

# CLARIFYING THE ALPHABET SOUP OF THE TBT AND THE SPS IN THE WTO

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## I. INTRODUCTION

In light of the agricultural trade reforms prompted by the Uruguay Round, concern is shifting to non-tariff measures (“NTMs”) that may impede trade. NTMs cover a wide range of policies “that have the effect of limiting trade, with no implied judgment on the legitimacy or otherwise of these measures.”<sup>1</sup> NTMs may include intellectual property rights protection, customs policies and technical regulations such as labeling requirements, environmental regulations, and food safety regulations.<sup>2</sup> The focus of this article is on technical regulations. The concern for NTMs has increased because of the recognition of the impact of NTMs on trade and the increase in the number of NTMs.<sup>3</sup> One measure of NTMs is the number of notifications of technical regulations submitted to the WTO. From 1981 to 1999, the cumulative number of notifications increased from 130 to over 3,100.<sup>4</sup>

However, considering technical regulations solely as possible impediments to trade ignores the potential trade facilitation feature of many technical regulations. Technical regulations that standardize quality or provide information to the consumer help reduce transaction, processing, and information costs.<sup>5</sup> The reductions of such costs may enhance trade,<sup>6</sup> and indeed, this is usually the stated purpose of the trade agreements.<sup>7</sup>

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1. OECD, AGRIC. POLICIES IN EMERGING AND TRANSITION ECONOMIES: SPECIAL FOCUS ON NON-TARIFF MEASURES 20 (2001), available at <http://www1.oecd.org/publications/e-book/1401121E.pdf>

2. See *id.* at 17.

3. *Id.* at 11.

4. See *id.* at 22.

5. See Agreement on Technical Barriers to Trade, Apr. 15, 1994, art. 2, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, available at [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf) [hereinafter TBT Agreement].

6. See OECD OBSERVOR, THE DOHA DEVELOPMENT AGENDA: TARIFFS AND TRADE 1 (Aug. 2003).

7. “Enhancing trade” refers to any positive trade effects such as an increase in trade volume, the expansion of trade across countries, or a reduction of costs to name a few.

In recognition of national sovereignty to protect consumers, plants, animals and the natural environment, the WTO established the Agreement on Technical Barriers to Trade<sup>8</sup> (“TBT Agreement”) and the Agreement on the Application of Sanitary and Phytosanitary Measures<sup>9</sup> (“SPS Agreement”). These Agreements further specify the articles of the General Agreement on Tariffs and Trade (“GATT”), and attempt to enhance trade through standardization and by limiting protectionist regulations.<sup>10</sup>

In light of the significance of these Agreements on issues related to the highly contentious beef hormone dispute between the United States and the European Communities, and the potential dispute between these trading partners over the use of genetically modified organisms “GMO,” an article explaining the Agreements is useful. This article will concentrate mainly on defining and comparing the TBT and SPS Agreements and their underlying regulations.<sup>11</sup> This article also explores the historical development to help explain the Agreements and their placement in the GATT.

## II. THE DEVELOPMENT OF THE AGREEMENTS AND THEIR PLACEMENT IN THE GATT

Article I of the GATT establishes the “General Most-Favored-Nation Treatment” principal:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with . . . respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally

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8. TBT Agreement, *supra* note 5, at pmbl.

9. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, available at [http://www.wto.org/english/docs\\_e/legal\\_e/15-sps.pdf](http://www.wto.org/english/docs_e/legal_e/15-sps.pdf) [hereinafter SPS Agreement].

10. See TBT Agreement, *supra* note 5, at art. 5; see also SPS Agreement, *supra* note 9, at art. 5.

11. Several aspects of the operation of the Agreements are not presented in this article, such as the dispute settlement process and technical support.

to the like product originating in or destined for the territories of all other contracting parties.<sup>12</sup>

Article XI provides some limitations to Article I.<sup>13</sup> “The provisions of paragraph 1 of this Article shall not extend to the . . . [i]mport and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade.”<sup>14</sup> Article III of the GATT requires that imported products from the contracting parties (or Members) be treated “no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”<sup>15</sup>

However, Article XX of the GATT permits members to make measures “necessary to protect human, animal or plant life or health,” so long as these sanitary and phytosanitary measures do not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>16</sup> The implication is that a member “could impose more stringent requirements on imported products than they required [sic] of domestic goods.”<sup>17</sup> For example an importing member who does not have a particular disease within its territory could require that exporting members with the disease test for it; however, the importing member does not

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12. General Agreement on Tariffs and Trade, July 6, 1986, article I ¶ 1, *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e/pdf](http://www.wto.org/english/docs_e/legal_e/gatt47_e/pdf).

13. *Id.* art. XI.

14. *Id.* art. XI ¶ 2(b).

15. *Id.* art. III ¶ 4.

16. *Id.* art. XX. (Throughout the remainder of this article, “regulations”, “standards”, and “measures” are referred to as regulations. Although the terminology is simplified to a single word, the differences between these words can be important. The TBT Agreement defines a technical regulation as a “document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marketing or labeling requirements as they apply to a product, process or production method.” (citing TBT Agreement, *supra* note 5, Annex 1.1)). (In contrast, technical standards are “rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.” (citing *id.* Annex 2.2)). (Much of the discussion, related to the TBT Agreement also applies to standards as stipulated in the Code of Good Practice WTO (citing *id.* Annex 3)). (The SPS Agreement avoids the distinction between regulations and standards by using the word “measures” (citing SPS Agreement, *supra* note 9, at App. 1)).

17. Understanding the WTO Agreement on Sanitary and Phytosanitary Measures (May 1998), *available at* [http://www.wto.org/english/tratop\\_e/sps\\_e/spsund\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsund_e.htm).

have to abide by the regulation.<sup>18</sup> Any confrontations that arose from these conflicting stipulations could be resolved through the dispute settlement process.<sup>19</sup>

By the end of the Tokyo Round of multilateral trade negotiations (1974-1979), the members signed the TBT Agreement.<sup>20</sup> The 1979 TBT Agreement established a series of principles that guided the use of technical barriers and included text to describe the dispute settlement process.<sup>21</sup> However, Thorn and Carlson argued that “the TBT Agreement contains few substantive obligations, and none that go substantially beyond those already spelled out under the GATT.”<sup>22</sup> Because sanitary and phytosanitary measures might be used to restrict trade, a new agreement to deal with the “loopholes” left by the TBT Agreement and more generally by the GATT XX paragraph b emerged.<sup>23</sup>

The SPS Agreement, established in 1994 during the Uruguay Round (1986-1994), specifically dealt with regulations to protect human, animal, and plant life, or health from the risks of food-borne animal and plant diseases and pests.<sup>24</sup> The SPS Agreement further developed the rules to support the use of SPS standards created by three international standard-setting bodies.<sup>25</sup> In 1994, the TBT Agreement was updated.<sup>26</sup>

As the Agreements on technical barriers evolved, they became more specific. Consider Figure 1. The GATT broadly protected imports from unfair discrimination but permitted members to develop regulations that protect life or health of humans, animals and plants.<sup>27</sup> However, the general references to tech-

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18. *See, e.g., id.*

19. *See id.*

20. *See id.*

21. *See id.*

22. Craig Thorn & Marinn Carlson, *The Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade*, 31 *LAW & POL’Y INT’L BUS.* 841, 842 (2000).

23. *See generally* TBT Agreement, *supra* note 5; *see also* Understanding the WTO Agreement on Sanitary and Phytosanitary Measures, *supra* note 17.

24. *See generally* SPS Agreement, *supra* note 9 (discussing that the SPS Agreement can be interpreted as also covering a limited set of environmental regulations, including regulations that prevent the spread of disease and pests that could adversely affect the life or health of local or wild plants and animals (flora and fauna). In the following discussion, the environmental element of the SPS Agreement refers solely to flora and fauna).

25. *See* WTO, *MODULE 3, GOODS: RULES ON NTMS, A TRAINING PACKAGE E3-24* (1998), at [http://www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto03/wto3.pdf](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto03/wto3.pdf).

26. *See* Understanding the WTO Agreement on Sanitary and Phytosanitary Measures, *supra* note 17.

27. *See generally* General Agreement on Tariffs and Trade, *supra* note 12.

nical regulations in the GATT of 1947, in particular Articles III, XI and XX, were too broad to cope with the complexities of the increasingly integrating world markets. A GATT working group concluded that technical barriers were the largest category of NTMs faced by exporters.<sup>28</sup> Thus, the 1979 and 1994 TBT Agreements helped narrow the focus by developing more specific guidelines to deal with divergent opinions and specifications of goods in terms of health, safety and quality.<sup>29</sup> A fear developed that the GATT members were developing creative schemes of protectionism under the guise of protecting their citizens, animals and plants.<sup>30</sup> A more tightly focused SPS Agreement established rules to deal with divergent opinions concerning risk in terms of life or health of humans, plants and animals.<sup>31</sup>

The most recent narrowing of focus on food and agricultural products occurred even before the advent of public awareness of genetically modified organisms and of major food-borne illness scares. This narrowing of focus, especially the particular emphasis on food safety, reflects consumer concern, as voiced by national delegations, for food safety issues, the potential of food safety regulation to be used in a protectionist way, and the increasing interest to open trade in the food and agricultural sector.<sup>32</sup>

### III. THE WTO AGREEMENT ON TECHNICAL BARRIERS TO TRADE (TBT AGREEMENT)

#### A. Coverage of TBT Agreement

The Members established the TBT Agreement for the “protection of human, animal or plant life or health, of the environment or for the prevention of deceptive practices.”<sup>33</sup> The protection of human safety is the largest category of

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28. See MODULE 3, GOODS: RULES ON NTMS, A TRAINING PACKAGE, *supra* note 25, at E3-1.

29. TBT Agreement, *supra* note 5, at pmbl.

30. See MODULE 3, GOODS: RULES ON NTMS, A TRAINING PACKAGE, *supra* note 25, at E3-20.

31. *See id.*

32. See Understanding the WTO Agreement on Sanitary and Phytosanitary Measures, *supra* note 17.

33. TBT Agreement, *supra* note 5, at pmbl.

TBT regulation.<sup>34</sup> Regulations concerning human life or health range from seat belts in cars to warning labels on cigarettes.<sup>35</sup> The protection of animal and plant life or health includes regulations, for example, that protect animal or plant species from extinction due to environmental pollutants. The protection of the environment covers, for example, the emission standards of automobiles.

The TBT Agreement is not explicit concerning whose environment (domestic or foreign) the technical regulation affects.<sup>36</sup> However, international case law has established a precedent, which limits the ability of a country to enforce regulations that affect the activities of another country.<sup>37</sup> For example, Country A cannot restrict the environmentally harmful activities of Country B if the harm of the activities does not directly affect the environment of Country A. The regulations for the prevention of deceptive practices allow governments to require the provision of information about the product so as to prevent fraudulent or misleading practices.<sup>38</sup> Implicit in this provision is the standardization of definitions and classifications, packaging requirements, and measurements. The TBT Agreement allows for regulations that promote quality and technical harmonization, which aids trade facilitation.<sup>39</sup> For example, regulations that require a certain weight/size specification for a food product are acceptable under the TBT Agreement.<sup>40</sup>

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34. See INT'L AGRIC. TRADE RESEARCH CONSORTIUM, *THE ROLE OF PRODUCT ATTRIBUTES IN THE AGRICULTURAL NEGOTIATIONS* 27 (2001) (on file with Drake J. Agric. L.).

35. See Understanding the WTO Agreement on Sanitary and Phytosanitary Measures, *supra* note 17.

36. See generally TBT Agreement, *supra* note 5.

37. See generally John Ewers, *Dueling Risk Assessments: Why the WTO and CODEX Threaten U.S. Food Standards*, 30 ENVTL. L. 387 (2000) (stating that while this is true for unilateral regulations or disputes, countries may establish multilateral agreements, which are not a part of the WTO to protect the environment); DAVID BLANFORD, ET AL., *POTENTIAL IMPLICATIONS OF ANIMAL WELFARE CONCERNS AND PUBLIC POLICIES IN INDUSTRIALIZED COUNTRIES FOR INTERNATIONAL TRADE*, available at [http://dblandford.aers.psu.edu/PDF/Papers/Potential\\_implications\\_of\\_animal\\_welfare\\_concerns\\_and\\_public\\_policies\\_in\\_industrialized\\_countries\\_for\\_international\\_trade.pdf](http://dblandford.aers.psu.edu/PDF/Papers/Potential_implications_of_animal_welfare_concerns_and_public_policies_in_industrialized_countries_for_international_trade.pdf) (last visited Apr. 24, 2004).

38. TBT Agreement, *supra* note 5, at art. 2.2.

39. See *id.* art. 2.

40. See *id.*

## B. *The TBT Principles*

The TBT Agreement has three major guiding principles: (1) avoidance of unnecessary obstacles to trade, (2) harmonization of standards, and (3) transparency of regulations.<sup>41</sup> The WTO lists separately additional principles. However, in this article, additional guiding principles are considered under the rubrics of these three major principles.<sup>42</sup>

### 1. *Avoidance of Unnecessary Obstacles to International Trade*

While the TBT Agreement is established to grant nations the right to establish regulations, these regulations are not to “create unnecessary obstacles to trade.”<sup>43</sup> A regulation is considered an unnecessary obstacle to trade “when (i) a regulation is more restrictive than necessary to achieve a given policy objective, or (ii) when it does not fulfill a legitimate objective.”<sup>44</sup>

The stipulation of not creating unnecessary obstacles does not prevent a Member from having stricter regulations than other Members have if the regulating Member, at the request of another Member, can prove that a stricter regulation is necessary to avoid risks from a less strict regulation.<sup>45</sup> The risk assessment must consider, “*inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.”<sup>46</sup>

#### a) *Product versus Process*

A Member can avoid unnecessary obstacles to trade by regulating products not processes and by adopting international standards (discussed below).<sup>47</sup> The TBT Agreement permits countries to regulate process wherever relevant and required.<sup>48</sup> Yet, if a product is what is desired, say oranges of a certain size, the regulation should not stipulate the process or production method to achieve or-

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41. See MODULE 3, GOODS: RULES ON NTMS, A TRAINING PACKAGE, *supra* note 25, at E3-5.

42. See *id.* at E3-5 to E3-16.

43. *Id.* at E3-6.

44. *Id.* at E3-7.

45. See TBT Agreement, *supra* note 5, at arts. 2.1, .3, .5.

46. *Id.* art. 2.2.

47. See *id.* art. 2.7.

48. *Id.* art. 2.4.



anges of a certain size. Rather, the regulation should only regulate the product, the size of the oranges.<sup>49</sup>

## 2. *Harmonization*

Another way that a Member can avoid unnecessary obstacles is by following international standards if such standards exist. Such a policy leads to harmonization of regulations across Members.<sup>50</sup> The TBT Agreement encourages Members to participate in international standard setting bodies such as the International Organization of Standards.<sup>51</sup> A Member is to follow the international standards “except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.”<sup>52</sup>

### a) *Equivalence*

Harmonization of all regulations may take many years; therefore, the TBT allows for equivalence.<sup>53</sup> If a Member satisfies the intent of a regulation through its own regulations, the importing Member should accept the product, provided that the importing Member is “satisfied that these regulations adequately fulfill the objectives of their own regulation.”<sup>54</sup> This principle is similar to the idea of product versus process. Both principles are useful in the TBT Agreement.<sup>55</sup> For example, firms in different Members may have different least-cost production practices to produce the same product. Requiring all Members to use the same production process may inappropriately favor some Members over others, because the stipulated production process may be the least-cost

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49. *Id.* art. 2.8.; *see also id.* Annex 1.

50. *See id.* art. 2.6.

51. *Id.* (International standards organizations may only set standards and not regulations because the international standards organizations cannot require Members to abide by the standards).

52. *Id.* art. 2.4.

53. *See id.* art. 2.7.

54. *Id.*

55. *See generally id.*

process for some Members but not all.<sup>56</sup> Therefore, product versus process, in conjunction with equivalence, helps to reduce costs, which facilitates trade.<sup>57</sup>

*b) Non-Discrimination and National Treatment*

All Members are to receive Most-Favored Nation Treatment under the TBT Agreement, as stipulated under the GATT.<sup>58</sup> An importing Member cannot require an exporting Member to meet regulations that are stricter than those established by the importing Member.<sup>59</sup> However, as stated earlier, exceptions are permitted.<sup>60</sup> All Members are to be treated exactly the same; however, developing country Members may receive special and differential treatment.<sup>61</sup> In addition to non-discrimination, Members must not discriminate based on the method of evaluating conformity to regulations.<sup>62</sup> The conformity assessment “grant[s] access for suppliers of like products originating in the territories of other Members under conditions no less favourable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation.”<sup>63</sup>

*c) Mutual Recognition*

A further step to greater harmonization is mutual recognition. The TBT allows for and encourages Members to accept the conformity assessments of different countries.<sup>64</sup> Mutual recognition allows exporting Members to avoid the expense of reproducing conformity assessments in each importing Member.<sup>65</sup>

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56. See *id.* art. 2.7.

57. See *id.*

58. *Id.* Annex 3D; see also Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, art. II, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, 1169 (1994) [hereinafter Final Act].

59. See TBT Agreement, *supra* note 5, at art. 2.1.

60. See generally Final Act, *supra* note 58.

61. See TBT Agreement, *supra* note 5, at art. 12.

62. See *id.* art. 5.1.1.

63. *Id.*

64. *Id.* art. 6.1.

65. See *id.* art. 5.1.

### 3. *Transparency*

A Member must notify the WTO Secretariat within sixty days of the implementation of a new regulation when an international standard does not exist, or there are technical factors inconsistent with the regulation.<sup>66</sup> Another instance where notification is necessary is when there is a change in a regulation that may have substantial trade effects on other countries.<sup>67</sup> Regulations can go into effect immediately, with a subsequent review period in cases of emergencies.<sup>68</sup> Countries are also required to establish national Enquiry Points so that all Members can review and obtain information on the regulations of other Members.<sup>69</sup>

### 4. *Other Stipulations of the TBT Agreement*

Beyond the principles above, the TBT Agreement also lays out a set of guidelines that encourages Members to assist other Members, especially developing country Members, in complying with technical regulations.<sup>70</sup> In addition, the TBT Agreement makes allowances for special and differential treatment of developing country Members.<sup>71</sup>

The TBT Agreement additionally sets forth an institutional structure to assist in the review of TBT regulations and the adjudication of disputes over regulations.<sup>72</sup> The TBT Agreement established the TBT Committee, which is to be consulted on all matters concerning the Agreement.<sup>73</sup> The Dispute Settlement process should conform with Articles XXII and XXIII of GATT 1994.<sup>74</sup> The Agreement also establishes a group of technical experts to assist the Dispute Settlement Panel answer questions of a technical nature.<sup>75</sup>

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66. *Id.* Annex 3 ¶ L.

67. *See id.* arts. 2.9, 5.6.

68. *See id.* arts. 2.10, 5.7.

69. *See id.* art. 10.1.

70. *Id.* art. 11.1.

71. *Id.* art. 12.1.

72. *Id.* art. 14.1.

73. *Id.* art. 13.1.

74. *Id.* art. 14.1.

75. *Id.* art. 14.2.

#### IV. THE WTO AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES (SPS AGREEMENT)

##### A. Coverage of SPS Agreement

The SPS Agreement defines sanitary or phytosanitary regulations as regulations:

- (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
- (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.<sup>76</sup>

The SPS Agreement also covers

all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.<sup>77</sup>

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76. SPS Agreement, *supra* note 9, at Annex A ¶ 1(a)-(d).

77. *Id.*

## B. *The SPS Agreement Principles*

An overarching aim of the SPS Agreement is “to maintain the sovereign right of any government to provide the level of health protection it deems appropriate, but to ensure that these sovereign rights are not misused for protectionist purposes and do not result in unnecessary barriers to international trade.”<sup>78</sup> The WTO tries to achieve the aims of the SPS Agreement through four guiding principles with several supporting features: (1) harmonization; (2) risk assessments; (3) regional conditions; and (4) transparency.<sup>79</sup> The supporting features broadly deal with the treatment of developing countries, dispute settlement, and administrative matters.<sup>80</sup>

### 1. *Harmonization*

The WTO encourages the harmonization of sanitary and phytosanitary regulations by encouraging Members to accept international standards, guidelines or recommendations.<sup>81</sup> However, the WTO afforded Members the opportunity to have more stringent guidelines “if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate.”<sup>82</sup> The WTO also encourages Members to participate in three specific organizations that generate international standards on food safety and other sanitary and phytosanitary issues: Codex Alimentarius Commission (“Codex”); the International Office of Epizootics (“OIE”), also known as the World Animal Health Organization; and the International Plant Protection Convention (“IPPC”).<sup>83</sup>

Codex is a joint organization of the Food and Agriculture Organization (“FAO”) and the World Health Organization (“WHO”).<sup>84</sup> Codex deals with food safety standards.<sup>85</sup> OIE is an international organization that deals with animal

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78. Understanding the WTO Agreement on Sanitary and Phytosanitary Measures, *supra* note 17.

79. *See id.*

80. *See id.*

81. *See id.*

82. SPS Agreement, *supra* note 9, at art. 3 ¶ 3.

83. *Id.* art. 3 ¶ 4.

84. Understanding the WTO Agreement on Sanitary and Phytosanitary Measures, *supra* note 17.

85. *See id.*

health and disease standards.<sup>86</sup> IPPC is a multilateral agreement, which establishes an organization within the FAO that writes standards that prevent the introduction and spread of pests of plant and plant products.<sup>87</sup>

a) *Equivalence*

The WTO stipulates that Members are to accept different sanitary or phytosanitary measures that the exporter demonstrates as equivalent.<sup>88</sup> If there is a controversy over equivalence, the exporting Member must prove compliance.<sup>89</sup>

2. *Risk Assessments*

The SPS Agreement states that SPS regulations are to be based on science “taking into account risk assessment techniques developed by the relevant international organizations.”<sup>90</sup> Nevertheless, members may deviate from the international standards if a proper risk assessment is performed.<sup>91</sup> Article 5.1 states, “Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.”<sup>92</sup> For animal or plant life or health, the nature of the stricter regulations must take into account not only science but also the biological and economic consequences of the stricter regulation.<sup>93</sup>

A factor to be considered in the risk assessment is relevant economic factors. Such factors include “the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.”<sup>94</sup>

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86. *See id.*

87. *See* SPS Agreement, *supra* note 9, at Annex A ¶ 3.

88. *See id.* art. 4 ¶ 1.

89. *See id.*

90. *Id.* art. 5 ¶ 1.

91. *See id.* art. 3 ¶ 3.

92. *Id.* art. 5 ¶ 1.

93. *See id.* Annex A ¶ 4.

94. *Id.* art. 5 ¶ 3.

Whatever the level of protection deemed appropriate, the resulting regulations must minimize negative trade effects.<sup>95</sup> However, “the SPS Agreement allows [Members] to give food safety, animal and plant health priority over trade.”<sup>96</sup> Included in the idea of minimizing negative trade effects, members are required to apply rules consistently and in consideration of technological and economic feasibility.<sup>97</sup>

In cases where sufficient science does not exist,

[A] member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.<sup>98</sup>

Initially this principle, as established in the Rio Declaration on Environment and Development, was to provide protection over actions that may produce unknown environmental damage.

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.<sup>99</sup>

The EC has suggested that the precautionary principle is applicable not only to environmental protections but also to SPS issues.<sup>100</sup> In a communication from the European Communities, the EC argued,

The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) clearly sanctions the use of the precautionary principle, although the

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95. *See id.* art. 5 ¶ 4.

96. Understanding the WTO Agreement on Sanitary and Phytosanitary Measures, *supra* note 17.

97. *See* SPS Agreement, *supra* note 9, at art. 5 ¶ 6.

98. *Id.* art. 5 ¶ 7.

99. UNITED NATIONS ENVIRONMENT PROGRAMME, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, Principle 15 (June 1992), *available at* <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163>.

100. *See* WTO, Committee on Sanitary and Phytosanitary Measures, Communication from the European Communities, G/SPS/GEN/168, 9 (Mar. 14, 2000), *available at* <http://docsonline.wto.org>.

term itself is not explicitly used. Although the general rule is that all sanitary and phytosanitary measures must be based on scientific principles and that they should not be maintained without adequate scientific evidence, a derogation from these principles is provided for in Article 5.7.<sup>101</sup>

In case of emergency situations, the stipulation permits immediate actions to be taken with subsequent review.<sup>102</sup>

The stipulations concerning risk assessment are sufficiently open to allow for many interpretations of “risk assessment”<sup>103</sup> and the “appropriate level of protection.”<sup>104</sup> However, if a Member has reason to believe that a regulation is unnecessarily restrictive to trade, the Member may petition for an explanation and eventually present their case as provided by Articles XXII and XXIII of GATT 1994 and the Dispute Settlement Understanding.<sup>105</sup> If the matters are of a highly technical nature, the panel of the Dispute Settlement may approach consultants or the relevant international organizations to advise the panel.<sup>106</sup>

### 3. *Regional Conditions*

The SPS Agreement recognizes that pests and diseases vary by geography and ecosystems without regard to national boundaries; therefore, the Agreement permits differential treatment of regions regardless of national borders.<sup>107</sup> The exporting Member must bear the burden of proof that a region or regions within its territory are free or have low incidence of a pest or disease.<sup>108</sup>

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101. *Id.* at 9.

102. *See* Understanding the WTO Agreement on Sanitary and Phytosanitary Measures, *supra* note 17.

103. *See* SPS Agreement, *supra* note 9, at Annex A ¶ 1(b).

104. *See id.* Annex A ¶ 5 (defining the appropriate level of sanitary or phytosanitary protection as “the level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory”).

105. *Id.* art. 11 ¶ 1.

106. *See id.* art. 11 ¶ 1-2.

107. *Id.* art. 6 ¶ 1-2.

108. *See id.* art. 6 ¶ 3.



#### 4. *Transparency*

Members are responsible for the prompt publication of all SPS regulations.<sup>109</sup> The timing of the announcements should provide “a reasonable interval” between publication and enactment of the regulation so as to provide other Members time to react and adjust to the new regulation.<sup>110</sup>

Each Member must also establish an enquiry point, which is to house SPS regulations and provide any relevant documents.<sup>111</sup> Information at the enquiry points should be sufficient to answer all questions concerning SPS regulations of Members. The regulations submitted to the enquiry point should include those regulations that are deviations from international standards or regulations created in the absence of international standards.<sup>112</sup>

#### 5. *Other Stipulations of the SPS Agreement*

Some of the other supporting stipulations of the SPS Agreement deal mainly with Members who are developing countries.<sup>113</sup> Members are to provide technical assistance to other Members that need such help, while developing country Members are permitted more time to comply with regulations if extensions are possible.<sup>114</sup> The Agreement encourages developing country Members to participate in international standards organizations.<sup>115</sup>

The SPS Agreement also establishes the Committee on Sanitary and Phytosanitary Measures, which is to carry out the provisions of the SPS Agreement.<sup>116</sup> The Committee is a repository of regulations and also reviews the operation and implementation of the Agreement when necessary.<sup>117</sup>

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109. *Id.* art. 7; *see also id.* Annex B ¶¶ 1-2.

110. *Id.* Annex B ¶ 2.

111. *Id.* Annex B ¶ 3.

112. *See id.* Annex B ¶¶ 3-5.

113. *See, e.g., id.* art. 10.

114. *See id.* art. 10 ¶ 3.

115. *Id.* art. 10 ¶ 4.

116. *Id.* art. 12 ¶ 1.

117. *Id.* art. 12.

## V. COMPARISON

The TBT and SPS Agreements share a number of similarities in terms of principles and structure; though, they do have significant differences in terms of purview and function.<sup>118</sup> Both Agreements state that the legal domains under each Agreement are distinct.<sup>119</sup> However, interpretation of the line of distinction may not always be clear. Disputes could fall under either the TBT Agreement or SPS Agreement depending on the intent of the regulation and the requirement to prove the case.<sup>120</sup> Therefore, a comparison of the two Agreements is useful.

Both the SPS and TBT Agreements are focused on providing Members the legal opportunity to protect human, plant and animal life or health, and the environment (for the SPS Agreement, the environment pertains to the protection of wild flora and fauna) from disease and pest infestation.<sup>121</sup> A contrast between the Agreements in this definition is the source of the risk to life or health. Under the SPS Agreement the risk must come from diseases, organisms associated with diseases, pests (including weeds), or contaminants (including pesticide and veterinary drug residues and extraneous matters).<sup>122</sup> For the TBT Agreement, the risk may come from any other sources other than these sanitary or phytosanitary sources.<sup>123</sup>

More specifically in the SPS Agreement, the form of the sanitary and phytosanitary risks must arise from “the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms.”<sup>124</sup> Particular to human and animal life or health, Members may protect from the “risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs.”<sup>125</sup> The risks that could affect the environment include damage “from the entry, establishment or spread of pests.”<sup>126</sup>

As stated in Article 1.5 of the TBT Agreement, the TBT Agreement is not to cover any sanitary or phytosanitary measures.<sup>127</sup> Therefore, one way to

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118. See generally *id.*; TBT Agreement, *supra* note 5, at art. 1.5.

119. TBT Agreement, *supra* note 5, at art. 1.5; SPS Agreement, *supra* note 9, at art. 1 ¶ 4.

120. See generally TBT Agreement, *supra* note 5.

121. *Id.* pmb.; SPS Agreement, *supra* note 9, at Annex A n. 4 (defining animal to include fish and wild fauna and “plant” to include forests and wild flora).

122. SPS Agreement, *supra* note 9, at Annex A ¶ 1(a)-(d).

123. TBT Agreement, *supra* note 5, at art. 1.5.

124. SPS Agreement, *supra* note 9, at Annex A ¶ 1(a).

125. *Id.* Annex A ¶ 1(b).

126. *Id.* Annex A ¶ 1(a), (d).

127. TBT Agreement, *supra* note 5, at art. 1.5.

view the purview of the TBT Agreement is that it covers any risks to humans, animals, plants or the environment which are not sanitary or phytosanitary risks. Interpreting the purview of the TBT Agreement as the complement of the SPS Agreement allows the interpretation of the TBT Agreement as covering a wide variety of risks. As related to humans, animals, plants and the environment, the TBT Agreement delineates what it does not, rather than what it does cover, which implies that the TBT Agreement can cover an even greater range of risks.<sup>128</sup> With respect to other areas of trade, the purview of the TBT Agreement is even wider because the TBT Agreement states that Members may institute regulations to protect national security and prevent deceptive practices.<sup>129</sup> Thorn and Carlson stated “[t]he coverage of the TBT Agreement, [as compared to the SPS Agreement], is extremely broad and diverse, and it was difficult to develop firm, objective disciplines that could apply to the entire range of measures covered.”<sup>130</sup>

While the TBT Agreement is much broader in terms of its reach, the points at which the TBT Agreement and SPS Agreement come together are of particular interest. In the area of food for human use, the boundary between what is a TBT or a SPS regulation is not always clear because the boundary between food quality and food safety is not always clear. A food quality issue would fall under the TBT Agreement while a food safety issue would fall under the SPS Agreement.<sup>131</sup>

Consider a hypothetical example based in part on a previous SPS dispute. Say that a Member wanted to label beef produced with hormones. The case could be made that consumers have a right to know that the beef is produced with (or without) hormones (irrespective of concerns for human health or life); thus, the labeling issue falls under the TBT Agreement.<sup>132</sup> On the other hand, the case could be made that the labeling of the beef as produced with (or without hormones) could fall under the SPS Agreement because some risk assessments, of at least some of the hormones used in beef-production, may suggest that the hormones harm hu-

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128. *See id.* pmb1.

129. *Id.*; *see also* GRETCHEN STANTON, U.N., REVIEW OF THE IMPLEMENTATION OF THE SPS AND TBT AGREEMENTS, CONFERENCE ON INT’L FOOD TRADE BEYOND 2000: SCIENCE-BASED DECISIONS, HARMONIZATION, EQUIVALENCE AND MUTUAL RECOGNITION, § I(A)(3) (Oct. 1999), at <http://www.fao.org/docrep/meeting/x2705e.htm>.

130. Thorn & Carlson, *supra* note 22, at 842.

131. *See id.* at 841-42.

132. JUDSON O. BERKEY, ASIL INSIGHTS, IMPLICATIONS OF CODEX STANDARDS FOR THE REGULATION OF GENETICALLY MODIFIED FOOD, (Sept. 2000), *available at* <http://www.asil.org/insights/insigh51.htm>.

man life or health.<sup>133</sup> It should be noted that other risk assessments suggest that the hormone treated beef may not harm human life or health.<sup>134</sup> In the first scenario, the issue is about food quality (or the perception of food quality). In the second scenario, the issue is about food safety. The results of this dispute may have great bearing on any disputes brought before the Dispute Settlement Panel on GMO.

The juncture of the TBT and SPS Agreements may prove contentious because Members will have different perspectives on whether a regulation is a food quality or food safety issue, as demonstrated by the hypothetical example. However, Members potentially may avoid the difficulty of choosing the “best Agreement” for their cases by filing the disputes as violations of multiple Agreements (e.g., SPS, TBT, GATT, Agreement on Agriculture).

The example highlights another difference between the TBT Agreement and the SPS Agreement: risk assessment. Under the SPS Agreement, the Member must have scientific evidence to support the imposition of the SPS regulation.<sup>135</sup> In contrast, the TBT Agreement provides more liberal justification for the imposition of regulations because the TBT Agreement permits a number of factors to be considered in the risk assessment.<sup>136</sup> In some cases the more narrowly defined risk assessment of the SPS Agreement, relative to the TBT Agreement, may prove to be a more demanding criterion to meet before the Dispute Settlement Panel.<sup>137</sup>

A related issue has to do with international standards. Both agreements encourage members to use international standards whenever possible. Under the SPS Agreement, deviations from the international standards must be proven scientifically by an appropriate risk assessment.<sup>138</sup> Under the TBT Agreement, a Member may state its deviation from the international standard as “ineffective or

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133. Compare J. J. Kastner & R. K. Pawsey, *Harmonizing Sanitary Measures and Resolving Trade Dispute through the WTO-SPS Framework, Part I: A Case Study of the US-EU Hormone-Treated Beef Dispute*, 13 FOOD CONTROL 49 (2002), with BERKEY, *supra* note 132. The EU, in part, lost the dispute with the U.S. over beef hormones because the EU did not provide a risk assessment of the effects of human consumption of beef treated with the hormones that the U.S. used; rather the EU argued from the general risks associated with hormones. Thus the EU did not effectively provide a proper risk assessment.

134. See Kastner & Pawsey, *supra* note 133, at 52-53.

135. SPS Agreement, *supra* note 9, at art. 2 ¶ 2.

136. TBT Agreement, *supra* note 5, at art. 2.2.

137. Compare *id.* with SPS Agreement, *supra* note 9, at art. 5 ¶ 3.

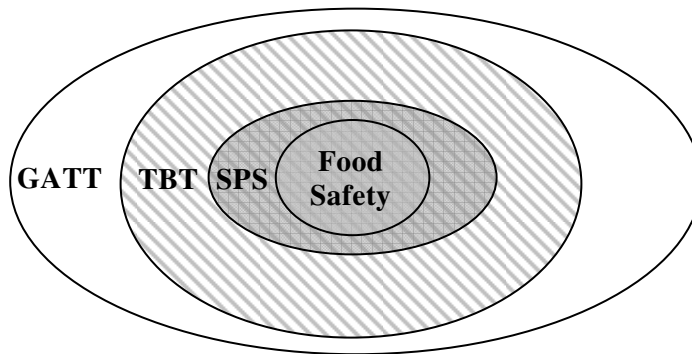
138. SPS Agreement, *supra* note 9, at art. 3 ¶ 3.

inappropriate” because of “fundamental technological problems” or “geographical factors.”<sup>139</sup>

## VI. CONCLUSION

The three principles of the TBT Agreement work together to provide a framework that should enhance trade. The SPS Agreement also shares these principles. Both Agreements state that developing countries are to receive special and differential treatment. The challenge for the WTO and its Members is to encourage greater integration of markets without leaving developing country Members out of the market because of regulations that are stricter than the developing countries can currently meet.<sup>140</sup> This concern is evident in the nature and origin of proposals brought before the WTO negotiations in March 2001.<sup>141</sup> Another challenge is not to encourage an unnecessary race for stricter regulations as suggested by the increase in the total number of technical regulation notifications to the WTO.<sup>142</sup> Such a race would force some Members out of the market thus permitting the possibility of increased concentration of trade among the remaining Members. The appropriate use of the TBT and SPS Agreements may facilitate trade for all Members by providing a transparent framework to encourage standardization and prevent abuses of technical regulations.

Figure 1. The Narrowing of Focus of International Agreements



139. TBT Agreement, *supra* note 5, at art. 2.4.

140. See AGRIC. POLICIES IN EMERGING AND TRANSITION ECONOMIES, *supra* note 1, at 20.

141. See INT’L AGRIC. TRADE RESEARCH CONSORTIUM, THE ROLE OF PRODUCT ATTRIBUTES IN THE AGRICULTURAL NEGOTIATIONS: IARTC COMMISSIONED PAPER No. 17, 54 (2001).

142. See AGRIC. POLICIES IN EMERGING AND TRANSITION ECONOMIES, *supra* note 1, at 14.