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TAJIKISTAN

REVIEW OF THE DRAFT LAW ON TECHNICAL REGULATION

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ABBREVIATIONS

| | | |
|------|---|---|
| CIS | - | Organization of the former States of the Soviet Union |
| ISO | - | International Organization for Standardization |
| ITC | - | International Trade Centre (Geneva) |
| MSTQ | - | Metrology, Standards, Testing and Quality |
| SECO | - | State Secretariat of Economic Affairs (Switzerland) |
| SME | - | Small and Medium Enterprise |
| SQAM | - | Standards, Quality Assurance, Accreditation and Metrology |
| SPS | - | Sanitary and Phyto-sanitary (measures) |
| TBT | - | Technical Barriers to Trade |
| WTO | - | World Trade Organization |

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1. INTRODUCTION

1.1 Background

The State Secretariat of Economic Affairs (SECO) of the Government of Switzerland mandated ITC to develop and implement a trade-related technical assistance programme for Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan.

In Tajikistan the objective of the project is to strengthen the sustainable expansion and diversification of SME exports in Tajikistan. It aims to develop national capacity for trade development by focusing on business services providers while also addressing institutional issues. It provides a comprehensive and holistic technical cooperation response to priority needs identified in cooperation with the Government of Tajikistan during the preparatory phase of the project RER/61/85 (2002-2003). The conclusive phase of the project has been designed based on the results of the implementation of the project TAJ/61/92 (2004-2005) and the recommendations provided by an independent evaluator appointed by SECO.

One immediate objective is to strengthen Business Support Services Organisations through increasing the quality and range of their services that can assist potential and actual exporters in becoming more export competitive. Under this objective, the project will also contribute to improving the Standards, Quality Assurance, Accreditation and Metrology (SQAM) infrastructure as well as the regulatory infrastructure.

Currently Tajikstandart, the national standards body, is responsible for standardization, metrology, certification and accreditation. It is also responsible for State control for compliance with standards. A draft Law on Technical Regulation has been prepared and needs to be reviewed. An analysis of the current structure of the SQAM system and the regulatory infrastructure is required, leading to proposals to restructure the system for its compatibility with international standards and practice.

1.2 Project Terms of Reference

Under the overall guidance of the Chief, Office for Arab States, Europe and the CIS (OASEC) and the direct supervision of the ITC Trade Promotion Officer and under the technical guidance of the ITC Senior Adviser on Standards and Quality Management, the following project objectives were formulated, namely

- Review of the draft Law on Technical Regulation to ensure its compatibility with the WTO Agreement on Technical Barriers to Trade and international requirements;
- Review of the National Quality Infrastructure¹ and Regulatory Infrastructure leading to recommendations to align it with the requirements of the WTO Agreement on Technical Barriers to Trade and international best practices;

¹ The terminology “National Quality Infrastructure” is used in this report instead of the more common abbreviations such as SQAM, MSTQ or others which are considered to be limiting. The National Quality Infrastructure is seen as the totality of all the organizational structures, whether public or private, that provide Metrology, Standards, Inspection, Testing, Certification and Accreditation services either to the private industry or to the authorities.

- Consultations with stakeholders to present the findings and obtain feedback on the proposed changes to the National Quality Infrastructure and Regulatory Infrastructure; and
- Submitting reports and recommendations outlining, *inter alia*, the changes proposed to the draft Law on Technical Regulation and the National Quality Infrastructure and Regulatory Infrastructure.

1.3 Realization of the Project Terms of Reference

The project is handled in two stages due to logistical constraints. During the first stage the draft Law on Technical Regulation is reviewed, whereas the fieldwork, i.e. the review of the National Quality Infrastructure and Regulatory Infrastructure will be the subject of the second stage later in 2007.

This report deals with the review and recommendations regarding the draft Law on Technical Regulation.

2. GENERAL ISSUES RELATING TO THE DRAFT LAW

2.1 Limitations of the review

The review of the draft Law on Technical Regulation was conducted on an unofficial English translation.

In addition, it should be clearly understood that the draft Law on Technical Regulation was evaluated before consultations with various stakeholders were conducted in Tajikistan. The draft law was purely evaluated against international best practices, the requirements of the WTO TBT Agreement and information obtained from two specific reports of previous ITC missions to Tajikistan, namely:

- John Gilmour, Umeda Nabieva and Shyam K. Gujadhur, *Current situation and needs assessment in the area of standardization, quality assurance, accreditation and metrology (SQAM) in Tajikistan*, ITC/DTCC/04/2729, International Trade Centre, June 2004; and
- E Parkany, *Assistance to selected laboratories in Tajikistan*, ITC/DTCC/06/2815, International Trade Centre, February 2006.

It is therefore important that the comments in this report be evaluated in the final instance against the original Russian text, because some of the nuances of the draft law may have been lost in translation. The actual situation on the ground may also necessitate an adjustment of various recommendations provided in this report.

2.2 General comments on the draft Law on Technical Regulation

The draft Law on Technical Regulation is extremely comprehensive and covers technical regulation, standards development and publication, voluntary and mandatory conformity

assessment, accreditation, state supervision with respect to mandatory standards and technical regulations and information systems regarding all of the above. It therefore covers much, much more than just technical regulation. This is an extraordinary wide field and it mixes in one piece of legislation the regulatory and the non-regulatory domain, as well as many elements of the National Quality Infrastructure, but not all. As an example: It does not make sense to consider Standards in the draft Law on Technical Regulation, but Metrology is not dealt with.

Whereas it is not specifically wrong to try and contain everything in one piece of legislation, covering such a wide field makes the draft law very complex, unwieldy and very difficult to understand and implement. Hence, in most economies, developed as well as developing, the tendency is to “unpack” such legislation into much smaller and more user-friendly pieces of legislation. In the process the regulatory and non-regulatory elements are separated, and the various elements of the National Quality Infrastructure are properly dealt with.

In principle, the following pieces of legislation, appropriately augmented by secondary level legislation containing the technical details, are essential in order to establish an effective National Quality Infrastructure and the Technical Regulation Infrastructure, namely:

- Law on standardization and the national standards body;
- Law on metrology and the national metrology institute;
- Law on legal metrology and the national legal metrology department;
- Law on accreditation and the national accreditation body; and
- Law on Technical Regulation.

Sometimes the metrology and the legal metrology legislation are combined. This is generally not an issue, if the responsibilities and legal requirements are carefully enumerated. Implementation does, however, remain problematic due to the inherent differences in the basic business approach by the scientists that are responsible for the national measurement standards, and the regulators that are responsible for implementation of metrology regulations if working side by side in the same organization.

In order to provide the required conformity assessment services to the market place and the authorities, technically competent inspection, testing and certification bodies need to be established. In most developing economies and economies in transition these services have to be provided initially by government bodies, such as the national standards body or laboratories of state departments due to the lack of such conformity assessment service providers in private industry. The system should, however, be set up in such a way that private service providers are encouraged to develop. Therefore, legislation providing the state institutions with any sort of protection against such competition or that is perceived to create a state monopoly, is not useful, and is seen by major trading partners as a key impediment to free trade.

From previous reports it is understood that Tajikstandart currently operates in accordance with five Laws of the Republic of Tajikistan, namely the Laws on:

- Standardization;
- Provision of Unified Measurement;
- Product and Service Certification;
- Protection of Consumers' Rights; and
- Quality of Safe Food.

The current draft Law on Technical Regulation will lead to the repeal of the Laws on "Standardization" and "Product and Service Certification". In the light of tendencies elsewhere, this can be considered as a retrograde step. It would be far more effective and efficient to revise the above Laws and align them with international best practices, while at the same time develop and promulgate the Law on Technical Regulation solely for its intended purpose, namely to regulate the development, implementation and maintenance of technical regulations in whatever form and by whichever regulatory authority.

Recommendation 1: *The scope of the draft Law on Technical Regulation should be carefully reconsidered, and it is recommended that it deal with the issue of technical regulation, their development, implementation and maintenance. It should retain the requirements for a supervisory body for technical regulation and other organizational structures required for their implementation. The sections dealing with standardization and conformity assessment (including accreditation) especially in the non-regulatory domain should be separated and dealt with in other legislation, i.e. the current Laws under which Tajikstandart operates could be revised and brought in line with international best practices.*

2.3 General comments on conflicts of interest

Many developing economies and economies in transition established a functioning National Quality Infrastructure by following a totally integrated approach. This means that standards, metrology, inspection, testing and certification functions on behalf of the authorities and the private industry were concentrated in one organization, namely the national standards body. As industry develops, and other conformity assessment service providers are established there is a natural desire to ensure the technical competence of the same. The national standards body is then inevitably given the authority to assess such service providers and attest to their technical competency. This immediately leads to a massive conflict of interest. The national standards body cannot operate its own laboratories and certification services, and then be considered to be unbiased when assessing or accrediting others doing the same, over and above the problem of becoming privy to company confidential information, i.e. pricing, customer base, etc.

In addition, the national standards body is often given the authority to administer mandatory standards (= technical regulations) on behalf of its parent Ministry, usually the Ministry for Trade and Industry. This leads to another untenable situation, namely the very industry that the national standards body is supposed to support in the development of standards and quality, is now being "policed" by them. The industry reaction normally is then to avoid the

national standards body as far as possible, and any genuine cooperation is extremely difficult. Anecdotal evidence in other economies where this is the case also indicates that the national standards body develops standards primarily with the view to have them declared mandatory, or to have them declared mandatory in order to ensure work for their laboratories. Industry is then over-regulated and the real standardization needs of industry are no longer considered – the national standards body becomes totally inward looking. This is a very unhealthy situation, and many developing economies and economies in transition are therefore separating the administration of compulsory standards and technical regulations from the national standards bodies.

Although the current draft Law does not deal with the organizational structures of Tajiistandart, some of its provisions will necessitate the total re-organization of the organization, i.e. it may lose its current status as a regulatory authority. It is not clear how this will be achieved, and in which time frame this has to be affected. The re-engineering of Tajikstandart and the whole system of technical regulation will require tremendous effort, and appropriate time should be allowed to make it happen, over and above the fact that it would need very rigid and proper time management.

Recommendation 2: *The authorities in Tajikistan should carefully consider separating the accreditation function from Tajiistandart and establish a national accreditation body if it is considered that Tajiistandart should continue providing conformity assessment services to both the authorities and the industry. The alternative would be to separate the conformity assessment services from Tajikstandart and commercialize them. This whole issue should be the subject of a proper needs assessment and consultations with the various stakeholders before a final decision is made.*

Recommendation 3: *The authorities in Tajikistan should carefully consider separating the regulatory functions from Tajikstandart in a very orderly manner after consultations with all the stakeholders and allow appropriate time for all the stakeholders to adjust to the new situation.*

3. DISCUSSION OF SPECIFIC ARTICLES OF THE DRAFT LAW

3.1 General

The comments and recommendations on the draft Law on Technical Regulation are presented under the same numbering as used in the draft Law for the various Articles in order to facilitate better understanding. In addition, it should be noted that only those Articles that are considered to be in need of fundamental review and amendment are discussed. Articles or text not mentioned are considered to be generally in good order even though they may be in need of some detail adjustments.

3.2 Section I. General Provisions

Article 1. Basic Notions

Quite a number of definitions are listed to clarify the nomenclature used in the draft Law. These should be carefully reviewed and aligned with internationally accepted definitions of the same as contained in the WTO TBT Agreement and various ISO Standards.

Article 2. Principles of Technical Regulating

Eleven principles according to which technical regulation shall be carried out are listed in the draft Law. Included amongst the generally very useful principles are the following three that should be reviewed, namely:

- *Unity of the system of measurements;*
- *It is not permitted to combine accreditation and certification functions in one organization;*
- *It is not permitted to finance functions of state supervision over the compliance with the requirements of technical regulations from sources other than the state budget.*

The unity of the system of measurements is an appropriate principle, but the draft Law does not deal with metrology even though other parts of conformity assessment (i.e. inspection, testing and certification) together with accreditation are dealt with. This creates a gap, which needs to be closed, probably by appropriately referencing the Law on Provision of Unified Measurement in some way.

It is proper that certification and accreditation cannot be provided by one and the same organization in order to avoid conflicts of interest. The same is true for inspection and testing as well, hence these should be included as well. Inspection, testing and certification can, however, be combined without any conflicts of interest and the text should be carefully worded not to preclude that possibility.

The text could therefore be revised to read:

- *It is not permitted to combine accreditation with any of the inspection, testing or certification functions in one organization.*

The idea to fund state supervision only from the state budget is a noble one. This should, however, be carefully reviewed, especially in the light of the pressures on the state budget in most economies. There is nothing wrong with having suppliers of commodities pay not only for the conformity assessment, but also to properly fund the state supervision. Because these payments or fees are a form of taxation, they should be subject to exactly the same rigorous approval regime as is the case for the technical regulation itself, i.e. regulatory authorities are not entitled to set their own fees, and these have to be the same for both domestic producers and importers.

Article 3. Legislation on Technical Regulation

In Sub-Article 3 the draft Law states –

3. Ministries, state committees, other bodies of executive power and local self-government have the right to issue in the area of technical regulation acts of only a recommendatory nature.

In principle this is correct, as technical regulation can only be promulgated by the highest legislative authority, in this case Majlisi Namoyandagon Majlisi Oli of the Republic of Tajikistan. As will be argued later, however (see 3.3), in order to develop effective and efficient technical regulation, authorities other than the Majlisi Namoyandagon Majlisi Oli need to be given the authority to promulgate the technical details of such technical regulation. This could mean that any of the listed authorities could be given such authority in a technical regulation.

The text could therefore be amended to read:

3. Ministries, state committees, other bodies of executive power and local self-government have the right to issue in the area of technical regulation acts of only a recommendatory nature unless specifically authorized in the relevant technical regulation to issue mandatory requirements in the form of legislation supplementary to the technical regulation.

Article 4. Jurisdiction of an Authorized Body for Technical Regulating

The Authorized Body for Technical Regulating is a very important institution that will help Tajikistan to implement a proper technical regulation regime. Its functions therefore have to be very carefully constructed to ensure that the responsibilities of the various players in the development and implementation of technical regulation are clearly articulated. The Authorized Body has the same function in technical regulation as has the state legal advisor or the state auditor, namely one of oversight and audit. The Authorized Body should not be involved in the actual administration of any technical regulation, none of the responsible regulatory authorities should report to it or be controlled by it, and it should act as a coordinating body only where required. The various regulatory authorities must retain full responsibility and accountability for their actions in regard to the development, implementation and maintenance of technical regulations.

In the light of the above, the following three functions listed in this Article would need some review, namely:

- *coordination of activity for development of technical regulations by creation of annual program for development of technical regulations on the basis of state executive bodies' and bodies' of local self-administration, scientific institutions', citizens' and their unions' proposals and its submission to the Government of the Republic of Tajikistan for approval;*
- *ensure organization of works on implementation of analysis and expertise of draft technical regulations in expert commissions;*
- *providing the functioning of Informational Centre on technical barriers to trade, sanitary and phytosanitary measures.*

The various regulatory authorities must remain responsible for the development and implementation of technical regulations. They should therefore retain the responsibility to develop annual programmes; it should not be the responsibility of the Authorized Body. This adds just another bureaucratic layer to the process. In addition, why does the Government need to approve the annual programme? Will such an approval add to the efficiency or effectiveness of the system?

The coordinating role of the Authorized Body will be much better served if the text can be amended to read as follows:

- *analysis of the annual programs for development of technical regulations submitted by state executive bodies, bodies of local self-administration, scientific institutions, citizens and their unions in order to initiate coordination activities amongst relevant regulatory authorities in the development of technical regulations.*

The whole issue of expert commissions operating under the auspices of the Authorized Body needs to be carefully reviewed. Technical regulations will in all probability be developed principally by the regulatory authorities. It is extremely unlikely that scientific institutions or citizens and their unions will do so. And if they do, they should be persuaded to use the good offices of the regulatory authorities rather than go it alone. The reason why this is the only effective way in which technical regulations can be developed has to do with the principle that technical regulations can only be implemented by the authorities, by nobody else. Hence if the authorities are not convinced that technical regulation is necessary, it is highly unlikely that such technical regulations developed by citizens or scientific institutions will be implemented.

If that is so, then draft technical regulations will be developed by the regulatory authorities. They will use experts to do so, and these are often the only experts in a specific field available in Tajikistan. The Commission of Experts that the Authorized Body is to set up will consist of exactly the same experts, which amounts to a massive duplication of effort. It would be much more productive if the Authorized Body ensures that draft technical regulations are developed in accordance with the correct principles and procedures, rather than review the technical content. For this they do not need a new Commission of Experts for every draft technical regulation, and much of the work could be done by personnel of the Authorized Body.

It is therefore recommended that the wording of this function be reworded as follows:

- *ensure organization of works on implementation of analysis and expertise of draft technical regulations in expert commissions if required in the case of technical regulations developed outside of the regulatory authorities.*

The third element of this Article that needs to be carefully reviewed concerns the provision of the Information Centre. In terms of the WTO TBT and SPS Agreements, each Member State has to establish a National Enquiry Point. The National Enquiry Point is the first port of call of any WTO Member that wishes to obtain information regarding technical regulations, conformity assessment requirements, sanitary and phytosanitary measures, and all the other issues that are incorporated in these two Agreements. An analysis of the enquiry points as listed on the official website of the WTO reveals that for the TBT domain

the majority of the Member States have placed it with the national standards body, whereas the Ministry of Agriculture or similar is usually the enquiry point for the SPS domain.

Over and above the enquiry point, every WTO Member State has a Notification Authority that is responsible for notifications of new technical regulations and related developments to the WTO Secretariat. The question that needs to be carefully reviewed is whether the Authorized Body is the appropriate place to house the vast amount of information required, or whether a decentralized approach is better, or whether the national standards body should be charged with this responsibility or some other organization. By writing the requirement as bluntly into the draft Law as is the case currently, Tajikistan authorities limit themselves as to future options.

It is therefore recommended that the wording be adapted as follows:

- *ensuring the proper functioning of Information Centres on technical barriers to trade, and sanitary and phytosanitary measures, either by themselves or through other relevant organizations.*

3.3 Section II. Technical Regulations

Article 6. Kinds of Technical Regulations

In this Article provision is made for two types of technical regulations, namely General and Special Technical Regulations. This split into two levels of legislation should be very carefully reviewed as it has been shown in countries that have introduced such a split as being very unwieldy. Even the European Union, with its very complex regulatory approach and infrastructure has opted for only one level. The notion of a lower level of regulation is sound, but they should not be called “Special Technical Regulations” thereby giving the impression that two types of technical regulations exist which is confusing to suppliers and authorities alike.

The following approach has proven to be very effective and efficient in many countries. The Technical Regulation is approved and promulgated by the Majlisi Namoyandagon Majlisi Oli. The Technical Regulation is a high-level enabling piece of legislation, which provides the framework for the implementation of the technical regulation. In this Technical Regulation lower levels of executive power are given to the authority to promulgate the technical, administrative and other details required to implement the technical regulation. These should, however, not be inconsistent with the Technical Regulation proper. The Technical Regulation should also place a prohibition on the lower levels of executive power on issues where they should not have the authority to promulgate additional requirements.

It is strongly recommended to follow a single Technical Regulation with defined authorities for promulgating detail, rather than having a two-tier Technical Regulation system. If this recommendation is adopted, it means that Article 6 and Articles 10 and 11 will need to be extensively revised.

Article 7. Application of Technical Regulations

The principle of using international standards as the basis for technical regulation is sound – it is also the WTO TBT Agreement requirement. However, very often international standards, norms and rules do not exist or may not be appropriate for Tajikistan. In such cases, or when international standards have been adopted as national standards reference could also be made to such national standards.

It would therefore be useful to also include national standards in sub-article 4, by amending the wording slightly to:

4. Where appropriate international standards, norms, and rules exist or where these have been adopted as national standards, they should be used in full or in part as a basis for developing draft technical regulations.

Within this Article, sub-article 5 states the following –

5. The testing and measurement rules and methods are applied in the order determined by special technical regulations.

This means that for every General Technical Regulation a Special Technical Regulation has to be promulgated due to the fact that testing and measurement details cannot be incorporated in the General technical Regulation by default. This is not an effective or efficient way to deal with the issues – see also discussion under Article 6 above. Should the General Technical Regulation deal with a very simple issue, then there is nothing wrong to include some of the detail in the General Technical Regulation.

It is therefore recommended that the text be adjusted to read as follows:

5. The testing and measurement rules and methods are applied in the order determined by the relevant technical regulations.

Article 9. Procedure of Developing Technical Regulations

1. Any individual or legal entity can be the developer (requester) of a draft technical regulation.

2. The developer (requester) of a draft technical regulation shall publish at his/her own expense a notice on the development of a technical regulation in an official printed publication and/ or in the electronic informational system of common use.

This Article allows any individual or legal entity to develop a draft technical regulation and the authorities have no choice but to publish it for comment and go through the whole process to have it promulgated. This is not the normal way that the development of technical regulation is approached anywhere in the world. Technical regulation is a serious intervention of the authorities in the market place, and needs the full support of the authorities. And in terms of the WTO TBT Agreement requirements the government of a Member State is solely accountable for technical regulations, nobody else. Hence to allow

any individual or legal entity to develop the draft technical regulation just does not make any sense.

It would be far more appropriate for individuals and legal entities to approach the relevant authorities if they believe that a specific market failure has occurred that needs to be remedied by state intervention in the form of technical regulation. The relevant regulatory authority should then be required to start the process by first conducting a proper regulatory impact assessment, or as it is listed in this draft Law in sub-articles 9.3 and 9.7 to establish “*a justification of the necessity for its development*”. Only once such a regulatory impact assessment has been conducted, which would indicate clearly that technical regulation is required and is the most appropriate form of state intervention, the development process starts. If the regulatory impact assessment shows that technical regulation is not required or will be ineffective, then the authorities stop the process and inform the requester. This also indicates that the list detailing the necessity for development in sub-article 9.7 should be moved to much earlier within the Article.

It is therefore strongly recommended that the following amendments to the first two sub-articles of this Article are considered, namely:

1. Any individual, legal entity or authority can request the regulatory authority under whose auspices a specific issue falls, to initiate the development of a technical regulation to deal with a specific market failure. The relevant regulatory authority must conduct an initial assessment to establish whether the specific market failure has any substance and if so conduct or have a proper regulatory impact assessment conducted to establish whether technical regulation will be the most effective and efficient way to deal with the market failure. The relevant regulatory authority is obliged to inform the requestor regarding the outcome of the initial assessment and the regulatory impact assessment.

2. The relevant regulatory authority as the developer of a draft technical regulation shall publish at his/her own expense a notice on the development of a technical regulation in an official printed publication and/ or in the electronic informational system of common use.

The official printed publication is obliged to publish the notice on the development of a draft technical regulation submitted by the developer (requester) within thirty days from the moment of its receipt.

Later on in the Article the following is stated:

6. Once the developer has accomplished the procedures of publication of notifications, discussions with concerned interests, and preparation of the list of disagreements (if any) draft technical regulations are submitted to the Authorized Body for Technical Regulation to undergo expertise by commissions of experts in the area of the technical regulating.

The commission of experts will include, on an equal rights basis, interested representatives from bodies of executive authorities, scientific-technical organizations, co-operations of entrepreneurs, and consumers. The procedure for forming and the activity of the commissions of experts are approved by the Government of the Republic of Tajikistan. The Authorized Body for Technical Regulation approves the members of the commissions of experts and ensures their activity. Meetings of the commissions of experts are to be open to the public.

The notion of an Expert Commission that has to review the work already done by experts of the relevant regulatory authority should be carefully reconsidered. A country like Tajikistan mostly has a limited pool of experts in any given field. These experts will in all probability already be involved in the development of the draft technical regulation, especially if the first part of the recommendation on this Article is adopted, namely that technical regulations are only developed by the relevant authorities and no longer by just anybody. If this is the case, then the need for an Expert Commission falls away, and maintaining it will be bureaucratic duplication of effort without adding any value to the development process. Once draft technical regulations have been through the public comment stage as enumerated earlier in this Article, it also has to be notified to the WTO membership once Tajikistan is a Member State. This international comment period would add another check and balance to ensure that technical regulations to be implemented are necessary and well constructed. It is therefore strongly recommended that this sub-article and all other references to the Expert Commission be scrapped and be replaced by a requirement that the Authorized Body for Technical Regulation checks whether all the necessary steps have been taken by the developer.

The following wording could be considered:

6. Once the developer has accomplished the procedures of publication of notifications, discussions with concerned interests, and preparation of the list of disagreements (if any) draft technical regulations are submitted to the Authorized Body for Technical Regulation.

The Authorized Body for Technical Regulation considers whether the developer has followed all the required procedures in developing the draft technical regulation, and provides a report in this regard to the developer and the authorities responsible for taking the draft technical regulation through its approval and promulgation process.

3.4 Section III. Standardization

Article 15. Principles of Standardization

Article 15 states the following –

2. Standards are developed and applied in the same way and to the equal extent in respect to given or similar products, processes (methods) of manufacture, storage, transportation, sale, operation and disposal disregarding the country and/or location of origin (performance), the nature or peculiarities of transactions, and/or persons who are the manufacturers, executors, sellers, and buyers.

The wording implies that standards (which are voluntary in nature) can only be applied in the manner determined by this sub-article, and no other. This unnecessarily limits the scope for the subject matter of voluntary standards. In addition, voluntary standards mean exactly what it says, every manufacturer or supplier is entitled to use the standard or not. Furthermore if the standard is used, it can be used in any way the user finds appropriate. It is therefore recommended that this sub-article be scrapped.

It is, however, important to ensure that if suppliers do use national standards, and claim compliance with national standards, then such a claim must be true. If it can be proven that

suppliers make false claims of compliance then they should be guilty of an offence. A principle to this effect should be developed and included.

The following wording could be considered as a replacement of sub-article 2:
2. No person, manufacturer or supplier may claim that a product, process (method) of manufacture, storage, transportation, sale, operation and disposal complies with an international or a national standard unless the person, manufacturer or supplier can demonstrate that the claim is true in all material respects.

3.5 Section IV. Assurance of Conformity

Article 21. Principles of Assurance of Conformity

Amongst the many useful principles listed in sub-article 1, the fifth principle reads:

Opportunity for the applicant to choose the method and schemes of mandatory conformity assurance regarding specific products;

This would only be true if the technical regulation lists a number of methods. For example, in some of the EU Directives, producers or suppliers are given a choice on the methodology of conformity assessment. In such cases the supplier has a choice of conformity assessment methodology. Where no such choices of conformity assessment methodology are listed in the technical regulation, the supplier has to follow the single, defined methodology. Such a situation is even WTO TBT Agreement compliant, as all suppliers have to comply with exactly the same requirements; there is no need to provide choices.

The notion of choice has its roots in the New Directives of the EU, where compliance with the published EN Standard confers a presumption of conformance with the essential requirements of the relevant New Directive. Suppliers are, however, at liberty to provide evidence of conformity to the essential requirements through other standards, but then they have the additional issue to prove that the standard used also proves compliance with the essential requirements. The reality is that most opt to follow the published EN Standard.

In developing economies or economies in transition it is debatable whether such a sophisticated approach as the EU Directives is the most efficient or effective. Most such economies keep things simple by stating clearly what the minimum technical requirements are, what the appropriate conformity assessment methodology is, but then allow suppliers to have a choice of technically competent conformity assessment service providers.

It is therefore recommended that this principle be amended to read:
Opportunity for the applicant to choose the method and schemes of mandatory conformity assurance only if such a choice is provided in the relevant technical regulation regarding a specific product.

Article 30. Recognition of Results of Assurance of Conformity

Sub-article 1 reads as follows:

1. Recognition of the results of assurance of conformity of products, being imported to the territory of Republic of Tajikistan, is to be carried out based on the principles of

It is not permitted to create unnecessary barriers to trade;

Establishing simplified, distinct and clear procedures and minimizing terms and costs that bear the applicant while passing these procedures;

It is not permitted to introduce additional requirements and tests, as well as duplication of activities on the part of state or other authorized bodies.

The principles enumerated here are sound with the exception of the third one. It is quite possible that the technical regulation in Tajikistan is different than the one from which such a product comes from. The conformity assurance would therefore only be valid for the requirements of the country of origin and not with the requirements of Tajikistan. In such a case the authorities in Tajikistan are quite within their rights to impose additional requirements in order to ensure compliance with the domestic requirements.

It is therefore recommended that this principle be amended slightly to read:

It is not permitted to introduce unnecessary additional requirements and tests, as well as unnecessary duplication on the part of the state or other authorized bodies.

Article 31. Rights and Responsibilities of Applicants in the Field of Mandatory Assurance of Conformity

Under this Article, in sub-article 2 it is written that the Applicant is obliged:

Based on the court decision, to stop the manufacture of a product, conformity of which had been assured before, in regard to which nonconformity to requirements of relevant technical regulations is found.

Experience in many countries has shown that this is a very limiting statement, and it makes it very difficult for the authorities to ensure that suppliers meet their obligations in terms of technical regulation requirements. To obtain court decisions takes a long time, and in the meantime the supplier can dispose of non-conforming commodities to the detriment of society or the environment. Therefore most countries provide in their technical regulations for the relevant Minister to issue a legal directive to stop the manufacture or supply of a commodity under suspicion of non-compliance until a court decision on the matter can be reached. Should the supplier not contest the Minister's directive, then it becomes final after a specified time.

It is therefore recommended that this paragraph of the sub-article be amended to read as follows: *Based on the legal directive of the executive authority, to stop the manufacture of a product, conformity of which had been assured before, in regard to which nonconformity to requirements of relevant technical regulations is found until a final court decision on the matter is reached.*

3.6 Section V. Accreditation

Article 33. Principles of Accreditation

1. Accreditation is performed on the basis of principles of:

An applicant is entitled to choose the form and scheme of conformity assessment among the forms and schemes provided for such kind of products that meet corresponding technical regulations.

The inclusion of this principle that basically has to do with conformity assessment does not make sense in this Article on Accreditation. It is either an error in the translation text, or it should be removed if it appears in the original.

3.7 Section VI. State supervision over Observance of Requirements of Technical Regulations

Article 34. The basic principles for Carrying Out State Supervision

Under this Article the first three elements of sub-article 1 read:

1. The basic principles for carrying out state supervision are:

Presumption of good faith of business entities, i.e. a business entity is not recognized as having violated mandatory requirements and conditions unless otherwise established;

The activity of the specially authorized state bodies is funded out of the state budget only;

State supervision related to a specific type of production is performed by only one specially authorized state body.

The second principle is extremely limiting and will place a heavy burden on the state finances. In many developing economies and economies in transition suppliers have to pay the regulatory authorities a fee to help cover the costs of state surveillance. The suppliers are generally not totally against such a fee, if the regulatory authorities do a proper job and as long as the fee is perceived as being equitable, i.e. the fee is reasonable in comparison to the value of the commodity and as long as local producers and importers are dealt with equally.

It is recommended that the second principle be amended to read:

The activity of the specially authorized state bodies is funded out of the state budget only, unless fees to be paid by suppliers are specifically provided for in the relevant technical regulation.

The third element provides for the involvement of only one specially authorized state body for a given commodity. In theory this is a very supplier friendly principle. In practice it is extremely difficult if not impossible to enforce. The reason is fairly simple. Many technical regulation requirements are cross cutting; a typical example is Electromagnetic Interference (EMI) which cuts across a vast range of products. These could be in the telecommunications field such as fax machines and fixed line telephones, household appliances such as electric drills and kitchen utensils, office equipment such as desk top computers and electrical medical equipment. Now all of these would normally be subject to their own set of technical

regulations, usually of a safety nature. The question is now who should be responsible for the EMI requirements? Should it be one authority with the required EMI expertise for all such equipment or should the authorities for medical devices also become proficient in the field of EMI? This would depend on the actual situation and hence some manoeuvring space should be provided.

It is recommended that the following wording be considered:

State supervision related to a specific type of production is performed by only one specially authorized state body, unless such commodities are subject to more than one technical regulation in which case a proper working arrangement shall be agreed on by the relevant authorities.

Article 35. Objects of State Supervision

This Article states:

- 1. The state supervision over the compliance with the requirements of technical regulations (hereinafter referred to as “state supervision”) is carried out exclusively in regard to the observance of the requirements of technical regulations.*
- 2. Regarding products, the state supervision is to be carried out exclusively at a stage of product circulation on the market.*

Whereas the first sub-article is a sound one, the second sub-article can give rise to problems in some very specific situations. In the case of very high risk commodities, many countries require the involvement of the state supervision authorities before such a commodity is placed into service or on the market. Typical examples are high pressure vessels or boilers. In most countries these are inspected and tested by accredited inspection authorities and then have to be registered and inspected by the state surveillance before they can be put into service. The current wording would exclude such a possibility.

It is recommended that this sub-article be amended as follows:

:2. Regarding products, the state supervision is to be carried out exclusively at a stage of product circulation on the market, unless specifically required otherwise in the relevant technical regulation.

Article 37. Rights and Responsibilities of Specially Authorized State Bodies of State Supervision

The fourth sub-article in Article 37 reads:

- 4. In case of revealing infringements of the requirements of technical regulations, the specially authorized state bodies shall:*

Require elimination of infringements in a justified period of time in view of an infringement’s character;

Inform directly or through the media interested persons and potential consumers about hazardous products produced and/or sold;

Undertake actions established by laws of the Republic of Tajikistan to prohibit alienation (sale) and (or) transfer of product to other persons;

Based on a court decision, undertake actions to ban (suspend) fully or partially processes of manufacture, storage, transportation, sale, operation and rendering services, and also to recall products from circulation;

Take other actions stipulated by the legislation of the Republic of Tajikistan with the aim to prevent causing harm.

All of the above actions of the specially authorized state bodies are sound with the exception of the fourth one, namely that any actions to ban the distribution of non-conforming commodities can be taken only after obtaining a court order. This is not a very safe situation. As has already been argued above (see discussion on Article 31) the specially authorised state body needs to be authorized in some form (usually through a directive from the relevant Minister) to stop a supplier to distribute commodities that are suspected to be non-conforming. The check and balance to ensure that this authority is not abused lies in the fact that it is temporary until a court decision can be reached, unless the supplier does not contest the directive.

It is recommended that the fourth sub-article element is revised to read:

Based on the legal executive authority directive ultimately ratified by a court decision, undertake actions to ban (suspend) fully or partially processes of manufacture, storage, transportation, sale, operation and rendering services, and also to recall products from circulation

3.8 Section IX. Financing in the Field of Technical Regulation

Article 44. Financing in the Field of Technical Regulation

The following expenditures are financed from the means of the Republican budget:

Creation and implementation of technical regulations development program including performing expertise of draft technical regulations;

Creation and implementation of national standards development program, in case the state is the requester, including performing expertise of draft national standards;

Implementation of the state supervision over the observance of requirements of technical regulations;

Formation and maintenance of the National Information Fund of Technical Regulations and Standards;

Payment of dues to and participation in international (regional) organizations on standardization, metrology and accreditation, the list of which is established by the Government of the Republic of Tajikistan.

In this Article a number of activities are listed for funding by the state. Some of them are related to technical regulations only, as the heading indicates. A number of them however, i.e. those that deal with standards, metrology and accreditation, are basically in the voluntary domain, and only serve as support for the technical regulation domain. Standards, metrology and accreditation are also widely used outside the technical regulation domain, and it is not clear whether only those activities that relate to technical regulations are funded by the state

or whether all such activities are to be funded by the state. In addition, only the development of standards requested by the state are funded – what about those required by industry? This is the result of trying to deal with both the regulatory domain and the non-regulatory domain in one piece of legislation (see 2.2 above).

Anecdotal evidence from other developing economies and economies in transition indicate that the state needs to provide the funding for the development of all standardization work; otherwise it will just not happen. The same applies to metrology, and even accreditation where the industry is not strong or diversified enough to fund a national institution. The argument regarding the necessity of providing for the possibility for fees to be paid by suppliers is listed under the discussion of Article 34 above. This Article therefore needs to be carefully reviewed to ensure that it does not become too limiting. The overall standardization, metrology and accreditation strategy of the Government of Tajikistan should provide guidance. If such a strategy does not exist, then one should be developed, because these issues are too important in a modern state to leave to chance.

3.9 Section X. Final and Transitional Provisions

Article 45. Transitional Provisions

The transitional provisions enumerated under this Article are laudable in that the transitional time has been kept very short. The question is whether this is realistic? Transitional arrangements of six months to rectify and totally re-engineer systems that have been in place for decades may prove to be beyond the capacity of the system to re-invent itself. In many countries where such programmes have been successfully implemented, longer and more realistic periods have been agreed to by all the stakeholders, both public and private. Hence it is recommended that the government undertakes a proper review of the re-engineering requirements, the available capacity to affect the changes and then align these Transitional Provisions with such a realistic and agreed time frame. The support that could be obtained from outside sources should be figured into such calculations.

Article 46. Procedure for Putting the Present Law in Force

1. *The present Law comes into effect after six months from the date of its official publication.*
2. *The Government of the Republic of Tajikistan within six months from the moment of present Law official publication shall:*

Ensure adoption of normative legal acts stipulated by present Law;

Make own decisions compliant to the present Law.

3. *From the date the present Law becomes effective, the following acts shall be recognized as invalid:*

Law of the Republic of Tajikistan “On Certification of goods and services” as of December 13, 1996 #313

Law of the Republic of Tajikistan “On Standardization” as of December 14, 1996 #333;

Law of the Republic of Tajikistan “On changes into the Law of the Republic of Tajikistan “On certification of goods and services” as of May 3, 2002, #24;

The Law of the Republic of Tajikistan “On Changes into the Law of the Republic of Tajikistan “on Standardization” as of May 3, 2002 #25.

The repeal of the various Laws is discussed in detail in 2.2 above.

3.10 Final Recommendation

Recommendation 4: *The authorities in Tajikistan should carefully consider each of the recommendations offered under the various headings in this Section on the review of the text of the draft Law on Technical Regulations. The actual problems that could be faced by the various regulatory authorities and the organizations of the National Quality Infrastructure in implementing this draft Law should also be factored into the final text to ensure that the draft Law, which is an important piece of legislation, has the best chances of success.*

