

**‘RELEVANT’, ‘INTERNATIONAL’, AND ‘STANDARDS’  
UNDER THE TECHNICAL BARRIERS TO TRADE  
AGREEMENT: THREE SIDES OF A GOLDEN  
TRIANGLE**

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**ABSTRACT**

*The absence of a definition in an international agreement to which several States are signatories, not only creates uncertainty but also prevents the effective implementation of the said Convention. The potential misuse of such broad and undetermined clauses in international instruments tends to trouble the global legal community and plagues the regime. Unfortunately, Article 2.4 of the Technical Barriers to Trade (‘TBT’) Agreement fails to define and highlight the contours of the term – ‘relevant international standards’. Through this paper, the author aims to navigate the jurisprudential underpinnings of the undefined term ‘relevant international standards’ in the TBT Agreement. In this backdrop, this paper attempts to bridle this unruly horse and contextualise the term using interpretative tools. The importance of standards especially in a consumer-driven market is showcased, coupled with an in-depth analysis of contemporary judicial decisions that have aimed to bridge the widening hiatus. Subsequently, the possibility of including international organisations whose standards could be considered as a part of the undefined term is evaluated. While attempting the herculean task of evaluating the inclusion of a few potential International Standardising Bodies, the paper would use the ‘consensus’ requirement present under Article 1.2 of the TBT Agreement as an interpretative tool. Moreover, the qualifications of ‘relevant’ and ‘international’ are examined with the objective of streamlining the interpretation. The author concludes the paper by viewing the international standardising bodies through a critical lens and provides novel suggestions to accentuate the existing lacunae.*

**Keywords:** Relevant International Standards, Technical Barriers to Trade Agreement, Standardisation, International Standardising Bodies, Consensus

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## INTRODUCTION

The expansion of international markets led to an increase in the consumer demand and preference for products being safer and better. The solution to this was found in the process of standardisation – where products go through a process of development in order to meet certain well-defined criteria, which would be tailored according to the values and inclinations reflected by the society<sup>274</sup> Over the years, standardisation has become a catalyst for international trade, global commerce, and the World Trade Organization (‘WTO’) through the TBT Agreement that is aimed at providing some deference to technical regulations and international standards.<sup>275</sup> However, the term ‘relevant international standards’ has not been defined under the TBT Agreement giving rise to a plethora of problems.

An undefined term in an agreement is always an issue when it comes to the interpretational aspect of it. Not only does it cause immense confusion to jurists and practitioners, but also tends to be a matter of worry due to the possibilities of imprecise evaluations of products. The lack of an explanation for such an imperative term goes against the need for which it was incorporated. The potential misuse of such broad undetermined clauses in international instruments tends to trouble the global legal community and plagues the regime with the following issues.

*Firstly*, since the WTO is not a standard-setting body, there has been a ‘regulatory outsourcing’ to several International Standardising Bodies (“ISBs”). The standards developed by private ISBs have assumed immense significance as compliance to the TBT Agreement is adjudicated with respect to the fulfilment of these standards.<sup>276</sup> The growth of this transnational framework has materialised in a vacuum without any interference from any formal State law – leading to the development of extremely fluctuating informal standards. The delegation of legislative power to private parties has made this paradigm more of power politics than good global governance practices. *Secondly*, the TBT Agreement does not expressly list the ISBs which have been determined to provide such standards, unlike the Sanitary and Phytosanitary

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<sup>274</sup> Humberto Zuniga Schroder, ‘Definition of the Concept ‘International Standard’ in the TBT Agreement’ (2009) 43(6) Journal of World Trade 1223, 1225.

<sup>275</sup> Luis Cabral and Tobias Kretschmer, ‘Standard Battles and Public Policy’ in Shane Greenstein and Victor Stango (eds), *Standards Battles and Public Policy* (Cambridge University Press 2006).

<sup>276</sup> Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012).

Measures ('SPS') Agreement, leading to considerable confusion.<sup>277</sup> *Thirdly*, the standards created by the ISBs, which have been adopted in the regulatory landscape of the WTO are claimed to be incorporated through opaque processes that are not in accordance with the due procedure, with nonchalance towards the ideals of inclusivity, consensus and representativeness – the pillars supporting the foundation of the WTO.<sup>278</sup> In this backdrop, the paper seeks to define the contours of the term 'relevant international standards' and suggest measures to bridge this gap and rectify this grave error for a holistic international trade framework.

Through this paper, the author aims to navigate the jurisprudential underpinnings of the undefined term 'relevant international standards' in the TBT Agreement. Part I of the paper introduces the topic at hand and attempts to explain the background and significance of the lack of a definition and the imperative need to streamline such an explanation. The paper, through Part II, aims to examine the nature of standards in the international trade regime. The need for having the standards in the first place will be explored, coupled with their responsibilities as espoused under the TBT Agreement will be navigated. Through Part III of the paper, the author will attempt to bridge this vacuum through an in-depth analysis of judicial decisions. Moreover, it will seek to evaluate the inclusion of a few potential ISBs by interpreting the provisions of the TBT Agreement vis-à-vis the SNP Agreement. The paper will use the 'consensus' requirement present under Article 1.2 of the TBT Agreement as an interpretative tool. Additionally, this part will study the decision-making process of the ISBs through a critical lens to highlight the need of streamlining a precise explanation for the term.

Part IV of the paper will seek to provide novel suggestions and recommendations in order to ensure that the ISBs become both effective and efficient and duly discharge their responsibilities as envisioned by the TBT Agreement.

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<sup>277</sup> Agreement on the Application of Sanitary and Phytosanitary Measures 1995, art 3(4).

<sup>278</sup> Panos Delimatsis, "Relevant International Standards' and 'Recognized Standardization Bodies' under the TBT Agreement' [2014] SSRN Electronic Journal <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2489934](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2489934)> accessed 12 February 2021.

## EXAMINING THE UNIQUE NATURE OF ‘STANDARDS’ IN THE INTERNATIONAL TRADE CONTEXT: PROVIDING CONTEXTUAL UNDERPINNINGS

This part aims to elucidate the nature and behaviour of ‘standards’ under the global framework vis-à-vis the TBT Agreement. Moreover, this part of the paper examines the importance of the standards in the international trade regime and highlights their imperative role by highlighting their nationwide presence. Additionally, this section also discusses the problems faced by the practice of standardisation, arising from the lacunae present in the TBT Agreement leading to a multitude of issues.

International trade, essentially, involves the export and import of goods across different jurisdictions and customers. Hence, there was a need to create certain ‘standards’ which could act as common parameters on which the quality and innovation of a product could be adjudicated nationwide.<sup>279</sup> The Preamble of the TBT Agreement establishes an assumption that adherence to ‘standards’ by a product is a clear benchmark of its efficiency, indicating a status of calibre.<sup>280</sup> Standards have thus become, technical knowledge codified under several international instruments in order to provide for procedural safeguards while developing conformity assessment systems.<sup>281</sup> They have been developed in such a manner that they constrict and regularise the behaviour of producers. They have become important yardsticks for measuring the development of domestic markets as well as the growth of international economies.<sup>282</sup> Initially, they were created to act as a mechanism of ‘self-regulation’ and were deemed to be ‘soft-laws’ due to their non-binding nature.<sup>283</sup> However, through the years, the standards which were supposed to bridge the gaps have instead become ‘hard-laws’ that are binding.<sup>284</sup> The advent of technology coupled with the complexities of a diverse world, have left most traditional states incompetent to regulate such behaviours. The incompetency arises

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<sup>279</sup> *ibid.*

<sup>280</sup> The Technical Barriers to Trade Agreement, Preamble.

<sup>281</sup> Peter Swann, Paul Temple and Mark Shurmer, ‘Standards and Trade Performance: The UK Experience’ (1996) 106 *The Economic Journal* 1297, 1298.

<sup>282</sup> Knut Blind and Andre Jungmittag, ‘The Impact of Patents and Standards on Macroeconomic Growth: A Panel Approach covering 4 Countries and 12 sectors’ (2008) 29(1) *Journal of Productivity Analysis* 51.

<sup>283</sup> Nils Brunsson and Bengt Jacobsson, *A World of Standards* (Oxford University Press 2000) 89.

<sup>284</sup> John Howard Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press 2006) 65.

from the lack of adequate technological resources.<sup>285</sup> These constraints are present in most States and have led States to delegate their regulatory and supervisory role vis-à-vis the creation of technological standards with non-state actors, giving rise to a 'technocratic legitimacy' at the transnational level.<sup>286</sup> Such an approach, ridden with 'technological rationality' has appeared to be a win-win situation for both the States as well as the private actors, since there is a reduction of costs for the governments and an accentuation of sovereignty for private actors.<sup>287</sup>

Standards, supported by the pillars of innovation, quality, technological growth and evolution of knowledge, has been the basic foundation of consumer welfare.<sup>288</sup> The advantages and benefits arising from the presence of standards in the international community are innumerable. Standards provide an incentive to producers to innovate and capitalise on technological advances since it provides them a first-mover advantage and allows the creator to capitalise and subsequently monopolise the product vis-à-vis the market.<sup>289</sup> For instance, if there is a new technology with respect to fruits, the producer would attempt to capture this development since a standard would be created and provided to him based on the inclusion of the technology within his product.

This would provide the producer with an impetus to innovate and introduce effective products in the market.<sup>290</sup> Thus, the '*trade facilitation*' function of standards cannot be dispensed with. As highlighted through the above illustration, standards play an imperative role in ensuring the growth of businesses and national markets.<sup>291</sup> This aids in enabling trade with other countries across the world who would want the developed and specialised product, leading to an increase

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<sup>285</sup> Linda Sender, *Soft Law in European Community Law* (Hart Publishing 2004).

<sup>286</sup> Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton University Press 2009) ch 2.

<sup>287</sup> Kenneth W Abbot and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421.

<sup>288</sup> Daron Acemoglu, Gino Gancia and Fabrizio Zilibotti, 'Competing Engines of Growth: Innovation and Standardization' (2012) 147 *Journal of Economic Theory* 570.

<sup>289</sup> Christel Lane, 'The Social Regulation of Inter – Firm Relations in Britain & Germany: Market Rules, Legal Norms and Technical Standards' (1997) 21 *Cambridge Journal of Economics* 197.

<sup>290</sup> Harm Schepel, *The Constitution of Private Governance – Product Standards in the Regulation of Integrating Markets* (Hart Publishing 2005).

<sup>291</sup> Patrick Messerlin, *Measuring the Costs of Protection in Europe: European Commercial Policy in the 2000s* (Peterson Institute for International Economics 2001).

in the profitability, while also facilitating trade between nations.<sup>292</sup> This leads to an ease in business, affecting access to markets positively, and augments the survival of small-scale businesses.<sup>293</sup> The TBT Agreement hence, attempted to regulate these standards in order to introduce them into the skewed jurisprudence of international trade.

However, apart from these advantages, the presence of standards has been the subject of criticism from several scholars and noted academicians on account of the fact<sup>294</sup> that standards may also impede trade.<sup>295</sup> The adoption of these standards leads to an increase in the compliance costs for businesses, subsequently affecting economies of scale and trade in a negative manner.<sup>296</sup> Moreover, several standards which have been created have captured several markets and industries leading to the spread of asymmetric information and data. Organisations using these standards while attempting to monopolise the markets create several restrictions to access the market for both domestic and foreign actors.<sup>297</sup> Additionally, the WTO places a lot of emphasis on the usage of ‘relevant international standards’ espoused under Article 2.4 of the TBT Agreement.

However, unfortunately, the TBT Agreement does not provide any meaning, explanation or illustration which would allow the evaluation of the contours of the meaning of this term. Such a legislative lacuna has furthered the growth of private ISBs, which has led to a plethora of issues.<sup>298</sup> The involvement of private bodies has rendered the creation and adoption of standards a political decision-making process and a battle of egos between different countries, instead of setting up of good governance practices.<sup>299</sup> These decision making processes employed by private ISBs are devoid of any tenets of inclusion, transparency or representation

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<sup>292</sup> Michelle P Egan, *Constructing a European Market: Standards, Regulation and Governance* (Oxford University Press 2001).

<sup>293</sup> A Claire Cutler, *Private Power and Global Authority – Transnational Merchant Law and the Global Political Economy* (Cambridge University Press 2003).

<sup>294</sup> Robert W Staiger and Alan O Sykes, ‘International Trade, National Treatment and Domestic Regulation’ (2011) 40 *Journal of Legal Studies* 149.

<sup>295</sup> Panos Delimatsis, ‘Relevant International Standards’ and ‘Recognized Standardization Bodies’ under the TBT Agreement’ [2014] SSRN Electronic Journal 2  
<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2489934](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2489934)> accessed 12 February 2021.

<sup>296</sup> *ibid.*

<sup>297</sup> *ibid.*

<sup>298</sup> Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012).

<sup>299</sup> *ibid.*

and instead are opaque in their approach. The focus on power politics has led to prioritising the interests of developed countries over developing countries, which has resulted in a structural divide.<sup>300</sup>

The major disadvantage is that standards created by such processes are being used to check compliance with WTO obligations vis-à-vis the TBT Agreement, and thus, there is an immediate need to bridge this legislative vacuum.

### **ATTEMPTING TO BRIDGE THE JURISPRUDENTIAL HIATUS: STREAMLINING THE MEANING OF 'RELEVANT INTERNATIONAL STANDARD'**

Through this part, the author attempts to plug in these legislative lacunae and examine if it is possible to provide some meaning or context to the term 'relevant international standards' while considering a conjoined reading of other provisions in the TBT Agreement. Through such examination, the author aims to provide a list of ISBs which would qualify as standardising bodies under the TBT Agreement, similar to the SPS Agreement.<sup>301</sup> As stated earlier, the standards created by these ISBs will be evaluated on the touchstone and anvil of WTO obligations. It is imperative that the decision-making processes are also viewed through a critical lens.

#### **A. EVALUATING THE SCOPE OF INCLUSION OF POTENTIAL INTERNATIONAL STANDARDISING BODIES: A HERCULEAN TASK?**

The scope of the term 'relevant international standards' shall be evaluated after inspecting the qualifications to the term 'standards' provided under Article 2.4 of the TBT Agreement, i.e., by investigating the jurisprudence around the terms 'international' and 'relevance' and then, attaching these pieces of the puzzle together in order to provide some contours regarding the application of the entire term.

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<sup>300</sup> Panos Delimatsis, "Relevant International Standards' and 'Recognized Standardization Bodies' under the TBT Agreement' [2014] SSRN Electronic Journal

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2489934](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2489934)> accessed 12 February 2021.

<sup>301</sup> Agreement on the Application of Sanitary and Phytosanitary Measures 1995, art 3(4).

**a) THE ‘CONSENSUS’ AND THE ‘OPENNESS’ CRITERIA: HIGHLIGHTING THE ‘INTERNATIONAL’ REQUIREMENT**

The WTO is an organisation which is driven by consensus amongst its member States and thus, it was contended that the term ‘relevant international standards’ must be interpreted in a manner that permits only those standards which are created through consensus between States or the standards created by ISBs where the approval of the standards are done by consensus.<sup>302</sup> However, a bare reading and perusal of the attached Explanatory Note to Annexure 1.2 of the TBT Agreement which defines the term ‘standard’,<sup>303</sup> clearly states that standards will essentially be determined by the documents created by the international standardisation communities, irrespective of the consensus requirement.<sup>304</sup> The Explanatory Note defines ‘standards’ as documents that are created either by consensus or even by non-consensus.<sup>305</sup> This position highlights the fact that the drafters of the TBT Agreement did not intend to consider ‘consensus’ as a requirement.<sup>306</sup> This was even held in the EC- Sardines case, where the Appellate Body held that focus has to be given to the last line of the Explanatory Note, where the ingredient of consensus has been rendered insignificant.<sup>307</sup> The major imbroglio occurred when it was showcased that the definition as present in Annexure 1.2 of the TBT Agreement was substantially based on and derived from ISO/IEC Guide where the requirement of consensus has been given paramount importance.<sup>308</sup> However, the incorporation of the last sentence signifies the intention of the drafters to exclude this imposition on the creation of a standard.<sup>309</sup> Moreover, the Appellate Body in the above case, arrived at the conclusion that such a position to not give importance to the requirement of consensus was present in order to ensure flexibility in the ISBs under the TBT Agreement, who now had the choice to choose between either the incorporation or the ignorance of this ‘consensus’ requirement in their internal operation.<sup>310</sup>

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<sup>302</sup>Claus Dieter Ehlermann and Lothar Erring, ‘Decision Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization adequate for Making, Revising and Implementing Rules of International Trade?’ (2005) 8(1) *Journal of International Economic Law* <<https://hdl.handle.net/1814/3484>> accessed 12 February 2021.

<sup>303</sup> Technical Barriers to Trade Agreement (entered into force 1 January 1995) 1868 UNTS 120 Annexure 1.2.

<sup>304</sup> *ibid* Explanatory Note.

<sup>305</sup> *ibid*.

<sup>306</sup> WTO, *European Communities- Trade Description of Sardines* (25 July 2003) WT/DS231/18.

<sup>307</sup> *ibid* para 35-37.

<sup>308</sup> *ibid* para 225.

<sup>309</sup> *ibid* para 223.

<sup>310</sup> *ibid* para 227.



This interpretation warrants the incorporation of the 'openness' criterion which is to be examined closely by inspecting Annexure 1 of the TBT Agreement and subsequent reading of Annexure 1.2 and 1.4.<sup>311</sup> Annexure 1.2 defines a standard to be a document that is created and approved by a recognised international body.<sup>312</sup> On the other hand, Annexure 1.4 defines an international body to be one whose membership is open to at least all the member states of the WTO.<sup>313</sup> A similar provision is also present in Article 3.4 of the SPS Agreement where a residuary clause is provided which defines standards to be *firstly*, the ones created by the above-mentioned bodies and *secondly*, the documents created by international organisations whose membership is 'open for all' as identified by the SPS Committee.<sup>314</sup>

Such an analysis found support in the decision of the *US Tuna II* case, where a 'dolphin safe' standard was contended to be a 'relevant international standard'.<sup>315</sup> However, the adjudicators held that since the Agreement on International Dolphin Conservation Program allowed membership to new States and parties only via an invitation, such a 'dolphin safe' standard was outside the purview of being a 'relevant international standard'.<sup>316</sup> Hence, the United States was under no liability to apply this standard on their products.

Thus, from the above-mentioned analysis, it can be observed that the term 'relevant international standards' encompasses only those standards which are created by ISBs whose membership is 'open to all' members of the WTO. Such an interpretation highlights the evaluation of the 'international' qualification present in the term 'relevant international standards' enshrined under Article 2.4 of the TBT Agreement.

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<sup>311</sup> Rudiger Wolfrum, Peter Tobias Stoll and Anja Seibert Fohr (eds), *WTO Technical Barriers and SPS Measures* (Brill 2007) 191.

<sup>312</sup> Technical Barriers to Trade Agreement (entered into force 1 January 1995) 1868 UNTS 120 Annexure 1.2.

<sup>313</sup> *ibid* Annexure 1.4.

<sup>314</sup> Agreement on the Application of Sanitary and Phytosanitary Measures 1995, art 3(4).

<sup>315</sup> WTO, *United States- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (14 December 2018) WT/DS381/49/Rev 1.

<sup>316</sup> World Trade Organization, 'The WTO Agreement Series Technical Barriers to Trade' <[https://wto.org/english/res\\_e/publications\\_e/tbttotrade\\_e.pdf](https://wto.org/english/res_e/publications_e/tbttotrade_e.pdf)> accessed 12 February 2021.

## b) SHOWCASING THE 'RELEVANCE' QUALIFICATION

Through this part, the jurisprudence surrounding the qualification of 'relevance' is sought to be highlighted in order to ascertain if this can aid in the interpretation of Article 2.4 of the TBT Agreement.

In the *EC-Sardines* case, the Appellate Body borrowed the definition of 'relevance' from the Webster's New World Dictionary, where 'relevance' is defined as "*bearing upon or relating to the matter in hand and thus, pertinent*".<sup>317</sup> On the other hand, in the cases of *US – COOL*<sup>318</sup> read with *Australia – Tobacco Plain Packaging* case,<sup>319</sup> it was decided that the qualification of 'relevance' was a dynamic concept and could not be pre-decided. It must be assessed based on the specific facts and circumstances of the case.<sup>320</sup> Moreover, the 'relevance' of the standards for other international instruments and agreements transcended across the claims made by the parties.<sup>321</sup> Essentially meaning that, if one standard was not relevant for a particular claim, it could still be relevant for other claims.<sup>322</sup> The absence of 'relevance' of a particular standard does not *ipso facto* render the standard irrelevant. Thus, the relevance of a standard has to be adjudicated upon by examining the 'specific purpose and the specific claim' for which it has been raised.<sup>323</sup>

While accentuating the meaning of 'relevance', the above jurisprudence fails to offer a steady and uniform benchmark or yardstick which can aid in defining the scope of Article 2.4. Since relevance has to be judged on a case-to-case basis, it becomes extremely arduous to employ this interpretation as a precedent in ascertaining the ISBs which will be under the purview of the TBT Agreement.

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<sup>317</sup> Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012) para 229.

<sup>318</sup> WTO, *United States- Certain Country of Origin Labelling Requirements* (7 December 2015) WT/DS384/39.

<sup>319</sup> WTO, *Australia – Certain Measures concerning Trademarks, Geographical Indications, and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* (9 June 2020) WT/DS435/28.

<sup>320</sup> *ibid* para 7.405.

<sup>321</sup> *ibid*.

<sup>322</sup> *ibid*.

<sup>323</sup> *ibid* para 7.420.

**c) THE ADDITIONAL ACCOMPANYING 'DEDUCTION/INFERENCE' METHOD**

Several academicians<sup>324</sup> pose an argument that the TBT Agreement does not expressly list ISBs whose standards would be construed as the 'relevant international standards' under Article 2.4 of the TBT Agreement is unfounded as a deeper and closer look at Annexure 1 of the TBT Agreement mentions two standardising bodies, namely the International Organization for Standardisation ('ISO') and the International Electrotechnical Commission ('IEC')<sup>325</sup> However, these bodies have merely been provided as illustrations in the 'Explanatory Note' of the provisions and definitions present in Annexure 1. These bodies have also been mentioned in Annexure 1 since the TBT Agreement relies substantially on their Guide, i.e. the ISO/IEC Guide in order to provide definitions to several terms.<sup>326</sup> Hence, an inference can be drawn that the standards created by these bodies is within the scope of Article 2.4 of the TBT Agreement.

However, it has been contended that the presence of these two bodies does not exclude the involvement of other ISBs, and thus, it is not an exhaustive list.<sup>327</sup> Article 3.4 of the SPS Agreement substantiates this contention as it states that international standards are the recommendations, standards, and, guidelines provided by ISBs such as the World Organization for Animal Health and for Plant Health, Codex Alimentarius Commission, and the international institutions under the International Plant Protection Convention.<sup>328</sup> Here, Article 3.4 limits the scope of the terms as only the standards created by these bodies are validated.

Unlike this explicit mention under the SPS Agreement, the TBT Agreement states that the two bodies i.e., the ISO and the IEC in a haphazard manner does not expressly highlight that under Article 2.4, the international standards would solely be the ones created by these ISBs. Through a closer look, such an inference can be made and, is a way of including potential ISBs under the scope of Article 2.4.

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<sup>324</sup> Steven Bernstein and Erin Hannah, 'Non-State Global Standard Setting at WTO: Legitimacy and the Need for a Regulatory Space' (2008) 11(3) *Journal of International Economic Law* 575.

<sup>325</sup> Technical Barriers to Trade Agreement (entered into force 1 January 1995) 1868 UNTS 120 Annexure 1.2 explanatory note.

<sup>326</sup> *ibid.*

<sup>327</sup> Humberto Zuniga Schroder, 'Definition of the Concept 'International Standard' in the TBT Agreement' (2009) 43(6) *Journal of World Trade* 1223, 1225.

<sup>328</sup> Agreement on the Application of Sanitary and Phytosanitary Measures 1995, art 3(4).

## B. ORGANISATIONS SATISFYING THE ABOVE CRITERION

As highlighted in the above discussion, the term ‘relevance’ is not a requirement that is set in stone. Hence, the organisations satisfying the ‘openness’ criterion have to be primarily evaluated to set some level of uniformity and consistency in the standardisation framework. This is because not every standard can be adjudicated upon by the WTO Panel and Appellate Body each time ‘relevance’ has to be determined. An empirical analysis showcases the presence of several international organisations that develop standards and whose membership is open to all the members of the WTO.<sup>329</sup> The organisations and the corresponding TBT Documents have been mentioned herein for easy understanding and identification.

<b>Proposed GATT Code of Conduct for preventing TBT (1972)</b>	<b>List created under Article 10.4 and 13.3. of the TRS Agreement (1980)</b>	<b>Information provided involved in the creation of standards (1999)</b>	<b>2<sup>nd</sup> TBT Triennial Review (2000)</b>
FAO, OIML, IPU, IGU, ISO, IEC	WMO, IMO, ILO, OIV, IOOC, ICAO, IIR, BIPM, IAEA	WHO, IEC, ITU, ISO, OECD, OIE, OIML, CODEX, UN/ECE	IEC, OIE, OIML, OECD, ITU, FAO, WHO, ISO

The acronyms of the above organisations have been mentioned for an easier understanding and is an attempt to keep the table precise. As stated, the standards created by the institutions can be considered to be ‘relevant international standards’ under the TBT Agreement. Hence, with the above analysis, the author has attempted to put some ‘reigns and leashes over this unruly horse’ and, through a nuanced reading of the provisions of the TBT Agreement, has provided the above-mentioned contours to specify the scope of the undefined term present under Article 2.4 of the TBT Agreement.

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<sup>329</sup> Humberto Zuniga Schroder, ‘Definition of the Concept ‘International Standard’ in the TBT Agreement’ (2009) 43(6) Journal of World Trade 1225.

## VIEWING THE DECISIONS TAKEN BY THESE STANDARDISING BODIES THROUGH A CRITICAL LENS

As showcased above, standards created by the ISBs are within the scope of the TBT Agreement and will, thus, be checked on the touchstone of WTO obligations. Essentially, indicating that the standards would be a determinative factor in assessing compliance with the TBT Agreement. Hence, there exists a need to examine the stages of the decision-making process leading to the creation and evolution of standards through a critical lens. The following part will *firstly*, analyse the several stages taken by the ISBs, *secondly*, highlight the major issues faced by member States during such procedures and meetings, and *lastly*, it will provide several suggestions to augment the existing framework.

### A. UNDERSTANDING THE STAGES OF DECISION MAKING FOR THE CREATION OF 'STANDARDS'

The analysis carried out in the above parts has clearly allowed us to deduce that the WTO is not a standard-setting regulatory body with the ability to issue and decide on the promulgation of technical standards.<sup>330</sup> Instead, the WTO has outsourced its regulatory power to international organisations that are adept in creating technologically efficient and compatible standards.<sup>331</sup> It is imperative to analyse the process behind the creation of these standards as these yardsticks will only be compatible and efficient in their truest sense if all the interests of the members are considered and the rules of the organisation are respected.<sup>332</sup>

There are around six stages after which a standard is approved. This includes a discussion and debate over every aspect and feature of the standard by all the members involved.<sup>333</sup> *Firstly*, there is a 'proposal stage' which highlights the need for a particular standard in the international community and requires confirmation to move to the subsequent stage.<sup>334</sup> *Secondly*, there is

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<sup>330</sup> Christian Calliess, George Nolte and Peter Tobias Stoll (eds), *Coalitions of the Willing: Avantgarde Or Threat?* (Carl Heymanns Verlag 2007).

<sup>331</sup> *ibid.*

<sup>332</sup> Henk J De Vries, *Standardization: A Business Approach to the Role of National Standardization Organizations* (Springer Science and Business Media 1999) 34 – 37.

<sup>333</sup> 'Stages and Resources for Standards Developments' (*International Standardization Organization*)

<<https://iso.org/stages-and-resources-for-standards-development.html>> accessed 12 February 2021;

'International Electrotechnical Commission' (*IEC*) <<https://iec.ch/homepage>> accessed 12 February 2021; 'The Codex System: The Codex Alimentarius Commission and How it Works'

(*FAO*) <<http://fao.org/3/a0850e/a0850e01.pdf>> accessed 12 February 2021.

<sup>334</sup> *ibid.*

the ‘preparatory stage’ which involves the creation of a working group to facilitate the initiation of a working draft of the standards.<sup>335</sup> *Thirdly*, we have the ‘committee stage’ which comprises several technical committees to comment on the working draft created in the earlier stage. A final draft is then created and circulated for voting and comments in the *fourth* stage of ‘enquiry’.<sup>336</sup> Subsequently, in the *fifth* stage, the standard is approved after circulation to all members of the ISBs and *finally*, is published by the respective Secretariat of that international organisation.<sup>337</sup>

At first glance, these stages do not present any issues with the process of decision-making and approval of an international standard. Hence, there exists a need to look beneath the surface to evaluate the procedures closely and critically.

## **B. SHOWCASING THE MAJOR IMBROGLIOS IN THE PROCESS OF DECISION MAKING**

The following problems are faced on an everyday basis in the above stages of creating an international standard in these standardisation bodies.

### **a) LACK OF PARTICIPATION FROM SEVERAL INTERESTED STAKEHOLDERS**

The creation and development of a standard as evidence from a part is a detailed process and does not merely involve member States discussing amongst themselves. These procedures encompass a host of representatives, bodies, interest groups, governmental organisations, non-governmental institutions, environmentalists, manufacturers, representatives, producers and consumers.<sup>338</sup> All these groups are imperative to facilitate smooth discussion and deliberation over the imposition of a standard and hence, co-ordination between these bodies is necessary.<sup>339</sup> However, due to the substantial investment of time, interest and money, several

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<sup>335</sup> *ibid.*

<sup>336</sup> *ibid.*

<sup>337</sup> *ibid.*

<sup>338</sup> Humberto Zuniga Schroder, ‘Definition of the Concept ‘International Standard’ in the TBT Agreement’ (2009) 43(6) *Journal of World Trade* 1223, 1233.

<sup>339</sup> Anne Wilcock and Alejandra Colina, ‘Consumer Representation on Consensus Standards Committee: A Value-Added Practice’ (2007) 3(1) *International Journal of Standards and Services* 1.

of these stakeholders fail to participate in the decision-making process leading to the creation of a standard that obviously does not represent their true needs, wants and concerns.<sup>340</sup>

In the long run, such standards are not supported by the people affected by them and end up being side-lined. This ends up frustrating and making the process redundant since these standards are present in theory but not in practice.

#### **b) DISADVANTAGEOUS POSITION FOR 'DEVELOPING COUNTRIES'**

Apart from the reduction of active participation in the process, it is evident that the ISBs and the decisions rendered by them are skewed in favour of the developed countries and the developing countries are at a disadvantageous position<sup>341</sup> Empirical studies have also highlighted that developing countries do not hold prominent positions in the ISBs.<sup>342</sup> Moreover, the committees headed by developed countries have often been shown to have prejudice towards developing countries and do not facilitate coordination between the states irrespective of the 'level of development'.<sup>343</sup> This has disincentivised developing countries to meaningfully participate in the creation of standards and contribute to the decision-making process. This leads to non-participation along with the issues highlighted above. Moreover, it is apparent that a corollary and logical consequence to this non-participation is that most of the standards are tilted towards developed countries. Hence, this 'vicious circle' still continues.

#### **c) 'POLITICISATION' OF THE DECISION-MAKING PROCESS**

Another issue majorly faced during such processes is that of external political pressure exerted on the representatives, and hence, during none of the stages the process is completely isolated from political pressure.<sup>344</sup> The pressure is not only exerted by developed countries or the countries most affected by the recognition of certain standards but also by dominant producer groups and bodies.<sup>345</sup> Hence, the current regime is riddled with biases and prejudice. Thus, it

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<sup>340</sup> Bruce J Farquhar, 'Governance in the International Standardization Organization (ISO) and the International Electrotechnical Commission' [2005] Consumers International 342.

<sup>341</sup> Filippo Fontanelli, 'ISO and CODEX Standards and International Trade Law: What gets said is not what's heard' (2011) 60(4) The International and Comparative Law Quarterly 895.

<sup>342</sup> Humberto Zuniga Schroder, 'Definition of the Concept 'International Standard' in the TBT Agreement' (2009) 43(6) Journal of World Trade 1223, 1233-1236.

<sup>343</sup> *ibid.*

<sup>344</sup> Alan O Sykes, *Product Standards for Internationally Integrated Goods Markets* (Brookings Institution 1995).

<sup>345</sup> *ibid.*

was contended that there exists a need to create an independent adjudicatory and regulatory body free from the pressure and influences exerted by such interest groups who aim to make the process undemocratic and generally skewed in their favour, hampering the international spirit.<sup>346</sup>

**d) LENGTHY PROCESS OF THE CREATION OF STANDARD**

A study has found that the average time to discuss, debate, create, and approve a standard through all of these different stages takes a minimum time of five years or even more.<sup>347</sup> Such findings highlight the extremely lengthy process adopted by these standardising bodies. An obvious consequence of this is that the objective of creating a standard is completely frustrated. It was shown earlier that the major need and advantage of having standards is capitalisation and monopolisation of recent technological advances.<sup>348</sup> Here, the lengthy process frustrates this aim as, by the time the standard is approved, the technology does not remain novel and loses its value, rendering the standard old and obsolete. The subsequent technology that comes uptakes another five years of time to be finalised, creating a void in the system.

This process even leads to the creation of low-quality standards due to the non-approval of subsequent standards which is a result of the lengthy processes involved in reaching a consensus. The standards created earlier are not replaced and hence, are valid and can still be found in several guides and documents issued by the ISBs. These standards may not be appropriate for the contemporary market and economic conditions and instead of acting as a catalyst to innovation, they may impede trade and delay the growth of products and services by several years.<sup>349</sup>

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<sup>346</sup> Archana Negi, Jorge Antonio Perez Pinda and Johannes Blankenbach (eds), *Sustainability Standards and Global Governance* (Springer Singapore 2020).

<sup>347</sup> Humberto Zuniga Schroder, 'Definition of the Concept 'International Standard' in the TBT Agreement' (2009) 43(6) *Journal of World Trade* 1223, 1238.

<sup>348</sup> Robert Vinaja and Mahesh S Raisinghani, *A Review of the Standards Making Process in the Telecommunications Industry: Challenges and Potential Solutions* (IEEE 2001).

<sup>349</sup> *ibid.*



**e) PROCEDURAL IMPEDIMENTS DURING THE PROCESS**

The decision-making process consists of several procedural restrictions which highlight the problems faced by the members of the ISBs. *Firstly*, the issue of translation from one language to the other at every stage of the process makes it difficult for several representatives to follow the discussion and meaningfully participate in it.<sup>350</sup> Also, a lot of understanding of the standard gets diluted or lost in translation from one language to the other. Here, it is imperative to note that the language constraints are not only for the member States but also the technical experts, consumer representatives, producer interest bodies, non-governmental groups and other local organisations.<sup>351</sup> Moreover, the cultural background and differences contribute to making the process time-consuming and acts as a major procedural restriction.<sup>352</sup>

*Secondly*, the views of the technical experts involved during the process have not always been independent of their national identity, making them partial and biased.<sup>353</sup> These experts are supposed to render impartial assistance to the ISBs in order to ensure that the technical underpinnings and consequences of their decisions are understood.<sup>354</sup> These experts provide the members with a window, which helps them view the practical implications of their theoretical decisions. Such bias warrant re-evaluation of appointments, capacities and functions of these technical experts involved in several committees of the process.

All these issues cumulatively hamper the efficient functioning and working of the standardisation bodies in creating and developing 'relevant international standards' and thus, in the long run, undermined the obligations espoused by the TBT Agreement. In response to these issues, I suggest some recommendations which would allow the ISBs to accentuate the existing regime.

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<sup>350</sup> United Nations, *International Products Standards: Trends and Issues* (1991) 50.

<sup>351</sup> *ibid.*

<sup>352</sup> Humberto Zuniga Schroder, 'Definition of the Concept 'International Standard' in the TBT Agreement' (2009) 43(6) *Journal of World Trade* 1223, 1238.

<sup>353</sup> Kristin Tamm Hallström, *Organizing International Standardization: ISO and IASC in the Quest of Authority* (Edward Elgar 2004) 158.

<sup>354</sup> *ibid.*

### C. SUGGESTIONS FOR ENSURING EFFECTIVE STANDARDISING BODIES

In response to the issues highlighted above, the author attempts to propose the following recommendations in order to augment the skewed jurisprudence so that the international legal landscape can be accentuated in the long run. Moreover, these suggestions aim to provide true meaning to WTO obligations under the TBT Agreement.

In order to ensure that all stakeholders meaningfully participate in the decision-making process of creating standards, the ISBs have to ensure that some incentive is provided to the representatives and delegates to contribute effectively. Certain organisations could make it mandatory for representative groups to be present during the decision-making process as well as give them positions of power in order to provide them with an impetus to be involved during the creation of such standards. Committees and bodies can, thus, be specially created to look after the consumer's wants and needs vis-à-vis a standard. For instance, the Committee on Consumer Policy was specifically established by the ISO to look after the interests of consumers and provide them with a forum to express their thoughts and experiences so that the standards, which are ultimately created for consumer satisfaction, can gain prominence in the long run. Essentially, in the end, every attempt made must ensure that these groups feel included in the process. Close co-operation and co-ordination between different stakeholders would allow the process of creation of standards to be a holistic process, one which ensures that every voice is heard and every opinion is considered.

In order to increase the participation of developing countries, the first step would be to ensure that the developing countries are given positions of power such as chairpersons and secretariats of ISBs not because being in such positions would allow them to dominate and influence the process, but because it would ensure that they are incentivised in participating in such meetings, leading to the end of the 'vicious circle'. This would assure them that their concerns will be attended and their 'special needs' will be looked after by the ISBs. Moreover, a special investigative process needs to be undertaken to inspect the concerns of the developing countries in order to make the standards truly international in nature. In furtherance of this cause, a special policy committee and a task force was created by the ISO to figure out the needs of the developing countries and create a future policy plan which can be implemented. Such procedural safeguards would provide all the countries with the same platform and forum, to deliberate and decide a standard.

Moreover, in order to solve the problems generally present in most decision-making processes on the international forums i.e., lengthy procedures and opaqueness, it is suggested that a provision for a time limit is established so that the process is completed within a fixed and reasonable period of time, and this will avoid rendering the entire process redundant or making the technology obsolete. Moreover, the standards must be revised and examined once every two years in order to keep up with the pace of growth and economic development. Additionally, it is highly recommended that the principles of – impartiality, transparency, representativeness, coherency, openness, effectiveness, relevance and contemporariness are steadily incorporated into the process. The case of *US Tuna II* espoused these guiding principles as well. However, it is imperative that these principles are applicable in the practical arena as well and are followed in both letter and spirit. All of these suggestions must be favourably looked over and incorporated accordingly, as these processes will develop relevant international standards whose compliance will adjudicate the breach of the WTO obligations through the TBT Agreement.

## **CONCLUSION**

In the course of this paper, the author has attempted to define and provide some clarity on the term ‘relevant international standards’ under Article 2.4 of the TBT Agreement. The contours of defining such a term were showcased by conjointly reading Annexure 1.2 and Annexure 1.4 of the TBT Agreement and coming to the ascertainment that the standards created by the standardising bodies whose membership is open for all WTO members will come under the purview of Article 2.4 of the TBT Agreement. The limitations of the ‘consensus’ requirement were also highlighted in order to arrive at such a determination. Moreover, through the course of the paper, the author has critically evaluated the decision-making process of the standardising bodies since the standards created by such procedures are the anvil on which compliance under the TBT Agreement is adjudicated. In the end, the paper concludes by providing novel suggestions in order to ensure representativeness in the processes. The adoption of standards created by such inclusive steps and measures would make them ‘relevant international standards’ in the true sense.