

**THE LIMITED (AND SOMETIMES PERVERSE) CONTRIBUTION OF THE WTO TO GLOBAL
ADMINISTRATIVE LAW**

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Prefatory Note: Although Rob Howse and I were invited as a team, we have ended up submitting separate short papers. The papers are complementary. I concentrate on what the agreements themselves do, under an ideal interpretation, and on what the Appellate Body has done. Rob gives much more attention to the shadowy and ill-defined, but practically very significant, Committee process in the WTO. This difference is connected to the fact that we had different takes on the background paper by Kingsbury, Krisch & Stewart [KKS]. We both approve of the suggestion for the conscious creation of a field of “global administrative law”. The question is what the KKS paper is doing when it discusses the WTO. Rob sees the paper as pointing to the WTO as one of the new international regimes for which we need to be figuring out new ways of securing accountability, transparency, and the like. That is an important question with regard to all WTO institutions, and it is specially urgent with regard to the less visible parts of the structure, like the Committees, that Rob concentrates on. I saw the KKS paper as to some extent offering the WTO as a source of useful techniques and insights for the construction of a global administrative law. If the WTO plays that role at all, it must be in the content of the agreements themselves and the work of the Appellate Body. But I am skeptical that the WTO (by which I shall mean the agreements and the dispute settlement system) is actually a very useful source.

I have no wish to understate the significance of the extensive review of national administrative action that is provided for under the WTO agreements, review by a quasi-judicial international dispute-settlement system with compulsory jurisdiction. Many of the WTO agreements include miniature “administrative procedure acts”, in topic-

appropriate forms, that require review either of quasi-judicial administrative determinations (especially the Antidumping, Subsidies, and Safeguards Agreements) or of administrative rule-making (especially the SPS and TBT Agreements).

But despite the importance of the administrative-law aspects of the WTO, it seems to me that most of what the WTO says about administrative law turns out to be *relatively* uninteresting for the KKS project (as I understand it) of developing a global administrative law. I say this for three reasons: (1) KKS are specially interested in identifying new modes and techniques of review which can be used to control the new sorts of administrative bodies and behavior that are springing up in the global administrative space. But the aspects of WTO law I have mentioned involve review by thoroughly traditional techniques, all familiar from national administrative law, of thoroughly traditional administrative bodies and behavior. The only major difference is that the review is undertaken by an international body. (2) The quasi-judicial review under the WTO involves rules that are stated in the Agreements themselves. For the most part, the Appellate Body has not been appealing to “general principles” of law for the requirements it imposes on, say, a determination of injury-from-dumping or on the adoption of an SPS regulation. It has been interpreting specific commitments, agreed to explicitly by all WTO Members, and it has done so reasonably faithfully to the Agreements in question. Therefore (3), the quasi-judicial review under the WTO implicates primarily the least far-reaching of KKS’s three possible normative goals for global administrative law, namely, securing intra-regime lawfulness of institutional action (as opposed to protecting independently-grounded rights or protecting democracy).

I.

I turn now to the topic we were asked to address specifically: harmonization and mutual recognition in the TBT Agreement. Since the TBT and SPS Agreements are very similar in the relevant respects (although not identical), I shall include some remarks on the SPS as a bonus.

On the face of things, the TBT and the SPS require the use of international standards. After all, both agreements include a provision that says, in different words, “If there are relevant international standards, the regulator shall use them, . . .” But in each case, the provision continues with an “except” or an “unless”; the obligation is explicitly subject to a limitation that to my mind leaves very great leeway for the national regulator. And if we consider the overall structure of the agreements, I think the effect of even this conditional obligation turns out to be vanishingly small. It turns out that the provisions on international standards add nothing (or perhaps I should say “almost nothing”) to the other obligations that are imposed by the agreements even when there are no relevant international standards. (Rob points out to me that once we take into account the activities of the TBT Committee and the technical assistance program, the practical effect of the TBT may approach an absolute obligation to use international standards, especially in developing countries. But that is not what the agreements say, nor what the Appellate Body has said so far.) So let me explain why I claim that the *agreements*, properly interpreted, really impose no significant obligation at all with regard to using international standards.

(1) First, as I have noted, neither agreement creates an absolute obligation to use international standards. Under the SPS, the obligation is to use any relevant international standard (I ignore in this paper the more detailed controversy about the meaning of “based on”), *except that* one can have a higher standard if one does a risk assessment. Under the TBT, the obligation is to use any relevant international standard *unless* it is “ineffective” or “inappropriate”. In each case, the obligation to use the international standard is explicitly conditional.

(2) Furthermore, as I have said, it turns out that the conditional obligations to use international standards add [almost?] nothing to the obligations that are imposed by the agreements even when there are no relevant international standards. Before I give the argument for this conclusion, let me make two assumptions: (a) we are only concerned with cases where the country wants to have a *higher* standard (more protective and more trade-restrictive) than the international standard, and (b) no two different standards have

the same levels of protection and trade-restrictiveness. (In a full treatment, I would need to either justify these assumptions or discuss what happens when we relax them, but I shall not do that here. I hope it will be clear that whether or not the assumptions are completely true as they stand, the situation they specify is common and central to the operation of two agreements.)

It turns out that it is a little easier to see how the argument works with respect to SPS, so let us start there. My claim is that the SPS imposes no real obligation regarding international standards. The reason is that if the (national) regulator satisfies the obligations it would have under the Agreement in the absence of any relevant international standard, then it also necessarily satisfies the conditional obligation it has in the presence of an international standard. In the absence of an international standard, the country has to do a risk assessment. In the presence of an international standard, the country has to do a risk assessment *or* use the international standard. Satisfying the first obligation (“do a risk assessment”) entails satisfying the second (“do a risk assessment or use the international standard”). But then the existence of the international standard plainly does nothing to make the obligation more stringent in any direction. In fact, the existence of the international standard “weakens” the obligation; it makes the obligation easier to satisfy. There are more legal courses available with the international standard in place than there were without it.

The situation is basically the same under the TBT; it is just a little harder to see. Consider: In the absence of an international standard, the country’s chosen standard must not be unnecessarily trade-restrictive. That is to say, there must be no other feasible standard that achieves as high a level of protection and is less trade-restrictive. Suppose the country’s standard satisfies this requirement. Now suppose an international standard is adopted. Given what we have already said, it cannot be that the international standard both achieves as high a level of protection as the national standard and is less trade-restrictive. But by hypothesis, the international standard is less trade-restrictive (we said we are only worrying for now about cases where the national standard is more restrictive). It follows that the international standard cannot achieve as high a level of

protection. In other words, the international standard is “ineffective”, and the country is not required to use it. [I make an important and controvertible assumption here about the meaning of “ineffective”. I assume it means “ineffective to achieve the level of protection chosen by the regulating country”, as opposed to “ineffective, in the special circumstances of the regulating country, to achieve the level of protection aimed at by the international standard”. There are features of the immediate textual context of “ineffective” that point in both directions. But if we look at the larger context, only my interpretation is consistent with the idea that countries get to choose their own level of protection.] In sum, if the regulating country’s standard is legal in the absence of an international standard, it must also be legal in the presence of an international standard. Just as under the SPS, the existence of an international standard does nothing to make the obligation more stringent in any direction. Rather, the existence of the international standard “weakens” the obligation. There are more legal courses available with the international standard in place than there were without it.

Notice that this argument is *not* offered to prove that the SPS and TBT impose no significant new obligations. They do, both of them. The SPS imposes a significant new obligation to use risk assessment; the TBT imposes a significant new obligation to use measures that are not unnecessarily restrictive. The point is just that once these very important obligations are in place, the only real effect of an international standard under either agreement is to make life easier for the regulator, by providing an alternative avenue to legality.

Moving out from these particular provisions, let us consider more generally what the SPS and TBT say about harmonization and mutual recognition.

(1) There is no doubt that the TBT and the SPS posit harmonization by reference to international standards and its weaker cousin, mutual recognition, as aspirational goals. But even right here at the start, we should not overestimate the aspiration. Both agreements are careful to say that countries are entitled to choose their own levels of protection (or of the achievement of other legitimate goals). Once we recognize that

countries have differing preferences, even about universal goals like health and safety, we must also recognize that neither perfect harmonization nor universal mutual recognition would be appropriate. The WTO embodies the belief that there is too little harmonization and mutual recognition in the world as it stands, and this is no doubt correct. The WTO therefore embodies an aspiration to more extensive harmonization and mutual recognition than now exists. But it cannot consistently aspire to universality in these respects, so we should not think it does.

(2) If we look now at what the SPS and TBT say specifically about “obligations” to harmonize or to grant recognition to other countries’ standards, we find that the obligations are almost all purely hortatory (to “take part” in international standardization efforts, to “give positive consideration” to recognition of others’ standards, and so on). There are two seeming exceptions. (a) The TBT requires country’s to state regulations in terms of performance rather than design characteristics “wherever appropriate”. [2.8] Even if this obligation is thought to be justiciable, it does not require recognition of any other country’s standard as such, and it is in fact a simple consequence (although one worthy of separate statement) of the “not unnecessarily restrictive” requirement. (b) The SPS requires recognition of another country’s standard when that country “objectively demonstrates” that its standard achieves the home country’s level of protection. [4.1] But again, this is a consequence (again no doubt worthy of separate statement) of the “not unnecessarily restrictive” requirement or the scientific justification requirement in SPS 2.2.

If we look now for a moment beyond the SPS and the TBT, it might seem that the Appellate Body [AB] in *U.S. – Shrimp* was making a move in the direction of encouraging recognition of other countries’ standards when it required the U.S. to negotiate with Malaysia under the chapeau of GATT Article XX. In response: (a) As I read *Shrimp*, the AB does not say there is a duty to negotiate, but only a duty not to discriminate in respect of which other Members you negotiate with. To be sure, once the U.S. has negotiated with the Caribbean countries, then failure to negotiate with Malaysia would violate *either* a duty to negotiate *or* a duty not to discriminate in respect of

negotiation. But if the U.S. negotiated with no one, it would obviously not violate a duty not to discriminate. The AB's *holding* could only involve a duty not to discriminate, since what they found the U.S. violated was the ban on "unjustified discrimination" in the chapeau of XX. (b) The AB made it very clear that it was not requiring recognition, since it made it clear that the ability of the U.S. to maintain its regulation did not depend on agreement with Malaysia actually being reached. (c) Whatever obligation the AB imposed on the U.S. in *Shrimp*, it was (in context) only a condition on the U.S.'s establishing an *excuse* for otherwise illegal conduct (a violation of Article XI had already been found); it was not a free-standing obligation. [This is relevant also to appreciating the significance of the AB's imposition of "procedural due process" requirements on the U.S.'s decisions about which countries to certify as having adequate turtle-protection programs. Similarly in *EU – Tariff Preferences*, the requirement that the EU announce the standards for its drug program and the procedures for inclusion and exclusion of particular countries was imposed only as a condition for use of the "Enabling Clause" *defense* to a GATT Article I violation.] (d) The Appellate Body has just held in the *U.S. – Gambling* case that even though the United States had violated GATS Article XVI, it was not required, as a condition of establishing an Article XIV defense, to consult or negotiate with Antigua. (This incidentally tends to confirm my reading of *Shrimp* with regard to the duty to negotiate.)

II.

Returning now to the SPS and TBT agreements, let us look beyond the topic of harmonization/recognition. (This is a digression, but I hope a revealing one. It allows me to ride for a bit my current hobby-horse.) Both agreements include "notice and comment" provisions, which provide specifically for notification to, and consideration of the comments of, foreign countries whose trade is affected. One is accustomed to think of notice-and-comment provisions as being designed to insure that the interests of all parties affected by the regulation are taken into account. But I think that that is not the function of those provisions here – or at least not in the obvious way. In fact, there is nothing in either the SPS or TBT agreement that requires that the foreign costs of a

regulation be weighed or balanced against local benefits. Both agreements are completely explicit that the regulating country can choose its own level of acceptable risk or its own desired level of achievement of any legitimate objective, which is inconsistent with the idea that a regulation (which is not unnecessarily restrictive) might be illegal just because it imposes foreign costs that are too great for the benefit it achieves (“balancing” or so-called “strict proportionality”). Furthermore, both the requirement of a risk assessment (under the SPS) and the requirement to avoid measures that are unnecessarily trade-restrictive (under the TBT) can be fully understood as promoting “good government” *with regard to purely domestic interests*. (An unnecessarily trade restrictive measure hurts the domestic interests that are gratuitously forbidden to trade.) In this perspective, the “notice and comment” provisions can be understood as guaranteeing that the regulator will be open to *information* from foreign traders that may be relevant to evaluating the *domestic* rationality of the regulation. Foreign traders will be eager to provide information about, say, less restrictive regulatory techniques, even if the regulator is not required to consider their interests as such, because anything that hurts foreign traders hurts their would-be domestic transaction-partners as well.

This may sound odd. Surely the whole point of the WTO is to protect foreign interests from damage by trade-reducing regulation, and we seem to be denying that. I am not denying that. Undeniably a point of the WTO is to protect foreign interests; except for the international effects of regulation, we would not have an international agreement. But even though the WTO is about protecting foreign interests, it is only (TRIPS aside) about protecting foreign interests from the damaging fallout of *domestically irrational* regulatory choices (such as protectionism). The point here is subtle, but it is essential to understanding the genius of the WTO. *In the very special context of trade*, it is not necessary to the achievement of (global) efficiency that national governments take account of the foreign effects of their decisions. Rather, it suffices that they *not* consider the foreign effects of their decisions, and that they regulate rationally from the point of view of all domestic interests. (Of course there are other background assumptions – competitive markets and the usual convexities and divisibilities and so on.) The reason, in a nutshell, is that *in the trade context* all foreign effects are transmitted through the

price mechanism. So, not attending to the foreign effects of one's (trade-affecting) regulations means not attending to the effects on world prices; that eliminates the possibility of purposeful exploitation of market power; and that is enough to guarantee that domestically rational regulation is globally efficient. It does not matter that the domestic regulation has foreign effects. As long as the domestic regulator is not specifically attending to those effects for the purpose of exploiting market power in international markets, domestically rational regulation will be globally efficient. In sum, foreign countries have a definite interest in domestic good government where there are trade effects, but they need no more than *domestic* good government (policy that is rational with respect to all affected domestic interests) to protect them as long as they are not specifically targeted. [I should also mention somewhere that another point of the WTO, aside from protecting each country against the irrationality of others, is protecting each country against its own irrationality. There is a "self-binding" element – not always effective, of course – against the political temptation to protectionism.]

The trade context is crucially different, in the respect I have been discussing, from, say, the environmental context, where there are physical cross-border effects and where it is not true that all foreign effects are transmitted through the price mechanism. Many people have learned that foreign environmental effects are an "externality", and that the failure of the national regulator to consider such effects results in inefficiency. And so it does. But the trade context is different: so long as foreign effects are transmitted solely through prices, then if the domestic policy is not purposefully designed to exploit foreign interests, domestic rationality suffices for global efficiency. In effect, the domestic interests who want to trade are an adequate representative of the foreign interests they would trade with. [Note that the point is applicable even to the trade-mediated effects of environmental regulation. In the *Shrimp* case, for example, the effect of the U.S. regulation on foreign shrimpers is transmitted entirely through the effect of the regulation on the prices they can command. So if it is the *United States* regulation that is in issue (as opposed to Malaysia's non-regulation, which *does* have physical spill-over effects on possibly-U.S.-visiting turtles, but which the WTO does not address), then the only issue should be whether the regulation is domestically rational.]

III.

Finally, I turn to a totally different sort of point about the TBT, or specifically about the Appellate Body's decision in *EU – Sardines*. This is the one instance where the WTO seems to make a contribution to the principal KKS project of developing law for the review of international bodies, especially new types of multi-governmental or partly non-governmental bodies, and sadly, this is also what I refer to in my title as the WTO's "perverse" contribution to global administrative law.

The question arose in *Sardines* whether a standard adopted by the International Organization for Standardization [ISO] could count as an "international standard" under the TBT despite the fact that it had not been adopted by consensus in the ISO. (The EU claimed it had not been adopted by consensus. The AB never needed to actually decide the factual point, since they held it irrelevant.) An Explanatory Note to the definition of "standard" in the TBT says, in part: "Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus." The AB held that the effect of the second sentence was to establish that even an ISO standard *not* adopted by consensus could count as an international standard for purposes of the TBT. This is very odd. On the AB's interpretation, the second sentence has effect only if the straightforward factual assertion in the first sentence is straightforwardly false. What the second sentence would seem rather to say is that where the TBT deals with standards *other than international standards* (which it does, for example in the Code of Good Practice for subordinate-government standard-setting bodies), it includes even standards that are not based on consensus. It would make perfect sense to distinguish in this way, to have a wider definition of standards for the Code of Good Practice provisions of the TBT, which are a form of *discipline* on standard-setting, than in connection with the provisions of the TBT that (apparently) give a specially authoritative status to international standards.

The fault here is not entirely the AB's. The basic problem is with the Explanatory Note itself. The assertion that "standards prepared by the international standardization community are based on consensus" does seem to be false. But it seems nevertheless to express a *presupposition* of the TBT, and quite possibly a crucially important presupposition. The TBT itself and all the rest of the WTO agreements have all been consented to by each Member. No Member is bound except by its own actual consent. It is natural to suppose, given the first sentence of the Explanatory Note, that the Members thought that insofar as they were giving any authority to international standards, they were still doing so on the same terms: no Member would be bound unwillingly. What is more, this may have been a normative intention even though the drafters did not see the need, because of a misapprehension of how international standardization organizations worked, to make consensus an explicit normative requirement (except by "conversational implication").

Unfortunately, the Appellate Body's decision in *Sardines* creates just the possibility the Members may have thought they were avoiding: that a Member might be put under a new obligation in respect of some international standard without its own consent. As I say, the basic problem is in the Explanatory Note itself, but the AB never even appears to notice that they may be subverting a crucial normative presupposition of the Agreement (nor that on their interpretation, the second quoted sentence of the Note presupposes that the first sentence is false.) Of course, the damage is less than it might appear, if I am correct in my claim that the SPS and TBT agreements do not really make international standards obligatory in any way. (And the damage is greater to the extent the Committee is making international standards obligatory in practice.) But international standards are certainly accorded some authoritative status because they create "safe harbors" for national regulators, and a Member might not even want such safe harbors from the effect of WTO obligations to be created for other countries' regulations without its consent.

As I say, this may be the only thing in the WTO texts or jurisprudence that contributes to the most interesting part of "global administrative law", concerning the

possibilities for controlling the behavior of “non-standard” international entities; and the effect of the AB’s decision is to *reduce* the control that affected parties can exercise over the relevant behavior. Of course there is nothing invariably wrong with less-than-consensus decision-making. But it does seem perverse to say that less-than-consensus decision-making will suffice for the decision of a body that was “delegated” power on the expectation that it would decide by consensus. The situation is complicated further by the fact that the international standards bodies have traditionally not viewed their own work as “binding” in any sense. They do not view themselves as exercising any power to obligate, or indeed any power to affect obligations, delegated or otherwise. So Member consent seems specially desirable before we make such standards authoritative.