Domestic Regulation, Harmonization, and Technical Barriers to Trade

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1. INTRODUCTION

“All trade is ‘trade and’”

The relationship between the international trade regime and social, environmental, and health policies received unprecedented dominated diplomatic and scholarly analysis in the past decade. The WTO Appellate Body has affirmed the regime’s capacity to accommodate such relationships, especially under the GATT,2 but this progress does not signal the end of the linkage debate. There is institutional ambivalence, if not hostility, to the AB’s emerging linkage jurisprudence.3 A civil society campaign is also being waged over the social, environmental and cultural implications of services liberalisation under the GATS negotiations.4 These attitudes show that concerns about the WTO’s constraints on domestic regulatory autonomy persist.

This paper contributes to recent legal and policy analyses of barriers to trade that are embedded in domestic regulation,5 by reconsidering the harmonization provisions of the WTO Agreement on Technical Barriers to Trade (TBTA). Considerable scholarly attention has been devoted to the TBTA’s companion agreement dealing with food safety and plant and animal health, the Agreement on Sanitary and Phytosanitary Measures (the SPSA),6 but the

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2 Firstly, the AB has made clear that Article XX can impose appropriate disciplines on the problematic aspects of social, health or environmental measures, such as hidden protectionism or “knee-jerk unilateralism”. The Shrimp-Turtle dispute showed that measures could be appropriately disciplined, and that problematic or potentially problematic aspects of these kinds of measures could be addressed (United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, adopted 6 November 1998, ¶104 (Shrimp-Turtle AB) Howse above n 1, at 111. Secondly, the AB has signalled a greater role for itself in weighing these regulatory values against trade values (Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef, Report of the Appellate Body, adopted 10 January 2001, WT/DS161/AB/R (Korea-Beef AB)). Trachtman J, “Lessons for the GATS from Existing WTO Rules on Domestic Regulation” in Mattoo A & Sauve P (eds) Domestic Regulation and Service Trade Liberalization (2003) World Bank/Oxford University Press, Washington DC, 57, at 73-74 (2003a).


4 See, for example, the submissions to the Australian Senate Inquiry into the General Agreement on Trade in Services and Australia-US free Trade Agreement (www.aph.gov.au) and Australian Senate Foreign Affairs, Defence & Trade References Committee, Voting on Trade: The General Agreement on Trade in Services and an Australia-US Free Trade Agreement (2003) Australian Senate, Canberra.


TBTA has received relatively scant appraisal.\(^7\) The SPSA disciplines were tested soon after the Agreement’s introduction,\(^8\) but neither the TBTA nor its predecessor the Standards Code\(^9\) had been subject to dispute settlement analysis until 2000.\(^10\) This may be explained by the fact that the TBTA merely superceded an existing agreement; the less sensitive nature of TBTA coverage; the novelty of the SPSA’s emphasis on science; or the prevalence of protectionist SPS measures. Whatever the reason, the obligations of the TBTA remain largely unexplored. This paper examines the harmonization claims that lie at the heart of the TBTA, assesses its harmonization “architecture”, and considers the implications of its agenda for domestic regulation for a range of non-trade purposes. It draws upon the AB’s TBTA decisions in Sardines and Asbestos, as well as linkage jurisprudence under under agreement.

Part 2 of this Paper provides some theoretical perspectives on the TBTA’s over-arching goal of international harmonization of technical regulations. It presents a typology of harmonization, assesses the legitimacy of harmonization claims, and highlights the importance of matching the choice of the mechanism for harmonization with its underlying objectives. Part 2 then applies this theoretical framework to the TBTA, providing a framework within which to assess the operation of key disciplines. Part 3 then assesses the scope and operation of the TBTA. It examines the definitional threshold for TBTA application, then considers how the AB’s Sardines ruling clarifies the Agreements substantive obligations. It reveals some flaws in the Agreement’s architecture that may undermine achievement of goals underpinning its harmonization provisions. Part 4 takes up these concerns, identifying improvements to the regime that would enable it to achieve its trade liberalisation objective while also advancing the accommodation of non-trade policy goals. As the process of harmonization expands into other subject areas, such as liberalisation of services and investment, these issues will increase in importance. This paper concludes that the WTO should use its experience of the TBTA to ensure that mechanisms for harmonization are constantly reviewed, assessed, and modified to ensure that they maintain legitimacy.

2. PERSPECTIVES ON HARMONIZATION

2.1 THE CASE FOR HARMONIZATION

Before examining the TBTA’s approach to harmonization of international standards, it is worth reflecting on the reasons for, and means of, achieving of such a goal. Harmonization comes at the cost of diversity the value of which is implicit in the theory of comparative advantage.\(^11\) The following discussion will provide a framework for analysing the TBTA’s harmonization provisions. It is drawn principally from the analyses of Bhagwati and Leebron in their 1996 works on fair trade and harmonization.\(^12\) Since there is no general theoretical proposition that all nations will benefit from harmonization,\(^13\) harmonization should not be

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\(^7\) Notable exceptions include Marceau & Trachtman, above n5; Trachtman 2003a, above n2.


\(^10\) The WTO AB considered the definition of “technical regulation in European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,” Report of the Appellate Body, WT/DS135/AB/R (Asbestos AB) but applied the provisions of the TBTA for the first time in European Communities – Trade Description of Sardines WT/DS231/R, 22 May 2002 (Sardines Panel); WT/DS231/AB, 26 September 2002 (Sardines AB).


\(^13\) Leebron, above n11, at 84.
regarded as an end in itself but as a means by which to achieve wider policy goals. The analytical frameworks identified by Bhagwati and Leebron therefore emphasise the importance of understanding the asserted purpose of harmonization claims for any assessment of their legitimacy and workability.

2.1.1 Typology of harmonization

Harmonization has no fixed meaning. Leebron defines it broadly as “making the regulatory requirements or governmental policies of different jurisdictions identical, or at least more similar” but goes on to develop a useful typology of “harmonizations”:

1. Harmonization of specific rules that regulate the outcome, characteristics, or performance of goods. Under a broad reading of “performance”, Leebron includes in this group the standardisation of product qualities and characteristics, as well as production or manufacturing process.

2. Harmonization of policy objectives, which set standards for governmental action, but leave discretion on how objectives are to be achieved.

3. Harmonization of principles that will underpin policy in particular areas, such as cost allocation (e.g. polluter pays principle), the requirement for scientific basis for decision, or preserving labour’s right to organise.

4. Harmonization of institutional structures and procedures, such as public participation in rulemaking and access to judicial dispute settlement.

For each of these types of harmonization, the degree of harmonization may vary. In some cases no difference will be tolerated, so the harmonization “margin” will be zero. Other approaches set a floor and a ceiling for new measures, but Leebron notes that the more common model is only to require countries to accept some minimum, with the problem that this becomes a *de facto* standard due to internal political pressures to reduce domestic industry’s regulatory burden.

2.2.2 Harmonization claims

Harmonization claims can be non-normative and normative. Non-normative claims rest only on the strength of reducing difference, while normative harmonization claims seek to identify which law should be used as the basis for the new harmonized rules. The following typology explores non-normative claims that laws should be made more similar. Bhagwati undertakes a broad grouping of arguments against diversity (and in favour of harmonization) into philosophic, economic and political. His categories provide a useful starting point for analysis, but they miss important points that are captured by Leebron’s more detailed classification. I have therefore attempted to combine these classifications, incorporating Bhagwati’s arguments into Leebron’s seven claims for harmonization.

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14 Ibid, at 42.
15 Ibid, at 43.
16 Ibid, at 44.
17 Ibid.
18 Ibid, at 45.
19 Ibid, at 46.
20 Ibid, at 47.
21 Ibid, at 47-50. This issue will be considered further in the analysis of the TBTA’s harmonization model, below.
22 Ibid, at 42. It is one thing to say that they very fact of diversity requires harmonization in order eliminate “unfair” differences and restore the level playing field; it is quite another for one country to assert that it is their regime that should become the norm.
23 Bhagwati, above n12, at 9.
1. Jurisdictional interface: Harmonization is required to enable participants and systems to interact or communicate. This is essentially an efficiency claim that emphasizes the need for harmonized systems and technologies to facilitate border exchange. Agreements on railway gauges and telecommunications protocols are good examples of this category.  

2. Externalities: Harmonization is required to prevent the imposition of transborder social costs and to ensure reciprocity of effects. This category captures the philosophical claim that harmonization is necessary to give effect to transborder obligation, identified by Bhagwati. Leebron suggests that this claim is strongest when it purports to protect international public goods, but that harmonization per se cannot deal with externalities unless the normative rules or standards do so. Bhagwati’s second philosophical claim - that trade with poor countries will immiserize local workers - also fits neatly within Leebron’s idea of distributional externalities within the high standards country. On this view, fair trade requires equality of treatment.

Bhagwati suggests that philosophical claims about externalities are easily subject to protectionist abuse, especially when the concerns require the governments of other countries to modify their practices. He also emphasizes that the validity of such claims will be undermined if the difference in standards reflects genuine difference in the preferences of each country. These issues are considered below.

3. Leakage and non-efficacy of rules: Harmonization is required to prevent the circumvention of local rules by leakage of non-conforming goods or transactions into or out of the jurisdiction. Harmonization is thus an alternative to policing borders, goods and transactions, since it guarantees that all entrants have complied with the same requirements.

Leebron also characterizes concerns about industry flight as a form of leakage, insofar as enterprises relocate to jurisdictions with less stringent regulatory requirements and imports substitute for domestic production. The harmonization claim here centres on national government’s inability to make optimal policy choices (such as compensating those who have been injured by the distributional realignment) and the risk that they may instead be forced to change their stricter laws or policies: “because we are unable to make optimal policy choices in the face of trade competition, you must change your laws (even if doing so is not welfare enhancing for you)”. Bhagwati classifies this politically-mediated externality as a political claim for harmonization, deriving principally from those seeking protection. It is logically connected with his economic claims for harmonization. These centre on the concern that liberalisation of trade and investment has created “kaleidoscopic comparative advantage” among “footloose” industries which exacerbates even slight differences in regulatory environments, affecting a firm’s competitive position.

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24 Leebron, above n11, at 52.
26 Leebron, above n10, at 55.
28 Ibid, at 31-32.
29 Leebron, above n10, at 56.
32 Leebron, above n10, at 59.
33 Bhagwati, above n11, at 31-32.
34 Ibid, at 22. See also Sassen, above n31, at 8: “offshoring creates a space economy that goes beyond the regulatory umbrella of the state.”
35 Bhagwati, ibid, at 31. Bhagwati notes a radical shift in attitude towards a presumption of predation from free trade without
The leakage/nonefficacy claim is weak unless there is something “wrong” with the regulatory policies of the exporting nation. Indeed, regulatory diversity will be legitimate if it results from differences in endowments, technologies, or preferences that form a nation’s comparative advantage. The substantive legitimacy of these differences may be undermined, however, if there are significant differences in institutions and the influence of domestic coalitions such that the regime adopted is not the ideal, but simply the “best politically attainable.” In most cases, therefore, Leebron suggests that the claim for substantive legitimacy of differences is weakened, and diversity must instead be defended on pragmatic grounds or on the basis of the legitimacy of the process by which the laws and measures were arrived at.

4. Fair competition: Harmonization is necessary because the lesser regulatory burdens enjoyed by industry in other countries are unfair. This claim provides the normative basis for removing the regulatory difference that causes the leakage or inefficacy outlined above. The argument goes that comparative advantage derived from regulatory difference is not real comparative advantage, but in fact a form of subsidy. This can work an injustice on individuals or groups, or on the nation as a whole. Leebron argues that harmonization is a crude tool for dealing with systemic or structural failures in national policies, which probably result from macroeconomic factors.

5. Economies of scale: Harmonization makes it possible or easier to increase the scale of production. Harmonization removes both compliance and legal information costs and can remove an “artificial source of comparative advantage enjoyed by domestic producers.”

6. Political economies of scale: Harmonization increases efficiency in the development of new policies and regulations. This occurs in the pooling of resources and expertise in multilateral fora. Relocation of regulatory functions out of the national political sphere can also de-politicise decisions and protect national governments from domestic interest group influence. It will not necessarily make regulatory regimes more democratic, though, if some domestic constituencies have greater influence in international processes or organisations than they would have domestically.

7. Transparency: Harmonization eliminates a country’s ability to choose rules that have greater protective effect. It thereby gives effect to one of the central norms of the international trading system. Leebron suggests that it is “controversial” to base harmonization claims solely on arguments of trade transparency, but also concedes that this claim is so difficult to address in other ways that it may justify complete regulatory identity. Even where rules have been harmonised, however, Leebron cautions that the way in which an identical policy is applied may still provide opportunities for protection. Moreover, the compromises involved in

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36 Leebron, above n10, at 60.
37 Ibid, at 69.
38 Ibid, at 66-67,70-75.
39 Ibid, at 70.
40 Ibid, at 61-62.
41 Ibid.
42 Ibid.
43 Ibid, at 63-64.
44 Ibid.
46 Ibid.
the process of rule harmonization can often produce incoherent or vague measures that enable protective policies to continue.\(^{47}\)

Not all legitimate claims for harmonization actually require harmonization of domestic regulatory regimes. If the basis of the claim is to achieve economies of scale or to address transparency concerns, Leebron suggests that mutual recognition would be equally appropriate. This approach would not respond, however, to claims based on externalities, non-efficacy or fair competition\(^{48}\). Since mutual recognition is the “regulatory equivalent of a free trade area”, it would provide no answer to concerns that the regulatory regime of another country imposes transboundary costs, hinders the implementation of domestic laws, or is somehow “unfair”.\(^{49}\)

2.3.3 Mechanisms for harmonization

Whatever the basis of the substantive claim for harmonization, the harmonization process will influence its realisation.\(^{50}\) The structure and operation of harmonization processes is often contentious, both internationally and domestically.\(^{51}\) This is because the distribution of costs and benefits can be quite skewed, making it hard to ensure the reciprocity that underpins the trade regime.\(^{52}\) The problems that such asymmetries create for negotiating harmonization are exacerbated by the shifts in the power and influence of certain interest groups resulting from the change in forum.\(^{53}\)

The composition of the harmonization body is also critical.\(^{54}\) Where it comprises national representatives, there is an internal tension over who “represents” the nation. In the case of Codex Alimentarius, for example, the representation on national priorities may vary depending on whether it is trade, agriculture or health bureaucrats who participate. If the harmonization model delegates standard-setting to groups of experts who do not represent national interests, national political struggles may be avoided, but the end product may lack legitimacy for this very reason.\(^{55}\) Leebron suggests that the best approach for future harmonization initiatives in areas of trade linkage might be the ILO model which permits national constituencies to participate at the international level.\(^{56}\) The composition of international standard setting bodies under the TBTA is considered further in Part 4 of this paper.

2.3.4 Contrasting consumer perspectives on harmonization

Before moving to an application of these theoretical foundations to the harmonization provisions of the TBTA, it may be useful to compare the considerations set out above with the Principles for International Harmonization adopted by the Transatlantic Consumer Dialogue (TACD) in 2000.\(^{57}\) Like the analysis of Bhagwati, the overall thrust of the principles is skeptical of harmonization. Although the focus is on consumer health and safety, rather than

\(^{47}\) Ibid, at 66.
\(^{48}\) Ibid, at 91-92.
\(^{49}\) Ibid.
\(^{50}\) Ibid, at 78.
\(^{51}\) Ibid, at 85.
\(^{52}\) Ibid, at 84.
\(^{53}\) Ibid.
\(^{54}\) Ibid, at 86-87.
\(^{55}\) Ibid.
\(^{56}\) Ibid, at 88.
economic considerations, the TACD Principles correlate closely with the considerations outlined above.

The TACD’s first principle is that the most appropriate subjects of harmonization are standards that have no health or safety component, and by extension, differences in cultural preferences regarding health standards should be preserved.\(^{58}\) This principle is consistent with the view of both Leebron and Bhagwati that the mere fact of difference is not an argument for harmonization where diversity reflects national preferences. A related concern is the appropriateness of the WTO to resolve disputes involving health and safety standards.\(^{59}\) The second principle is that some issues such as water and public services, should be exempt from international rules altogether. While Leebron and Bhagwati both recognise that not all claims for harmonization are legitimate, they are unlikely to support an approach that removes economically significant activities from the rules of international trade solely on purported public interest grounds, unless there was a clear economic case for it. The TACD’s third principle is that international standards should set minima, rather than ceilings for domestic requirements. Leebron certainly makes the point that in practice most harmonization initiatives involve setting minimum standards,\(^{60}\) but the central theme of his analysis is that the best technique of harmonization will depend upon each individual harmonization claim.

The remainder of the principles concern procedural aspects of harmonization. They call for standard-setting processes that use the precautionary principle, and that are open, democratic and accountable.\(^{61}\) These issues are consistent with Leebron’s concerns about the dangers of de-politicising domestic policy-making by shifting it upward to multilateral organisations. Although he does not prescribe a single optimal process, his preference for an ILO-style model for future initiatives is certainly consistent with the need for greater transparency and representation in international standards processes. Unlike Leebron, the TACD is deeply suspicious of the use of functional equivalence and mutual recognition as alternatives to harmonization, although Leebron acknowledges the inappropriateness of mutual recognition when the harmonization claim is based on leakage or inefficacy of local laws.\(^{62}\)

2.2 Harmonization in International Trade Rules

This section examines the approaches to harmonization taken in the WTO Agreement on Technical Barriers to Trade (TBTA), using the Leebron-Bhagwati analytical framework. It has long been accepted that domestic policies and laws can nullify or impair the purported benefits of trade policies, and that the WTO must therefore reach beyond “border” measures.\(^{63}\) The GATT does this to some extent, but the growth in non-tariff barriers to trade during the 1960-70s prompted GATT parties to negotiate the Standards Code, the predecessor to the TBTA, in the Tokyo Round. The addition of the SPSA during the Uruguay Round stemmed from the failures of the Standards Code to curtail the growth in technical regulations, especially in agricultural products.\(^{64}\) The TBTA and its companion the SPSA now add considerably to the disciplines on domestic regulatory autonomy contained in the GATT.

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\(^{58}\) Ibid, Principle 1.
\(^{59}\) Ibid, Principle 4. The role of the WTO dispute settlement tribunals is explore in Part 3 of this paper.
\(^{60}\) Leebron, above n10, at 47-50.
\(^{61}\) TACD, above n57, Principles 5 & 6.
\(^{62}\) Leebron, above n10, at 90-94.
\(^{63}\) Bhagwati, above n11, at 23-24.
\(^{64}\) Marceau & Trachtman, above n5, at 813-815.
2.2.1 Types of harmonization in the TBTA

The GATT and other WTO agreements principally adopt a model of negative integration, laying down rules that enable domestic regulations to be struck down if they fail to meet a set of general standards, such as necessity, non-discrimination and balancing.\textsuperscript{65} In addition to these rules, however, the TBTA’s harmonization and mutual recognition provisions contain a rare instance of positive integration, by establishing a process of multilateral “re-regulation”.\textsuperscript{66} The TBTA’s substantive obligations comprise a duty to consider adoption of international standards and to participate in international standard-setting; procedures for the drafting, adoption and notification of national product regulations. Thus, the TBTA incorporates two parallel types of harmonization:

1. Harmonization of specific rules relating to product requirements, reflected in the presumption of adoption of international standards; and
2. Harmonization of substantive and procedural principles/approaches to rule-making regarding product requirements, such as non-discrimination, necessity, least trade restrictiveness and transparency.\textsuperscript{67}

It is open to debate whether the TBTA sets product standardization as a requirement or a goal. Current interpretation of the harmonization provisions suggests that it remains a goal for future fulfilment, rather than an immediate obligation.\textsuperscript{68} That said, the analysis in \textit{Sardines} in Part 3 of this paper will show that use of international standards has already become the TBTA’s presumptive norm.

2.2.1 The TBTA’s harmonization claims

Leebron’s analysis emphasises that an appraisal of the extent of, and procedures for, harmonization activities must rest on an understanding of the rationale for harmonization. The Preamble to the TBTA sheds light on the Agreement’s underlying harmonization claims. Its key trade concerns appear to be economies of scale\textsuperscript{69} and transparency.\textsuperscript{70} This conclusion is supported by the Decision of the Committee on Technical Barriers to Trade on Principles for the Development of International Standards, Guides, Recommendations.\textsuperscript{71} Principle 10 speaks of the need to “facilitat[e] international trade and preventing unnecessary trade barriers”, and to avoid adverse effects on fair competition and preference being given to the characteristics or requirements of specific countries or regions.

Leebron notes that the achievement of economies of scale and transparency do not necessarily require regulatory harmonization. He suggests that mutual recognition and the use of performance-based criteria for production specifications might achieve the same outcome at lower cost. The TBTA incorporates these alternatives to harmonization, by encouraging Members to consider granting mutual recognition of both standards and conformity assessment, and to specify technical regulations in terms of performance rather than design or descriptive characteristics.\textsuperscript{72} It is not surprising, however, that the TBTA does not require these mechanisms as the preferred approach, since the negotiation of mutual recognition and

\textsuperscript{65} Ibid, at 838.
\textsuperscript{66} Ibid. The only other agreement to adopt this model is the SPSA.
\textsuperscript{67} See the typology of harmonization outlined by Leebron, above n10,at 43-46.
\textsuperscript{68} Both agreements aim “to harmonize … on as wide a basis as possible.” TBTA, Article 2.4; SPSA Article 3.1.
\textsuperscript{69} “Recognising the important contribution that international standards and conformity assessment systems can make… by improving efficiency of production and facilitating the conduct of international trade.”
\textsuperscript{70} “…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.”
\textsuperscript{71} Decision of the Committee on Principles for the Development of International Standards, Guides, Recommendations with Relation to Articles 2, 5, and Annex 3 of the TBT, G/TBT/9 Annex 4.
\textsuperscript{72} TBTA Article 2.7 (mutual recognition), 2.8 (performance characteristics), Article 6 (conformity assessment). Principle 10 of the Guidelines repeats the call for the use of performance-based criteria.
conformity assessment arrangements with every trading partner is likely to involve significantly higher costs that a process of international standardization.

It might also be argued that the TBTA aims to overcome leakage or non-efficacy of domestic product requirements by allowing Members to insist upon product standards that ensure product safety, subject to certain disciplines. Members must be able to show why they should be able to enforce domestic requirements on imports (that is, why this is not an unnecessary obstacle to trade). In this way, the disciplines are aimed at providing Leebron’s “fairness” claim, a view again supported by the Principles for International Standards.\(^\text{73}\) While it is not included in the objectives of the TBTA, the Agreement also provides Leebron’s “political economies of scale” because removing controversial standard-setting functions to international fora insulates Members from the pressure of domestic coalitions.\(^\text{74}\)

2.2.3 The TBTA’s harmonization mechanisms

Whether the TBTA’s the harmonization obligation is a goal to be achieved or an immediate obligation, the TBTA itself does not actually attempt to develop product rules. Rather, it “agrees to agree”, and delegates the standard-setting function to other international bodies. The Agreement therefore also incorporates Leebron’s fourth type of harmonization, to the extent that it establishes rules for the recognition of international standard-setting organisations. Consistent with Leebron’s analysis, the choice of standard-setting bodies under the TBTA has its own risks: many criticisms of industry-bias and unaccountability have plagued both the TBTA’s principal delegates, the Codex Alimentarius and the International Organisation for Standardisation (ISO).\(^\text{75}\) The device of quasi-legislative delegation does, however, address gaps in the WTO’s subject matter competence in linkage policy areas, such as health and environment.\(^\text{76}\) The role of these international bodies is developed in Part Four below.

3. THE SCOPE AND OPERATION OF THE TBTA

Having explored the theoretical rationale for the TBTA’s harmonization framework, this part examines the Agreement’s principal obligations in more detail. It supplements the WTO’s limited jurisprudence on the TBTA, in particular its decision in Sardines, with the AB’s approach to similar provisions in related agreements. This part starts with a consideration of the scope of the TBTA then explores its principal substantive obligations.

3.1 THE SCOPE OF THE TBTA

3.1.1 The breadth of “technical regulation”

Since the TBTA imposes more stringent obligations than the GATT, its impact on domestic regulatory autonomy depends in large part on the range of measures to which it applies. Only measures that fall within the definition of technical regulations or standards are subject to the TBTA’s disciplines.\(^\text{77}\) If a measure does not fall within the definition of technical barriers, and

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\(^{73}\) TACD, above n57, at Principle 10.

\(^{74}\) Howse, above n1, at 101.

\(^{75}\) See below, Part 4.

\(^{76}\) Marceau & Trachtman, above n5, at 838.

\(^{77}\) Asbestos AB, above n10, at ¶59; Sardines AB, above n10, at ¶175. Until the Panel decision in Asbestos, there was some uncertainty over the implications of a product requirement falling outside the definition of “technical regulation” or “standard” because it was based on PPM criteria. A small number of WTO members had suggested that a failure to fall within the definition of technical regulation or standard would bring an ESFM-type standard outside the scope of the TBT Agreement and therefore in contravention of it. On this analysis, such standards would necessarily be WTO-inconsistent. (WTO Committee on Trade and Environment, Report of the Committee on Trade and the Environment (1996), WT/CTE/W/40, 12 November 1996, at ¶70; Non-Paper by the Arab Republic of Egypt, WTO Committee on Trade and
its WTO-consistency is examined under either the SPSA (if the measure sets food safety, or plant or animal health requirements) or the GATT (for other restrictions on trade in goods). One might expect that Members seeking to constrain the abuse of product regulation for trade protection purposes would advocate broad definitions that produce broad TBTA coverage. The AB’s current interpretation leaves regulations that indirectly affect goods trade outside the scope of TBTA obligations.

The TBTA disciplines mandatory and voluntary measures, the former as “technical regulations”, the latter as “standards”. A technical regulation is:

- 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 deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

The scope of the definition of technical regulation was clarified in the Asbestos dispute and applied in Sardines. In Asbestos, Canada challenged France’s ban on production, use, and importation of asbestos and products containing asbestos. The ban operated in conjunction with a limited number of exceptions. This ban constituted a technical regulation because it:

- applied to an identifiable product or group of products;
- set down technical characteristics; and
- was mandatory.

The requirement that a regulation apply to an “identifiable” product or group of products is essential for compliance with the regulation. Article 2.9.2 of the TBT Agreement obliges Members to notify other Members “of the products to be covered” by a proposed technical regulation. The products to which a regulation applies must be identifiable, but this does not mean that they be specifically identified in the regulation itself. The group of products to which a regulation applies may be very broad, especially if the measure is couched in negative or prohibitive terms. As Asbestos shows, a measure to the effect that “no product that might contain asbestos may do so”, plus administrative provisions for exclusions from the prohibition, can constitute a technical regulation. A blanket ban on certain products will, however, fall outside this definition if it stipulates no criteria by which such products may be admitted.

The Asbestos decision left some uncertainty over the element of product specificity. It was considered further in the Sardines dispute. In Sardines, Peru challenged Council Regulation (EEC) No. 2136/89 (the “EC Regulation”) which laid down marketing standards for preserved sardines. The EC Regulation stipulated that one species of fish - *Sardina pilchardus* - was the only species that could be preserved in this manner. The AB reversed the Panel’s conclusion that the EC’s outright ban on asbestos products, subject to listed exceptions, fell beyond the definition of a technical regulation. The AB was unable to “complete the analysis” of whether the French measure satisfied the requirements of the TBTA, because the Panel had refrained from considering the application of the TBTA and because there was no pre-existing case law interpreting the Agreement. It therefore proceeded to an examination of the measure’s consistency with the GATT. Asbestos AB, above n10, at ¶¶81-85. This approach demonstrates that whenever the TBTA does not apply or is not invoked, the challenged measure will be analysed within the GATT framework.

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78 TBTA, Annex 1, ¶2. These disciplines are similar to those for mandatory requirements, and extend to standard-setting bodies, sub-national governments and even non-governmental organisations that set standards.

79 TBTA, Annex 1, ¶1.

80 Asbestos Panel, Asbestos AB, above n10.

81 Sardines Panel, Sardines AB, above n10.

82 Asbestos AB, above n10, at ¶66-73.

83 Ibid, at ¶70; Sardines AB, above n10, at ¶180.

84 Asbestos AB, above n10, at ¶70-75.

85 Ibid, at ¶71.

86 The EC Regulation stipulated a range of requirements relating to the size and preparation of the fish, the preserving medium to be used, and the container in which they were to be sold. EC Regulation, Articles 4-7. Canada, Chile, Colombia,
Walbaum – could be named “sardines”. It was perhaps not coincidental that this species only inhabited European coastal waters – all other preserved sardine-type fish had to be called pilchards, sprats or some other name. This meant that *Sardinops sagax*, which occurs mainly in the along the coasts of Peru and Chile, could not be identified in the European market as sardines, or even Pacific Sardines, even though the preserved product has the same appearance, smell, taste and texture as the *pilchardus* species.

In order to determine whether it is a technical regulation, a measure must be examined as an "integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it." The EC argued that its regulation only constituted a technical regulation in respect of *Sardina pilchardus* so that its effect on how other species were named could not be assessed under the TBTA. The AB extended its broad reading of the definition of technical regulation, requiring only that a measure applies to a group of products or products generally. Affected products need not be expressly named, identified or specified in the regulation. The stipulation of a positive requirement in respect of some products (i.e. that preserved sardines must contain *Sardina Pilchardus*), necessarily implied a correlating negative condition that it must not contain other species, which would also be caught by the TBTA. This extension to “negative requirements” was necessary to avoid a significant loophole in the operation of the Agreement.

3.1.2 Product characteristics

The types of “technical characteristics” that a regulation must prescribe is also broad, but not broad enough to bring many contentious domestic regulations within the scope of the TBTA. According to the AB, “technical characteristics” include any objectively definable “features”, “qualities”, “attributes” or other “distinguishing marks” of a product. They might relate to a product’s composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. The TBTA definition would thus include product specifications for consumer safety (flammability, strength, toxicity) or environmental protection (recycled content, recyclability, re-use or other environmentally-sound disposal; energy efficiency; pollution emissions; and chemical or other hazardous components). Requirements that products be harvested, manufactured or produced using a specific method or in accordance with general environmental standards will not meet this test, unless those PPMs have some impact on the physical qualities or features of the product. This issue is taken up in the discussion of PPMs below. The application of the definition to genetically-modified organisms remains unclear and will depend on a range of factors, including the physical manifestation of the gene manipulation in the regulated product. Measures that are based on a mixture of public health and other policy objectives may be scrutinized under both the TBTA and SPSA.

Combining these elements, it may be said that the specification of physical product characteristics or qualities or performance requirements may be in positive or negative terms, although technical regulations must do more than simply ban the use of certain hazardous or unacceptable materials.

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Ecuador, the United States and Venezuela participated in the Panel proceedings as third parties.

87 Asbestos AB, above n10, at ¶64.
88 EC Regulation, Article 9; Sardines Panel, above n9, at ¶7.31.
89 Sardines AB, above n9, at ¶176.
90 Sardines Panel, above n10, at ¶7.46.
91 Asbestos AB, above n10, at ¶67.
92 Ibid.
3.1.3 PPM coverage

Much of the attention over the inclusion of non-economic factors in trade measures has concerned domestic regulations governing the way in which a product is manufactured, processed or harvested. The general distinction has been between production or processing method (PPM) requirements that are “incorporated” into the physical characteristics or qualities of the product, and those measures that have no physical impact on the end-product (unincorporated PPMs). Resistance to any sort of unincorporated PPM derives from concerns about transboundary application of domestic preferences. These, according to many, are at best inconsiderate of differing endowments or preferences, and at worst ripe for protectionist abuse.

Concerns over the protectionist or unilateralist abuse of unincorporated PPMs might be allayed by subjecting such measures to the strict disciplines of the TBTA, with its objectives of transparency and removal of unnecessary or disguised barriers to trade. Ensuring that PPM-standards are subject to the disciplines of the TBTA would provide an accountable and rules-based approach to formulating such standards. Despite this, there has been general resistance to a PPM-inclusive definition of technical regulations in the TBTA. The AB’s emphasis on physical characteristics of goods almost certainly signals a definition that excludes PPMs from the scope of the TBTA. The AB’s emphasis on physical attributes leaves PPM measures to be scrutinised only under GATT. In Shrimp-Turtle, the AB upheld the GATT-consistency of a unilateral unincorporated PPM. In Korea-Beef and Asbestos, it laid out a new balancing test for “necessity” under Article XX(b) and (d) which is potentially more flexible and less onerous than the “least trade restrictive” interpretation of earlier disputes. There is therefore a good chance that PPM measures could be more easily justified under GATT than under the TBTA. To the extent that the harmonization claims that underpin the TBTA are apply equally to PPMs as they do to physical product requirements, this interpretation undermines the TBTA’s capacity to achieve its goals. It also overlooks one of the major factors that underpins

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94 Bhagwati, above n11, at 13.
95 There was some uncertainty over whether the reference to “their related processes or production methods” in the definition of technical regulation could bring mandatory non-product PPM requirements within the purview of the TBTA. WTO Secretariat Note for the Committee on Trade and Environment, Negotiating history of the coverage of the Agreement on Technical Barriers to Trade with regard to labelling requirements, voluntary standards, and processes and production methods unrelated to product characteristics, WT/CTE/W/10, 29 August 1995, argues that the parties only intended the TBTA to apply to product-related or “incorporated” PPMs. During the negotiation of the Tokyo Round Standards Code and the Uruguay Round TBTA, the United States sought to extend coverage to PPMs, in order to discipline the development of such a standard. This proposal was dropped in 1990 in the face of strong opposition, the parties choosing only to refer to product-related PPMs. WTO Secretariat, Note by the WTO Secretariat, Negotiating History on the Coverage of the Agreement on Technical Barriers to Trade with regard to Labeling Requirements, Voluntary Standards, and PPMs Unrelated to Product Characteristics, WT/CTE/W/10, G/TBT/W/11, 29 August 1995. Woolcock S, “Trade and Eco-labelling: subsidiarity at work?”, Paper presented to the CRUSA/RIIA Study Group on Trade and Eco-labelling, 31 January 1996, London, 26-28. This point is also discussed in Marceau & Trachtman, above n5, at 860. An interpretation that excludes unincorporated PPMs has been preferred by most commentators. See Rege V, “GATT Law and Environment-related Issues Affecting the Trade of Developing Countries” (1994) 28 Journal of World Trade 97; Staffin E, “Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and Its Role in the “Greening” of World Trade” (1996) Columbia Journal of Environmental Law 205, at 237; Churche M, “ISO 14 000, Standards for Environmental Management Systems and the Multilateral Trading system: Synergies or Conflicts” paper presented at the ACEL ISO 14000: Regulation, Trade and Environment Conference, Canberra, 2 July 1996, Appleton A, Environmental Labelling Programs: International Trade Law Implications (1997) The Hague, Kluwer Law International; Joshi M, “Are Eco-Labels Consistent with World Trade Organisation Agreements?” (2004) 38:1 Journal of World Trade 69, at 74-77; Contrast Cameron J & Ward H, The Uruguay Round’s Technical Barriers to Trade Agreement (1993) WWF, Gland, at 11; Marceau & Trachtman, above n5, at 860-861.
product regulation, and in this respect appears to be at odds with the TBT Committee’s Principles for International Standards. Principle 10 provides that “international standards need to be relevant and to effectively respond to regulatory and market needs, as well as scientific and technological developments in various countries.” The focus of regulation is the harmful impact of production or manufacture, exclusion of such regulations from the TBTA will leave this principle unfulfilled.

The irony of excluding PPMs from the scope of the TBTA is compounded by the fact that ISO, one of the international standards bodies recognised under the TBTA, has laid down standards for quality assurance management systems and environmental management systems, both systems-based PPMs. A significant portion of the notifications to the Committee on Technical Barriers to Trade have involved national rules on such management systems. ISO 9000’s and 14000’s status may have to be clarified if members make its implementation compulsory for some products.

3.1.4 Labelling

While PPM regulations themselves may fall outside the scope of the TBTA, PPM-based labelling schemes are likely to be included. The negotiating history of the TBTA suggests that parties did not intend labelling schemes based on unincorporated PPMs to be subject to the TBTA. This is the generally-accepted academic and diplomatic view, at least among developing countries, despite its impracticability for schemes that employ a mix of product and process labelling criteria.

The clarifications of the scope of “technical regulation” in the Asbestos and Sardines decisions point to a broader role for the TBTA regarding labelling. The definition of technical regulation extends to “… symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.” These requirements must be “related”, but need not be intrinsic to, the product itself. The definition is silent on the criteria or information included on a label or package: the second sentence of the definition

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98 Marceau & Trachtman, above n5, at 861; Trachtman 2003a, above n2, at 62.
99 Committee on Technical Barriers to Trade, above n71.
100 In 1998, 648 Technical Regulations or standards were notified, 98 of which (about 15%) referred to protection of the environment as either the main or one of the purposes of notification. WTO Secretariat Note for the Committee on Trade and Environment, Item 4: Provisions of Multilateral Trading System with Respect to the Transparency of Trade Measures Used for Environmental Purposes and Environmental Measures and Requirements which have Significant Trade Effects, WTO Document WT/CTE/W/118, 28 June 1999.
102 WTO Secretariat Note for the Committee on Trade and Environment, Negotiating history of the coverage of the Agreement on Technical Barriers to Trade with regard to labelling requirements, voluntary standards, and processes and production methods unrelated to product characteristics, WT/CTE/W/10, 29 August 1995. See also Appleton, above n95, at 93, Chang S, “GATTing a Green Trade Barrier - Eco labelling and the WTO Agreement on Technical Barriers to Trade” (1997) 31 Journal of World Trade 137, at 140-147, and Joshi, above .
104 The strong opposition to the Belgian proposal for a “socially responsible” labelling (G/TBT/M/23) and the Dutch timber labelling scheme (G/TBT/Notif/98.448) provide evidence of this. See Marceau & Trachtman, above n5, at 861, notes 194-195.
105 Members wishing to use labelling schemes point out the impracticability of separating the WTO coverage of products under an eco-labelling scheme, based on the criteria used to award the label. CTE Report 1996 above n77, at ¶61. They argue that the same coverage should be given to all schemes, whether or not their criteria include non-product-related PPMs. Submission by Canada, Elements of a possible understanding to the TBT Agreement on Eco-labelling, WT/CTE/W/21and G/TBT/W/21, 21 February 1996; Submission by Switzerland, WT/CTE/W/192, 19 June 2001.
106 TBTA, Annex 1, ¶1.
107 Sardines AB, above n10, at ¶189 (citing Asbestos AB, above n10, at ¶67).
does not limit coverage to process or production methods that affect a product’s characteristics.

Some take the view that the second sentence of the definition should take colour from the first, so that only labelling schemes relating to PPMs that affect product characteristics can be brought within the TBTA. This would leave pure PPM schemes for assessment under GATT. In other words, the second sentence does not extend the reach of the first sentence but is simply subject to it. The alternative view is that the second sentence clarifies the application of the TBTA to labelling requirements, ensuring that regardless of whether the criteria by which labels are awarded are PPM-based, the labelling schemes nonetheless fall within the scope of the TBTA. This approach is not only consistent with the TBTA’s meta-regulatory objectives, it also acknowledges that a label (or packaging) is attached to and therefore necessarily part of the product itself, regardless of the criteria by which the label is awarded or the warnings/statements it makes.

3.2 THE NATURE OF TBTA DISCIPLINES

It was noted in Part 2 that the TBTA commits Members to two streams of regulatory harmonization. Members are firstly encouraged to use international standards as a basis for domestic measures. The other substantive disciplines reflect the Agreement’s harmonization of norms and principles. They require non-discriminatory treatment that avoids unnecessary obstacles to trade in the preparation, adoption and application of measures, by ensuring that measures are not more trade-restrictive than necessary to fulfil a legitimate objective.

3.2.1 Article 2.4 First limb - Adopting international standards

The TBTA does not mandate harmonization of product standards, but provides incentives for the adoption of international standards. Article 2.4 requires Members to use international standards as a basis for technical regulations, where standards exist, and permits higher standards in some circumstances. Members may adopt their own measure where no international norm has been established. They may also adopt their own standard where the international measure would be ineffective or inappropriate to fulfil a particular policy objective, “for instance because of fundamental climatic or geographical factors or fundamental technological problems”. Technical regulations that accord with international standards are rebuttably presumed to be consistent with the TBTA’s other substantive obligations.

This provision was contested in Sardines because the EC Regulation’s restrictive naming standards contrasted with the standards set by the Codex Alimentarius Commission (Codex). Codex adopted a standard for canned sardines and sardine-type products in 1978 and revised it in 1995 (“Codex Stan 94”). Codex Stan 94 set quality and minimum content standards for products containing fish and regulated product naming and labelling. Under Codex Stan 94,
the name “sardines” was reserved exclusively for the species *Sardina pilchardus*, but other species on the list could use the name “sardines” in conjunction with a country, regional or common name qualifier.\textsuperscript{118} Peru argued that the EC Regulation prohibited the marketing of Peruvian *Sardinops Sagax* as “Pacific Sardines”, and that this was inconsistent with Codex Stan 94 as the relevant international standard. Accordingly, it argued that the EC Regulation was inconsistent with TBTA Article 2.4. This claim raised several important issues for the operation of the TBTA harmonization obligation.

**TBTA Application to pre-existing product requirements**

The *Sardines* dispute clarified that WTO members are obliged to review technical regulations that predate the WTO Agreement upon the introduction of new international standards. Article 2.4 says that “where technical regulations are required… they shall be based on international standards”. This language is capable of implying a temporal trigger (“at the time regulations are required”) or a circumstantial trigger (“in situations where regulations are required”) for the obligation to use international standards. Peru advocated a circumstantial trigger, arguing that the obligation refers to all on-going circumstances that require regulation, even where those regulations are already in place.\textsuperscript{119}

The equivalent harmonization provision of the SPSA was considered in *Hormones*.\textsuperscript{120} While that provision is arguably more complex than the TBTA (because of the requirements of risk assessment and scientific basis),\textsuperscript{121} the *Sardines* AB adopted similar reasoning. In *Hormones*, the AB concluded that the harmonization provision of the SPSA applied to all existing and future domestic measures,\textsuperscript{122} there being no evidence of an intention to exempt existing measures from SPSA disciplines.\textsuperscript{123} This decision was based in part on the language of the SPSA, which refers to both “adopting or maintaining” SPS measures, but more broadly on a contextual reading of the SPSA’s obligations.\textsuperscript{124} This context included reference to Article XVI:4 of the *WTO Agreement*, which requires Members to “ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the [covered] agreements.”\textsuperscript{125}

The EC advanced an interpretation of the TBTA, similar to the one it had unsuccessfully advocated for the SPSA in *Hormones*, that only required regard to international standards where a new technical regulation was being considered. It argued that Article 2.4 of the TBTA did not apply to measures adopted before the introduction of international standards.\textsuperscript{126} It relied upon the general principle of treaty interpretation against retroactivity,\textsuperscript{127} claiming that the *preparation and adoption* of its Regulation was an “act which took place before the entry into force” of the TBTA and thus could not be affected by it.\textsuperscript{128}

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\textsuperscript{118} Codex Stan 94, Article 6.1.1.

\textsuperscript{119} The third party submissions of Canada, Chile, Colombia, Ecuador, and the United States all supported this approach. The issue was, however, essentially moot, since the EC Regulation was also inconsistent with the TBTA’s predecessor the Standards Code, which had been in force when the EC Regulation came into effect. *Sardines Panel*, above n10, at ¶5.6.

\textsuperscript{120} *Hormones AB*, above n8.

\textsuperscript{121} Marceau & Trachtman, above n5, at 841; Trachtman 2003a, above n2, at 71.

\textsuperscript{122} *Hormones AB*, above n8 at ¶128.

\textsuperscript{123} Ibid.

\textsuperscript{124} Emphasis added. The EC emphasised this distinction in the *Sardines* appeal. See *Sardines AB*, above n10, at ¶31.

\textsuperscript{125} *Sardines AB*, above n10, at ¶123.

\textsuperscript{126} Ibid, at ¶199.

\textsuperscript{127} Vienna Convention on the Law of Treaties, Article 28. “[u]nless 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 its entry into force”.

\textsuperscript{128} See the discussion of EC arguments in *Sardines AB*, above n10, at ¶32. It claimed that this interpretation was supported by the language of Article 4, which did not impose an obligation to use draft international standards whose completion is not imminent.
The obligation not to “maintain” measures inconsistent with the SPSA is absent from the TBTA, so it might be argued that the SPSA is more explicit in its intended retroactivity. But this difference in language appears not to have been decisive in the Sardines AB decision. Rather, the AB relied on the similarities in the language of the two agreements.\(^\text{129}\) It found considerable textual support for the alternative view, especially the centrality of the TBTA’s obligation to harmonize international standards as widely as possible.\(^\text{130}\) Excluding existing measures from such a key provision would essentially establish grandfather rights for these measures, a consequence which WTO negotiators could not have intended.\(^\text{131}\) The AB thus endorsed the Panel view that Article 2.4 imposed an ongoing obligation to reassess existing technical regulations in light of new or revised international standards.\(^\text{132}\)

In somewhat colourful language (possibly directed towards its domestic audience) the EC also argued that revision of domestic measures whenever new international standards are agreed would turn international standard-setting bodies into “world legislators”. The Sardines Panel and AB regarded the EC’s fear as overstated because the obligation to use international standards was a qualified one. A Member could simply choose not to introduce any technical regulation at all; could ignore “irrelevant” standards; and need only use international measures “as a basis” for domestic measures.\(^\text{133}\) Moreover, a Member need not follow international standards where they would be ineffective or inappropriate. While these comments may have provided some comfort on the question of retroactivity, they did nothing to reassure critics who point to the fact that international standards are the de facto ceiling, but not the floor for domestic regulation.

The AB’s analysis appears to conflate two separate but related aspects of the TBTA’s retroactive operation. The first issue is whether the TBTA applies to pre-existing technical regulations at all, and the AB’s acceptance that they do is not surprising. The second question is what the TBTA requires in relation to existing measures. An affirmative conclusion to the first question still demands an analysis of the structure and operation of the agreement to answer the second question. It does not follow that all obligations apply to existing measures. There is undoubted textual support for the AB’s conclusion, but it could also be argued that the TBTA addressed the issue of pre-existing measures sufficiently in Article 2.3. That provision contemplates that Members must review existing product requirements on a regular basis to assess whether they are still necessary and whether a less trade restrictive measure might serve the same ends. It might easily be concluded, therefore, that this was the way in which negotiators chose to deal with the question of existing measures, rather than to require review in light of new international measures.

The obligation to re-visit long-standing, domestically popular environmental and consumer safety standards once international measures are agreed would be unproblematic if international standards introduced a more demanding set of social or environmental obligations and if the TBTA owed a positive duty of adoption. Yet there is an indisputable asymmetry in the impact of this decision: nations that have technical regulations in place may have to modify them to fit international standards, while the AB emphasises that other nations

\(^\text{129}\) Sardines AB, above n10, at ¶205-207.
\(^\text{130}\) It noted that Article 2.6 obliges Members to participate in preparing international standards by the international standardizing bodies for products which they have either “adopted, or expect to adopt technical regulations.” Sardines Panel, above n10, at ¶ 7.76, adopted by the AB, at ¶212. The Panel pointed out (at ¶7.76) that this obligation would be redundant if, having reached agreement on an international standard, members were free to ignore them in relation to existing technical regulations. Other relevant factors were that Article 2.3 of the TBTA proscribes the maintenance of domestic measures where the circumstances justifying their imposition have ceased to exist.
\(^\text{131}\) Sardines AB, above n10, at ¶208, 215. Sardines Panel, above n10, at ¶7.79, citing Hormones AB, above n8, at ¶128.
\(^\text{132}\) Sardines Panel, ibid, at ¶7.78.
\(^\text{133}\) Ibid.
are free to ignore international measures and to keep domestic standards low or non-existent. This is precisely the concern raised by consumer and environmental groups in the final stages of the Uruguay Round.\footnote{Leebron, above n10, at 47.} Indeed, a Member is free to challenge the stricter technical regulation of another Member even where they have chosen not to adopt the relevant international standard. Considered in conjunction with the broad definition of technical regulations, a large proportion of a Member’s pre-1995 building, labelling, packaging, recycling, environmental and health laws must now be scrutinised for consistency with international criteria as and when these criteria are developed.\footnote{Leebron, above n10, at 47.}

This one-sided approach to harmonization runs counter to the TBTA’s harmonization claims, and to common harmonization practice that contemplates acceptance of some minimum.\footnote{Leebron, above n10, at 47.} It actually fuels the risk of regulatory stagnation, if not a race towards the bottom,\footnote{Bhagwati observes that fear of downward harmonization is a valid theoretical argument, which has not been borned out in practice. Bhagwati & Srinivasan, above n12, at171.} since high-standards countries will be loathe to raise standards while others are not required to introduce even basic minima.

**Relevant international standards**

For the purposes of Article 2.4, an international standard is relevant to a domestic technical regulation if it bears upon, relates to, or is pertinent to the same subject matter.\footnote{Sardines Panel, above n10, at ¶7.69, accepted by the AB, at ¶225.} In *Sardines*, the EC argued that Codex Stan 94 could not be considered a “relevant” international standard for several reasons. It argued that Codex Stan 94 could not be an international standard because Codex failed the principle of consensus.\footnote{Ibid, at ¶7.91; Sardines AB, above n10, at ¶225.} Codex rules of procedure permit measures to be adopted by means of a formal vote, rather than by consensus in some circumstances.\footnote{TBTA Annex 1, ¶2, Explanatory Note.} No evidence was presented to support the suggestion that Codex Stan 94 lacked consensus, but the EC’s argument failed in any event, because the TBTA itself clearly contemplates the use of standards that have not been adopted by consensus: \footnote{Sardines AB, above n10, at ¶227.}

> Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.\footnote{TBTA Annex 1, ¶2, Explanatory Note.}

An interesting aspect of this conclusion was the AB’s emphasis that the TBTA’s eschewal of a consensus requirement had no bearing on the internal workings of international standards bodies:

> 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.\footnote{Sardines Panel, above n10, at ¶7.69, accepted by the AB, at ¶230.}

This observation might be understood as the latest attempt by the AB to demonstrate the WTO’s capacity to respect other sources of international obligations.\footnote{United States - Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, WTO Document WT/DS2/AB/R, 29 April 1996, adopted 20 May 1996.}
confidence in their decision-making processes and accountability. Viewed in this way, the AB’s comments seek to enhance the effectiveness of the TBTA’s harmonization objectives by ensuring that its mechanisms, including bodies to whom standard-setting functions are delegated, are best adapted to achieve their designated roles.

*Interpreting the international standard*

Members must use international standards “as a basis” for technical regulations. The AB followed its reasoning in *Hormones*, satisfied that a measure need not “conform to” an international standard in order to be “based on” it.\(^{145}\) It is sufficient if a technical regulation “stands”, is “founded” or “built” upon, or “supported by” that standard.\(^{146}\) This requires “a strong and very close relationship” between the two, such that the international standard is the "principal constituent", "fundamental principle", "main constituent", or "determining principle" of the national measure.\(^{147}\) This relationship could not exist where the national measure and international standard are inconsistent or contradictory.\(^{148}\) The EC argued that the EC Regulation was essentially based upon Codex Stan 94, as understood by reference to its negotiating history rather than its plain meaning.\(^{149}\) The Panel and AB focussed on the final text of Codex Stan 94 to conclude that the EC Regulation directly contradicted the international standard.\(^{150}\) The language of Codex Stan 94 is fairly clear, but it is somewhat concerning that the Panel declined to clarify the correctness of its interpretation with the Codex Commission itself.

The TBTA’s elevation of international standards to “first-preference” status involves a delegation of regulatory power from the WTO to those bodies. Trachtman suggests that this delegation creates potential agency problems for the WTO in ensuring that their international “agents” are faithful to the WTO’s objectives.\(^{151}\) Permitting the WTO dispute settlement tribunals to have the last word in deciding what those delegates said in their international standards overcomes this concern, but it hardly engenders confidence in the even-handedness of the process. The decision not to seek Codex’s input was understandable in relation to Codex Stan 94. But as a matter of broad principle, it is concerning that a WTO Panel is able to determine unilaterally “the meaning” of international instruments created outside the WTO

\(^{145}\) *Hormones AB*, above n8, at ¶163, adopted in *Sardines AB*, above n10, at ¶242.

\(^{146}\) *Ibid*. It remains to be seen whether more is required in order to show that a measure has been prepared “in accordance with” the international standard, in order to enjoy Article 2.5’s presumption that it does not constitute an unnecessary obstacle to trade.

\(^{147}\) *Sardines AB*, above n10, at ¶245.

\(^{148}\) *Ibid*, at ¶248.

\(^{149}\) Article 6.1 of Codex Stan 94 provides that only *Sardina pilchardus* could be labelled “sardines”, but that other species could be called:

- “… ‘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”.

In earlier drafts, paragraph 6 provided that:

6.1.1. The name of the product shall be:

(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, or the species; or

(iii) 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.

The EC argued that this structure allowed countries to choose between “X sardines” and the common name of the species, depending upon the law and custom of the country in which the product is being sold. *Sardines Panel*, above n10, at ¶4.45. Accordingly, it was permissible for the EC – as the place where the products were sold – to require *Sardina nigra* to be called “pilchards”, rather than “Pacific sardines” because “pilchards” was the term commonly used in EC countries. It said that in determining the meaning of the final text of Codex Stan 94, regard should be had to the original phraseology because negotiating history suggested that the final textual change was “merely editorial”. *Ibid*, at ¶¶7.94-7.95.


\(^{151}\) Trachtman J, “Addressing Regulatory Divergence Through International Standards” in Mattoo & Sauve, above n2, 27, at 31 (Trachtman 2003b). Trachtman actually suggests that it creates multiple agency problems if the principals are each Member government.
system. If this approach is taken in future disputes involving more ambiguous international standards, however, WTO dispute settlement tribunals could effectively determine the meaning of the standard, while the WTO has avoided the political sensitivity of developing the standard in the first place.152

The WTO Dispute Settlement Understanding gives Panels the discretion to seek additional information. It would be prudent to expect consultation where interpretation of another organisation’s legal instrument, rather than factual information, is involved.153 Indeed, the best approach would be to introduce a rule of procedure to the effect that where a dispute involves interpretation of international standards, the secretariats of the standards-delegates must be consulted, as technical experts within Article 13 of the DSU, to confirm the standards’ intended meaning. Again, enhancing the mechanisms of harmonization will assist in winning public support for the TBTA’s over-arching goals.

The delegation component of the TBTA’s harmonization architecture creates another risk: that bodies like Codex, ISO and others, which existed long before the WTO, will now see themselves as mere extensions of the WTO’s executive arm, disregarding or downplaying the non-trade priorities in their objectives. The danger in this is that trade concerns receive double consideration - once at the standard-setting stage and once at the TBTA-compliance stage, thereby “diluting” the importance of non-trade policy objectives.

Codex objectives involve the development of international standards for food and food products to protect the health of consumers and to ensure “fair trade practices.” In 2002, Codex underwent an independent review in 2002 which recommended that the organisation’s highest priority should be food safety. This recommendation was endorsed by FAO management, with the proviso that it was necessary to “bear[] in mind the expectation of members that international food trade issues also need to be given due consideration as required by existing WTO Agreement, especially the TBT.”154 The FAO’s logic is somewhat circular. The TBTA recognises the need for product standards, and says that the best way to set standards that every Member can live with is through these international bodies. It is the fact of delegation to international bodies, and the compromises that take place therein, that ensures their trade-compatibility. It should not, therefore, be necessary for organisations like Codex to have explicit regard to trade considerations – Member delegations will do that anyway. That said, the objectives of Codex still emphasise the trade facilitation aspects of harmonization.155

3.2.2 Article 2.4 Second limb - Avoiding international standards

Burden of proof

The conclusion that the EC regulation was not based on the international standard prompted consideration of the proviso in Article 2.4, which states that Members must base technical regulations on relevant international standards “except where they would be ineffective or inappropriate to achieve a legitimate objective.”156 The Sardines Panel decided that this language created an exception to the general rule in favour of international standards.157 This

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152 Marceau & Trachtman, above n5, at 2002, 840; Trachtman 2003a, above n2, at 72.
153 Article 13 of the DSU provides that "Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter".
156 TBTA Article 2.4, emphasis added.
157 Sardines Panel, above n10, ¶7.50.
placed the burden of proving the exception on the EC as the party claiming it.\(^{158}\) Once Peru had shown that a technical regulation and a relevant international standard existed, and that the regulation was not based upon the international standard, the EC had to demonstrate that the international standard was ineffective or inappropriate to achieve its legitimate objectives of consumer information.\(^{159}\) The Panel justified the inconsistency between its approach to TBTA Article 2.4 and the *Hormones* AB’s approach to the SPSA, arguing that the system of risk assessment under the SPSA was a discrete alternative mechanism for national standard setting, not an exception to a general rule in favour of harmonization.\(^{160}\)

The AB rejected this reasoning. It noted the “strong conceptual similarities” between the SPSA and TBTA,\(^{161}\) and adopted the same standard of proof as it had in *Hormones* to conclude that there is no “general rule-exception relationship” in Article 2.4.\(^{162}\) Accordingly, for TBTA disputes involving non-compliance with international standards, the complaining party bears the burden of proving the effectiveness and appropriateness of international standards to achieve the legitimate objective of the technical regulation.\(^{163}\) Any practical difficulties that the complaining party might encounter in identifying the legitimate objective or showing the measure’s ineffectiveness or inappropriateness could be overcome by the procedural and transparency safeguards in the TBTA.\(^{164}\)

The AB’s rejection of a “general rule-exception relationship” in respect of international standards accords a greater degree of deference to sovereign policy choices than the Panel’s approach to Article 2.4. Placing on the complaining party the burden of proving inconsistency with all of Article 2.4 will make it easier for Members to maintain higher domestic measures. It will fall to the complaining Member to adduce evidence either that the policy objectives were not legitimate (a difficult task), or that the international standards were capable of fulfilling those objectives and well-suited to doing so. Given that the TBTA imposes no reciprocal obligation on members to “upwardly harmonize” technical standards, the AB’s approach to burden of proof probably achieves an appropriate compromise between harmonization and diversity. The AB’s approach is therefore reassuring for observers who are fearful of WTO intrusion into domestic regulatory autonomy, although it certainly highlights the selectivity of the AB’s literal reading of WTO texts.\(^{165}\)

Unfortunately, the *Sardines* decision casts no light on the final phrase in Article 2.4, which identifies some illustrative foundations for the “inappropriateness or ineffectiveness” of international standards. The list is inclusive, but it remains to be seen whether the specification of “fundamental geographical or climatic factors or fundamental technological

\(^{158}\) … the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduced evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.


\(^{160}\) Ibid, footnote 70 to ¶7.50.

\(^{161}\) Ibid, at ¶274.

\(^{162}\) Ibid, at ¶275.

\(^{163}\) Ibid, at ¶282.

\(^{164}\) Ibid, at ¶277-280. These include the compulsory system of information provision established in TBTA Article 2.5; the national inquiry point that each Member is required to establish under Article 10.1; and information obtained during the dispute settlement proceedings themselves.

\(^{165}\) Appleton & Heiskanen, prefer the Panel’s approach to the burden of proof, arguing that it is most consistent with the text of Article 2.4, and is supported by other provisions of the TBTA, such as Article 2.5, which requires Members introducing measures that will have a significant effect on trade to explain the justification for that regulation in terms of the provisions of Article 2.2-2.4. Appleton A & Heiskanen V, “The Sardines Decision: Fish Without Chips?” paper presented to the seminar *A New Constellation: SPS, TBT and the Codex Alimentarius in Light of the Hormones and Sardines Cases*, University of Geneva, 14 March 2003 (copy on file with author).
problems” will form a benchmark against which the legitimacy of other possible reasons for rejecting international standards might be measured. These are quite narrow criteria for justifying inappropriateness or ineffectiveness, and make no allowances for differences in demographic factors, cultural preferences or perceptions or tolerance of risk.

**Legitimate objectives**

Recognising that regulatory diversity may stem from legitimate differences between Members, the TBTA generally leaves it to individual Members to determine which policy objectives they will pursue. Article 2.2 recognises the legitimacy of national security requirements; the prevention of deceptive practices; and protection of human health or safety, animal or plant life or health, or the environment. This list is non-exhaustive. The TBTA Preamble also provides that Members should not be prevented from taking measures to achieve protection “at the levels it considers appropriate”, suggesting that objectives may be pursued at higher levels of protection than is provided by international standards.

Based on their approach to disputes under GATT involving trade restrictions for domestic policy purposes, dispute settlement tribunals are likely to scrutinise the legitimacy of claimed objectives, mindful that a higher level of deference is shown to domestic policy objectives than to the means by which those objectives are advanced. In *Sardines*, the EC purported to introduce its naming regulation in order to ensure market transparency, consumer protection, and fair competition. Since Peru acknowledged that market transparency, consumer protection, and fair competition were all legitimate policy goals in *Sardines*, this aspect of the EC claim was not in issue, but the means by which that objective was pursued was examined closely.

**Assessing effectiveness and appropriateness**

A measure that is not based on a relevant international standard does not have to be both ineffective and inappropriate to achieve a legitimate policy objective in order to meet the requirements of Article 2.4. Members may depart from international standards that would be effective in achieving a policy goal, if they are not the most suitable or fitting means of achieving that goal. The nub of the EC claim that Codex Stan 94 was ineffective or inappropriate was that accurate naming of canned fish products reduced the risk of consumer confusion and enabled consumers to make a proper comparison between equivalent products.

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166 The Director of Public Citizen’s Global Trade Watch Program attempted to argue that the list is likely to be exhaustive. Wallach L., “Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards” (2002) 50 U Kansas Law Rev. 823, 831: “The acceptable reasons for exceeding international standards in under the WTO are strictly limited to fundamental climatic, geographical or technical inappropriateness.”

167 TBTA Article 2.4. The WTO web-site’s explanation of the TBTA states that the TBTA takes into account the existence of legitimate divergences of taste, income, geography and other factors and provides a high degree of flexibility. See www.wto.org/eol/e/wto03_10.htm#note1.

168 An interesting issue that remains to be clarified is whether a requirement will be implied into the TBTA of consistency in the of levels of protection that a Member selects for products or activities posing similar risks, akin to Article 5.5 of the SPSA. (*Hormones AB*, above n8, at ¶213; *Australia – Measures Affecting Importation of Salmon*, Report of the Appellate Body, WT/DS18/AB/R, 6 November 1998 (*Salmon AB*), ¶158). The AB has recognised that risks are often identified on an ad hoc basis, so that Article 5.5 is not a requirement for absolute or perfect consistency. What is scrutinised is arbitrary or unjustifiable inconsistencies. *Hormones*, ibid, at ¶213. The *Sardines* dispute did not consider this issue, but some element of regulatory consistency has been implied into GATT Article XX. Marceau and Trachtman suggest that, given the similarities between that language and TBTA article, an equivalent obligation may be found in there too. Marceau & Trachtman, above n5, at 847.

169 *Sardines Panel*, above n10, at ¶7.122.


172 *Sardines Panel*, at ¶7.116-7.117; *Sardines AB*, at ¶¶286-288.
To call other fish species “sardines”, would confuse or mislead consumers and enable those products to benefit from the reputation established by *Sardina pilchardus*. 

The EC’s claim rested on an assumption that European consumers in fact associated the term “sardines” with only one species of fish, *Sardina pilchardus*. This assumption was said to derive from expectations that pre-dated the EC Regulation and from those created by it. The EC adduced evidence from three countries that laws pre-dating the EC Regulation mandated the naming of *Sardinops sagax* as “pilchards” or “Pacific pilchards”. Neither the Panel nor the AB accepted that this evidence of national practice showed that naming *Sardinops sagax* “Pacific sardines”, in accordance with Codex Stan 94, would necessarily mislead those consumers. Moreover, Peru submitted considerable evidence to contradict the EC’s assertions that European consumers associated only *Sardina Pilchardus* with the name “sardines”.

The Panel also rejected the EC’s claim that other consumer expectations were created by the EC Regulation itself:

If we were to accept that a WTO Member can “create” consumer expectations and thereafter find justification for the trade-restrictive measure which created those consumer expectations, we would be endorsing the permissibility of “self-justifying” regulatory trade barriers. Indeed, the danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of the governmentally created consumer expectations.

177 *Sardines Panel*, at ¶7.123.
178 Ibid, at ¶7.127.
179 Ibid, at ¶7.129-130; *Sardines AB*, above n10, at ¶290. Indeed, the design of the UK laws, at least, suggested a level of versatility in consumer perceptions.
180 *Sardines Panel*, above n10, at ¶7.131-132.
181 Ibid, at ¶7.127.
183 *Sardines AB*, above n10, at ¶290.

Indeed, it is worth pointing out that the EU is not alone in introducing measures of this sort: earlier this year the US Congress enacted a limit on the use of the name catfish for species not native to the US. The change was introduced to reduce competition from burgeoning Vietnamese catfish imports, despite concerns being raised about the hypocrisy of United States participation in the *Sardines* dispute in support of Peru’s complaint. Son T, “US Senators attack catfish import limit”. *The Vietnam Investment Review* 25 March 2002, Bennett D, “U.S., Vietnam in word battle over catfish” *Delta Farm Press*, June 14, 2002, accessed on Lexis, 19 September 2002.
determine how the AB would approach more subtle claims about expectations formed by the regulation under scrutiny. For example, one might well imagine a dispute involving a measure of long standing which has produced significant changes in consumer attitudes, such as smoking bans and seatbelt laws. It would be worrying if this “acquired legitimacy” were never to satisfy the requirements of the TBTA. Moreover, the *Sardines* decision offers little guidance on whether the political difficulty of adopting an international standard can form the basis for a claim that the standard would be “inappropriate.” These matters may have a significant impact on the success of the TBTA harmonization compromise, but they await further clarification.

*The TBTA non-discrimination obligation*

TBTA Article 2.1 synthesises the national treatment and most-favoured nation principles contained in GATT Articles I and III into a single non-discrimination obligation. In addition to its obligation to harmonize international standards, WTO Members must accord to imported goods treatment no less favourable than that accorded to like products from domestic producers or from another trading partner. Like the GATT, the TBTA’s disciplines only apply to “like products”, so the meaning of that term will be important. GATT disputes like *Asbestos* have emphasised the physical characteristics of “like” products. Marceau and Trachtman raise some concern over the AB’s current approach to the “like product” analysis which considers whether the goods are in a “competitive relationship”, since it ignores that the point of regulatory distinction is often the very issue that distinguishes otherwise similar products.

The scope of the TBTA non-discrimination obligation is especially important because the TBTA has no equivalent to GATT Article XX. The absence of an exceptions clause is surprising, given the TBTA’s stricter requirements. It is best explained by understanding the whole of the TBTA as premised upon a recognition that some technical barriers to trade are necessary to fulfil a wide range of legitimate policy objectives. This view finds support in the Preamble and TBTA Article 2.2. The absence of any form of saving from the non-discrimination obligation creates the curious position that measures that draw a legitimate policy distinction between otherwise like products will satisfy other elements of the TBTA, be justifiable under GATT Article XX, but breach the TBTA’s non-discrimination obligation.

This represents a flaw in the TBTA framework that could undermine the success of its substantive harmonization principles.

Marceau and Trachtman suggest three responses to the situation in which a measure that otherwise satisfies the TBTA, and would fall within one of the exceptions in GATT Article XX, is inconsistent with Article 2.2’s non-discrimination obligation. The first solution would involve squeezing the “accordion of likeness” more tightly for the TBTA than the GATT, so that products could be regarded as unlike based on the characteristic that underpins the legitimate regulation. The second approach would be to read GATT Article XX as cumulative on, and therefore applicable to, TBTA Article 2.2. The third approach would

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One wonders whether the EC was happy for the WTO process to rule the regulation inconsistent so that it could insulate itself from criticism and pressure from the domestic interest groups who had secured the regulation in the first place. Howse, above n1, at 101.

181 TBTA, Article 2.1.

182 Marceau & Trachtman, above n5, at 819.

183 WTO Agreement Annex 1A, General Interpretative Note to Annex 1A, in GATT above n5, at 20. Conversely, compliance with the TBTA affords no presumption of GATT-consistency, unlike its companion the SPSA, Article 2.4.

184 Marceau and Trachtman, above n5, at 874. While Marceau and Trachtman suggest that this would require “heroic” interpretation, it could be justified on the basis of the narrower scope of TBTA coverage, with the applying only to products’ physical or function characteristics.

185 Ibid, at 874.
focus on whether the regulation afforded less favourable treatment of imported products taking into account the legitimate regulatory objectives that are permissible under the TBTA. The authors seem to suggest that the third approach would be easiest to justify on current interpretations to the TBTA and related agreements.

Avoiding unnecessary obstacles to trade

In addition to the harmonization and non-discrimination obligations, Article 2.2 of the TBTA provides that:

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*: 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.

The language of Article 2.2 is generally comparable to GATT Article XX(b) and (d), read with its chapeau. Under Art XX, proving the necessity of the measure:

…involves in every case a process of weighing and balancing a series of factors which prominently includes the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.

Marceau and Trachtman suggest that this new balancing test for Article XX is less deferential to national regulatory goals than a test that simply considers whether the goals are met because it purports to assess the importance of the goal. It was certainly true in *Korea Beef* that the fit between choice of the policy goal and the measure selected was so poor as to suspect the true intent of the policy goal. The implications of the AB’s modification of the “necessity” test remain uncertain, with some authors suggesting that it will actually relax the requirements in Article XX. In any event, Article 2.2 imposes a more explicit cost-benefit requirement than Article XX, when it says that the determination of necessity must “take account the risks that non-fulfilment would create.” Moreover, while the approach to GATT Article XX may be of general guidance to Article 2.2’s test of “necessity”, Article 2.2 is a positive obligation, not an exception to TBTA disciplines. The burden of proof thus falls on the complaining party to demonstrate that the measures were more trade restrictive than necessary to achieve the relevant policy objective. This may well affect its interpretation.

3.2.3 Summary

The TBTA sets high hurdles for national measures to overcome. Members may select their own social policy objectives and introduce regulations to achieve those objectives, but need to...
use international standards wherever they will be effective and appropriate. The interpretation of these standards, and assessment of a Member’s compliance rests with the WTO dispute settlement tribunals. Future disputes will describe the detailed contours of a Member’s right to adopt higher standards as national priorities dictate. These obligations leave considerable scope for interpretation: while the choice of legitimate objectives remains with Member governments, open-ended criteria will enable dispute settlement tribunals to mould the kind of regulatory measures that Members may adopt.\textsuperscript{195}

The achievement of the TBTA’s harmonization objectives is intrinsically affected by its choice of harmonization processes and institutions. However well adapted to its underlying harmonization claim the TBTA’s provisions may be, the Agreement will founder if its delegates fail to perform. The disciplines of the TBTA emphasise the importance of international standards, yet bodies like codex and ISO have received scant attention to date. This gap is beginning to be filled. Part 4 of this paper builds upon the foregoing analysis to recommend improvements to the TBTA’s delegation model that would enhance the transparency, accountability and credibility of new international norms, and their sensitivity to non-trade priorities.

4. HARNESSING HARMONIZATION

4.1 IMPROVE DECISION-MAKING AND ACCOUNTABILITY IN STANDARDS BODIES

While the TBTA does not mandate harmonization, the \textit{Sardines} decision demonstrates that it is certainly easier for a Member to defend product requirements that are based on international standards, or that have been reviewed (and adapted) in light of new international standards. The presumptive force of these standards should provide a powerful incentive to Members to contribute to their development. This incentive is reflected in the TBTA’s call on Members to “play a full part, within the limits of their resources, in the development of international standards for products for which they have adopted or intend to adopt regulations.”\textsuperscript{196}

The proviso about resources points to a key deficiency in the composition of current bodies – their northern bias. The TBTA defines an international organisation as one whose Membership is open to at least all WTO Members. It undermines the very basis of the TBTA’s key harmonization mechanisms if that definition is purely theoretical because developing countries lack the resources and expertise to participate.\textsuperscript{197} While this north-south imbalance is hardly unique to these bodies,\textsuperscript{198} their influential status in the new WTO regime has attracted increased attention to the problem. The FAO has acknowledged the need to build the capacity of developing countries in Codex\textsuperscript{199} and a recent World Bank-Doha Development fund initiative is aimed at improving developing country representation.\textsuperscript{200} The success of the developments should be monitored closely. The SPS committee has this function in relation to

\begin{footnotesize}
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\item \textsuperscript{196} TBTA, Article 2.6.
\item \textsuperscript{197} Codex meetings are currently held around the world, thus increasing the cost and difficulty of participation for poorer countries.
\item \textsuperscript{198} Sassen, above n31, at18
\item \textsuperscript{199} FAO response to the Independent Review of the Codex Alimentarius Commission, 2002, ¶29, located on the FAO website: \url{www.fao.org}.
\item \textsuperscript{200} In 2002, the World Bank announced its US$3000000 support for the new “Standards and Trade Development Facility”, established to assist developing countries meet non-tariff trade barriers. The Facility will focus predominantly on SPS measures, rather than technical regulations. “World Bank Grant Kicks Off Bank-WTO Assistance on Standards” WTO News, 27 September 2002.
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national SPS standards, but no such role is given to the Committee on Technical Barriers to Trade.

The northern bias in composition and decision-making procedures of standards bodies is not their only problem. There is some concern that weaker voting requirements will undermine the democratic legitimacy of international standards:

“The fact that the “legislative” act in connection with SPS measures takes place outside the WTO may lend the WTO a degree of insulation from criticism and offers a legislative device that may evade the need for unanimity/consensus – at democratic cost.”

Reviewing the role of Codex, the International Plant Protection Convention and the International Office for Epizootics under the SPSA, Stewart and Johansen predict that decision-making in those bodies will become more politicised, and less consensus-based.

The authors point out the strong science base of these bodies, a key distinction between SPSA and TBTA measures. One might, therefore presume that concerns about politicisation are even more valid for TBTA standards than those under the SPSA.

As well as evading the WTO’s consensus requirements, the shift to the international forum affords certain domestic coalitions greater power than they would have at home. Within national delegations, there is disproportionate representation of industry over consumer or other policy linkage representatives. Wallach, for example, suggests that 80% of Codex committee delegations are industry representatives, while only one percent represent public interest organisations. This industry bias also manifests itself in the departmental “lead agency” representation – usually headed by trade or agriculture officials, rather than health or environment.

The Committee on Technical Barriers to Trade has attempted to address some of these issues with criteria by which to determine whether an international standard can be used for TBTA compliance. The Principles for the Development of International Standards, Guides, Recommendations agreed as part of the TBT Committee’s second triennial review are designed to “ensure transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and to address the concerns of developing countries.” The Principles require that information about standards-bodies work programs be made available to the public in Member countries, with opportunities for public input. Membership of international standards bodies should be open to the relevant bodies of at least all WTO Members, for every stage of standard setting, from policy development, to technical development, voting and dissemination. Consensus procedures should be developed to resolve conflict in order to ensure the impartiality of decision-making procedures.

Principles 7 and 8 refer to the need for “meaningful” opportunities to participate, and Principle 13 seeks to address the practical resource constraints that might eviscerate legal

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201 Marceau & Trachtman, above n5, at 2002, 840; Trachtman 2003a, above n2, at 72.
202 Stewart & Johansen, above n155, at 45, 52.
203 This is ironic given that some view the negotiation of tighter trade disciplines as a mechanism by which individual Members are able to manage or contain “vulgar (domestic) interest group politics. Howse, above n1, at 101.
204 Ibid, 2. Public Citizen cites a 1993 study which showed that 80% of non-governmental participants in delegations were industry representatives, while only 1% came from public interest groups. See also Consumers International, “Ensuring Food Safety – A Questions of Standards: The Work of the Codex Alimentarius Commission, 1999. Similar concerns have been raised about ISO: Hauselmann P, “ISO inside out”, WWF International Discussion Paper, 1996.
205 Wallach, above n166, at 835-837.
206 Committee on Technical Barriers to Trade, above n71.
207 Ibid, at ¶1.
208 Ibid, at ¶¶3-5.
210 Ibid, at ¶¶8, 9.
participation rights. It calls on Members to use technical assistance and capacity building to enhance developing country participation, emphasising that:

Constraints on developing countries, in particular, to effectively participate in standards development, should be taken into consideration in the standards development process. Tangible ways of facilitating developing countries participation in international standards development should be sought. The impartiality and openness of any international standardization process requires that developing countries are not excluded de facto from the process (emphasis added).

A curious aspect of the CTBT’s Principles is the call for international standards bodies to “put in place procedures aimed at improving communication with the World Trade Organization.” Since the activities (if not the output) of these bodies still sit outside the jurisdictional competence WTO, at least in a formal sense, it might have made more sense for CTBT to develop procedures by which it could communicate with them! A monitoring role like that given to the SPS committee would be most appropriate, although this would require amendment or interpretation of the Committee’s power in the TBTA itself. One The somewhat cavalier approach to relations with international standards bodies suggested by Principle 11 merely fuels concerns that they will become handmaidens of the WTO.

A final over-arching concern about the “multi-layered governance” model reflected in the TBTA’s delegation mechanism is its “shift to the politics of expertise”. The international standards bodies currently recognised under the TBTA is technocratic. They adopt a model of experts groups. ISO, for example, currently has over 2000 technical working groups that develop the detail of standards. The technocratization of international standard-setting is beyond the scope of this paper, but Picciotto’s prescription for addressing the dangers of the phenomenon could also cure some of the flaws outlined above. As well as making them more democratic, broadening the composition of standard-setting and decision-making bodies would provide perspectives that highlight the subjective and contingent nature of specialist knowledge. Picciotto’s conclusion is that international organizations need to “foster broad participation in deliberative decision-making.” Participatory models might include changes to: the composition of bodies or of delegations; voting procedures; or adoption procedures, for example by providing Members with some right of reservation. The CTBT Principles provide a good start, but fail to address issues of national representation and participation outlined in this section. A single model will not suit that array of international bodies, so further research will be needed on the structure, functions and procedures of each international standards organisation, to help ensure a best-fit approach to institutional design.

4.2 Consider expanding the stable of international standards bodies

Much of the concern about the TBTA’s harmonization framework is that it stifles legitimate diversity, and offers little incentive for upward harmonization of regulatory requirements. The pre-eminence of international standards within the TBTA regime could, however, be used as an opportunity to elevate the importance of environmental protection or other non-economic goals, by recognising a broader array of international treaties as “international standards.” The explicit acknowledgment of such instruments as “relevant international standards” would help connect the WTO regime to policy linkage areas in a way that respects the status of both instruments and reconciles competing policy systems. Compliance with them would raise a presumption of WTO-consistency under the TBTA, and obviate any need to test their GATT-consistency.

211 Ibid, at ¶11.
213 Ibid.
214 Ibid.
215 Ibid, at 348.
The efficacy of such an approach would be subject to a clear agreement on which body is responsible for determining whether there has been “compliance”. In Sardines, the WTO Panel and AB reached their own conclusions about the proper interpretation of Codex Stan 94, despite requests by the EC to consult with Codex to confirm its meaning. The AB affirmed the Panel’s discretion to consult, making clear that it was under no duty to do so.\textsuperscript{216} The amendment of dispute settlement procedures along the lines recommended in section 3.2.1 above, requiring Panels to consult the relevant international body on questions of interpretation would satisfy this requirement.

Of course, very few international agreements could currently be adopted as international standards organisations because their applicability is constrained by whether they set “product standards”. For example most MEAs set national targets for certain environmental objectives, rather than stipulating the contents of particular products. The conventions of the ILO similarly relate to workers’ rights and conditions of employment. The AB’s current reading of “technical regulation” would exclude Agreements that speak to production processes. As has been argued elsewhere in this paper, this narrow reading does a disservice to the ends of both trade enhancement and non-trade objectives, so a formal interpretation that includes PPMs in the definition should be preferred in any event.

The unpopularity of this proposal among WTO Membership given persistent attitudes towards PPMs, cannot be over-estimated, even in areas such as labelling. It is set forth here, however, as a way of prompting re-consideration the linkage question and reconciling the tensions between trade and other international “legalities”\textsuperscript{217} using the vehicle of the TBTA (and potentially the SPSA). It could do so in a way that avoids the politics of compromise that seems to have beset negotiations on the trade-environment work program, by seeking to respect both sets of obligations. As with the AB’s current interpretation of other international standards, it would not imply any obligation on non-parties to the international agreement to join or accept its obligations. It would merely recognise that compliance with standards stipulated by those agreement satisfied Article 2.4 for Members who do comply, thus overcoming the “party-non-party” tensions in the WTO MEA debate.

5. CONCLUSIONS

Harmonization necessarily comes at the expense of diversity. Only where that diversity is illegitimate or susceptible to abuse should it be eliminated. Analysis of the WTO Agreement on Technical Barriers to Trade (TBTA) suggests that its underpinning rationale for harmonization is a desire to prevent the use of product regulations for protectionist motives, to facilitate trade by creating the conditions for economies of scale, and to ensure that trade is “fair” by removing diversity if it creates an “unfair” obstacle to trade. The Agreement pursues harmonization on two levels. Firstly, it promotes international standardization of product requirements. Secondly, it harmonizes the principles and criteria by which the WTO-consistency of domestic measures will be assessed. These broad approaches are well-suited to the TBTA’s desired goals from harmonization.

Legitimate claims for harmonization can founder if the harmonization mechanisms are flawed. This paper has pointed to several weaknesses in the TBTA’s coverage, interpretation and delegation provisions. It sought to emphasise the irrationality of excluding PPM requirements from the scope of TBTA disciplines, ignoring a fundamental focus of much

\textsuperscript{216} Sardines AB, above n10, at ¶298-302, citing Hormones AB, above n8, at ¶147, and Shrimp-Turtle, above n2, at ¶104.

\textsuperscript{217} “Legalities” is a termed coined by Arup, above n195, to refer to the collection of local laws, policies, administrative practices and regulatory culture.
social and environmental regulation and leaving them to be scrutinised under the less-onerous obligations of the GATT.

Using the first substantive analysis of TBTA, the Panel and AB decisions in *Sardines*, it also showed that the obligation to base domestic technical regulations on relevant international standards applies to measures introduced before the TBTA or the international standard came into effect. While the burden of demonstrating the suitability or appropriateness of an international standard rests on a complaining Member, the *Sardines* decision nonetheless confirms the importance of international standards. This is problematic when interpretation of those measures rests not their authors, but with the WTO. The expectation that a party will reconsider domestic laws when international standards are agreed is not balanced by a duty to consider the adoption of such international norms where no national standard is yet in place. This may advance the objectives of trade facilitation and transparency, but it does little to further the non-trade goals advanced by the international standard.

The *Sardines* Appellate Body decision confirmed the right of Members to select their own social policy objectives and introduce regulations to achieve those objectives. The contours of this right are not yet know. The focus of WTO scrutiny will, it seems, be on the manner in which those domestic priorities are given effect. The parallels with GATT Article XX analysis are obvious and the AB has demonstrated a willingness to “cross-fertilize” its readings of Annex 1A agreements, but it is hard to predict how the differences in language and operation might or should affect TBTA interpretation. This cross-fertilization makes interpretation of the TBTA important for the guidance it might offer on other WTO Agreements, especially the GATS. While the GATS poses different challenges, key aspects of the treaty language are comparable to the TBTA, the GATT and, to a lesser extent the SPSA.

In the meantime, it is essential that the membership and decision-making procedures of international bodies are subject to on-going review and improvement. Just as the TBTA requires review and evaluation of existing national standards when international norms are adopted, so too should the systems and institutions of international standard-setting be subject to on-going re-evaluation, improvement and, where necessary, replacement. Public scrutiny of the quality of international standards institutions and their resulting norms will only increase, if harmonization becomes the norm for other WTO disciplines such as services and investment liberalisation.

Harmonization need not be downward. Indeed, with a true commitment to using the WTO regime to achieve sustainable development, Members could recognise a range of international environmental and other agreements as relevant international standards, so that domestic laws implementing those agreements were presumptively consistent with the TBTA. Broadening the range of international standards bodies could ensure that harmonization enhances, rather than erodes, WTO handling of policy linkages.

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218 Marceau & Trachtman, above n5, at 813.
220 Trachtman 2003b, above n151, 37.