Communities' assertion that the EC Regulation does not regulate preserved *Sardinops sagax* relates to the first criterion, which requires that a document apply to identifiable products. The European Communities' argument distinguishing "naming" from labelling requirements relates to the second criterion, which requires that a document lay down product characteristics. We will consider each of these arguments in turn.

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. (footnote omitted)

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50 European Communities' response to questioning at the oral hearing; Peru's response to questioning at the oral hearing.
51 European Communities' response to questioning at the oral hearing.
52 *Ibid*.
53 Panel Report, para. 7.44.
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.*

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. 55 In our view, the European Communities' argument, as presented on appeal, relates rather to the first criterion: the European Communities is claiming that preserved *Sardinops sagax* is not an identifiable product under the EC Regulation. 56

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. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, "of the products to be covered" by a proposed "technical regulation". (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. 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. 57 (original emphasis; footnote omitted)


55 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)

56 European Communities' appellant's submission, paras. 43–47.

57 Appellate Body Report, *supra*, footnote, para 70.
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 argues that the Panel erred in failing to acknowledge that the EC Regulation uses the term "preserved sardines" to mean—exclusively—preserved *Sardina pilchardus*. 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.

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". This is abundantly clear from a plain reading of the EC Regulation itself. The EC Regulation is entitled "Council Regulation (EEC) 2136/89 of 21 June 1989 Laying Down Common Marketing Standards for Preserved Sardines". Article 1, which sets forth the scope of the EC Regulation, states that "[t]his Regulation defines the standards governing the marketing of preserved sardines in the Community." Article 2 states that "[o]nly products meeting the following requirements may be marketed as 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*.

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".

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. As the Panel record shows, the EC Regulation has been enforced against preserved fish products imported into Germany containing *Sardinops sagax*. 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'."  

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".  

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. A finding to the effect that the EC Regulation does not contain a related product characteristic in the form of a labelling requirement does not negate the existence of other product characteristics set out in the EC Regulation.

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. … Based on the ordinary meaning, we consider that labelling and naming requirements are essentially "means of identification" of a product and as such, they come within the scope of the definition of "technical regulation".

> In any event, the distinction which we have been asked to draw between "naming" and "labelling" requirements is not supported by the text and structure of the EC Regulation.  

189. In *EC – Asbestos*, we examined what it means to lay down product characteristics, and concluded that:

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63 European Communities' appellant's submission, para 43.
64 European Communities' statement at the oral hearing.
65 Panel Report, para. 7.39.
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". The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, inter alia, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. 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. In addition, according to the definition in Annex 1.1 of the TBT Agreement, a "technical regulation" may set forth the "applicable administrative provisions" for products which have certain "characteristics". Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements". (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a "technical regulation" may be confined to laying down only one or a few "product characteristics". (original emphasis; underlining added)

Accordingly, product characteristics include not only "features and qualities intrinsic to the product", but also those that are related to it, such as "means of identification".

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. As we stated earlier, the EC Regulation expressly identifies a product, namely "preserved sardines". Further, Article 2 of the EC Regulation provides that, to be marketed as "preserved sardines", products must be prepared exclusively from fish of the species Sardina pilchardus. We are of the view that this requirement — to be prepared exclusively from fish of the species Sardina pilchardus— is a product characteristic "intrinsic to" preserved sardines that is laid down by the EC Regulation. Thus, we agree with the Panel's finding in this regard:

67 Appellate Body Report, supra, para. 67.
68 We observe that Article 2 of the EC Regulation lays down another intrinsic product characteristic in requiring that only products "sterilized by appropriate treatment" may be marketed as preserved sardines.
… one product characteristic required by Article 2 of the EC Regulation is that preserved sardines must be prepared exclusively from fish of the species *Sardina pilchardus*. This product characteristic must be met for the product to be "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. We consider that the requirement to use exclusively *Sardina pilchardus* is a product characteristic as it objectively defines features and qualities of preserved sardines for the purposes of their "market[ing] as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. 69

191. In any event, as we said in *EC – Asbestos*, a "means of identification" is a product characteristic. 70 A name clearly identifies a product; indeed, the European Communities concedes that a name is a "means of identification". 71 As the following excerpt from the Panel Report illustrates, the European Communities itself underscored the important role that a "name" plays as a "means of identification" when it argued before the Panel that one of the objectives pursued by the European Communities through the EC Regulation is to provide precise information to avoid misleading the consumer:

The European Communities argues that the provisions of its Regulation laying down minimum quality standards, harmonizing the ways in which the product may be presented and regulating the indications to be contained on the label, all serve to facilitate comparisons between competing products. It further submits that some of these objectives are pursued by the Regulation at issue in conjunction with EC Directive 2000/13. The European Communities argues that this is particularly true of the name; accurate and precise names allow products to be compared with their true equivalents rather than with substitutes and imitations whereas inaccurate and imprecise names reduce transparency, cause confusion, mislead the consumer, allow products to benefit from the reputation of other different products, give rise to unfair competition and reduce the quality and variety of products available in trade and ultimately for the consumer. 72 (emphasis added)

192. Before concluding on this second criterion and proceeding to the third criterion in the definition of "technical regulation", we observe that, although the European Communities argued before the Panel that Article 2 of the EC Regulation could not be analyzed in isolation, on appeal, the European Communities

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69 Panel Report, para. 7.27.
71 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.
72 Panel Report, para. 4.71.
asks us to focus our attention exclusively on whether Article 2, taken by itself, lays down product characteristics. As the Panel correctly points out, in EC – Asbestos, we stated that "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole". With this in mind, we observe that the Panel analyzed other articles of the EC Regulation and found that that those, too, lay down product characteristics.

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 fulfill 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. We also find that it is mandatory.

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.

198. The Panel also rejected "the European Communities' argument that Article 2.4 [of the TBT Agreement] does not apply to existing technical regulations."
199. The European Communities appeals this finding. The European Communities "does not argue that the TBT Agreement does not apply to technical regulations enacted before 1995". Instead, the European Communities contends that Article 2.4 of that Agreement does not impose an ongoing obligation on Members to reassess their existing technical regulations in the light of the adoption of new international standards, or the revision of existing ones.

200. We recall that Article 28 of the Vienna Convention on the Law of Treaties (the "Vienna Convention") 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, 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. The European Communities does not contest that the EC Regulation—which is currently in force—is an act that has not "ceased to exist". However, according to the European Communities, the preparation and adoption of the EC Regulation are both "acts that ceased to exist"—in the sense that they were completed—before the date of the entry into force of the TBT Agreement. Therefore, the European Communities contends that, consistent with Article 28 of the Vienna Convention, Article 2.4 of the TBT Agreement is not applicable to the EC Regulation.

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80 European Communities' statement at the oral hearing.
81 Ibid.
82 Supra, footnote.
84 European Communities' appellant's submission, paras. 66–83.
85 Supra.
86 European Communities' appellant's submission, para. 63; European Communities' response to questioning at the oral hearing.
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.

203. According to the European Communities, it is evident from the text of Article 2.4 that the temporal scope of the provision is limited to the two stages of *preparation* and *adoption* of technical regulations, and that the continued existence thereafter of these regulations is not governed by that provision. The European Communities finds support for this contention in what the European Communities sees as the time-limited nature of the terms "where technical regulations are required", "exist", "imminent", "use", and "as a basis for" in the text of Article 2.4, and also in the absence in the text of that provision of the words "maintain" or "apply".  

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

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87 European Communities' appellant's submission, paras. 66–67; European Communities' response to questioning at the oral hearing.
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. This supports the view that Members have to use relevant international standards that currently exist or whose completion is imminent with respect to the technical regulations that are already in existence. We do not consider that the word "imminent", the ordinary meaning of which is "likely to happen without delay", is intended to limit the scope of the coverage of technical regulations to those that have yet to be adopted. Rather, the use of the word "imminent" means that Members cannot disregard a relevant international standard whose completion is imminent with respect to their existing technical regulations.  

88 (original emphasis; footnote omitted)

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. We fail to see how the terms "where technical regulations are required", "exist", "imminent", "use", and "as a basis for" give any indication that Article 2.4 applies only to the two stages of preparation and adoption of technical regulations. To the contrary, as the Panel noted, the use of the present tense suggests a continuing obligation for existing measures, and not one limited to regulations prepared and adopted after the  
TBT Agreement entered into force. The European Communities reads Article 2.4 as if it said "where technical regulations are in preparation or are to be adopted", which is clearly not the case. The obligation refers to technical regulations generally and without limitations.

206. The European Communities' claim is also at odds with our reasoning in  
EC Measures Concerning Meat and Meat Products (Hormones) ("EC–Hormones") 89, which, as the Panel correctly

88Panel Report, para. 7.74.
89Appellate Body Report, supra.
pointed out, is relevant to the issue before us. In *EC – Hormones*, we addressed the temporal scope of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), and stated:

We agree with the Panel that the *SPS Agreement* would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the *SPS Agreement* reveals a contrary intention. We also agree with the Panel that the *SPS Agreement* does not reveal such an intention. The *SPS Agreement* does not contain any provision limiting the temporal application of the *SPS Agreement*, or of any provision thereof, to SPS measures adopted after 1 January 1995. In the absence of such a provision, it cannot be assumed that central provisions of the *SPS Agreement*, such as Articles 5.1 and 5.5, do not apply to measures which were enacted before 1995 but which continue to be in force thereafter. If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly.\(^{90}\)

(emphasis added; footnote omitted)

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".\(^{91}\) 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".\(^{92}\) 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.\(^{93}\) No such explicit exemption is found in the terms "where technical regulations are required", "exist", "imminent", "use", or "as a basis for".

209. The European Communities' argument that our ruling in *EC – Hormones* is not relevant to Article 2.4 of the *TBT Agreement* is not persuasive. The European Communities contends that we based our ruling in *EC – Hormones* on the wording of Articles 2.2, 2.3, 3.3, and 5.6 of the *SPS Agreement*, and that all these provisions include the word "maintain".\(^{94}\) The European Communities argues that the word "maintain" implies that a provision applies to measures already prepared and adopted. The European Communities then notes that Article 2.4 of the *TBT Agreement* does not include the word "maintain".\(^{95}\) It is true that, in *EC – Hormones*, we referred to Articles 2.2, 2.3, 3.3, and 5.6 of the

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\(^{90}\) Appellate Body Report, *supra*, para. 128.

\(^{91}\) European Communities' response to questioning at the oral hearing.

\(^{92}\) Appellate Body Report, *supra*, footnote, para. 128.

\(^{93}\) *Ibid.*

\(^{94}\) European Communities' appellant's submission, paras. 62–63; European Communities' response to questioning at the oral hearing. We note that although the European Communities refered to Article 2.3, this provision does not include the word "maintain".

\(^{95}\) *Ibid.*: European Communities' response to questioning at the oral hearing.
Our analysis there focused on the meaning of Articles 5.1 and 5.5 of the SPS Agreement, which, like Article 2.4 of the TBT Agreement, do not include the word "maintain". As we have explained, we found in that appeal that Articles 5.1 and 5.5 of the SPS Agreement apply to existing measures, despite the absence of the word "maintain". Thus, this argument by the European Communities fails on its own logic.

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".

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

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 first sentence imposes an obligation on a Member "preparing, adopting or applying" a technical regulation that may have a significant effect on trade of other Members to provide the justification for that technical regulation. The second sentence of Article 2.5 states that whenever a technical regulation is "prepared, adopted or applied" for one of the legitimate objectives explicitly set out in Article 2.2 and is in accordance with relevant international standards, it is to be rebuttably presumed not to create an unnecessary obstacle to trade. The use of the term "apply", in our view, confirms that the requirement contained in Article 2.4 is applicable to existing technical regulations.

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

96Appellate Body Report, supra, para. 128.
97Ibid.
98European 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.
99Panel Report, para. 7.75.
expect to adopt technical regulations." Those Members that have in place a technical regulation for a certain product are expected to participate in the development of a relevant international standard. 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. 100 (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. We note also that there is additional contextual support in the title of Article 2, which reads "Preparation, Adoption and Application of Technical Regulations by Central Government Bodies". (emphasis added) This express reference to the application of technical regulations in the title of Article 2 runs counter to an interpretation of Article 2.4 that would limit its scope to the preparation and adoption of technical regulations.

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.

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

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100 Ibid., para. 7.76.
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". 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*. 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". 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. We will address each of these arguments in turn.

A. The European Communities' Argument that Consensus is Required

219. The European Communities argues that only standards that have been adopted by an international body by consensus can be *relevant* for purposes of Article 2.4. The European Communities contends

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101 Panel Report, para. 7.70.
102 European Communities' appellant's submission, para. 123.
103 Ibid., para. 134.
104 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 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)
that the Panel did not verify that Codex Stan 94 was not adopted by consensus, and that, therefore, it cannot be a "relevant international standard".\footnote{European Communities' response to questioning at the oral hearing.}

220. However, 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 \textit{TBT Agreement}. The term "standard", is defined in Annex 1.2 as follows:

\begin{enumerate}
\item \textbf{Standard}
\begin{quote}
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.
\end{quote}

\textbf{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. \textit{Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.} (emphasis added)
\end{enumerate}

221. The European Communities does not contest that the Codex Commission is an international standardization body, and that it is a "recognized body" for purposes of the definition of a "standard" in Annex 1.2.\footnote{European Communities' response to questioning at the oral hearing.} The issue before us, rather, is one of \textit{approval}. The definition of a "standard" refers to documents \textit{approved} by a recognized body. Whether approval takes place by consensus, or by other methods, is not addressed in the definition, but it is addressed in the last two sentences of the Explanatory note.
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 the TBT Agreement which states that the TBT Agreement covers "documents that are not based on consensus".\(^{107}\)

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. The last sentence of the Explanatory note refers to "documents". The term "document" is also used in the singular in the first sentence of the definition of a "standard". We believe that "document(s)" must be interpreted as having the same meaning in both the definition and the Explanatory note. The European Communities agrees.\(^{108}\) Interpreted in this way, the term "documents" in the last sentence of the Explanatory note must refer to standards \textit{in general}, and not only to those adopted by entities \textit{other than} international bodies, as the European Communities claims.

223. Moreover, the text of the last sentence of the Explanatory note, referring to documents not based on consensus, gives no indication whatsoever that it is departing from the subject of the immediately preceding sentence, which deals with standards adopted by international bodies. Indeed, the use of the word "also" in the last sentence suggests that the same subject is being addressed—namely standards prepared by the international standardization community. Hence, the logical assumption is that the last phrase is simply continuing in the same vein, and refers to standards adopted by international bodies, including those not adopted by consensus.

224. The Panel's interpretation, moreover, gives effect to the chapeau of Annex 1 to the \textit{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, \textit{however}, the following definitions shall apply … (emphasis added)

\(^{107}\) Panel Report, para. 7.90 and footnote 86 thereto.  
\(^{108}\) European Communities' response to questioning at the oral hearing. The United States agreed. (United States' response to questioning at the oral hearing)
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"). 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.  

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.

226. Furthermore, we observe that the Panel found that, in any event, the European Communities did *not* prove that Codex Stan 94 was *not* adopted by consensus. Instead, the Panel found that, "[t]he record does not demonstrate that Codex Stan 94 was not adopted by consensus".

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*. It is not intended to affect, in any way, the internal requirements that international standard-setting bodies may establish for themselves for the adoption of standards within their respective operations. In other words, the fact that we find that the *TBT Agreement* does not require approval by consensus for standards adopted by the international standardization community should not be interpreted to mean that we believe an international standardization body should not require consensus for the adoption of its standards. That is not for us to decide.

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

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110Ibid., subclause 3.2.

111Panel Report, footnote 86 to para. 7.90. The report of the meeting of the Codex Commission where Codex Stan 94 was adopted, which Peru submitted to the Panel, makes no mention of votes being cast before its approval. (Report of the Twelfth Session of the Joint FAO/WHO Codex Alimentarius Commission (ALINORM 78/41), submitted as Exhibit Peru-14 by Peru to the Panel) We note that, at the oral hearing, the European Communities and Peru agreed that the Panel's conclusion that the record does not demonstrate that Codex Stan 94 was not adopted by consensus is a factual finding, which is beyond the purview of appellate review.
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. 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".

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*. Codex Stan 94 covers 20 fish species in addition to *Sardina pilchardus*. 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". The European Communities appeals this finding.

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.

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112 European Communities' response to questioning at the oral hearing.
113 Ibid.
114 See supra, paras. 184–185.
115 The fish species covered by Codex Stan 94 are listed in section 2.1.1 thereto. (Supra, footnote) See also, supra, para. 5.
116 Panel Report, para. 7.112.
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".  

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. 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. Further, Peru argued that prohibiting the marketing in the European Communities of Sardinops sagax imported from Peru as, for example, "Peruvian sardines" would run counter to the first of the four options in section 6.1.1(ii).

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."

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 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.

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

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117 Ibid., para. 7.101. See also, supra, footnote 104, explaining why the European Communities interprets this as a stand-alone option.
118 Panel Report, para. 4.43.
119 Panel Report, para. 7.103.
120 Our interpretation is also consistent with the English print version of section 6.1.1(ii) of Codex Stan 94. See supra, footnote 5.
Panel interpreted the word "basis" to mean "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge". 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", 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." 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. According to the European Communities, the term "as a basis" should involve a consideration of the texts as a whole, examining the basic structure of the domestic measure and deciding whether the international standard has been used in its preparation and adoption. The European Communities adds that, in order to determine whether a relevant international standard, or a part of it, is used "as a basis for" a technical regulation, the criterion to apply is not, as the Panel suggested, whether the standard is the principal constituent or the fundamental principle of the technical regulation, but, rather, whether there is a "rational relationship" between the standard and the technical regulation on the substantive aspects of the standard in question.

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". 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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121 Panel Report, para. 7.110, quoting Webster's New World Dictionary, supra, footnote, p. 117.
122 Panel Report, para. 7.111.
123 Ibid., para. 7.112.
124 Ibid, para. 7.112.
125 Ibid., para. 150.
126 Ibid., para. 155.
127 Ibid.
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.\(^{150}\)


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*.\(^{129}\)

(...)

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.\(^{130}\) According to the European Communities, an examination based on the criterion of the existence of a "rational relationship" focuses on "the qualitative aspect of the substantive relationship that should exist between the relevant international standard and the technical regulation".\(^{131}\) In response to questioning at the oral hearing, the European Communities added that a "rational relationship" exists when the technical regulation is informed in its overall scope by the international standard.

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. Moreover, the European Communities does not offer any arguments relating to the context or the object and purpose of that provision that would support its argument that the existence of a "rational relationship" is the appropriate criterion for determining whether something has been used "as a basis for" something else.

248. We see no need here to define in general the nature of the relationship that must exist for an international standard to serve "as a basis for" a technical regulation. Here we need only examine this measure to determine if it fulfils this obligation. 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.

249. Thus, we need only determine here whether there is a *contradiction* between Codex Stan 94 and the EC Regulation. If there is, we are justified in concluding our analysis with that determination, as the only appropriate conclusion from such a determination would be that the Codex Stan 94 has not been used "as a basis for" the EC 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

\(^{128}\) Ibid., para. 163 and footnote 150 thereto.

\(^{129}\) Panel Report, para. 7.110.

\(^{130}\) "European Communities' appellant's submission, para. 155.

\(^{131}\) Ibid.
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 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" 132, 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). 133 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.

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132 European Communities' appellant's submission, para. 150.
133 European Communities' response to questioning at the oral hearing.
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.

We accept the European Communities' contention that the EC Regulation contains the prescription set out in section 6.1.1(i) of Codex Stan 94. However, as we have just explained, the analysis must go beyond section 6.1.1(i); it must extend also to sections 6.1.1(ii) and 2.1.1 of Codex Stan 94. And, a comparison between, on the one hand, sections 6.1.1(ii) and 2.1.1 of Codex Stan 94 and, on the other hand, Article 2 of the EC Regulation, leads to the inevitable conclusion that a contradiction exists between these provisions.

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.

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.

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

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".

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.\(^{134}\) (footnote omitted)

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

\(^{134}\)Panel Report, para 7.50. See also, Panel Report, paras. 7.52 and 7.114.
accomplishing", "having a result", or "brought to bear", whereas "inappropriate" refers to something which is not "specially suitable", "proper", or "fitting." 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. That is, whereas it may not be specially suitable for the fulfilment of the legitimate objective, an inappropriate means may nevertheless be effective in fulfilling that objective, despite its "unsuitability". Conversely, when a relevant international standard is found to be an effective means, it does not automatically follow that it is also an appropriate means. The question of effectiveness bears upon the results of the means employed, whereas the question of appropriateness relates more to the nature of the means employed.


92 Ibid., p. 103. (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". 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".

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. The Panel also noted Peru's acknowledgement that those "objectives" are "legitimate", and the Panel saw "no reason to disagree with the parties' assessment in this respect." 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. The Panel was of the view that, if this factual premise is valid, it must be concluded that Codex Stan 94 is "ineffective or inappropriate" to meet the "legitimate objectives" of market transparency, consumer protection, and fair competition. In other words, if European Communities consumers associate the term "sardines" exclusively with Sardina pilchardus, a product identified as "sardines" would have to be made exclusively of Sardina pilchardus so as not to mislead
those consumers. 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.*" The Panel also found that, by establishing a precise labelling requirement "in a manner not to mislead the consumer", "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." 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.

265. Although the Panel had assigned the burden of proof under Article 2.4 to the European Communities—so that it was for the European Communities to prove that Codex Stan 94 was "ineffective or inappropriate" to meet the European Communities' "legitimate objectives"—the Panel stated that Peru had, in any event, adduced sufficient evidence and legal arguments to allow the Panel to reach the conclusion that the standard was not "ineffective or inappropriate".

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 disputes the Panel's conclusion that the burden rests with the European Communities to demonstrate that Codex Stan 94 is an "ineffective or inappropriate" means to fulfil the "legitimate objectives" of the EC Regulation. 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. In particular, the European Communities argues that the Panel erred in founding its analysis on the factual premise that consumers in the European Communities associate "sardines" exclusively with *Sardina pilchardus*. Furthermore, the European Communities contends that the Panel erred in concluding that the term "sardines", either by itself or when combined with the name of a country or geographic area, is a common name for *Sardinops sagax* in the European Communities. The European Communities also objects to the decision by the Panel to take this conclusion into account in its assessment of whether consumers in the European Communities associate the term "sardines" exclusively with *Sardina pilchardus*.

268. In considering these claims of the European Communities, we will address, first, the question of the burden of proof, and, next, the substantive content of the second part of Article 2.4 of the *TBT Agreement*.

A. The Burden of Proof

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140 Ibid., para. 7.123.
141 Ibid., para. 7.137.
143 Panel Report, para. 7.133.
144 Panel Report, para. 7.138.
145 European Communities' appellant's submission, paras. 176–179.
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. 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 context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation. (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*. The relevant statement in the Panel Report—found in a footnote—reads as follows:

> We are cognizant of the Appellate Body's finding in *EC – Hormones* that, in reference to Articles 3.1 and 3.3 of the SPS Agreement, the latter provision, which allows Members to establish their own level of sanitary protection, does not constitute an exception to the general obligation of Article 3.1, and that the burden of the complaining party to establish a *prima facie* case of inconsistency "is not avoided by simply describing that provision as an 'exception'". However, we consider that the Appellate Body's finding in *EC – Hormones* does not have a direct bearing on the matter before us. (emphasis added)

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

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148 Panel Report, footnote 70 to para. 7.50.
149 Panel Report, footnote 70 to para. 7.50.
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. Given the conceptual similarities between, on the one hand, Articles 3.1 and 3.3 of the SPS Agreement and, on the other hand, Article 2.4 of the TBT Agreement, we see no reason why the Panel should not have relied on the principle we articulated in EC–Hormones to determine the allocation of the burden of proof under Article 2.4 of the TBT Agreement. In EC–Hormones, we found that a "general rule-exception" relationship between Articles 3.1 and 3.3 of the SPS Agreement does not exist, with the consequence that the complainant had to establish a case of inconsistency with both Articles 3.1 and 3.3.\(^{150}\) We reached this conclusion as a consequence of our finding there that "Article 3.1 of the SPS Agreement simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement".\(^{151}\) Similarly, the circumstances envisaged in the second part of Article 2.4 are excluded from the scope of application of the first part of Article 2.4. 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

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

\[ \ldots \text{except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued} \ldots \]

\(^{150}\)Appellate Body Report, supra, para. 104.

\(^{151}\)Ibid.
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.  

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'". The Panel also stated that:

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. … The question of effectiveness bears upon the results of the means employed, whereas the question of appropriateness relates more to the nature of the means employed. (original emphasis)

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. 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.

2. The Application of the Second Part of Article 2.4

287. With respect to the application of the second part of Article 2.4, we begin by recalling that Peru has the burden of establishing that Codex Stan 94 is an effective and appropriate means for the fulfilment of the "legitimate objectives" pursued by the European Communities through the EC Regulation. Those

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152 See supra, para. 261.
154 Ibid.
155 Panel Report, para. 7.118.
156 Ibid., para. 7.122.
"legitimate objectives" are market transparency, consumer protection, and fair competition. To satisfy this burden of proof, Peru must, at least, have established a *prima facie* case of this claim. If Peru has succeeded in doing so, then a presumption will have been raised which the European Communities must have rebutted in order to succeed in its defence. If Peru has established a *prima facie* case, and if the European Communities has failed to rebut Peru's case effectively, then Peru will have discharged its burden of proof under Article 2.4. In such an event, Codex Stan 94 must, consistent with the European Communities' obligation under the *TBT Agreement*, be used "as a basis for" any European Communities regulation on the marketing of preserved sardines, because Codex Stan 94 will have been shown to be both effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities. Further, in such an event, as we have already determined that Codex Stan 94 was not used "as a basis for" the EC Regulation, we would then have to find as a consequence that the European Communities has acted inconsistently with Article 2.4 of the *TBT Agreement*.

288. This being so, our task is to assess whether Peru discharged its burden of showing that Codex Stan 94 is appropriate and effective to fulfil these same three "legitimate objectives". In the light of our reasoning thus far, Codex Stan 94 would be *effective* if it had the capacity to accomplish all three of these objectives, and it would be *appropriate* if it were suitable for the fulfilment of all three of these objectives.

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.\(^{157}\) This is why Peru has the burden of showing that Codex Stan 94 is both *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.\(^{158}\)

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."\(^{159}\) 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*.\(^{160}\) 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*, 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".\(^{162}\) 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

\(^{157}\)Panel Report, para. 7.116.

\(^{158}\)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)

\(^{159}\)Ibid., para. 7.138.

\(^{160}\)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.

\(^{161}\)Ibid., para. 4.88.

\(^{162}\)Ibid., para. 4.86.
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;

(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; (…)
4. Recent Developments

4-1. REGISTRATION, EVALUATION, AUTHORISATION AND RESTRICTIONS OF CHEMICALS (REACH)

From Bridges Weekly Trade News Digest, Vol. 8, No. 24, Jul. 7, 2004
http://www.ictsd.org/weekly/04-07-07/story4.htm

EC CHEMICALS REGULATION DRAWS RENEWED CRITICISM AT WTO

At a 1 July meeting of the WTO Committee on Technical Barriers to Trade (TBT), the US, Japan and other EC trading partners reiterated their criticism against the proposed European chemicals policy REACH (Registration, Evaluation, Authorisation and Restrictions of Chemicals), saying the legislation would be too costly and burdensome and would disrupt global trade. Meanwhile, civil society groups renewed their calls for strengthening the chemicals policy, calling on the EC to resist the "US government's efforts to weaken" the legislation.

In a 51-point document submitted to the TBT Council, the US elaborated on its concerns, already expressed at previous TBT meetings (see BRIDGES Trade BioRes, 11 July 2003). Specifically, the US noted that the EC's latest proposal, released in October 2003 (see BRIDGES Trade BioRes, 31 October 2003), "still appears to adopt a particularly costly, burdensome and complex approach" that could "prove unworkable in its implementation, disrupt global trade, and adversely impact innovation". The US feared that the current proposal might affect the majority of US goods exported to EC -- worth over US$150 billion in 2003 -- given that chemicals are used in the production of most manufactured goods. The US added that the impact likely would be even greater following the recent accession of the 25 new EC member states, and called on the EC to improve the regulations' cost-effectiveness so as to minimise negative trade impacts.

Several Asian countries, including, China, Chinese Taipei, Japan, Thailand and Singapore on behalf of the Association of South East Asian Nations (ASEAN) also voiced concerns. The countries pointed to the expected economic impact on developing countries, in particular on small and medium sized enterprises, which they said would be unable to cope with the complex, burdensome and costly system. Moreover, they criticised the scope of obligations under the new policy as going beyond other countries' chemical management regulations. China complained that the EC had not carried out an adequate assessment of impacts on the chemicals industry in poor countries. The EC said it would respond to the comments in writing. Japan warned that the policy might be inconsistent with WTO rules, as it may end up restricting Japanese exports to EC countries.

Civil society groups, on the other hand, renewed their calls on the US to cease its "campaign to weaken the EU chemicals policy". "Rather than attacking the REACH policy, the administration should emulate it to safeguard US consumers from the tens of thousands of unregulated, potentially dangerous chemicals on the market," said Lori Wallach, Director of Public Citizen's Global Trade Watch. The TransAtlantic Consumer Dialogue -- a coalition of more than 60 consumer groups in Europe and the US -- urged the EC to strengthen the proposed policy. Among their recommendations, they demanded that hazardous chemicals not be subject to volume thresholds for registration and authorisation; that the authorisation procedure for chemicals of high concern should be strengthened, including through a strong substitution test; and that all consumer articles containing chemicals -- domestic and imported -- should be assessed, whether the chemicals were intended to be released or not.
Certain members of the US Senate also brought forth concerns. In a letter to US Trade Representative Robert Zoellick, Frank Lautenberg (D-NJ) and Jim Jeffords (I-VT) raised questions with regard to the US government's position on the potential trade implications of the EC's proposal. "We are troubled by reports that the position of this administration on REACH may reflect the interests of a narrow segment of US industry without consideration of the broader ramifications for the US economy, national interest, public health and the environment," they noted. The senators requested Zoellick to specify which provisions of REACH he considered to be in conflict with which WTO provisions. They also called on Zoellick to explain how he had arrived at his position on REACH and who he had consulted in the process.

Background
The REACH legislation is set to replace 40 different pieces of current legislation in the EC. Among the most fundamental changes is a proposed shift of the burden of proof for the safety of chemicals from public authorities to companies that produce, import and use chemicals. A new European Chemicals Agency would administer the legislation. Registration and approval procedures would vary depending on the amount of chemicals manufactured or imported, and on the level of risk. While the vast majority of chemicals would only need to be registered, authorisation would be required for substances of "very high concern," such as carcinogens, mutagens and reproductive toxicants, subject to a risk assessment. To obtain authorisation for a specific use, the applicant would have to show that the risk from the use was adequately controlled or that socio-economic benefits outweighed the risks.

For additional resources see trade-environment.org.


DEVELOPING COUNTRIES SAY REACH COULD HAVE "GRAVE CONSEQUENCES"
Thirteen of the EU's leading trade partners, including several developing countries, issued a statement on 8 June urging Brussels to modify the proposed Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) legislation to reduce its "potentially disruptive impact on international trade" and "grave consequences on developing economies". The joint press statement from the missions to the EU of India, Brazil, Mexico, Singapore, South Africa, Thailand, Chile, Israel, Korea, Malaysia, Australia, Japan and the US came at the end of a meeting hosted by the American Chamber of Commerce to the EU (AmCham-EU) in Brussels, Belgium on the impact of the draft chemicals regulation on international trade flows. The legislation has gone through a first reading in the European Parliament and a vote in the Council of Ministers (see Bridges Trade BioRes, 25 November 2005).

Risk, notification costs and substitution key concerns
The statement calls on the EU to use the opportunity provided by the second reading in Parliament, scheduled for October 2006, to make key changes to reflect their concerns regarding the workability of the regulation, its effects on international trade, and the opacity of the
regulatory process. In particular, the countries said they wanted a "more risk-based authorisation process" to decide what products would be subject to the registration and regulation requirements. They stressed the importance of only including chemicals on the basis of a risk assessment that demonstrated clear health or environmental risks, and questioned the environmental value of including chemicals which have been processed to the point at which they have no more risky characteristics, or which are covered by other legislation. They said that some parts of the draft legislation, such as the inclusion of "everyday bulk commodities", high registration fees and demands on technological and human resource capacity could be particularly burdensome for small and medium-sized enterprises in developing countries.

The countries also took aim against the substitution principle in the draft legislation, under which companies that wanted to use a chemical that had been deemed hazardous by the REACH approval and registration process would be required to use another safer chemical, if available. They argued that mandatory substitution would cause "unnecessary market disruptions without clear environmental benefits". Instead, they suggested that the EU harmonise its rules with existing international regulatory efforts, using data from the Organisation for Economic Co-operation and Development (OECD) and other relevant organisations.

No explicit mention of WTO compatibility, but allusions made

Although the countries did not make an explicit reference to the WTO-compatibility of REACH, the frequent references to "effects on international trade", "unnecessary market disruptions" and "unclear environmental benefits" was interpreted by many analysts as a reference to the possibility that aspects of REACH could be regarded as constituting an unnecessary obstacle to trade. The US in April of this year suggested that the regulation could be challenged through the WTO's dispute settlement system under Article 2.2 of the WTO Agreement on Technical Barriers to Trade (TBT), which specifies that WTO Members shall not adopt or apply technical measures that are unnecessary barriers to trade insofar as they are more trade-restrictive than necessary.

The US is expected to raise its objections to REACH at an EU-US summit to be held on 21 June in Vienna.

EU, civil society lash back

REACH was originally designed to protect consumers and the environment against the adverse effects of chemicals found in products like paint, detergents, cars and computers. Environmental group WWF said that the countries making the statement had failed to take account of changes that had been made to the bill after its first reading in the EU parliament -- including revisions to the text to make sure the rule-making was based on that from relevant international regulatory fora, to allow for exemptions, and to prioritise chemicals on the basis of risks. Justin Wilkes, a chemical safety campaigner at WWF, said it was "part of a continuing US effort to weaken REACH to the benefit of its chemicals industry". Instead, WWF argued, REACH could help developing countries to create domestic systems for sound chemicals management. A recent study drafted for the European Parliament's Development Committee estimates the costs to the chemical companies operating in African, Caribbean and Pacific countries to be just Euro 50 million over 11 years.
In response to questioning regarding the statement and the WTO implications of the legislation, the EU told reporters on 9 June that it had consulted with the WTO and its own legal service about compliance with the TBT Agreement. "We do not see how [REACH] could contravene WTO rules", said environment spokesperson Barbara Helfferich.

**Additional resources**

Optional Reading

Horn & Weiler, Preliminary Paper, "European Communities - Trade Description of Sardines: Textualism and its Discontent" The WTO Case Law of 2002
