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# WTO Agreements on Technical Barriers to Trade and Sanitary and Phytosanitary Measures

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# What we'll cover today...

- What we do in OCCIC in the standards realm
  - What are standards?
  - The TBT Agreement
  - The SPS Agreement
  - A hypothetical – you be the lawyer
  - Any questions?
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# OCCIC and the Standards portfolio...

- What do we do?
  - Provide legal and policy guidance on:
    - Issues relating to the World Trade Organization's TBT and SPS Agreements
    - Issues relating to standards and technical regulations aspects of U.S. Free Trade Agreements
    - And other standards-related DOC initiatives:
      - U.S. role in standards-setting bodies



# Why are standards a trade issue?

- Standards probably affect 100% of trade!
- Non-tariff barriers to trade (NTBs)
- Measures such as testing and inspection procedures, labelling requirements, etc.:
  - Can impose significant costs and other burdens on firms, and reduce exports
  - May be used to protect domestic industry



# The WTO

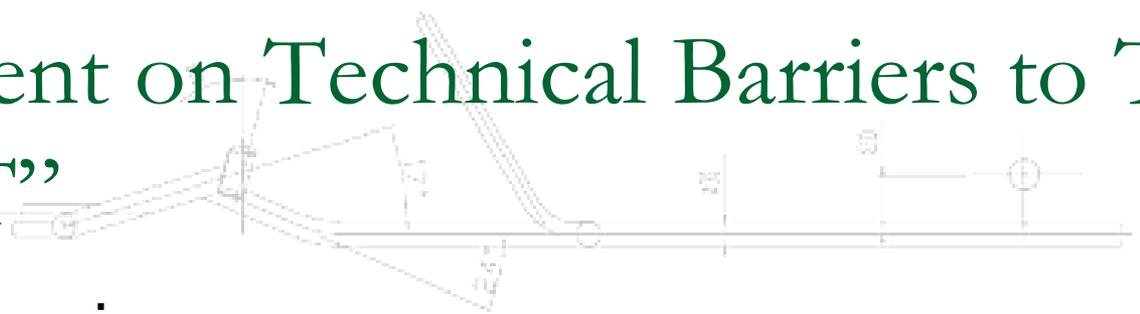
WORLD TRADE  
ORGANIZATION



- Seeks to drive all trade barriers towards use of tariffs, not other measures
- But some non-tariff barriers are justified, for example to protect human health and safety
- The Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) set Members' obligations for measures within their scope



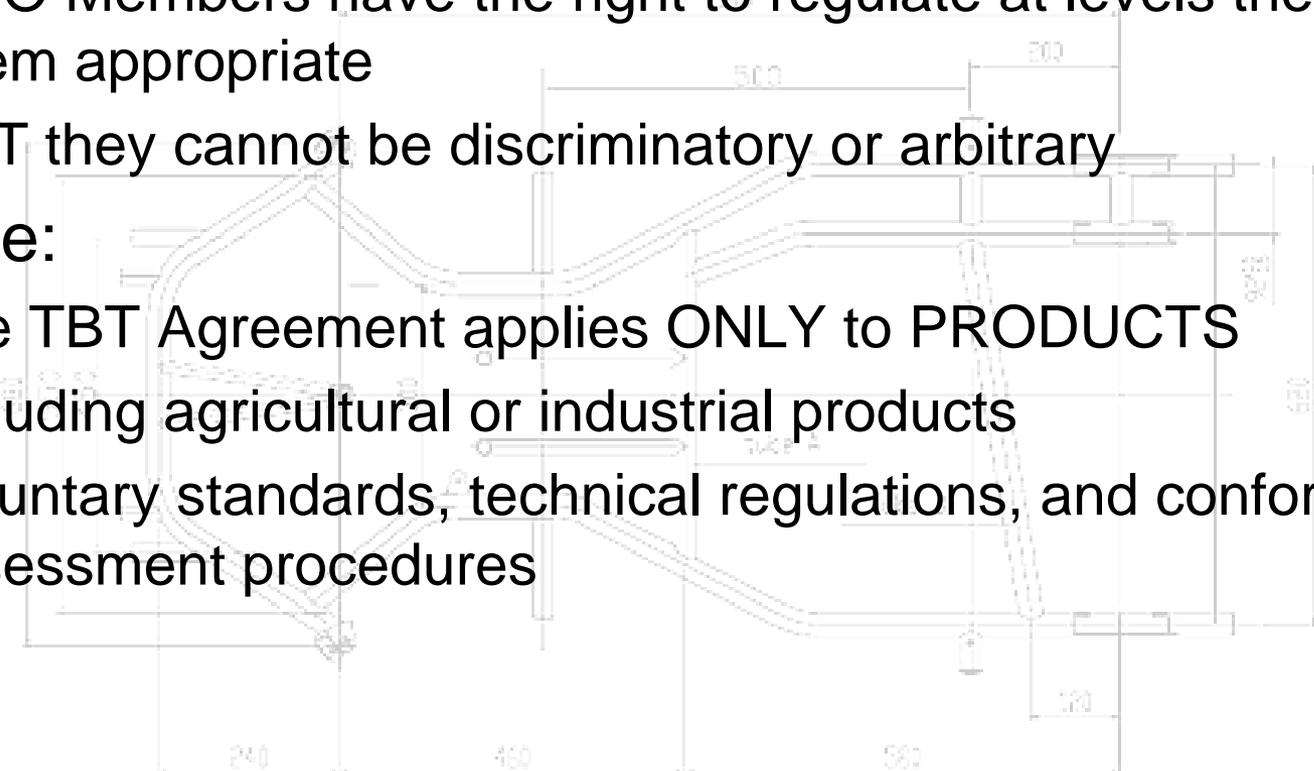
# Agreement on Technical Barriers to Trade, or “TBT”



## ■ Basic premise:

- ❑ WTO Members have the right to regulate at levels they deem appropriate
- ❑ BUT they cannot be discriminatory or arbitrary

## ■ Scope:

- ❑ The TBT Agreement applies **ONLY** to **PRODUCTS**
  - ❑ Including agricultural or industrial products
  - ❑ Voluntary standards, technical regulations, and conformity assessment procedures
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# What is a voluntary standard?

- Developed by industry or government
- Rules, guidelines or characteristics for products, or related processes and production methods
- NOT MANDATORY
- Can be: symbols, packaging, marking or labeling requirements



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# TBT coverage of voluntary standards

- Code of Good Practice (Annex 3 of TBT)
    - Takes most requirements for mandatory technical regulations and applies them to development and application of voluntary standards
  - Article 4:
    - Central government standardizing bodies required to comply with Code of Good Practice and Members must ensure such compliance
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# What is a “technical regulation”?

- Requirement for product characteristics or their related processes and production methods
- MANDATORY
- Can be requirements for: symbols, packaging, marking or labeling requirements

<b>Nutrition Facts</b>	
Serving Size 3 oz (85g) Servings Per Container 1	
Amount Per Serving	
<b>Calories</b> 180	Calories from Fat 90
% Daily Value*	
<b>Total Fat</b> 10g	<b>15%</b>
Saturated Fat 40g	<b>20%</b>
Trans Fat 0.5g	
<b>Cholesterol</b> 70mg	<b>23%</b>
<b>Sodium</b> 60mg	<b>3%</b>
<b>Total Carbohydrate</b> 0g	<b>0%</b>
Dietary Fiber 0g	<b>0%</b>
Sugars 0g	
<b>Protein</b> 22g	
Vitamin A 0%	• Vitamin C 0%
Calcium 2%	• Iron 15%
*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your caloric needs:	
	Calories: 2,000    2,500
Total Fat	Less than 65g    80g
Saturated Fat	Less than 20g    25g
Cholesterol	Less than 300mg    300mg
Sodium	Less than 2,400mg    2,400mg
Total Carbohydrate	300g    375g
Dietary Fiber	25g    30g
Calories per gram: Fat 9 • Carbohydrate 4 • Protein 4	

Mandatory FDA regulations for labeling of packaged foods

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# What are “conformity assessment procedures”?

- Procedures used to make sure that technical regulations or standards are fulfilled
- Includes:
  - sampling, testing and inspection;
  - evaluation, verification and assurance of conformity;
  - registration



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# Reasons countries have for establishing technical regulations or CAPs...

- “Legitimate objectives” include:
    - National security requirements
    - Prevention of deceptive practices (such as misleading labeling)
    - Protection of human health/safety, animal, plant life/health, environment
  - Unacceptable objectives are:
    - To protect domestic industry by applying regulations in an arbitrary or discriminatory manner against foreign imports
    - Unnecessary obstacles to trade
    - Example: EC Sardines Regulation
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# Obligations of Members

## Non-Discriminatory Treatment

- Members shall ensure that products imported from the territory of any Member shall be accorded National Treatment or Most Favored Nation (MFN) Treatment
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# Obligations of Members

## No Unnecessary Obstacles to Trade

- Members shall not prepare, adopt or apply a standard with a view to or with the effect of creating an unnecessary obstacle to trade, taking into account risks of non-fulfillment would create
  - Measures are not more trade restrictive than necessary to achieve the government's legitimate objective
  - Note, there may be necessary obstacles to trade
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# Unnecessary Obstacles to Trade...

- Burden of proof is on the complaining Member to show:
    - The objective for setting the standard is not legitimate
    - Or, although legitimate, another measure is available to fulfill the objective which is significantly less trade restrictive
      - Alternative measure
      - Reasonably available
      - Significantly less trade restrictive
      - Fulfills legitimate objective
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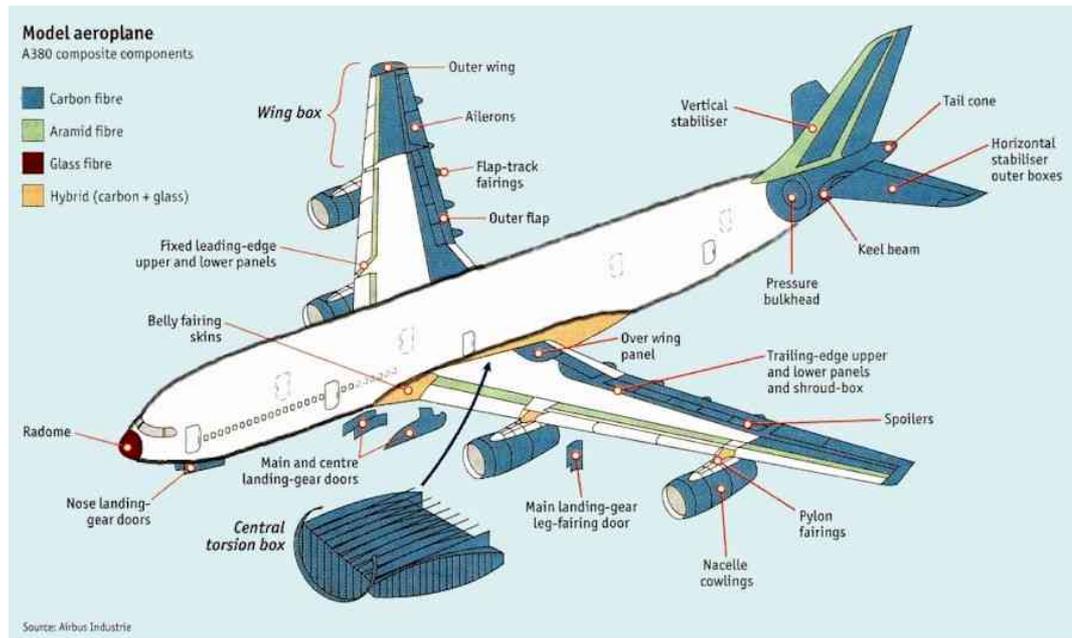
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# International Standards

- Must use them “as a basis,” unless “ineffective or inappropriate”
  - Members must also participate in international standards development through international standardizing bodies
  - Purpose is harmonization- to facilitate trade
  - “Rebuttable presumption” that if based on int’l standard, it is not an unnecessary obstacle to int’l trade
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# Performance vs. Design-based Standards

- Must use performance over design based standards wherever appropriate
  - (“soft” obligation)



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# Transparency requirements:

- IF technical regulation or conformity assessment procedure is:
    - Not in accordance with an international standard, and
    - Will have a significant effect on trade, then
  - Members are obligated to:
    - Publish a notification of the regulation/procedure,
    - Notify WTO of the regulation,
    - Provide copies upon request, allow for comments,
    - And take those comments “into account”
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# Notification requirements...

- Note: applies to “Members”
  - Must provide “reasonable time” to make comments:
    - TBT Cmtee. has said 60 days
  - Must provide “reasonable interval” between publication and entry into force:
    - TBT Cmtee has said “not less than 6 months” except when would be ineffective for fulfilling legitimate objective
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# Inquiry Point



- NIST inquiry point for all U.S. technical regulations
- USDA is inquiry point for SPS measures
- Members must notify for local governments one level below central
- Trade Agreements Act - places this obligation in DOC
- DOO placed with NIST

# Peru Sardines Case

EC-Trade Description of Sardines

WT/DS231 (AB- 2002-3)



- Found that EC Sardine Regulation which permitted only a certain European sardine species (*sardina pilchardus* Walbaum, found in Eastern North Atlantic, Mediterranean and Black Seas) to be marketed as “preserved sardines” inconsistent with Article 2.4 bc was contrary to relevant international standard (Codex)
- Peru wanted the Codex standard in order to market its products: *Sardinops sagax sagax*, found in Eastern Pacific Ocean

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# TBT Committee International Standards: Decisions and Recommendations

- Principles for development of international standards, guides, and recommendations:
    - Transparency
    - Openness
    - Impartiality and Consensus
    - Effectiveness and Relevance
    - Coherence (avoid duplication by cooperation)
    - Development dimension
  - Note: now incorporating into FTAs
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# TBT Chapters in U.S. FTAs

- Coverage of central government bodies
  - International Standards: TBT Committee Decision
  - Technical Regulations: equivalence
  - Conformity Assessment: trade facilitation, acceptance of results of CABs in other Party, recognition of CABs, negotiations
  - Transparency: non-discriminatory opportunities for persons to participate; notifications to Parties at same time made to WTO; minimum 60 days for comments; requires publication (print or electronically) of responses to significant comments at time of final adoption of regulation.
  - 5 year grace period to implement transparency provisions.
  - Establishes TBT Committee or coordinator
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# WTO Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS”)



- Prescribes basic rules for food safety and animal and plant measures.
  - Like TBT, does not establish specific standards, but sets forth general requirements and procedures to ensure that SPS measures protect against risks, rather than serve as disguised trade barriers.
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# Right to Adopt SPS Measures, choose level of protection

- No WTO Member should be prevented from adopting and enforcing SPS measures necessary to protect the life and health of humans, animals and plants in their territory so long as not discriminatory or a disguised restriction on trade.





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# Rights and Obligations

- Members have the right to take SPS measures necessary for the protection of human, animal/plant life or health
  - Based on scientific principles & not maintained without sufficient scientific evidence (except for Article 5.7)
  - Risk assessment required, taking into account available scientific evidence & economic factors
  - Cannot discriminate, or be applied in a manner constituting a disguised restriction on international trade
  - SPS measures which conform to this Agreement presumed in accordance with GATT 1994 and in particular, Article XX(b)
  - Notification obligation (similar to TBT) in Annex B
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# Definition of SPS Measure:

- Any measure applied:
    - to protect animals or plants from pests and diseases;
    - to protect humans or animals from contaminants or toxins in foods;
    - to protect humans from diseases carried by animals, plants or pests; or
    - to prevent or limit other damage from pests
  - Within the territory of the Member
  - Includes:
    - Laws, regulations, production methods;
    - Testing, inspection, certification and approval procedures;
    - Quarantine treatments;
    - Sampling procedures and methods or risk assessment; and
    - Packaging and labelling requirements directly related to food safety
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## Precaution (*not* Precautionary Principle)

- Where there is a lack of scientific evidence concerning a certain measure, the SPS Agreement allows for interim precautionary measures to be instituted, but Members have an obligation to review such measures in light of developing science.
  - Beef Hormones Case (1998)
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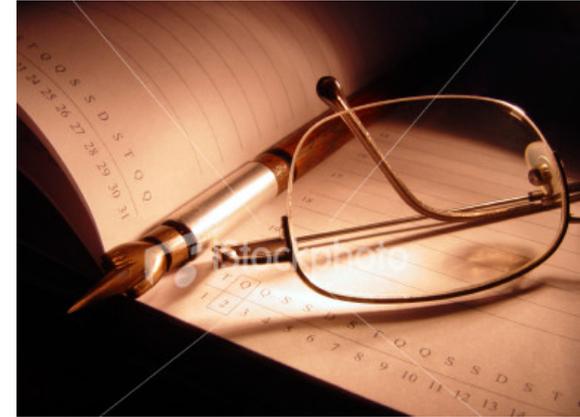
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# International Standards in SPS

- Base measures on standard, guideline, or recommendation from recognized organization (Art. 3.1)
    - Codex Alimentarius
    - World Organisation for Animal Health (OIE)
    - International Plant Protection Convention (IPPC)
  
  - Safe Harbor (Art. 3.2)
    - Application of standard, guideline, or recommendation from three named entities deemed consistent
  
  - Higher standard allowed (Art. 3.3)
    - Must have scientific justification and be justified by scientific risk assessment process
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# Hypothetical – You be the lawyer!

A small U.S. food manufacturer comes to you with a complaint: it has become aware of a new requirement on labeling of certain “high risk” packaged foods by a small foreign country. The labeling requirement is that high risk packaged foods must bear a large red “stop sign” on the packaging to protect the health of the country’s consumers. No neighboring countries have similar requirements.



*What can you, as a lawyer in OCCIC, do to help the ITA team?*

*What are the questions you should be thinking of as you tackle the problem?*

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# Thinking about Compliance Problems

- Practical questions:
    - Are there other companies that have expressed concerns? Are they similar to this concern?
    - Is there a regulation at issue? If so, do we have a copy of it in a language we can read?
    - Is there an ITA team tackling the case?
    - What are the policy implications of this case?
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# Thinking about Compliance Problems

- Legal questions:
    - Is this an SPS or TBT measure? Is it implemented by a government entity – central, department, sub-regional?
    - Does it affect international trade?
    - Is there a relevant international standard?
    - Was the measure notified to the WTO?
    - Is the measure discriminatory?
    - Is the measure too restrictive? Any alternatives?
    - If so, what is the country's justification?
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