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From ‘Standard-Takers’ to ‘Standard-Makers’: Developing Countries and Least-Developed Countries’ Perspectives in the Harmonization of Technical Regulations Through International Standards

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The Agreement on Technical Barriers to Trade (hereinafter ‘TBT Agreement’) pursues the harmonization of technical regulations – one of the most commonly used measures affecting trade – through the use of international standards. International standards are developed by international standardizing bodies outside the World Trade Organization. Developing countries and least-developed countries (LDCs), however, encounter several obstacles impeding their effective participation in international standard setting, and, as a result, tend to determine ex post, based on their trade flows, which international standards to follow. Therefore, they are often referred to as ‘standard-takers’ instead of ‘standard-makers’. This article argues that a detailed look at the text of the TBT Agreement and the TBT Committee Decision makes clear that concrete steps to remove these obstacles and to engage developing countries and LDCs in international standard setting must become a prerequisite for promoting documents prepared by standardizing bodies to the status of an international standard within the meaning of the TBT Agreement.

1 INTRODUCTION

The creation of the TBT Agreement was an important milestone in the development of the global rules on internal trade-restrictive regulations. The previous system under the General Agreement on Tariffs and Trade 1947 (GATT) addressed these measures primarily through non-discrimination obligations.¹ The TBT Agreement goes considerably further and disciplines a particular class of internal measures, including technical regulations.² For the past ten years, technical barriers have represented one of the most commonly applied measures by World Trade Organization (WTO) Members.³ According to some estimates, they affect around 80% of world trade.⁴ On the one hand, Members often use measures such as technical regulations to pursue legitimate public policy objectives, including the prevention of deceptive practices; or the protection of human health or safety, animal or plant life or health, and the environment.⁵ On the other hand, compliance with technical regulations requires a firm to adjust its production to different markets, reducing economies of scale, which may raise the costs of exports, especially for developing countries and LDCs.⁶

To solve this problem, the TBT Agreement explicitly encourages Members to harmonize their technical

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³ The authors thank Chevrolet Valles and Christian Vidal-Lein for their valuable comments on earlier drafts. The views expressed in this article are the personal academic views of the authors. All errors remain ours alone.
⁵ The term ‘technical regulation’ is defined in Annex 1.1 to the TBT Agreement as follows: Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. Other measures covered by the TBT Agreement are standards and conformity assessment procedures. This article does not contribute to the debate on the extent to which private standards are covered by the TBT Agreement.
⁷ Jürgen Kuerta, A Look Behind the Mirror: Standardization, Institution and the WTO SPS and TBT Agreements, 30(2) UNSW L.J. 504, 512 (2007).
⁸ For legitimate objectives set out in Art. 2.2, third sentence of the TBT Agreement.
regulations through the creation of international standards that Members may use as a basis for the formulation and application of domestic technical regulations. This entails the delegation of a so-called 'quasi-legislative' authority to international standard-setting bodies that are recognized by Members, while retaining certain monitoring and enforcement powers in the WTO. In this way, international standards that are created outside the WTO, and most of which are of a voluntary nature, are elevated to the status of an 'informal law' in the WTO legal system. Members can rely on these standards to justify the WTO-consistency of their technical regulations that are based on, or are in accordance with, them. Overall harmonization has positive effects on international trade, as it reduces the diversity of technical barriers, thereby diminishing the costs of exports. Yet, it also presents a number of challenges, in particular for developing countries and LDCs. Charnovitz, for example, cautioned that international standards could only raise welfare if set at an appropriate level. He stated that '[a]n excessive standard that is too high for most of the world could actually retard economic growth and lower incomes.' According to the WTO World Trade Report 2005, '[i]f countries lack expertise that would allow them to take full part in the setting of international standards or if they lack bargaining power, harmonization can generate asymmetric compliance costs for different countries. Indeed, because of their limited resources, developing countries and LDCs cannot participate as actively as developed Members in international standard setting, and instead tend to determine ex post, based on their trade flows, which international standards to follow. This has led some commentators to characterize them as 'standard-takers' as opposed to 'standard-makers'.

This article addresses three major obstacles arising from the current system of international standard setting that prevent developing countries and LDCs from becoming standard-makers: regulatory competition, technical obstacles to their effective participation, and insufficient influence on decision-making. We argue that the legal framework under the TBT Agreement, complemented by the 2000 Decision on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement (hereinafter 'TBT Committee Decision'), can be used effectively to address these obstacles. In section 2, we discuss the concept of 'international standard' and provide a brief overview of the major disciplines under the TBT Agreement relevant to international standards. In section 3, we address the obstacles that developing countries and LDCs encounter in international standard setting and explain how they can be overcome. In section 4, we provide our concluding thoughts. The article discusses international standards mainly in the context of the TBT Agreement. Nonetheless, relevant concepts and obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter 'SPS Agreement') will also be addressed to the extent that they elucidate the meaning of similar terms and obligations in the TBT Agreement.

2 INTERNATIONAL STANDARDS UNDER THE TBT AGREEMENT: MEANING AND RELEVANT OBLIGATIONS

2.1 The Concept of International Standard Under the TBT and SPS Agreements

International standards fulfill similar functions in the legal frameworks of the TBT and the SPS Agreements. Yet, these Agreements use different approaches to define the term international standard. The SPS Agreement, in Annex A.3, provides the list of the three sister organizations that set standards for the purposes of the Agreement: (1) the Codex Alimentarius Commission (Codex), (2) the International Office of Epizootics (OIE), and (3) the International Plant Protection Convention

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1 See infra alia, Recitals 5 and 4 of the preamble and Arts 2.4, 2.5 and 2.6 of the TBT Agreement. These provisions are discussed in section 2.3 below.


4 See Arts 2.4 and 2.5 of the TBT Agreement.

5 On the role of harmonization and standards in international trade, see Delimaris, supra n. 9, at 3-4, and WTO, World Trade Report 2005: Exploring the Links Between Trade, Standards and the WTO, 51, 54 (Geneva, WTO 2005).


7 WTO Report 2005, supra n. 11, at 54.


9 Ibid.

10 There may also be other obstacles irrelevant to the process of international standard setting itself, such as the lack of interest of some developing countries in standards for industrialized goods, or the lack of coordination between governmental authorities and local industries for purposes of their effective participation in international standard setting. The discussion of these obstacles falls outside the scope of this article.
(IPPC). In addition, Annex A.3(d) to the SPS Agreement states that for matters not covered by the above organizations, the SPS Committee can identify appropriate standards promulgated by other relevant international organizations open for membership to all WTO Members. 17

In contrast, the TBT Agreement does not contain a similar list, nor does it provide a general explicit definition of international standard. Instead, the TBT Agreement defines this term by establishing the characteristics of the 'standard' and the 'international body' approving it. 18 This raises the question as to why the TBT and SPS Agreements use different approaches to define international standards, and whether this difference has any bearing on the interpretation of legal obligations addressing standards under these Agreements. 19

There appear to be two main reasons for this difference. The first reason is that the subject matter of the TBT Agreement is much broader than that of the SPS Agreement. The TBT Agreement disciplines measures that lay down product characteristics or their related processes, or labelling requirements affecting trade in virtually all goods, while the SPS Agreement is concerned with a narrow group of measures addressing health risks (e.g. those arising from additives, toxins or disease-causing organisms in foods). 20

The broad coverage of the TBT Agreement makes it extremely difficult to identify all possible areas in which international standards are developed by various standard-setting bodies. Many of these bodies are of a non-governmental or semi-governmental nature, such as the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC), and the International Telecommunication Union (ITU), in contrast with Codex, OIE and IPPC, all of which are inter-governmental organizations. 21 The problem of identifying all such bodies was raised in the GATT Committee on Technical Barriers to Trade in the 1980s. 22 In that period, the GATT Secretariat circulated illustrative lists of some twenty-four international bodies and organizations involved in standard setting for TBT purposes, including ISO. 23

Furthermore, it is likely that with technological development and changes in societal values the areas of standardization for TBT purposes will expand. In this respect, in US – Tuna II (Mexico), the Appellate Body observed that the absence of a list of international standardizing bodies in the TBT Agreement 'suggests that the TBT Agreement also aims to encourage the development of international standards by bodies that were not already engaged in standardizing activities at the time of the adoption of the TBT Agreement'. 24

Some commentators suggest that there was also a political reason for not including a list of international standardizing bodies in the TBT Agreement. It is generally understood that, under the TBT regime, organizations such as ISO, IEC and ITU, would likely qualify as 'international standardizing bodies'. 25 However, ISO and IEC have been founded and managed mainly by European countries. 26 In contrast, the United States (US) has traditionally relied on standards set by private bodies (inter alia, Underwriters Laboratories Inc.) targeting the US market. Given significant differences between the US and European countries in their approaches to developing standards, the United States has been resistant to limit the scope of standard-setting activities under the TBT Agreement to, inter alia, ISO/IEC, where it fears European influence. 27 In addition, many developing countries perceived ISO as an organization representing the interests of companies from developed countries. 28

Accordingly, it appears that the difference in approaches to defining international standards under the TBT Agreement and the SPS Agreement results from idiosyncratic reasons, and was not intended to affect the interpretation of legal obligations addressing international

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17 To date, the SPS Committee, however, does not appear to have identified such other relevant international organizations. See Marina Yoshrko Narka, International Organizations in WTO Dispute Settlement: How Much Institutional Sensitivity?, 134 (1st ed., Cambridge University Press 2012).


19 E.g., on Arts 2.2 and 2.5 of the TBT Agreement and Art. 3.2 of the SPS Agreement, respectively. We discuss these provisions in section 2.3 below.

20 See Annex A.1 to the SPS Agreement.

21 On ISO, see Dillier, supra n. 9, at 7–10.

22 TBT Committee, Activities of Private Standardizing Bodies, TBT/W/36 (20 Sept. 1981).

23 TBT Committee, Information on Existing International Standards; Note by Secretariat, TBT/W/15/Rev.1 (12 May 1982); and TBT Committee, List of International Standardizing Bodies for Purposes of Article 7.4 and 13.3 of the Agreement; by Secretariat, TBT/W/8 (5 June 1990).


26 Nakai, supra n. 25, at 1272.


standards under these Agreements. In the following section, we proceed to analyse the meaning of the term international standard under the TBT Agreement.

2.2 The Term ‘International Standard’ Under the TBT Agreement

The TBT Agreement defines the term international standard by establishing the characteristics of a ‘standard’ and an ‘international body’. The term standard is defined in Annex 1.2 as follows:

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

The Explanatory Note in the same provision clarifies that [s]tandards prepared by the international standardization community are based on consensus and that [t]he Agreement covers also documents that are not based on consent. The term international body is defined in Annex 1.4 as a [b]ody or system whose membership is open to the relevant bodies of at least all Members.

In its two decisions involving the interpretation of the term ‘international standard’, EC – Sardines and US – Tuna II (Mexico), the Appellate Body examined either the characteristics of an instrument claimed to be a standard or the entity approving it. In EC – Sardines, the European Union (EU) argued, inter alia, that Codex Stan 94, adopted by Codex, was not approved by consensus, and, therefore, was not an international standard. The EU relied on the definition of the term ‘standard’ in the sixth edition of the ISO/IEC Guide 2:1991 (ISO/IEC Guide), which expressly includes a consensus requirement. The Appellate Body, however, rejected the EU’s argument, because the definition of the term ‘standard’ in the Explanatory Note to Annex 1.2 to the TBT Agreement explicitly covers documents that were not approved by consensus. Consequently, the Appellate Body upheld the panel’s finding that Codex Stan 94 met the definition of ‘standard’ in Annex 1.2.

In US – Tuna II (Mexico), the Appellate Body interpreted the term ‘international body’ when assessing whether the dolphin-safe definition and certification adopted by the Agreement on the International Dolphin Conservation Program (AIDCP) constituted a relevant international standard within the meaning of Article 2.4. The Appellate Body explained that it is primarily the characteristics of the entity approving a standard that lends the standard its “international” character, and that the entity must be an international standardizing body. The Appellate Body clarified that the latter is a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members. As the AIDCP did not satisfy the requirement of openness, the Appellate Body found that it did not constitute an international standardizing body.

The meaning of the term ‘international standard’ can also be informed by relevant definitions provided in the ISO/IEC Guide. The introductory clause in Annex 1 to the TBT Agreement stipulates that the terms used in the ISO/IEC Guide and the TBT Agreement must have the same meaning to the extent that the definition given to a term in the TBT Agreement does not depart from that in the ISO/IEC Guide; in the latter situation the definition in the TBT Agreement must prevail. For example, as explained, one important difference between the definition of ‘standard’ in the ISO/IEC Guide and the TBT Agreement is the requirement of consensus, addressed in EC – Sardines. Another difference in the definition of this term, noted by the Appellate Body in US – Tuna II (Mexico), relates to the entity developing the standard. The Appellate Body observed that the ISO/IEC Guide refers to standards approved by international organizations, whereas the TBT Agreement stipulates that a standard is to be approved by a body, which may, but need not, be an organization. Nevertheless, to the extent that definitions in the TBT Agreement do not depart from those in the ISO/IEC Guide, the latter must be used to interpret the term ‘international standard’. In this respect, an interesting element of the definition of ‘standard’ in the ISO/IEC Guide, which is not present in the TBT Agreement, is that [s]tandards should be based on the consolidated results of science, technology and experience, and aimed at the promotion of optimum community benefits.

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29 Note that, in EC – Sardines, the EU (then the EC) did not dispute the fact that Codex was an international body, whereas, in US – Tuna II (Mexico), the parties did not dispute that the measure at issue was a standard. See Appellate Body Report, European Communities – Truth Descriptions of Sardines, WT/DS211/AB/R (adopted 25 Oct. 2002), DSR 2002:VIII, 3359 (EC – Sardines), para. 221; and Appellate Body Report, US – Tuna II (Mexico), para. 353.
31 Ibid., paras 220–227, 233.
33 Ibid., paras 357–359 (emphasis added).
34 Ibid., para. 359.
Finally, in earlier decisions involving standards, WTO adjudicators seem to have given insufficient weight to the issue of how the standards in question were developed, that is, whether the basic principles of transparency were observed, and the views of all stakeholders, including those representing developing countries, were taken into account. The importance of this issue has, however, increased in the wake of the TBT Committee Decision. The TBT Committee Decision requires international standardizing bodies to, inter alia, create transparent procedures that enable WTO Members to have an overview of their work programme and to comment on their work results. Moreover, it states that the membership of international standardizing bodies should be open on a non-discriminatory basis to the relevant bodies of at least all WTO Members and that meaningful opportunities must be provided to the latter to participate and contribute at all stages of the standard’s elaboration. Furthermore, the TBT Committee Decision envisions that standardizing bodies should be impartial and, thus, not give privilege to or favour the interest of particular suppliers, countries or regions. The international standardizing bodies should establish consensus procedures that seek to take into account the views of all parties concerned and to reconcile any conflicting arguments among them.  

In US – Swim II (Mexico), the Appellate Body held that the TBT Committee Decision bears directly on the interpretation of the concepts of ‘open’ and ‘recognized activities in standardization’ in the TBT Agreement, as it is a subsequent agreement within the meaning of Article 31(3)(a) of the 1969 Vienna Convention on the Law of Treaties. The Appellate Body stated that ‘to the extent that a standardizing body complies with the principles and procedures that WTO Members have in the TBT Committee Decision decided “should be observed” in the development of international standards, it would be easier to find that the body has “recognized activities in standardization”’. The Appellate Body thus suggested that a particular body is an international standardizing body for the purposes of the TBT Agreement if it observes the principles and procedures established in the TBT Committee Decision.  

The significant weight attached by the Appellate Body to procedures for the elaboration of international standards has positive consequences for developing countries and LDCs. Principles such as impartiality and consensus ensure that the views of developing countries are taken into account when an international standard is developed. In fact, it has been suggested that the TBT Committee Decision was adopted as an ‘external call for reform’ to catalyze the improvement of standardizing practices by international bodies that fall under the purview of the TBT Agreement, and to contribute to the effective participation of developing countries and LDCs in international standard setting.  

In the following section, we provide an overview of WTO Members’ major obligations under the TBT Agreement relevant to international standards.  

2.3 Obligations Relevant to International Standards  

The TBT Agreement recognizes the important role the international standards play in facilitating trade, and encourages their use to harmonize domestic technical regulations. One important incentive to pursue this goal is established in Article 2.5 (second sentence). Pursuant to this provision, technical regulations adopted or applied for one of the legitimate objectives explicitly mentioned in Article 2.2 (e.g. the protection of human health) and that are ‘in accordance with relevant international standards’ are ‘rebuttable presumed not to create an unnecessary obstacle to international trade’ within the meaning of Article 2.2 (emphasis added). In other words, the technical regulations are presumed to be consistent with the latter provision.  

There appears to be a close parallel between the legal standards under Articles 2.5 of the TBT Agreement and

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57 Some authors criticized the reluctance of the Appellate Body to assess whether the standards were approved by consensus. In this respect, Du notes that: ‘In EC – Hormones, Codes standards that were key to the ruling against the EC were adopted by a secret vote of 33–29 with 7 abstentions.’ Michael M. Du, Reducing Product Standards Heterogeneity Through International Standards in the WTO: How Far Are We Here?, 64 (2) J. World Trade 295, 313 (2010) (footnotes omitted). Note that the ‘relevant international standards’ on EC – Sardina, Codex Stat 94, was voted upon favorably by eighteen countries, of which only four endorsed it fully, out of 150 Codex Members at that time. Neither Peru nor any EC Member State were among these eighteen countries. See Panel Report, EC – Sardina, para. 6.5.

58 See TBT Committee, Decision and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995, 46, G/TBT/1/Rev.10 (9 June 2011). Similar principles are set out in the Code of Good Practice (Annex 9 to the TBT Agreement), e.g. para H. 4 and N thereof. Nonetheless, this Code applies only to regional and national standard-setting bodies. Thus, the TBT Committee Decision is the first legal instrument that refers to these principles in the context of international standard setting.

59 Appellate Body Report, US – Swim II (Mexico), paras 371–372. Note that ten years before, when the panel in EC – Sardina was confronted with the task of interpreting the legal status of the TBT Committee Decision, the panel determined that it was merely a ‘policy statement of preference’. Panel Report, EC – Sardina, para. 7.91.


61 Delmarzini, supra n. 9, at 131.

62 See Recitals 3 and 4 of the preamble and Art. 2.6 of the TBT Agreement.

63 Interestingly, Art. 3.2 of the SPS Agreement, which is the provision analogous to Art. 2.5 of the TBT Agreement, establishes a similar presumption for SPS measures that ‘conform to international standards’, without specifying whether the presumption is ‘rebuttable’. In EC – Hormones, the Appellate Body, however, confirmed that this is indeed the case. Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS50/AB/R, WT/DS48/AB/R (adopted 15 Feb 1999), DSBR 1998 I, 135 (EC – Hormones), para. 170.
of the SPS Agreement.\textsuperscript{44} The ordinary meaning of ‘in accordance with’ is similar to ‘conform to’.\textsuperscript{45} In EC – Hormones, the Appellate Body interpreted ‘conform to’ in Article 3.2 as requiring ‘compliance with’ or ‘correspondence in form or manner’ with an international standard.\textsuperscript{46} It stated that to benefit from the presumption under Article 3.2, ‘a measure would embody the international standard completely and, for practical purposes, converts it into a municipal standard [in case technical regulation]’.\textsuperscript{47} The term ‘relevant’ in Article 2.5 means ‘bear[ing] upon, relat[ing] to, or be[ing] pertinent to’.\textsuperscript{48} However, when a technical regulation is identical to an international standard, the ‘relevance’ of this standard can hardly be questioned.

WTO adjudicators have not yet clarified the function that the Article 2.5 presumption performs in the framework of Article 2.2 of the TBT Agreement, and, specifically, how it must be rebutted. Even without this presumption, the complainant would bear the burden of demonstrating that the challenged technical regulation is inconsistent with Article 2.2.\textsuperscript{49} One could argue that when the presumption applies, the standard of proof that the complainant must meet under Article 2.2 (i.e. the degree of persuasion) will increase. For example, the panel may be less likely to apply the balance of probabilities standard, and may look for more substantial evidence convincing it ‘beyond a reasonable doubt’.\textsuperscript{50} Another possibility is that the evidence submitted by the complainant, if scientifically rigorous, will cast doubt on whether the alleged international standard actually meets the definition of the term ‘standard’ in the ISO/IEC Guide complementing the definition of this term in Annex 1 to the TBT Agreement. To recall, the ISO/IEC Guide provides that the standards should be based on the ‘consolidated results of science’.\textsuperscript{51} The panel may thus resolve the issue by simply rejecting the argument that the relevant international standard exists within the meaning of Article 2.5.

In addition to the incentive under Article 2.5, Article 2.4 of the TBT Agreement imposes a qualified obligation on Members to use relevant international standards, or their relevant parts, ‘as a basis for’ technical regulations. The Appellate Body interpreted the term as a basis for requiring a ‘very strong and very close relationship between’ a Member’s technical regulation and the existing relevant international standard.\textsuperscript{52} Importantly, however, the legal standard under Article 2.4 is less stringent than the standard of ‘in accordance with’ under Article 2.5, as it does not require that a relevant international standard be converted fully into the domestic technical regulation.\textsuperscript{53}

Article 2.4 further stipulates that the obligation to base technical regulations on relevant international standards does not apply when such standards or their relevant parts ‘would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued’. ‘Legitimate objectives’ mentioned in Article 2.4 are the same as those set out in Article 2.2.\textsuperscript{54} As a general principle, Members are free to determine their own level of protection of these objectives.\textsuperscript{55} The term ‘ineffective means’ refers to ‘means which does not have the function of accomplishing the legitimate objective’, while an ‘inappropriate means’ is ‘a means which is not especially suitable for the fulfilment of the objective’.\textsuperscript{56} The Appellate Body held that the complainant bears the burden of showing that the challenged technical regulation is not based on

\begin{notes}
\item[44] In EC – Sardine, the Appellate Body confirmed the relevance of the SPS Agreement for interpreting similar terms and concepts in the TBT Agreement. Appellate Body Report, EC – Sardine, paras 212–214. A key difference between Arts 3.2 TBT and 3.2 SPS is that the latter creates the presumption of consistency with the relevant provisions of the SPS Agreement and the GATT 1994, whereas Art. 2.5 refers only to Art. 2.2 of the TBT Agreement.
\item[45] \(\text{The ordinary meaning of 'in accordance with' is 'in a manner conforming with'. See } \text{http://www.oxforddictionaries.com (accessed 29 Apr. 2016).}\)
\item[47] \(\text{Id., para. 170.}\)
\item[49] Indeed, it is generally presumed that Members’ measures are WTO-consistent until proven otherwise. See, inter alia, Appellate Body Report, United States – Countering Datas on Certain Corrosion Resistant Carbon Steel Flat Products from Germany, WT/DS115/AB/R and Corr.1 (adopted 19 Dec. 2002), DSU-2002-IX, 3770, (US – Corros Surf), para. 157.
\item[50] In normal circumstances, WTO panels/the Appellate Body do not appear to have required the proof beyond a reasonable doubt, and instead applied a less stringent ‘preponderance of the evidence’ (i.e. ‘balance of probabilities’) standard of proof. See Michelli, T. Grando, Eladinos, Prof. and Fee-Finding in WTO Dispute Settlement, 86–93 (1st ed., Oxford University Press, 2009).
\item[52] The Appellate Body clarified that ‘international standard’ is used ‘as a basis for’ a technical regulation when it is used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation; and that, at a minimum, there should be no contradiction between the technical regulation and the relevant international standard. Appellate Body Report, EC – Sardine, paras 244–245, 254.
\item[53] \(\text{See } \text{id., paras. 242. See also Appellate Body Report, EC – Hormones, para. 165.}\)
\item[55] Recital 6 of the preamble to the TBT Agreement.
\end{notes}
the existing international standard and that the standard would not be an ineffective or inappropriate means to achieve the legitimate objective pursued by the regulation. Another much broader exception to the obligation under Article 2.4 appears to be established under Article 12.4 of the TBT Agreement for developing countries and LDCs. This provision states that ‘developing country Members should not be expected to use international standards as a basis for their technical regulations …., which are not appropriate to their development, financial and trade needs’. Among other obligations relevant to international standards, Article 2.6 of the TBT Agreement requires Members to ‘play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations’. Article 2.9 sets out various transparency requirements in circumstances where a Member’s technical regulation deviates from a relevant international standard. Article 11 deals with technical assistance, inter alia, on matters relating to the participation of developing countries in international standard setting. Article 12.6 requires Members to take such reasonable measures as may be available to them to ensure that international standardizing bodies prepare international standards with respect to products of special interest to developing countries.

In this section, we have defined the term international standard and outlined the key provisions under the TBT Agreement addressing it. In the next section, we discuss the key obstacles that developing countries and LDCs encounter in international standard setting, and how these obstacles could be addressed by international standardizing bodies.

3 OBSTACLES PREVENTING DEVELOPING COUNTRIES AND LDCS FROM BECOMING STANDARD-MAKERS AND HOW THEY CAN BE OVERCOME

3.1 Effects of International Regulatory Competition on Developing Countries and LDCs

One contradiction arising from the structure and the object and purpose of the TBT Agreement is that it encourages, on the one hand, the harmonization of technical regulations through international standards, and, on the other hand, the development of international standards by various standardizing bodies, whose standard-setting activities may overlap. This creates room for regulatory competition whereby different standardizing bodies elaborate competing standards on the same subject matter, potentially to the detriment of the goal of harmonization. The problem of regulatory competition was, for example, raised in one of the sessions of a Codex Committee, where participants from the EU, Mexico and Costa Rica noted the possibility of the overlap and contradiction between standards for fresh fruits and vegetables prepared by the United Nations Economic Commission for Europe, and Codex. Similarly, in the TBT Committee, Brazil and Australia expressed their concerns regarding the definition of ‘frozen’ in the EU’s regulation prohibiting the use of frozen poultry meat in products to be labelled as ‘fresh poultry meat preparations’, noting the apparent contradiction between this measure and the relevant international standard adopted by OIE. Nonetheless, the EU’s measure appeared to be in line with a different international standard developed by Codex.

Some commentators have argued that this regulatory competition ‘may not be such a bad thing’ — for example, it may improve the quality of standards — and that, in circumstances when conflicting standards exist, it should be the prerogative of each Member to choose the standard it prefers. We do not question the possible benefits of the regulatory competition. However, its negative implications for the involvement of developing countries and LDCs in international standard setting must also be considered. For instance, these countries are forced to choose between different standard-setting bodies developing overlapping standards on the same product. Because their resources are limited, they tend to prioritize their participation in those bodies that develop standards most relevant to their export priorities, and become de facto excluded from participation in other fora developing standards on the same subject matter. Another negative implication is that compliance with competing standards transformed into technical regulations increases the costs of exports. For example, the Organisation for Economic Co-operation and Development has estimated that the costs of meeting...
differing standards and technical regulations in its member countries, including the costs of testing and certification, can amount to between 2% and 10% of the overall cost of the product. This may limit export opportunities of firms from developing countries and LDCs, as they generally avoid higher-cost markets in light of the impacts on production expenditures.

The above negative effects could be alleviated by narrowing the regulatory competition to only those areas where the difference in regulatory approaches is justified by objective reasons, such as science. According to the ISO/IEC Guide, 'standards should be based on the consolidated results of science, technology and experience'. Furthermore, the principle of coherence under the TBT Committee Decision directs international standardizing bodies to avoid duplication or overlap in their work and to engage in cooperation.

Some international standardizing bodies have taken steps to establish cooperation and coordination with each other. For instance, ISO and Codex regularly participate as observers in the TBT Committee, where they share their work programmes and other relevant information relating to their standard-setting activities. In addition, they periodically update each other on their respective work. The collaboration between Codex and OIE has resulted in a number of standards developed jointly by these organizations, which cross reference one another's relevant texts. In addition, some international standard-setting bodies jointly prepare workshops and technical assistance programs. These cooperation and coordination efforts lead to more effective harmonization and enhance the opportunities for developing countries and LDCs to participate in international standard setting. These examples should, therefore, be followed by other international standardizing bodies.

### 3.2 Technical Obstacles to the Effective Participation of Developing Countries and LDCs in International Standard Setting

The problem of the effective participation of developing countries and LDCs in international standard setting is well known. It has been raised by developing countries and LDCs themselves in different WTO fora, including the TBT Committee. International standard setting is technically complex, lengthy and costly. While each standard-setting body has its own procedures, in general, participants propose standards, prepare working drafts, report to capitals, submit comments, try to achieve consensus for the standard's adoption, or vote (if necessary). This process can take around five years or more. In this process, developing countries and LDCs often experience language barriers and lack of technical expertise; moreover, they must pay high membership fees. These barriers contribute to a large extent to the low rate of participation of developing countries and LDCs in international standard setting.

The above technical obstacles must be addressed to ensure that the participation of developing countries and LDCs in international standard setting goes 'beyond a seat at the table'. This is recognized in the TBT Agreement itself (inter alia, Article 12.6) as well as in the TBT Committee Decision. The latter calls for seeking 'tangible ways of facilitating developing countries' participation in international standards development' through inter alia capacity building and technical assistance within international standardizing bodies.

A number of international standardizing bodies have already taken measures to achieve this goal. For instance, ISO has created a training academy (the 'ISO Academy'), and a capacity building programme called 'twinning'.

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**Notes**

63 Kurtz, supra n. 4, at 517.
64 Maclean et al., supra n. 6, at 6-7.
65 ISO/IEC Guide 2:2001. Similarly, Wykström & McDaniels argue that 'when standard-setting moves away from science and technology, its value ... is more open to question'. Wykström & McDaniels, supra n. 60, at 18.
66 See the principle of coherence in the TBT Committee Decision, 48.
67 E.g., WTO Committee, Thematic Session on Standards, G/TBT/GEN/141 (5-6 Mar. 2013), paras. 1.6 and 7th ISO Voting Portal, RD/TBT/31 (27-28 Nov. 2012).
69 E.g., Code of Practice on Good Animal Feeding. See Codex, Relations Between the Codex Alimentarius Commission and Other International Organizations, Geneva (14-18 July 2014), 5, para. 11.
70 Ibid., para. 3. See also the Standards and Trade Development Facility's work in: http://www.standardsfacility.org/ (accessed 29 Apr. 2016).
71 E.g., WTO Docs. G/TBT/5, paras. 19 and 22; G/TBT/W/195, 1; and WT/Misc/101/17, para. 1.5.
74 Ibid., at 1238.
75 See Delamarre, supra n. 9, at 7-8.
76 E.g., in Codex, while around 72% of developing countries attend regular Commission sessions, the average attendance rate for the committees where standards are developed is 24.8%. See Codex, Participation of Developing Countries in the Work of Codex, CX/GP 09/25/9, Twenty-Fifth Session Paris, France (30 Mar.-4 Apr. 2009).
77 Wykström & McDaniels, supra n. 60, at 20.
78 See the principle of development dimension in the TBT Committee Decision, 48.
through which developed-country Members may share their knowledge in standard setting with developing countries. Codex has launched a 'Codex Trust Fund' supporting the participation of around 2,300 representatives from developing countries in international standard setting. Similar initiatives should be undertaken by other bodies or organizations that are seeking the status of an international standardizing body in the TBT legal framework.

3.3 Insufficient Influence on Decision Making

Another important obstacle that developing countries and LDCs face is that, sometimes, their views are not always taken into account, or, at least, not given sufficient weight, in the process of international standard setting. From a practical perspective, one can hardly expect that every decision in international standard-setting bodies would be adopted by consensus as this would likely lead to deadlock. To recall, in EC – Sardines, the Appellate Body clarified that the TBT Agreement covers standards that are not adopted by consensus. Yet, it is questionable whether standards prepared without the involvement of the representatives of developing countries and LDCs (e.g., by the representatives of industrialized Members), or which were overwhelmingly opposed by developing countries and LDCs could be characterized as an international standard within the meaning of the TBT Agreement. In this regard, the TBT Committee Decision provides that 'all relevant bodies of WTO Members should be provided with meaningful opportunities to contribute to the elaboration of an international standard'. It further requires that 'consensus procedures ... be established that seek to take into account the views of all parties concerned and to reconcile any conflicting arguments'.

Finally, the Decision states that international standards 'should not give preference to the characteristics or requirements of specific countries or regions when different needs or interests exist in other countries or regions'.

A number of international standardizing bodies have undertaken efforts to adopt decisions by consensus. For instance, according to its Rules of Procedures, Codex must make every effort to reach agreement on the adoption or amendment of standards by consensus. Voting is only possible if such efforts to reach consensus have failed. ISO standards must be adopted by consensus, i.e. in the 'absence of substantial opposition'.

Despite these efforts, much more must be done. One of the main problems that must be resolved is the inadequate reporting on how standards were developed and which comments and amendments by the representatives of which Members were provided with respect to their various drafts. For example, even experienced and well-recognized standard-setting bodies such as ISO and Codex do not appear to provide full and consistent reports on these issues available in the public domain. Without a clear understanding of how a given international standard was developed, one cannot assess its consistency with all the procedural requirements under the TBT Committee Decision, such as impartiality and the requirement
to establish consensus procedures.

4 Concluding thoughts

In this article, we discussed the concept of 'international standard' and the main functions it fulfills in the TBT Agreement. One of these functions is the harmonization of WTO Members' technical regulations – one of the most commonly used measures affecting trade. Developing countries and LDCs, however, can only benefit from harmonization if the key obstacles to their participation in international standard setting – regulatory competition, technical obstacles, and insufficient influence on decision-making – are addressed adequately by international
standard-setting bodies. Concrete steps to remove these obstacles and to engage developing countries and LDCs in international standard setting must become a prerequisite for promoting documents prepared by standardizing bodies to the status of an international standard. This argument finds support in the text of the TBT Agreement and the TBT Committee Decision.

Developing countries and LDCs may, for their part, wish to participate more actively in the development of international standards that may affect their trade interests. There are technical assistance and capacity building programmes provided by international standard-setting bodies. In addition, their involvement in international standard setting could be increased if they were to collaborate with their regional trade partners, or other developing countries and LDCs sharing interests in preparing certain standards. Their collective representation in international standard setting could reduce their costs of participation, and maximize their influence on the decision-making within international standard-setting bodies. Finally, the TBT Committee provides a useful forum for discussing standards developed by various international standardizing bodies and organizations. Developing countries and LDCs could represent the interest of their consumers and industries more effectively if they were to take active part in these discussions.