

**A NEW DEVICE FOR CREATING INTERNATIONAL LEGAL
NORMATIVITY: THE WTO Technical Barriers to Trade Agreement and
“International Standards”¹**

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¹ This paper is a very small piece of a very large project, a commentary on the TBT Agreement that I am writing with my colleague Don Regan, as part of the Oxford University Press WTO Commentary series. The good ideas in this paper should be attributed to my collaboration with Don; the errors, and normative assertions, are mine alone.

FIRST DRAFT: comments welcome, please do not cite without permission

Introduction

This paper examines an extraordinary mechanism for the creation of new international legal norms that is contained in the WTO Technical Barriers to Trade (TBT) Agreement.

As interpreted by the Appellate Body—the WTO’s highest judicial instance—the TBT Agreement applies to a very wide range of domestic regulations, arguably only excluding those measures that deal with certain aspects of food and agricultural health and safety regulation that are defined as falling within the exclusive province of the WTO Agreement on Sanitary and Phytosanitary Measures (SPS). One of the key disciplines of the TBT Agreement is the obligation for WTO members to use “international standards” as a “basis” for their technical regulations, unless the international standards are ineffective or inappropriate (Article 2.4). Yet international standards themselves are mostly of a voluntary nature and do not result in most cases in binding treaty commitments; quite a few of these standards are the creation of non governmental bodies, or private/public partnerships where industry is the driving force. By virtue of Article 2.4 of the TBT Agreement, a very broad range of normative material, including privately

generated norms in some cases, is converted or transformed into international legal obligation.

The incorporation of treaty norms from other regimes into the WTO—such as the WIPO great conventions on intellectual property rights—has been widely commented; such incorporation inevitably changes the nature and implications of the obligations in question, by virtue of attaching them to a trade-driven system of dispute settlement and enforcement. But TBT is different; it doesn't incorporate or transform existing international law, but rather turns a mass of normative material that *never before* had the status of international law into international legal obligation.

Most of the paper sketches how this automatic law-making mechanism functions in the context of the TBT Agreement as a whole; the conclusion considers the implications for “progressive” regulatory democracy.

The Obligation to Use International Standards as Interpreted by the WTO

AB: The *Sardines* ruling

It is far from obvious that an obligation to use international standards as a “basis” for regulations confers legal force on the standards themselves. As Henrik Horn and Joseph Weiler have argued, the treaty language is open to a procedural interpretation: international standards must be a focus of the regulatory process—the deliberation involved in deciding on regulations. On such a reading, however, the substantive regulatory outcomes of WTO Members may differ radically from what is implicit or explicit in the international standards in question. There is no requirement of

correspondence between the *outcomes* and the international standards, provided the international standards have been taken into account in the regulatory process.²

Alternatively, the obligation to use international standards as a “basis” might be interpreted as an *aspirational* obligation, one that WTO Members are expected to meet progressively, over a considerable period of time; while such an obligation would nevertheless confer some legal force on the substance of the standards themselves, this would be attenuated by the progressive, “best efforts” nature of the obligation to use the standards as a basis.

It was precisely in this manner that in the *EC-Meat Hormones* case, the WTO Appellate Body viewed an obligation in the SPS Agreement to harmonize domestic regulations by basing them on international standards. In *Hormones* the panel below, the first instance, had taken a procedural approach to this SPS obligation; the major motivation for the Appellate Body’s rejection of the panel interpretation was a concern with retroactivity. The SPS Agreement applied to regulations in existence already at the time the SPS Agreement came into force, and therefore on a procedural reading, a regulation could run afoul of SPS on account of a failure to do something in a regulatory process that occurred prior to the entry into force of SPS—hence, retroactivity. In fairness to the Appellate Body, the panel below did not have a good answer to the retroactivity problem; on the other hand, the Appellate Body *could* have solved the problem by “reading down” this particular provision so that it did not apply retroactively to the regulatory process that brought into existence measures already in place when the SPS Agreement came into force. It could have done so, while giving full force to the

² Henrik Horn and J.H.H. Weiler, “European Communities—Trade Description of Sardines: Textualism and its Discontent”, American Law Institute, Philadelphia, PA, February 2004.

application of other SPS provisions to existing measures; in other words, the AB could simply have held that the parties to SPS had not contracted out of the retroactivity principle, and so it should be presumed to govern the scope of application of the provisions in the Agreement.

In any event, when the panel in the *Sardines* case applied the requirement in TBT to use international standards as a “basis” for regulations, it apparently never even considered the possibility of a procedural approach. In fact, although the meaning of the obligation to use international standards as a “basis” for technical regulations was an issue of first impression, the panel didn’t bother to elaborate explicitly its understanding of the kind of relationship between international standards and a domestic technical regulation that is required by this obligation.³ Instead, the panel parsed the international standard as if it were the governing *law* of the dispute, assuming that what TBT 2.4 required it to do was to determine the substantive consistency or conformity of the EC’s regulation with the international standard in question.

In an amicus curiae brief to the Appellate Body in *Sardines*, I argued that the panel had erred in law in assuming that the correct reading of TBT 2.4 was that its mandate was to determine the conformity of the EC’s measure with international standards; given the lack of textual guidance in 2.4 itself as to the kind of relationship intended by the language “use. . . as a basis,” I suggested that it was appropriate to understand the requirement in terms of reasonableness; there must be a reasonable relationship between the international standard and the domestic regulation. The notion of a reasonable relationship is able to encompass both procedural and substantive

³ For a criticism of the panel in this regard, see R. Howse, “The Sardines Panel and AB Rulings: Some Preliminary Reactions,” (2002) *Legal Issues of Economic Integration*, pp. 250-252.

elements; it may be appropriate to consider the way in which the international standard might have been used in the domestic regulatory process, or whether it was ignored, and why, as well; it could, in some contexts, also be appropriate to also examine whether the regulation itself is consistent with the purposes or aims of the international standards regime in question. A reasonable relationship test leaves a great deal to context, in recognition of the wide variety of normative material, and the many different purposes entailed in the broad notion of international standards or standardization; it also allows judgments to be made about the relative legitimacy of different kinds of standards, or their suitability for shaping domestic regulation in various ways. In oral argument before the Appellate Body, the EC pursued the notion of a rational connection or nexus test for “based on”; the Appellate Body responded that there wasn’t a textual foundation for any such interpretation (even though in *Hormones*, the AB itself had suggested, in interpreting the SPS Agreement, that the obligation to base one’s measures on a risk assessment meant that there must be a rational relationship or connection between the risk assessment and the regulation—equally without an explicit textual foundation!). In *Sardines*, the Appellate Body, having rejected the notion of rational relationship, went on to hold that, on the facts, it need not dispose of the issue of how close a connection was implied in the language “use . . . as a basis for”, since the EC regulation at issue actually *contradicted* the international standard in question, and a regulation that contradicts an international standard could not possibly have that standard as a basis. Then, in dicta, the AB speculated that, “use . . . as a basis for” probably suggested a “very strong and substantial relationship” between a Member’s regulation and the substance of the international standard in question. Needless to say, a test of “very strong and substantial

relationship” has no more textual foundation in the actual words of 2.4 than a test of “rational relationship.”

At the same time, contrary to what the Appellate Body suggests, it is entirely possible that a domestic regulation that contradicts an international standard may nevertheless have some kind of rational relationship to that standard. For example, an international standard may provide a default norm or specification while at the same time indicating that this norm or specification is only for use where a regulating authority does not see the need to adopt its own specification. In that case, the normative message of the international standard is something like: “here is a default that you can use if you decide not to consume domestic administrative resources in crafting your own standard, but the default is not being held out as a desideratum on its own merits—i.e. the standard doesn’t aspire to harmonization.” In such an instance, a distinctive domestic specification that is entirely different from, or contradicts the *default*, in no way conflicts with the *normative message* of the international standard taken as a whole in light of its object and purpose. Such a specification might well be found to be rationally related to the international standard, in as the international standard endorses, or at least attaches no disapprobium to, *deviation* from the default.

Be that as it may, by opining in dicta that a “very strong and substantial” relationship may be required between domestic regulations and international standards under TBT 2.4, the AB has clearly suggested that international standards have considerable, automatic legal force in the WTO.

By automaticity I mean here that the Appellate Body does not, apparently, consider it to be of any importance to take into account the intentions or practice of the

standard-setting regime in question; it is unconcerned with the intentions of the standard-setting regime or its participants, and uninterested in the practice of that regime. The AB is quite prepared to confer legal force on international standards, without any consideration of the institutional context in which the standards arise.

Other aspects of the *Sardines* ruling, as well as other provisions of TBT have to be taken into account in order to understand just how broad an automatic law-making mechanism the AB may have created by its interpretation (again, largely in dicta) of SPS 2.4.

First of all, the Appellate Body held—in what I believe was a misreading of the TBT text—that Article 2.4 applied even to international standards not in existence at the time at which a Member’s regulation was adopted in domestic law. Thus, let’s say that when the United States adopted its current regulations on widgets there was no international widget standard; according to the Appellate Body if, several years later, an international widget standard has come into being that differs from the regulatory approach of the US, the United States is in non-conformity with 2.4 if it does not amend its domestic regulation such that the international standard becomes the basis for the regulation. Thus, on the AB’s approach, one could even use international-standard setting strategically, to create *new* standards that impugn a WTO Member’s *existing* regulations.

Such possibilities gain in significance on account of a yet further aspect of the AB ruling in *Sardines*: to gain legal force through TBT 2.4, a standard need not be adopted by consensus in the relevant international standard setting body. Thus, a WTO Member may be bound to apply an international standard that it voted against even as a voluntary

norm! Here, the AB was interpreting Annex 1.2 of the TBT Agreement, which stipulates, *inter alia*, “Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents which are not based on consensus.” The AB considered the second sentence here to modify fundamentally the first sentence, suggesting there could be international standards not based on consensus but nevertheless having legal force under TBT 2.4. Such a reading would be grammatically and logically possible if the AB were dealing with international standards *not* prepared by the international standardization community. In other words, TBT 2.4 might be considered, under the terms of the Annex to cover both standards prepared by the international standardization community (consensus-based) but also standards that are international but promulgated in fora or regimes different from standardization regimes, and in this latter case the standards do not have to be consensus-based to be given legal force under TBT 2.4.

I actually believe that “international standards” in 2.4 is broader than the concept of those standards created by what are traditionally viewed as organizations in the business of international standardization, and extends to norms that are standards even if they are not the products of a *standardization* regime, but rather some other kind of international regime (for example, an environmental treaty such as the Biosafety Protocol). However, in the *Sardines* case, the AB was dealing with a standard from *Codex Alimentarius*, which is at the core of the “international standardization community.” Thus whatever *other* documents might be included within the meaning for international standards by virtue of Annex 1.2, *this* document was of the kind covered by the first sentence, which refers to standards based on consensus.

But the best interpretation of the second sentence of Annex 1.2 is that it was intended to address municipal standards setting systems, which are *disciplined* by TBT. Just as one might want to exclude from the legal force granted by 2.4 international standards not decided by consensus, one might very well want to *discipline* domestic standards setting exercises that allow standards to be made without a consensus. For instance, non-consensual decisionmaking might create additional risks of capture by concentrated interests, thus making it inappropriate to have such international standards legally binding through TBT 2.4, while also making it important to apply transparency and due processes disciplines in TBT to such domestic standards. In sum, the two sentences at issue in Annex 1.2 make sense as both attempting to address the *downside* of non-consensus decisionmaking.

Now, however, after the AB ruling in *Sardines*, international standards are binding through 2.4 regardless of whether they are made by consensus, and also even if they are documents that are not the product of the international standardization community.

The TBT Agreement nowhere defines international standards, nor does the Agreement attempt to list the international regimes that qualify to promulgate international standards within the meaning of TBT 2.4.

The *reductio ad absurdum* that follows from these lacunae, when combined with the TBT interpretation of the AB in *Sardines*, is that any combination of public and private actors from different countries with an interest in imposing a global regulatory approach in some issue area could get together, emit a self-declared “international standard” and, as regards the WTO membership, the material in question would

automatically acquire the force of international law,⁴ binding on states who did not participate in the process, or on those who did, but objected to the standard. It is true that TBT 2.6 states that WTO Members “shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations.” But it is also true that 2.6 begs the question of what is an “appropriate” international standardizing body; for a wide variety of WTO Members the resources issue is a decisive one, and many developing countries, even if participation in a standards regime is in principle open to them, do not have domestic standards systems or networks, which are the fundamental premise or precondition of full participation in most international standards regimes. Further the Code of Good Practice in the TBT Agreement explicitly applies only to national or sub-national standard setting bodies, whether public or private or public/private partnerships (TBT, Annex IIIB). Annex 1, paragraph 5 defines an “international body or system” as a “Body or system whose membership is open to the relevant bodies of at least all WTO Members.” This does suggest that for their standards to be considered as international standards under TBT, international bodies cannot *exclude* a particular WTO Member or Members. But it remains that there is no *minimum* threshold for participation by WTO Members. Thus, in theory an international standard devised by a regime in which only a small minority of WTO Members are active participants would still acquire normative force through 2.4.

⁴ Of course, it must always be remembered that Members do not have to use international standards where they are ineffective or inappropriate. But, to the extent that it has been the subject of judicial interpretation, the AB seems to have adopted a rather narrow and technical meaning to this qualification. 1

TBT and International Regulatory Competition

The absence of a defining list of international standard setting bodies in TBT⁵ raises the question of contestation or competition between different international standard setting bodies. In a number of areas, including corporate social responsibility and some aspects of the environment, it has been observed that standards-setting regimes have multiplied; regulatory competition at the international level may not be such a bad thing, for the same reasons that, subject to constraints on races to the bottom, regulatory competition may well generate superior outcomes at the domestic level. Nor is regulatory competition necessarily at odds with the harmonization goal of international standardization; one could well expect “winners” to emerge from the competition.

But how is one to deal with the existence of multiple international standards covering the same regulatory field under TBT 2.4? The interpretation that is most in conformity with respect for regulatory autonomy would be that the obligation to use international standards as a “basis” for regulations is fulfilled by choosing the international standard a Member prefers. It is not inconceivable, however, that the WTO dispute settlement organs would attempt to conduct their own “beauty contest” among international standards regimes, based on the notion that international standards must be “effective” and “appropriate”—thereby taking treaty language that apparently confers a measure of “subsidiarity” on domestic regulators and using it to impose an additional constraint on regulatory autonomy.

⁵ It should be noted that SPS is different in this regard; in an Annex to SPS the standardization regimes to which SPS obligations on international standards apply are defined in most cases, with a residual clause that includes other regimes, where the matter in question has not been a subject of standard-making in the preferred listed regimes.

The TBT Committee Decision on Principles for International Standardization: The WTO attempts to hegemonize the international standardization TBT in the name of “undistorted markets” and “technological development”

This possibility is adumbrated by developments that have already occurred in the TBT Committee, the diplomatic body at the WTO charged with administering and reviewing the TBT regime. “The Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Article 2, 5 and Annex 3 of the Agreement”⁶ attempts to shape and constrain international standard-setting in light of the norms and priorities of “Geneva”—the trade insider community. Parts of this “Decision” reflect concerns about participation, democracy, and openness that are laudable. But the Decision goes on to attempt to impose on international standard-setting bodies a free trade, anti-regulatory agenda—international standards need to respond, inter alia, to “market needs.” “They should not distort the global market, have adverse effects on fair competition, or stifle innovation and technological development.”(D.10) But of course many standards are precisely and rightly intended to distort the “global market”—altering the outcomes that would be otherwise produced by an “undistorted global market” in the name of diverse human values. In any event it is revealing to see that not only the “undistorted market” but also “technological development” remain gods for “Geneva.”

⁶ Reproduced in “Decisions and Recommendations Adopted by the Committee since 1 January 1995”, WTO Committee on Technical Barriers to Trade, G/TBT/1/Rev. 8, 23 May 2002.

And the one kind of competition that “Geneva” will not stand for is *regulatory* competition! (After all, it might produce a new space for policy contestation and diversity) Thus, the “Decision” seeks “Coherence”, and exhorts each standard-setting body to avoid “duplication of, or overlap with, the work of other international standardization bodies.”

Could the Decision be a basis for rejecting as “international standards” those standards that are considered by the WTO dispute settlement organs to not be in conformity with the letter or spirit of the “Decision”? While Palmeter and Mavroidis do not list committee Decisions as a source of WTO law in their authoritative treatise,⁷ at least one panel has treated such committee work as an applicable legal norm to fill a gap in the treaty itself.⁸

It should be noted that there is an additional role that international standards play in the TBT Agreement: a measure that is “in accordance with international standards” (note the language here is different from 2.4) will be “rebuttably presumed” to not constitute an “unnecessary obstacle to trade.”(2.5) Thus, following international standards could here provide some added protection for domestic regulatory autonomy against the frequently anti-regulatory bias discernable in WTO panel rulings on whether measures are “least-trade-restrictive.”(A bias the Appellate Body, as it was then, tried to correct in its approach to this kind of test in the context of the GATT treaty; see the *EC-Asbestos* ruling).

⁷ D. Palmeter and P.C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Second Edition) (Cambridge: Cambridge University Press, 2004).

⁸ *European Communities – Antidumping Duties On Malleable Cast Iron Tube Or Pipe Fittings From Brazil* (WTO Doc. WT/DS219/R of 7 March 2003). 7.321.

The committee Decision could be seen as an attempt to erode this feature of 2.5, giving a basis to a WTO panel to refuse to entertain the presumption of conformity with least-trade-restrictiveness unless the international standard itself is, why, least-trade-restrictive in the opinion of the panel!

Conclusion

At first glance, TBT 2.4 as interpreted by the AB appears as a mechanism that constrains democratic regulatory space by bootstrapping into binding law, norms that have been created by bodies and institutions not subject to direct democratic control or scrutiny, even where the norms haven't been consented to by the state bound. When one considers that many of these norms are essentially the product of concentrated private interests the picture looks even darker, from the perspective of participatory regulatory democracy.

In fact, matters are somewhat more complex. John Braithwaite has pointed to the defects of many domestic standard-setting and regulatory processes from a progressive democratic perspective. Braithwaite suggests that international regulatory processes may actually enhance democracy, where they are open to a wider variety of stakeholders than many domestic processes, and allow for more open contestation of policies.⁹ A comparison of the policies for NGO participation in international standard-setting bodies such as ISO and Codex¹⁰, however imperfect they may be, reveals much greater openness in the standard-setting bodies, generally speaking, than in the WTO itself. The outcomes

⁹ "Prospects for Win-Win International Rapprochement of Regulation", in *Regulatory Cooperation for an Interdependent World*, OECD(PUMA), 1994.

¹⁰ For an examination of some of these policies, see Ecologia, "Increasing the Effectiveness of NGO Participation in ISLO TC207", ISO/TC207/NGO TG N25; see also FAO, "Principles Concerning the Participation of International Non-Governmental Organizations in the Work of the Codes Alimentarius Commission", at www.doexalimentarius.net/web/ngo_participation.jsp.

in these bodies, while in some cases in the past exemplifying industry capture, at least have in principle some chance of being influenced by the participation of broader social interests, and this seems to be the case (again albeit imperfectly) for the *Codex* biotech negotiations, for example.

Further, it is an important, but largely unobserved, feature of TBT that the requirement to use international standards as a “basis,” while it might have been thought of by “Geneva” as primarily a means of disciplining regulatory diversity that results in more *stringent* regulations, is nowhere in TBT qualified by the notion that one is entitled to regulate less strictly than what is implied in international standards.

Thus, by virtue of 2.4, and also the AB’s broad interpretation of a “technical regulation”, WTO Members are arguably required to ensure that their entire domestic regulatory landscape bears a close relationship to emerging environmental and labor standards, even where the standards themselves are contained in codes or other instruments that are themselves voluntary, non-binding or “soft law.” Indeed, TBT 2.4 provides a complete refutation to the “Geneva” orthodoxy that labor and human rights are “outside” the WTO; for these are clearly “international standards,” and inasmuch as these rights are relevant to domestic regulation, they have normative force by virtue of TBT 2.4. If one believes that “democracy” in the relevant senses will be enhanced by the domestic regulatory state following basic labor and other human rights norms, then the democratic potential of TBT 2.4 is considerable.

The trick now is to avoid the erosion of that potential by “Geneva” further attempting to shape the nature of international standards and standard-setting bodies for TBT purposes according to its “insider” trade *uber alles* perspective. This requires

activism both in the WTO forum itself and also in the relevant international standard setting regimes.