CHAPTER EIGHT

NON-ECONOMIC JUSTIFICATION PROVISIONS
IN THE TBT AGREEMENT

I. TBT Agreement

Technical regulations and standards are a widely-used instrument in the regulation of economic activities. They come in the form of compulsory or voluntary requirements concerning product characteristics, process and production methods, packaging and labelling requirements, or the applicable administrative procedures. Technical regulations and standards no doubt have a positive impact on the functioning of markets by improving economic efficiency and providing standardised information. They create common expectations upon which market participants—producers and customers—can rely in their economic transactions. Moreover, technical regulations and standards are frequently adopted to serve non-economic objectives like consumer protection, public health, product safety, or environmental concerns.

The downside of technical regulations and standards is that they can create significant barriers to international trade. The application of multiple regulatory requirements in different states increases the transaction costs for producers and traders engaged in cross-border trade. In cases were not only multiple but also conflicting regulatory requirements exist in different states, cross-border trade may not be possible at all because it would be too costly for producers to adapt a particular product to each state’s specific requirements. This is a challenge that the TBT Agreement attempts to address.

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1 For a comprehensive examination of the relationship between standards and international trade, see the World Trade Report 2005, published by the WTO. The International Organization for Standardization (ISO) and other standardisation bodies have published or collected several hundred thousand standards applicable at the international, national or regional level. On the role of standards in the international economy, see Gehring/Jessen, Technische Handelshemmnisse (TBT), in Hilf/Oeter (eds), WTO-Recht (2005) Ch 20, paras 1ff.

2 In EC law, the ECJ approached this problem by introducing the principle of “mutual recognition”. This principle requires that goods, which are lawfully put on the market in one Member State, must have access to the market in other Member States. The seminal case establishing this principle is Case 120/78 Cassis de Dijon [1979] ECR 639. Harmonisation in the EC has also taken place through legislative instruments adopted at the Community level (Directives, Regulations). The WTO agreements themselves do not include a similarly far-reaching mutual recognition obligation or the possibility to harmonise national standards through legislation at WTO level.
Technical barriers to trade are usually not the most visible types of trade policy concerns. They are an example of “low politics” with little public attention.\(^3\) This should not hide the fact that technical regulations and standards have a significant economic impact for cross-border trade in products.

The present Chapter examines how the TBT Agreement incorporates non-economic objectives. This is done in a way similar to the examination of the SPS Agreement in the previous Chapter. The comparison between the SPS and TBT Agreements reveals that they share many common features, but that there are also some important differences between these two agreements.

A. Drafting History and Background

Historically, international trade law needed to find a balance between, on the one hand, the legitimate right of WTO Members to enact technical regulations and standards and, on the other hand, the objective of reducing (protectionist) barriers to trade resulting from diverging and/or conflicting technical regulations and standards.

This tension also found its way into the Preamble of the TBT Agreement. The Preamble expressly recognises the “important contribution that international standards and conformity assessment systems can make…by improving efficiency of production and facilitating the conduct of international trade.” Subsequently, however, the Preamble cautions that technical regulations and standards should not “create unnecessary obstacles to international trade” and not be applied “in a manner which would constitute a means of arbitrary or unjustifiable discrimination…or a disguised restriction on international trade”. These are the basic benchmarks of the TBT Agreement which are elaborated in more detail in subsequent provisions of this agreement.

Prior to the adoption of the TBT Agreement, mainly GATT 1947 applied to technical regulations and standards. Yet, due to the general scope of GATT, this agreement was soon considered as insufficient to deal effectively with the more specific issue of technical barriers to trade. This became obvious once the most blatant forms of protectionism (in particular, tariffs and other import barriers) had been removed during the first decades of GATT. It was at this moment that technical barriers to trade caught the attention of the Contracting Parties of GATT as another form of obstacles to international trade. The main concern was that multiple and divergent national requirements in the form of technical regulations and standards create obstacles to

\(^3\) Abbott, US-EU Disputes over Technical Barriers to Trade and the ‘Hushkits’ Dispute, in Petersmann/Pollack (eds), Transatlantic Economic Disputes. The EU, the US, and the WTO (2004) Ch 8. The author discussed the underlying causes for trade dispute in the area of technical barriers to trade, which include different systems for adopting technical standards (e.g. private versus public), different regulatory philosophies, or the fact that there are multiple jurisdictions and regulators (sometimes even within a state) adopting different standards.