

they do not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade, countries have the right to take measures "necessary to protect human, animal or plant life or health." The obligation is reflected in paragraphs 2.1 and 7.1 of the Tokyo Round TBT, which state that standards-related measures must avoid creating "unnecessary obstacles" to trade. The Uruguay Round Agreement on TBT further clarifies the meaning of necessary as not "more trade-restrictive than necessary." In other words, between two regulatory options that are reasonably available and equally effective, a country would be expected to choose that which is likely to have the measurably smaller effect on trade.

The alternative to this discipline would be to allow regulations that could affect trade more than necessary. Such regulations would not increase a country's ability to achieve its desired levels of environmental protection. Nevertheless, they would both jeopardize the opportunity for export-dependent countries, such as Canada, to realize their economic potential and be inconsistent with the environmental objective of ensuring the most efficient use of the planet's resources.

The purpose of the least trade-restrictive discipline is to ensure that regulations do not affect trade to a greater extent than is required; it does not compromise Canada's right to achieve its chosen levels of environmental protection.

iv) Scientific Justification and Risk

Some Canadians believe that environmental standards-related measures must be based on scientific justification. This is incorrect. Scientific justification is not a requirement of the measures implemented under the Agreement on TBT.

However, the new Agreement on TBT does state explicitly that the extent to which a technical regulation restricts trade must take into account the risk that might be incurred should the regulation's objective not be fulfilled. This is sometimes referred to as proportionality. Closely related to the requirement that a measure be necessary, it means that the trade restrictiveness of environmental measures should be less severe when the risk of potential damage to the environment is low than when the risk is high.

An example of proportionality is the 1992 OECD Decision Concerning the Control of Transfrontier Movements of Wastes Destined for Recovery Operations. The Decision, taken in the context of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, divides products into green, amber and red categories on the basis of criteria such as their hazardous characteristics and their involvement in previous environmental incidents. Wastes on the green list (e.g. paper) may move among OECD countries on the basis of normal commercial controls. The transboundary movement of wastes on the amber list (e.g. antifreeze fluids) must be preceded by a notification to the importing country. Wastes on the red list (e.g. ceramic-based fibres) can be