1 PREAMBLE

1.1 Text of the Preamble

Members,

Having regard to the Uruguay Round of Multilateral Trade Negotiations;

Desiring to further the objectives of GATT 1994;

Recognizing the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;

Desiring therefore to encourage the development of such international standards and conformity assessment systems;

Desiring however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement;

Recognizing that no country should be prevented from taking measures necessary for the protection of its essential security interest;

Recognizing the contribution which international standardization can make to the transfer of technology from developed to developing countries;

Recognizing that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavours in this regard;

Hereby *agree* as follows:

1.2 General

1. Panels and the Appellate Body referred to the preamble to the TBT Agreement when interpreting various provisions of that Agreement.[1] The Appellate Body in *US – Clove Cigarettes*

[1] See Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.485; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.87 and 7.90; *EC – Seal Products*, paras. 7.416-7.417 and 7.582-7.584; *US – COOL*, paras. 7.233, 7.551, 7.600, 7.670, and 7.760; *US – Tuna II (Mexico)*, paras. 7.41, 7.110, 7.225, 7.276,

considered that the preamble to the TBT Agreement "sheds light on the object and purpose of the Agreement".[2]

2. The Panel in *EC – Sardines* referred to several recitals in the Preamble in the context of discussing the degree of Members' regulatory autonomy under the TBT Agreement:

> "We also note in this respect that the WTO Members expressed in the preamble to the TBT Agreement their desire that:
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> > […] technical regulations and standards […] do not create *unnecessary obstacles* to trade […]; (emphasis added)
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> and recognized that:
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> > no country should be prevented from taking measures to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, *at the levels it considers appropriate,* subject to the requirement that they are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail or a *disguised restriction on international trade* […]. (emphasis added)
>
> Article 2.2 and this preambular text affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them. At the same time, these provisions impose some limits on the regulatory autonomy of Members that decide to adopt technical regulations: Members cannot create obstacles to trade which are unnecessary or which, in their application, amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Thus, the TBT Agreement, like the GATT 1994, whose objective it is to further, accords a degree of deference with respect to the domestic policy objectives which Members wish to pursue. At the same time, however, the TBT Agreement, like the GATT 1994, shows less deference to the means which Members choose to employ to achieve their domestic policy goals. We consider that it is incumbent upon the respondent to advance the objectives of its technical regulation which it considers legitimate."[3]

3. In *EC – Sardines*, the Appellate Body found that the obligation in Article 2.4 of the TBT Agreement applies to measures that were adopted before the TBT Agreement entered into force but which have not ceased to exist. In the course of its analysis, the Appellate Body referred to several recitals in the Preamble:

> "The significant role of international standards is also underscored in the Preamble to the *TBT Agreement*. The third recital of the Preamble recognizes the important contribution that international standards can make by improving the efficiency of production and facilitating the conduct of international trade. The eighth recital recognizes the role that international standardization can have in the transfer of technology to developing countries. In our view, excluding existing technical regulations from the obligations set out in Article 2.4 would undermine the important role of international standards in furthering these objectives of the *TBT Agreement*. Indeed, it would go precisely in the opposite direction."[4]

7.460, and 7.467; *US – Clove Cigarettes*, paras. 7.111-7.114, 7.329, 7.359-7.360, and 7.370; and *EC – Sardines*, paras. 7.119-7.120. See also Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, paras. 5.201, 5.214, 5.253, and 5.266; *US – Tuna II (Mexico*) *(Article 21.5 – Mexico)*, paras. 7.30 and 7.87-7.92; *EC – Seal Products*, paras. 5.121-5.124, and 5.310; *US – COOL*, paras. 370, 373, and 445; *US – Tuna II (Mexico)*, paras. 212-213, 313, 316, and 379; *US – Clove Cigarettes*, paras. 89-100, 108-109, 120, and 172-173; *EC – Sardines*, para. 215.

[2] Appellate Body Report, *US – Clove Cigarettes*, para. 89.

[3] Panel Report, *EC – Sardines*, paras. 7.119-7.120.

[4] Appellate Body Report, *EC – Sardines*, para. 215.

4. The Panel in *EC – Trademarks and Geographical Indications (Australia)* referred to several recitals in the Preamble in the context of discussing the distinction between technical regulations and standards:

> "The object and purpose of the TBT Agreement is, in large part, disclosed by the two main groups of substantive provisions that it contains: one that relates to technical regulations and standards in Articles 2 to 4, and another that relates to conformity assessment procedures in Articles 5 to 9. It is also reflected in the preamble, of which the fifth recital, and also the third and fourth recitals, draw this distinction. If the Panel were to embed measures subject to Articles 5 to 9 in the definition of a technical regulation and thereby subject them to the technical regulations provisions in Articles 2 to 4 as well, it would lead to an unreasonable result."[5]

5. Considering how the object and purpose of the TBT Agreement informs the interpretation of the term "international standardizing body", the Appellate Body in *US – Tuna II (Mexico)* noted that:

> "[T]he *TBT Agreement* explicitly encourages the development of international standards. Thus, the preamble of the *TBT Agreement* states, in relevant part: '*Recognizing* the important contribution that international standards … can make … by improving efficiency of production and facilitating the conduct of international trade; *Desiring* therefore to encourage the development of such international standards'."[6]

6. In the context of a finding declared by the Appellate Body "moot and of no legal effect", the Panel in *EC – Seal Products* noted that the objectives listed in the sixth and seventh recitals of the preamble to the TBT Agreement constitute one of the relevant factors in assessing the legitimacy of an objective not explicitly mentioned in Article 2.2 of the TBT Agreement.[7]

1.3 Second recital

7. The Appellate Body in *US – Clove Cigarettes* stated that the second recital links the TBT Agreement to the GATT 1994[8] and considered:

> "While this recital may be read as suggesting that the *TBT Agreement* is a 'development' or a 'step forward' from the disciplines of the GATT 1994, in our view, it also suggests that the two agreements overlap in scope and have similar objectives. If this were not true, the *TBT Agreement* could not serve to 'further the objectives' of the GATT 1994. The second recital indicates that the *TBT Agreement* expands on pre-existing GATT disciplines and emphasizes that the two Agreements should be interpreted in a coherent and consistent manner."[9]

1.4 Fifth recital

8. The Appellate Body in *US – Clove Cigarettes* explained:

> "The fifth recital reflects the trade-liberalization objective of the *TBT Agreement* by expressing the 'desire' that technical regulations, technical standards, and conformity assessment procedures do not create unnecessary obstacles to international trade. It states:
>
> > *Desiring* however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

[5] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.513.
[6] Appellate Body Report, *US – Tuna II (Mexico)*, para. 379.
[7] Panel Reports, *EC – Seal Products*, paras. 7.415-7.416 (referring to Appellate Body Reports, *US – Tuna II (Mexico)*, para. 313; and *US – COOL*, para. 370); and Appellate Body Reports, *EC – Seal Products*, para. 6.1.
[8] Appellate Body Report, *US – Clove Cigarettes*, para. 90.
[9] Appellate Body Report, *US – Clove Cigarettes*, para. 91.

> We see the fifth recital reflected in those TBT provisions that aim at reducing obstacles to international trade and that limit Members' right to regulate, for instance, by prohibiting discrimination against imported products (Article 2.1) or requiring that technical regulations be no more trade restrictive than necessary to fulfil a legitimate objective (Article 2.2)."[10]

1.5 Sixth recital

9. In *US – Clove Cigarettes*, the Appellate Body found that "the explicit recognition of Members' right to regulate in order to pursue certain legitimate objectives" in the sixth recital "qualifies" the objective of avoiding the creation of unnecessary obstacles to international trade through technical regulations, standards, and conformity assessment procedures.[11] The Appellate Body observed as follows:

> "We read the sixth recital as counterbalancing the trade-liberalization objective expressed in the fifth recital. The sixth recital 'recognizes' Members' right to regulate versus the 'desire' to avoid creating unnecessary obstacles to international trade, expressed in the fifth recital. While the fifth recital clearly suggests that Members' right to regulate is not unbounded, the sixth recital affirms that such a right exists while ensuring that trade-distortive effects of regulation are minimized. The sixth recital suggests that Members' right to regulate should not be constrained if the measures taken are necessary to fulfil certain legitimate policy objectives, and provided that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the Agreement. We thus understand the sixth recital to suggest that Members have a right to use technical regulations in pursuit of their legitimate objectives, provided that they do so in an even-handed manner and in a manner that is otherwise in accordance with the provisions of the *TBT Agreement*.
>
> The balance set out in the preamble of the *TBT Agreement* between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX."[12]

10. The Appellate Body in *US – Tuna II (Mexico)* considered that the sixth recital sheds light on the meaning and ambit of the "treatment no less favourable" requirement in Article 2.1:

> "The sixth recital of the preamble recognizes that a WTO Member may take measures necessary for, *inter alia*, the protection of animal or plant life or health, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that such measures 'are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination' or a 'disguised restriction on international trade' and are 'otherwise in accordance with the provisions of this Agreement'. Although the sixth recital does not explicitly set out a substantive obligation, we consider it nonetheless sheds light on the meaning and ambit of the 'treatment no less favourable' requirement in Article 2.1, by making clear, in particular, that technical regulations may pursue legitimate objectives but must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination. "[13]

11. The Appellate Body also referred to the sixth recital of the preamble in support of its conclusion that, in the context of Article 2.2 of the TBT Agreement, the question of whether a technical regulation "fulfils" an objective is concerned with the degree of contribution that the

[10] Appellate Body Report, *US – Clove Cigarettes*, paras. 92-93.
[11] Appellate Body Report, *US – Clove Cigarettes*, para. 94.
[12] Appellate Body Report, *US – Clove Cigarettes*, paras. 95-96.
[13] Appellate Body Report, *US – Tuna II (Mexico)*, para. 213.

technical regulation makes toward the achievement of the legitimate objective.[14] In this regard, the Appellate Body noted:

> "We see support for this reading of the term 'fulfil a legitimate objective' in the sixth recital of the preamble of the TBT Agreement, which provides relevant context for the interpretation of Article 2.2. It recognizes that a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives 'at the levels it considers appropriate', subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the *TBT Agreement*. As we see it, a WTO Member, by preparing, adopting, and applying a measure in order to pursue a legitimate objective, articulates either implicitly or explicitly the level at which it seeks to pursue that particular legitimate objective."[15]

12. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Appellate Body noted the "important commonalities" that the language of the sixth recital of the preamble has with the chapeau of Article XX of the GATT 1994, underscoring the fact that the concepts of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and a "disguised restriction on trade" are found both in the chapeau of Article XX and in the sixth recital of the preamble of the TBT Agreement.[16]

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[14] Appellate Body Report, *US – Tuna II (Mexico)*, para. 315.
[15] Appellate Body Report, *US – Tuna II (Mexico)*, para. 316.
[16] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.88-7.89.