The New GATT Code and the International Harmonization of Products Standards

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Enactment by the Ninety-third Congress of the Trade Act of 1974 gave the President of the United States renewed authority to negotiate reciprocal trade agreements over the next five years, thereby enabling the United States to join the new round of multinational trade negotiations which opened in Geneva on February 11, 1975, under the auspices of the General Agreement for Tariffs and Trade (GATT). A principal objective of the United States and the many other participant nations is the elimination of the non-tariff barriers (NTB's) to free...
trade represented by, among other things, incompatible products standards.

Products standards represent the specifications involving the quality, safety, performance or other characteristics with which producers either may or must comply in the development and production of a good or a manufacturing process. If a producer fails to comply with a given standard, he may find it difficult or may be prohibited entirely from marketing his inventory in a locality in which the standard is in force. A nation which seeks to curb imports in selected industries may do so by developing a standard with which compliance is mandatory and with which overseas competitors find it uneconomical to comply.

The development of such a standard may often serve a legitimate purpose, such as protecting public health and safety. It is often no simple task, however, to determine whether the intent behind the development of a particular standard was for one of these purposes, or whether it was created primarily to protect a domestic industry from foreign competition. In either case, the existence of incompatible products standards presents a major obstacle to international trade. This article will examine the problem of incompatible standards and review the various international and regional efforts to reconcile the differences between standards, a process called "harmonization of standards."

I
THE MOVE TOWARD HARMONIZATION

A. THE IMPORTANCE OF INTERNATIONAL COOPERATION

Until recently little attention was paid to the problems of both incompatible products standards and other types of NTB's. Within the

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Query, however, what safety interest of the Norwegian public is protected by the regulation that the "sole of all shoes must be made of a single piece of natural leather, which precludes [the use] of artificial leathers such as 'corfam.'" Non-Tariff Barriers: An Inventory, Int'l Comm., Sept. 21, 1970, at 13.

For an extensive worldwide inventory of standards which may potentially function as non-tariff barriers, see Hearings on Tariff and Trade Proposals, supra, at 123-312; Int'l Comm., supra, at 9-14.

3. The Kennedy Round of the GATT considered only a few non-tariff barriers such
past several years, however, the problem of harmonizing incompatible standards has become important to such bodies as the GATT, the European Economic Community (EEC), the European Free Trade Association (EFTA), and the United Nations Economic Committee for Europe (ECE). The following are the principal factors influencing this change:

1. The first six rounds of the GATT have produced an average reduction in tariff barriers of ten percent. Since the initial reduction of higher tariff levels seems to be a more effective stimulant to trade than their final elimination, other trade barriers, including the existence of products standards, have now acquired growing significance. National groups, formerly protected from foreign competition by high tariffs, now feel obliged to pressure their respective legislatures into adopting new non-tariff protective devices.

2. Recent years have seen vast increases in international trade as well as the development of higher levels of technology, both of which have required greatly accelerated standards-making activities. Nations throughout the world have realized that such a flurry of activity has increased the likelihood that incompatible standards will be developed, and, as a consequence, are beginning to see the benefit both in harmonizing existing standards before the divergence becomes too great, and in creating new standards which will be uniform from the date of their creation.

3. The rise of great multinational corporations has proven to be an incentive to unify standards, especially engineering ones, since components manufactured in several countries must be compatible with all other parts of the assembled product.

as the American Selling Pricing System of Customs valuation of certain benzenoid chemicals [See Middleton, Technical Specifications: A Case Study of Non-tariff Barriers to Trade (1), 12 E.F.T.A. Bull. No. 2, at 3-5 (1971)], an agreement on an antidumping code, and elimination of certain non-tariff restrictions, such as the discriminatory European road-use taxes on U.S. automobiles. The field of standards was not then discussed. Travaglini, Expanding World Trade: Facts and Problems, 45 Denv. L. Rev. 736, 737 (1968).


5. For example, 80-90 percent of the international standards in force today were adopted within the last ten years. It is anticipated that their number will increase tenfold in the next ten years. Hearings on H.R. 8111 Before the Subcomm. on Commerce and Finance of the House Interstate and Foreign Commerce Comm., 92d Cong., 1st Sess., ser. 49 at 1 (1971).

6. The divergence, especially in national safety standards, appears to be accelerating rather than diminishing. "In 1955, for example, one basic Volkswagen model could be exported anywhere in Europe whereas now nine to ten variations of the basic model are needed to satisfy the different safety standards." Baldwin, supra note 1, at 145.

4. In recent years, in response to consumer pressure, governments in Western and non-Communist nations have become increasingly demanding in the areas of product safety and public health, and have published health and safety standards with which consumer products must conform.

5. The number of voluntary standards, i.e., where compliance is not legally required, has increased as manufacturers have attempted to meet consumer demands for comparative shopping "measuring-sticks" which clearly tell consumer buyers what levels of performance can be expected from each product. The problem of transnational deviations among products standards can only be solved through international negotiation and consensus. The process of harmonizing national product standards, however, is not an easy one; it involves not only conciliation at the standard-development stage, but also continuous cooperation at later stages as well. It is only through an analysis of the process that an accurate appraisal of its likely success can be made.

B. The Total Harmonization Solution

The process of total international harmonization of products standards involves three steps. First, differing products standards must be made uniform. As many nations as possible should participate in the effort so that the stragglers will not find that other nations have adopted a uniform standard different from their own.

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8. A distinction has been drawn between voluntary and mandatory standards. Voluntary standards are those which are accepted and used by certain persons, but compliance therewith is not required by law. Although not binding by themselves, they may have considerable effect in a market if a large number of users give preference to products conforming to such standards. For example, an American building contractor might not wish to use imported materials which fail to meet United States standards, even though he would legally be permitted to do so.

Mandatory standards are those with which the law demands compliance. Their objective is not so much standardization as it is to ensure minimum levels of safety, performance, or accuracy in products. Middleton, supra note 3, at 3. Mandatory standards are usually the more obvious barriers to trade because imported products must often conform to them or be barred from sale. Often they are developed initially as voluntary standards, but are then adopted by legislation or regulation as mandatory standards. For example, the Occupational Safety and Health Administration has by regulation referenced more than 120 voluntary standards. These were originally voluntary standards promulgated by the American National Standards Institute. See American National Standards Institute (ANSI), The Role of the American National Standards Institute 1, 1972. (This and other ANSI pamphlets may be obtained from the American National Standards Institute, 1430 Broadway, New York, New York, 10018.)

9. Hearings on H.R. 8111, supra note 5, at 78.

10. American oxygen hose used in operating cutting tools is colored green in accor-
Secondly, the programs of tests and inspections which ensure that a product has complied with a uniform standard ("quality assurance" systems) must be harmonized through the adoption of common standards for testing laboratories, with designated national agencies accrediting the labs and maintaining a constant check on compliance with such standards. Failure to do this would lead to increased production and selling costs. Finally, there must be a joint development of programs which in some way mark a product in order to show that it complies with a given standard ("certification" systems). Often orders are placed for only those products with a specific certifying mark. Producers in countries which have not adopted the system must go to the expense of securing this mark, while risking possible refusal by a target nation to place the mark on the product.


11. Since Italy does not recognize inspection of certain types of equipment by the inspection associations in exporting nations or, presumably, by the foreign manufacturer himself, it provides its own inspectors. French and German exporters have repeatedly complained that Italy causes long delays in shipments because it fails to supply inspectors "for months on end." And even when inspectors do arrive, their expenses and the costs of the tests they perform, if any, are usually paid for by the exporter, thereby increasing the production and selling costs of the product and reducing any competitive advantage in the target country it might otherwise have had. Baldwin, supra note 2, at 144.

12. The Tripartite Accord on Electrical Components, originally signed by the United Kingdom, France, and West Germany and drafted under the auspices of the European Standards Coordinating Committee (CENEL), an organization of the members of the national standards bodies of the Common Market and European Free Trade Association, provides for a system for certifying complying products with a "mark of conformity." Lack of U.S. Action in World Standards Costs Exporters §, supra note 10, at 6. The Accord specifies that once an "Authorized Institution" places the "mark of conformity" on a good, other signatories must accept the product without further testing.

Products imported from non-member countries such as the United States not bearing the "mark of conformity" have to undergo local testing and certification even though the United States commodity may be identical to those of member nations in every other respect. Lack of U.S. Action in World Standards Costs Exporters §, supra note 10, at 6. This means additional costs and delays. If United States electronic goods were excluded under the system, the sales loss would be $2.2 billion, or about seventy percent of the total worldwide American electronic exports of $3.2 billion. Hearings on S. 1257 and S. 1798 at 128. The probable takeover of the system by the International Electrotechnical Committee (IEC) in the near future would permit expanded worldwide membership with American participation. Id., at 92.
It is clear that adoption of a harmonization system through this three-step procedure would benefit manufacturers and consumers alike. In addition to the primary benefit of freeing economic relations from the distortions caused by differences in standards and standards systems, it would foster innovation by permitting sellers to market new products with confidence that they meet accepted standards which purchasers require. It would increase the interchangeability and acceptability of products and would lower production and selling costs. Standardized products would often be more dependable because they would have been tested to conform with standards which were known to be reliable. Further, harmonization would reduce the amount of requisite quality control through enlarged production scales, conserve time and money in purchasing, limit the amount of paperwork, facilitate the training of personnel, expedite the introduction of automation, and create more sources of supply for parts.

A totally harmonized world, however, may be the technician's impossible dream. Its adoption may be possible only for certain goods under specified conditions. A single set of standards cannot always account for differing national values and circumstances. Differences in climate, for example, may make a uniform standard regulating the manufacture of sardine cans appropriate for production at sea level, but inappropriate at higher elevation where altitude may affect the cans' seams. The advantages of a single set of standards, moreover, will often be outweighed in situations where concerns for public health and safety emphasize a need for a "best possible" standard rather than a uniform standard. Many nations may not compromise a high national safety standard just to adopt a lesser uniform international standard. Conversely, countries with a lower standard may not feel necessarily compelled to adopt a higher international standard where they believe their populaces are already sufficiently well-protected.

Recognizing the impracticality of total harmonization and the need for a broadly workable solution, numerous bilateral and multilateral compromise measures have been proposed by various organizations.

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concerned with international products standards. It is these suggestions which will likely serve as the model for the new GATT Code on Standards.

II

INTERNATIONAL STANDARDS ORGANIZATIONS

A lack of centralization in the standards-making process had resulted in almost as many standards organizations as published standards. A partial listing of international organizations which are involved in the standards area numbers over two dozen. Some are treaty organizations, some are non-treaty, and many are agencies of the United Nations. In addition, there are hundreds of national standards groups which may directly or indirectly have an effect on international standards-making. This proliferation of organizations represents perhaps the principal cause for the burgeoning number of incompatible standards appearing on the world's markets.

A. INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO) AND THE INTERNATIONAL ELECTROTECHNICAL COMMISSION (IEC)

1. History and Procedures of the ISO and IEC

The ISO and the IEC are closely allied and perform similar functions. The IEC, the older of the two, has been collaborating on standards in the electrotechnical field since 1906. The ISO, which began to function on an official basis in 1947, was an outgrowth of the United Nations Standards Coordinating Committee, a wartime group of the national standards bodies of eighteen allied countries. Its work covers every area of technology except electrotechnical questions which

16. International organizations involved in the standards areas include the Asian Standards Advisory Committee, the European Committee for Standardization, the Commonwealth Standards Conference, the Pan American Standards Commission, and the International Organization for Standardization. Certain international organizations, such as the European Economic Community and the United Nations, have divisions devoted to international standardization. Prominent among these is the Codex Alimentarius Commission of the United Nations (see notes 38-39 infra). American National Standards Institute, The ABC's of International Standardization, 1972.

17. Jenssen, supra note 9, at 8-9.

remain in the jurisdiction of the IEC. The objective of both organi-
izations is to encourage agreement among producers, buyers, govern-
ments and scientific groups on harmonized “International Standards.”
While their goal was initially to reconcile differences between national
standards, a new role, the development of an international agreement
on a single standard, has been emerging. This role is especially
apparent in areas of new technology where standards have yet to be
created.19 In addition both have begun to harmonize certification
systems.

The procedure for formulating a standard in the ISO20 begins when
a draft proposal of a standard is submitted by one of the organization’s
technical committees to the central secretariat21 for registration as a
draft ISO standard. A draft which is adopted by a majority of the
participants on the technical committee and approved by 60 percent of
the member national standards bodies is forwarded to the ISO Council
for acceptance and publication.22

The member bodies of ISO are the “most representative organiza-
tions for standardization” in their respective countries.23 In 1973 there
were 56 member bodies24 of which the developing nations formed a
majority. Seventy percent of them were either governmental institu-
tions or organizations incorporated by public law.

The character of each member body varies from country to country.
Domestic industry participates in the work of the ISO through the
national member body; some member bodies are heavily influenced by
suggestions of industry while others are not. In some instances the
member institution has domestic duties such as certification and quality
control in addition to international responsibilities; others participate
only at the ISO level.25 In most countries there exists a type of
partnership between the government and the national standards or-

19. Id. at 6-7.
20. The ISO is the larger of the two organizations and carries out its programs
through 1,400 technical committees, subcommittees, and working groups comprised of
50,000 experts from all over the world. Its Geneva central secretariat, which acts as the
post office for the technical committees and adds the final touch to their recommenda-
tions, has a staff of 85 from twenty nations. See generally, Reduced Trade Barriers Aim as
21. See note 20 supra.
22. Hearings on S. 1257 and S. 1798 at 47.
23. Id. at 130.
25. Id.
The United States, however, constitutes an exception to this latter rule: American participation in the ISO is through the American National Standards Institute (ANSI), which has neither official recognition nor financial support from its government. A private national conglomerate of U.S. citizens and institutions involved in the standards area, ANSI coordinates the development of standards in the private sector and compiles and publishes them. It does not, in and of itself, develop standards.

Adoption by member nations of published ISO standards is voluntary. Of the over 2,500 ISO standards presently published some nations such as the U.S.S.R. have published hundreds while others have adopted fewer than twenty. Among Western European countries (in the European Committee for Standardization) there has been a trend toward the adoption of international rather than national stan-

26. The degree of the governmental subsidization of the organization, however, varies from country to country. There is one hundred percent funding in Russia. Hearings on S. 1257 and S. 1798 at 74. In England the government provides matching funds, sometimes over fifty percent, to the British Standards Institute. Hearings on H.R. 8111, supra note 5, at 40. In France the non-governmental AFNOR (Association Francaise de Normalisation), the French member of the ISO, receives approximately two-thirds of its budget from a special tax France charges domestic industry. It is a parafiscal tax applied as an additional part of the "value-added" tax. Hearings on S. 1257 and S. 1798 at 46.

27. Hearings on H.R. 8111, supra note 5, at 58. ANSI is also closely allied with the U.S. National Committee of IEC, sponsored by twenty-nine different domestic organizations, Hearings on S. 1257 and S. 1798 at 147.

ANSI's activities both domestically and on the ISO are supported solely through membership dues, the sale of published standards, and certification accreditation fees. American National Standards Institute, The Role of the American National Standards Institute, supra note 8, at 1. The United States government's role in international standards activity has been limited to providing ANSI with technical information and the services of technical experts, despite several attempts to provide further and quite extensive government support. See S. 1798, 92d Cong., 1st Sess. (1971); H.R. 8111, 92d Cong., 1st Sess. (1971); H.R. 7506, 93d Cong., 1st Sess. (1973). These bills would have allowed for the issuance of grants to qualified private, non-profit organizations such as ANSI for the promotion and development of international standards and entering United States participation on international standards-making bodies by clarifying the authority of the Department of Commerce to promote such activities. See also Hearings on H.R. 8111, supra note 5, at 15.

ANSI's solely private funding has resulted in a discontinuity of representation and an erratic performance by the United States in the ISO. Participation has been excellent in areas in which there is a strong industrial interest, such as in the fields of petroleum products, data processing and automobiles, but where interest is weak, participation has been minimal. Id. at 58.

It was United States representation at the ISO which prevented the international adoption of the Swiss national standard for automobile headlights which would have excluded sealed beams of the American variety. See Travaglini, supra note 3.


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32. Sturen, supra note 18, at 5-8.

It should be noted, however, that in many countries adoption of ISO standards is merely a gesture of goodwill since national standards, especially in the highly developed countries, are already compatible with those of the ISO. Hearings on S. 1257 and S. 1798, supra note 10, at 132.
34. Sturen, supra note 18, at 9.
rapidly respond to technological advance, and supervision of technical requirements remains the duty of expert technical staffs. All technical regulations, finally, can be arranged within one unified, systematic Code.

In the United States, however, there are disadvantages which become apparent with the use of this technique. Certain state constitutional limitations on the use of referential legislation exist. Standards-making responsibilities, furthermore, may be improperly delegated to private bodies where a legislative or governmental agency prospectively adopts by reference standards not yet developed by private interest groups:

The constitutional nostril of the court begins to sniff . . . when the legislature adopts not only the existing standards of some technical or professional group, but any which it may prescribe in the future.

The greatest difficulty in using the "reference to standards" technique, however, is that it may tend to bypass many of the "due process" steps constitutionally required in the standards-making and adopting process. A 1960 case indicates that standards-making agencies should: (1) give interested parties an opportunity to be heard, (2) provide due notice of any hearing on proposed standards, (3) ensure fair conduct during the hearing, (4) include support for the decision in the record of the hearing, (5) submit proposed findings and a tentative report, and (6) allow for an opportunity to file and to be heard upon exceptions to the report. This analysis indicates that there might well be a denial of due process if an ISO standard were adopted merely by reference to a single ISO volume of standards without appropriate notice and hearings. Such conduct might also violate the statutes under which national agencies operate in adopting standards. In practice,

36. Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201, 229 (1937). See also Hillman v. Northern Wasco Co. People's Util. Distr., 213 Or. 264, 323 P.2d 664 (1958), disapproving of the delegation of legislative powers to a private agency. One solution to the problem may be that instead of prospectively adopting by reference an international standard, the adopting legislation should provide that conformity to future standards will constitute "prima facie" evidence of compliance with the regulation as well.
38. See, e.g., 37 Fed. Reg. 21102-103 (1972), for the procedures to be used in adopting Codex Alimentarius standards.
however, the need to have the complete text of the standards available
during the adoption procedures and hearings has generally meant that
to date the "reference to standard" technique has not been frequently
employed in the few cases in which the United States has adopted
international standards.39

B. THE EUROPEAN ECONOMIC COMMUNITY (EEC)

The concept of standards harmonization has been well-suited to the
EEC's objective of bringing together "an area in which economic exchanges develop in a domestic market, . . . [where] all barriers would disappear . . . ."40

The EEC had several options in harmonizing standards. It could, for
eexample, have drafted an international convention which was self-
executing or which required signatories to enact standards identical to
a model contained in the convention. Instead, however, it decided to
gradually harmonize existing legislation. Its legal basis for such a
course rested in several articles of the Treaty of Rome,41 including
articles 100 and 101 (relating to approximation of legislation), in
articles 30 et seq. (concerning measures which are equivalent to
eliminating quantitative restrictions), and in the "catch-all" article 235
(dealing with supplementary action to achieve one of the objectives of
the Community not provided for elsewhere in the Treaty).42

While prior to 1968 a number of proposals for uniform standards
had been submitted to the EEC Council of Ministers,43 the Council had

In a related context nonobservance of certain steps in the standards-making process,
such as the failure to allow a wide variety of interests to participate in the development
and adoption of standards, may constitute a violation of anti-trust laws. For an excellent
article discussing the problem see Baker, *Antitrust as a Spur to Technical Progress*, 23 Am.

39. For example, the Food and Drug Administration in proposals for adopting the
food products standards of the International Codex Alimentarius Commission as United
States standards has published the full standards in the Federal Register. 38 Fed. Reg.

The Codex Alimentarius Commission is an international agency jointly sponsored by
the United Nations Food and Agricultural Organization and the World Health Organiza-
tion, whose task it is to develop and administer a program of drafting recommended
international food standards which, when adopted by member nations, will be applied by
those countries to domestic products, imports and exports.

Int'l & Comp. L. 1, 2 (1970).

41. Treaty Establishing the European Economic Community, *done* Mar. 25, 1957, 298
U.N.T.S. 3. An unofficial English text may be found in 1 CCH COMM. MKT. REP. (1972).

42. Middleton, *supra* note 3, at 6. Cf., replies of the Commission to questions in the

43. E.g., see 8 E.E.C. J.O. 1729 (1965).
adopted only a few as directives. During March 1968, however, the EEC Commission submitted to the Council for approval a “general program for the elimination of technical barriers to trade caused by disparities between legislative measures in Member States.” On May 28, 1969, the Council adopted the program in two resolutions. These resolutions, one commentator said,

established a timetable for the elimination of [technical] obstacles [in the industrial and food products area] and, as an interim measure, provided that Member States refrain from adopting any new regulations likely to create a technical obstacle to trade without first consulting with the Commission and the other Member States in order to arrive at common measures. The purpose of this provision is to prevent creation of a new obstacle to trade while work is being done to approximate legislation in a given area.

Recognizing the great difficulty of harmonizing the entire industrial and agricultural products sector, however, the EEC has recently shifted its ground:

Brussels now will push for legislative harmonization only when this is absolutely necessary to assure the free flow of goods and services and only when all other means fail. According to Brussels' revised concept, total harmonization will be replaced by partial harmonization or other methods to improve interstate trade.

In areas of health and environmental and consumer protection, however, the EEC will continue to push towards total harmonization.

The approximation of standards mentioned in the 1969 resolutions is typically accomplished through a directive. The directive is adopted when the EEC Commission, having regulative competence, proposes that the Council of Ministers, composed of representatives from the Member States, address a directive to the Member States. The European Parliament and others are consulted and a directive is issued. For example, in the adoption of a directive “on the approximation of the laws of these Member States relating to emulsifiers, stabilizers, thickeners and gelling agents for use in foodstuffs,” the Council received a proposal from the Commission. The European Parliament then offered its opinion on the proposal, as did the Economic and Social

44. Middleton, supra note 3, at 6.
46. Waelbroeck, supra note 42, at 4.
48. Id. at 2.
49. No citation to the Commission's proposal was given in 17 E.E.C. J.O., LEGISLATION No. 189, at 1-7 (1974).
Committee, whereupon the Council issued a directive which included general criteria regarding the purity of these products and test procedures for determining purity. The directive does not dictate the form and means by which it is to be implemented by a Member State; this is left to the discretion of the domestic agency. Instead it gives guidelines which must be in some manner incorporated into the national standards legislation.

The standard in the directive may not necessarily be one developed by the EEC Council, but may instead be a referenced international standard promulgated by, for example, the ISO or IEC. While the Council's reference to an international standard may be voluntary, referencing of the directive's standard or an "approximation" thereof by a Member State is mandatory.

C. EUROPEAN FREE TRADE ASSOCIATION (EFTA)

Unlike the EEC, the EFTA realized from the beginning that achieving total harmonization would be impractical, and therefore it was never attempted. The EFTA rejected proposals to harmonize standards through "approximation" legislation, to create agreements by which importing countries would license manufacturing plants in exporting countries, or to harmonize quality assurance systems. The Council instead desired an approach which could be rapidly im-

52. 17 E.E.C. J.O., LEGISLATION No. 189, at 1-7 (1974); see Articles 6 and 7. For additional examples of directives, see 17 E.E.C. J.O., LEGISLATION No. 191, at 1-10 (1974) (rear view mirrors, field of vision, and windshield wipers) and 17 E.E.C. J.O., LEGISLATION No. 221 at 1-14 (1974) (motor vehicle seats and anchorages, and honey).
54. During the whole process of "approximating" a standard in a directive, one question which has remained unexplored is "how approximate" the standard enacted by a Member State may be; at what point is a standard described in a directive so materially changed in the national legislation as to be no longer "approximate" or uniform? The answer to this question is, of course, beyond the scope of this article.
55. The EFTA had been a witness to the difficulties of the EEC in reaching agreement on uniform standards which were acceptable to various levels of technology.
56. Under this proposal, an importing country would inspect another nation's export manufacturing plants and license them if it was duly satisfied. It was felt, however, that such a program would be costly and time-consuming, and might be forbidden in some countries outlawsing inspection of certain plants by foreign inspectors. Convention to Remove Barriers to Trade in Pharmaceutical Products, 11 E.F.T.A. BULL. No. 8, at 3, 4 (1970).
57. The Association rejected this plan since it believed there would be too long a delay if national legislation had to be amended to provide for uniform testing and inspection among adhering countries. Id.
plemented through existing institutions without impeding future harmonization efforts. These criteria were more relevant to EFTA economically than they had been to the EEC due to "the size of EFTA and the relatively high proportion of trade with countries outside the free trade zone."^58

The Joint EFTA/Finland Council, therefore, adopted on April 5, 1968, a program which provided for the referencing of relevant standards of international products standards agencies whenever they were adopted. The EFTA itself, however, would develop and publish no standards of its own. Deviation from these standards was permitted only when it was genuinely justifiable and, even then, only upon notice to other Member States. If appropriate international standards did not exist, the guidelines suggested that EFTA members take the initiative in the appropriate international body to have relevant standards formulated. This program was adopted despite the lack of express legal authority in its Stockholm Convention to deal in this area; reliance was instead placed on "EFTA 'pragmatism.'"^59

The approach provided for the reciprocal recognition of tests whereby an importing country would recognize tests conducted by a testing institution in the exporting nation pursuant to the requirements of the importing country. Membership was to be open to both EFTA and non-EFTA nations. Such a scheme could be rapidly implemented without changing national legislation, without harmonizing standards, and without impeding the progress of future harmonization.

Between 1969 and 1970 expert groups were authorized to draft a proposed scheme which could be applied to pharmaceuticals, pressure vessels, agricultural machinery and tractors, gas appliances and ships' equipment.^60 The EFTA Convention for the Mutual Recognition of Inspections in respect of the Manufacturing of Pharmaceutical Products, signed on October 8, 1970, is illustrative of this interim road to harmonization. The area of pharmaceuticals has in the past been a heavily licensed one in which products are often doubly tested, both in the exporting nation, to assure compliance with domestic standards, and again in the target nation.

The Convention provides that the national standards institution in the importing state ask the national institution in the exporting state

58. Middleton, supra note 3, at 8.
59. Id. at 6-7.
60. Id. at 7.
for information regarding the general manufacturing standards of the firm in question, as well as specific standards relating to certain products. After inspection of the plant, the manufacturing nation’s institution sends along the information. If the inspection or information is insufficient, the target nation can request further information through specific interrogatories, which the exporting nation can supply on a voluntary basis through further inspection. The information contained in a confidential report is then evaluated by the importing nation which, if satisfied, grants an import license.

Manufacturers are safeguarded in two ways. First, a manufacturer is under no duty to transmit the requested information during the inspection. Second, only quality control information need be supplied; this usually excludes the areas of technical know-how, research and development, and financial matters.

D. The General Agreement on Tariffs and Trade (GATT)

Since tariffs between international trading nations have in recent years been substantially reduced, GATT has recently become much more interested in the non-tariff area of trade barriers. One working committee of GATT’s Council of Representatives recently developed an inventory of over eight hundred separate non-tariff barriers (NTB’s) which it then divided into five subheadings, one of which was standards.

While the role of standards-making is clearly outside the scope of the GATT, the trade barrier which is imposed by differences between nations is

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61. Such action may, however, lead the importing state to conclude that its information is insufficient, and thus deny the license.

62. This description of the pharmaceutical scheme is from Convention to Remove Barriers to Trade in Pharmaceutical Products, supra note 56, at 5.

The scheme for pressure vessels is similar to that of the pharmaceutical convention in that the importing nation recognizes an act of a certified institution in the exporting nation. Here the exporting nation’s institution conducts tests which may be based either on standards adopted by the importing nation or, alternatively, in accord with other standards, e.g., the exporter’s standards, which have been declared acceptable by the importing nation.

63. See note 4 supra and accompanying text.

64. The five include government participation in trade (subsidies, government purchasing, etc.), customs and administrative entry procedures, standards, quantitative restrictions, and charges on imports (surcharges, prior import deposits, etc.). Reduced Trade Barriers Aim as Negotiators Meet to Plan Worldwide Talk, supra note 20, at 9.

Most of GATT’s work is carried on by the Council of Representatives, which makes reports at the meetings of the Contracting Parties and supervises working groups and committees.
product standards clearly is not. There is, however, no explicit authorization for standards work in the GATT itself. While several articles of GATT deal with certain non-tariff trade barriers, there has been no mention of the harmonization of standards per se. Such authorization may, however, be implied from the fact that a lack of harmonization hampers the basic goals of the GATT described in the Preamble—to substantially reduce tariffs and other barriers to trade and to eliminate discriminatory treatment. In addition, Article XX provides that safety and health measures (which often take the form of standards) should not be applied so as to constitute unjustifiable discrimination between countries where similar conditions prevail.

1. The GATT Push for Standards Harmonization

Each of the five NTB subheadings developed by the Council's working committee is handled by various working groups. The Working Group on Standards has proceeded faster towards a solution of the trade barrier problem than many of the others. Based upon a United States proposal made to the Group in May 1970 and other suggestions, the Group has already made several drafts of a Code of Conduct relating to standards. It can be expected that the Code which is finally adopted will encourage agreeing nations to adopt existing standards which have been harmonized by international standards bodies to the greatest extent possible, except where they are "inappropriate."

In order to ensure the signatures of nations such as the United States having complex standards-adopting procedures, the Code should require its adherents to follow steps which are consistent with "due process of law," e.g., providing interested parties with notice that work is being conducted on a standard, allowing them an opportunity for comment on the proposal, publicizing the adopted standard, and

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66. See the Preamble to GATT, supra note 65.
67. GATT art. XI, para. 2(b); Note, The Restrictive Effects of Industrial Standards on International Commerce, 4 LAW & POL. IN INT'L BUS. 607 (1972).
68. Further work on this Code has already begun at negotiations this year.
69. "Inappropriateness" will certainly include the excuse that "the international standard is not truly global, but is loaded in favor of a particular regional technology, so that its adoption would be discriminatory." STEINER & VAGTS, supra note 4, at 1049.
allowing a reasonable interval between the date the standard is adopted and the date upon which it is to take effect so that producers affected by the standard have a reasonable time within which to comply. Since countries vary widely in the percentage of voluntary and mandatory standards adopted, furthermore, the Code should acknowledge the distinction and provide accordingly for different adoption procedures and obligations.

Where harmonization of test methods and quality assurance systems is concerned, widest adoption of the Code will be possible if it allows for either (1) a flexible EFTA-type scheme where differing test and inspection methods acceptable to importing nations are conducted by national exporting institutions, or perhaps (2) a self-testing and self-certification program conducted by exporting manufacturers themselves.

2. Problems Confronting the Proposed GATT Code on Standards

The Working Group on Standards will have to confront several difficulties in drafting a Code on Standards. Perhaps the major problem concerns the question of what form the Code should take. It could be either an executive agreement or a treaty; if the latter, the choice is between a self-executing treaty or an executory one. The relationship between this Code and the General Agreement, furthermore, would need to be clarified.

Were the agreement to take the form of a treaty, the question of whether or not the executive branch of government has the authority to make such an agreement without the approval of the legislature would be avoided. While in the United States the treaty-making power "extends to all proper subjects of negotiation between our government and the governments of other nations," it was not until recently clear whether or not the President had authority to make an executive agreement concerning non-tariff standards barriers without the ap-

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70. E.g., see Note, The Restrictive Effects of Industrial Standards on International Commerce, supra note 67, at 611-12, 619-20 (lack of opportunity to comment on a proposed statute regarding eyeglasses).

This procedure should help to preclude any violation of the "internal affairs" limitation on United States treaty-making powers.

71. In Australia, 100 percent of national standards are voluntary; in U.S.S.R. 100 percent are compulsory; and in Turkey 82 percent are voluntary and 18 percent compulsory. American National Standards Institute, ISO Member Bodies, supra note 24.

proval of Congress. In the Trade Reform Act of 1974, however, Congress explicitly found that "barriers to... international trade are reducing the growth of foreign markets for the products of [the] United States" and authorized the President to

\[\text{take all appropriate and feasible steps within his power (including the full exercise of the rights of the United States under international agreements) to harmonize, reduce, or eliminate such barriers to... international trade.}\]

Among the steps which the President may take under the Act to help eliminate non-tariff barriers is that of entering into trade agreements with foreign countries, although before doing so he must consult with several congressional committees. Moreover the Congress, after receiving notification from the President, a copy of the agreement, and a draft of proposed implementing legislation, must pass a bill implementing the agreement before it is to take effect. If the appropriate procedures are followed and the President and the Congress cooperate as planned, this procedure will provide the ideal vehicle for adopting the GATT Code as an executive agreement.

Whether or not the Code should be self-executing will probably depend on the extent, if any, to which it is integrated into the GATT. If it takes the form of a completely independent treaty, it might well be self-executing, provided conflicts as to its effects on existing national and regional standards and standards systems can be reconciled.

The question of self-execution becomes an inquiry into the extent to which the provisions of the GATT itself are self-executing assuming, as seems likely, that the Code will be closely tied to GATT. Courts in Europe and the United States have been split on this question. With regard to Article III of the GATT, one German case has held it was

74. Id. § 102(a).
75. Id. § 102(a).
76. Id. § 102(b). Even before this act was passed, authority existed for the position that the President may conclude an executive agreement in the commercial area without the express approval of Congress. Communiqué Regarding a Joint United States-U.S.S.R. Commercial Commission on May 26, 1972, 8 WEEKLY COMP. PRES. DOCS. 924 (June 2, 1972). The Commission was established to promote development of mutually beneficial commercial relations between the two countries. Among other things the Commission was to study possible United States-U.S.S.R. participation in the manufacture of various products. See also B. Altman & Co. v. United States, 224 U.S. 583, 601 (1912), upholding an agreement dealing with commercial relations between two countries, authorized by Congress. See generally Hearings on S. 596, H.R. 14363, and H.R. 14647 Before the Subcomm. on National Security Policy and Scientific Development of the House Foreign Affairs Comm., 92d Cong., 2d Sess. 4 (1972).
77. Pub. L. No. 93-618, supra note 73, § 102(e).
not self-executing, while two decisions of the Italian Court of Appeal have determined that it was.\textsuperscript{78} In a similar showing of inconsistency in American courts, one California decision held Article III to be self-executing, while a New York holding disagreed.\textsuperscript{79}

Other difficulties awaiting the determination of the Working Group on Standards include questions regarding the range of products to which the Code should apply, the extent to which total harmonization should be sought, the parties to which the Code’s obligations and benefits should extend, the application of the Code to private, non-governmental bodies, the resolution of conflicts between state and federal agencies in countries such as the United States, and the power of GATT to enforce compliance with provisions of the Code.

CONCLUSION

With the divergence among national products standards on the rise, nations have earnestly sought means by which standards can be harmonized so as to reduce the trade barrier effect of product standard incompatibility. Due to differences in national circumstances and values, however, most regional and international bodies have found it difficult to achieve total harmonization of standards, test procedures, and certification programs. Several beginnings have nonetheless proved relatively successful in eliminating some standards trade barriers.

The EEC in requiring its Member States to adopt domestic legislation which “approximates” standards found in Council directives has reduced the incompatibility among standards and increased the free flow of goods in areas under its jurisdiction, though it seems that the “approximation” approach is best suited to a group like the EEC in


which Member States are under some legal obligation to follow the directives of a Council of Ministers.

The more successful route may prove to be that of the EFTA, requiring reciprocal recognition of accepted standards and testing procedures of exporting nations by importing nations. This approach does not require change in domestic standards but still leaves open the possibility of future harmonization of those standards, while preserving the ease of implementation.

The litmus test of both of these approaches, however, lies ahead in the current round of the GATT talks. The GATT Code of Standards represents an attempt at harmonization by a broader number of nations. While the fact that nothing in the Code could apparently compel participating nations to adopt the harmonized standards may be a major question mark looming over its effectiveness after adoption, the GATT Working Group on Standards can at least be assured that the United States, armed with the provisions of the recent Trade Act of 1974, is fully prepared to join in the international effort to reduce trade barriers caused by transnational differences in products standards. With that assurance, and the universally recognized need for an improvement in this area, the GATT talks may hold real promise for international product standards harmonization at last.

80. See note 1 supra.
81. See Part I.A. supra.