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International Standards as Global Public Goods in the World Trading System

Ming DU & Fei DENG

International standards have assumed special legal significance in the World Trade Organization (WTO) Agreement on Technical Barriers to Trade (‘TBT Agreement’). This article conceptualizes international standards as global public goods and argues for applying global administrative law principles to vet international standards before they are afforded quasi-legislative status in the WTO law. We traced how the WTO Appellate Body has changed its original hands-off approach in EC – Sardines in 2002 to a more intrusive approach in US – Tuna II in 2012. We submit that the WTO Appellate Body’s new approach to international standards marks a distinctive pathway for the development of global administrative law in producing global public goods. The compliance with global administrative law principles set out in the TBT Committee Decision in turn provides international standardizing bodies with additional legitimacy and accountability. However, contrary to popular opinion, we submit that adoption by consensus is not a necessary condition for a standard to be recognized as an international standard in the world trading system.

1 INTRODUCTION

Until the 1980s, setting product standards had been primarily an internal matter for firms or the domain of private sector technical bodies at the national level. International standards were few and far between.\(^1\) However, when tariffs, quotas and other traditional instruments of protectionism are increasingly unimportant trade barriers in global economy after a series of successful negotiations in the GATT/WTO system, the focus of the international trade community has shifted to non-tariff regulations that exist ‘behind the border’, especially heterogeneous product standards adopted by WTO Members purportedly for legitimate public regulation purposes.\(^2\) Indeed, negotiated tariff liberalization may even create an incentive for states to pursue ‘policy substitution’, for example, using product

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standards as covert non-tariff measures, when deviation from tariff bindings has become more difficult. Though effects of heterogeneous product standards on international trade are difficult to quantify, there is strong evidence supporting the proposition that they could potentially constitute substantial barriers to international flow of goods. Even worse, if product standards do not serve any genuine regulatory purposes but are covert trade barriers, they will cause additional deadweight losses that make them more inefficient than traditional instruments of protection. Against this background, harmonization of heterogeneous product standards through international standards has served as an instrument of trade liberalization. International standards have the potential to facilitate trade across borders by making products more substitutable, improving consumer confidence in specific product characteristics and ensuring compatibility between products. To the extent that different standards have artificially segmented the domestic from foreign markets, international standards are expected to lead to increased trade and competition and, ultimately, to lower prices and enhanced quality.

The preamble of the WTO Agreement on Technical Barriers to Trade (‘TBT Agreement’) captures the important role of international standards in improving production efficiency and facilitating international trade. Article 2.4 of the TBT Agreement further provides that WTO Members are obliged to use relevant existing or imminent international standards ‘as a basis’ for technical regulations unless they are ineffective or inappropriate to achieve their regulatory objectives. In EC – Sardines, the WTO Appellate Body concluded that the term ‘as a basis for’ implies ‘a very strong and close relationship between a municipal technical regulation and a relevant international standard’. If a WTO Member chooses to deviate from a relevant international standard, it must offer justification for such a deviation if challenged by another WTO Member. Moreover, Article 2.5 of the TBT Agreement provides that technical regulations adopted in accordance with international standards are afforded the rebuttable presumption of not creating

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unnecessary obstacles to international trade. Article 2.4 and Article 2.5 of the TBT Agreement have created strong incentives for WTO Members to make domestic technical regulations consistent with relevant international standards. An OECD empirical study confirmed that WTO Members have implemented Article 2.4 of the TBT Agreement in various ways.\footnote{Barbara Fliess et al., The Use of International Standards in Technical Regulation, OECD Trade Policy Papers No. 102 at 32 (OECD Publg. 2010).}

Article 2.4 of the TBT Agreement represents an extraordinary mechanism for the creation of new international legal norms. As Howse points out, by virtue of Article 2.4 of the TBT Agreement, a very broad range of normative materials, which are mostly of a voluntary nature, may be converted or transformed into international legal obligation.\footnote{Robert Howse, A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and ‘International Standards’ in Constitutionalism, Multilevel Trade Governance and Social Regulation 393 (Christian Joerges & Ernst-Ulrich Petersmann eds., Hart Publg. 2006).} This is so because, in spite of the central role of international standards in the TBT Agreement, the TBT Agreement does not name any international standardizing bodies that qualify to promulgate international standards within the meaning of Article 2.4. This is markedly different from the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (‘SPS Agreement’), which was modelled from the TBT Agreement and which explicitly names three international standardizing bodies.\footnote{Erik Wijkstrom & Devin McDaniels, Improving Regulatory Governance: International Standards and the WTO TBT Agreement, 47 J. World Trade 1013, 1017 (2013).}

To make the situation even worse, the Appellate Body set the precedent of taking a hands-off approach in\footnote{WTO Appellate Body Report, EC – Sardines, supra n. 7, at para. 227.} EC – Sardines in 2002 when it came to controlling the effectiveness and legitimacy of international standards.\footnote{Ming Du, Reducing Product Standards Heterogeneity through International Standards in the WTO: How Far across the River? 44 J. World Trade 295, 312–317 (2010); Joost Pauwelyn, Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties, 17 J. Inl. Econ. L. 739, 749 (2014).} In that case, the Appellate Body found that its rulings were ‘not intended to affect, in any way, the internal requirements that international standard-setting bodies may establish for themselves for the adoption of standards within their respective operations’, and how international standards are set outside the WTO was ‘not for us to decide’.\footnote{WTO Appellate Body, US – Tuna II, at para. 11.} Ten years later, in US – Tuna II, the Appellate Body moved away from its earlier ruling in EC – Sardines and took a more intrusive approach to assess whether the standard at issue was an international standard fit for the purpose of the TBT Agreement. In this case, the Appellate Body overruled the Panel’s conclusion that the dolphin-safe definition and certification in the Agreement on the International Dolphin Conservation Program (AIDCP) was a relevant international standard for assessing whether the US had used the international
standard as a basis for its dolphin-protecting measures. The Appellate Body’s new interpretative approach to international standards in *US – Tuna II* has shed some fresh light on some long-standing puzzles such as what constitutes a relevant international standard in the TBT Agreement. More importantly, we submit that the Appellate Body’s grappling with international standards over the past decade provides us with an excellent case study on some systemic issues that have recently grabbed the attention of international law scholars: the mechanisms through which global public goods are produced, the relevance of global administrative law principles in generating global public goods, and the international judicial and non-judicial enforcement of global public goods.

This article is organized as follows. Part II starts with the proposition that international standards may be conceptualized as global public goods, and we then draw on the literature on global public goods to identify how international law addresses the challenges that this concept has posed to the international legal system. Part III reviews the WTO Appellate Body’s interpretation of international standards in the TBT Agreement over the past decade. We first revisit the Appellate Body’s ruling in *EC – Sardines*, highlighting some probably unexpected systemic implications flowing from the Appellate Body’s hands-off approach to reviewing the effectiveness and legitimacy of international standards. We then move on to review the Appellate Body’s analysis of what constitutes an international standard in *US – Tuna II*. We highlight how the Appellate Body has deviated from its earlier ruling in *EC – Sardines* and applied the TBT Committee Decision on Principles for the Development of International Standards, Guides, and Recommendations with Relation to Articles 2, 5 and Annex 3 to the Agreement (‘TBT Committee Decision’) as a ‘subsequent agreement’ between WTO Members in settling the *US – Tuna II* case. Moreover, we explore the unresolved puzzle of whether adoption by consensus is an essential condition for a standard to be recognized as an international standard in the TBT Agreement. Part IV submits that the WTO Appellate Body’s handling of international standards marks a distinctive pathway for the development of global administrative law. Complying with the global administrative law principles

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set out in the TBT Committee Decision in turn provides international standardizing bodies with additional legitimacy as forums for producing global public goods. Part V concludes the article.

2 INTERNATIONAL STANDARDS AS GLOBAL PUBLIC GOODS

2.1 THE CONCEPT OF GLOBAL PUBLIC GOODS IN INTERNATIONAL LAW

The concept of public goods has traditionally been discussed within the framework of the nation-state, and only recently has the discourse on public goods been extended to the global sphere. In economic theory, a public good, in contrast to a private good, is defined by two characteristics: non-rivalry and non-excludability. First, there is no rivalry between potential users of a public good: one person can use it without diminishing its availability to others. Second, it is non-excludable because no one can be excluded from the consumption of a public good, even if he did not contribute to its production. A frequently used example of public good is clean air. Our breathing does not deplete it, and it cannot be appropriated by a few. However, the concept of public goods is an ideal type. In fact, few goods are fully non-rivalrous and non-excludable. As modern-day pollution illustrates, goods long thought to be non-rivalrous, such as fresh air, in fact have a rivalrous quality. Goods that do not fully meet the tests of non-rivalry and non-excludability are usually termed ‘impure’ public goods.

Global public goods come in different varieties. The economists usually classify global public goods into three varieties: single-best-effort goods, aggregate-effort goods and weakest-link goods. The provision of single-best-effort goods does not depend on the aggregate effort of multiple actors; instead, they can be provided by a single actor or group of actors. Examples of single-best-effort public goods include scientific and medical discoveries and the deflection of an asteroid about to pulverize the earth. If, for example, the asteroid has been deflected away from the earth by an interceptor missile launched by one state, then a global public good – safety in this case – is provided and

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19 Specifically, goods that are non-rivalrous but excludable, such as cable television signals are termed ‘club goods’ and goods that are non-excludable but rivalrous, such as high seas fisheries ‘common pool resources’. See Daniel Bodansky, *What’s in a Concept? Global Public Goods, International Law and Legitimacy*, 23 European J. Intl. L. 651, 653 (2012).
nothing more needs to be done. Aggregate-effort goods refer to global public goods that can only be produced through the aggregate efforts of multiple countries. For example, climate change mitigation is a function of the total level of greenhouse gas emission reduction achieved by all of the countries in the world. Although individual countries can make efforts to contribute to the goal of climate change mitigation, their efforts will not be able to solve the problem if other major emitting countries are not required to reduce their emission reductions. Weakest-link goods, often encountered in relation to safety and security issues such as eliminating infectious diseases and curtailing the proliferation of weapons of mass destruction, require action by all, including those least willing or lack capacity to do so. Otherwise, a single actor that fails to do its part can undo the efforts of the vast majority of actors.

Different varieties of public goods entail different problem types to policy-makers. Weakest-link goods involve a holdout problem, whether the holdout is an unwilling one or an unable one. That of aggregate-effort goods involves collection action and the free riding problem. Nation states and other actors will not invest in global public goods if their independent action will have no impact, or if they can free ride on the investment of others. And that of single-best-effort goods involves the problem of unilateralism. Since not all global public goods are normatively desirable, a unilateral action to provide global public goods is not free from risks and legitimacy inquiries.

Precisely because global public goods involve different production technologies with different incentive structures, different varieties of global public goods raise different governance challenges to international law. One major contribution of global public goods discourse to international law is that global public goods calls for different institutional responses and international law plays a variable role in their production. For single-best-effort global public goods, for example, an international institution is not needed to develop them because they do not necessarily require joint rule-making. Yet where decisions over implementation, such as a unilateral decision to utilize climate engineering to combat climate change, can have negative externalities, international legal obligations and institutions that constrain unilateral action can better ensure...
fairness and manage conflicts, and possibly produce public goods more efficiently. With weakest-link public goods, the challenge sometimes lies in a state’s lack of capacity to provide the public good. For example, some ‘failed states’ are unable to eradicate an infectious disease because they lack functional governing institutions. In such a scenario, weakest-link public goods call for assistance, either from individual states or the international community, to enable countries to contribute to the provision of the public good or even direct action to provide the public good in the weakest link’s place. If weakest-link situations involving states unwilling to cooperate, such as a rogue state refusing to respect non-proliferation of nuclear weapons, then coercion in one kind or another may be the only effective response. In such cases, international law can provide institutional mechanisms through which coercive acts can be implemented, either through international intuitions, an individual state or small group of states.

For aggregate-effort public goods, there is a greater need for centralized institutions to produce them and international law can play an important role in their provision. For example, international institutions can provide a forum for negotiations and thereby help to reduce transaction costs. They can also promote a learning process, through which countries change their evaluation of the costs and benefits of providing the global public good. International law may also change the incentive structure that states face by lowering the costs of participating in an agreement and raising the costs of staying out; and help to legitimize action by those who have an interest in producing a public good to put pressure on others to participate in supplying the good. That being said, the production of aggregate-effort goods presents the severest challenge to global governance today. The cooperation of at least the most influential players is essential to its provision, and international law has had only intermittent success in providing aggregate-effort public goods.

2.2 INTERNATIONAL STANDARDS AS GLOBAL PUBLIC GOODS AND THE ROLE OF GLOBAL ADMINISTRATIVE LAW

We submit that international standards, referring to standards adopted by international standardizing bodies, should be viewed in global public goods terms. Similar to other international institutions that are designed to address

29 Shaffer, supra n. 15, at 679–680.
30 Bodansky, supra n. 19, at 662–663.
31 Ibid., at 659–660.
32 Krisch, supra n. 17, at 4.
global concerns, a wide range of international standardizing bodies have been set up to harmonize heterogeneous product standards and increase global economic efficiency. The most prominent examples include the International Standard Organization (ISO), the International Electrotechnical Commission (IEC), and the International Telecommunication Union (ITU). Take ISO as an example. ISO has so far developed over 19,500 international standards on a variety of subjects, covering almost all aspects of technology and manufacturing. International standards are both non-rivalrous and non-excludable global public goods because they are available to all, and no state can monopolize their use. Indeed, the very purpose of international standards is inclusive: the more often they are used in a global scale, the better. Specifically, international standards are aggregate-effort goods in the sense that they can only be produced through the aggregate efforts of multiple stakeholders.

The word ‘good’ in the term ‘global public goods’ refers to a product, and not a normative attribute. That is to say, states may hold different opinions on whether a global public good is normatively good or bad. This is so because global public goods may have different impacts, and states may have different tastes and values. Even if everyone agrees that a global public good should be provided, different actors will still have different preferences about which norm to choose due to its distributive consequences and different value choices. In other words, the recognition of the virtues of global public goods has not solved the issue of how they should be produced and whether the production mechanism is legitimate. As a result, attempting to invest an international organization with authority to make decisions regarding the provision of global public goods would raise some difficult questions. For example, what should be the composition of the decision-making body? Should institutions producing global public goods be open to all states, reflecting the global nature of the public goods or should they have more limited membership to promote more efficient decision-making? What is the appropriate decision-making rule? Should consensus be required, which has proved problematic in the UN climate change regime or should institutions be able to make decisions by qualified majority vote?

These are precisely the issues that international standards bring to the world trading system. Even though there exists a general consensus on the positive role of international standards in reducing non-tariff trade barriers, what constitutes an international standard has emerged as a key issue in trade disputes. In US – Tuna II, the Appellate Body refused to recognize AIDCP as a relevant international standard because it was not automatically open to all interested parties. In EC –
Sardines, it was not entirely clear whether the relevant international standard, Codex Stan 94, was adopted by consensus.37 In EC – Hormones, the Codex standard that was key to the ruling against the EC was adopted by a secret vote of 33–29 with seven abstentions.38 In both EC – Sardines and EC – Hormones, the EC was practically bound by international standards that it has never consented to in the first place, not to mention that the close vote strongly indicated how controversial those international standards were when being adopted. Unsurprisingly, a number of important questions need to be answered. Is universal participation of all interested parties an essential procedural condition for all international standards? Must all international standards be adopted by consensus? Can standards adopted by non-governmental organizations (NGOs) and industry groups be recognized as international standards for the purpose of the TBT Agreement? Who has the power to decide whether an international standard should be recognized or not?

The controversy on the attributes of international standards is of course easy to understand. Before the TBT Agreement came into effect, many international standards rarely received significant attention outside of scientific circles and they had no international legal consequences for states. A state could simply refuse to accept an international standard and then ignore it.39 The unbinding nature of international standards and voluntary acceptance procedures gave states maximum control over which standards they adopted, avoiding potential conflicts. However, the incorporation of international standards into the TBT Agreement has changed the nature of these previously voluntary standards. Since the outcome of a major trade dispute may hinge on what the relevant international standard is, WTO Members now have strong incentives to ensure that international standards meet certain criteria before they are willing to afford them normative force.

This leads to the issue of how we can hold the producers of international standards accountable for their decision-making, so that international standards, both procedurally and substantively, not only meet the functional needs of the world trading system, but also are perceived as legitimate for their newly found normative force in the TBT Agreement. We argue that the accountability mechanisms highlighted by the global administrative law project are particularly relevant to address the concerns raised here.40 The global administrative law provides practical tools drawn from domestic administrative law for enhancing the

40 The major research outputs of global administrative law research project can be found at the website of the Global Administrative Law Project, http://www.iilj.org/gal/.
accountability of decision-making in the production of global public goods at the international level. As outlined by the leading proponents of the project, these tools include both procedural and substantive requirements such as procedural participation, transparency and access to information, reasoned decisions, monitoring, inspection, reporting, notice and comment procedures, mechanism of review by a court or other independent tribunal, proportionality, means-ends rationality, avoidance of unnecessarily restrictive means and meeting legitimate expectations. These accountability mechanisms may be developed through international treaties, internal mechanism adopted by international institutions or international judicial decisions. \[41\]

But how far global administrative law tools and principles have been accepted across international institutions remain unresolved, at least they have not been instituted across different governance areas despite strong calls for effective accountability mechanisms at international level. In the next section, we will critically review how WTO administrative and judicial bodies deal with international standards. Special emphasis is placed on the role of global administrative law tools and the role of the WTO judicial body as a gatekeeper to filter out transnational standards that are not international standards for the purpose of the TBT Agreement.

3 THE WTO JURISPRUDENCE ON INTERNATIONAL STANDARDS: FROM EC – SARDINES TO US - TUNA II

3.1 A CRITIQUE OF THE APPELLATE BODY’S HANDS-OFF APPROACH IN EC – SARDINES

In EC – Sardine, the EC challenged the Panel’s finding that Codex Stan 94 was a relevant international standard on the basis that only standards that were adopted by consensus could be regarded as international standards for the purpose of Article 2.4 of the TBT Agreement. On this issue, the TBT Committee Decision, adopted on the second Triennial Review of the TBT Agreement in 2000, explicitly provides that when developing international standards, consensus procedures should be established that seek to take into account the views of all


\[42\] Kingsbury et al., Ibid., at 31–37.


parties concerned and to reconcile any conflicting arguments. Nevertheless, the Panel in EC – Sardines delegated the TBT Committee Decision as a mere ‘policy statement of preference’ and not the controlling provision in interpreting Article 2.4. The Panel further found that Codex Rules of Procedure permit measures to be adopted by means of a formal vote. The Panel then quoted the explanatory note to Annex 1.2 (defining the term ‘standard’) of the TBT Agreement, which states: ‘... standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus’. The Panel explained the above two sentences of the Explanatory Note as follows:

The first sentence reiterates the norm of international standardization community that standards are prepared on the basis of consensus. The following sentence, however, acknowledges that consensus may not always be achieved and that international standards that were not adopted by consensus are within the scope of TBT Agreement. This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a relevant international standard.

The Appellate Body then upheld the Panel’s interpretation that a standard could constitute a relevant international standard even if it was not adopted by consensus, viewing the omission of a consensus requirement as a deliberate choice on the part of the drafters of the TBT Agreement.

It is submitted that the Appellate Body’s interpretation was flawed. To begin with, it is a controversial interpretative technique to construct the meaning of international standards by using elements from the generic definition of standard enshrined in Annex 1.2 and its Explanatory Note. A careful reading of the Explanatory Note allows two different interpretations, which seem to be equally plausible. The Appellate Body found that the word ‘also’ in the last sentence of the Explanatory Note makes it clear that the word ‘documents’ in the same sentence can only refer to ‘standards prepared by the international standardizing community’. However, it is entirely equally possible that ‘documents’ refer to standards in the generic sense. Not all standards are international standards. The
Explanatory Note to a generic definition of standard naturally covers other standards (municipal or transnational) that may not qualify as international standards, for example, they do not require consensus to be adopted, but are still subject to the TBT disciplines.

Moreover, as an extension of erroneously viewing the TBT Committee Decision as having no legal binding force, the Appellate Body in EC – Sardines took a hands-off approach when it came to controlling or double-checking the legitimacy of international standards.\(^{50}\) It announced that how international standards were set outside the WTO was ‘not for us to decide’.\(^{51}\) It is clear that the Appellate Body turned a blind eye to who set international standards and how international standards were developed in international standardization bodies. The normative force of international standards was rendered automatically in the sense that the Appellate Body took international standards as mere facts, whilst declining to consider the origin, nature, scientific quality, legitimacy and accountability of the standards in question. Consequently, international standards that were never conceded to by the disputing parties and were merely voluntary in nature were given teeth in the settlement of global trade disputes. This is all the more striking if we consider the nature, composition and working processes of some international standardization bodies.

3.1[a] The Capture of International Standardizing Bodies

Governance arrangements for international standards setting are complex, involving a range of actors (e.g., governments, national standardizing bodies, private sector) and settings (e.g., dedicated international standard-setting organization, private sector consortia or the marketplace).\(^{52}\) Indeed, the vast majority of international standards emanate from private sector standards developing organizations or private/public partnerships in which non-state actors, including business associations and NGOs, are the driving force.\(^{53}\) For example, the ISO and the IEC are largely private sector organizations in which states and governments cannot be members, and the primary stakeholder is the industry sector.\(^{54}\)

\(^{50}\) Pauwelyn, supra n. 11, at 749.


\(^{54}\) Mattli & Buthe, supra n. 1, at 4.
Whereas technological rationality is an important factor in standardization activities, international standardization remains a highly politicized process. For instance, national standardizing bodies, along with private sector stakeholders, are arguably most concerned with minimizing their domestic switching costs as a result of standardization. The more important standardization becomes, the fiercer is the competition for increased influence in international standard-setting bodies. Since industries organized themselves more efficiently than consumers, there is a risk of bias in international standard setting towards industry interests rather than interests of consumers and the general public. For example, evidence shows that much of the work within technical committees in the ISO is largely dominated by industry-driven interests.


Since the TBT Agreement does not contain a list of international standardizing organizations, each WTO Member enjoys the flexibility to select an international standard that it deems relevant in a given situation. This is problematic because in the real world, multiple international standardizing bodies co-exist and they sometimes create duplicative and possibly contradictory international standards. For example, the global standard setting in the information and communication technology (ICT) industry was described as a ‘balkanized paradigm’. Driven by government policy, technological advance, business strategy, regional integration and changed ideology among scientists and engineers, numerous industry consortia have emerged and in some way compete with the traditional international standardizing bodies like the ISO and IEC. In practice, WTO Members frequently have different opinions as to what the relevant international standard is, and they tend to disagree on which international standardizing bodies are relevant to the purpose the TBT Agreement. The specific trade concerns raised in the TBT Committee have shown that this is a major cause of many trade

For example, the US challenged the EU olive oil grading for its deviation from the relevant Codex standard. The US argued that the EU measure was following the International Oliver Council (IOC) standards, which it did not consider to be an internationally recognized standardizing body since IOC grading standards reflected input exclusively from its members in European and Mediterranean countries.

3.1[c] Developing Countries’ Concerns

Significant economic resources and technical expertise are prerequisites for active participation in international standardization. Different resources, size of economies, level of private sector development and involvement, and scientific and technological capacity have structurally disadvantaged small developing countries in the international standard-setting process. As a result, the resulting standards may not reflect their needs and concerns. Evidence suggests that power politics and regulatory capture by the big developed states may be endemic in international standard setting. In short, the decision-making process in international standardizing bodies may suffer ‘democratic deficit’ and is unduly shaped by powerful countries and actors, thus unfit to settle politically sensitive trade disputes.

A related issue is that the development of international standards at international standardizing bodies is time-consuming, with an average development period of five years or more. Consequently, international standards adopted by international standardizing bodies may not necessarily reflect the status of existing technologies, but are obsolete, scientifically or technically flawed and not relevant to the global market. Once put in place, international standards are likely to resist adapting to new information and technologies simply because the consensus required in creating them may not exist to change them. There is a

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60 Wijkstrom & McDaniels, supra n. 10, at 1021–1023.
61 WTO, United States - Olive Oil, G/TBT/N/USA/395 (6 Apr. 2008); EC- Marketing Standards for Olive Oil, G/TBT/N/EEC/226 (22 Oct. 2008).
danger of perpetuating an international standard that may later be revealed by subsequent developments as outdated.  

All these issues identified above, the private nature of some international standards, the possible ‘capture’ of international standardizing bodies by industry sectors and big states, multiple international standards vying for authority and developing countries’ concerns, testify that the deferential approach taken by the Appellate Body to international standardizing bodies in EC – Sardines is untenable. As will be elaborated in the next section, precisely due to accountability and legitimacy concerns, the TBT Committee, a WTO administrative organ overseeing the implementation of the TBT Agreement, adopted a decision enunciating the principles for the development of international standards for the purpose of the TBT Agreement. The Appellate Body’s hands-off approach failed to address the concerns that prompted the adoption of the TBT Committee Decision in the first place. The objective of the TBT Agreement could fail if institutions to which the TBT has delegated standard-setting functions failed to deliver high quality standards.

Of course, these challenges in no way mean that it is inappropriate for WTO Members to delegate quasi-legislative authority to international standardizing bodies. The WTO does not by itself develop international standards, nor does it coordinate the harmonization of different standards across international standardizing bodies. Allowing ‘legislative acts’ on internationals standards to take place outside the WTO provides enormous benefits to the WTO regime. This structure allows subject-matter specialists, as opposed to trade specialists, to take a leading role in formulating the standards.  

The only issue is that international standards should not be taken as mere facts. Their suitability as a normative benchmark for standard setting should be critically evaluated, rather than being taken for granted.

### 3.2 Evaluating the Appellate Body’s Intrusive Approach in US – Tuna II

**3.2[a] What Constitutes a ‘Relevant International Standard’ in the TBT Agreement?**

The WTO obligation to use relevant international standards as a basis for domestic technical regulations is a continuous one, in the sense that WTO Members have an ongoing obligation to reassess existing technical regulations in light of new or

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66 Sykes, supra n. 6, at 69.

revised international standards.\textsuperscript{68} Despite the fact that different approaches and procedures are adopted by international standardizing bodies in their standardization activities, the obligation for WTO Members to use relevant international standards is the same.\textsuperscript{69} Because international standards have normative value in designing and implementing municipal standards, what constitutes an international standard has become an important threshold question in TBT-related disputes.

It is in \textit{US – Tuna II} that the Appellate Body has for the first time outlined some signposts for the determination of whether a standard at issue is an ‘international standard’ for the purpose of the TBT Agreement. Although the TBT Agreement provides definitions to ‘standard’ in Annex 1.2 and ‘international body’ in Annex 1.4, there is no explicit definition of ‘international standard’ in the TBT Agreement. The introductory clause of Annex 1 provides that, unless the terms are given definitions in the TBT Agreement, the terms shall have the same meaning as given in the ISO/IEC Guide 2:1991 (the ‘Guide’). Thus, the Guide constitutes an important context for dispute settlement purposes by directing the judiciary to have recourse to a non-WTO document to clarify certain TBT terms.\textsuperscript{70} The term ‘international standard’ is defined in the Guide as ‘a standard that is adopted by an international standardizing/standards organization and made available to the public’. Since Annex 1.2 of the TBT Agreement stipulates that a ‘standard’ is to be approved by a ‘body’, not ‘organization’ as used in the Guide, and that a specific definition in the TBT Agreement prevails upon the Guide, the Appellate Body concluded that for the purpose of the TBT Agreement, an international standard is ‘a standard adopted by an international standardizing body’.\textsuperscript{71} This definition suggests that it is primarily the characteristics of the entity approving a standard that lends the standard its international character.\textsuperscript{72} Then, what is an international standardizing body? According to the Guide, a body is defined as ‘a legal or administrative entity that has specific tasks and composition’ and a standardizing body as ‘a body that has recognized activities in standardization’. In addition, Annex 1.4 to the TBT defines ‘international body’ as a body ‘whose membership is open to the relevant bodies of at least all WTO Members’. Reading these definitions together, in order to qualify as an international standardizing body, the entity in question must have recognized activities in standardization and whose membership is open to the relevant bodies of at least all WTO Members.\textsuperscript{73}

\textsuperscript{68} Appellate Body Report, EC– Sardines, supra n. 7, para. 216.
\textsuperscript{69} WTO, supra n. 45, para. 19.
\textsuperscript{70} Delimatis, supra n. 49, at 18.
\textsuperscript{72} Ibid., para. 353.
\textsuperscript{73} Ibid., para. 359.
At least three questions emerge from this definition. First, who must recognize an entity’s activities in standardization? Second, how to determine whether or not an entity has ‘recognized activities’ in standardization? Third, is it possible for standards adopted by a non-governmental body, such as a non-governmental organization or industrial consortium, to be recognized as international standards?

With respect to the first question, the Appellate Body clarified that evidence of recognition by WTO Members as well as evidence of recognition by national standardizing bodies would be relevant.\textsuperscript{74} Thus, the high level of acceptance and market technology of the standard, i.e., the recognition of the standard by the market and industry, is not enough.\textsuperscript{75} With regard to the second question of what constitute ‘recognized activities’, the Appellate Body concluded that the term ‘recognize’ falls along a spectrum that ranges from a factual end (acknowledges of the existence of something) to a normative end (acknowledgement of the validity or legality of something). The ‘factual’ and ‘normative’ recognition constitute cumulative requirements.\textsuperscript{76} The factual dimension of the concept recognition would appear to require, at a minimum, that WTO Members are aware, or have reason to expect, that the international body in question is engaged in standardization activities.\textsuperscript{77} For the normative dimension of the concept, the Appellate Body provided a number of signposts on what ‘recognize’ might entail.

To begin with, WTO Members’ participation in an international body’s standardizing activities could constitute evidence suggesting that the international body is engaged in ‘recognized activities’. However, for the purpose of Article 2.4, the recognition of those who participated in the development of a standard would not necessarily be sufficient to find that a body has recognized activities in standardization. This is because international standards apply to all WTO Members, not merely those who participated in the development of the respective standard. Nevertheless, the Appellate Body stated that the larger the number of countries that participate in the development of a standard, the more likely it can be said that the respective body’s activities in standardization are ‘recognized’.\textsuperscript{78} Furthermore, the recognition of a body’s standardization activities may be inferred from the recognition of the resulting standard, i.e., when its existence, legality and validity have been acknowledged. This, however, does not mean that only a body whose standards are widely used can have recognized activities in standardization.

\textsuperscript{74} Ibid., para. 363.
\textsuperscript{78} Ibid., para. 390.
for the purpose of the TBT Agreement. Moreover, an international body that develops a single standard could have ‘recognized activities in standardization’ if other evidence suggests that the body’s standardization activities are recognized. It is not necessary that the preparation and adoption of standards is a principal function of the body in question.

Extraordinarily, the Appellate Body held that the TBT Committee Decision is a ‘subsequent agreement’ between the WTO Members within the meaning of Article 31(3) (a) of the Vienna Convention on the Law of Treaties (VCLT). As such, a WTO Panel is obliged under Article 3.2 of the WTO Dispute Settlement Understanding to take it into account when interpreting specific TBT provisions. The TBT Committee Decision has enunciated six principles for the development of international standards:

[T]here was a need to develop principles concerning transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and developing country interests that would clarify and strengthen the concept of international standards under the Agreement.

The Appellate Body held that the TBT Committee Decision bears specifically on the interpretation and application of the concept of ‘recognized activities in standardization’. From a factual perspective, the standardizing activities of a body that disseminates information about its standardization activities, as envisaged by the transparency procedures of the TBT Committee Decision, would presumably be acknowledged to exist, accorded notice or attention, and treated worthy of consideration by all WTO Members that make a good faith effort to follow international standardization activities. From a normative perspective, it would be easier for an international standardizing body to be ‘recognized’ to the extent that it has complied with the principles and procedures of the TBT Committee Decision which WTO Members have decided ‘should be observed’ in the development of international standards.

In US – Tuna II, at issue is whether or not the AIDCP constitutes an international standard. The AIDCP is a legally binding multilateral agreement, which entered into force in February 1999, and both Mexico and the United States are parties to the AIDCP. Any state or regional economic integration organization can be invited to accede to the AIDCP on the basis of a decision by

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79 Ibid., para. 392.
80 Ibid., para. 394.
82 WTO, supra n. 45, para. 20.
84 Ibid., para. 376.
the parties. The US argued that becoming a party to the AIDCP was not an option available to at least all Members because it was available only to those Members invited. Mexico responded that being invited to accede was only a formality and ‘no additional countries or regional economic integration organizations have expressed interests in joining the AIDCP’. The Appellate Body held that the TBT Committee Decision bears specifically on the interpretation of the term ‘open’ and referred to the relevant part of it, which states:

Membership of an international standardizing body should be open on a non-discriminatory basis to relevant bodies of at least all WTO members. This would include openness without discrimination with respect to the participation at the policy development level and at every stage of standards development.

Thus, in order for a standardizing body to be considered ‘international’, the body must be open to the relevant bodies of at least all WTO Members on a non-discriminatory basis. Any de jure or de facto disadvantage of accession tends to indicate that a body is not an international standardizing body. In addition, the body must be open ‘at every stage of standards development’. It is not sufficient for the body to be open at a particular point of time. Applying the test to the AIDCP, the Appellate Body ruled that if the invitation occurred automatically once a Member or its relevant body had expressed interest in joining a standardizing body, an invitation might indeed be a formality. However, the parties to the AIDCP had to take the decisions to issue an invitation by consensus. Therefore, the AIDCP was not an international standardizing body and the AIDCP dolphin-safe definition was not an international standard for the purpose of Article 2.4 of the TBT Agreement.

On the last question, a number of WTO scholars argued that standards adopted at both international governmental and non-governmental bodies could be recognized as international standards. Granted, it cannot be excluded that, under specific circumstances, Member States might be required to use as a basis of their technical regulations standards that were created by the private sector. This is the case, for example, when a non-governmental body’s standardization activities comply with the TBT Committee Decision and are recognized, both in terms of the factual dimension and the normative dimension, by WTO Members. What we would like to emphasize, however, is that for non-governmental bodies, the recognition of the standards adopted by a considerably large number of governments is essential. From a legal perspective, it does not really help if one

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\[87\] \textit{Ibid.}, para. 375.
\[88\] \textit{Ibid.}, para. 374.
\[89\] \textit{Ibid.}, para. 398.
\[90\] Pauwelyn, \textit{supra} n. 11, at 750; Partiti, \textit{supra} n. 76, at 91–93.
argues that the standard is of high quality and reflects the market needs, or that the six principles listed in the TBT Committee Decision are followed. In US – Tuna II, the Appellate Body has made it crystal clear that only evidence of recognition by WTO Members as well as evidence of recognition by national standardizing bodies would be relevant. In other words, the link of WTO Members’ official recognition is critical in the determination of whether a non-governmental standard-setting organization can meet the criteria. This is of course not to say that all WTO Members must recognize the non-governmental bodies’ standardization activities. The Appellate Body left open the possibility that support from a large number of WTO Members may be sufficient, so long as the standardizing body is open to all WTO Members.

3.2[b] International Standards and the Consensus Requirement

The Appellate Body’s approach to the TBT Committee Decision in US – Tuna II was radically different from its previous position in EC – Sardines and EC – Hormones. For a long time, the impact of decisions, principles and recommendations developed in the WTO special committees on the behaviour of WTO Members has escaped the scrutiny of WTO commentators. It was unclear of the legal implication of committee decisions and recommendations in WTO dispute settlement proceedings. The Panel in EC – Sardines considered the TBT Committee Decision as a mere ‘policy statement of preference’ and not the controlling provision in interpreting Article 2.4. By contrast, in US – Tuna II, the Appellate Body treated the TBT Committee Decision as a ‘subsequent agreement’ between WTO Members within the meaning of Article 31(3) (a) of the VCLT, and enforced it strictly. During the two latest triennial reviews of the operation and implementation of the TBT Agreement in 2009 and 2012 respectively, WTO Members stressed the importance of ensuring full application of

92 Ibid., para. 390.
94 Howse, supra n. 9, at 393. The prevailing view before US– Tuna II proposed by Mavroidis was that these acts are supplemental means of interpretation but not sources of law. Over the years, the WTO adjudicating organs have de facto shown substantial deference toward actions taken collectively by the WTO Members, even when such actions were taken at the lowest level of institutional integration, that of WTO committees. See Petros C. Mavroidis, No Outsourcing of Law? WTO Law as Practiced by WTO Courts, 102 Am. J. Intl. L. 421, 430–434 (2008).
95 WTO Panel Report, EC– Sardines, supra n. 46, para. 7.91.
the six principles outlined in the TBT Committee Decision.\footnote{WTO, Sixth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade (29 Nov. 2012), G/TBT/32; para. 8;} It is safe to conclude that the TBT Committee Decision will play a key role in assessing whether or not the standard at issue constitutes an international standard in future TBT disputes.

In \textit{US – Tuna II}, the Appellate Body’s analysis of a relevant international standard hinged, to a large extent, on the characteristics of the AIDCP in terms of openness.\footnote{Appellate Body Report, \textit{US – Tuna II}, supra n. 13, para. 372.} The Appellate Body interpreted the openness requirement expansively: besides the clear requirement that the international standardizing body must be open on a non-discriminatory basis at every stage of standard development, the Appellate Body seemed to indicate that representative participation is also part of the openness requirement. The US pointed out that although all states whose vessels fish for tuna in the relevant area were eligible under the AIDCP, WTO Members with an interest other than fishing, such as consumer or conservation interests, were ineligible to become parties. The Appellate Body agreed with the US that an international standardizing body must not privilege any particular interests in the development of international standards and underscored the imperative that international standardizing bodies ensure representative participation and transparency in the development of international standards.\footnote{\textit{Ibid.}, para. 379 and 385.}

As discussed in part II of the article, transparency and participation are important global administrative law tools to enhance accountability of international institutions when they produce global public goods. The Appellate Body’s ruling in \textit{US – Tuna II} that the AIDCP should not be recognized as an international standard could be viewed as a means of promoting transparency and participation in international standard setting. Besides transparency and participation, other principles listed in the TBT Committee Decision such as impartiality and consensus, relevance and effectiveness, coherence and addressing the concerns of developing countries should also be viewed as global administrative law tools because they all contribute to the quality and legitimacy of international standards in the world trading system. In view of their global public goods nature and the quasi-legislative force, it is necessary that international standards meet these substantive and procedural requirements.

That being said, the Appellate Body’s ruling in \textit{US – Tuna II} has left some uncertainties regarding the role of the principles set out in the TBT Committee
Decision in future trade disputes. In *US – Tuna II*, other than the requirement of openness, the Appellate Body did not elaborate on how other principles listed in the TBT Committee Decision will be interpreted and enforced. How far will a WTO Panel go in scrutinizing the international standard at issue in light of all the principles outlined in the TBT Committee Decision? What standard of review will a WTO Panel exercise in reviewing the international standardizing bodies’ compliance with the TBT Committee Decision? To what extent should a WTO Panel show institutional sensitivity to other international standardizing bodies? As we will demonstrate below, though some principles listed in the TBT Committee Decision have created specific norms that international standardizing bodies must observe, such as transparency and open membership, and violation of which will lead to a denial of international standards status, other principles do not create specific rules and are merely best efforts obligations. It is therefore important to read the TBT Committee Decision closely to distinguish these two types of norms.

Take consensus requirement as an example. It is set out as a principle in the TBT Committee Decision. Consensus is of course the desired way by which decisions are adopted in international standardizing bodies. But it is not the only mechanism. If efforts to develop consensus fail, a voting procedure is usually available. In Codex, for example, decisions are taken through voting and a draft standard is adopted if a majority of members vote in favour of it.\(^99\) If a standard was adopted by voting at an international standardizing body, will it be recognized as an international standard? In *EC – Sardines*, the Appellate Body gave a positive answer because the Appellate Body viewed the omission of a consensus requirement in the Explanatory Note to Annex 1.2 as a deliberate choice on the part of the drafters.\(^100\) However, as discussed in Part III.1 above, the Appellate Body’s interpretative technique on this issue was highly controversial. Moreover, the precedential value of the AB’s ruling in *EC – Sardines* was also called into question in light of the Appellate Body’s elevation of the TBT Committee Decision in *US – Tuna II* as a ‘subsequent agreement’ rather than a ‘policy statement of preference’ as the Panel conceptualized in *EC – Sardines*. Unfortunately, in *US – Tuna II*, the Appellate Body avoided revisiting the consensus requirement and preferred to leave it to future cases.\(^101\)

After *US – Tuna II*, there has been speculation on whether an international standard must be adopted by consensus to be recognized by the WTO.\(^102\) This is

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99 For example, Codex Alimentarius Commission, Procedural Manual (17th edn), Rule XII.2.
of course a reasonable inference from the Appellate Body’s ruling in US – Tuna II. If a violation of the openness requirement will render an otherwise international standard disqualified, there is no good reason why a deviation from the consensus requirement will not lead to the same result since both principles are clearly set out in the TBT Committee Decision. The uncertainty on this issue has already emerged within the TBT Committee. For instance, a number of countries accused the US of setting more restrictive transportation packaging requirements for the transportation of lithium batteries by air, which went beyond the international standard set by the International Civil Aviation Organization (ICAO). One of the US defences is that ICAO was not following the TBT Committee Decision, in particular the consensus requirement because decisions in the ICAO are taken by voting.103

We argue that it is not necessary for a standard adopted by consensus to be recognized as an international standard. In US – Tuna II, the Appellate Body stressed that the extent to which the TBT Committee Decision will inform the interpretation of international standards depends on the degree to which it ‘bears specifically on the interpretation and application of the respective term or provision’.104 The relevant part of the TBT Committee Decision on consensus reads:

All relevant bodies of WTO Members should be provided with meaningful opportunities to contribute to the elaboration of an international standard so that the standard development process will not give privilege to, or favour the interests of, a particular supplier/s, country/ies or region/s. Consensus procedures should be established that seek to take into account the views of all parties concerned and to reconcile any conflicting arguments.

It could be seen that what the TBT Committee Decision requires is only that consensus procedures are established to take into account the views of all parties and no particular interests should be favoured. There is nothing in the TBT Committee Decision requiring that international standards must be adopted by consensus. In other words, the consensus principle is only a ‘best effort’ obligation. It only requires the establishment of consensus-building procedures but does not require international standards adopted by consensus.105 The same is true with the requirement in the TBT Committee Decision to address developing country concerns.

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103 United States- Hazardous Materials: Transportation of Lithium Batteries, G/TBT/N/USA/518 (12 Feb. 2010).
The suggestion that international standards must be adopted by consensus is likely to cause several difficulties. First, the requirement seems to be too harsh because many standards adopted by international standardizing bodies will be disqualified as international standards simply because they were not adopted by consensus. Given that non-consensual procedures are explicitly permitted in international standardizing bodies, the denial of their international standards status by the WTO judicial body not only raises the issue of institutional sensitivity, but also opens a back door allowing non-cooperating countries to get a second bite of the apple in international standard setting.

Second, similar to Article 2.4 of the TBT Agreement, Article 3.1 of the SPS Agreement requires that SPS measures be based on international standards where they exist. In contrast to the TBT Agreement, international standards in the SPS Agreement are currently limited to standards established by Codex, International Office of Epizootics (OIE) or the International Plant Protection Convention (IPPC). As all standards adopted by Codex, OIE and IPPC are automatically international standards in Article 3.1 of the SPS Agreement, WTO panels and the Appellate Body will not second-guess the legitimacy of these standards. Significantly, all three international standardizing bodies designated in the SPS Agreement allow adopting international standards by voting in case efforts to reach consensus fail. In other words, standards adopted not by consensus are still international standards for the SPS Agreement. The SPS Agreement addresses the most sensitive trade disputes (relating to human health and safety), and it is long believed to impose more stringent obligations than the companion TBT Agreement. It is therefore difficult to explain why consensus is required for international standards in the TBT Agreement, but not in the SPS Agreement.

Third, it has long been criticized that the consent-based structure of international law presents a structural bias against effective action on global public goods, especially given the large number of sovereign states today. What is needed is a turn to non-consensual lawmaking mechanisms, especially through powerful international institutions with majoritarian voting rules. If this is true, then a rigorous emphasis on consensus will likely exacerbate the already severe collective action problem in producing international standards and reverse an emerging trend of loosening the consent element in international lawmaking process in order to provide more effectively global public goods.

106 Annex A to the SPS Agreement.
109 Krisch, supra n. 17, at 12–25.
Finally, an inflexible consensus requirement will not promote international standard setting, and the function of international standards envisioned by TBT drafters will not be fully achieved. Because the TBT Agreement has raised the power and profile of international standardizing bodies, WTO Members have strong incentive to see that international standards adopted at international level conform to domestic standards to gain competitive advantage as well as avoid potential trade disputes. As a result, the international standard-setting process is more politically charged and controversial than before. Evidence shows that voting has been used more frequently to adopt international standards in Codex since the adoption of the TBT Agreement, despite a strong preference for reading decisions by consensus. Thus, a mandatory consensus requirement will only intensify the controversy or even paralyze the international standard-setting process when stakes are high enough.

By contrast, our argument that adoption by consensus is not a condition to recognize an international standard has a number of advantages. First, the Appellate Body could avoid a sudden U-turn from its earlier ruling in EC – Sardines. Second, the exact meaning of consensus is not clear. In the WTO, for example, consensus is reached if no member present at the meeting when the decision is taken formally objects to the proposed decision. By contrast, the ISO defines ‘consensus’ as ‘a general agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the view of all parties concerned and to reconcile any conflicting arguments. Consensus need not imply unanimity.’ Clearly, the definition of consensus in the ISO is quite vague. What are ‘substantial issues’? What is ‘an important part of the concerned interests’? What does ‘the absence of sustained opposition’ mean? The ISO has provided no guidance to these concepts and different interpretations have been suggested. It is very likely that the Appellate Body will defer to the judgment of international standardizing bodies rather than make its own.

We further argue that except some highly unusual scenarios, for instance, where some members sustain a fundamental objection to a proposed international standard and support it with sound arguments, but these concerns are completely ignored, a WTO Panel will not set aside easily an international standard on the basis that it was not adopted by consensus but a voting. Our argument is consistent

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111 Marrakesh Agreement Establishing the WTO, Article IX:1, footnote 1.
113 Schroder, supra n. 75, at 231.
with the observation that tribunals that are located within a global regime, like WTO panels and the Appellate Body, are generally reluctant for prudential reasons to review closely the decisions of other bodies within the regime, or to rock the boat and disturb reciprocity by reviewing decisions of other regimes. Nevertheless, reluctance cannot be equated to inattention or inaction. We would like to emphasize the WTO tribunal retains a critical judicial role to intervene if the consensus-building procedures were grossly violated.

Third, consensus is a main feature of international standard-setting process and voting takes place only on rare occasions. Even if some international standards were not adopted by consensus, it should not cause much concern because WTO Members are permitted to deviate from international standards that are not effective or appropriate to achieve their regulatory objectives. In US - Tuna II, the Panel was of the view that while the AIDCP standard did contribute to the objective sought by the US, it failed to do so in some respects— for example, it failed to address unobserved adverse effects on dolphins by using the method of setting on dolphins. The complaining party (Mexico) therefore failed to show that it was an effective and appropriate means to fulfil the US objectives. Similarly, in US - COOL, the Panel found that the relevant Codex standard did not have the function or capacity of accomplishing the US objective of providing information to consumers about the countries in which an animal was born, raised and slaughtered.

To conclude, the Appellate Body’s intrusive approach to international standards in US - Tuna II is a welcome move. The elevation of international standards to ‘first preference’ status in the TBT Agreement involves a delegation of regulatory power from the WTO to international standardizing bodies. Such a delegation creates potential agency problems over whether these ‘agents’ are faithful to the WTO’s objectives. The WTO judicial review provides an important external check on international standards that are truly appropriate for the purpose of the WTO.

114 Stewart & Badin, supra n. 15, at 583.
4 A DISTINCTIVE PATHWAY FOR THE DEVELOPMENT OF GLOBAL ADMINISTRATIVE LAW?

The WTO Appellate Body’s new approach to international standards in *US - Tuna II* marks a distinctive pathway for the development of global administrative law. The TBT Agreement does not contain a list of international standardizing bodies that qualify to promulgate international standards, nor does it provide any definition of international standards within the meaning of Article 2.4. The TBT Committee, a WTO administrative organ at probably the lowest level, has adopted a decision setting out a number of principles and procedures that international standardizing bodies are expected to comply with. Although several previous Panels were reluctant to recognize the legal value of WTO committee decisions, the Appellate Body interpreted the TBT Committee Decision as a ‘subsequent agreement’ between WTO Members within the meaning of Article 31(3) (a) of the VCLT. The concept of subsequent agreement is an ambiguous one as there is no specific guidance in the VCLT on the issue of what constitutes a subsequent agreement. Other than a temporal requirement that the agreement must be adopted subsequently to the relevant treaty, nothing is said in the VCLT about the form, which a subsequent agreement between the parties should take.

In *US – Clove Cigarettes*, the Appellate Body has offered some broad guidance to the meaning of subsequent agreement in the VCLT. According to the Appellate Body, the term ‘agreement’ in Article 31(3)(a) of the Vienna Convention refers, fundamentally, to substance rather than to form. Citing *EC – Bananas III*, the Appellate Body stated that a subsequent agreement is one that ‘bears specifically upon the interpretation’ of a treaty provision. This would seem to involve specific reference to provisions in the WTO Agreements, or at least the express intention of affecting WTO law. In addition, a subsequent agreement must ‘clearly express a common understanding, and an acceptance of that understanding among Members’ with regard to a specific provision of the WTO Agreements.

Applying these criteria to the TBT Committee Decision in *US - Tuna II*, the Appellate Body noted that the TBT Committee Decision was adopted subsequent to the conclusion of the TBT Agreement. Furthermore, the membership of the TBT Committee comprises all WTO Members and that the TBT Committee

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121 Appellate Body Report, *US – Clove Cigarettes*, supra n. 81, para. 267.


124 Appellate Body Report, *US – Clove Cigarettes*, supra n. 81, para. 267.
Decision was adopted by consensus. Finally, the content of the TBT Committee Decision expresses an agreement between Members on the interpretation or application of international standards and it bears directly on the interpretation of the term ‘open’ in Annex 1.4 to the TBT Agreement, as well as on the interpretation and application of the concept of ‘recognized activities in standardization’. Therefore, the TBT Committee Decision can be considered as a subsequent agreement within the meaning of Article 31(3)(a) of the VCLT.

The Appellate Body’s interpretation of the TBT Committee Decision is a major step in expanding the scope of multilateral legislation. Instruments to which WTO Members attach little importance such as WTO committee decisions proved decisive in the interpretation of WTO rules. Different from other WTO decision-making bodies, such as the Ministerial Conference, which have clear authority to make binding decisions on WTO Members, the TBT Committee, like other twenty committees of its kind, meets monthly and is attended by government representatives with no formal decision-making powers. If a TBT Committee decision qualifies as a subsequent agreement, so do all decisions made by consensus by organs and bodies whose membership comprises all WTO Members, regardless of hierarchical level. Even so, the understanding of the term ‘subsequent agreement’ which is not limited to subsequent international treaty and extends to less formal or even informal arrangements is compatible with the practice of other international courts. However, it must be emphasized that the reason why the TBT Committee Decisions could be taken into account in US – Tuna II was because it bears directly on the interpretation of certain terms and provisions in the TBT Agreement. If not, it would not be regarded as a subsequent agreement among WTO Members and would not be taken into account.

In effect, the Appellate Body has transformed what would be at best the ‘soft law’ of the TBT Committee Decision into a code of administrative procedure and practice for international standardization. The scrutiny by the WTO judicial body helps ensure that only standards that are impartial, effective, well reasoned, and generated through transparent and open procedures are given legal effect. These procedural and substantive requirements, also known as global administrative law tools, would help ensure that the resulting standards embody a

126 Ibid., para. 372.
127 Vidigal, supra n. 123, at 1034.
128 Ibid.
fair consideration of affected interests, and thereby would reduce the risk of suppressing local regulatory autonomy through invocation of international standards that may lack public legitimacy.

Moreover, the WTO Appellate Body’s recognition of the legal value of the TBT Committee Decision has a significant impact on international standardizing bodies. Thanks to the TBT Agreement, international standardizing bodies, formerly forums for discussion, deliberation and dissemination of scientific knowledge, have been transformed as sites of negotiation for quasi-binding standards. WTO Members could no longer pick and choose international standards they prefer without proper justifications. The raise of the power and profile of international standardizing bodies has created a new set of challenges for them as international institutions. Since WTO Members have strong incentive to see that the new international standards conform to possible future national TBT measures, consensus on new international standards can no longer be assumed. Such a trend will likely damage the credibility of relevant international standardizing organizations.

Against this backdrop, the adoption of the TBT Committee Decision and the Appellate Body’s confirmation of the TBT Committee Decision as a key element that shall be taken into account in interpreting international standards practically force international standardizing bodies to review the integrity and effectiveness of their international standards setting process if they still want to be relevant in the standardization business. The price of not complying with the TBT Committee Decision, a set of global administrative principles, is simply too high to ignore. Indeed, key international standardizing bodies have announced their support of the TBT Committee Decision, and they have taken various initiatives to improve their internal standards-setting processes in light of the TBT Committee Decision. Following the global administrative law principles set out in the TBT Committee Decision in turn, provide international standards promulgated by these international standardizing bodies with additional legitimacy as global public goods.

It is important to clarify that, although we strongly support the WTO judicial body’s strict enforcement of the TBT Committee Decision and argue

132 Stewart & Johanson, ibid., at 52.
133 Id., at 52.
enthusiastically that it marks a distinctive path for the development of global administrative law in producing global public goods, we have not argued that we now have a perfect solution for all the issues presented by the incorporation of previously voluntary standards into a binding international trade regime. For example, it is argued that the principles set out in the TBT Committee Decision are not sufficiently inclusive and additional criteria would need to be developed.134 One example is impact assessment. Like domestic regulations, the impact of international standards should be periodically reviewed and the assessment process should lead to the amendment of the standard if necessary.135 So far this impact assessment procedure does not exist in the TBT Agreement. Another example is that it is not clear to what extent non-economic interests such as environmental sustainability should be considered in the international standard-setting process.136 Also, some initiatives taken at international standardizing bodies are quite controversial. For example, struggling to be relevant in the fast-changing ICT global standards-setting scene, ISO and IEC seek to spend up their standard-setting process by borrowing the standards of other new standardizing actors. This strategy undercuts ISO and IEC’s legitimacy as international standardizing bodies because they shift from ‘pure standard development’ to the inclusion of ‘formalization of external standards’, and their ‘democratic ideals have been slightly adapted to cater to economic demands for timely standards’.137

5 CONCLUSION

Since international standards assume special legal significance under the TBT Agreement, what standards may be recognized as international standards have become an important threshold question. This article conceptualizes international standards as global public goods and argues that global administrative law principles play an important role in reviewing international standards. We traced how the WTO Appellate Body has changed its original hands-off approach in EC – Sardines to a more intrusive approach in US – Tuna II, applying global administrative law principles to vet international standards before they are afforded

134 Delimatis, supra n. 49, at 23–25.
135 Ibid., at 24.
136 In US – Tuna II, the Appellate Body pointed out that an international standardizing body must not privilege any particular interests in the development of international standards. However, it is unclear how this statement will impact the standard setting in practice. Environmental sustainability, for example, is not mentioned in the TBT Committee Decision.
quasi-legislative status. We submit that the WTO Appellate Body’s new approach to international standards marks a distinctive pathway for the development of global administrative law in producing global public goods. Following the global administrative law principles set out in the TBT Committee Decision provide international standardizing bodies with additional legitimacy as producers of global public goods.

We have also argued that there is a need to distinguish two types of obligations embodied in the TBT Committee Decision. Some principles in the TBT Committee Decision have created specific norms that international standardizing bodies must observe, such as transparency and open membership, and violation of which will lead to a denial of international standard status. By contrast, other principles such as consensus and addressing developing countries’ concerns are merely procedural requirements, and they only represent ‘best efforts’ obligations. This finding gives rise to some further questions: what rules and norms may be called global administrative law? How to distinguish global administrative law from other normal materials? What is the rationale for such a distinction? Clearly, these questions are beyond the scope of this article and we will leave them for future research.
