CHAPTER 11

STANDARDS AND CONFORMITY ASSESSMENT SYSTEMS

OVERVIEW OF RULES

1. BACKGROUND OF RULES

(1) STANDARDS AND CONFORMITY ASSESSMENT SYSTEM

"Standards" related to products quality and assessment of whether products conform to the criteria ("Assessment") (hereinafter referred to "Standards and Conformity Assessment System") are domestic measures implemented by each country with various policy objectives such as health protection, consumer protection, environmental protection, quality requirements, information services and so on. Originally, such measures were intended for legitimate policy objectives and were not intended for the purpose of trade restrictions. However, standards and conformity assessment systems may have the effect of trade restrictions when conformity assessment is discriminatory, or when excessive regulations are imposed on imported products even when the same standards are applied to the imported productss and domestic products.

Conventional trade restrictive measures at the border, such as high tariffs or an import licensing system etc. have been reduced gradually by establishing rules through GATT/WTO negotiations. On the other hand, as corrections of trade restrictive measures at the border are made, with the increase in cross-border trade and economic transactions, trade-restrictive aspects of domestic measures like Standards and the Conformity Assessment System have become apparent and is attracting attention as systems for establishing Non-tariff Barriers (NTB)[1] [2].

(2) HISTORICAL BACKGROUND

Traditionally, domestic measures including Standards and Conformity Assessment Systems were considered to fall under the authority of each country. In fact, the main objective of the GATT/WTO negotiations at first was the formation of rules for border measures, and GATT was not active in rule-making for domestic regulations. In practice, there are cases where a reasonable difference is observed in product regulations of each country due to differences in climatic and geographical factors. Therefore, international unification of the Standards and Conformity Assessment Systems is not necessarily fair and rational in some aspects. On the other hand, where each country creates arbitrary technical standards and where there is no harmonization mechanism for the regulations, unnecessary obstacles may be created for companies to conduct cross-border

[1] The WTO Annual Report FY2005 (World Trade Report) titled, "Trade, standards and the WTO", sheds light on the tension between trade barriers and legitimate policy objectives. In addition, in the FY2012 world trade report titled, "Trade and public policies: A closer look at non-tariff measures in the 21st century", mainly summarized the TBT Agreement and SPS Agreement along with the recent adjustments to NTB and the trends of international cooperation in the NTB field.

[2] The scope of NTBs is very wide, including domestic taxes, domestic regulatory measures, anti-dumping, countervailing duties, country of origin regulations, quantitative restrictions, subsidies and so on (WTO Annual Report FY2012).

trade transactions due to disparity in standards of each country, and economic welfare may decrease as a whole. Moreover, some standards and conformity assessment system are established for the purpose of protecting the domestic industry. Additionally, due to non-transparency in the process of standard-setting by countries, there are cases where changes are made in the established standards which incur high costs for the industries. International rules relating to Standards and Conformity Assessment Systems have been developed based on the coordination of such trade liberalization benefits and regulatory authority that establish standards and conformity assessment systems in each country.

The initial efforts were made with the aim of developing international standards with international non-governmental organizations and for the adoption of those standards by as many countries as possible. Efforts in the formation of Standards and Conformity Assessment Systems were carried out through various international authorities such as ISO: International Organization for Standardization, IEC: International Electro-technical Commission, ITU: International Telecommunication Union, and Joint FAO/WHO: Food Standards Programme Codex Alimentarius Commission.

One of the international rules that was established under the GATT / WTO regime is the “Agreement on Technical Barriers to Trade (GATT Standards Code)” agreed as a result of the Tokyo round in 1979. The GATT Standards Code was joined by interested member countries. To avoid the creation of unnecessary obstacles in trade by Standards and Conformity Assessment Systems established by countries, the GATT Standards Code provided provisions for ensuring prohibition of discriminatory technical regulation for domestic and international products, and ensured transparency of the procedures during establishment of standards and technical regulations and amendments to them. In the agreement, only domestic measures regulating product specifications (specs) such as the quality and performance were covered and domestic measures for process of production such as Processes and Production Methods (hereinafter “PPM”) were excluded. Although a limited number of countries joined the GATT Standards Code, there was great significance in reaching an agreement for the first time on a rule to adjust domestic regulations of countries that establish Standards and Conformity Assessment Systems.

Later, in the Uruguay Round which ended in 1995, the GATT Standards Code became a part of the “Agreement on Technical Barriers to Trade” (hereinafter referred to as “TBT”) agreed by all member countries. In the TBT Agreement, clarification and strengthening of obligations by member countries and domestic measures for PPM regulations were included. In addition, provisions to promote the international harmonization of Standards and Conformity Assessment Systems, such as the development of technical regulations on the basis of international standards (TBT Agreement Article 2.4) and active participation in international standardization activities (TBT Agreement Article 2.5) etc., were included.

In addition, specific disciplines concerning sanitary and phytosanitary measures were negotiated as a part of the Uruguay Round agricultural negotiations. In the final agreement, however, sanitary and phytosanitary measures were addressed in a separate agreement, the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter referred to as the “SPS Agreement”). As a result of the Uruguay Round, the TBT Agreement and the SPS Agreement were annexed to the WTO Agreement and subject to the single undertaking requirement. This change has significantly expanded the range of countries covered under agreements in these areas and has strengthened international disciplines.

2. LEGAL FRAMEWORK

(1) RELATIONSHIP BETWEEN GATT AND TBT AGREEMENT/SPS AGREEMENT

In order to understand the overall picture of regulations on Standards and Conformity Assessment Systems, first the major provisions related to Standards and Conformity Assessment Systems in the GATT need to be discussed. Members must not treat imported products less favourably in comparison to domestic products (Article III: 4 of the GATT) and there should be no discriminations against any country (Article I: 1 of the GATT) regarding the requirements and regulations affecting the imports from other WTO member countries. Furthermore, measures and laws affecting the sales, distribution, transportation, inspection, processing etc. of products should be published (Article X: 1 of the GATT). In addition, prohibition or restrictions of import/exports is permitted when necessary in order to apply standards related to the classification of products, sales etc. (Article XI: 2(b) of the GATT).

The scope of Article 2.1 of the TBT Agreement and Article III: 4 of the GATT overlap to a considerable extent. For example, in Article III: 4 of the GATT related to "requirements and regulations affecting imports", the WTO has imposed an obligation on member countries regarding imported products from other WTO member countries to grant "treatment no less favourable than that accorded to like products" of domestic origin. However, some differences exist in the scope of application and content of regulations between GATT and the TBT Agreement. Measures subject to GATT Article III: 4 laws, regulations and requirements which influence imports -- all measures of the importing country excluding financial payment obligations of tariffs, import taxes, etc. (Articles III:1 and III:2 of GATT). Requirements with which compliance is voluntary are also included in the scope of GATT Article III: 4 (India–Autos (DS146, 175)). In contrast, measures subject to Article 2.1 of the TBT Agreement are limited to "technical regulations".

According to the Appellate Body precedent in the EC–Asbestos (DS135), "the TBT Agreement imposes obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT", and it also indicated that GATT and the TBT Agreement are in the relationship of a general law and a special law. However, the Appellate Body in the recent US–Tuna II (DS381) case held that "the obligations under Article 2.1 of the TBT Agreement and Article III: 4 of the GATT are not substantially the same", and criticized the Panel for only making findings under Article 2.1 of the TBT Agreement and failing to do so under GATT Article III:4. In future WTO dispute settlement proceedings, there will be many situations where the GATT and TBT are overlappingly applied.

(2) TBT AGREEMENT

(a) Target products and the three pillars of TBT Agreement

The TBT Agreement, with its three pillars of technical regulations, standards, conformity assessment procedures, provides various mechanisms for the acceleration of international harmonization of regulations and mutual acknowledgement and promotes trade liberalization so that Standards and Conformity Assessment Systems do not create unnecessary obstacles to international trade.

The TBT Agreement covers not only industrial products but also includes all agricultural products (Article 1.3 of the TBT Agreement). However, sanitary and phytosanitary measures in the SPS Agreement and procurement by government agencies for their own production and consumption covered by the Agreement on Government Procurement are exempt from the TBT Agreement. (For details on the Agreement on Government Procurement, refer to Article 1.4 and 1.5

of TBT Agreement and Chapter 14 of Part II).

"Technical regulations" refer to documents that lay down product characteristics or their related PPM, with which compliance is mandatory. "Standards" refers to documents in which compliance is not mandatory. In Japan, typical standards are the Japan Agricultural Standards (JAS) and the Japanese Industrial Standards (JIS). Unlike the GATT Standards Code, the TBT Agreement covers not only domestic measures relating to the quality, performance or the product specifications (specs) but also targets domestic measures related to PPM regulations (Paragraph 1 and 2, Annex 1 of the TBT Agreement). In addition, labelling regulations (e.g. origin labelling regulations) and packaging regulations are also included in the scope of technical regulations and standards (TBT Agreement preamble). Consequently, it can be said that pursuant to the TBT Agreement, technical regulations broadly cover product regulations. "Conformity assessment procedures" are a set of procedures to determine whether or not a product is in compliance with the applicable standards. They include product sampling, test/inspection, and procedures for assuring compliance, confirmation, warranty, procedures for registration/authorization etc. (paragraph 3, Annex 1 of the TBT Agreement).

Often contested in WTO dispute settlement procedures, the definitions of technical regulations have been clarified. Three requirements of technical regulations in the EC-Asbestos (DS135) and EC-sardines case (DS231) have been made clear. Namely, (1) the products subject to the regulation are identifiable; (2) the regulation sets the product specification; and (3) compliance with the regulations is mandatory. When determining the necessity of a "TBT notification", the three requirements of technical regulations should be considered (refer to (B) (iv)).

The case that set out the first and second requirements, *"the products subject to regulation are identified and the regulation sets the product specification"*, is EC-Asbestos (DS135). In this case, a major issue was whether or not measures taken by France prohibiting the manufacture, processing, sales and import of asbestos violated Article 2 of the TBT Agreement. The panel judged that the target products were not identified as the measures prohibited all products containing asbestos, and since it did not generally specify particular products, it did not satisfy the above two requirements. However, the Appellate Body overruled this decision, saying that there is no need for the measures to be specific about the target product by the name, etc., and that the measures identifying the target products as "all products (that may contain asbestos as a raw material)" and requiring the specification in a negative form that all products "shall not contain asbestos" was sufficient to satisfy the above two requirements.[3]

In addition, the Appellate Body in the EU–Seal Products (DS400, 401) case reversed the Panel's decision that the measures, which prohibit import/export and regional sale of seals and seal products, satisfied the three requirements and were therefore technical regulation. The Appellate Body determined that the measures did not regulate the product specifications because the requirements for the exceptions (requirements for allowing import/export and regional sale of seal products) were not aimed at regulating the product specifications but rather sought to prohibit or allow imports depending on the specifications of hunters, hunting methods, and objectives of hunts. Thus, it concluded that the measures were not technical regulations (whether or not the measures regulated PPM and therefore constituted technical regulations could be a separate issue, but the Appellate Body did not made determination, as the Panel did not sufficiently discuss this point).

The cases which set out the third requirement, "compliance with the regulations is made

[3] According to the EC-Asbestos case, regulations that target all the products will also be handled as technical regulations. However, at least in practice to date, regulations covering all products are hardly ever discussed, as many of the target regulations of the TBT notifications and TBT Committee are specific to identified products to some extent.

mandatory", are the United States-Tuna II case and the United States-COOL case (DS384, 386). In the United States-Tuna II case (DS381), a ban on the dolphin-safe labelling on landed tuna unless specific fishing methods were used was contested. In this case, distribution/sale of tuna products in the US market was allowed even without the dolphin-safe labelling. The Panel cited the precedent of "measures to prohibit specific geographical indications" (Article 22 of the TRIPS Agreement) (EC-Geographical Indications (DS290)) and decided that compliance was made mandatory since "labelling is not possible unless tuna is caught using specific fishing methods". (One panelist had the opposing view that it was considered mandatory if the products could be sold in the market without labelling). The Appellate Body rejected the United States' argument that "compliance of labelling is not compulsory because marketing is possible without labelling in the United States", and said that the possibility of sales in the market had no relation with the requirement. On the other hand, the Panel on the United States-COOL case (DS384, 386) determined that the COOL measures were technical regulations. For the related measures (Letter of Secretary of Agriculture facilitating voluntary enforcement of additional regulations), the Panel stated that they needed to consider whether or not it was de facto mandatory, and concluded that the related measures were not technical regulations (the point did not become an issue before the Appellate Body because the United States repealed the Letter and the claims on the said Letter were withdrawn).

(b) Obligations of the Member

The TBT Agreement imposes various obligations upon WTO member countries. They can be classified into substantive discipline on details of technical regulations, standards, and conformity assessment procedures (hereinafter referred to as "technical regulations etc.", see below i-iii) and procedural discipline related to establishing technical regulations etc. (see below iv)

The main obligations of the member countries relating to technical regulations will be explained below. Since for standards and conformity assessment procedures the TBT Agreement includes disciplines parallel to those applying to technical regulations, they will not be dealt with in this document. With respect to standards and conformity assessment procedures, refer to Article 5 (conformity assessment procedures by central government agencies) and Annex 3 (code of good practice for the preparation, adoption and application of standards) of the TBT Agreement.

i. National treatment, Most-Favoured-Nation treatment (TBT Agreement Article 2.1)

Regarding technical regulations for products imported from other WTO member countries, member countries have the obligation to grant no less favourable treatment for like products of (1) domestic products and (2) products imported from a third country (TBT Agreement Section 2.1). Seeking a level playing field (condition of competition) for domestic products and imported products (and imports from third party countries), this article sets out the national treatment principle (see GATT Part II, Chapter 2, Article I) and the Most-favoured-nation principle (GATT Part II, Chapter 1), which are basic principles of the WTO Agreement.

In past dispute settlement procedures involving Article 2.1 of the TBT Agreement, Panels and the Appellate Body analyzed three elements: (1) whether the target measure was a technical regulation; (2) whether the imported products and domestic products (and imported products from third countries) are like products; and (3) whether imported products are treated less favourably compared to domestic products (and imported products from third countries).

With regard to the above-mentioned concepts of "like products" and "treatment no less favourable", to date Panels and the Appellate Body have made judgments in relation with Article I and Article III of the GATT. Two points should be noted with regard to "treatment no less favourable". The first point is that not only legal discrimination (when the laws and regulations are

discriminatory with respect to nationality), but de facto discrimination (where due to differences in regulations for imported products and domestic products the conditions of competition faced by imported products have changed) is also included in "treatment no less favourable". The second point is, unlike the precedent in the EC-Asbestos case (DS135), the United States-Tobacco case (DS406) held that instead of comparing the "overall imported products" and "domestic like products", the comparison of "products of the petitioning country" with the "domestic products of the same type" will suffice; it then found that the United States measures treated products of the petitioning country less favourably. Both of these judgments are attracting attention as they expand the concept of "treatment no less favourable". Hereafter, future cases will be observed carefully as they clarify the scope of the TBT Agreement discipline.

Finally, the balance of the benefits of trade liberalization and the interests of the authority of the technical regulations of the member countries in the interpretation of Article 2.1 of the TBT Agreement is also an important point. In the TBT Agreement, there is no provision on general exceptions corresponding to Article XX of the GATT. In the United States-Tobacco case (DS406), the Appellate Body held that even if changes to the conditions of competition to treat the imported products are less favourable than the domestic products, where there is a "legitimate regulatory distinction" such changes do not amount to discrimination against imports; thus, it does not violate Article 2.1 of the TBT Agreement because such changes do not constitute "treatment less favourable" under that Article. More specifically, the Appellate Body determined whether the design, architecture, structure, operation and application of a technical regulation indicated whether import products are treated in an even-handed manner. The above determination criteria were also used in the reports of the United States–Tuna II case (DS381) and the United States–COOL case (DS384, 386) that were issued after the determination.[4]

ii. Necessity Rule (Article 2.2 of the TBT Agreement)

Article 2.2 of the TBT Agreement provides that WTO countries should not introduce technical regulations that are more trade-restrictive than necessary to achieve the objectives. Unlike the Article 2.1 of the TBT Agreement, this section applies in cases where imported products and domestic products are treated similarly and also in cases where domestic products do not exist. In addition, this Article includes a "necessity test" to determine whether any technical regulation fulfils a legitimate policy objective allowed by the TBT Agreement. Similar to Article 2.1 of the TBT Agreement (review of exemptions), it provides balancing function between the benefits of trade liberalization and the interests of the authority of technical regulations of the member countries.

In dispute settlement proceedings to date involving the TBT Agreement, Panels and the Appellate Body analyzed two elements: (1) whether the technical regulations in question fulfill a legitimate objective and (2) whether the technical regulations in question are more trade restrictive than necessary to fulfil that legitimate objective (the United States-Tuna II case (DS381) and the United States-COOL case (DS384, 386)).

According to the TBT Agreement, there are five "legitimate objectives": "the necessity for national security"; "prevention of fraudulent usage"; "protection of human health and safety"; "protection of life and health of animals and plants"; and "environmental safety". However, this is only an illustrative list and technical regulations for other objectives are not excluded. (This is different than Article XX of the GATT, which lists 10 specific justified reasons). According to precedent, determination of the "legitimate objective" was made on the basis of the documents of

[4] In the EU-Seal Products case (DS400, 401), the Panel adopted the determination criteria described in the text, but the Appellate Body did not determine that the measures were not technical regulations and thus did not discuss Article 2.1 of the TBT Agreement.

the technical regulation or its legislative history, as well as other structures and operations etc. of the technical regulations (United States-Tuna II case (DS381)). In addition, it has been decided that a threshold does not exist for the "fulfillment" of the legitimate objective, (United States-COOL case (DS384, 386)).

An assessment of whether the technical regulation is "more trade-restrictive than necessary" involves "holistic weighing and balancing" of the following factors: (1) the degree of contribution of fulfilling the objectives, (2) the degree of trade restrictions, and (3) the risk incurred by non-fulfillment of the objectives. In normal cases, the above three points are addressed by comparing the technical regulation and reasonably available possible alternative measures. Even if any of these factors cannot be accurately quantified and can only be assessed in qualitative terms, the Panel should conduct weighing and balancing rather than ending its analysis with a conclusion that the burden of proof has not been fulfilled. The following three points are specifically considered: (1) whether less restrictive alternative measures exist that can achieve the same policy objectives of the challenged technical regulations; (2) whether such alternative measures fulfill the legitimate objectives of the technical regulations to the same extent; (3) the risk when the legitimate objectives are not fulfilled; and (4) whether the alternative measures can be reasonably implemented (United States-Tuna II (DS381) and United States-COOL (DS384, 386)).

To summarize the above necessity rule, it can be considered that technical regulations that fulfill urgent and important policy objectives do not violate Article 2.2 of the TBT Agreement even if their level of restriction is considerably high. On the other hand, a low level of restriction for less important policy objectives violates the Article 2.2 of the TBT Agreement. In the four precedents to date (United States-Tuna II (DS381), United States-COOL (DS384, 386), EC-Seal Products (DS400, 401), and United States-Tobacco (DS406)) in which a violation of Article 2.2 was alleged, the Appellate Body did not find that the technical regulation violated this Article. However, the Appellate Body in the EC-Seal Products case determined that the measures at issue were not technical regulations and did not make determination on the violation of the TBT Agreement, including this Article. We must await future cases to determine whether the hurdles for violation of this Article are high or low.

iii. Formation of technical regulations with International standards as their basis (Article 2.4 of TBT Agreement)

When relevant international standards exist or establishment is imminent, the WTO member countries bear an obligation to use such international standards as the basis for their technical regulations. However, if the international standards are neither effective nor applicable to fulfill the legitimate objectives of the technical standards, due to climatic or geographical factors or due to basic technical problems, then there is no need to use them as the basis (Article 2.4 of the TBT Agreement).

In the United States-Tuna II case (DS381), the Panel and the Appellate Body determined the applicability of the Article using the following three steps: (1) whether a relevant international standard exists or establishment of such a standard was imminent; (2) whether the international standard is used "as a basis" for the challenged technical regulation; and (3) whether there are any reasons for exemption. According to precedent, the term "relevant" means "to bear upon, relate to or be pertinent to". In practice, the term is interpreted taking into account the similarity of the target products and technical requirements (EC-Sardines (DS231)). There is no definition of "international standards" in the TBT Agreement, but the "six principles of international standards" adopted in the second triennial review on TBT Agreement ((d) see (1)) is referenced as an interpretative guideline to this Article (the United States-Tuna II case (DS381)). The six principles that international standards should satisfy are: (1) transparency, (2) openness, (3) impartiality and

consensus, (4) effectiveness and relevance, (5) coherence, and (6) a development dimension. The background of such reference was the triennial review on the TBT Agreement adopted the text by the consensus of all the WTO member countries.

It should be noted that even when international standards are established after the technical regulations are introduced, Article 2.4 of the TBT Agreement will be applicable according to the EC-Sardines case (DS231).

According to the precedent, the requirement regarding "whether the international standard is used "as a basis" for the technical regulation", the technical regulation is not required to be the same as the international standards; however, it should be closely related and should not contradict the international standard (EC-Sardines case (DS231)).

Regarding the burden of proof[5] related to the exemption, as with the precedent regarding Article 3.1 and Article 3.3 of the SPS Agreement (EC-Hormones case (DS26)), first, the claimant is obligated to prove that the relevant international standards are appropriate and effective (EC-Sardines case (DS231)).

iv. Ensuring transparency during the establishment of technical regulations (Article 2.5, Articles 2.9 to 2.12 and Article 10 of the TBT Agreement)

When WTO member countries establish technical regulations, the TBT Agreement places an obligation to accept comments from other Members and to ensure transparency in establishment procedures.

First, when WTO members make amendments or establish technical regulations, implementing Member countries must notify the WTO Secretariat in advance with a draft of the technical regulations (Article 2.9 of the TBT Agreement). The implementing countries must submit TBT notifications when proposed technical regulations are not consistent with relevant international standards except when the subject product is not traded (Introductory clause, Article 2.9.2 of the TBT Agreement). "Revision and Establishment" not only includes the adoption of technical regulations but also the relaxation of technical regulations; however, they are not included in case of deregulations and TBT notifications are not necessary.

The number of notifications made in 2017 was 2,585 (of which 36 were made by Japan). The number of notifications from 1995 to 2017 amounted to 30,265 (including 854 notifications by Japan). (See Figure II-11-1.)

A TBT notification format has been established to include the details of the technical regulations, objectives, covered products, enforcement schedule, related laws etc. (It was approved in the first TBT Agreement triennial review decision). Based on the information provided therein, other WTO members can make comments to the implementing country, and the implementing country has the obligation to consider these comments (Article 2.9.4 of the TBT Agreement). Additionally, where there are no TBT notifications, Members can request explanations on the validity of the technical regulations from the implementing country (Article 2.5 of the TBT Agreement).

In order to consider and reflect the views and concerns of WTO members, the schedule for the enforcement process of technical regulations etc., is as follows. It is encouraged to provide 60 days for comments on TBT notification (second TBT Agreement triennial review decision). Furthermore, a "sufficient period" must be provided between the end of the comment period and publication of the final measure in order to consider the opinions that have been submitted (fourth TBT

[5] The concept of burden of proof differs from that of the Japanese code of civil procedure. Under WTO law, the concept is to determine which party shall prove the legal claim (violation or defense) that it makes. Unlike the burden of proof under the Japanese code of civil procedure, it does not require that only a single party exercises the right to prove.

Agreement triennial review decision).

In addition, WTO member countries have an obligation to set up an enquiry point to answer a wide range of questions from other WTO members and interested parties about their technical regulations (Articles 10.1 to 10.3 of the TBT agreement). The list of inquiry points in each country has been published on the WTO website. In Japan, the Ministry of Foreign Affairs has been specified as the enquiry points. Furthermore, when requested by other WTO members, the developed WTO member countries have an obligation to provide an applicable laws under the TBT notification or a summary of the laws in English, French and Spanish, if the law is very long, (Article 10.5 of the TBT Agreement).

WTO member countries also have an obligation to ensure that all enforced technical regulations can be accessed by stakeholders (Article 2.11 of the TBT Agreement). The Government of Japan releases all enforced technical regulations through the Official Gazette and on its website.

Figure II-11-1 Number of TBT Notifications

	Japan	US	EU	China	India	Brazil	Russia	Total of All Member Countries
No. of Notifications in 2017	36	295	101	59	17	119	9	2,585
Total No. of Notifications since Accession to WTO	854	3,193	1,463	1,313	139	1,572	86	30,265

Source: G/TBT/40: TWENTY-THIRD ANNUAL REVIEW OF THE IMPLEMENTAION AND OPERATION OF THE TBT AGREEMENT

Figure II-11-2 Number of STCs raised

Members/Regions	Japan	U.S.	EU	Canada	Mexico	Australia	NZ	Republic of Korea
No. of STCs raised in 2017 (inc. from previous year)	53	105	115	62	21	39	15	17
No. of STCs raised since Accession to the WTO	84	240	258	115	83	62	39	59

(c) TBT Committee (Article 13 of the TBT Agreement)

The TBT Committee is the body established by the WTO to deal with matters related to enforcement of the TBT Agreement and fulfillment of its objectives (TBT Agreement, Article 13). As for the mechanism of the WTO, see 4. “WTO Mechanism”, General Remarks of Part II).

The TBT Committee mainly deal with Specific Trade Concerns (STC), which are protectionist measures of member countries in the form of technical regulations (see TBT Triennial Review (d)), creates guidelines related to the TBT Agreement, and, shares experiences of individual countries.

Concerns expressed by Japan at meetings of the TBT Committee about individual measures of

each country described in Part I fall under the above STCs (specific trade concerns). In 2017, the number of STCs discussed was the largest ever (178 cases), of which 27 cases were new and the rest were those that had been continued from before. Many of the STCs were brought by developed countries, such as Japan, the United States, the EU, and Canada. Japan also attaches importance to opportunities to express concerns to other WTO Members at TBT Committee meetings.

(d) The TBT Agreement Triennial Review (Article 15.4 of the TBT Agreement)

In accordance with Article 15.4 of the TBT Agreement, the TBT Committee reviews the implementation and management of the TBT Agreement every three years. The TBT Agreement Triennial Review has been conducted every three years since 1997. More recently, the 8th TBT Triennial Review Decision was adopted by consensus by the all WTO member countries in November 2018.

In subsequent TBT Agreement Triennial Reviews, procedures for TBT notifications and the implementation procedures by the TBT Committee have been debated and the rules for implementation have been gradually defined. Notably, six principles for international standards adopted in the second TBT Agreement Triennial Review in 2000 are considered to be a reference to Article 2.4 of the TBT Agreement regarding the procedures for dispute resolutions and hold significant influence (see (b) (iii)).

In the eighth TBT Agreement Triennial Review, countries including Japan submitted written proposals (a total 13 countries), and extensive discussions were carried out in informal meetings of the fifth TBT Committee held between June and November 2018. The topics discussed were (1) good regulatory practice, (2) regulatory cooperation between members, (3) technical regulations, (4) conformity assessment procedures, (5) standards, (6) transparency, (7) technical assistance, and (8) operation of the committee. The three main points are as follows.

The first point is Good Regulatory Practice (GRP). GRP is a concept that includes various efforts for lowering trade barriers caused by standards and conformity assessment systems. (However, this term is not used in the TBT Agreement). As was recommended in the seventh Triennial Review, the Committee agreed in the eighth Triennial Review to continue to exchange information on mechanisms of GRP adopted by Members that facilitate the implementation of the TBT Agreement, (and encourage Members that conduct regulatory impact assessment (RIA) to provide a hyperlink to the studies (ex ante) in the pertinent notification to the TBT Committee, as well as to notify on a regular basis or publish on a publicly accessible website the subsequent related assessments (ex post) .

The second point is transparency. Japan suggested encouraging Members, where possible, to provide a website address giving to the text of the relevant documents in the notification format. As recommendations in the eighth Triennial Review, the Committee agreed to recommend Members to notify the adopted final text of technical regulations and conformity assessment procedures and to endeavor to provide the Secretariat with up-to-date website information for where adopted final texts of technical regulations, as well as applicable conformity assessment procedures, can normally be accessed.

The third point is the operation of the committee. The Committee agreed to adjust, on a trial basis, the procedures for the inclusion of STCs in the agenda of the Committee: Members should directly inform both the Secretariat and the Member(s) involved of their intension to do so no less than twenty calendar days prior to the convening of the TBT Committee meeting and the agenda should be circulated no less than fifteen calendar days before the meeting.

(3) SPS AGREEMENT

The SPS Agreement seeks to prevent the application of sanitary and phytosanitary (SPS) measures as disguised trade restrictions and to harmonize national SPS measures based on international standards. The main points are as follows:

1. Members shall ensure that any SPS "measure is applied only to the extent necessary to protect human, animal, or plant life or health," based on scientific principles (Article 2.2).
2. Members shall ensure that SPS "measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail. Sanitary and phytosanitary measures shall not be applied in a manner that would constitute a disguised restriction on international trade" (Article 2.3).
3. "Members shall base their sanitary or phytosanitary measures on international standards, guidelines, or recommendations, where they exist, except as otherwise provided for in the Agreement" (Article 3.1).
4. "Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is scientific justification" to do so (Article 3.3).
5. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment taking into account risk assessment techniques developed by the relevant international organizations. (Article 5.1).
6. Members shall conduct risk assessment taking into account available scientific evidence (Article 5.2).
7. Members shall avoid arbitrary or unjustifiable distinctions in the level of sanitary or phytosanitary protection that result in discrimination or disguised restrictions on international trade (Article 5.5).
8. Members shall ensure that such measures are not more trade-restrictive than required to achieve the appropriate level of sanitary or phytosanitary protection (principle of proportionality, Article 5.6).
9. "In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members" (Precautionary principle, Article 5.7).
10. "Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures to ensure transparency." (Articles 7).

3. PRACTICAL TIPS FOR TAKING ADVANTAGE OF THE TBT AGREEMENT

(1) STATUS OF UTILIZATION AND BACKGROUND OF THE TBT AGREEMENT

As mentioned in this document, from the strategic point of view of individual industries, the TBT Agreement is an international rule that can affect product regulations of other countries; however, Japanese industries that use the TBT Agreement are limited (e.g. , automobile industry,

material industry, cosmetics industry and information technology device industry[6]). One of the reasons for this could be that the existence of the TBT Agreement or application procedures is not well-known in the industry.

Prior research and literature related to the TBT Agreement is mainly focused on the dispute settlement procedures or on previous cases and analysis from a logical point of view. Benefits can be realized only when the procedures for application of the TBT Agreement are explained or discussions of the TBT Committee are introduced from a more practical point of view, and the TBT Agreement is vigorously applied.[7]

This section aims to explain how the Japanese industry should act when faced with trade-restrictive measures of a foreign government, and explains how to apply the TBT Agreement in detail and how a collaborated effort with the government will make the TBT Agreement even more effective. The discussion in this section will be restricted to the TBT Agreement and the approach of the TBT Committee in response to the trade-restrictive measures, and does not intend to deny the industry seeking other means and channels. Rather, it is desirable to respond effectively by combining the demands and requests to the other country with requests and negotiations in bilateral talks in collaboration with the government.

(2) VIEWPOINT FOR FINDING OUT PROBLEMS

When faced with trade-restrictive measures of a foreign government, first there is a need to examine whether or not the measure falls within the scope of the TBT Agreement. In such situations, besides examining the definition of technical regulations, the following aspects of the technical regulation should also be examined.

- Are Japanese products (one's own products) subjected to discrimination in comparison to domestic products or products of third countries without any reasonable explanation? (See Article 2.1 of the TBT Agreement. For details, see (2) (2) (b) (i))
- Are the regulations more excessive than necessary to attain legitimate policy objectives of the country imposing the measures? (See Article 2.1 of the TBT Agreement. For details, see (2) (2)(b) (ii))

(3) SPECIFIC APPLICATION OF THE TBT AGREEMENT

(a) Information collection (Examining the TBT notification)

When conformity of a measure to the TBT Agreement is questionable, first, it is necessary to examine the details of the measure. While most WTO member countries publish details of measures on their websites, it is better to also check for any TBT notifications.

As mentioned above, WTO member countries are obligated to submit a prior TBT notification when establishing technical regulations and conformity assessment procedures. Since the WTO publishes all TBT notifications on its website, industries can check for TBT notifications. A TBT notification contains the details of the proposed technical regulations, the objectives, target products, enforcement date, and related laws etc. By examining the TBT notification, the effects possibly affecting a company by the proposed technical regulation can be verified. Additionally, in November 2016, "ePing" was officially launched.[8] It is a system that enables users to search for

[6] The industries that utilized the TBT Committee in November 2018 are listed.

[7] Japanese literature which introduced a detailed status of the discussions of the TBT Committee is p.47 - 51 of the September 2012

[8] ePing, SPS & TBT Alert System, available at <http://www.epingalert.org/en>.

SPS/TBT notifications in the past three years and automatically and regularly receive notifications related to areas of interest for which they register. The launch of the system is expected to enable prompt responses to changes in regulations of each country, resolution of trade problems at an early phase, an increase in opportunities to enter into overseas markets, etc.

However, there have been cases where several countries have not submitted a TBT notification or have not provided a 60-day comment period without a valid reason (see Part I). Management of the notification process should be improved and fulfillment of the recommended guidelines in the TBT Agreement and the subsequent the TBT Agreement Triennial Review Decision is necessary.

(b) Commenting on the TBT notification and Utilizing the TBT enquiry point)

Next, how to express views and concerns to the enforcing country when there is a need. The response will be mainly through comments on the TBT notification if it is within the TBT notification period. Many member countries generally gather opinions from stakeholders through public comments; however, it is advisable to check whether or not comment on the TBT notification is possible..

As mentioned above, member countries have the obligation to consider comments made with respect to TBT notifications. Not only the government of Japan, but the industry (industry organizations or individual companies) can also comment on TBT notifications. Also, enquiry and requests for information are possible via enquiry points even for cases without TBT notifications).[9]

In order for the country implementing the measure to consider and reflect on the comments, it is generally advised to comment on the TBT notification at an early stage. (Footnote 9). In addition, it is desirable to make claims based specifically on provisions of the TBT Agreement or international rules rather than merely expressing concerns.

(c) Utilizing the TBT Committee

When the enforcing country does not revise the measure even though views and concerns have been expressed, the concerns should be expressed and requests should be filed directly through the government at bilateral consultations held during the period of TBT Committee meetings, and consideration should be given to raising such measure as a “Specific Trade Concern (STC)” in the TBT Committee. There were the cases which direct approach to the enforcing country resulted in correction and improvement of such measures. Regarding the STC in the TBT Committee, countries raising STCshould register the STC 20 days prior to the TBT Committee through the WTO Secretariat, and the list of registered STCs will be distributed to the WTO member countries 15 days before the Committee (The eighth TBT Agreement Triennial Review Decision); it is possible to collaborate with other countries that share the same concerns. Detailed minutes of the TBT Committee meetings are published on the WTO website. The TBT Committee is generally held three times every year (March, June and November) in Geneva; hence it is possible to check the status of the revision of the measures of the other countries.

Member countries are aggressively taking advantage of STC as a tool to rectify protectionist measures taken through technical regulations. Particularly after the financial crisis of 2008, there was a sharp rise in the number of STCs (Figure II-11-2) due to increasing protectionist measures taken by developing nations. In 2017, there were 178 STC cases, breaking the previous highest level.

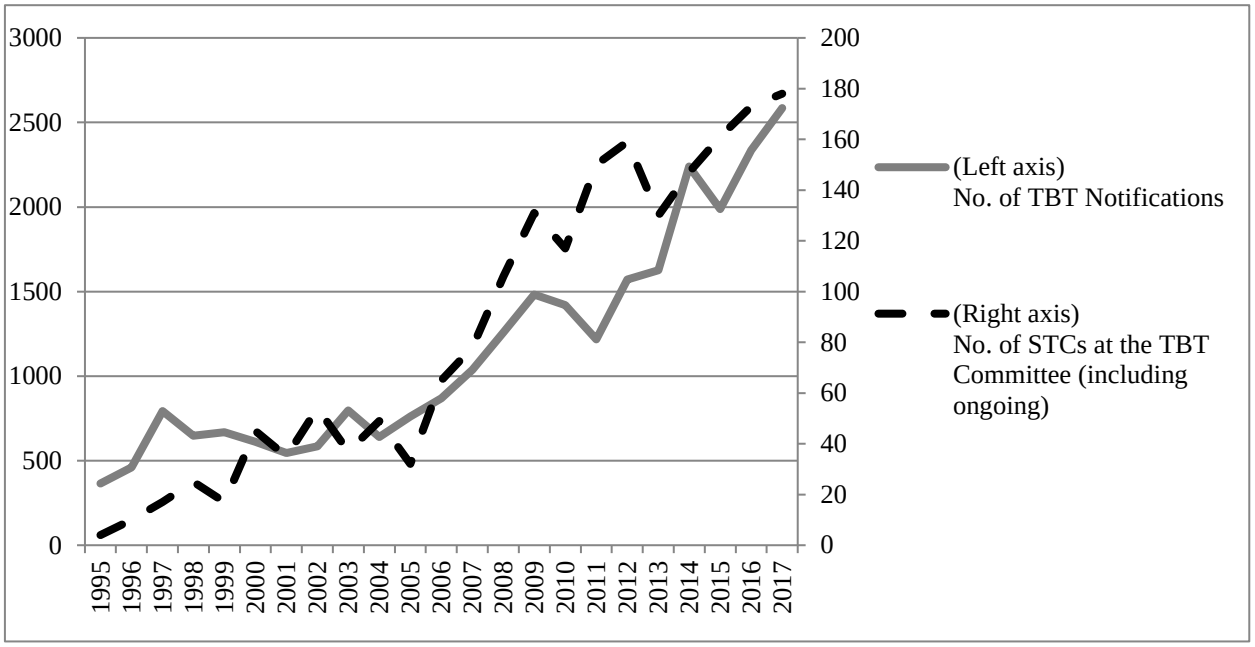
The number of concerns expressed by countries via STC by the end of 2017 can be categorized

[9] The list of inquiry points in each country have been published on the WTO website. In Japan, the Ministry of Foreign Affairs and Japan External Trade Organization (JETRO) are specified as the inquiry points.

as follows: (1) request for clarification and additional information (371); (2) accusation of unnecessary trade barriers (333); (3) lack of transparency (308); (4) rationality of the policy objectives (232); (5) conformity to international standards (216); (6) discrimination against imported products (170); and (7) securing adequate transitional period (136). It may be useful to re-examine the measures in question from these viewpoints.

Following are the advantages of having protectionist measures revised through the TBT Committee: 1. by carrying out rule-based discussions between the trade authorities at multiple venues, a revision of the measure by the enforcing country is possible without making it a political problem; 2. it becomes easy for the country to correct the measure because at the TBT Committee the domestic regulations can be discussed starting at the development stage (TBT notifications should be made no later than six months prior to the introduction of regulations, and the measures pertaining to the notifications will be the subject of discussions); and 3. There is a tendency to voluntarily improve irrational regulations, because the trade authorities become accountable as the regulator in the enforcing country.

Figure II-11-3 Status of TBT notifications and STCs in the TBT Committee



Source: G/TBT/40: TWENTY-THIRD ANNUAL REVIEW OF THE IMPLEMENTAION AND OPERATION OF THE TBT AGREEMENT

(d) Utilizing WTO dispute settlement procedures

When concerns are still not resolved with the above procedures, requesting a WTO dispute settlement procedures is one of the options (see Chapter 17). The main body that utilizes the dispute settlement procedures is the government. However, important factors for companies are the provision of information, and requests from individual companies and industries for the government to recognize questionable measures taken by other countries, to consider adverse effects to domestic industries, and the necessity to utilize dispute settlement procedures. In general, public-private cooperation is beneficial in addressing problem measures of other countries. Particularly when there is a possibility to apply for dispute resolution procedures in the future, it is extremely important to share information and collaborate with the government from an early stage.

The main TBT dispute cases to date are shown in Figure II-11-4, however, there are no cases

involving Japan. Disputes concerning the interpretation of the TBT Agreement in WTO dispute settlement procedures were rare until recently. However, after three reports were issued by Appellate Body in 2012, some TBT dispute cases have been pending, and the specific details of the TBT Agreement are being clarified. As the numbers of cases build up, the TBT Agreement will be further clarified and elaborated, and easier understanding of its provisions by industries is expected.

In addition, by the application of the dispute settlement procedures, not only can the individual problem measures be improved, but the prevention of implementing further trade-restrictive measures and copying of the problem measures by other countries can also be expected. There is a deep-rooted apprehension in the industry that application of the dispute settlement procedures tends to deteriorate bilateral relations. However, nearly 20 years have passed since the establishment of the WTO and China and Russia has acceded to the WTO, and it can be generally said that dispute settlement procedures have followed a rule-based practice worldwide.

When contemplating whether to initiate WTO dispute settlement procedures, the following points should be considered: The first is the time taken to solve the case. If it is solved at an initial stage of discussions, the WTO dispute settlement procedures will end in two to three months. However, if the case extends to the decision of the Appellate Body, it may take two to three years. The second point is the cost of lawyers, etc. (However, in WTO dispute settlement procedures, there are no fees incurred for the WTO Secretariat or the Panel). It is desirable to conduct a legal analysis at an early stage for dealing with trade-restrictive measures; however, when applying the WTO dispute settlement procedures, hiring professional legal services is indispensable. It is necessary to examine if such investment justifies the benefits from resolving the problem measures. The third point is that, basically, the effects of recommendations given by the WTO dispute settlement procedures are only prospective (achieved in the future), and the problem measures will only be improved from that point of time onwards. Retrospective relief can only be realized separately through domestic litigation in the other country.

Figure II-11-4 List of major TBT dispute cases

Case Number	Case Name	Stage	Agreement Interpretation (Upper: Panel, Lower: Appellate body)				
			Technical Standards Conformity	Article 2.1, TBT Agreement	Article 2.2, TBT Agreement	Article 2.4, TBT Agreement	Article 5, TBT Agreement
DS135	EC-Asbestos case Complainant: Canada (Appellate Body Report circulated: April 2001)	P	Judgment (denied)	No judgment	No judgment	No judgment	-
		AB	Judgment (accepted)	No judgment	No judgment	No judgment	-
DS231	EC-Sardines case Complainant: Peru (Appellate Body Report circulated: September 2002)	P	Judgment (accepted)	-	-	Violation	-
		AB	Judgment (accepted)	-	-	Violation	-
DS381	US—Tuna II case Complainant: Mexico (Appellate Body Report circulated: March 2012)	P	Judgment (accepted)	Non-violation	Violation	Non-violation	-
		AB	Judgment (accepted)	Violation	Non-violation	Non-violation	-
	Compliance proceedings of the same case Complainant: Mexico (Panel established: January 2014)	P	Judgment (accepted)	Violation	-	-	-
	Appellate Compliance proceedings of the same case (Appellate Body Report circulated: November 2015)	AB	Judgment (accepted)	Violation	-	-	
	Compliance proceedings of the same case Complainant: US (Panel established: May 2016)	P	No dispute (accepted)	Violation	-	-	-
	Appellate Compliance proceedings of the same case (Appellate Body Report circulated: December 2018)	AB	No dispute (accepted)	Violation	-	-	-
	Compliance proceedings of the same case (second time) Complainant: Mexico (Panel established: June 2016)	P	No dispute (accepted)	Non-violation	-	-	-
	Appellate Compliance proceedings of the same case (second Time) (Appellate Body Report circulated: December 2018)	AB	No dispute (accepted)	Non-violation	-	-	-
DS384 DS386	US-COOL case Complainants: Canada, Mexico (Appellate Body Report circulated: July 2012)	P	Judgment (accepted)	Violation	Violation	-	-
		AB	No dispute (accepted)	Violation	Non-violation	-	-
	Compliance proceedings of the same case Complainants: Canada, Mexico (Panel established: September 2013	P	Judgment (accepted)	Violation	Non-violation	-	-

Case Number	Case Name	Stage	Agreement Interpretation (Upper: Panel, Lower: Appellate body)				
			Technical Standards Conformity	Article 2.1, TBT Agreement	Article 2.2, TBT Agreement	Article 2.4, TBT Agreement	Article 5, TBT Agreement
	Appellate compliance proceedings of the same case (Appellate Body Report circulated: May 2015)	AB	Judgment (accepted)	Violation	No determination (Panel's judgment was nullified)	-	-
DS400 DS401	EC-Seal Products case Complainants: Canada, Norway (Appellate Body Report circulated: May 2014)	P	Judgment (accepted)	Violation	Non-violation	-	• Violation of the 1st sentence of Article 5.1.2 • Non- violation of the 2nd sentence of Article 5.1.2 • Non- violation of Article 5.2.1
		AB	Judgment (denied)	No determination (Panel's judgment was nullified)	No determination (Panel's judgment was nullified)	-	-
DS406	US-Clove cigarettes case Complainant: Indonesia Appellate Body Report circulated: April 2012	P	Judgment (accepted)	Violation	Non-violation	-	-
		AB	Judgment (accepted)	Violation	-	-	-
(DS434) DS435 DS441 DS458 DS467	Australia—Tobacco Plain Packaging case Complainants: (Ukraine,) Honduras, Indonesia, Dominica, Cuba (Panel Report circulated: June 2018, appeal by Honduras, Dominica: July-August 2018)	P	Judgment (accepted)	No determination (not filed by the complainants, and practically not an issue)	Non-violation	-	-
DS499	Russia-Railway equipment	P	Judgment (denied)	Non-violation (Not applicable to technical regulations)	-	-	Partial violation

(Stage: examination stage, P: Panel, AB: Appellate Body)

Source: GATT/WTO documents

(4) SUMMARY

As mentioned before, the TBT Agreement is a significant tool with huge possibilities to affect the technical regulations set by foreign governments. Combining the wide-ranging definition of technical regulations, and the effective use of the TBT Agreement, trade-restrictive measures employed by other countries in several industries can be prevented in advance or can be contained to a minimum level. In the future, it can be hoped that industry will use the TBT Agreement as one of their corporate strategies, collaborating with the government effectively for its active utilization.

4. ECONOMIC ASPECTS AND SIGNIFICANCE

When significant differences exist between the standards and conformity assessment systems of

different countries, the smooth development of free trade is likely to be impeded because exporters must deal with separate measures for each country, causing manufacturing and sales costs to increase. Furthermore, when such measures discriminate between domestic and foreign products, or limit the quantity of imports, international trade is unreasonably distorted. To enhance free trade, it is essential to promote the international harmonization of standards and conformity assessment systems, to provide more transparency in the drafting and administration processes of domestic standards regulations and to ensure that equal treatment is accorded to domestic and foreign products.

SPS measures are applied to prevent the entry of diseases and pests from abroad, taking into account their prevalence in the exporting and importing country, as well as other relevant factors that are based on scientific and technical grounds. Although differences in the SPS systems adopted by different countries exist, they should not be used to disguise restrictions on international trade.

MAJOR CASES

(1) EC – Measures Concerning Meat and Meat Products (Hormones) (SPS Agreement – DS26)

In December 1985, the EU, responding to consumer concerns, decreed that as of January 1988, all imports of meat from animals raised using hormones would be banned (a decision not to use hormones within the EU territories was made in March 1988). The United States requested consultations under Article XXIII of the GATT, arguing that the measures lacked scientific evidence and were inconsistent with Article 7.2 of the Tokyo Round Standards Code. In January 1989, the EU began enforcing a total ban on imports of meat raised with growth hormones. The United States, in response, imposed retaliatory measures that same month under Section 301: 100-percent tariffs on EU imports of beef, tomato-based products, coffee, alcoholic beverages, and pet food, totaling approximately $90 million.

The matter remained unresolved. As a result, in June 1995, the United States charged that the EU measures lacked a scientific basis and were in violation of both the GATT and the SPS Agreement. The Unites States stated it would refer the matter to WTO dispute settlement if it was not resolved by the end of 1995.

In response, the EU convened a “Scientific Conference on the Use of Growth Promoters in Meat Production” for scientists and consumer groups. The Conference’s report, published in January 1996, concluded that the data on the use of natural and artificial hormones and related compounds showed no evidence of human health risk. Notwithstanding, the EU agriculture ministers decided to continue the import ban.

In January 1996, the United States requested consultations under GATT Article XXII, alleging that the EU measures were inconsistent with Articles III and XI of the GATT, and Articles 2, 3, and 5 of the SPS Agreement. In May 1996, a panel was established. In July 1996, Canada also requested consultations under GATT Article XXII; a panel was established in October 1996.

In August 1997, the Panel report was issued. The Panel found that the EU measures were neither based on international standards nor on any risk assessment and that the arbitrary or unjustifiable distinctions in the level of protection resulted in discrimination or a disguised restriction on international trade. The Panel therefore found the EU measures in violation of Articles 3.1, 5.1 and 5.5 of the SPS Agreement.

In September 1997, the EU appealed the Panel finding to the Appellate Body. In January 1998,

the Appellate Body issued its report, finding that the EU measures were not discriminatory, did not constitute a disguised restriction on international trade and, therefore, were not inconsistent with Article 5.5 of the SPS Agreement. However, the Appellate Body upheld the Panel's findings that the EU measures were not based on sufficient risk assessment and therefore violated Article 5.1 of the SPS Agreement. Lastly, the Appellate Body reversed the Panel's interpretation regarding the burden of proof by finding that the burden of proof to establish a WTO infraction resides with the complaining country (in this case, the United States) in cases where a country introduces or maintains sanitary or phytosanitary measures and the question is whether the measures result in a higher level of protection than would be achieved by relevant international standards.

In February 1998, the Appellate Body report was adopted, directing the EU to bring its measures into WTO compliance by May 1999.

The WTO Dispute Settlement Body (DSB) recommended the EU to take appropriate measures in conformity with the Appellate Body report. The EU, however, failed to withdraw the import ban by the deadline. The United States and Canada, after going through arbitration under paragraph 6, Article 22 of the DSU, obtained DSB approval for the countermeasures (suspension of the application) and raised the tariff rates in July and in August 1999, respectively.

The EU again filed a complaint in accordance with the WTO dispute settlement procedures, claiming that the countermeasures were in violation of GATT Article II, etc. because the Unites States and Canada continued the countermeasures even after the EU corrected the measures (DS320: US-Continued Suspension of Obligations in the EC-Hormones Dispute). The Panel report and the Appellate Body report were circulated in March and October 2008, respectively. The Appellate Body determined that the parties involved were required to first initiate a compliance proceeding, in order to confirm whether the EU had removed the measures found to be inconsistent with the SPS agreement based on the decisions of DS26. Subsequently, a settlement was reached in September 2009.

(2) EC – Labelling Regulations on Sardines (TBT Agreement – DS231)

In June 1989, the EU adopted Council Regulation No. 2136/89, which permits the word "sardine" on canned sardines manufactured only from European sardines (*Sardina pilchardus*). This regulation does not permit non-European sardines to be labelled "sardines" even when qualified by a geographical reference, for example, "X sardines".

The international standard for sardine-type products adopted by the Codex Alimentarius Commission of FAO/WHO in 1978 ("Codex standard") defines canned sardines as those manufactured from fresh or frozen fish on a list of 21 fish species, including the European sardine and the Peruvian sardine (*Sardinops sagax*). However, under that standard, only the European sardine can be labelled simply as "sardines". The other 20 species, including the Peruvian sardine, can be labelled as "sardines" only if the name "sardine" is qualified by a country, geographic area or species reference, for example, "X sardines".

In March 2001, Peru requested consultations with the EU pursuant to GATT Article XXII, arguing that the EU Regulation violates Article 2.4 and other provisions of the TBT Agreement, which require that technical regulations be based on relevant international standards. A panel was established in July of that year.

The main issues in this case were: (i) whether the EU Regulation constitutes a "technical regulation" as defined in the TBT Agreement; (ii) whether the Codex standard is a "relevant international standard" as defined in Article 2.4 of the TBT Agreement; and (iii) whether this is a case in which using such relevant international standards would be an ineffective or inappropriate

means for fulfilling the legitimate objectives (Article 2.4).

The Panel issued a report in May 2002, finding that: (i) the EU Regulation constitutes a "technical regulation" under the TBT Agreement; (ii) the Codex standard is a "relevant international standard" as defined in Article 2.4 because both the EU and the Codex standards refer to the same product (preserved sardines) and the EU Regulation sets forth labelling requirements that correspond to the Codex standard although the Codex standard was not used "as a basis for" the EU Regulation; and (iii) the complaining party only bears the burden of establishing a *prima facie* case by demonstrating that a relevant international standard exists and has not been used as a basis for the technical regulation in question, while the defending party bears the burden of demonstrating that the relevant international standards would be "an ineffective or inappropriate means for the fulfilment of the legitimate objectives." The Panel found that the EU failed to demonstrate that the Codex standard was an ineffective or inappropriate means for the fulfilment of the legitimate objectives (and conversely, Peru demonstrated that the Codex standard was an effective and appropriate means for such objectives). Therefore, the Panel concluded that the EU Regulation violates Article 2.4 of the TBT Agreement.

The EU appealed the Panel's decision to the Appellate Body in June 2002. The Appellate Body circulated the report in September of that year and found that, as the complaining party, Peru bears the burden of demonstrating that the Codex standard is an effective and appropriate means to fulfill these legitimate objectives. But on all other points, it upheld the Panel's findings and confirmed that the EU Regulation is in violation of Article 2.4 of the TBT Agreement. The Report was adopted in October 2002 and the DSB recommended that the EU bring the Regulation into conformity with its obligations under the TBT Agreement. Subsequently, a settlement was reached in July 2003.

(3) United States - Measures Concerning the Importation, Marketing and Sales of Tuna and Tuna Products (TBT Agreement - DS381)

The United States has enforced a ban on use of the dolphin-safe labeling on tuna products produced from landed tuna based on specific fishing methods (hereinafter referred to as "the labeling regulations"). In Mexico, tuna which habitually swim along with the dolphins were caught conventionally with purse seine nets. However, due to the labeling regulations, the United States will not display dolphin-safe labels on tuna products produced from tuna caught by this method. The United States claims that the objective of the labeling regulation is to inform consumers about whether or not the tuna was landed without harming dolphins.

Mexico requested that the DSB establish a panel on March 9, 2009, alleging that the labeling regulations created unfair barriers for Mexican tuna exports to the United States and was inconsistent with the multilateral treaty, the "Agreement on the International Dolphin Conservation Program" (hereinafter referred to as "AIDCP"), and so violate-ds Articles I and III of GATT as well as Article 2 of the TBT Agreement.

The main issues in this matter were: (1) whether the labeling regulations were technical regulations under the TBT Agreement, (2) whether there was a violation of the national treatment obligation (TBT Agreement, Article 2.1), (3) whether the labeling regulations were more trade-restrictive than necessary for the fulfillment of legitimate objectives (TBT Agreement, Article 2.2), and (4) whether there is a need to base the labeling regulations on the AIDCP which is a related international standard (Article 2.4 of the TBT Agreement).

The Panel issued its report on September 15, 2011. Regarding the above-mentioned four claims, the Panel findings were as follows: (1) the labeling regulations are technical regulations within the

meaning of the TBT Agreement; (2) the labeling regulations are neutral to nationality and hence do not violate Article 2.1 of the TBT Agreement; (3)although the policy objectives of the labeling regulations are legitimate, the United States violates Article 2.2 of the TBT Agreement and should adopt less trade-restrictive measures of AIDCP as alternatives to achieve the same policy objectives; (4) while acknowledging the AIDCP as an international standard, the AIDCP alone cannot inform American consumers adequately about the tuna fishing methods; thus, the panel concluded that there is no need to adopt AIDCP as a basis for the labeling regulations. However, the Panel exercised "judicial economy" and did not give an opinion on the GATT claims.

In response, Mexico and the United States filed an appeal to the Appellate Body on October 31, 2011. The Appellate Body distributed its report on May 16, 2012.

Concerning (1), the Appellate Body rejected the United States' claim, stating that "conformity to the labeling regulations is not mandatory and it is possible to market in the United States even without the labeling". The Appellate Body held that the possibility to market has no relation to the judgment on this case, and that compliance to the labeling regulation is mandatory since labeling is restricted to specific fishing methods. Concerning (2), the labeling regulations violate the Article 2.1 of the TBT Agreement because the products of the United States and Mexico are not treated equally and the competitive conditions are changed disadvantageously to the Mexican products. Concerning (3), the Appellate Body judged the conformity to the Article by using two steps: whether the technical regulations in question fulfill the legitimate objectives or whether they are more trade-restrictive than necessary to fulfill the legitimate objectives. With regard to the "legitimate objectives", they ruled that by comparing the contents, legislation process, structure and implementation of the technical regulations, AIDCP cannot become an alternative measure to the labeling regulations to equally fulfill the policy objectives of the United States, and so Article 2.2 of the TBT Agreement was not violated. Concerning (4), conformity to this Article was judged by analyzing three steps -- whether any relevant international standards exist or will be enacted in the near future; whether the technical regulations are based on international standards; and whether there are any applicable exemptions. In the second TBT Agreement Triennial Review conducted in 2000, the interpretation of "the six principles for international standards" was adopted by uniform consensus of all WTO member countries. It was concluded that the AIDCP does not meet the requirements of an international standard because such standards must be open to all WTO member countries. The DSB adopted the above-mentioned Appellate Body Panel reports in July 2012. In September of the same year, the parties agreed to set the reasonable period for compliance at 13 months (until July 2013).

However, Canada and Mexico requested the establishment of a compliance panel in November 2013, claiming that compliance by the United States was insufficient. On April 14, 2015, the compliance panel circulated its report. The panel conducted analysis, focusing on the three elements of the amended measure of the United States: (A) the eligibility requirement: Mexican tuna products made from tuna caught by setting on dolphins are ineligible to receive the US dolphin-safe label; (B) certification requirement: for tuna caught in the Eastern Tropical Pacific Ocean (ETP) by a large purse seine vessel (the majority of the Mexican tuna fleet) to receive the dolphin-safe label, it must be certified by the captain and an independent on-board observer who has a certain qualification that (i) no dolphins were killed or seriously injured and that (ii) the fishing method of setting on dolphins was not used; and (C) tracking requirement: tuna to be contained in tuna products labelled dolphin-safe must be accompanied by a statement certifying that it was segregated from non-dolphin-safe tuna from the time it was caught through processing, and tuna caught in the ETP by a large purse seine vessel must be accompanied by an additional statement. Regarding (A) the eligibility requirement, the panel found that the measure to treat tuna product made from tuna caught by setting on dolphins as being ineligible for the dolphin-safe label

in itself is not inconsistent with Article 2.1 of the TBT Agreement, in light of the risk of such fishing method. However, it found that the other two requirements impose a discriminatory burden and therefore are inconsistent with that Article, on the grounds that regarding (B) the certification requirement: while an independent observer's certification is required in addition to the captain's certification for tuna caught in the ETP, only the captain's certification is required for tuna caught in other fisheries; and regarding (C) the tracking requirement, different verification and tracking methods are required depending on where tuna was caught, and a greater burden is imposed on tuna caught in the ETP. Conformity with Article 2.2 and Article 2.4 was not included in the issues discussed by the panel.

Dissatisfied with the conclusions by the panel, the United States filed an appeal with the Appellate Body in June 2015.

On November 20, 2015, the Appellate Body circulated its report. It reversed the panel's decision, holding that the panel erred in analyzing the three elements of the amended tuna measure separately because these elements are related to one another. Based on dispute settlement precedent, the Appellate Body conducted a two-step analysis concerning less unfavourable treatment of imported products in the meaning under Article 2.1 of the TBT Agreement, from the viewpoints of whether (A) the US amended measure has a detrimental impact on Mexican tuna products and (B) such detrimental impact stems exclusively from a legitimate regulatory distinction. Regarding (A), the Appellate Body found that the amended tuna measure modifies the conditions of competition to the detriment of Mexican tuna products in the US market by excluding most Mexican tuna products from access to the dolphin-safe label, while treating tuna products from the United States and other countries as being eligible for access to the label on certain conditions (the amended measure is identical with the original measure on this point). Regarding (B), the Appellate Body considered that it is necessary to assess whether the regulatory distinction by the amended measure is "calibrated" to the risks to be prevented by the measure in order to assess whether the amended measure lacks "even-handedness". Although the Appellate Body was unable to conduct a full analysis of "calibration" in the absence of a proper assessment by the panel of the respective risks posed to dolphins inside and outside the ETP large purse-seine fishery, it found that the determination provisions (an observer certification is required for non-ETP purse seine fishing if the competent authorities determine that certain conditions are met) do not require an observer certification for both ETP large purse seine fishing and other fishing methods in all circumstances of comparably high risks. As a result, the tracking and verification requirements impose a greater burden on ETP large purse seine fishing than other fishing methods. Thus, it cannot be said that the amended measure is designed so that it is "calibrated" to the risks to dolphins arising from different fishing methods. Such detrimental impact of the amended measure cannot be said to stem exclusively from a legitimate regulatory distinction.

Based on these grounds, the Appellate Body found that the amended measure is inconsistent with Article 2.1 of the TBT Agreement. The Appellate Body also found that the amended measure is inconsistent with Articles I: 1 and III: 4 of the GATT 1994, and concluded that the measure is not justified under Article XX of the GATT 1994. The DSB adopted these Appellate Body and Panel reports in December 2015. The United States requested the DSB to establish a compliance panel in April 2016, stating that it had taken a corrective measure for compliance in accordance with provisional final regulations of March 2016. On the other hand, Mexico also made its second request for the establishment of a compliance panel in May 2016, claiming that compliance by the United States was insufficient. The compliance panel circulated panel reports for both procedures in October 2017. The reports stated that the correction measures by the United Stated were "calibrated" to the risks to dolphins and thus did not constitute a violation of Article 2.1 of the TBT Agreement, while also determining that a violation of the GATT was justified by the provision of

Article XX of the GATT.

In December 2017, Mexico filed an appeal to the Appellate Body against the decision above. The Appellate Body for the second compliance proceedings circulated a report in December 2018. The Appellate Body maintained the panel judgment that the correction measures by the United States were consistent with Article 2.1 of the TBT agreement and justified by Article XX of the GATT.

(4) United States - Labeling Measures on Imported livestock (TBT Agreement - DS384, 386)

Regarding meat, the United States has outlined the following five categories and introduced a labeling system with distinguishable labels for each category.

(1) Category A: Produced in the United States

Meat derived from animals that are born, bred and slaughtered exclusively in the United States.

(2) Category B: Produced in multiple countries

Meat derived from animals that are born and bred in multiple other countries but slaughtered exclusively in the United States.

(3) Category C: Imported for immediate slaughter

Meat derived from animals that are imported into the United States for immediate slaughter.

(4) Category D: Produced in a foreign country

Meat that is derived from animals that are not born, bred or slaughtered in the United States.

(5) Category E: Ground meat

The labels for each of the categories are as follows. For products derived from 100% Category A meat, label A meaning “-produced in the United States” can be affixed. For Category B & C meat, all countries of birth, breeding or slaughter must be displayed. However, the country of origin can be displayed in any order for Category B. Furthermore, products derived from meat in these categories along with Category A meat are not permitted to use only the label “produced in the United States” (label A) and must affix a label (label B or C) indicating all the producing countries. However, the country of origin can be displayed in any order if the mixing process is completed in one production day. Regarding Category D meat, a label with country names (label D) in accordance with the rules of origin will be affixed. Regarding Category E meat, the list of all producing countries is necessary.

In response to the United States claim that the objective of these Country of Origin Labeling (COOL) measures was to communicate the country of origin to consumers, Canada and Mexico argued that the real intention lay in domestic industry protection, alleged violations to Article 2.1 and 2.2 of the TBT Agreement and requested that the DSB establish a Panel.

The Panel decided that, according to the COOL decision, information on the countries involved in each stage of the entire process of the supply chain (birth, breeding, slaughter and processing) must be maintained. In order to maintain such information on the country of origin, the necessity to manage livestock separately according to their countries of origin will arise, and due to increased cost of imported livestock compared to livestock produced in the United States by such separation, the Panel judged that this will become an incentive for the traders to use livestock produced in the United States rather than to use imported livestock. The Panel therefore concluded that the COOL measures discriminated against imported livestock and hence violated Article 2.1 of the TBT Agreement.

The panel acknowledged that the COOL measures are based on a legitimate objective of providing consumers with the country of origin information. However, -the Panel held that the contents of the label for labels B and C do not convey correct information about the country of origin to the consumer and hence the COOL measures do not fulfill above objective and so violate TBT Agreement, Article 2.2.

The Appellate Body supported the Panel's decision that the unfavourable effects on the imported products was not caused by a legitimate regulatory distinction but was due to discrimination against the imported products, and so the COOL measures violated TBT Agreement, Article 2.1. (The Panel came to its decision after examining the judgment criteria set out in the Appellate Body's decision in the United States-Tobacco case and the United States-Tuna II case discussed in other paragraphs). However, with regard to the decision on the violation of Article 2.2 of the TBT Agreement, the Appellate Body followed the criteria it set out in the United States-Tuna II case regarding the COOL measures and alternative measures claimed by Canada and Mexico, and so it modified the Panel's interpretations to consider the following: (1) the degree of contribution to the fulfillment of the objectives; (2) the degree to which it limits the trade; and (3) the seriousness of the risk and results of not achieving the objectives. The Appellate Body found no thresholds regarding the fulfillment of legitimate objectives. Regarding the measures, the Appellate Body stated that the Panel did not make rulings on enough facts to determine the degree of contribution to fulfill the objectives. It overruled the Panel's decision on this point, and held that it could not determine whether the COOL measures violated Article 2.2 of the TBT Agreement.

The United States responded to the above decision and corrected the COOL measure, but Canada and Mexico requested the DSB to establish a compliance panel in August 2013, claiming that compliance by the United States was insufficient. The compliance panel determined that the revised COOL measures more adversely affected the competitive opportunities for imported products than the original measures because the revised COOL measures required more detailed labeling of the country of origin than the original COOL measures and imposed a heavier burden on separate management and recordkeeping of livestock, thus creating a stronger incentive to choose domestic products over imported products. The compliance panel then determined that the measures that discriminated between livestock produced in the United States and imported livestock were in violation of Article 2.1 of the TBT Agreement because the increased burden of recordkeeping, the continued risk of incorrect labeling, and the continuation of exceptions such as the use at restaurants and in processed foods, etc. caused adverse effects not related to a legitimate regulatory distinction. With respect to Article 2.2 of the TBT Agreement, the compliance panel compared the revised COOL measures and four alternative measures claimed by the complainants, and determined that (1) the revised COOL measures only contributed partially to the regulatory objectives, (2) the degree of trade restrictions was higher than before the revision, (3) the degree of risk incurred by non-fulfillment of the regulatory objectives in consideration of the interests of consumers, etc. could not be confirmed by the evidence submitted, and (4) hat either the alternative measures claimed by the complainants did not contribute to the regulatory objectives to the same degree as the revised COOL measures or the content of the alternative measures was not properly identified by the complainants. The compliance panel then concluded that the complainants failed to sufficiently demonstrate that the revised COOL measures were more trade-restrictive than necessary, and therefore did not determine whether there was a violation of Article 2.2. In November 2014, the United States filed an appeal with the Appellate Body.

In May 2015, the Appellate Body circulated its report. It found no errors in the panel's findings concerning consistency with Article 2.1 of the TBT Agreement, and upheld the panel's conclusion that the amended COOL measure is inconsistent with that Article.

Regarding Article 2.2 of the TBT Agreement, the Appellate Body held that an assessment of whether a technical regulation is "more trade restrictive than necessary" involves the "holistic weighing and balancing" of all relevant factors, namely, (i) the degree of contribution of the regulation to a legitimate objective, (2) its trade-restrictiveness, and (3) the risk incurred by non-fulfillment of the objective. In light of the nature of the objective pursued by a technical regulation, the level of protection sought, as well as the nature, quantity, and quality of evidence, and the characteristics of the regulation as revealed by its design and structure, it will not always be possible to quantify a particular factor. For example, even if the degree of contribution can only be assessed with low accuracy (that is, a factor cannot be accurately quantified and can only be assessed in qualitative terms), the panel must not end its analysis with a conclusion that the burden of proof has not been fulfilled, but rather it must conduct weighing and balancing. Thus, the Appellate Body found that the panel erred in concluding that it was unable to ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective and therefore that it was unable to ascertain whether the proposed alternative measures would make an "equivalent" degree of contribution to the amended measure's objective. Based on such grounds, the Appellate Body reversed the panel's decision that the complainant did not make a prima facie case that the amended COOL measure is more trade restrictive than necessary. On the other hand, the Appellate Body concluded that there were not sufficient findings of facts to complete the analysis of whether the amended COOL measure is consistent with Article 2.2 of the TBT Agreement.

With regard to the panel's finding that the amended COOL measure is inconsistent with Article III: 4 of the GATT 1994, the Appellate Body dismissed the United States' argument that in the context of permitting imposition of a certain amount of costs necessary for country of origin labeling the Panel erred in not taking into consideration Article IX of the GATT 1994 in interpreting Article III: 4 of the GATT 1994. It upheld the panel's decision. In response to the adoption by the DSB of the report, Canada and Mexico proceeded seek approval of countermeasure, and the countermeasure were approved on December 21, 2015. During almost the same period, revocation of the COOL measure was considered in the U.S., and it eliminated the measure on December 18, 2015.

(5) United States - Measures Affecting the Production and Sales of Clove Cigarettes (TBT Agreement-DS406)

The United States implemented measures banning production and sales of clove-flavored cigarettes (hereinafter referred to as "the prohibition measures"). According to a congressional Committee the objective of the prohibition measures is to protect public health and to reduce cigarette smoking in people aged less than 18 years. The reason for prohibition is to remove from the market flavored cigarettes, which cause new smokers to adjust easily to smoking, and for the purpose of preventing young people from acquiring regular smoking habits. However, menthol cigarettes were explicitly exempted from the prohibition measures.

In response, Indonesia requested the establishment of a panel on June 9, 2010, alleging that the measures of the United States which prohibit flavored cigarettes except for menthol, treat clove cigarettes imported from Indonesia less favourably and so are inconsistent with the national treatment obligation in Article 2.1 of the TBT Agreement (alternatively Article III: 4 of the GATT).

In accordance with dispute resolution procedure in previous cases, conformity to Article 2.1 of the TBT Agreement was disputed based on: (1) whether the measures in question are technical regulations; (2) whether the imported product and the domestic product are "like products"; and (3) whether the imported products are being treated less favourably as compared to the domestic

products. However, in this case the applicability of (2) like product and (3) treatment no less favourable were mainly contended.

Regarding “likeness” in the above-mentioned (2), the Panel found that the prohibition measures were technical regulations. While stating that the judgment on “likeness” in decisions on Article III: 4 of the GATT and the conventional standards based on the competitive relationship of products do not apply automatically to “likeness” pursuant to Article 2.1 of the TBT Agreement, and among the above conventional standards as a result of giving special consideration to the “physical characteristics” of the product and “consumer tastes and habits”, the Panel found that the two cigarettes were “like products”. Regarding (2) above the Panel said that based on the preamble of the TBT Agreement and that the prohibition measures affect technical regulations, and because the standards based on competitive relationship adopted in likeness judgments of panels in GATT Article III:4 cases do not automatically apply to the likeness judgment of Article 2.1 of the TBT Agreement. Therefore, the Panel focused on the legitimate objective of the prohibition measures and conducted an evaluation placing special emphasis on the physical characteristics included in the above-mentioned conventional standards and consumer tastes and habits, and it concluded that the two cigarettes were “like products”. Regarding (3) above, “treatment no less favourable”, the Panel not only acknowledged that the treatment for clove cigarettes imported from Indonesia can be compared with domestically-produced menthol cigarettes, but also held that the these products are treated differently affecting the conditions of competition for the imported product and hence the prohibition measures are inconsistent with Article 2.1 of the TBT Agreement.

The United States raised objections to the Panel judgment and appealed to the Appellate Body on January 5, 2012 (additionally, it appealed regarding the Panel decision regarding violation of Articles 2.9.2 and 2.12 of the TBT Agreement).

The Appellate Body thoroughly examined the preamble of the TBT Agreement and held that it extends the GATT rules (Recital 2) and that both agreements should be interpreted as being consistent with each other. Also, along with the aim to remove trade barriers for advancement of trade liberalization (Recital 5), it recognizes the right of member countries to establish technical regulations for legitimate objectives (Recital 6); and the Appellate Body stated that each provision should be interpreted consistently with these benefits. In addition, regarding (2) above, “likeness”, in light of the above-mentioned objectives described in the preamble of the TBT Agreement, the Appellate Body stated that “likeness” of the products in question should be based on the quality and degree of the competitive relationship as with Article III: 4 of the GATT, and disagreed with the Panel’s judgment because the Panel considered the legitimate objective of the technical regulation to determine “likeness”. Additionally, as appealed by the United States, the Appellate Body conducted an analysis of the Panel findings about the end uses of clove cigarettes and menthol cigarettes and consumer tastes and habits in relation to these products; the Appellate Body supported the Panel’s judgment that clove cigarettes and menthol cigarettes are like-products within the context of Article 2.1 of the TBT Agreement, though it did so for different reasons. With regard to (3) above, “treatment no less favourable”, in light of the relationship between Recital 6 in the preamble of the TBT Agreement and Article III:4 of the GATT, the Appellate Body held that if the technical regulations in question do not legally discriminate against imported products, it does not necessarily constitute “treatment no less favourable” just because there is an adverse effect on the competitive opportunities for imported products against similar (“like”) domestic products. The analysis should be conducted on whether or not the cause is exclusively based on a distinction in the legitimate regulatory objective, rather than reflecting discrimination against the imported products based on the adverse effect to it. To determine whether or not the technical regulations are discriminating against the imported products, the design of the technical regulations, particularly its even-handedness must be examined. In addition, the Appellate Body held that conformity to the

national treatment obligation under Article 2.1 of the TBT Agreement should be determined by comparison of the products imported from the claimant with domestic products of same type. In addition, based on the evidence from statistical data, the prohibition measures which prohibited imports of clove cigarettes from Indonesia and permit-teds domestically-produced menthol cigarettes, the Appellate Body concluded that the design of the system prohibition measures resulted in adverse impact on the competitive opportunities for clove cigarettes. The stated objective of the prohibition measures was to reduce the number of young smokers by banning flavored cigarettes which are typically easier to smoke than regular cigarettes. However, since this characteristic is common to both menthol cigarettes and clove cigarettes, the Appellate Body concluded that the cause of the adverse impact on the competitive opportunities for clove cigarette was not due to distinction based on differences related to legitimate regulatory objectives of the regulations. From the foregoing, although the prohibition measures do not explicitly set out discriminatory treatment of imported products as compared to domestically-produced products of the same type, it functions as the form of discrimination. In other words, the Appellate Body judged that by excluding menthol cigarettes from the prohibition measures against flavored cigarettes, clove cigarettes imported from Indonesia are treated less favourably than domestically-produced products of the same type. The decision also ruled that prohibition measures were inconsistent with Article 2.12 of the TBT Agreement.

The DSB adopted the Appellate Body report in April 2012, and a settlement between parties was reached in October 2014.

(6) EC – Measures Prohibiting the Importation and Marketing of Seal Products (TBT Agreement – DS400, 401)

The EU introduced a measure to prohibit import/export and sales of all pinnipeds (seals, sea lions, and walruses; hereinafter simply referred to as “seals”) and seal products in the region (hereinafter referred to as the “measure”). The measure exempted (1) traditional hunting conducted for a living by indigenous people such as Inuit (Inuit exception), (2) hunting for the purpose of sustainable management of marine resources (management hunting exception), and (3) import of products by tourists, etc. for personal use (tourist exception). In addition, implementation regulations of the measure, which provided procedures required for distributing seals and seal products in the EU market based on the measure, (hereinafter referred to as the “implementation regulations”) were published in August 2010.

Canada and Norway requested the establishment of a panel on February 14, 2011 and March 14, 2011, respectively, claiming that the measure violated the WTO Agreements.

Issues in dispute in this case were (1) whether or not the measure violated Article 2.1 of the TBT Agreement, (2) whether or not the measure violated Article 2.2 of the TBT Agreement, (3) whether or not the implementation regulations violated Article 5.1.2 of the TBT Agreement, which provides conformity assessment procedures shall not be more trade-restrictive than necessary, and (4) whether or not the implementation regulations violated Article 5.2.1 of the TBT Agreement, which provides that conformity assessment procedures shall be undertaken in a no less favourable order for products originating in the territories of other Members than for like domestic products. (3) and (4) are the first cases where issues concerning conformity assessment procedures are being determined in a WTO dispute settlement proceeding.

The Panel released its report on November 25, 2013. With regard to (1), the Panel determined that seals from Greenland and the EU are like products of Canadian seals. The Panel then determined that the measure caused a detrimental impact on competitive conditions for Canadian seals on the grounds that while the Inuit exception and management hunting exception are only

minimally applicable to Canadian seals, they are broadly applicable to seals from Greenland and the EU. The Panel concluded that the measure was not based on legitimate policy objectives because this distinction could not reasonably be explained by the policy objectives of the EU, i.e. animal welfare, and thus violated Article 2.1 of the TBT Agreement. With regard to (2), the Panel determined that the measure contributed to the policy objectives of the EU to a certain extent. The Panel then determined that the measure did not violate Article 2.2 of the TBT Agreement on grounds that the alternative measure presented by Canada and Norway (setting animal welfare requirements, certifying conformity to animal welfare requirements, and presenting conformity certification) were not proven to achieve the same degree of achievement of the policy objectives as the measure. With regard to (3), the Panel determined that the implementation regulations violated the first sentence of the Article 5.1.2 of the TBT Agreement because they were published only three days before its entry into force (published on August 17, 2010) and that short period created unnecessary obstacles to international trade. On the other hand, the Panel determined that the implementation regulations did not violate the second sentence of Article 5.1.2 (which provides that conformity assessment procedures shall not be more strict or be applied more strictly than is necessary) because the alternative measures were not proven, the same reason given regarding (2). With regard to (4), the Panel determined that it could not conclude that the implementation regulations violated Article 5.2.1 of the TBT Agreement because the Panel was not provided with a sufficient basis.

The parties appealed to the Appellate Body in January 2014, and the Appellate Body report was published in May 2014. It determined that the requirements for the exceptions of the measures (requirements for allowing import/export and regional distribution of seal products) related to the specifications of hunters, hunting methods, and objectives of hunts and not to “product characteristics” under paragraph 1, Annex 1 of the TBT Agreement. For this reason, the Appellate Body rejected the Panel’s ruling that the measures were “technical regulations”, and did not made legal determination on the claims that assumed the measures were “technical regulations” under the TBT Agreement (Articles 2.1, 2.2, 5.1.2, and 5.2.1). This included the issue of whether or not the measures regulated PPM under paragraph 1, Annex 1 of the TBT Agreement and therefore constituted technical regulations.

(7) Australia-Tobacco / Plain Package (TBT Agreement / TRIPS Agreement) (DS435, 441, 458, 467)

Australia enacted the 2011 Tobacco / Plain Packaging Act in December 2011, introducing measures as follows, concerning packaging of all tobacco products supplied in Australia: (A) obligating to display graphic health warnings in a prescribed format over a certain proportion of surface, (B) prohibiting the use of trademarks in principle, while allowing to describe only the brand name and company name in the specified background color, font and location (in other words, the use of character trademarks is allowed, but the use of figurative trademarks is prohibited.), (C) limiting specifications such as shape, surface treatment, material, and color.

In response to this measure, Ukraine (DS434), Honduras (DS435), Dominican Republic (DS441), Cuba (DS458) and Indonesia (DS467) requested consultations under Article XXII of GATT (March, April and June 2012, July and May 2013, respectively), and a unified panel was established at the DSB meeting in April 2014. However, as for DS434, the procedure was suspended in May 2015 and ended after 12 months at the request of Ukraine under Article 12.12 of the DSU.

The issues in this procedure were as follows: (1) regarding the aspect of technical regulations of packaging and labelling, etc., whether it is more trade-restrictive than necessary to fulfil a legitimate objective (Article 2.2 of the TBT Agreement); (2) regarding the aspect of trademark

regulations, (i) whether this measure violates Article 6*quinquies* of the Paris Convention providing that "[e]very trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union" (Article 2.1 of the TRIPS Agreement), (ii) whether the measure forms an obstacle to trademark registration based on the nature of the goods (tobacco product) (Article 15.4), (iii) whether the protection of a trademark remains as a passive right to exclude the use of third parties or includes the right to use it actively (Article 16.1), (iv) whether the measure violates Article 20 providing that "[t]he use of a trademark in the course of trade shall not be unjustifiably encumbered by special requirements."

The panel report was issued in June 2018, not recognizing any inconsistencies for any of the issues. With regard to the issue (1) (Article 2.2 of the TBT Agreement), the Panel found that Article 2.2 of the TBT Agreement and Article 20 of the TRIPS Agreement do not contradict each other and are applied cumulatively and harmoniously, and that it does not mean that Article 2.2 of the TBT Agreement is not applicable to the measure just because it is a trademark regulation subject to the TRIPS Agreement. Thus the panel found that the measure as falling under the technical regulation under the TBT Agreement.

Subsequently, the panel found that the purpose of this measure was to reduce use of, and exposure to, tobacco products, and therefore falls under a "legitimate objective" under Article 2.2 of the TBT Agreement. Next, regarding the other elements to be considered under Article 2.2, (a) regarding the contribution of the measure to the objective, the measure may minimize the ability of the brand feature that creates a positive association with tobacco products and reduce their appeal. By making the specification plain, health warnings can be easily recognized and the effectiveness of health warnings can be improved. In consideration that it can reinforce and supplement the effectiveness of other comprehensive tobacco control regulatory measures in Australia by applying in conjunction with them that are not subject to disputes in this case (including graphic health warnings), it can, and actually do, contribute to the policy objective of reducing the use of, and exposure to, tobacco products in Australia. Thus, the measure was found to contribute meaningfully to the purpose. (b) Regarding the degree of trade restrictiveness of the measure, the measure reduces the use and consumption of tobacco by their design and thus has the effect reducing tobacco imports and restricting trade, as long as the Australian tobacco market is supplied by imported products. However, the panel denied the other effects such as reducing the value of imported products and preventing entry into the market due to brand differentiation. (c) Regarding the risk of failure to achieve the objectives of the measure, the consequence of failure to achieve the objectives to the public health is found to be particularly serious (i.e., it was found that the use / exposure of tobacco products does not decrease and thus public health does not improve.) (d) Regarding alternative measures, any of the four specific alternative measures claimed by the complainants is not regarded as a less-trade-restrictive alternative measure that has the same degree of contribution to the objective as the present measures mainly for the following reasons.

(d)-i Raising the minimum purchase age: This alternative only affects the availability of tobacco products for a limited age group, and does not affect the initiation, cessation or relapse of smoking by other age groups. Compared with the measure at issue, it cannot affect the demand for tobacco products itself. Therefore, this alternative measure would not be a less-trade-restrictive measure with an equivalent contribution that can substitute the measure at issue.

(d)-ii Raising tax rate on tobacco products: Given the perception that a tax increase has the effect of replacing with low-priced products ("down-trading" or "downward substitution"), this alternative measure may affect the trade volume of imported products like the measure at issue. Thus, the complainants has failed to establish that the tax increase is less trade-restrictive than the measure at issue. Further, the tax increase cannot substitute the measure at issue, as it does not

address aspects of the demand for tobacco products that the measure addresses as part of comprehensive tobacco control regulations. Therefore, this alternative does not have the same degree of contribution as the measure at issue.

(d)-iii Improvement of anti-tobacco social marketing campaigns: If this alternative has an effect equivalent to the measure at issue on tobacco reduction, at least it is equally trade-restrictive. Further, this alternative does not include the removal of branding elements which make a product look appealing, and undermines the effectiveness of existing social marketing campaigns by issuing inconsistent messages with brands on the packaging. Therefore, this alternative is not a substitute for the measure at issue, and it does not contribute to the objective to the same degree as the measure at issue.

(d)-iv Pre-vetting (preliminary screening of individual packaging): Because of wide discretion and the possibility of misjudgment, this alternative does not contribute to the objective to the same degree as the measure at issue.

As a result of comprehensive consideration of each of the above factors, the panel found that there are no alternative measures that are less-trade-restrictive and have equivalent contributions to the objective, especially in view of the fact that this measure functions as part of comprehensive tobacco control regulations. In conclusion, the panel did not find that the measure is inconsistent with Article 2.2 of the TBT Agreement.

Australia argued that, based on Article 2.5 of the TBT Agreement, the measure at issue is in accordance with the "relevant international standards" under the Tobacco Control Framework Convention and thus, is presumed not create an unnecessary obstacle to international trade. However, the panel did not find that Article 2.5 applies to the measure, as the guidelines based on the treaty are not clear and detailed enough, they do not satisfy elements such as "document" and "common and repeated use".

In addition, regarding (2) the main issues in the TRIPS Agreement, the panel found as follows:

(i) (Article 2.1 of the TRIPs Agreement, Article 6*quinquies* of the Paris Convention) The protection that the other countries of the Union should give as a result of registration refers to the protection given as a result of trademark registration in that country. Since the substantive rights to be protected is not stipulated, Article 6*quiquies* of the Paris Convention and Article 2.1 of the TRIPs Agreement are not violated;

(ii) (Article 15.4 of the TRIPs Agreement) Article 15.4 stipulates that a registration must not be refused due to the nature of goods or services for a mark that qualifies as a trademark. The scope and content of protection of a trademark after registration are not stipulated. Therefore the violation of article 15.4 is denied;

(iii) (Article 16.1 of the TRIPs Agreement) The protection of a trademark under Article 16.1 does not include the right of the trademark holder to use the trademark, but remains the right to exclude the use of unauthorized third parties. The complainants argue that the measure at issue decreases the distinction function of the trademark, and thus causes the likelihood of confusion, and limits the trademark owners' ability to prevent unauthorized use. However, this argument has not been proved, violations of Article 16.1 are not recognized.

(iv) (Article 20 of the TRIPs Agreement) First, the "use" of a trademark protected under Article 20 is not limited to restricting the distinction function, but includes a wide range of commercial, promotional and promotional actions, so this measure is a "special requirement" that prevents the use of a trade mark.

Furthermore, the criteria to find inconsistency with Article 20 were presented for the first time

that it is necessary to consider whether there are justifications or reasons that sufficiently support the encumbrance of special requirements. As a consideration, panel mentioned the nature and extent of the encumbrance resulting from the special requirements, the reasons for the special requirements, and whether the reasons provide sufficient support for the resulting encumbrance. Regarding these factors, the encumbrance of this measure is far-reaching in that it prohibits trademark holders from obtaining economic value from figurative trademarks. Next, the reason for the measure and the justification were to reduce the use and exposure of tobacco products, as was the case under Article 2.2 of the TBT Agreement. Lastly, as long as the reason sufficiently supports the encumbrance, the Members have a degree of latitude regarding the choice of intervention to address a policy objective. And when there is a reasonably available alternative measure that would lead to at least equivalent outcome in terms of the policy objective, such an alternative measure may call into question the reasons presented by the respondent country. Considering this, as discussed in Article 2.2 of the TBT Agreement, the alternative measures claimed by the complainants do not have an equivalent contribution to the purpose and suppose Australia cannot be found to have exceeded its discretion over aspects of policy intervention, even though the encumbrance of this measure is extensive, it is designed to supplement existing regulations as part of Australia's comprehensive tobacco control regulations. By limiting the use and exposure of tobacco products, it can, and actually do, contribute to the purpose of improving public health. Thus, the panel concluded that the encumbrances on the use of trademark caused by the application of the measure was sufficiently supported by the reasons of the maeausre at issue,, and that no violation of Article 20 was found.

After that, in July-August 2018, Honduras (DS435) and Dominican Republic (DS441) appealed, and this case is currently pending in the Appellate Body procedure.

(8) Russia-Railway Equipment (TBT agreement) (DS499)

In October 2015, Ukraine requested consultations pursuant to Article XXII of GATT, claiming that Ukrainian products has been unable to be imported due to Russia's measures for importing railway equipment and parts and thus is inconsistent with Articles 2 and 5 (conformity assessment procedures) of the TBT Agreement. The panel was established in December 2016.

The measures at issue are: (i) systemic prevention of imports of Ukrainian products into Russia by suspending or rejecting new issues of certificates conforming the quality of railway equipment; (ii) suspending the validity of certificates and refusing the issue new certificates, for railway products suppliers in Ukraine; and (iii) not recognizing the certificates of Ukrainian railway product suppliers that were issued under CU Technical Regulation 001/2011.

Ukraine claimed that (i) above is inconsistent with the most-favoured-nation treatment obligation (Article I:1 of the GATT), etc.; (ii) above violates Article 5.1.1 of the TBT Agreement (conformity assessment procedures should not be discriminatory but MFN), Article 5.1.2 of the TBT Agreement (conformity assessment procedures must not be achieved for the purpose of causing unnecessary obstacles to international trade and should not be stricter than necessary) and Article 5.2.2 of the TBT Agreement (when receiving an application, the competent body promptly examines the completeness of the documentation); and (iii) above violates Articles 2.1, 5.1.1 and 5.1.2 of the TBT Agreement, and Articles I and III:4 of the GATT.

The panel circulated its report in July 2018. The instruction to suspend the validity of certificates was found that Ukraine did not establish the inconsistency with Article 5.1.1 of the TBT Agreement. In view of the security situation in Ukraine, the Panel found that there was a risk to the life and health of Russian inspectors The Panel consequently found that although it was necessary to undertake an investigation in Ukraine to complete the conformity assessment, the inspectors could

not be dispatched to carry out inspections. Therefore, the situation in Ukraine was not comparable to that in other exporting countries and thus no discrimination was found. In addition, it was found that Ukraine did not establish its claim that the conformity assessment procedure was more strict than necessary (Article 5.1.2). The fact that the Russian organization did not communicate the results of the conformity assessment to the applicant in precise and complete manner was found to be inconsistent to Article 5.2.2.

Regarding the rejection of certifications, the inspectors could not be sent, and the inconsistency of Article 5.1.1 of the TBT Agreement was not accepted as above. On the other hand, regarding the rejection of certifications, although it was possible for Russia to inspect the relevant sample products outside Ukraine, and thus there were other rational methods of inspection, Russia did not carry these out. This fact demonstrates that Russia applied the conformity assessment more strictly than necessary for Ukrainian products with respect to technical regulations and was found contrary to Article 5.1.2 of the TBT Agreement. Some measures were found contrary to Article 5.2.2 of the TBT Agreement, as Russia did not communicate the results of the assessment in a precise and complete manner.

Regarding non-recognition of certification issued by CU countries other than Russia, it does not fall under technical regulation, and thus did not find it to be inconsist with Article 2.1 of the TBT Agreement. However, inconsistency with Articles I:1 and III:4 of the GATT were found as Ukrainian products are disfavoured compared with products from Russia or other countries.

Regarding the alleged systemic prevention of imports, the Panel found that Ukraine has not established its claims of inconsistency with the GATT.

Raising certain objections to the Panel’s decision, Ukraine appealed to the Appellate Body in August 2018.