

Removing Technical Barriers to Trade: The Next Step Toward Freer Trade

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Technical standards for products can form technical barriers to trade. These standards have been at issue in many recent disputes brought before GATT. With the decrease in the level of tariffs worldwide, the issue of technical barriers to trade has moved to the forefront in international trade discussions. In 1994, the Technical Barriers to Trade Agreement was created during the Uruguay Round of GATT negotiations. The European Community has established a system of standardization to reduce technical barriers as nontariff barriers to trade. Other regional organizations have followed suit. This Comment analyses the international, regional, and national arrangements designed to reduce the effect of technical barriers to trade. It then analyzes several disputes that have come before dispute panels established by the WTO and other international agreements to understand the process through which the agreements to reduce technical barriers to trade achieve their goals.

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I. INTRODUCTION

With the steady decline in the level of tariffs globally, proponents of free trade have turned their attention to the elimination of technical standards as a nontariff barrier to trade. The Uruguay Round of the General Agreement on Tariffs and Trade (GATT) has resulted in lower tariff rates around the world. Although tariffs in developing countries are still generally much higher than tariffs in developed countries, the average tariff rate in both sectors of the world economy has decreased following the conclusion of the Uruguay Round of GATT. Since the

conclusion of the Uruguay Round, the average tariff rates imposed by developing countries have fallen from 15.3% to 12.3%.¹ Likewise, the average rates in developed countries have decreased from 6.3% to 3.9%.² In addition to its many achievements, the Uruguay Round concluded with the Agreement on Technical Barriers to Trade. The inclusion of this agreement in the Uruguay Round's negotiations indicates that technical barriers to trade are an important factor in the functioning of the global economy.

This Comment will consider the actors and trends in this dynamic area of international law. The first section will discuss the major agreements that provide the foundation for the regulation of standards. The second section will explore the major institutions involved in formulating harmonized standards. In order to illustrate the trend toward removing standards which may act as technical barriers to trade, the final section will discuss recent disputes brought before international dispute panels.

II. WHAT ARE TECHNICAL BARRIERS TO TRADE?

Following the reduction of tariffs on a global scale, the focus of GATT and other international agreements has turned to removing nontariff barriers to trade. One form nontariff barriers may take is one of many technical barriers to trade. Technical barriers refer to product standards, which may differ from country to country. These standards have the effect of restricting trade.³ Such standards are specifications for any type of a product's characteristics or manufacture and may be established by private or public bodies.⁴ Although compliance with these specifications is not mandatory, the market may penalize those who do not comply.⁵

Technical standards require that products meet certain requirements before they are placed on the market. These specifications may act as barriers to trade when they differ from country to country by insulating domestic markets from outside competition. Conforming with these specifications can be so difficult and costly that it is economically impossible to comply with them and still remain competitive in the

1. See OECD, *THE NEW WORLD TRADING SYSTEM: READINGS*, 47 (1994).

2. *Id.* at 50.

3. See ALAN O. SYKES, *PRODUCT STANDARDS FOR INTERNATIONALLY INTEGRATED GOODS MARKETS 2* (1995).

4. See *id.*

5. Market actors can penalize manufacturers who sell products that do not comply with standards by refusing to sell the goods or by refusing to buy them at the price offered for goods which are in compliance with the standards. See *id.*

foreign market. This can occur when a country creates its standards around the particular practices of domestic industry.

The determination of whether a specification acts as a barrier to trade requires close examination of the facts. For example, Australia enacted measures requiring imported live cattle to be quarantined without providing quarantine facilities, which may effectively eliminate all imports of live cattle into the country.⁶ Since standardization bodies generally consult the domestic industry before creating new standards, they often reflect the practices of the domestic industry and, thus, are often incompatible with foreign standards.⁷ Border examinations, when left unregulated, may be expensive and time-consuming, even when imported products meet domestic standards.⁸ To remedy these limitations of entry into markets, GATT and other international agreements have implemented measures to regulate the establishment of standards. These international agreements allow standards to restrict imports only when there is a legitimate nondiscriminatory objective that the standard is designed to protect.

III. RELEVANT INTERNATIONAL AGREEMENTS

The first step in understanding the international system of standardization is the examination of the relevant international agreements. Standardization bodies follow the basic principles established by these agreements when formulating policy. While there are many international agreements that affect the creation of standards, the most important is the General Agreement on Tariffs and Trade (GATT).⁹ The Uruguay Round of GATT¹⁰ resulted in the Agreement on Technical Barriers to Trade (TBTA),¹¹ which is the most comprehensive international agreement on standards. In addition to these two international agreements, it is useful to discuss the provisions relating to technical barriers to trade found in the North American Free Trade

6. See Hans van Houtte, *Health and Safety Regulations in International Trade*, in *LEGAL ISSUES IN INTERNATIONAL TRADE* 128 (Petar Sarcevic et al. eds., 1990).

7. See *id.*

8. See *id.* at 129.

9. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

10. Final Act Embodying the Results of the Uruguay Round of Multi-Internal Trade Negotiations, Apr. 15, 1994, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 [hereinafter Uruguay Round].

11. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Agreements on Trade in Goods [hereinafter TBTA].

Agreement (NAFTA).¹² The common principles that pervade the international and bilateral agreements discussed below are the importance of freer trade and the removal of technical barriers to trade.

A. *General Agreement on Tariffs and Trade (GATT)*

GATT was created following World War II as a reaction to the protectionism of the 1930s, which caused economic problems worldwide.¹³ Initially, GATT merely embodied the result of multilateral tariff negotiations between twenty-three governments;¹⁴ however, through further rounds of negotiations, GATT has become the international body governing trade. The objective of GATT is to “[enter] into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”¹⁵

One of the primary mechanisms implemented by GATT to promote the reduction of tariffs and the liberalization of trade was the Most Favored Nation (MFN) provision.¹⁶ MFN treatment demands that tariff concessions granted to one contracting party also be granted to all other contracting parties. GATT, however, allows the creation of free trade areas and customs unions despite the MFN provision.¹⁷ This exception is necessary to allow the formation of these types of arrangements. Without the exception, all countries that are members of a free trade area or customs union would be in violation of GATT.

The second major provision of GATT that has resulted in the reduction of tariffs is article II, which emphasizes the importance of tariff concessions and binding tariff agreements.¹⁸ Tariff concessions, which provide for the reduction of tariffs, are binding on the contracting parties. Article II reemphasizes the MFN principle by providing for equal treatment for all contracting parties when a tariff concession is granted to any one of the GATT members.¹⁹

12. North American Free Trade Agreement, Dec. 8-17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

13. See RAJ BHALA, INTERNATIONAL TRADE LAW 85 (1996).

14. See Patrick Low, *Trading Free*, in INTERNATIONAL TRADE LAW, *supra* note 13, at 90. GATT was originally the embodiment of the multilateral tariff agreements. The governments intended to incorporate the agreement into the trade chapter of the International Trade Organization (ITO), the short-lived multilateral trade organization created in the aftermath of World War II.

15. GATT, *supra* note 9, pmbl.

16. See *id.* art. I.

17. See *id.* art. XXIV(5).

18. See *id.* art. II.

19. See *id.* art. II(1)(c).

While pursuing the goal of lowered tariffs, GATT provides exceptions to the basic principle of free trade. Article XX allows certain measures which function as barriers to trade to be applied, providing that the measures are not disguised attempts at “arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade.”²⁰ States may adopt measures to protect public morals; human, animal, or plant life or health; national treasures of artistic, historic, or archaeological value; or exhaustible natural resources if the measures are equally applicable to domestic production or consumption.²¹ Additionally, countries may enact measures against products produced by prison labor.²² In 1960, two more items were added to the list of justifiable exceptions.²³ Countries may enact measures to restrict exports of domestic materials in times when the domestic price is below the world price and the restriction is necessary to stabilize prices through a government plan, provided that it does not lead to discrimination against imports.²⁴ Countries may also restrict exports essential to acquisition or production of products in low supply as long as each of the contracting parties of GATT receive an “equitable share of the international supply of such products.”²⁵ GATT also provides exceptions for the protection of national security.²⁶

The Uruguay Round of GATT, which was finalized eight years ago, has resulted in the largest number of new substantive agreements and the largest increase in GATT’s enforcement power. The creation of the World Trade Organization (WTO) and the adoption of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) were two of the major accomplishments of the Uruguay Round that served to strengthen GATT’s institutions and authority. The WTO was established by the 1994 Uruguay Round Agreement Establishing the World Trade Organization (WTO Agreement).²⁷ The functions of the WTO are to “facilitate the implementation, administration and operation, and further the objectives”²⁸ of GATT and Multilateral Trade Agreements

20. *Id.* art XX.

21. *See id.* XX(a),(b),(f) & (g).

22. *See id.* art. XX(e).

23. *See id.* art. XX(j).

24. *See id.* art. XX(i).

25. *Id.* art. XX(j).

26. *See id.* art. XXI.

27. *See* General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round): Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993 I.L.M. 13 [hereinafter WTO Agreement].

28. *Id.* art. III(1).

(MTAs),²⁹ and to “provide [a] forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to [the] Agreement.”³⁰

The WTO is also charged with administering the Understanding on Rules and Procedures Governing the Settlement of Disputes.³¹ These procedures are set out in the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).³² The adoption of the DSU has greatly strengthened the enforcement power of the WTO and has exponentially increased the number of conflicts adjudicated at the international level.³³ In addition to increasing the credibility and enforcement powers of the WTO, the adoption of the DSU will result in a base of consistent case law and established rules, which will tend to be more precise and liberalize than domestic rules for discretionary foreign-policy making.³⁴ The DSU is founded on the principles embodied in articles XXII and XXIII of GATT.³⁵ The Dispute

29. These agreements include the Technical Barriers to Trade Agreement, as well as Agreements on Agriculture, the Application of Sanitary and Phytosanitary Measures, Textiles and Clothing, Trade-Related Investment Measures, Antidumping, Customs Valuation, Rules of Origin, Subsidies and Countervailing Measures, and Safeguards.

30. WTO Agreement, *supra* note 27, arts. III(2).

31. *See id.* art. III(3).

32. General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, 33 I.L.M. 112 [hereinafter DSU].

The DSU applies to:

- (A) Agreement Establishing the World Trade Organization
- (B) Multilateral Agreements on Trade in Goods
 - Annex 1A: Multilateral Agreements on Trade in Goods
 - Annex 1B: General Agreements on Trade in Services
 - Annex 1C: Agreement of Trade-Related Aspects of Intellectual Property
 - Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes
- (C) Plurilateral Trade Agreements
 - Annex 4: Agreement on Trade in Civil Aircraft
 - Agreement on Government Procurement
 - International Dairy Agreement
 - International Bovine Meat Agreement

See id. art. 1(1) & App. (1). The rules and procedures are subject to special rules and procedures found in some of the included agreements. *Id.* art. 1(2), app. 2.

33. *See* ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 85 (1997).

34. *See id.* at 86.

35. DSU, *supra* note 32, art. 3(1). Article XXII of GATT provides a duty of consultation when other contracting parties make representations “to any matter affecting the operation of [the] Agreement” and that a contracting party may consult with third party contracting parties when a sufficient solution is not reached bilaterally. *See* GATT, *supra* note 9, art. XXII. Article XXIII provides that when a party acts in a way which nullifies or impairs the agreement, the aggrieved party may investigate the matter, consult with other contracting parties and other

Settlement Body (DSB) established by the DSU is authorized to “establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.”³⁶

The DSU is the formalization of the dispute resolution practices exercised by GATT members. By 1952, it was already established that three or five independent experts from three contracting countries formed a panel to settle disputes under article XXIII(2).³⁷ The DSU assists in the further creation of international trade rules, which may “enhance predictability and legal security, limit the risks of abuses of power, reduce transaction costs of traders and producers, increase the scope for decentralized decision-making and thereby promote liberty and economic welfare.”³⁸

The Uruguay Round resulted not only in the establishment of the WTO, but also in the conclusion of numerous supplemental agreements. The Agreement on Technical Barriers to Trade (TBTA) was created “to ensure that technical regulations and standards, including packaging, marking and labeling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade.”³⁹ “All products, including industrial and agricultural products” fall within the scope of the TBTA.⁴⁰ Under the agreement, countries are obliged to refrain from adopting technical regulations⁴¹ that create “unnecessary obstacles to international trade,” by ensuring that the least trade-restrictive measure is used to protect legitimate interests.⁴² Standardization and conformity procedures shall have the meaning given to them through adoption by “the United Nations system and by international standardizing⁴³ bodies taking into

bodies, and, when necessary, suspend concessions or other obligations to the offending party. *Id.* art. XXIII.

36. DSU, *supra* note 32, at art. 2(1).

37. See Petersmann, *supra* note 33, at 84.

38. See *id.* at 85.

39. TBTA, *supra* note 11, pmb1.

40. *Id.* art. 1(3).

41. A technical regulation is defined as a “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.” *Id.* annex 1(1).

42. *Id.* at art. 2(2).

43. Standard is defined as “Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal

account their context and in the light of the object and purpose of [the] Agreement.”⁴⁴ Members must use international standards, where they exist, as the basis for their own standards unless the international standards do not appropriately serve the interests they are seeking to protect.⁴⁵ The TBTA endeavors to harmonize technical regulations to the widest degree possible, with member countries pledging to give their full support within the limits of their resources to achieving this goal.⁴⁶ Member countries are under an obligation of mutual recognition to the extent that the other members’ standards achieve the purposes of their own regulations.⁴⁷

The TBTA provides exceptions to the general rule that prohibit the adoption of restrictive technical standards. These exceptions are very similar to the general exceptions provided for in GATT. Both GATT and the TBTA accept otherwise prohibited restrictions that are “necessary” to ensure “national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.”⁴⁸ When applying these exceptions, countries must design their standards in a way that avoids giving domestic goods an unfair advantage and that ensures that the procedures used to determine conformity with standards are “fair and equitable.”⁴⁹ The definition of “necessary”⁵⁰ in relation to the invocation of the health, environmental, safety, and consumer protection exceptions, at least as regarding the GATT provisions has been at the center of many disputes.⁵¹ The complaining party has the burden of showing that the barriers are unnecessary by showing that “alternative GATT-legal measures could have been reasonably maintained.”⁵² If there are such alternatives that could have been used by the parties, then the standard will not be valid under article XX(b).⁵³

exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production methods.” *Id.* annex 1(2).

44. *Id.* art. 1(1).

45. *See id.* art. 2(4).

46. *See id.* art. 2(6).

47. *See id.* art. 2(7).

48. *Id.* art. 2(2).

49. *Id.* annex 3(D)—3(H), 3(J), 3(N), & 3(Q).

50. *See* GATT, *supra* note 9, art. XX.

51. *See* Lisa C. Thompson & William J. Thompson, *The ISO 9000 Quality Standards: Will They Constitute a Technical Barrier to Trade under the NAFTA and the WTO?*, 14 ARIZ. J. INT'L & COMP. L. 155, 179 (1997).

52. *Id.* at 179 (citing *Agreement on Technical Barriers to Trade, World Trade Organization*, reprinted in DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 150 (John H. Jackson et al. eds., 1995).

53. *See* Thompson, *supra* note 51, at 179.

The procedural requirements of the TBTA are laid out in the Code of Good Practice for the Preparation, Adoption and Application of Standards (Code of Good Practice or Code).⁵⁴ The Code requires that standardization bodies of the WTO members publish their work programs at least every six months to further transparency.⁵⁵ The TBTA encourages, but does not require, members to apply international standards made by bodies like the ISO.⁵⁶

The TBTA requires that members take reasonable measures to ensure that local governmental⁵⁷ and nongovernmental⁵⁸ standardization bodies adhere to the provisions of article 2 of the TBTA.⁵⁹ The Code of Good Practice is open for acceptance by any standardization body.⁶⁰ The substantive provisions include: a prohibition of discrimination; a duty to avoid creating unnecessary barriers to trade; a pledge to use international standards where they exist; a dedication to creating the most far-reaching standards possible; an obligation to avoid the duplication of the work of other standardizing bodies; a duty to publish; a requirement that members encourage other bodies to become members of ISO/IEC; an agreement to take comments into consideration when developing standards; and a duty to further the Code of Good Practice.⁶¹

In addition to the formulation of the Code of Good Practice, the TBTA established a Committee on Technical Barriers to Trade to provide a forum for consultation between members on issues related to the TBTA.⁶² The committee's major objective is to ensure that the members avoid duplication in their standardization efforts by establishing a system of communication providing for cooperation with other standardizing bodies.⁶³

54. See TBTA, *supra* note 11, art. 4(1); see also Code of Good Practice for the Preparation, Adoption and Application of Standards, TBTA *supra* note 11, Annex 3.

55. See *id.* Annex 3(J).

56. See *id.* Annex 3(c).

57. Local government is defined by the TBTA as a “[g]overnment other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.” *Id.* annex 1(7).

58. Nongovernmental body is defined by the TBTA as a “body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.” *Id.* annex 1(8).

59. See *id.* art. 3(1).

60. See *id.* annex 3(B).

61. See *id.* annex 3(D)—3(H), 3(J), 3(N), 3(Q).

62. See *id.* art. 13(1).

63. See *id.* art.13(3).

The Agreement on the Application of Sanitary⁶⁴ and Phytosanitary⁶⁵ Measures is an additional supplementary agreement to GATT, which further regulates the application of technical standards.⁶⁶ The agreement follows the same principles on which the TBTA was based, but further describes the exception allowing members of GATT to adopt measures for the protection of “human, animal or plant life or health, [when] based on scientific principles and . . . not maintained without sufficient scientific evidence.”⁶⁷ The agreement incorporates the same major provisions found in the TBTA, including a duty of harmonization, the recognition of equivalence, a duty of transparency, and exceptions for developing countries.⁶⁸

B. *North American Free Trade Agreement (NAFTA)*

NAFTA incorporates several provisions related to technical barriers to trade. Chapter nine of NAFTA provides for the removal of technical barriers to trade,⁶⁹ specifically prohibiting “unnecessary obstacles” to trade.⁷⁰ The two factors required to deem an obstacle to trade “necessary” are a legitimate objective for the restriction and that the parties who meet the restriction be able to trade in the product.⁷¹ Article 915 lists “legitimate objectives,” but the list is nonexhaustive.⁷² The

64. The Agreement on the Application of Sanitary Measures. *See infra* note 66 (relating to human health).

65. The Agreement on the Application of Sanitary Measures. *See infra* note 66 (relating to animal and plant health).

66. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A(4), Agreements on Trade in goods.

67. *Id.* at 6.

68. *See generally id.*

69. *See* NAFTA, *supra* note 12, ch. 9.

70. The NAFTA provision relating to Unnecessary Obstacles states:

No Party may prepare, adopt, maintain or apply any standards-related measure with a view to or with the effect of creating an unnecessary obstacle to trade between the Parties. An unnecessary obstacle to trade shall not be deemed to be created where:

(a) the demonstrable purpose of the measure is to achieve a legitimate objective; and

(b) the measure does not operate to exclude goods of another Party that meet that legitimate objective.

Id. 904(4).

71. *See* Thompson, *supra* note 51, at 184.

72. NAFTA defines “legitimate objectives” as objectives that ensure:

(a) safety,

(b) protection of human, animal or plant life or health, the environment or consumers, including matters relating to quality and identifiability of goods or services, and

agreement in article 904 allows a party to protect life and health through obstacles, but only when the imposing party has conducted a risk assessment.⁷³ The agreement stipulates that the parties shall use international standards as the basis for developing national standards, unless the international standards would be inappropriate to achieve the legitimate national objectives, due to limitations of the environment, geography, technology, and infrastructure or to satisfy scientific justifications or the desired level of protection.⁷⁴ Any action that satisfies international standards will be presumed to be necessary and nondiscriminatory.⁷⁵ NAFTA created a Standards Related Measures (SRM) Committee in 1994. The committee is a forum for the resolution of standards issues between the United States, Mexico, and Canada.

C. *Bilateral Agreements*

In addition to GATT and the TBTA, there are a number of bilateral agreements on standardization. The European Community, for example, has entered into a number of Mutual Recognition Agreements (MRA) for standards.⁷⁶ MRAs allow products from non-European Union (EU) member countries to circulate freely within the EU if they carry the accepted mark.⁷⁷ Although mutual recognition may occur without an agreement, MRAs facilitate the process in the same way that the European Standard mark does by establishing *prima facie* compliance.⁷⁸

(c) sustainable development, considering, among other things, where appropriate, fundamental climatic or other geographical factors, technological or infrastructural facts, or scientific justification but does not include the protection of domestic production.

NAFTA, *supra* note 12, art. 915.

73. *See id.* arts. 904(2), 907(2).

Where pursuant to article 904(2) a Party establishes a level of protection that it considers appropriate and conducts an assessment of risk, it should avoid arbitrary or unjustifiable distinction between similar goods or services in the level of protection it considers appropriate, where the distinctions:

- (a) result in arbitrary or unjustifiable discrimination against goods or service providers of another Party;
- (b) constitute a disguised restriction on trade between the Parties; or
- (c) discriminate between similar goods or services for the same use under the same conditions that pose the same level of risk and provide similar benefits.

Id. art. 907(2).

74. *See id.* art. 905(1).

75. *See id.* art. 905(2).

76. *See* EUROPEAN COMMISSION, GUIDE TO THE IMPLEMENTATION OF DIRECTIVES BASED ON NEW APPROACH AND THE GLOBAL APPROACH 63 (2000), available at <http://europa.eu.int/comm/enterprise/newapproach/legislation/guide/legislation.htm> (last visited Apr. 5, 2001)

77. *See id.*

78. *See id.*

As of May 1999, the Commission had concluded MRAs with Australia, New Zealand, the United States, Canada, Switzerland, and Israel.⁷⁹

The United States has formed approximately ten bilateral Business Development Committees (BDCs) to facilitate in-depth discussions on technical issues vital to trade.⁸⁰ The United States has BDC arrangements with countries such as China, South Africa, and Russia to exchange information on standards development. Through this exchange of information, the United States assists less developed countries in the formation of standards that will be compatible with the emerging international system of standardization.

IV. STANDARDIZATION BODIES

Standardization bodies develop new standards with input from various actors, including government agencies and contacts within business and industry. Compliance with the standards they develop is voluntary, but the market may require compliance for entry into certain markets or industries. The marks issued by standardization bodies are generally recognized as prima facie evidence of compliance with the standards.

A. *International*

The principal international standardization body is the International Organization for Standardization (ISO). While the ISO has the authority to develop standards for any product or industry, it generally defers to the more specialized organizations when possible.⁸¹ Depending on the individual circumstances, these specialized organizations may either cooperate with the ISO or create standards in their own fields.⁸²

79. *See id.*

80. *See Sino-US Trade Talks; Sino-US Trade Commission Meeting Closes, Eight Agreements Signed*, BRITISH BROADCASTING CORP., Oct. 19, 1995 at 3. One BDC between the U.S. and South Africa, *see* John Dlundu, *Gov't Seeks Members for Development Body*, BUS. DAY (S. Afr.), Jan. 15, 1999, at 2; and One BDC between the U.S. and Russia, *see Briefs*, RUSSIA & COMMONWEALTH BUS. L. REP., May 2, 1994, at 5(1).

81. The International Electrotechnical Commission (IEC) is the oldest major standardization organization still in operation. It was founded in 1908 and remains the premier international organization for the standardization of electrical and electronic goods. *See Sykes, supra* note 3, at 58.

82. Additional organizations include the International Telecommunications Union (ITU), the International Conference on Weights and Measures, the International Labor Organization, the International Bureau for the Standardization of Man-Made Fibres, the International Commission on Illumination, the International Air Transport Association, the International Institute of Refrigeration, and the International Institute of Welding. *See id.* at 59.

The ISO is a nongovernmental organization (NGO) creating a network of 130 national standards institutes.⁸³ Although the members of the ISO are not governments, some of the actors involved cooperate with the member governments or are part of the government framework of their countries.⁸⁴ The ISO coordinates the system of standards and publishes the finished standards.⁸⁵ To promulgate an international standard, the ISO relies on consensus agreements between national delegations representing economic stakeholders who form working groups to develop proposals for new international standards.⁸⁶ Once a member proposes to develop a standard, technical committees consisting of experts from industry, technology, and business, depending on the standard being developed, are assisted by representatives of government agencies, laboratories, consumer groups, or environmental groups that develop a recommendation to submit to the members of the ISO.⁸⁷ Once a recommendation is drafted, it is distributed to the ISO members who review and vote on the standard.⁸⁸ If the standard receives approval from at least 75% of the ISO members, it is adopted and published in the monthly *ISO Bulletin*.⁸⁹

One of the most significant developments resulting from the establishment of the ISO is the formulation of the ISO 9000 quality series.⁹⁰ More and more countries are requiring those that want to enter the market in certain business sectors to comply with the ISO 9000 series standards.⁹¹ The European Community (EC) requires compliance with ISO 9000 for foreign companies in certain industries.⁹² The EC is the first trade union to require the ISO 9000 certification for entry into the market of some industries.⁹³ The adoption of the ISO 9000 requirements by the EC is significant, given the large size of Europe's economy.

83. *See id.* at 58.

84. *See id.*

85. *See id.*

86. *See id.* at 59.

87. *See id.*

88. *See id.*

89. *See id.* at 59-60.

90. The series is a comprehensive set of five standards. It contains definitions and general principles that govern the ISO 9000 series. Processes used to report control over design and production of a conforming product are found in ISO 9001. ISO 9002 covers requirements to show that production processes are compliant. ISO 9003 outlines compliance testing for processes at final inspection and during testing. Quality management and quality systems implemented by company management are addressed by ISO 9004. *See* DR. JAMES W. KOLKA & GREGORY G. SCOTT, EUROPEAN COMMUNITY PRODUCT LIABILITY AND PRODUCT SAFETY DIRECTIVES 80 (1992).

91. *See* Thompson, *supra* note 51, at 156.

92. *See id.* at 155.

93. *See id.*

B. Regional

The development of regional standardization bodies is also significant. These bodies adopt uniform standards to facilitate trade between the members of the region. This serves not only to encourage trade between the countries involved, but the interaction between the regional and international bodies serves to create a more uniform system. The organizations also allow the countries involved to have more power in the international organizations, demonstrating strength in numbers.

The EC⁹⁴ has a highly sophisticated structure for the harmonization of standards.⁹⁵ The EC's standardization system is the most advanced attempt to achieve harmonization of standards. The EC is also in the forefront of adopting international standards as requirements for entry into certain markets.⁹⁶ The commission pledged continuing support for the international standardization underway by the ISO, IEC, and ITU in a public statement issued October 13, 2000.⁹⁷ For these reasons, it is useful to discuss the European standardization system in depth.

The EC formulated the "New Approach" in response to the difficulty the Community institutions had with the development of Europe-wide standards. The use of directives for standards harmonization had proved to be very difficult and time consuming due to the highly specific and technical nature of standards. The basic principles of the New Approach were developed by the Council Resolution of 1985 on the New Approach to technical harmonization and standardization.⁹⁸ The four basic principles established by the New Approach are, first, that legislation by the Community should only address the essential requirements that products must meet to be marketed within the EU, second, that technical specifications should be developed in harmonized standards, third, that harmonized standards are voluntary and a manufacturer may choose other standards to meet the requirements in the legislation, and fourth, that products which meet the

94. Current membership consists of Germany, France, the Netherlands, Belgium, Luxembourg, Austria, Italy, Spain, Portugal, Austria, the United Kingdom, Ireland, Greece, Denmark, and Sweden.

95. The terms European Community and European Union are not interchangeable. The EC is the part of the EU that is responsible for standards, among many other things. The EU refers to the entire competence of the EU and includes two other pillars, Security and Home Affairs. The choice of terms used is deliberate, referring either to the territory of the EU or to the actions of the EC.

96. See Thompson, *supra* note 51 at 155.

97. See Press Release, Commission Pledges Support for International Standards at World Standards Day (Oct. 13, 2000).

98. See Guide to the Implementation of Directives Based on New Approach and Global Approach, *supra* note 76, at 7.

standard are presumed to be in compliance.⁹⁹ Once the commission formulates general principles for technical standards, voluntary standardization bodies develop standards in accord with the general principles of the directive, which contain the technical specifications for each product.

For a system of uniform standards to be effective, a system of communication must be established so that duplication is averted and member states can avoid conflicting standards in the absence of a European standard. To facilitate communication, the member states have a duty of transparency, requiring them to notify the Commission and other member states of any new standards they develop.¹⁰⁰ The failure to follow the procedure of notification was at issue in a recent case before the European Court of Justice (ECJ).¹⁰¹ The resulting decision illustrates the ECJ's belief in the importance of the development of a system of uniform standards. The ECJ ruled against the City of Brussels because it passed new quality and safety standards for the leasing of furnished accommodations without first notifying the commission.¹⁰² The court held that

[m]ember states shall immediately communicate to the Commission any draft technical regulation, except where such technical regulation merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the Commission have a brief statement of the grounds which make the enactment of such a technical regulation necessary, where these are not already made clear in the draft. Where appropriate, Member States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation.¹⁰³

The member states must not only communicate the standard, but also the "text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation."¹⁰⁴ The purpose of this Requirement "is to enable the commission to exercise as effectively as possible the powers conferred on it by the Directive."¹⁰⁵

99. *See id.*

100. *See id.* at 8.

101. *See* Case C-145/97, *Comm'n v. Belg.*, 1998 E.C.R. I-2643.

102. *See id.* at I-2647.

103. *Id.* at I-2651.

104. *Id.* at I-2653.

105. *Id.* (citing Case C-279/94, *Comm'n v. Italy*, 1997 E.C.R. I-4743, ¶ 40).

Once the member states notify the proper parties of their standards, there is a period where other parties can object. If there is no objection to the standard by the commission or other member states, the standard will probably pass the other requirements of Community law.¹⁰⁶

The principle of mutual recognition of standards in itself helps to further the harmonization of standards; however, the commission may also ask European standardization bodies to develop a European standard.¹⁰⁷ Europe has three major standardization bodies: European Committee for Standardization (CEN), European Committee for Electrotechnical Standardization (CENELEC), and European Telecommunications Standards Institute (ETSI). While CEN and CENELEC membership consists of national standardization bodies,¹⁰⁸ ETSI membership also consists of other interested parties.¹⁰⁹ These three bodies are the only organizations authorized to issue the European Standard (EN).¹¹⁰ Once one of these bodies begins to develop a standard, national standardization bodies must cease their own development of the standard because the EN will preempt and replace it.¹¹¹

CEN's policy or cooperation with regard to European and international standardization includes several major principles. CEN is responsible for ensuring that a European platform exists for achieving a coherent position at the international level.¹¹² In addition, the body must

106. The trademark case establishing this principle is the *Cassis de Dijon* case. See *Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649 [hereinafter *Cassis de Dijon*]. For a national law to be valid under Community law, the law must be nondiscriminatory and proportional. The nondiscrimination principle comes from the national treatment provision of the Treaty Establishing the European Community. It requires that national laws not favor the member state's nationals or discriminate against nationals of another member. The principle of proportionality requires that the means used by the member states to achieve a legitimate objective are proportionate to that objective.

107. *Cassis de Dijon* establishes the general principles of mutual recognition: products which meet the standards of the country they were produced (within the EU) shall be accepted by other member states, where there is no Community legislation; the member states are free to legislate; the principle of free movement of goods may only be limited where standards are necessary to protect compelling interests, such as health, safety, consumer protection and environmental protections; and the means must be proportionate to serve one of these legitimate goals). See *id.* at 656-59. See also Guide to the Implementation of Directives Based on New Approach and Global Approach, *supra* note 76, at 7.

108. Helen Delaney & Rene van de Zande, *NIST Special Publication, A Guide to EU Standards and Conformity Assessment*, at 10 May 2000, at <http://ts.nist.gov/ts/htdocs/210/217/eu-guide/sp951.htm> (last visited Apr. 5, 2001).

109. See *id.*

110. See Guide to the Implementation of Directives Based on New Approach and Global Approach, *supra* note 76, at 45.

111. See Sykes, *supra* note 3, at 89. Earning the EN mark is significant because the mark carries with it recognition of compliance with European standards by those in business.

112. See *id.* at 102.

coordinate European interests with obligations imposed on ISO members.¹¹³ Priority is given to cooperation with the ISO, provided that the international standards meet European requirements and those standards are implemented by the non-European parties.¹¹⁴ In addition to cooperating with the ISO, CEN must support cooperation with other regional and developing countries' standardization bodies in line with European policies.¹¹⁵ CEN's focus on developing and maintaining coherent European standards in coordination with third-party countries and organizations exhibits the understanding by the EC that standardization on a global level is vital to global trade.

While Europe leads the world in the creation of a unified regional standardization system, every major economic area has some form of standardization body. In 1994, Latin America established the Mercado Comun del Sur (MERCOSUR),¹¹⁶ a customs union aimed at reducing barriers to trade. Additionally, the Pan American Standards Commission (COPANT) was formed to address the issues of standards. COPANT consists of members from South America, Central America, the Caribbean, Europe, and the United States.¹¹⁷ COPANT's goal is "to coordinate and promote South American standards, facilitate cooperation and encourage the exchange of goods and provision of services."¹¹⁸

The Asia Pacific Region has formed the Asia-Pacific Economic Cooperation (APEC) which has pledged to participate in the development of international standards and conformity assessment and to encourage its members to align with international standards.¹¹⁹ Also active in the Asia-Pacific area is the Association of Southeast Asian Nations (ASEAN). ASEAN has its own standards and conference forum, called the ASEAN Consultative Committee on Standards and

113. *See id.* at 167.

114. *See id.*

115. *See generally* Martha Meisels, *EC Standards Envoy Aiding Joint Project*, JERUSALEM POST, May 5, 1992 (reporting a meeting between Israel Standards Institute representatives and an emissary of the European Committee on Standardization.); *UIC: Railway Standards for the 21st Century*, M2 PRESSWIRE, July 16, 1997 (reporting a meeting between Int'l Union of Railways and European Committee for Standardization).

116. PETER S. WATSON ET AL., *COMPLETING THE WORLD TRADE SYSTEM: PROPOSALS FOR A MILLENNIUM ROUND 208-10* (1999).

117. *See Pan American Standards Commission to Adopt, Recognize NFPA Standards*, PR NEWSWIRE, Apr. 15, 1994.

118. *Id.*

119. *See Asia-Pacific Economic Cooperation Forum: Osaka Action Agenda on Implementation of the Bogor Declaration (Trade Liberalization and Facilitation; Economic and Technical Cooperation)*, Nov. 19, 1995, 35 I.L.M. 1111, 1117. The agreement calls for standardization cooperation with international and other regional bodies.

Quality (ACCSQ).¹²⁰ ACCSQ's primary objective is to harmonize standards in the region to reduce technical barriers to trade between the countries through the formation of MRAs.¹²¹

The Gulf states, through the GCC, are creating a Gulf quality mark "to promote consumer confidence and inter-GCC trade."¹²² The creation of the quality mark is designed to further efforts to increase inter-Arab trade and to create an Arab Customs union and common market.¹²³

C. National

Each country has a national standardization body, which officially represents the country within the international bodies. While the national bodies differ in form and in their private or public nature, the U.S. standardization organizations are good examples of typical national standards-related bodies.

The main U.S. standardization organizations are the National Institute of Standards and Technology (NIST) and the American National Standards Institute (ANSI). The NIST is an agency within the Commerce Department's Technology Administration, and has established a Standards in Trade (SIT) program to overcome technical barriers to trade.¹²⁴ The program supports commercial and economic staffs involved in "training and developing significant contacts in emerging markets."¹²⁵ It also works with other U.S. agencies, standardization bodies, and members of the private sector to train them in their responsibilities.¹²⁶

ANSI is the coordinator of the U.S. standards system. ANSI was awarded a \$500,000 grant from NIST to achieve "U.S. interests in areas of international standardization and conformity assessment."¹²⁷ ANSI is the official U.S. representative to the ISO.¹²⁸ ANSI and NIST cooperate

120. See *Product Standards Bureau Sets Forum on ASEAN MRA*, BUS. WORLD, July 15, 1999, at 26.

121. See *id.*

122. See Indira Chand, *New Hallmark to Set Standards for Excellence in Gulf Products*, GULF DAILY NEWS, Mar. 25, 2000.

123. See *id.*

124. *Prepared Testimony by Sergio Mazza; President, American National Standards Institute Before the Subcommittee on Technology, Environment and Aviation of the Committee on Science, Space and Technology*, FED. NEWS SERVICE (Sept. 22, 1994).

125. *Id.*

126. See *id.*

127. *NIST Awards \$500,000 Grant to ANSI to Strengthen U.S. Participation in International Standardization*, PR NEWSWIRE (FIN. NEWS), June 16, 2000.

128. *Pan American Standards Commission to Adopt, Recognize NFPA Standards*, *supra* note 117.

to achieve an effective U.S. voluntary standards system and to increase involvement and international standardization.¹²⁹

D. Conclusion

International actors recognize the importance of technical barriers to trade in today's global economy. This is illustrated by the numerous agreements and organizations concerning technical barriers to trade. To fully understand the current state of technical barriers, one must examine the conflicts concerning technical barriers to trade. These disputes shed light on the intricate workings of the agreements.

V. RECENT CONFLICTS AND DISPUTES BETWEEN COUNTRIES

The number and variety of disputes that have been brought before the DSB illustrate the types of measures taken to circumvent the prohibition on technical barriers to trade based on the exceptions allowing for the protection of health, safety, and the environment. These disputes illustrate the narrow interpretation given to the operation of these exceptions provided for in TBTA and other agreements. The rulings of the panels in these disputes show a preference for the elimination of standards as barriers to trade. The rulings also illustrate the panel's desire to deny member states' discretion to adopt measures under the guise of exceptions. Under the TBTA, to be justified, a standard, which acts like a technical barrier to trade, must have a "net benefit."¹³⁰ To show that there is a net benefit, the standard must serve public interest in "safety, quality, or effectiveness" and must be narrowly tailored to meet the legitimate goal.¹³¹ In this manner, dispute panels have consistently interpreted the exceptions narrowly, thereby exhibiting a marked preference for free trade in their rulings. Recent cases that have continued this trend can be categorized according to the exceptions they claim: health, environmental, or safety protection.¹³²

Protection of human health is often at the heart of disputes involving food products. The U.S. Department of Agriculture estimated that in 1996, U.S. agricultural exports were subjected to "more than 300 restrictive TBTs in 63 countries."¹³³ Methods used by countries to apply TBTs include requiring redundant food testing, implementing

129. *Id.*

130. Steven J. Rothberg, *From Beer to BST: Circumventing the GATT Standards Code's Prohibition on Unnecessary Obstacles to Trade*, 75 MINN. L. REV. 505, 530 (1990).

131. *Id.*

132. *Id.* at 525-29.

133. *FB Study Subtle Trade Barriers Costly to American Agriculture*, PR NEWSWIRE, Oct. 26, 1998.

unscientific plant health regulations, and imposing unnecessary shelf life requirements on imported products.¹³⁴

A significant dispute in trade dispute regarding technical standards was the EC ban on beef products that came from BST-injected cows.¹³⁵ This dispute shows the extent to which a party will go to maintain the standards it has created. The conflict between the EC and the U.S. was brought to the forefront by the implementation of the 1985 Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action (Hormone Directive).¹³⁶ The highly sensitive issue of hormone injected beef remained unresolved until 1996.¹³⁷ During this period the United States took countervailing measures to protest the EC measures. The DSB ruled against the EC in the case and set a fifteen month period for implementation.¹³⁸ However, the issue is still not resolved. The EC did not complete the required measures by the deadline and was ordered to give concessions to the extent of the nullification suffered by the United States and Canada.¹³⁹

Likewise, in a standoff dating back to 1989, Australia continues to challenge South Korean beef import restrictions.¹⁴⁰ In this case, South Korea enacted measures restricting the marketing of imported beef and requiring more stringent inspection of imported beef. New Zealand and the United States joined to bring the issue before the WTO dispute panel.¹⁴¹ The Korean regulatory scheme allegedly discriminated against imported beef by confining sales of imported beef to specialized stores, limiting display, and taking other measures to discourage the sale of imported beef.¹⁴² The panel found that the Korean requirements of sale of imported beef violated article II(1)(a) of GATT 1994 and could not be justified under the exceptions found in article XX(d).¹⁴³ The panel also found that special, more stringent record-keeping requirements for imported beef were also in violation of the agreement.¹⁴⁴

134. *See id.*

135. *See* Rothberg, *supra* note 130, at 508-11.

136. Committee on Technical Barriers to Trade, Report (1988) presented to the Contracting Parties at their Forty-Fourth Session, GATT/WTO B.I.S.D. § 35S/386-389 (1989).

137. *See* WTO Appellate Panel Report Concerning U.S. Complaint on E.C. Measures Affecting Meat and Meat Products (Hormones), *Overview of the State-of-Play of WTO Disputes*, at 6, at <http://www.wto.org> (last updated Mar. 23, 2001).

138. *See id.*

139. *See id.*

140. *See NZ Backs Aust in Beef Row*, EVENING POST (Wellington), Apr. 23, 1999, at 13.

141. *See id.*

142. *See* GATT/WTO Dispute Panel Report on Australia Complaint Concerning Republic of Korea Restrictions on Imports of Beef, Nov. 7, 1989, GATT/WTO B.I.S.D. § 36S/202-235 (1990).

143. *See id.*

144. *See id.*

Measures have been enacted to protect health in areas of products other than food products as well. In the area of health, the WTO dispute body ruled on a French restriction which banned imports of asbestos from Canada.¹⁴⁵ The French measures attempted to distinguish the banned imported asbestos from cement fiber, the sale of which was not prohibited. The panel found that the French ban on chrysotile (white) asbestos was justified on health grounds pursuant to the exceptions to GATT rules relating to “measures necessary to protect human life or health.”¹⁴⁶ The European Commission argued on behalf of the EU member states that the chrysotile asbestos ban was not a violation of the TBTA because the product posed a serious danger to health. The United Kingdom and the EU compiled scientific evidence supporting the ban.¹⁴⁷ The panel dismissed Canada’s argument that the ban was a technical barrier to trade because France allowed the importation of cement fiber, a “like product.”¹⁴⁸ Canada appealed the panel report and the panel concluded that asbestos-cement and fibro-cement products were, in fact, “like” products in light of evidence introduced by Canada.¹⁴⁹ However, the panel found that there was a justification for the violation of the agreement under article XX.¹⁵⁰

Another area of contention involves the environment. In 1996, a GATT panel held that U.S. quality standards for gasoline discriminated against foreign producers and importers.¹⁵¹ The GATT panel did not accept the U.S. argument that the standards set for gasoline fell under the exception that the measure was “necessary to protect human, animal or plant life or health.”¹⁵² The panel also found that the EPA’s measures were not a necessary means to protect air quality because the United States did not provide evidence to show that the baseline provisions it imposed on gasoline had a direct and compelling effect on air quality.¹⁵³

Last year, the European Commission initiated a dispute settlement proceeding against Chile due to Chile’s restriction on imports of

145. See *UK Government, Caborn Welcomes WTO Panel Ruling*, M2 PRESSWIRE, Sept. 19, 2000, at 2000 WL 26605561.

146. *Id.*

147. *See id.*

148. *See id.*

149. See WTO Panel Report Concerning Canada Complaint on French Measures Affecting the Prohibition of Asbestos and Asbestos Products, *Overview of the State-of-Play of WTO Disputes*, at 22-23, at <http://www.wto.org> (last visited Apr. 5, 2001).

150. *Id.*

151. See *At Instance of Brazil and Venezuela, GATT Panel Holds that American EPA’s Gasoline Rule Discriminates Against Foreign Producers and Importers as to Quality Standards*, 2 INT’L L. UPDATE 46 (1996).

152. *Id.* (quoting GATT, *supra* note 11, art. XX(b)).

153. *See id.*

swordfish, citing conservation reasons.¹⁵⁴ The EC complained that the Chilean legislation prohibited the landing of swordfish caught by EC fisherman in Chilean ports, thereby making it impossible to land them for warehousing or to transship them to other vessels.¹⁵⁵

In 1999, the European Commission filed a complaint challenging Argentina's trade barriers to textile imports.¹⁵⁶ The Commission's complaint centered on Argentina's requirements for certificates of origin, the declaration form on product composition, and its restrictive rules for labeling.¹⁵⁷

In 1998, the WTO panel dismissed a measure enacted by the United States on the basis of environmental protection concerns.¹⁵⁸ The WTO panel ruled against the United States in a complaint by India, Malaysia, and Pakistan.¹⁵⁹ The WTO panel ruled that a U.S. prohibition on the import of shrimp caught in nets that do not allow sea turtles to escape was not justified under the environmental protection exception to the GATT rules.¹⁶⁰ The "like products" rule makes this kind of ban difficult to uphold under GATT rules, since "a shrimp is a shrimp, whether or not the net in which it was caught has a turtle-excluder."¹⁶¹ The United States, in January 2000, reported that it had implemented the rulings and recommendations of the panel by revising the Shrimp/Turtle law to "(i) introduce greater flexibility in considering the comparability of foreign programmes and the United States programme and (ii) elaborate a timetable and procedures for certification decisions."¹⁶² Additionally, the US continued to negotiate with the countries engaged in shrimping in the Indian Ocean and continued to offer those technical assistance in developing and using nets which would not harm the turtle population of the region.¹⁶³ Malaysia, however, contended that the United States had not completed its obligations under the original ruling because it had not lifted the import prohibition, nor had it taken the necessary measures to

154. See *EU/Chile: Swordfish Dispute Goes to WTO*, EUROPEAN REP., May 3, 2000, available at 2000 WL 8841903.

155. See WTO Panel Report Concerning EC Complaint on Chile Measures Affecting the Transit and Importation of Swordfish, *Overview of the State-of-Play of WTO Disputes*, at 27, at <http://www.wto.org> (last visited Apr. 5, 2001).

156. See *EU Probes Argentina's Textiles Trade Barriers*, EUROPEAN REP., Dec. 8, 1999, at 1999 WL 8308387.

157. See *id.*

158. See *Turtle Wars*, THE ECONOMIST, Oct. 3, 1998, at 22.

159. See *id.*

160. See *id.*

161. *Id.* at 25.

162. See WTO Panel Report Concerning India, Malaysia, Pakistan, and India Complaint on U.S. Import Prohibition of Certain Shrimp and Shrimp Products, *Overview of the State-of-Play of WTO Disputes*, at 62, at <http://www.wto.org> (last visited Apr. 5, 2001).

163. See *id.*

allow the importation of shrimp and shrimp products without restrictions.¹⁶⁴ The matter was referred back to the original panel in October 2000. Ecuador, India, Japan, Mexico, Pakistan, Thailand, and Hong Kong have since reserved their rights to participate in the panel hearing.¹⁶⁵ The Appellate Body found that the measure was within the measures permitted in article XX, but still could not be upheld because the United States did not meet the exceptions of article XX(g).¹⁶⁶

Similarly, the United States and Canada have aired some of their disputes within the Canada-United States Free Area (CFTA).¹⁶⁷ The Canada-United States Free Trade Commission (CFTC) ruled that Canada's requirement that all salmon and herring caught in Canadian waters to land on Canadian soil before processing was excessive.¹⁶⁸ The goal that Canada was seeking to achieve, i.e. collecting data to further its environmental conservation measures, was legitimate, but Canada's requirement that all of the catch be landed on Canadian soil was disproportionate to that goal.¹⁶⁹

Another dispute arose between the United States and Canada in the case of ultra-high temperature (UHT) milk sold to Puerto Rico.¹⁷⁰ The CFTC found that Puerto Rico's technical standards were legitimate, but it did not uphold the ban against Canadian milk because Canada had been selling milk on the Puerto Rican market for fourteen years and had reasonable expectations that it would continue to be able to do so.¹⁷¹

As these disputes illustrate, the DSB and the CFTC are wary of allowing countries to erect technical barriers to trade under the guise of health, environment, and safety protection exceptions afforded by international agreements such as GATT and TBTA. There is nothing to indicate that the panels will deviate from this line of decisions, which will result in an increasing number of international standards, and undoubtedly an increasing number of conflicts, with few exceptions for countries that endeavor to prohibit certain imports.

164. *See id.*

165. *See id.*

166. *See id.* Article XX(g) states that members may enact measures that "[relate] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." *See* GATT, *supra* note 9, art. XX(g).

167. *See* Thompson, *supra* note 51, at 185.

168. *See id.*

169. *See id.* at 186.

170. *See id.*

171. *See id.* at 187.

VI. PROBLEMS IN DEVELOPING COUNTRIES

Standards imposed for the analysis of trade measures taken by developing countries cannot be as restrictive as those imposed on developed countries due to the unique characteristics of their economies. One of GATT's major objectives is to assist developing countries in strengthening their markets and developing principles of free trade.¹⁷² The problems facing integration of developing countries into the international trade system are great due to the fact that their economies are not robust enough to compete in the world market without government assistance. Developing countries are granted more exceptions and are given more lenient treatment in the area of standards, while still being expected to make attempts to participate in international standardization.

The TBTA recognizes the need to assist developing countries. In its preamble, two of the recitals deal with developing countries:

[R]ecognizing the contribution which international standardization can make to the transfer of technology from developed to developing countries . . . [and] [r]ecognized that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavors in this regard[.]¹⁷³

Article 12 includes special provisions for the treatment of developing countries.¹⁷⁴ Members are to provide "differential and more favorable treatment to developing country Members to [the] Agreement."¹⁷⁵ Developed members are under a duty to assist developing members with the development of technical standards and to take technological and socio-economic conditions of developing countries into account when determining whether the standards that developing countries implement are acceptable.¹⁷⁶ Additionally, developing countries are not under an obligation to use international standards as the basis for their standards.¹⁷⁷ Members are also under an obligation to ensure that international standardization bodies take developing countries interests into account. Upon the request of developing countries, members must prepare international standards governing products that are of special interest to developing countries.¹⁷⁸

172. See GATT, *supra* note 9, art. XVIII:1.

173. TBTA, *supra* note 11, pmbl.

174. See *id.* art. 12.

175. *Id.* art. 12(1).

176. See *id.* arts. 12(4), 12(8).

177. See *id.* art. 12(4).

178. See *id.* art. 12(6).

The ISO has a Committee of Developing Country (DEVCO) which works to

identify the needs and requirements of the developing countries in the fields of standardization and related areas . . . recommend measures to assist the developing countries in meeting these needs and requirements[,] provide a forum for the discussion of all aspects of standardization and related activities in developing countries, as well as among developing countries, [and] advise the General Assembly on the above matters.¹⁷⁹

ANSI, with the help of NIST is developing and organizing a U.S. DEVCO Technical Advisory Group (TAG). The group will coordinate the U.S. position with the ISO DEVCO goals and provide that information to the ISO DEVCO Committee.¹⁸⁰

A major concern for developing countries is that developed countries will use environmental and labor standards as nontariff barriers to trade.¹⁸¹ Developing countries often rely on lower labor and environmental standards in order to compete in the global market. Prohibiting them from using these methods may seriously injure their ability to compete.¹⁸²

By granting concessions to countries with markets that have not yet matured, developed nations aspire to eventually bring them to the level expected of the developed market economies. While it may not be desirable to allow countries to maintain lower labor and environmental standards, it is necessary for their development and eventual entrance into the global economy as envisioned by GATT.

VII. CONCLUSION

As the international standardization bodies and agreements on technical barriers to trade become more sophisticated and prevalent, the trend toward international standardization will continue. As the panel rulings show, the DSB is unwilling to accept many of the justifications offered by members to the technical barriers to trade created by its standards. The enforcement power created by the Uruguay Round will create an even greater impetus toward international standardization. The continued advancement of international standardization is possible only if members remain committed to the elimination of technical barriers to

179. *Western Hemisphere Standards Related Activities*, at <http://ts.nist.gov>. (last visited Apr. 4, 2001).

180. *See id.*

181. *See* John Dlodlu, *The WTO: Trusted But Seldom Loved, Developing Nations Still Need Protection in the Jungle*, BUS. DAY (S. Afr.), Aug. 12, 1999, available at 1999 WL 21400424.

182. *See id.*

trade and if regional bodies remain dedicated to international cooperation. The increasing elimination of technical barriers has taken place in a period when the major industrialized nations were experiencing an economic boom. However, the real question remains as to whether these nations will continue to eliminate protective barriers once there is a downturn in the growth of their economies.