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Transparency obligations under the TBT Agreement

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4. Transparency obligations under the TBT Agreement

Denise Prévost

1. INTRODUCTION

An important, and perhaps underestimated, aspect of the Agreement on Technical Barriers to Trade (TBT Agreement) is its insistence on the transparency of WTO Members' technical regulations, standards and conformity assessment procedures (hereafter referred to as TBT measures).[1] The TBT Committee has stressed that transparency is a 'fundamental pillar' in the implementation of the TBT Agreement and a key element of good regulatory practice.[2] In a recent OECD study on the importance of transparency in the area of non-tariff barriers to trade, it was concluded that:

> [T]ransparency mechanisms applied at different stages of the design, finalisation and implementation of domestic regulation significantly contribute in identifying and addressing potential barriers to domestic economic activity and international trade and investment.[3]

Recently, in the *US – Clove Cigarettes* dispute, the Appellate Body ruled for the very first time on the interpretation of the transparency provisions of the TBT Agreement. The fact that the transparency obligations of the TBT Agreement have now formed the basis of one of the claims in a WTO dispute highlights the importance of these disciplines for technical barriers to trade.

This chapter aims to sketch the transparency framework for technical barriers to trade as laid down in the TBT Agreement and further fleshed

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[1] The TBT Agreement applies to 'technical regulations', 'standards' and 'conformity assessment procedures'. For a discussion on the scope of application of the TBT Agreement and the meaning of these terms, see Chapter 2.

[2] G/TBT/26, 12 November 2009, para. 29.

[3] Evdokia Moisé, "Transparency Mechanisms and Non-Tariff Measures", OECD Trade Policy Working Paper 111, (2011), 32, http://dx.doi.org/10.1787/5kgf0rzzwfq3-en.

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out in decisions of the TBT Committee.[4] It begins by explaining the benefits of transparency in disciplines on technical barriers to trade, in order to elucidate the gains to be achieved through full implementation of the transparency obligations. Subsequently, it sets out the detailed rules on transparency contained in the TBT Agreement, and further developed in the decisions and recommendations of the TBT Committee, noting how these rules contribute to the attainment of the identified benefits. Thereafter, more specifically, the role of the transparency obligations in facilitating the resolution of trade conflicts without resort to dispute settlement is highlighted. Finally, the implementation record and the remaining problems with full compliance with the transparency obligations in the TBT Agreement are discussed.

2. THE BENEFITS OF TRANSPARENCY IN TBT MEASURES

Lack of transparency has been recognised as an impediment to trade, meriting attention in trade rules, since the drafting of the GATT 1947.[5] However, the growing realisation of the trade restrictive potential of domestic regulations and the consequent need for specific regulatory disciplines that led to the negotiation of the TBT Agreement in the Uruguay Round brought with it renewed attention to the need for effective transparency obligations as a tool to minimise the negative trade impact of regulatory requirements.[6] Consequently, the TBT Agreement

[4] The TBT Committee, which is composed of representatives of all WTO Members and takes decisions by consensus, has the mandate to meet to provide Members with the opportunity of consulting on any matters relating to the operation of the TBT Agreement or the furtherance of its objectives (see Article 13.1 of the TBT Agreement). Under this mandate it has made several decisions and recommendations relating to the transparency obligations of the TBT Agreement. A very useful compilation of the decisions and recommendations of the TBT Committee, including those relating to the transparency obligations under the TBT Agreement, are contained in WTO document G/TBT/1/Rev.10, 9 June 2011. This document is periodically updated by means of revisions.

[5] Article X of the GATT requires prompt publication of laws, regulations, judicial decisions and administrative rulings of general application that affect trade, as well as international agreements that affect trade policy in such a manner as to enable governments and traders to become acquainted with them, and prohibits the enforcement thereof prior to official publication.

[6] The Uruguay Round of trade negotiations took place between 1986 and 1994. It is useful to note that the Uruguay Round Agreement on Technical

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contains comprehensive and specific transparency obligations, going beyond those found in the GATT. These detailed obligations aim to secure the important potential gains that come from full transparency in domestic regulation. As noted in a 2011 OECD study:

> The transparency of the regulatory process not only ensures the predictability of the business environment, but is also a valuable tool for identifying and addressing unintended obstacles to trade which can also serve as a check against subtle forms of protectionism. Foreign traders … seeking access to a market as much as domestic market players need to base economic decisions on accurate assessments of potential costs, risks and market opportunities, but have greater difficulties in obtaining information when the regulatory environment is opaque.[7]

Clearly therefore, there is much to be gained from ensuring transparency of TBT measures. The benefits of transparency lie in two main areas, which could be called the *ex ante* and the *ex post* effects of transparency.

The *ex ante* effect of transparency can be described as follows. Exporters are often affected by regulatory decisions taken in foreign jurisdictions, for example regarding product safety specifications, eco-labeling and certification requirements, yet they typically have no say in the decision-making process involved in developing these technical requirements. Foreign regulators take into account national priorities and interests when making decisions on such requirements. This raises the problem which Robert Keohane has called the 'external accountability gap'.[8] This term describes the situation that arises in a globalising world where the impact of the actions of a state no longer coincides with its jurisdiction but goes beyond it, affecting the lives of persons outside it.[9]

Barriers to Trade was preceded by an earlier agreement by the same name, but commonly called the Standards Code, negotiated in the Tokyo Round, where attention was given to the proliferation of non-tariff barriers to trade. However, the Standards Code was only binding on its signatories, unlike the current TBT Agreement which is part of the 'single undertaking' to which all WTO Members are bound.

[7] Moisé, *supra* note 4.

[8] Robert Keohane, "Global Governance and Democratic Accountability". In David Held and Mathias Koening-Archibugi, eds., *Taming Globalization: Frontiers of Governance* (London: Polity Press, 2003) 130 at 141.

[9] For a broader discussion of the role of judicial review of regulations in the WTO as a way to mitigate the accountability gap identified by Keohane, see Joanne Scott, "European Regulation of GMOs: Thinking About 'Judicial Review' in the WTO", Jean Monnet Working Paper 04/04, (2004) http://www.jeanmonnetprogram.org/papers/04/040401.pdf.

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Imposing *ex ante* transparency obligations on regulating countries ensures that exporting countries are informed of proposed new or amended TBT measures at the draft stage and that affected foreign traders have the opportunity, through their governments, to raise concerns regarding these proposals and to have these comments taken into account in the regulatory process. This also facilitates the avoidance of disputes, as trade concerns can be addressed at an early stage, before TBT measures are finalised.

The second benefit of transparency, lies in its *ex post* effects. An important hurdle to exporters is often the paucity of information that is available regarding the technical requirements with which they must comply in their export markets. Technical regulations are often complex and subject to change; as a result of which exporters have no certainty that their products will have access to the markets of the country of destination. Technical standards, while not legally mandatory, may also have important practical implications for exporters, for example in respect of inter-compatibility of products. Further, procedures to assess the conformity of export products with the importing Member's technical regulations or standards may be complicated and difficult to understand so that even products meeting the required technical specifications are denied market access due to the absence of formal proof of such conformity. Obtaining the necessary information regarding the technical regulations, standards or conformity assessment procedures pertaining to their export markets is often a costly and burdensome process for exporters. Transparency obligations requiring prompt publication of adopted TBT measures are therefore crucial in facilitating market access for exports from other Members by greatly reducing the cost and difficulty of obtaining information regarding their trading partners' TBT measures. In addition, if publication of new measures takes place sufficiently in advance of their entry into force, traders are given an opportunity to adapt their products, packaging or production processes to the new requirements without loss of market access during this period. This avoids loss of export earnings and the costs associated with regaining lost market share.

Not only is the *ex post* effect of transparency important for traders, but it is also essential in enabling WTO Members to exercise their rights and police the implementation of the obligations of the TBT Agreement.[10]

[10] Scott refers to this as the 'all-important accountability function' of transparency, which operates to enable other Members to evaluate and contest proposed regulations. While she makes this point with regard to the transparency

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Lack of adequate information regarding the existence, content, objective and coverage of TBT measures makes it difficult for Members whose exporters are faced with technical barriers to trade to determine whether they have legal grounds to challenge these measures in terms of the disciplines of the TBT Agreement. Transparency with regard to TBT measures aims to ensure that WTO Members obtain full information about these measures in order to identify whether they are consistent with the TBT Agreement or not. It also makes it possible for traders to be well informed as to TBT measures affecting their exports and to lobby their governments to take action in this regard. Consequently, Members can try to resolve their trade concerns in bilateral discussions with the relevant Member,[11] in multilateral discussions at TBT Committee meetings,[12] or as a last resort in formal WTO dispute-settlement proceedings.

In order to capture the benefits of transparency mentioned above, the TBT Agreement has rules in place to promote both *ex ante* and *ex post* transparency, for each of the three types of technical barriers to trade that fall within its scope of application, namely technical regulations, standards and conformity assessment procedures.[13] The obligations with respect to each of these three categories of TBT measures are laid down in separate provisions, those on technical regulations and conformity assessment procedures in the body of the TBT Agreement itself, and those on standards in the Code of Good Practice for the Preparation, Adoption and Application of Standards contained in Annex 3 of the TBT

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provisions of the SPS Agreement, it is equally valid for those in the TBT Agreement. Joanne Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (Oxford: Oxford University Press, 2007) at 192–93.

[11] Wolfe notes that the WTO Secretariat 'knows that the real reason many experts attend [TBT] Committee meetings is to hold private unrecorded bilateral meetings with each other.' Robert Wolfe, "See You in Geneva? Legal (Mis)Representations of the Trading System" (2005) 11 European Journal of International Relations 339 at 353.

[12] The mechanism for raising specific trade concerns at TBT Committee meetings is discussed below, in Section 7. See further on the TBT Committee and its work, Chapter 8.

[13] Technical regulations and standards are both documents laying down product characteristics or their related processes and production methods, or labelling, packaging or marking requirements applicable to products, processes or production methods. The difference between technical regulations and standards is that the former are mandatory whereas the latter are not. Conformity assessment procedures are procedures used to check that requirements in technical regulations or standards are complied with. See Annex 1, paras 1–3 of the TBT Agreement.

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Agreement, which is open to acceptance by any standardising body within the territory of a WTO Member, or any regional governmental or non-governmental standardising body in which WTO Members or entities in their territories participate.[14] The various provisions containing the transparency obligations will be examined in more detail below, grouping together those provisions that aim towards similar objectives, but highlighting the differences in respect of the three distinct types of TBT measures where relevant.

3. *EX ANTE* TRANSPARENCY OBLIGATIONS

Going beyond existing transparency obligations in the GATT, which are limited to prompt publication of adopted measures, the TBT Agreement lays down the obligation of advance notification of draft TBT measures. In doing so, it evinces a proactive approach to addressing the trade restrictive impact of technical requirements. It provides an opportunity for affected parties to have their concerns heard while it is still possible to change the proposed measure. In this way, as noted above, regulating Members can obtain information in a timely manner regarding potential objections to their TBT measures and may use such information in the process of finalising the measure to avoid unnecessary trade restrictive effects.

The obligation of advance notification is contained in the following provisions of the TBT Agreement: Article 2.9–2.10 with regard to technical regulations; Article 5.8–5.9 with regard to conformity assessment procedures; and Annex 3 paragraphs J and L to N with regard to standards. The latter, however, does not bind WTO Members but instead the standardising bodies that adhere to the Code of Good Practice.

3.1 Scope of Application

It is useful to start by identifying the situations where the obligation of advance notification of draft TBT measures applies. In respect of

[14] See Annex 3 para. B of the TBT Agreement. Article 4 of the TBT Agreement obliges WTO Members to ensure that their central government standardizing bodies accept and comply with the Code of Good Practice, and to take reasonable measures available to them to ensure that local government and non-governmental standardizing bodies do so. Since the entry into force of the TBT Agreement, 162 standardizing bodies from 122 Members have notified adherence to the Code. See G/TBT/31, 2 March 2012, para. 11.

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technical regulations, the introductory paragraph of Article 2.9 specifies that the scope of application of this obligation is limited to cases where 'a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members.' The applicability of the obligation of advance notification of draft conformity assessment procedures is similarly limited under the introductory paragraph of Article 5.6 of the TBT Agreement.[15] In the case of standards, by contrast, the advance notification requirement applicable to standardising bodies that have accepted the Code of Good Practice is not conditional on a requirement of deviation from international standards, significant trade effect or any other criterion.[16] Therefore the remainder of this subsection will focus only on the applicability criteria for advance notification of technical regulations and conformity assessment procedures.

As identified by the Panel in *US – Clove Cigarettes*,[17] two conditions must be met for the applicability of the obligation to notify draft measures.[18] These are that: (i) no relevant international standard exists, or the technical content of the proposed measure deviates from that of the international standard; and (ii) the measure may have a significant effect on trade of other Members.[19]

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[15] The introductory paragraph of Article 5.6 sets out the following conditions for its applicability: 'Whenever a relevant guide or recommendation issued by an international standardizing body does not exist or the technical content of a proposed conformity assessment procedure is not in accordance with relevant guides and recommendations issued by international standardizing bodies, and if the conformity assessment procedure may have a significant effect on trade of other Members … '.

[16] It should be noted however that this notification obligation, as discussed further below, does not require advance notification of draft standards to other WTO Members through the WTO Secretariat, but rather a biannual publication of the work programme, including draft standards under preparation, of standardizing bodies that adhere to the Code of Good Practice, and notification thereof to the ISO/IEC Information Centre.

[17] Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes,* WT/DS406/R, adopted 24 April 2012, as modified by the Appellate Body Report. Hereinafter *US – Clove Cigarettes.*

[18] While the Panel in this case was dealing only with a claim under Article 2.9, since the measure at issue was a technical regulation, due to the closely similar wording of the introductory paragraphs of Articles 2.9 and 5.6 these findings can be generalised with regard to the applicability of the obligation of advance notification of conformity assessment procedures as well.

[19] Panel Report, *US- Clove Cigarettes*, *supra* note 17 at para. 7.521.

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The exemption of technical regulations or conformity assessment procedures whose technical content accords with that of an international standard from the obligation of advance notification seems to stem from the fact that the TBT Agreement aims to promote harmonisation of TBT measures around international standards.[20] As the international standard setting bodies that set standards relevant for purposes of the harmonisation obligations of the TBT Agreement are limited to those open for membership to all WTO Members,[21] one would expect that Members have sufficient opportunities to be informed of proposals for new international standards and to be directly involved in the development of these standards. This would render advance notification of the adoption of a TBT measure that accords with such an international standard at first sight not strictly necessary. However, several Members at lower levels of development, in practice, have difficulties participating effectively in international standard setting activities, and the resulting standards may therefore not reflect their needs and concerns.[22] Therefore, in 2009, the TBT Committee noted that 'in practice, for the sake of greater transparency, some Members choose to notify draft measures when they are in

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[20] Article 2.4 and Annex 3 paragraph F of the *TBT Agreement* oblige Members to base their technical regulations and standards, respectively, on relevant international standards where they exist or are imminent, unless such international standards would be ineffective or inappropriate to fulfil the legitimate objective of the measure. Article 5.6 of the *TBT Agreement* contains a similar obligation for conformity assessment procedures, but the criterion of effectiveness on international standards is not mentioned.

[21] Although the TBT Agreement does not define an 'international standard' the Appellate Body in the recent *US – Tuna II* dispute held that a relevant international standard is one set by an 'international standardizing body', which is 'a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members'. See Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, para. 539. For more information on the harmonisation obligations in the TBT Agreement and the concept of a relevant international standard and international standardising body, see Chapter 9.

[22] See further on this issue Spencer Henson *et al.*, "Review of Developing Country Needs and Involvement in International Standards Setting Bodies", Centre for Food Economics Research, Department of Agricultural and Food Economics, University of Reading, (2001), http://www.dfid.gov.uk/pubs/files/issb.pdf and Graham Mayeda, "Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries" (2004) 7 Journal of International Economic Law at 737–64.

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accordance with relevant international standards, guides or recommendations.'[23] This voluntary advance notification of the adoption of measures that are in accordance with international standards is to be welcomed. The additional possibility to voice their objections when the adoption of an international standard by a Member is being proposed is very useful for developing countries.[24]

The first criterion for the applicability of the advance notification requirement has not yet been the subject of a dispute. In *US – Clove Cigarettes* both parties agreed that no relevant international standards existed. As pointed out by Indonesia, existing standards for cigarettes developed by the International Organization for Standardization (ISO) do not distinguish among flavours of cigarettes. Consequently the Panel found the first condition for the applicability of the advance notification obligation to be met.[25]

The second applicability criterion, by contrast, has been clarified both by the TBT Committee and in dispute settlement.[26] In 1995, the TBT Committee adopted a recommendation regarding the meaning of a

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[23] G/TBT/26, 12 November 2009, para. 36.

[24] It is interesting to note that a similar situation arose in respect of the advance notification requirements under the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), which have the same condition for applicability. In discussions in the SPS Committee, the EU convincingly argued that the lack of notification of the adoption of a new SPS measure identical to an international standard has the result that other Members are faced, without warning, with obstacles to their trade. This is particularly the case as the relevant international standard-setting bodies have no mechanisms in place to notify adoption of their international standards. Certain Members thus suggested that the SPS Committee amend its notification guidelines to encourage Members to notify all new SPS measures, including those that *are* substantially the same as international standards. General support for this suggestion led to it being taken up in the third revision to the Recommended Transparency Procedures adopted by the SPS Committee at its meeting on 2–3 April 2008.

[25] Panel Report, *US- Clove Cigarettes*, *supra* note 17 at para. 7.525.

[26] Despite the absence of a formal precedent system in the WTO dispute settlement system, clarifications of provisions in WTO agreements by panels of the Appellate Body do have implications for future disputes. A panel or the Appellate Body in a subsequent dispute will resolve the same legal question in the same way, absent cogent reasons to do otherwise, in order to ensure legal certainty and predictability in WTO law. See Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, paras 145–62.

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'significant effect on trade',[27] specifying that factors such as the value or other importance of the imports; the potential growth of such imports; and the compliance difficulties faced by other Members should be considered and that both significant import-enhancing and significant import-reducing effects are included.[28]

In its submissions to the Panel in *US – Clove Cigarettes,* Indonesia relied upon this recommendation to argue that the US was obliged to notify in advance its ban on the use of flavourings in cigarettes. It noted that virtually all clove-flavoured cigarettes sold in the US originated in Indonesia, amounting to around USD 15 million in export earnings for Indonesia in 2008 and that approximately six million Indonesians depend on tobacco or cigarette production for their livelihoods.[29] The US did not contest the 'significant impact' of its measure on Indonesia's trade, and expressed the view that 'the term "significant effect" encompasses all non-*de minimis* effects on trade.'[30] The Panel agreed with the US in this regard, noting that significant means 'sufficiently great or important to be worthy of attention; noteworthy.'[31] In addition, the Panel clarified that as the wording of the second condition for applicability of the advance notification obligation is that the TBT measure 'may have' instead of 'will have' or 'has' a significant effect on trade, indicating a possibility as opposed to a certainty, no actual trade effects need be proven.[32] The US ban on clove cigarettes was thus found to meet the criterion of a significant effect on Indonesia's trade.[33] This finding, which was not appealed, is useful in establishing the low threshold of possible trade

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[27] This clarification aimed at promoting a consistent approach to the application of the advance notification obligation. It should be noted, however, that the TBT Committee has no authority to adopt binding interpretations of the TBT Agreement. Instead, its decisions could be seen as a 'subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions' to be taken into account together with the context of a provision under the rules of interpretation contained in Article 31.3(a) of the Vienna Convention of the Law of Treaties. The Appellate Body in *US – Tuna II* held a decision of the TBT Committee on international standard setting to be such a 'subsequent agreement'. See Appellate Body Report, *US – Tuna II*, *supra* note 22 at paras 366–372 and the discussion in section 3.4 below.

[28] G/TBT/M/2, 4 October 1995, para. 5.

[29] Panel Report, *US- Clove Cigarettes*, *supra* note 17 at paras 7.509 and 7.527.

[30] *Ibid.* at para. 7.513.

[31] *Ibid.* at para. 7.530.

[32] *Ibid,* at para. 7.529.

[33] *Ibid,* at para. 7.531.

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impact required for a non-harmonised technical regulation or conformity assessment procedure to be caught by the advance notification requirements of the TBT Agreement.[34]

3.2 Content of Obligation

In order to obtain the *ex ante* benefits of transparency, the obligation of advance notification must incorporate rules to ensure that there is an effective opportunity for input from parties potentially affected by the proposed measure. This has implications for the required timing of the notification as well as for its content.

To achieve the objectives of advance notification, the TBT Agreement sets out the following requirements in respect of technical regulations and conformity assessment procedures:[35] (i) a notice of the proposed measure must be both published and notified to Members through the Secretariat 'at an early appropriate stage' when amendments can still be introduced and comments taken into account (ii) the publication of the notice must be in a manner that enables interested parties in other Members to become acquainted with it;[36] (iii) notifications must include the product coverage,[37] objective and rationale of the measure; (iv) copies of the measure must be provided to other Members, upon request, indicating

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[34] Aside from the substantive applicability criteria for the advance notification obligation discussed above, it is useful to note that the scope of application of these obligations is also limited with respect to *whose* draft TBT measures are covered. Local government bodies and non-governmental bodies are excluded from the obligation to notify (see Articles 3.1 and 7.1 of the TBT Agreement). However, in the case of local government at the level directly below central government, Members are obliged to ensure compliance with the advance notification requirement unless the technical content of the measure at issue is the same as that of a previously notified measure of the central government (see Articles 3.2 and 7.2 of the TBT Agreement). In this respect the TBT Committee in 2006 invited Members to indicate which local government bodies in their jurisdictions are subject to the notification obligation under Articles 3.2 and 7.2.

[35] These requirements are set out in Article 2.9.1–4 (technical regulations) and Article 5.6.1–4 (conformity assessment procedures) of the TBT Agreement.

[36] The TBT Committee agreed in 2006 and 2009 to look into the way in which the publications containing such notices are made available, and now a list containing information on official publications related to technical regulations, standards and conformity assessment procedures is circulated in document series G/TBT/GEN/39/.

[37] In *EC – Asbestos* the Appellate Body clarified that the obligation to notify 'the products to be covered' by the proposed measure requires the identification of its 'product coverage'. See Appellate Body Report, *European Communities –*

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where possible the parts which in substance deviate from relevant international standards or guides;[38] and (v) reasonable time must be provided for comments in writing by other Members, comments must be discussed upon request and the comments and results of discussions must be taken into account.

In the case of standards, the requirements are slightly different. Each standardising body that has accepted the Code of Good Practice is obliged to:[39] (i) publish a work programme every six months indicating its name, address, standards under preparation and standards adopted in the preceding period,[40] and notify this work programme to the ISO/IEC Information Centre;[41] (ii) indicate for each draft standard the classification relevant to the subject matter, its stage in standards development and the references of any international standards used as a basis; (iii) allow at least 60 days for submission of comments on the draft standard by interested parties within the territory of a WTO Member before its adoption, and publish a notification of this comment period no later than at its commencement,[42] indicating where possible whether the draft standard deviates from relevant international standards; (iv) provide a

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Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001 at para. 70.

[38] In 2009, the TBT Committee adopted a recommendation encouraging Members to voluntarily indicate within the notification format whether they consider that a relevant international standard exists and to provide information about deviations if appropriate. See G/TBT/26, 12 November 2009, para. 36.

[39] Annex 3, paras J and L-N of the TBT Agreement.

[40] The TBT Committee agreed in 1999 that communication of the work programmes of standardizing bodies on the Internet could be a way of fulfilling this obligation (see G/TBT/M/15, 3 May 1999, paras 67 and 69). In 2006 it agreed to encourage bodies that use this option to specify the exact webpages where the information on work programmes is located under the 'Publication' item in the notification form (see G/TBT/19, 14 November 2006, para.68).

[41] The ISO/IEC Information Centre, located in Geneva, is jointly operated by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC). It aims to provide stakeholders with information about standardization, standards and related matters. See http://www.standardsinfo.net/. The ISO/IEC Information Centre shall transmit to the WTO Secretariat a copy of any notification received. The notifications under paragraph C of the Code of Good Practice are circulated under document series G/TBT/CS/N/- to WTO Members.

[42] In 2003, the TBT Committee agreed that this obligation could be met through the electronic publication of notices announcing the comment periods. See G/TBT/13, 11 November 2003, para. 27.

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copy of the draft standard, upon request, to interested parties;[43] and (v) take into account comments received, in the further processing of the standard.

As seen above, an interesting difference between the advance notification requirements for technical regulations and conformity assessment procedures as compared to standards is that the former do not specify the time period for comments. A too-short comment period can operate to render the advance notification obligation ineffective in achieving its objective. In order to clarify the timing of notifications, in 1995 the TBT Committee agreed that the notification should be made as soon as a draft with the complete text of the measure is available, and when amendments can still be made and taken into account.[44] In 2000, the TBT Committee agreed that the normal time limit for the presentation of comments on technical regulations and conformity assessment proceedings should be 60 days, and that any Member able to provide a longer comment period (e.g. 90 days) should be encouraged to do so.[45]

Further, in light of the principle of special and differential treatment of developing country Members, developed countries are encouraged by the TBT Committee to provide more than a 60-day comment period to improve the ability of developing countries to comment on notifications.[46] Nevertheless, in the absence of a clear time period for comments, concerns are often raised that Members implement the advance notification obligation too late, leaving little or no time for comments, thus diminishing its potential benefits. As noted by the TBT Committee in 2009, 'an insufficient period of time for presentation of comments … may prevent Members from adequately exercising their right to submit comments.'[47]

The issue of timing of notifications arose in *US – Clove Cigarettes*, where Indonesia claimed a violation by the US of the obligation in Article 2.9.2 of the TBT Agreement to:

> notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account.

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[43] Annex 3 para. M provides that '[a]ny fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.'
[44] G/TBT/M/2, 4 October 1995, para. 5.
[45] G/TBT/9, 13 November 2000, para. 13.
[46] G/TBT/13, 11 November 2003, para. 26.
[47] G/TBT/29, 12 November 2009, para. 40.

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The Panel started its analysis by stressing the importance of the obligation to notify a proposed TBT measure, stating that it is 'at the core of the TBT Agreement's transparency provisions'.[48] Noting that the provision refers to 'proposed' technical regulations, it held that the obligation applies to measures that are 'still in "draft" form i.e., not yet adopted or in force.'[49] This finding was reinforced by the fact that the second sentence of the provision refers to 'an early appropriate stage' when amendments can be made, and by the recommendation of the TBT Committee on the timing of notifications mentioned above. As noted by the Panel, 'the very purpose of the notification is to provide an opportunity for comment before the proposed measure enters into force, when there is time for changes to be made before "it is too late".'[50] Therefore, the measure at issue cannot have been enacted or adopted *before* the notification takes place.[51]

While the US did not dispute that its measure was never notified to the WTO Secretariat, it argued that the relevant information was publicly available, that Indonesia had provided input in the legislative process, and that the US 'is a leader in supporting transparency among the WTO Membership.'[52] The Panel rejected these arguments, holding that the obligation in Article 2.9.2 'is straightforward: WTO Members must notify other Members through the WTO Secretariat of the product coverage, the objective and the rationale of their proposed technical regulations, at an early appropriate stage', which the US had failed to do.[53] Making information otherwise publicly available is clearly insufficient to meet this obligation.

The obligation, in Article 2.9.3 of the TBT Agreement, to provide to other Members, upon request, particulars or copies of the proposed measure was also raised by Indonesia in the *US – Clove Cigarettes* dispute. The Panel noted that unlike that in Article 2.9.2, the obligation in Article 2.9.3 'is only triggered by the request of a Member'.[54] According to Indonesia, the US had failed to respond to its questions, made through the TBT Committee in August 2009,[55] seeking information regarding certain aspects of the US's measure. These questions, Indonesia argued,

48 Panel Report, *US – Clove Cigarettes*, *supra* note 17 at para. 7.536.
49 *Ibid.* at para. 7.536.
50 *Ibid.*at para. 7.536.
51 *Ibid.* at para. 7.536.
52 *Ibid.* at para. 7.540.
53 *Ibid.* at para. 7.541.
54 *Ibid.* at para. 7.545.
55 G/TBT/W/33, 17 August 2009.

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embodied its 'request' under Article 2.9.3. However, even if such questions could be regarded as such a request, the Panel stated that, as with the obligation in Article 2.9.2, the obligation under Article 2.9.3 only applies to 'proposed technical regulations', therefore those that are still in draft form where amendments can still be made and comments taken into account.[56] Thus, for the obligation to provide particulars or copies to apply, Indonesia should have requested the US to do so while the measure was still in draft form. As Indonesia's questions had been submitted almost two months after the enactment of the US measure, they could *not* relate to a 'proposed' technical regulation.[57]

This finding is useful in clarifying the scope of the obligations in the advance notification provisions in relation to their objectives. Since the obligations aim to ensure that other Members have adequate opportunities to provide input into the development of a technical regulation, standard or conformity assessment procedure, they are relevant only at a stage when comments can still have an influence, i.e. before the measure is finalised.

3.3 Exceptions

Clearly, if the advance notification requirement, including comment period, were to be applied rigidly without exceptions, the danger arises that a Member facing an urgent situation requiring the adoption of a TBT measure is obliged to delay its reaction until the notification procedure is completed. This unacceptable situation is avoided by the clear provision of an exception allowing the omission of such of the steps in the advance notification procedure as a Member may find necessary in the case of urgent problems of safety, health, environmental protection or national security. This exception is reflected in Article 2.10 (for technical regulations), Article 5.7 (for conformity assessment procedures) and Annex 3 paragraph L (for standards) of the TBT Agreement. In *US – Clove Cigarettes*, the US did not invoke this exception or bring evidence of any urgent circumstances falling under Article 2.10. As a result, there is as yet no case law interpreting this exception. One could expect from the wording 'as a Member may find necessary', however, significant leeway for Members, once an urgent problem in one of the identified areas has been shown, to decide what steps in the advance notice procedure it will omit.

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56 Panel Report, *US – Clove Cigarettes*, *supra* note 17 at para. 7.545.
57 *Ibid.* at para. 7.547.

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The use of the exception for urgent problems is however subject to specific conditions. Members using a shortened procedure must notify other Members immediately through the Secretariat of the measure, its product coverage, objective and rationale, and the nature of the urgent problems. Upon request, other Members must be provided with copies of the technical regulation. Finally, other Members must be allowed without discrimination to present written comments; these comments must be discussed upon request and taken into account together with the results of the discussions. Thus, the main difference between the requirements under the normal procedure and the procedure for cases of urgency has to do with the issue of timing, namely the absence in the latter of the requirement for publication of a notice 'at an early appropriate stage' and the obligation to provide a 'reasonable time' for comments.

3.4 Notification Procedures, Recommendations and Guidelines

In order to facilitate the implementation of the transparency obligations of the TBT Agreement, the TBT Committee has been active in adopting decisions and recommendations, and developing standard formats for notifications. While these decisions cannot be regarded as 'authoritative interpretations' of the relevant transparency obligations under Article IX of the *WTO Agreement*, since the competence to adopt such interpretations lies only with the Ministerial Conference and General Council, they may nevertheless have an influence in interpretation. As recognised by the Appellate Body in *US – Tuna II*, where the role of the TBT Committee's decision on 'Principles for the Development of International Standards, Guides and Recommendations' was at issue, the legal status of the decisions of the TBT Committee may be that of a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' to be taken into account in interpreting the relevant provision together with the context, under Article 31.3(a) of the Vienna Convention on the Law of Treaties (VCLT).[58] While these decisions are all 'subsequent' to the TBT Agreement, the extent to which such a decision will inform the interpretation and application of a provision of the TBT Agreement in a specific case, according to the Appellate Body, will depend on the degree to which it 'bears specifically' on the interpretation and application of the respective term or provision.[59]

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[58] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331; 8 ILM 679.

[59] See Appellate Body Report, *US – Tuna II*, *supra* note 22 at paras. 366–372.

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In the case of the decisions of the TBT Committee on transparency issues, they are often explicitly linked to specific transparency obligations, and clearly indicate that their purpose is to facilitate their implementation or address a particular problem in their application. They therefore would most likely meet the condition set out by the Appellate Body for their use as interpretative tools.

This willingness to refer to the decisions of the TBT Committee as interpretative tools in dispute settlement is to be commended, as it makes it possible for Members, through technical discussions among their delegates to the TBT Committee, to reach agreements 'fleshing out' the transparency provisions of the TBT Agreement, thereby operationalising them. Such agreements are far more likely to be reached at this technical level than through more political negotiations at the General Council or Ministerial Conference under the procedures for authoritative interpretations or amendments. Technocrats with regulatory experience, who usually represent Members at the TBT Committee, are more likely to understand the problems needing to be addressed and come up with pragmatic solutions than political representatives of Members in the higher decision-making bodies. Of course, however, the decisions made by the TBT Committee cannot amend the provisions of the TBT Agreement or alter the rights and obligations contained therein.[60]

The decisions of the TBT Committee typically result from technical discussions based on concrete experiences of Members regarding specific provisions of the TBT Agreement. This process of information sharing promotes regulatory learning between Members and ensures that the decisions of the TBT Committee are congruent with the practices of those actors whose conduct they aim to guide.[61] In addition, the fact that the TBT Committee maintains the subject of transparency as an agenda item at its

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[60] This limit to the legal status of the decisions of the TBT Committee is in fact useful, in that it facilitates consensus decision-making in the TBT Committee. As argued by Joanne Scott in respect of the similar activities of the SPS Committee, if these decisions were to be given specific authority in dispute settlement proceedings, the activities of the Committee would be impeded as Members might be reluctant to adopt decisions that would later be subject to interpretation and enforcement by panels or the Appellate Body. See Scott, *supra* note 11. Currently the SPS and TBT Committees have proved effective decision-makers, enabling Members to effect much-needed improvements to the relevant agreements.

[61] Robert Wolfe notes that in order to ensure the legitimacy of the results of decision-making at the WTO, 'the process needs to engage the actors whose conduct will be regulated. The effect of the most elegantly drafted agreement will be minimal if it is incongruent with the informal practices and mutual expectations of actors in the trading system.' Robert Wolfe, "Decision-Making and Transparency in

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meetings and periodically revises its decisions on the basis of ongoing discussion between Members, ensures responsiveness to evolving practice, and allows for 'learning by doing'. Consequently, despite the lack of formal binding status, the decisions and recommendations of the TBT Committee are typically followed and its notification formats commonly used by Members in the fulfilment of their transparency obligations.

Aside from the various decisions of the TBT Committee that have already been referred to above, it is useful to note certain others that have great potential in improving full implementation of the advance notification requirements and ensuring that their benefits are received as widely as possible.

The TBT Committee has developed, and periodically refined, a useful standard format for notifications, with boxes specifying the information to be provided, in order to ensure a uniform and efficient operation of the advance notification rules.[62] Guidelines have been adopted explaining the various boxes in the standard format, and the Committee has recommended that no section be left blank. To speed up the processing of notifications, Members are requested to submit them electronically, and the possibility of online submission has been raised.[63] The feasibility of creating a central depository for notifications on the WTO website was discussed, leading to the creation of the TBT Information Management System (TBT IMS).[64] Notifications received are circulated to all Members by the Secretariat.[65]

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the 'Medieval' WTO: Does the Sutherland Report Have the Right Prescription?" (2005) 8:3 Journal of International Economic Law 631 at 633.

[62] G/TBT/1/Rev.8, 23 May 2002, p. 11.

[63] While this proposal has not yet been implemented, the TBT IMS is currently being enhanced to make this possible as reported in the Annual Review of the TBT Agreement in 2012. See G/TBT/31, 2 March 2012, para. 23. It is interesting to note that for purposes of the SPS Agreement, such an SPS Notification Submission System has already been created, which allows national notification authorities to fill out and submit SPS notifications online.

[64] G/TBT/9, 13 November 2000, paras 13 and 15; G/TBT/13, 11 November 2003, para. 27. The TBT IMS is a very useful tool to assist Members in managing the vast amount of information notified under the transparency obligation of the TBT Agreement. It is a 'one-stop' database system, maintained by the WTO Secretariat, which can be used to obtain information on TBT measures that Members have notified to the WTO, on Members' enquiry points, on standardizing bodies that have accepted the Code of Good Practice, etc. See http://tbtims.wto.org/.

[65] These notifications are contained in the WTO document series G/TBT/N/[Member]/[Number].

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As some Members lack the capacity to monitor the floods of notifications on TBT measures,[66] in order to identify those that may give rise to trade concerns for them, the TBT Committee agreed in 2000 to request the Secretariat to prepare a monthly table of notifications issued. This table indicates the notification numbers, notifying Members, provisions of the TBT Agreement notified under, products covered, objectives and deadline for comments.[67] This summary of notifications assists Members in keeping track of notified measures of relevance to them.

Another important problem addressed by the TBT Committee is the absence of specific rules in the TBT Agreement on the handling of comments received after the notification of draft TBT measures. Aside from the obligation to enter into discussions on the comments, upon request, and take the comments and the discussion into account, no concrete guidelines are laid down, leading to inadequate implementation of this obligation and a limitation of its potential benefits. The TBT Committee therefore agreed on specific procedures for the handing of comments in 1995, and further refined these in 2003, 2006 and 2009.[68] In particular, these procedures require Members to notify the WTO Secretariat of which entity it has designated as responsible for handling comments. When comments are received through such a designated entity, the Member must, without further request, acknowledge receipt of the comments; within a reasonable time explain to the commenting Member how it will proceed to take the comments into account, and, if appropriate, provide further information on the measure; and upon adoption of the resulting TBT measure, provide a copy thereof to the commenting Member. Further, Members are encouraged to voluntarily respond to comments in writing, preferably in one of the three official languages of the WTO,[69] and to share their responses with the TBT Committee and disseminate them on their national websites. The possibility of using the TBT Information Management System[70] to post comments and replies thereto has been considered but not yet taken up. In addition, Members are encouraged to provide enough time between the end of the comment period and the adoption of the measure to allow

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[66] For example, in 2011, over 1200 notifications were received. In both 2009 and 2010 this number exceeded 1400.

[67] G/TBT/9, 13 November 2000, para. 13 and Annex 3 p. 22. These lists are circulated in the WTO document series G/TBT/GEN/N/-.

[68] G/TBT/M/2, 4 October 1995, para. 5; G/TBT/13, 11 November 2003, para. 26; G/TB/TBT/26, 12 November 2009, para. 42.

[69] English, French or Spanish.

[70] See footnote 66.

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for consideration of the comments received and the preparation of responses. Without this additional period, one may wonder whether Members who submit their comments at the end of the comment period have any chance that their concerns will be considered in finalising the TBT measure, or whether the obligation of consideration of comments has become a *pro forma* exercise. The importance of domestic coordination to ensure follow up and consideration of comments received has been emphasised.

As delays in responses to requests for documentation can undermine the possibility to comment within the period provided, the TBT Committee has agreed that requests for documentation must be processed within five working days if possible, or if a delay is foreseen the requester must be provided with an estimated delivery date. Electronic transmission of requests and documentation is encouraged. Further, in order to facilitate access to the texts of notified draft TBT measures, the TBT Committee decided in 2007 to establish a facility through which Members may voluntarily provide an electronic version of the notified draft text to the WTO Secretariat, which will then be stored on the WTO server and made accessible through a hyperlink within the notification form.[71] This avoids the need for Members to deal with individual requests for these draft texts by other Members, and ensures that the necessary information is fully and promptly available to all interested Members. Effective use of the comment period is thereby made possible.

Another important contribution by the TBT Committee to the effectiveness of the advance notification obligations has been to address the problem of translation. While Article 10.5 of the TBT Agreement obliges developed Members to provide the documents covered in a notification in English, French or Spanish (or in the case of lengthy documents, summaries in one of these languages), often the documentation related to TBT measures of developing Members is not available in one of the three official languages of the WTO. Consequently, the TBT Committee has agreed to create a mechanism for the voluntary sharing of information on the availability of an unofficial translation of notified measures.[72] It has also decided that upon request, a Member seeking a document that does not exist in a WTO working language will be informed by the notifying

[71] See G/TBT/GEN/65, 14 December 2007 and G/TBT/M/43, 21 January 2008, para 129

[72] G/TBT/M/43, 21 January 2008, para. 131. This mechanism comprises circulation by the Secretariat of a supplement to the original notification containing this information. Between January 2008 and November 2009, 178 such supplements were circulated. G/TBT/26, 13 November 2009, para. 51.

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Member of other Members who have requested the same document. The requesting Member may then approach such Members to determine whether they have translated the document and would be willing to share this translation on mutually agreed terms.[73] Where a translation is not available, the TBT Committee has stressed the importance of providing complete information in the 'Description of the content section of the notification format', as well as replying promptly to specific questions on the content of the measure, as these 'are important sources of information for understanding the proposed measure and the main basis for comments from interested parties.'[74]

All these efforts of the TBT Committee go a long way in improving the operation of the *ex ante* transparency rules to ensure that they achieve their objective of allowing effective and timely input by other Members in the process of development of a TBT measure.

4. *EX POST* TRANSPARENCY OBLIGATIONS

As noted above, not only can transparency *ex ante* lead to great benefits for traders and WTO Members by providing opportunities to influence the development of the relevant technical regulation, standard or conformity assessment procedure, but also transparency *ex post* is essential. Full and timely information regarding adopted technical regulations, standards and conformity assessment procedures is necessary to provide traders with certainty that their products will have access to the export market. Lack of sufficient and early information can have a chilling effect on exportation, or lead to loss of market share while a trader tries to adapt its product to the new requirements on the export market. In addition, the policing of compliance of a TBT measure with the obligations of the TBT Agreement can only be undertaken by affected Members if they have the necessary information regarding the adopted measure at issue.

To ensure that the *ex post* benefits of transparency are secured, the obligation of prompt publication of adopted measures, coupled with a reasonable period for traders to adapt to new requirements, is essential. In addition, a mechanism is needed whereby a Member can request additional information on the adopted measure in order to ensure a proper understanding of its nature and implications. The TBT Agreement provides such a framework for *ex post* transparency in Article 2.5 and

[73] G/TBT/M/2, 4 October 1995, para. 5.
[74] G/TBT/26, 13 November 2009, para. 51.

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2.11–2.12 (for technical regulations); Article 5.8–5.9 (for conformity assessment procedures); and Annex 3 paragraphs 0 and P for standards.

4.1 Obligation of Publication of TBT Measures

The TBT Agreement obliges WTO Members to ensure that all technical regulations and conformity assessment procedures which have been adopted 'are published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them.'[75] Similarly, standardising bodies that adhere to the Code of Good Practice are required to 'promptly publish' standards once they have been adopted.[76]

4.1.1 Scope of application

The obligation of prompt publication applies only to 'adopted' TBT measures. This condition for applicability was not the subject of dispute in *US – Clove Cigarettes*, the only case to date addressing the transparency obligations of the TBT Agreement. In that case, the enactment of the law at issue was agreed by both parties to be its date of adoption. However, this should not be seen to imply that a measure must become legally enforceable in order to be adopted. Clearly this cannot be the case as standards are also covered by the obligation of prompt publication once they have been 'adopted', whereas they are by definition not mandatory. Instead, adoption should be seen as the finalisation of the measure by the entity responsible for its creation (e.g. regulator, parliament, administrative agency or standardising body), so that changes are no longer possible without an amendment.

4.1.2 Content of obligation

Ex post transparency of adopted TBT measures is secured by the obligation to publish them promptly or otherwise make them available 'in such a manner as to enable interested parties in other Members to become acquainted with them.'

An important benefit from improved transparency, as noted above, is the opportunity it provides for early adaptation to new requirements in TBT measures. However, for this to be effective, exporters need to be given a period, before the new requirements come into force, to adapt their products or production processes. In Members at lower levels of

[75] Respectively Articles 2.11 (for technical regulations) and 5.8 (for conformity assessment procedures) of the TBT Agreement.

[76] Annex 3 para. 0 of the TBT Agreement.

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development, an adequate adaptation period may be particularly important as it may be difficult for producers to access the necessary technology and the financial resources for its implementation that may be entailed by the new requirements. In order to enable producers in exporting Members to adjust to new or changed technical regulations or conformity assessment procedures without losing market access during the adjustment period, the publication obligation of the TBT Agreement goes hand-in-hand with an obligation to allow a reasonable interval between the publication of the measure and its entry into force.[77] The stated aim of this provision is to allow an adaptation period for producers in exporting Members, particularly in developing Members, to meet the new requirements of the importing Member. As emphasised by the Appellate Body in *US – Clove Cigarettes*, the beneficiaries of this provision are 'producers in exporting Members, particularly developing countries'[78] and the 'reasonable interval' aims to provide them with 'a degree of certainty' with regard to the time within which the measure 'can reasonably be expected to enter into force'.[79]

As standards are not mandatory, and producers may therefore decide for themselves when they will comply with their requirements without losing market access in the interim, no reasonable adaptation period is required after the adoption of standards.

In view of the often-heard complaint that many countries provided little or no adaptation period with respect to adopted technical regulations,[80] in the Implementation Decision adopted by the Doha Ministerial Conference in 2001 it was agreed, in paragraph 5.2, that the 'reasonable interval' between publication of a TBT measure and its entry into force 'shall be understood to mean normally a period of not less than

77 Respectively Articles 2.12 (for technical regulations) and 5.9 (for conformity assessment procedures) of the TBT Agreement.

78 Appellate Body Report, *US – Clove Cigarettes*, *supra* note 17 at para. 287. One may expect that certainty regarding the length of the adaptation period is very important for small and medium-sized enterprises in all exporting Members.

79 *Ibid.* para. 287.

80 An examination of the overview of specific trade concerns raised in the TBT Committee provides an indication of the frequency with which the reasonable adaptation period was raised as an issue by Members before 2001. See G/TBT/GEN/74/Rev.9. These concerns were also raised in the discussions on the issue of 'implementation' leading up to the Doha Ministerial Conference in 2001.

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6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.'[81]

The issue of the provision of a reasonable adaptation period under Article 2.12 of the TBT Agreement arose for the first time in the *US – Clove Cigarettes* dispute. In that case, the technical regulation banning flavoured cigarettes was enacted on 22 June 2009, and came into force three months later. Relying on paragraph 5.2 of the Doha Ministerial Decision mentioned above, as an authoritative interpretation under Article XI:2 of the WTO Agreement, Indonesia claimed that the US was obliged 'to allow *as a minimum* a period of *six months* between the publication and entry into force' of the measure.[82] The Panel agreed, finding that certain features of the Doha Ministerial Decision suggested that Members intended to adopt a binding interpretation.[83] While not making a definitive finding on this point, it stated that it would 'be guided' by the Doha Ministerial Decision in its interpretation of the phrase 'reasonable interval' as this decision 'was agreed by all WTO Members meeting in the form of the Ministerial Conference, the highest ranking body of the WTO'.[84] It further considered that paragraph 5.2 of the Doha Ministerial decision could be considered a 'subsequent agreement of the parties' under Article 31.3(a) of the VCLT.[85] The US appealed this finding.

The Appellate Body examined the legal status of paragraph 5.2 of the Doha Ministerial Decision, to determine if it could be regarded as an 'authoritative interpretation' of the term 'reasonable interval'. Noting the pervasive legal effect of authoritative interpretations under Article IX:2 of the WTO Agreement, which bind all Members, the Appellate Body emphasised the 'clearly articulated and strict decision-making procedures' to which Article IX:2 subjects such interpretations.[86] These were held to contain two specific requirements: (i) a decision by the Ministerial Conference or General Council taken by three-fourths majority of Members; and (ii) taken on the basis of a recommendation of the Council

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[81] Doha Ministerial Decision on Implementation-Related Concerns, decision of 14 November 2001, WT/MIN(01)/17, para. 5.2. This decision aimed to take concrete action to address issues and concerns that have been raised by many developing-country WTO Members regarding the implementation of some WTO Agreements and decisions. It has been regarded as quid pro quo for these Members' agreement to the launching of the new round of negotiations.

[82] Appellate Body Report, *US – Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012 at para. 238.

[83] Panel Report, *US – Clove Cigarettes*, *supra* note 17 at para. 7.575.

[84] *Ibid.* at para. 7.576.

[85] *Ibid.* at para. 7.576.

[86] Appellate Body Report, *US – Clove Cigarettes*, *supra* note 83 at para. 250.

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overseeing the relevant Agreement.[87] While the first requirement was clearly met, since the Doha Ministerial Decision had been adopted by consensus in the Ministerial Council, the second requirement was not. The Panel had been willing to overlook the lack of a recommendation by the Council for Trade in Goods, stating that the absence of this 'formal requirement' was insufficient to conclude that the Decision was not an authoritative interpretation under Article XI of the WTO Agreement.[88] The Appellate Body disagreed, stressing that the authority to adopt authoritative interpretations 'must be exercised within the defined parameters of Article IX:2.'[89] Thus paragraph 5.2 'does not constitute a multilateral interpretation adopted pursuant to Article IX:2 of the WTO Agreement.'[90]

The Appellate Body then turned to the question whether paragraph 5.2 could be regarded as a 'subsequent agreement between the parties' on the interpretation of the term 'reasonable interval' in Article 2.12 of the TBT Agreement, in terms of Article 31.3(a) of the VCLT. It disagreed with the US that only a decision constituting an 'authoritative interpretation' under Article IX:2 of the WTO Agreement can be seen as a 'subsequent agreement between the parties' under Article 31.3(a) of the VCLT. The Appellate Body noted the difference between authoritative interpretations, which clarify WTO law for all Members, and bind all Members in all disputes in which they are relevant, and subsequent agreements, which are used as an interpretative tool to determine the meaning of a treaty provision in a dispute, which interpretation binds only the parties to that dispute.[91] The Appellate Body proceeded to examine whether paragraph 5.2 of the Doha Ministerial Decision meets the requirements of Article 31.3(a) of the VCLT. It noted that it is beyond dispute that it was adopted subsequent to the TBT Agreement.[92] It then examined whether the Decision 'expresses an agreement between Members on the interpretation or application of the term "reasonable period" in Article 2.12 of the TBT

[87] *Ibid.* at para. 251.
[88] Panel Report, *US – Clove Cigarettes*, *supra* note 17 at para. 7.575.
[89] Appellate Body Report, *US – Clove Cigarettes*, *supra* note 83 at para. 253. The Appellate Body noted that characterising a requirement as 'formal' does not permit the Panel to read the requirement out of the provision. It also recalled that Article IX:2 states that the authority 'shall' be exercised on the basis of a recommendation by the overseeing Council, which 'does not suggest that compliance with this requirement is dispensible.' *Ibid.* at para. 254.
[90] *Ibid.* at para. 255.
[91] *Ibid.* at paras. 257–8.
[92] *Ibid.* at para. 263.

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Agreement.'[93] It understood this to entail an examination of whether paragraph 5.2 'bears specifically upon the interpretation' of Article 2.12 of the TBT Agreement. On the basis of the terms and content of paragraph 5.2, which refers expressly to Article 2.12 and states that 'the phrase "reasonable period" shall be understood to mean normally a period of not less than six months', the Appellate Body held the function of paragraph 5.2 to be none other than to interpret the meaning of the term 'reasonable interval' and its content to clearly express a common understanding of the term and an acceptance of that understanding between Members. Consequently, paragraph 5.2 of the Doha Ministerial Decision was found to constitute a 'subsequent agreement' between Members under Article 31.3(a) of the VCLT of the meaning of 'reasonable interval' in Article 2.12 of the TBT Agreement.[94] Thus, its terms must be 'read into' Article 2.12 for purposes of interpretation.[95]

In this light, the Appellate Body found that Article 2.12 establishes the rule that 'normally' producers in exporting countries must require a period of 'not less than six months' to adapt their products or production methods to an importing Member's technical regulation.[96] Therefore, a *prima facie* case of inconsistency with Article 2.12 is made when a complainant shows that 'an importing Member has failed to allow an interval of not less than six months between the publication and the entry into force of the technical regulation at issue.'[97]

The willingness of the Appellate Body to recognise the interpretative force of paragraph 5.2 of the Doha Ministerial Decision can only be commended. It sets a clear minimum period for adaptation of producers to new technical regulations, thus promoting certainty for them. It also

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[93] *Ibid.* at para. 265. The Appellate Body noted that the Appellate Body Reports in *EC – Bananas III (Article 21.5 – US/Ecuador II)* had referred to the International Law Commission's description of a 'subsequent agreement' under Article 31.3(a) of the VCLT as a 'further authentic element of interpretation' and interpreted this to mean 'agreements bearing specifically upon the interpretation of the treaty'.

[94] *Ibid.* at paras. 266–268.

[95] *Ibid.* at para. 269. According to the Appellate Body, 'reading into' does not entail that the terms of paragraph 5.2 override or replace the terms of Article 2.12, but rather that the former 'constitute an interpretative clarification to be taken into account in the interpretation' of the latter.

[96] *Ibid.* para. 272. Disagreeing with the US contention that 'normally' does not support the conclusion that paragraph 5.2 represents a rule, the Appellate Body said that it does indicate a rule, but establishes that it is capable of derogation under certain circumstances.

[97] *Ibid.* para. 280.

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avoids rendering futile Members' efforts to operationalise vague provisions by fleshing out their terms, whether in the form of a decision of the Ministerial Conference or, more frequently, a decision of the TBT Committee. By doing so, it gives impetus to these efforts to resolve practical problems in a technical and non-politicised manner and encourages regulatory learning and the development of best practices.

4.1.3 Exclusions

To take into account the fact that delaying the entry into force of new technical regulations or conformity assessment procedures is not always possible, due to the urgent nature of some of these measures in the face of serious threats, the TBT Agreement excludes from the obligation to provide a 'reasonable period' for adaptation those 'urgent circumstances' as defined under the advance notification provisions. These are where 'urgent problems of safety, health, environmental protection or national security arise or threaten to arise'. Similarly, paragraph 5.2 of the Doha Ministerial Decision defines a 'reasonable period' as 'normally a period of not less than six months, except when this would be ineffective in fulfilling the legitimate objectives pursued.' According to the Appellate Body in *US – Clove Cigarettes*, Article 2.12 thus 'carefully balances the interests of, on the one hand, the exporting Member whose products might be affected by a technical regulation and, on the other hand, the importing Member that wishes to pursue a legitimate objective through a technical regulation.'[98]

In view of the wording and object and purpose of Article 2.12 as read together with paragraph 5.2 of the Doha Ministerial Decision, the Appellate Body identified three situations when a period of six months or more cannot be considered a 'reasonable period', namely: (i) when 'urgent problems of safety, health, environmental protection or national security arise' for the importing Member; (ii) when this interval would be ineffective in fulfilling the legitimate objectives pursued; and (iii) when producers in exporting Members can adapt their products or production methods to the requirements of an importing Member in less than six months.[99] Thus, to rebut a *prima facie* case of inconsistency with Article 2.12, a respondent has to show that one of these three situations exists.[100]

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[98] *Ibid.* para. 274.

[99] *Ibid,* para. 282.

[100] *Ibid.* para. 283. The Appellate Body here rejected the US argument that the burden of proof lies with the complainant to show that none of the three situations excluding the application of the obligation to provide a reasonable period of not less than six months exists. It stressed that the burden of proof

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Turning to the situation in *US – Clove Cigarettes*, the Appellate Body noted that the Panel had found that, in the absence of any evidence of argument that urgent circumstances were present, it could only conclude that they were not.[101] Neither had the US established that Indonesian producers were able to adapt to the new requirements within a three-month period.[102] Finally, while the Appellate Body agreed that the US had identified a legitimate objective for its measure, that of addressing youth smoking, it held that the US had not shown that an adaptation period of not less than six months would have been ineffective to fulfil this legitimate objective.[103] Consequently, the US had not rebutted Indonesia's prima facie case of violation of Article 2.12 of the TBT Agreement.

The clarifications provided by the Appellate Body in the *Clove Cigarettes* dispute in respect of the possible grounds for exclusion from the obligation to provide an adaptation period of at least six months are useful in establishing the limits of the obligation, in light of its purpose of providing a degree of certainty to producers with regard to the time within which they can expect a published technical regulation to enter into force, while balancing this with the right of importing Members to regulate to achieve their legitimate objectives. Its surprising allocation of the burden of proof on the respondent to show that the grounds for exclusion apply, contrary to other provisions that have been characterised as 'exclusions' or 'exemptions' rather than exceptions,[104] strengthens the

'*cannot* be understood in isolation from the overarching logic of the provision, and the function which it is designed to serve.' *Ibid.,* para. 286.

[101] Panel Report, *US – Clove Cigarettes*, *supra* note 17 at para. 7.507.

[102] Appellate Body Report, *US – Clove Cigarettes*, *supra* note 83 at para. 294. Here the Appellate Body rejected the US argument that Indonesian producers are able to market tobacco or menthol flavoured cigarettes on the US market, yet 16 months after the enactment of the regulation had still failed to adjust their production to produce these products instead of clove flavoured cigarettes, showing that the length of the adjustment period did not affect the producers in any way. According to the Appellate Body, these facts point rather in the direction that Indonesian producers require 'a significantly longer period than the three months allowed by the United States.'

[103] Appellate Body Report, *US – Clove Cigarettes*, *ibid.* at para. 295. In particular, the US had not shown why a three month adaptation period would not be ineffective in fulfilling its legitimate objective, but a six month period would be.

[104] Here one can think of the allocation of burden of proof not only under Article 2.4 of the TBT Agreement, but also similarly under Articles 3 and 5.7 of the SPS Agreement. In all these cases, the burden of proof has been squarely

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provision and promotes its effectiveness in achieving the envisioned *ex post* benefits.

4.2 Obligation to Explain the Justification for a TBT Measure

As explained above, effective enforcement by Members of their rights under the TBT Agreement necessitates information beyond simply the existence and content of technical regulations. It also requires information regarding the legitimate objective for the measure and other aspects of the justification for its imposition. Lack of such information makes it difficult for exporting Members to determine whether they have legal grounds to challenge the relevant technical regulations measures in terms of the disciplines of the TBT Agreement, in particular Article 2.2–2.4, which contains the prohibition on technical regulations that are more trade restrictive than necessary to fulfil their legitimate objective; the obligation to revoke a technical regulation if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances can be addressed in a less trade restrictive manner; and the obligation to base technical regulations on international standards unless they would be an ineffective or inappropriate means to fulfil the legitimate objectives pursued. Without information as to the objectives of the measure; the reasons why a relevant international standard is regarded as ineffective or inappropriate to achieve this objective; or the justification for the maintenance of a measure despite changed circumstances, an exporting Member will have difficulty assessing whether, and if so on what grounds, a technical regulation can be challenged. However, notifications and publication of TBT measures rarely contain more than the briefest statement of the objective and rationale of the particular measure or for its deviation from international standards. To address this problem, an additional *ex post* transparency provision has been included, namely in the first sentence of Article 2.5 of the TBT Agreement. According to this provision, a Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members, must, upon request of another Member, explain the justification for its technical regulation in terms of Article 2.2–2.4 of the TBT Agreement.

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placed on the complainant to show that the grounds for exclusion or exemption do not apply.

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4.2.1 Scope of application

The question of which situations give rise to the obligation to explain the justification for a technical regulation under the first sentence of Article 2.5 was at issue before the Panel in *US – Clove Cigarettes.* Examining the provision, the Panel considered that four elements 'must be present' for Article 2.5 to apply, namely: '(i) the Member in question is "preparing, adopting or applying a technical regulation"; (ii) this measure "may have a significant effect on trade of other Members"; (iii) there is a "request of another Member"; and (iv) the Member in question is to "explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4" of Article 2.'[105]

In the *Clove Cigarettes* case, the trigger or 'threshold question' for applicability of the obligation under the first sentence of Article 2.5, according to the Panel, was 'whether Indonesia actually *requested* the United States to explain the justification' for its technical regulation 'in terms of the provisions of paragraphs 2 to 4 *pursuant to* the first sentence of Article 2.5 of the TBT Agreement'.[106] Indonesia argued that it had submitted questions to the United States on two occasions after the relevant regulation was signed but before the measure entered into force, first in a document circulated through the TBT Committee,[107] and second during informal bilateral discussions where Indonesia posed 'essentially the same questions' to the US as those contained in the abovementioned document.[108] In addition, Indonesia had reiterated its questions after publication of the measure, in another document circulated through the TBT Committee.[109]

The Panel held that, as there was no mention of Article 2.5, nor any request that the United States explain the justification for the measure in terms of Article 2.2–2.4 of the TBT Agreement in the first document circulated by Indonesia, it was conceivable that the US 'would not have understood that Indonesia's questions in that document constituted a request pursuant to the first sentence of Article 2.5.'[110] Going on to examine if the request under Article 2.5 to provide justification in terms of Article 2.2 to 2.4 was 'implied' by the content of Indonesia's questions, the Panel noted that neither Article 2.3 nor 2.4 were relevant

105 Panel Report, *US – Clove Cigarettes*, *supra* note 17 at para. 7.449.
106 *Ibid.* at para. 7.450.
107 G/TBT/W/323, 20 August 2009.
108 Panel Report, *US – Clove Cigarettes*, *supra* note 17 at para. 7.452.
109 G/TBT/W/323, 5–6November 2009.
110 Panel Report, *US – Clove Cigarettes*, *supra* note 17 at para. 7.465.

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given the facts of the case,[111] thus it examined whether the questions related to Article 2.2 of the TBT Agreement. The content of the questions showed that they covered other provisions of the TBT Agreement as well as provisions in the SPS Agreement and the GATT 1994. Thus there was also no implicit request for justification in terms of Article 2.2 to 2.4 under Article 2.5 of the TBT Agreement.[112]

Clearly then, a request for explanation of the justification of a measure must be made in terms of Article 2.2 to 2.4 of the TBT Agreement for the obligation of Article 2.5 to apply. It is these provisions that would create problems of enforceability were the complainant not to be able to obtain the additional necessary information regarding the justification of the TBT measure under their terms.

4.2.2 Content of the obligation

Since the threshold condition for the application of the obligation under Article 2.5 was found not to be present in *US – Clove Cigarettes*, there is no case law on the substantive content of the obligation.[113] However, guidance on the content of the obligation contained in Article 2.5 may be found in the case law on the analogous provision in the SPS Agreement.[114] This case law clarifies that the provision embodies an informational requirement. It should not be understood as shifting the burden of proof to the Member imposing the technical regulation to justify its measure in dispute settlement proceedings.[115]

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[111] Article 2.3 relates to the maintenance of the measure in changed circumstances. However the measure had not yet been adopted at the time of the first two requests for information and had just been adopted at the time of the third request, so there could not yet be a situation of changed circumstances. As there were no relevant international standards, Article 2.4 of the TBT Agreement was not applicable. Panel Report, *US – Clove Cigarettes*, *supra* note 17 at para. 458.

[112] *Ibid.* at paras. 459–460.

[113] Given its finding of inapplicability of Article 2.5, the Panel did not have to address whether the US had complied with that obligation. However, in view of the US argument that it had nevertheless done so, the Panel noted that the US had provided an explanation for its measure in response to Indonesia's document at the relevant TBT Committee meeting. Nevertheless this finding gives no guidance on the content of the obligation of Article 2.5 as it merely cites the US response in the minutes of the relevant meeting. Panel Report, *US – Clove Cigarettes*, *ibid.* at para. 7.462 and footnote 794.

[114] Article 5.8 of the SPS Agreement.

[115] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February

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Despite the fact that it does not address the burden of proof, the obligation contained in Article 2.5 of the TBT Agreement can play a significant role in dispute settlement proceedings by assisting a Member in establishing a *prima facie* case that another Member's technical regulation violates Article 2.2, 2.3 or 2.4, for example because the regulation is not based on a relevant international standard that is both effective and appropriate in achieving its objective, or is more trade restrictive than necessary to achieve a legitimate objective. Without sufficient knowledge of the legitimate objective aimed at, including the level of protection of that objective the measure aims to achieve, the complainant is faced with a difficult burden of proof. In line with the case law on the analogous provision of the *SPS Agreement*, it could be argued that Article 2.5 assists the complainant in making a *prima facie* case in such situations as it can request the necessary information on the justification of the measure, which the respondent is then obliged to supply. The failure to provide the requested information would be a strong indication that the measure lacks the necessary justification.[116]

This, once again, elucidates the *ex post* benefits of transparency in enabling Members to enforce their rights under the TBT Agreement by ensuring that they have the means at their disposal to obtain the necessary information regarding the technical regulations of their trading partners.

1998 at para. 102. Overturning a ruling of the Panel, the Appellate Body in *EC – Hormones* held, 'Article 5.8 of the *SPS Agreement* does not purport to address burden of proof problems; it does not deal with a dispute settlement situation. To the contrary, a Member seeking to exercise its right to receive information under Article 5.8 would, most likely, be in a pre-dispute situation, and the information or explanation it receives may well make it possible for that Member to proceed to dispute settlement proceedings and to carry the burden of proving on a *prima facie* basis that the measure involved is not consistent with the *SPS Agreement*.'

[116] See Appellate Body Report, *Japan – Agricultural Products II*, WT/DS76/AB/R, adopted 19 March 1999 at para. 137. Here the US argued had that the Panel had imposed an impossible burden of proof on it by requiring it to prove lack of compliance with Article 2.2 of the *SPS Agreement*, namely that there were no relevant studies justifying Japan's measure. The Appellate Body disagreed, noting that the US could have raised a *prima facie* case that there was insufficient scientific justification for Japan's measure by requesting Japan, pursuant to Article 5.8 of the SPS Agreement, to provide 'an explanation of the reasons' for measure, which Japan would be obliged to provide. The failure of Japan to bring forward such justification would have been a strong indication that it did not exist.

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4.3 Obligation of Notification of Agreements on Issues Related to TBT Measures

A last *ex post* transparency obligation contained in the TBT Agreement that deserves a brief mention is that of notification of international agreements reached between a Member and any other country or countries on issues related to technical regulations, standards or conformity assessment procedures which may have a significant effect on trade. This obligation is contained in Article 10.7 of the TBT Agreement.

Unlike the transparency obligations discussed until now, this obligation relates to international (bilateral or plurilateral), rather than national, initiatives in the area of TBT measures. While it is limited to those international agreements that may have a significant effect on trade, it is likely that the same broad interpretation of a 'significant effect' as was taken in respect of the advance notification obligation, as discussed above,[117] will also apply here.

Where such an international agreement is reached, at least one WTO Member party to the agreement must notify other Members. This must be done through the WTO Secretariat, indicating the product coverage of the agreement and including a brief description of the agreement. In order to facilitate implementation of this obligation, the TBT Committee has adopted a format for these notifications.[118]

5. TRANSPARENCY REGARDING THE IMPLEMENTATION OF THE TBT AGREEMENT

Aside from the benefits to be gained from *ex ante* and *ex post* transparency obligations with respect to national TBT measures and international agreements in the area of TBT measures, transparency with regard to the implementation of the provisions of the TBT Agreement itself can have great value. Not only does such transparency allow Members to monitor each other's compliance with the relevant obligations, but equally usefully, it enables regulatory learning. Members are informed of how other Members have adjusted their regulatory regimes in order to come into compliance with the model for regulation reflected in the TBT Agreement. As this is often a difficult and burdensome task,

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[117] See Section 3.1 above.

[118] G/TBT/1/Rev.10, 9 June 2011, Annex D. Notifications under Article 10.7 of the TBT Agreement are circulated in official document series G/TBT/10.7/N/[Number].

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especially for less developed Members, this opportunity to learn from other Members that have encountered similar difficulties, from Members that have a more advanced regulatory system or from Members that have had to deal with new regulatory problems such as those relating to emerging technologies is invaluable.

5.1 Statements on Implementation and Administration of the TBT Agreement

Recognising the value of information sharing on this issue, the TBT Agreement promotes transparency regarding the implementation of its provisions. Article 15.2 of the TBT Agreement obliges each Member to notify the TBT Committee, promptly after the Agreement enters into force for that Member, of existing or new measures taken to ensure the implementation and administration of the Agreement. Thereafter, changes to such measures must also be notified to the TBT Committee. Statements under Article 15.2 aim to give a brief overview of how a Member implements the TBT Agreement.[119]

To ensure uniformity in compliance with this obligation, the TBT Committee agreed in 1995 on guidelines with respect to the content of Article 15.2 statements.[120] These guidelines specify that the statement should cover legislative, regulatory and administrative action taken to ensure that the provisions of the TBT Agreement are applied. Alternatively, if the TBT Agreement itself is incorporated directly into national law, the statement should indicate how this has been done. In addition, Members should specify in their statements the names of the publications they use to announce work on draft TBT measures, and those in which they publish the draft texts. Other useful information needed to give a full picture of implementation is further specified in the guidelines.[121]

Due to inadequate compliance with the obligation under Article 15.2, the TBT Committee in 1997 requested Members who had not yet done so

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[119] These statements are circulated in document series G/TBT/2/Add.-.

[120] G/TBR/M/2, 4 October 1995, para. 5.

[121] Information should be given on the expected length of the comment period provided and on the arrangements made with national and sub-national authorities that are responsible for drafting or amending technical regulations and conformity assessment procedures to provide early information on their proposals to enable the Member to compy with its notification obligations. In addition, the names and addresses of Enquiry Points or other agrencies that have specific functions under the TBT Agreement must be given, as well as the scope of their responsibilities.

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to submit their statements without further delay, or indicate the difficulties they face in this regard so that technical assistance may be provided.[122] In 2003, Members were invited to seek assistance from other Members that had complied with their Article 15.2 obligations,[123] and in November 2007 a workshop was organised by the WTO Secretariat on the Article 15.2 statement.[124]

More importantly, these efforts to facilitate compliance with Article 15.2 led to an initiative to engage in information exchange and regulatory learning, on a voluntary basis. Members were invited, in 1997, to make oral statements voluntarily on the arrangements they have in place to achieve effective inplementation and administration of their obligations under the TBT Agreement.[125] This additional voluntary transparency creates an opportunity to share good practices, through encouraging informal exchanges that may lead to the development of 'best practices' in regulation and foster common understandings of the issues involved.[126]

5.2 Voluntary Information Exchange on Technical Assistance and Special and Differential Treatment

Additional *ex post* transparency in respect of the implementation of the provisions of the TBT Agreement is promoted by the mechanism for voluntary exchange of information on special and differential treatment (SDT) and technical assistance needs of developing countries or responses to these needs, developed by the TBT Committee.[127]

While no such transparency obligation is found in the TBT Agreement itself, in order to increase transparency in the identification and prioritisation of technical assistance needs, in 2005 the TBT Committee

[122] G/TBT/5, 19 November 1997, para. 7.
[123] G/TBT/13, 11 November 2003, para. 7.
[124] G/TBT/M/43, 21 January 2008, para 3–5.
[125] G/TBT/5, 19 November 1997, para. 7. In 2000 the TBT Committee agreed to encourage Members to continue this sharing of experiences on implementation of the TBT Agreement. See G/TBT/9, 13 November 2000, para.9.
[126] While beyond the scope of this chapter, it is interesting to note that the TBT Committee has done additional work, unconnected with the transparency obligations, to encourage Members to disseminate good regulatory practice through in-depth exchange of experiences on various aspects of regulation. See further on the work of the TBT Committee in this regard G/TBT/1/Rev.10, 9 June 2011, Part I.
[127] G/TBT/1/Rev.10, 9 June 2011, Annex G.

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adopted a format for voluntary notification of specific technical assistance needs and responses.[128] In addition, a voluntary mechanism of information exchange on technical assistance was created.

Further, to operationalise the provisions on SDT, the TBT Committee agreed in 1997 to invite Members to exchange information, on a voluntary basis, on the implementation of the SDT provisions as well as on the problems they face in relation to the operation of these provisions.[129]

These informal mechanisms can be very useful in encouraging the use of the SDT provisions, which are typically difficult to enforce.[130] By bringing requests for SDT or technical assistance to the attention of all Members, the mechanisms create informal pressure to respond to these requests where possible. They also allow countries to coordinate their efforts and avoid overlapping initiatives.

6. REQUIRED INFRASTRUCTURE FOR TRANSPARENCY

Members are required by the TBT Agreement to have in place the necessary institutional infrastructure for the implementation of their transparency obligations. By obliging Members to clearly designate the bodies responsible for notifications, responses to queries and provision of relevant documentation, the TBT Agreement facilitates the otherwise burdensome task of collection of necessary information by exporting Members and their stakeholders. Without such obligations, it may be impossible for these interested parties to know to whom they ought to direct their requests for information.

Under Article 10.10, Members must designate a *single* authority as responsible for implementing at national level the notification procedures under the TBT Agreement, except those relating to standards. This

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[128] G/TBT/16, 8 November 2005. The format was adopted for use on a 2-year trial basis, but was subsequently continued and reviewed. The format is contained in G/TBT/1/Rev.10, 9 June 2011, Annex G. The notifications are circulated in WTO official document series G/TBT/TA[Number]/[Member].

[129] G/TBT/5, 19 November 1997, para. 33.

[130] See for example the decision of the Panel in *US – Clove Cigarettes* that the obligation in Article 12.3 of the *TBT Agreement* to 'take account of' developing country needs in preparing or applying a technical regulation only requires that developing country needs be considered alongside other factors before reaching a decision. Panel Report, *US – Clove Cigarettes*, *supra* note 17 at paras 7.630–7.634.

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authority must be a central government authority. However, if for legal or administrative reasons responsibility for notification procedures is shared between two or more central government authorities, the Member must, under Article 10.11, provide complete and unambiguous information on the scope of responsibility of each of these authorities.

In addition, two provisions oblige Members to create enquiry points, which are not necessarily the same bodies as those responsible for notifications. Under Article 10.1, Members must designate an enquiry point which is able to answer all reasonable enquiries from other Members, and interested parties in those Members, and provide relevant documents regarding adopted or draft technical regulations, conformity assessment procedures and standards issued by central or local government bodies, non-governmental bodies with legal power to enforce a technical regulation or regional standardisation bodies of which such bodies are members or participants. Again, where legal or administrative constraints lead to more than one enquiry point, complete and unambiguous information is required on the scope of authority of each enquiry point, and enquiries addressed to the incorrect enquiry point must be promptly conveyed to the correct enquiry point. Article 10.3 contains a similar obligation, with regard to the designation of one or more enquiry points to answer questions on adopted or draft standards and conformity assessment procedures issued by non-governmental bodies and regional bodies of which they are members or participants.[131]

The TBT Committee developed guidelines in 1995 to improve the handling of requests by enquiry points, providing that receipt of an enquiry should be acknowledged, and request for documents processed within five working days. If a delay is foreseen, the requester must be informed of the expected date of provision of documents. Electronic delivery of documents is encouraged.[132] In addition, the TBT Committee set out guidelines for the requests themselves, to facilitate the supply of the requested information and define when an enquiry should be considered 'reasonable' under Article 10.1 and 10.3.[133]

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[131] The TBT Committee agreed that the name, address, telephone and fax numbers, as well as the email address, if available, of enquiry points should be sent to the Central Registry of Notifications of the WTO Secretariat. The Secretariat regularly updates and circulates the list of Members' enquiry points under document series G/TBT/ENQ/-.

[132] G/TBT/M/2, 4 October 1995, para. 5.

[133] According to this definition, an enquiry should be considered reasonable when it is limited to a specific product or group of products, but not when it refers to an entire business branch or field of regulations or conformity

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7. TRANSPARENCY'S CONTRIBUTION TO RESOLVING TRADE CONCERNS

Transparency has proved essential in facilitating the resolution of trade concerns between Members in a constructive fashion without resort to dispute settlement. Not only do Members raise their concerns regarding notified draft TBT measures or published final TBT measures bilaterally through informal discussions, but they also do so in the context of the 'specific trade concerns' (STC) mechanism developed by the TBT Committee. In terms of its mandate under Article 13 of the TBT Agreement to afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives, the TBT Committee has been used by Members as a forum to discuss specific concerns they have regarding proposed or existing measures of other Members, and has developed a procedure to make the discussion more efficient.[134]

Without transparency through notification of draft TBT measures and publication of adopted measures, this mechanism would not be as useful as it currently is. As noted by Horn, Mavroidis and Wijkström:

> The [TBT] Committee is essentially a forum for the multilateral review of national measures, in contrast to the regular [dispute settlement] system, where disputes are resolved through legally binding adjudication by judges in Panels and the [Appellate Body]. Through discussions, trading partners acquire more complete knowledge about each other's measures coming under

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assessment procedures; and when an enquiry refers to a composite product, it is desirable that the parts or components, for which information is sought, are defined to the extent possible. Further an enquiry point should be prepared to answer enquiries regarding the membership and participation of that Member, or of relevant bodies within its territory, in international and regional standardizing bodies and conformity assessment systems as well as in bilateral arrangements, with respect to a specific product or group of products, and to provide reasonable information on the provisions of such systems and arrangements.

[134] It is beyond the scope of this chapter to discuss the STC mechanism in further detail. For a more detailed discussion of this mechanism and the role of transparency in making it feasible, see Henrik Horn, Petros C. Mavroidis and Erik Wijkström, "Between Transparency and Adjudication: Environmental Measures in the WTO TBT Committee", ENTWINED Working Paper, (Feb. 28, 2012), http://www.econ-law.se/Papers/TBT%2028Feb2012–2.pdf. The authors argue that 'WTO Members defuse a significant number of grievances concerning environmental measures in the Committee on Technical Barriers to Trade.' An overview of the STCs raised in the TBT Committee is contained in the document series G/TBT/GEN/74/-.

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> the purview of the TBT Agreement, and are in [a] better position to determine whether to raise a dispute before the WTO dispute settlement system. WTO Members' 'notifications' starts this process.[135]

The STC discussions could lead to the revision of the notified measure or to further bilateral consultations between the Members involved. Thus, through the use of the STC mechanism, disputes can often be resolved without recourse to the expensive and time-consuming process of formal dispute settlement. Sometimes technical or financial assistance may be provided to facilitate compliance with the contested measure.[136] In addition, Members learn from each other and obtain clarity with regard to the operation of the different regulatory or standard-setting regimes in place in other Members. This may assist in facilitating compliance with the relevant technical regulations or standards. These very useful outcomes would be greatly diminished were it not for the existence of the transparency obligations, which provide the information needed for these discussions. In fact, the TBT Committee reports that 70 per cent of STCs relate to notified measures.[137]

8. IMPLEMENTATION OF TRANSPARENCY OBLIGATIONS

8.1 Record of Implementation

Since the entry into force of the TBT Agreement in 1995, the number of advance notifications of draft TBT measures has grown exponentially. As pointed out by the EU in the context of the sixth Triennial Review of the TBT Agreement, 'whereas less than 400 draft texts had been notified in 1995, the year of the entry into force of the TBT Agreement, this number has more than tripled in the last years to attain a peak of 1491 notifications in 2009.'[138] In 2012 this number increased to 1550 new

[135] *Ibid.*

[136] With regard to the STC mechanism of the SPS Committee, Joanne Scott has noted: 'The readiness of States to cooperate in problem-solving in the committee, including in the provision of technical assistance to developing country Members, stands in contrast to the difficulties associated with formal attempts to re-draw the parameters of special and differential treatment for developing countries within the SPS frame. Scott, *supra* note 11. The same applies to the STC mechanism in the TBT Committee.

[137] G/TBT/GEN/74/Rev.9, 11 October 2011, para. 2.

[138] G/TBT/W/354, 12 June 2012, para. 4.

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notifications. Until the end of 2012, 15,736 notifications of technical regulations and conformity assessment procedures were received from 116 Members.[139] The number of days allowed for comments under these notifications has increased from an average of 46.9 in 1995 to 56.6 in 2012. However, 86 notifications in 2012 did not provide a comment period, stated that it was inapplicable, or had a comment period which had already lapsed at the time of notification.[140] Surprisingly, very few of these notifications were made under the exceptions for urgent circumstances.[141]

Notifications of international agreements under Article 10.7 number 137 to date.[142] With regard to statements on the implementation and administration of the TBT Agreement, 126 Members had submitted at least one such statement by February 2013, of which 42 had submitted two or more statements.[143]

Most Members (143) have designated one or more enquiry points as required under Article 10.1 and 10.3 of the TBT Agreement.[144] However, this fact says nothing about the operational capacity of the enquiry points to deal with the multiplicity of requests for information they receive. In fact, an often-raised concern is that of delayed responses to requests for information, or the lack of any response at all.[145]

8.2 Problems with Implementation

Despite the great benefits to be obtained from implementation of the transparency provisions of the TBT Agreement, some compliance problems remain. In particular, as noted by the EU in June 2012:

> [c]ertain Members do not notify on a regular basis their technical regulations and conformity assessment procedures, or do not notify them at a draft stage. In the same vein, certain Members' Enquiry Points systematically do not answer any of the enquiries or comments received on individual notifications.

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[139] G/TBT/31, 2 March 2012, para. 8. In addition, 2,575 addenda and corrigenda to these notifications were made.
[140] *Ibid.* at para. 10.
[141] *Ibid.* at Annex A.
[142] *Ibid.* at para. 12.
[143] G/TBT/GEN/1/Rev.11, 29 February 2012.
[144] G/TBT/ENQ/38/Rev.1, 8 July 2011.
[145] See for example Japan's statement on this point in the context of the Sixth Triennial Review of the TBT Agreement, G/TBT/W/352, 7 May 2012.

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> This non-respect of the basic obligations seriously hampers the effectiveness of the procedure.[146]

The transparency obligations of the TBT Agreement may be difficult for some developing Members to comply with, in view of the resources they demand. Particularly in the area of TBT measures, where regulatory agencies and standard-setting bodies are diverse and a wide range of policy areas are covered, it may prove difficult for a less developed Member to maintain 'an effective Enquiry Point that can store thousands of documents on technical regulations, standards and conformity assessment procedures for the host as well as other Members.'[147] In 2009, the importance of the operational capacity of enquiry points was stressed during the Fifth Triennial Review of the TBT Agreement.[148] Although in developed countries, where regulatory transparency is the norm, compliance with the transparency obligations of the TBT Agreement entails few additional costs, many instances of non-compliance with the transparency obligations remain.

In fact, concerns with regard to inadequate implementation are very often raised as specific trade concerns (STCs) at meetings of the TBT Committee. Currently, the third-highest number of STCs raised in the TBT Committee to date (being 193 out of a total of 365) relate to transparency, exceeded only by the related issue of requests for further information (256 STCs) and concerns regarding unnecessary barriers to trade (213 STCs). An additional 75 STCs have been raised regarding the provision of a reasonable adaptation period before published measures come into force.[149]

Clearly therefore, the work done by the TBT Committee has an important role to play. In strengthening and operationalising transparency obligations, laying down procedural guidelines for their implementation, and providing technical assistance and opportunities for regulatory learning through sharing good practices with developing country Members that experience difficulty in complying with these obligations, these decisions are valuable tools to address the problems of implementation of transparency obligations. In this respect, the willingness of the Appellate Body to refer to decisions of the TBT Committee as interpretative tools under Article 31.3(a) of the VCLT is to be welcomed. The fact that this

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[146] G/TBT/W/354, 12 June 2012, para. 5.

[147] Robert Wolfe, "Regulatory Transparency, Developing Countries and the WTO" (2003) 2 World Trade Review 157 at 167.

[148] G/TBT/26, 12 November 2009, para. 54.

[149] G/TBT/31, 2 March 2012, Figure 5.

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gives these decisions legal effect in WTO disputes, to the extent that they 'bear specifically' on the interpretation of the relevant transparency provisions in the TBT Agreement, fleshing out and operationalising these treaty provisions serves to create a strong incentive for compliance with the guidelines they contain. It also creates impetus for further work in this regard in the TBT Committee.

9. CONCLUSION

It is widely recognised that '[o]n the whole, transparency mechanisms appear to be a particularly cost effective tool for avoiding unnecessary obstacles to trade.'[150] The transparency obligations regarding advance notification of draft TBT measures, publication of adopted measures and the explanation, upon request, of the justification for technical regulations hold great potential to improve market access possibilities.

Advance notification enables exporting Members to be informed of proposed new or amended TBT measures and to transmit this information to their exporters. This gives Members, and through them their traders, the opportunity to make comments regarding these proposals at an early stage and to have these comments taken into account in the regulatory process. They can also raise concerns on notified measures bilaterally or in multilateral STC discussions at TBT Committee meetings, thus facilitating opportunities to resolve trade concerns in a constructive manner without resort to dispute settlement.

The prompt publication requirement for adopted TBT measures is crucial in facilitating market access for exports from Members by greatly reducing the cost and difficulty of obtaining information on their trading partners' TBT measures. It also enables exporting Members to exercise their rights and police the implementation of the obligations of the TBT Agreement, by ensuring that Members obtain full information on the content of the TBT measures of importing Members in order to identify whether they are consistent with the TBT Agreement. The provision of a reasonable adaptation period before the entry into force of a published measure is of particular importance, especially for developing country Members and for small- and medium-sized enterprises in all Members, as exporters need time to adjust to new requirements without losing market access while they do so. The finding of the Appellate Body in *US – Clove Cigarettes* that the Doha Ministerial Decision, which determines the

[150] Moisé, *supra* note 4.

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reasonable adaptation period to be normally not less than six months, must be read into the relevant provision, as a subsequent agreement on the interpretation thereof under Article 31.3(a) of the VCLT is to be commended. It provides much needed clarity and certainty to exporters on the adaptation period they can expect, absent urgent circumstances.

The obligation to provide justification for technical regulations, upon request, supplements the other transparency provisions by enabling Members to obtain information beyond that relating to the existence and content of technical regulations, such as that regarding the legitimate objective of the measure, the reasons for its deviation from international standards, and why other less trade restrictive regulations were not adopted to achieve the objective of the measure. This information enables an exporting Member to raise any concerns regarding the measure in a focused manner, by pointing to specific inconsistencies with Article 2.2 to 2.4 of the TBT Agreement in bilateral discussions or in the multilateral forum of the TBT Committee. It can also play a useful role in dispute settlement proceedings by assisting an exporting Member in establishing a *prima facie* case of violation of Articles 2.2, 2.3 or 2.4.

Compliance with these transparency obligations can therefore lead to great benefits, both *ex ante* and *ex post*, for Members and their exporters. However, the lack of detailed procedural rules operationalising these provisions has hindered their effective implementation. To meet this need and strengthen the transparency provisions, the TBT Committee has undertaken extensive work, in the form of decisions clarifying and fleshing out Members' transparency obligations and giving procedural guidance for their implementation. The decisions, while not amounting to 'authoritative interpretations' of the transparency provisions, are commonly followed by Members and have resulted in improvements in transparency. These improvements can be expected to increase greatly now that the Appellate Body, in the recent *US – Tuna II* dispute, has shown a willingness to use the decisions of the TBT Committee as interpretative tools in dispute settlement.

The work of the TBT Committee has particular value for developing country Members. The impact of the transparency obligations for Members at different levels of development varies both in terms of the compliance burden they impose and in terms of the potential benefits they offer. Both the implementation of transparency obligations and managing the inflow of information resulting from increased transparency require institutional infrastructure and human and financial resources. To facilitate compliance with the transparency obligations and to assist Members to derive full benefits from them, the TBT Committee has created useful mechanisms to address constraints faced by less

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developed Members. Examples are the mechanisms to improve access to unofficial translations of documents; to provide access to the TBT IMS database, where notifications of TBT measures and other relevant sources of information are compiled; and to facilitate access to notified draft TBT measures by storing documents electronically on the WTO server and enabling access to these documents through hyperlinks in notifications.

In this way, the work of the TBT Committee, with regard to improving the procedural arrangements for transparency under the TBT Agreement, has been instrumental in furthering the realisation of the benefits of transparency while reducing some of its costs.

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