Private Norms as International Standards? – Regime Collisions in Tuna-Dolphin II

Carola Glinski*

I. Introduction

The requirements of free trade and economic globalisation and the respective international legal framework, namely in the context of the WTO, have led to a decrease of the regulatory power of the nation states which cannot be replaced by comparable public international law making – neither in content nor with respect to legitimacy considerations. At the same time, there is an increasing need for uniform standards in order to make economies and products compatible. Therefore, the various forms of private (transnational) standard setting, including private regulation of public goods1 such as health and safety concerns, working conditions and the environment, gain importance. This includes institutionalised standardisation – for example, in the framework of the ISO2 – but also purely private rules or regulatory programmes negotiated between different stakeholder groups like eco- or fair trade labels, or the unilaterally adopted ‘self’-regulation of transnational corporations related to social and environmental aspects of their activities (‘corporate social responsibility’).3

Using the example of Tuna-Dolphin II4, this article explores the legitimate potential of private norms for governing public goods and to adjust the relation between world trade on the one hand and social welfare and environmental protection on the other, in concrete: the recognition of private standards in the framework of WTO law, namely as “international standards” in the terms of the Agreement on Technical Barriers on Trade (TBT Agreement). In this case, the contested US provisions in Tuna-Dolphin II are heavily based on a widely used transnational private label. As private transnational standards and certification programmes have become more wide-spread and national regulations increasingly refer to these programmes or to their contents, the need for recognition of these purely private standards in the framework of WTO law is becoming ever more pressing.

In its report, the Appellate Body emphasised the correct interpretation of (the concept of) “international standards”, thereby highlighting the importance of their procedural legitimacy. This article draws on the arguments of the Appellate Body, although the relevance of the private label was not discussed in the dispute settlement proceedings.

The approach taken in this article is to regard normative references of public international law – here, WTO law – as “collision norms” which can be used for a differentiated selection between competing public or private standards that claim legal relevance in a certain situation. Hereby, the most legitimate public or private regime for governing the problem at issue should be chosen.

The argument goes as follows: After a short overview of the facts of the case (II.), the applicability of the TBT Agreement to (voluntary) labelling requirements (III.), and the interpretation of “international standards” (IV.) with special view to private regulation (V.), I develop my argument with some preliminary remarks on the approach taken related to the legitimacy of law with particular view to legitimacy deficiencies of WTO law (VI.) and to the legitimacy of private regulation (VII.). These consid-

---

* Dr. Carola Glinski is senior researcher at the Collaborative Research Center ‘Transformations of the State’ at the University of Bremen.

1 The qualification as “private norms” refers to the private authors of the norm as opposite to state law. “Public goods” are usually defined as goods that are non-rival and non-excludable like a clean environment or social security. Within the traditional nation state, public goods are usually provided for by the state. In a transnational system, however, an exclusive state responsibility for public goods is less obvious.

2 International Organization for Standardization.


4 United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WTO Doc. WT/DS381.
II. Background

Basically, Tuna-Dolphin II concerns two competing labelling requirements on "dolphin-safe" tuna products.\(^5\) The contested US provisions,\(^6\) which are heavily based on a widely used transnational private label – originally developed by the US NGO “Earth Island Institute” (“EII”) in cooperation with three big tuna producers\(^7\) – comprise stronger fishing restrictions than the “Agreement on the International Dolphin Conservation Programme” (“AIDCP”)\(^8\) by the “Inter-American Tropical Tuna Commission” (“IATTC”) with its own “dolphin-safe” label.\(^9\) The crucial point is that the US provisions – in line with the EII labelling requirements – only allow the use of a “dolphin-safe” label for tuna caught in the Eastern Tropical Pacific Ocean (“ETP”) if dolphins are not intentionally chased, encircled or netted during an entire tuna fishing trip and if this is confirmed by an independent observer. The “AIDCP” label prohibits the killing and seriously injuring of dolphins as well. Its major difference from the “EII label” lies in the permission of the intentional chasing, encircling and netting of dolphins, provided that they are not killed or seriously injured.\(^10\) Consequently, the “AIDCP” label must not be used in the US market. Therefore, Mexico claimed a violation of a number of provisions of the GATT and the TBT Agreement, including Article 2.4 TBT which requires domestic technical regulation to be based on “international standards”.

III. Applicability of the TBT Agreement

The TBT Agreement aims at ensuring that technical regulations, including packaging, marking and labelling requirements, do not create unnecessary obstacles to international trade (Article 2.2 TBT). The applicability of WTO law to voluntary private labels and to the certification of production methods, however, has long been disputed amongst scholars as well as WTO members. Arguments range from absolute inadmissibility of all sorts of “non-product-related process and production methods” regulations as unequal treatment and, therefore, discrimination against “like products” in terms of Article III.4 GATT, to complete non-applicability of WTO law to voluntary private labels as a means

\(^{5}\) In the late 1980s, the fishing practice of chasing, encircling and netting of dolphins with purse seine nets in the Eastern Tropical Pacific Ocean in order to get the beneath swimming tuna – which by then had killed an estimated 7 million dolphins – was made public by the US NGO “Earth Island Institute”. This led to consumer boycotts, a privately organised “dolphin-safe” labelling and monitoring scheme and legal interventions mainly in the US. The respective US provisions concerning import restrictions on tuna had already been subject to the famous “Tuna-Dolphin I” rulings, see United States – Restrictions on Imports of Tuna, Panel Report, 16 August 1991, I.L.M. 33 (1991), at pp. 1594 et seq.; United States – Restrictions on Imports of Tuna, Panel Report, 20 May 1994, I.L.M. 33 (1994), at pp. 839 et seq., which were however never adopted. In these decisions only the US labelling provisions (at issue now) had not been condemned. In 1992, the Parties of the Inter-American Tropical Tuna Commission agreed on a binding progressive reduction of dolphin mortalities in the tuna purse seine nets fishery in the ETP by setting annual limits, see La Jolla Agreement, February 1992, available on the Internet at [http://www.iattc.org/PDFFiles2/IATTC-Resolution-on-IJ-Agreement-Apr-1992.pdf]> (last accessed on 12 July 2012); Panama Declaration, October 1995, available on the Internet at [http://www.iattc.org/PDFFiles2/Declaration_of_Panama.pdf] (last accessed on 12 July 2012); in 2001 this was followed by the “Agreement on the International Dolphin Conservation Programme” with its own “dolphin-safe” label.

\(^{6}\) United States Code, Title 16, Section 1385 (“Dolphin Protection Consumer Information Act”); Code of Federal Regulations, Title 50, Section 216.91 (“Dolphin safe labelling standards”) and Section 216.92 (“Dolphin safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels”); Earth Island Institute v. Hogarth, 494 F.3d 757 (9th Cir. 2007). See also United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Panel Report, WTO Doc. WT/DS381/R, 15 September 2011, at pp. 2 et sqq.

\(^{7}\) For the EII label see http://www.earthisland.org/dolphinSafeTuna/consumer.


\(^{9}\) AIDCP Resolution to Establish Procedures for AIDCP Dolphin Safe Tuna Certification of 20 June 2001; AIDCP Resolution to Adopt the Modified System for Tracking and Verification of Tuna of 20 June 2001.

\(^{10}\) Article 1 AIDCP “Resolution to Adopt the Modified System for Tracking and Verification of Tuna”: “The terms used in this document are as defined in the AIDCP System for Tracking and Verification of Tuna (...)”.

This content downloaded from 40.67.221.209 on Thu, 18 Mar 2021 10:44:43 UTC
All use subject to https://about.jstor.org/terms
of market-based self-regulation – at least if there are no concrete compliance incentives under state law – and, therefore, the very unlawfulness of such labels.

In particular, the applicability of the TBT Agreement to labels concerning "non-product-related process and production methods" has been dismissed by the majority of scholars with a view to the wording of Annex 1 TBT. In point 1, sentence 1 and point 2, sentence 1 of that Annex, "technical regulations" and "standards" are respectively defined in reference to "product characteristics or their related processes and production methods", whereas "related" has been interpreted as traceable within the characteristics of the concrete product. Under this opinion, this should also apply to labelling requirements despite the wording of sentence 2 of point 2 of the Annex, which does not contain the word "related". Here, the Panel of Tuna Dolphin II – without further discussion – regarded the US labelling provisions as product-related as they apply to a product and therefore held them to be an issue of the TBT Agreement. This finding remained uncontested. Therefore, the Appellate Body was not concerned with the applicability of the TBT Agreement. The fact that these process and production methods aim at the protection of extra-territorial environmental goods was not discussed at all.

Another important issue was whether the labelling requirements have to be regarded as mandatory or as voluntary and, therefore, as "technical requirements" according to point 1 of Annex 1 to the TBT or as "standards" according to point 2 of that Annex. Hitherto, the great majority of authors had categorised this type of regulation, which lays down (mandatory) requirements for a voluntary label, as voluntary, whereas the Panel classified them as mandatory and therefore as technical regulations.

Although the Appellate Body admits that the fact of (a mandatory) "requirement" (for a voluntary label) does not in itself render a measure a technical regulation, it upheld the findings of the Panel with a view to the particular circumstances of the case, and especially to the fact that legislation by state authorities

---


15 See Panel Report, WTO Doc. WT/DS381/R, at 7.71 et seq.


17 With one dissenting opinion, see Panel Report, WTO Doc. WT/DS381/R, at 7.146 et seq.


that contains specific enforcement mechanisms lays down exclusive requirements for the broad subject of dolphin safety.21

Consequently, the requirements of Article 2 TBT would also apply to (comprehensive or exclusive) requirements for voluntary eco-labels or fair trade labels that are concerned with production methods. Therefore, it is even more important to analyse the preconditions for private (transnational) labels to potentially constitute an “international standard” within the scope of Article 2 TBT.22

IV. “International Standard”

The notion of “international standard” is concretised in the TBT Agreement. According to Annex 1, point 2 TBT, a “standard” is a “(d)ocument approved by a recognised body that provides, for common and repeated use, rules, guidelines and characteristics for products and related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with (...) labelling requirements as they apply to a product, process or production method”. The explanatory note to Annex 1, point 2 makes it clear that a standard does not necessarily have to be based on consensus. A standard constitutes an “international standard”, when it is adopted by an international “(b)ody or system whose membership is open to the relevant bodies of at least all Members”, Annex 1, point 4.23 A “standardizing body” is defined as a “body that has recognised activities in standardization”24 Therefore, an “international standard” has to be approved by an “international standardizing body”, that is, a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members.”25

Annex 3 of the TBT26 – which demands standards not to be unnecessarily trade restrictive and to be based upon relevant international standards – explains that its requirements are open for acceptance for all standardising bodies, be they governmental or non-governmental, local, national, regional or international. A non-governmental body is defined as one “which has legal power to enforce a technical regulation”, Annex 1 point 8.27

The TBT’s Decision on Principles for the Development of International Standards (“Committee Decision”)28 adds the procedure-oriented principles of transparency, openness, impartiality and consensus, effectiveness, relevance and coherence, and of addressing the concerns of developing countries for the development of international standards. These principles clearly aim at achieving a broad and representative consensus, where “all interested parties”29 really have the chance of giving relevant input.30

21 Report of the Appellate Body, WTO Doc. WT/DS381/AB/R, at paras 188 et sqq. Hereby, the Appellate Body highlights the ruling in European Communities – Trade Description of Sardines that a regulation must apply to an identifiable product or group of products, it must lay down characteristics of the product, and “compliance with the product characteristics must be mandatory” (EC – Sardines, at para. 176). According to the Appellate Body the situation in both cases is similar: Whereas in EC – Sardines other species of sardines could be marketed on the EC market, provided they are not called “sardines”, here, tuna products could be marketed, provided they are not called “dolphin-safe” (!), see Report of the Appellate Body, WTO Doc. WT/DS381/AB/R, at paras 183 et sqq., 198. On this see also the amicus curie submission by Robert Howse, available on the Internet at <http://www.worldtradelaw.net/amicus/howsetunaamicus.pdf> (last accessed on 12 July 2012), at p.4 et sqq., who highlights the point that it depends on the relevant “identifiable product” if a regulation could be regarded as mandatory. In EC – Sardines, the relevant product was “sardines” whereas here the relevant product was defined as “tuna” or “tuna products”, not as “dolphin-safe tuna” (!).

22 Another issue in this regard was the question whether de facto practice of private market actors, for example, their de facto adherence to voluntary labelling requirements, renders these voluntary requirements of de facto mandatory. See WT/DS381/R, at 7.166 ff. For detailed analysis, see Arcuri, “Back to the Future”, supra note 19, at ill.

23 Harm Schepel, “The Empire’s Drains: Sources of Legal Recognition of Private Standardisation under the TBT Agreement”, in: Christian Joerges and Ernst-Ulrich Petersmann (eds), Constitutionalism, Multilevel Trade Governance and International Economic Law (Oxford: Hart Publishing, 2011), pp.397 et sqq., at p.405, however, has observed that the requirement of an international standard to be set up by an international body as such is not explicitly laid down in the TBT Agreement, which, therefore, would enable bodies or systems that are not open to national bodies to set up international standards.


25 Report of the Appellate Body, WTO Doc. WT/DS381/AB/R, at paras 349 et sqq., in particular at para. 359. Herby the Appellate Body also clarifies that a “body” (“legal or administrative entity that has specific tasks or composition”) (ISO/IEC Guide 2: 1991, 4.1) is sufficient to enact an international standard; it is not necessary to have an “organization” (“body that is based on the membership of other bodies or individuals and has an established constitution and its own administration”) (ISO/IEC Guide 2: 1991, 4.2)), ibid., at paras 351 et sqq.

26 Annex 3: Code of Good Practice for the Preparation, Adoption and Application of Standards.


29 Section A of the Committee Decision, supra note 28.

30 See also Josef Falke, Internationale Normen zum Abbau von Handelshemmnissen (St. Augustin: KAN, 2002), at pp. 85 et sqq.
This triggers the question of which kind of norm-setting arrangement is required in order to produce legally valid international standards. Is it enough to have a system that is open to the relevant bodies of all WTO members, which would include respective international agreements? Is it necessary to have mixed systems that are open to all relevant national bodies but which also adhere to the inclusion of all interested parties and to procedural fairness requirements, which would aim at (well-organised) institutionalised standardisation? Or would it also be possible to have purely private regulatory systems that are open to all interested parties from all WTO members and adhere to the relevant fairness requirements? What are the requirements for a "recognized" body?

The Committee Decision has gained importance as the Appellate Body has regarded it as a "subsequent agreement" within the meaning of Article 31 (3)(a) of the Vienna Convention regarding the interpretation of the TBT Agreement. Therefore, its principles have been ascribed particular relevance concerning the questions of "openness" and of "recognized" activities in standardisation.

According to the Appellate Body, the concept of "recognition" implies a factual (acknowledgement of the existence) and a normative (acknowledgement of the validity and legality) element: For the factual element, in order to be acknowledged to exist, information about the standardising activities of a body has to be disseminated according to the transparency requirements of the Committee Decision, whereas the normative element implies adherence with the (other) principles of the Committee Decision. Therefore, in order to be regarded as recognised, an "international standard" now has to pass the respective procedural legitimacy test. A wide de facto participation (of WTO members or standardising bodies) in the standardisation activities could be regarded as certain evidence of "recognition", although there is no prerequisite that the standard is widely used. Also, the development of a single standard could be enough to be regarded as recognised. Moreover, an international standardising body must be "open," "on a non-discriminatory basis," "at every stage of standards development." Indeed, the Appellate Body rejected the finding of the Panel that the AIDCP labelling standard was the relevant "international standard". According to the Appellate Body, the necessity of either having a fishing fleet in the agreement area or being otherwise invited to join the agreement would not fulfil these requirements. The requirement of having a fishing fleet would privilege fishing interests in relation to consumer or environmental protection interests. This would infringe with the principle of "impartiality and consensus" which does not allow for the privilege of any particular interest. The requirement of an invitation to join would only be sufficient if the issuance of an invitation was a pure formality.

As mentioned above, the question as to whether or not the private EUI labelling standard could constitute a relevant international standard or be otherwise relevant was not even mentioned in the reports of

---

31 See e.g. Harm Schepel, "The Empire's Drains", supra note 23, at pp.397 et sqq., 402 et sqq., who calls this "private intergovernamental" and argues in favour of the ISO as the relevant standardisation organisation.
32 See, for example, WT/DS381/R, at 7.685, 7.687.
39 Committee Decision, supra note 28, at 6.
40 "The AIDCP membership was open for signature from 21 May, 1998 until 14 May, 1999 to States whose vessels fished for tuna in the Agreement Area. Given that there were no limitations to or prohibitions of fishing in the agreement area, provided that the vessels did not operate in the EEZ of one of the coastline countries of the agreement area, any country whose fishing fleet was operating in the ETP could have signed the AIDCP. Thus the AIDCP was indeed open to signature on a non-discriminatory basis to the relevant bodies of at least all WTO Members in accordance with the principle of openness as described in the TBT decision. In addition, the AIDCP remains open to accession to any States or regional economic integration organization that is invited to accede to the Agreement on the basis of the parties' decision. To this day, the AIDCP membership is therefore open on a non-discriminatory basis to the relevant bodies of at least all WTO Members in accordance with the principle of openness as described in the TBT Committee Decision." (at 7.691).
42 Committee Decision, supra note 28, at 8: "All relevant bodies of WTO Members should be provided with meaningful opportunities to contribute to the elaboration of an international standard so that the standard development process will not give privilege to, or favour the interests of, a particular supplier/s, country/ies or region/s."
the panel and the Appellate Body. These are the issues that I want to discuss in the following. I suggest determining the relevant standard on a case by case basis, thereby trying to find the most legitimate regime in order to compensate for potential legitimacy deficiencies for the relevant issue.

V. Purely private regulation as international standards?

Clearly, an international standardisation body can be a private organisation such as the ISO. Such an organisation can be composed not only of governmental or administrative personnel but also of private representatives. It should, however, be open on a non-discriminatory basis to the “relevant bodies of at least all WTO members” (Section B of the Committee Decision). Would that rule out purely private regulation that is only set or negotiated by (transnational) private systems but not organised via national delegations, for example agreements between industry and environmental or consumer organisations?

The requirement of participation of national delegations had long been disputed between the US and the EU. The EU insisted upon delegations, arguing that the composition of the standardisation organisation was essential and that only non-discriminatory access for all national bodies guaranteed the necessary international consensus, given that it is the national bodies which have to implement the international standards or take them as a basis for their national norms. The US, in contrast, argued that it was not composition and membership that counts, but a fair and open procedure, especially with regard to the inclusion of technical expertise, regardless its origin. According to this latter approach, standardisation has to consider safety and regulatory aspects, technical expertise and (global) market forces. With a view to regulatory philosophy, this has been qualified as a conflict between a European “(... integrated, formalistic and policy-driven” approach and an American “pluralistic, sometimes fragmented, (...) market-driven” approach.

The Committee Decision has not solved the conflict as now delegations and a fair including procedure are mentioned. The question concerning the best or most legitimate representation of the interests concerned remains. First, aspects of membership or participation and procedure cannot be regarded separately but rely on each other. Second, the conflict cannot reasonably be reduced to “policy-driven” delegations vs. “market-driven” private actors, as there can be a sub-optimal representation of interests in “policy-driven” systems as well, whereas a private market-based negotiation system can surely be a forum of political debate and representation of competing interest. Third, even a unilateral business or user-made standard can constitute a legitimate minimum standard as will be shown below.

Indeed it may be doubted that only a negotiation system that is primarily or exclusively composed of state delegations meets the requirements of an “ideal” standard setting body according to the principles mentioned above. This kind of organisation of international standardisation leads to a situation where the representatives of business and of other interests – such as safety or the environment – do not meet directly at the international level but only indirectly through members of national delegations. It has been criticised that those interests that have already been superseded at the level of the national standardisation bodies are no longer reflected at the international level. The ISO, for example, has often been said to be dominated by industrial inter-


46 Schepel, The Constitution of Private Governance, supra note 45, at pp. 190 et sqq. with further references. Of course this conflict does not only concern regulatory philosophies but also economic interests in the dissemination of technologies. As a consequence of the membership based composition the EU has an important influence on the work of the ISO, whereas the US American standards are adopted by private (professional) organisations and are widely recognised, see Schepel, ibid., at pp. 191 et sqq.

47 Section B of the Committee Decision, supra note 28.

48 See infra, at VII.

There is well possible that a private standard that has been directly negotiated at the global level between the relevant interest groups—a for example, industry, environmental protection and consumer groups—meets the above-mentioned principles of fair procedure and therefore offers greater legitimacy, in particular if it includes industry and civil society from both developed and developing countries. In such a case, the necessary consensus can be achieved more directly through participation of the different stakeholders at the relevant negotiation stage and the reflection of the different protection interests, local particularities, political and social realities and not least economic conditions in the standard is better ensured, as is said to happen in the case of the label of the ‘Forest Stewardship Council’ or with regard to ‘fair trade’ labels.

The recognition of purely private standards in the framework of the TBT Agreement would seem to be a logical consequence of their ever-increasing importance de facto as well as de jure. Private transnational certification programmes are becoming ever more sophisticated and they are increasingly referred to by national law. In fact, not only have standardisation organisations such as ISO developed elaborate procedural requirements but also private transnational certification programmes have begun to systematically adjust their structures and procedures to the above mentioned requirements of the Annex to the TBT Agreement in order to become recognised as ‘international standards’. The ‘Forest Stewardship Council’, for example, has registered with the World Standards Services Network (WSSN). Moreover, other private standards apart from the requirements for dolphin-safe tuna, such as the standards of the ‘Forest Stewardship Council’ or the ‘Marine Stewardship Council’ have been incorporated into (several) national regulation systems in various ways. Therefore, the relevance of private transnational negotia-

---


51 See also Schepel, The Constitution of Private Governance, supra note 45, at pp. 28, 35.


55 http://www.wssn.net/WSSN. See Meidinger, “Multi-Interest Self-Governance”, supra note 52, at pp. 279 et sqq.

56 In Bolivian law and Brazilian administrative practice, e.g., enterprises which have been certified by the ‘Forest Stewardship Council’ are assumed to manage their forests in a sustainable way in accordance with the legal requirements. For Brazil, see Cristiane Derani and José Augusto Fontoura Costa, “State and Private Sector in a Cooperative Regulation: The Forest Stewardship Council and other Product Labels in Brazil”; in: Olaf Dilling, Martin Herberg and Gerd Winter (eds), Responsible Business: Self-Governance and the Law in Transnational Economic Transactions (Oxford: Hart Publishing, 2007), pp. 293 et sqq., at p. 301; for Bolivia, see Errol Meidinger, “Forest Certification as Environmental Law Making by Global Civil Society”, in: Errol Meidinger, Chris Elliott and Gerhard Oesten (eds), Social and Political Dimensions of Forest Certification (Remagen: Kessel, 2003), pp. 293, at p. 315. Acre, a Brazilian federal state, even requires the certification of the ‘Forest Stewardship Council’ as a precondition for foresting; see Errol Meidinger, “Environmental Certification Programs and U.S. Environmental Law: Closer Than You May Think”, 31 The Environmental Law Reporter (2001), pp. 10162 et sqq., at p. 10166. For more details see Meidinger, “Multi-Interest Self-Governance”, supra note 52, at pp. 275 et sqq.
tion systems which are open to stakeholders from all WTO members has already been discussed. Pauwelyn argues that non-traditional sources of global regulation such as private standards could at least play a role as benchmarks when deciding whether a concern is legitimate, whether a national standard is appropriate and whether a country has acted in a non-discriminatory manner.

Counter-arguments, such as private programmes being too independent from national regulation to be able to constitute a valid justification or limitation to state laws, would lose weight with their growing recognition by state laws.

Also, the argument that acceptance of private transnational standards would lead to a multiplicity of standards (in contradiction to the goal of harmonisation of technical requirements) is not convincing with a view to certification programmes and labels because these do not aim at pure technical harmonisation as a precondition for the compatibility of products but at a competition of different values and protection aims and their persuasiveness. Besides, this problem is not specific to private standards, but could as well arise with regard to different public standards.

Of course, the often mentioned problem of the legitimacy of privately set standards and the representation of interests of citizens, consumers and, in particular, of developing countries must be taken into consideration. Therefore, their legitimacy for the legal effect in question requires scrutiny in each individual case. In this respect, the Appellate Body’s emphasis on the procedural legitimacy requirements as enshrined in the Committee Decision can be regarded as a considerable step beyond the narrow formal test according to the wording of the TBT Agreement as to whether a standard derives from an “international body or system,” which had been hitherto applied by WTO panels and the Appellate Body and which had already attracted some criticism.

VI. Legitimacy Considerations

The approach towards the legitimacy of law taken here is based on the idea of consensus or consent of those who are affected by the relevant norm and of (their/common) welfare. The consensual basis of law perspective has to be constructed as being based on (national) consensus: here, the legitimacy chain from the people (with the possibility of equal input through elections) over parliament to the executive replaces direct consensus and safeguards the dedication of the output to common welfare.

It is, however, common ground that such exclusively state-based constructions are no longer satisfactorily effective in highly differentiated and globalised societies with a plurality of public, private and semi-private regimes in place. Serious doubts have been raised as to whether the long legitimacy chains in public international law might be too long to legitimise WTO law, at least when it comes to the impact of WTO law on social protection or environmental protection at the national level. The arguments put forward are that the WTO is dominated by the executive, that bureaucratic-governmental elites enjoy (relative) autonomy, that negotiations are secretive, that there is no open public discourse (which consti-


58 Pauwelyn, “Non-Traditional Patterns of Global Regulation”, supra note 14, at pp. 217 et sqq.


60 Another obstacle is seen in the requirement for a non-governmental body of having “legal power to enforce a technical regulation”, according to Annex 1 Point 8. See Pauwelyn, “Non-Traditional Patterns of Global Regulation”, supra note 14, at pp. 210, 221 et seq., according to whom the competence to enforce a private standard (instead of a mandatory technical regulation) might not be considered to be sufficient.

61 See e.g. Meidinger, “Multi-Interest Self-Governance”, supra note 52, at p. 279.

62 See e.g. Charnovitz, “International Standards and the WTO”, supra note 53, at p. 13, who also highlights the value of a diversity of standards and of some regulatory competition.

63 See e.g. Pauwelyn, “Non-Traditional Patterns of Global Regulation”, supra note 14, at p. 212.

64 E.g. Pauwelyn, “Non-Traditional Patterns of Global Regulation”, supra note 14, at pp. 219 et seq. See infra, at VI.


66 See e.g. Gregor Bachmann, Privatrecht als Organisationsrecht – Grundlagen einer Theorie privater Rechtssetzung, Jahrbuch junger Zivilrechtswissenschaftler (JbZiRWiss) 2002, pp. 9 et seq., at p. 13; id., Private Ordnung (Mohr Siebeck, Tübingen, 2006), at 163 et seq., 179 et seq., with further references.
tutes an essential element for democratic legitimacy), and that there is only weak parliamentary control by ex-post ratification on a sink or swim basis, so that, in fact, no possibility exists to adjust or change WTO law as negotiated by the executive. Besides, the WTO has a very independent judicial review mechanism, the decisions of which cannot be politically embedded or corrected. In fact, as can be seen from reports by the Panel and the Appellate Body, precedents do have considerable impact on the further interpretation of WTO law.

In order to compensate for the resulting legitimacy deficiencies, academic authors have suggested interpreting WTO law in a restrictive manner so as to concretise the principle of non-discrimination in such a way as not to aim at market integration or deregulation (or even at regulatory competition). The law of the nation states should be given as much regard as possible, taking into consideration that the nation state is the forum that reflects those interests which would otherwise have no standing, such as social security or environmental protection. The reality of dispute settlement, however, has been different. Another approach is to interpret or concretise WTO law in such a way as to give the WTO democratic backing by giving consideration to other regimes or standards, be they public or private, that are not driven by national consensus. One mechanism to achieve this would be to concretise open-textured terms such as the term “international standards”.

An important aspect of consensus relates to the level at which a decision is made. This is addressed by the principle of subsidiarity, which builds upon more basic principles such as individual freedom, self-determination, participation and democracy. The higher the level of decision (making), the less influence individuals have. Also, people are mistaken about the real relevance of subjectively distant decision levels. In a political multi-level-system, subsidiarity demands the allocation of decision competences at the lowest, most immediate level, which is able to handle the issue in question effectively and which includes all interests concerned. In its original meaning, this principle applied in an all-embracing way as to include the relationship between societal self-regulation and state law.

With regard to decision-making, consensus should be ensured by procedures that meet the general requirements of transparency, openness, plural participation of the interests concerned, reversibility and accountability. Deficiencies relating to an ex ante consensus can be compensated by ex post acceptance and recognition.

In the following, I take a particular look at the legitimate potential of private regulation in WTO law.
VII. Private Regulation

The aim of this article is not to define private regulation as “law” or as “non-law” but to show the requirements for a private rule to be legitimately applied by state law. These requirements depend on the extent to which a private rule gains legal effects by its application through state law. In principle, two levels of legal effects can be distinguished beyond a binding effect merely on those who have agreed on the rules: a broader binding effect also on “outsiders” of the same group or industry (as the signatories), and a standard setting effect which also concerns third parties or the public interest.

1. “Minimum Standard”

Where the application of the private rule – for example, through general clauses of state law, such as “common usage”, “commercial practice”, or “generally accepted standard” – may lead to the establishment of minimum requirements for a certain group of actors, for example, companies in the same industry, including “outsiders” who have not adhered to the private rule, the legitimacy towards these “outsiders” has to be safeguarded. Therefore, the consensus position must reflect the “group interest” in such a way that it is theoretically acceptable to all members of the group. This requires that the rule be adopted by a representative variety of the group members in order to not unfairly exclude certain parties. A rule that was decided by big companies to the disadvantage of small- and medium-sized enterprises would not fulfill this requirement. Also, companies from industrialised countries should not be able to establish rules that are equally valid for companies from the developing world. Furthermore, long-established companies should not be able to establish rules to the disadvantage of newcomers.

2. “Maximum standard”

The application of a private rule would establish a “maximum” requirement when the legal effect would be a “safe harbour” for those (companies) who comply with the private rules. In this case the private rules would in effect amount to the exclusive definition of (business) obligations. In a weaker form, a private rule might constitute a standard the exceeding of which would trigger justification duties. Here, the generalisation of the private rule clearly might concern third parties or the public interest. These interests have to be reflected in the consensus to the extent they may be affected, in particular through fair, transparent, open and pluralistic decision-making procedures based on

---

75 Here, only the self-commitment or the consent of the authors of the private rule or standard is required. Examples of legal effects would be the protection of trust in private (business) regulation in contract law or advertising law through openly worded provisions. See Carola Glinski and Peter Rott, “Umweltfreundliches und ethisches Konsumverhalten im harmonisierten Kaufrecht”, Europäische Zeitschrift für Wirtschaftsrecht 2003, pp.649 et sqq.; Carola Glinski, „Produktionsaussagen und Vertrauensschutz im Kauf- und Verwaltungsrecht“, in: Gerd Winter (ed.), Die Umweltverantwortung multinationaler Unternehmen (Baden-Baden: Nomos, 2005), pp. 187 et sqq. Moreover, commitments by business could gain legal relevance in relation to states, according to the respective public law or to public international law. For the legal status of transnational enterprises in public international law, see e.g. Georg Dahm, Jost Delbrück and Rüdiger Wolfrum, Völkerrecht, vol. 02, 2nd ed. (Berlin: de Gruyter, 2002), at pp. 246, 250; Carolin F. Hillemanns, Transnationalen Unternehmen und Menschenechte (Zürich: D 2004), at 31; Tietje, „Die Staatslehre und die Veränderung ihres Gegenstandes“, supra note 74, at p. 1091. For more details see Carola Glinski, Die rechtliche Bedeutung der privaten Regulierung globaler Produktionsstandards (Baden-Baden: Nomos, 2010), at pp. 112 et sqq.

76 For detailed analysis of the following see Glinski, Die rechtliche Bedeutung der privaten Regulierung globaler Produktionsstandards, supra note 75, at pp. 95 et sqq. with further references; id., „Recht und globale Risikosteuerung – ein Dreistufen-Modell“, in: Jörg Scharrer et al. (eds), Risiko im Recht – Recht im Risiko (Baden-Baden: Nomos, 2010), at pp. 241 et sqq., at pp. 249 et sqq.

77 This concept has first been developed for the internal regulation of private associations, where no direct approval of each internal rule by every member can be organised, e.g. in professional associations. Here, consensus is regarded as the basis for legitimacy, but is complemented by the concept of “group welfare” or “group interest”. See Bachmann, „Privatrecht als Organisationsrecht“, supra note 66, at pp. 19 et sqq. For similar considerations concerning an erga omnes effect of public international law acts, see Jost Delbrück, „Prospects for a “World (internal) Law”?: Legal Developments in a Changing International System“, 9 Indiana Journal of Global Legal Studies (2002), pp. 401 et sqq., at pp. 417 et sqq.

78 For acceptability as a criterion of legitimacy, see Jürgen Habermas, Faktizität und Geltung, 4th ed. (Frankfurt: Suhrkamp, 1994), at p. 151; see also Dieter Hartmann, “Praxis – Fachliteratur – Definitionen, Funktionen, rechtliche Bewertungen“, Medizinrecht 1998, at pp. 8 et sqq., at p. 10.

79 Bachmann, Private Ordnung, supra note 66, at pp. 206 et sqq.

80 On this see German Constitutional Court, 14/7/1987, Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 76, at pp. 171 et sqq., at p. 185 – Professional rules for lawyers, with general concerns related to sufficient representation; similarly Constitutional Court, 9/5/1972, BVerfGE 33, at pp. 125 et sqq., at p. 158 et sqq. – Medical specialist; discussed in Bachmann, Private Ordnung, supra note 66, at pp. 60 et sqq. See also the German Federal Supreme Court (Bundesgerichtshof, BGH), 7/2/2006, Wettbewerb in Recht und Praxis 2006, pp. 1113 et sqq., at p. 1116 – Trial subscription. Comprehensive analysis by Carola Glinski, Die rechtliche Bedeutung der privaten Regulierung globaler Produktionsstandards, supra note 75, at pp. 279 et sqq.

81 The classical case is the concretisation of public law requirements for the protection of health and safety and the environment by private or semi-private norms.
expert knowledge in order to ensure that their interest and the public interest is served.82

At the international or transnational level participation mainly involves so-called “stakeholders”. Therefore, the relevant question is whether these stakeholders, especially so-called NGOs (Non-Governmental Organisations), really represent the relevant interests in an accountable manner as they are not elected representatives.83 Whether an NGO in fact represents the asserted interests depends of course on the individual case.84 For example, there is no better representation of environmental protection as such than by environmental organisations. Moreover, NGOs live from their reputation, which puts them under public scrutiny or under the control of the relevant particular interests. In principle, it is acknowledged that NGOs are of particular importance in the representation of interests, values and preferences which are not represented or organised otherwise, e.g. of minorities, of vulnerable persons, of those who are not represented by governments and of public interests which somehow got lost in the political process.85

VIII. Application

1. “Minimum” or “Justifying Standard” (Article 2.5 TBT)

One legal consequence of an “International Standard” in the TBT Agreement is that national measures in accordance with relevant international standards are “(rebuttable) presumed not to create an unnecessary obstacle to international trade” (Article 2.5 TBT). Therefore, first of all, the legal impact of an “international standard” in the TBT Agreement is that of constituting a kind of a justifying “minimum standard”. At the least, those national measures that are in conformity with the relevant standard are (rebuttable) justified as not being unnecessarily protective and thus in conformity with the TBT Agreement.86

Such justification of a protective regulation can only interfere with contradicting economic interests. Thus, each (private or public) trans- or international regulation that does reflect the relevant economic interests according to the above mentioned principles related to “group regulation” could be regarded as a legitimate justifying minimum standard in the sense of Article 2.5 TBT.

a. The “AIDCP dolphin-safe label”

The agreement on the AIDCP monitoring and labeling scheme was open for signature by States with a coastline bordering the Agreement Area and by States (or regional economic integration organizations) which were members of the IATTC or whose vessels fish for tuna in the ETP.87 It was ratified, amongst others, by Mexico and US, and also by Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru, the Vanuatu and Venezuela. Bolivia, Colombia and the European Union are applying the agreement provisionally. It is therefore based basically on a consensus between those countries whose vessels fish for tuna in the relevant area. Surely their consensus sufficiently reflects the economic interests concerned,88 including those of developing countries, so that it can legitimately be regarded as an international “minimum standard” that justifies equal or equivalent national legal labelling requirements according to Article 2.5 TBT, if such existed. Openness for parties other than those who fish for tuna in the agreement area (in the sense of a “(b) ody or system whose membership is open to the rel-

82 See the references supra note 73.


84 Steffek, “Legitimacy and Activities of Civil Society Organizations”, supra note 83, at pp. 8 et sqq., has developed the criteria of participation, inclusion, transparency and accountability for the relation NGOs – represented interests, and independence from other interests. His respective results are rather disillusioning with respect to the NGOs examined.


86 Charnovitz, “International Standards and the WTO”, supra note 53, at p. 17, calls this legal effect “presumption” of conformity. See also Scott, “International Trade and Environmental Governance”, supra note 72, at pp. 325 et sqq.; Pauwelyn, “Non-Traditional Patterns of Global Regulation”, supra note 14, at pp. 213 et sqq., goes even further and discusses whether the TBT agreement in effect amounts to “real” minimum standards which may not be undercut.

87 Article XXVI AIDCP: “This Agreement shall remain open to accession by any State or regional economic integration organization that meets the requirements in Article XXIV, or is otherwise invited to accede to the Agreement on the basis of a decision by the Parties.”; Art. XXIV AIDCP: “This Agreement is open for signature at Washington from May 21, 1998, until May 14, 1999 by States with a coastline bordering the Agreement Area and by States or regional economic integration organizations which are members of the IATTC or whose vessels fish for tuna in the Agreement Area while the Agreement is open for signature.”

The interests of tuna producers from developing countries fishing in this area are of particular interest regarding this consent.

The private Ell monitoring and labelling scheme was developed by a US NGO in cooperation with more than 50 countries, with more than 90% of the world's tuna companies from more than 50 countries voluntarily participating, including such from developing countries in general but also from developing countries fishing in the ETP, such as Costa Rica, Ecuador, Colombia, Peru or Venezuela. Therefore, the Ell labelling scheme is now based on broad and representative transnational acceptance and adherence within the relevant industry. Thus, there is no ex ante legitimacy through a procedurally correct drafting process but potential ex post legitimacy qua broad and representative recognition within the relevant line of industry.

Whereas a correct drafting procedure guarantees – at least to a certain extent – that all interests concerned are able to give relevant input in a situation still open, ex post recognition bears the risk of in fact not being based on the free will of all who adhere to the rules but instead on the power of facts already created by some potent actors. This problem, however, is less striking when it comes to norms concerning political values where greater plurality and reversibility is possible and even necessary than for pure technical harmonisation.

In principle, legitimacy qua ex post recognition is a question of whether those who have adhered to the rules in fact had an alternative. In case of economic pressure, the answer is, "it depends": Market forces as such, especially consumer expectations which demand adherence with a private rule, are no obstacle to the legitimising effect of acceptance, as the respective reciprocity of expectations is an integral part of the market (logic) itself.

Here, the US-American market has certainly exerted considerable pressure in favour of the application of the higher certification requirements along the lines of the Ell label, not only as a consequence of (American) consumer expectations and the respective retailer conduct but also to a certain extent because of the US legal framework. This, however, was not the case on other markets such as the EU market. Besides, alternative labels exist (and have existed). Yet, the Ell label seems to have been accepted worldwide amongst producers and a variety of markets. Provided that there are no important details to the contrary, the Ell label could be regarded as a legitimate transnational business rule qua recognition.

The Ell label could therefore also constitute a legitimate international "minimum standard" which justifies according national requirements. As laid down above, it can be assumed that a broad and representative variety of corporations will safeguard their own economic group interest sufficiently and that stronger protection by (WTO) law is not required. The disregard of some few corporations ("black sheep") in the consensus – here, mainly the Mexican fleet – can be justified by the fact that the law itself calls for objective standards that do not take account of each individual opinion.

As a first consequence, the US labelling requirements which conform to the private Ell requirements
could be considered as being in accordance with WTO law, according to Article 2.5 TBT.96

No decision needs to be made as to which of the two standards in question is more legitimate for the purpose of Article 2.5 TBT. Each international standard that is in accordance with the mentioned legitimacy requirements is qualified to justify respective national measures. It is well possible that an international agreement constitutes a legitimate minimum standard, which is exceeded by practice that in itself constitutes a higher legitimate minimum standard.

Further, even if a private labelling requirement was not based on 90% adherence within a given industry, but only on a broad and representative consensus of those companies aiming at a certain market segment, for example, the fair trade market or the market for eco-products, it could constitute a justifying standard for a national regulation concerning that particular market segment.97

2. “Maximum” or “Limiting Standard” (Article 2.4 TBT)

Vice versa, of course, further legitimacy requirements are needed to the extent that an “international standard” legally constitutes a kind of “limiting standard”, or even a “maximum standard” establishing justification duties or leading to a restriction of stricter national requirements. An example would be Article 3.3 SPS Agreement that requires scientific justification for national measures not based upon the relevant international standard.98 In such a case, the “international standard” has an impact on the national legal potential to formulate its own protection interests or policy goals. Here, clearly the different protection interests and the public interest are concerned. For the concretisation of a limiting function of an international standard, public or private regulation must reflect the protection interests affected in the best possible way in order to be legitimate.

Pursuant to this approach, the greater the limiting impact on national protection strategies is, the higher are the legitimacy requirements, especially with regard to the relevant protection interests. If the relevant (international) standard does not meet these legitimacy requirements, the national regulatory competence cannot be legitimately limited. This is exactly the often mentioned problem with the SPS Agreement, which ascribes the Codex Alimentarius a limiting function, although it does not meet these requirements but had been originally only designed as a minimum standard.99

As far as the TBT Agreement is concerned, the exact extent to which an “international standard” narrows down national regulation margins is not entirely clear. Article 2.4 TBT requires members to use international standards “as a basis for their technical regulations except when such international standards (...) would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued (...)”.100 As a basis for is not the same as “conform to” but gives a certain margin of appreciation.101 It has also always been highlighted that WTO members are free to define their own protection interests and level of protection as long as a legitimate objective is pursued, such as the protection of human health or safety, animal or plant life or health, or the environment (see Article 2.2 TBT).102

For the definition of legitimate levels of protection (above the relevant international standard), however, existing risks must be made plausible, for example
through scientific data (see Article 2.2 TBT), although the wording is less authoritative than in the SPS Agreement. In fact, in the case at issue, the US was required to submit scientific evidence that dolphins were adversely affected by being chased, encircled and netted with purse seine nets although they were released afterwards, without any dolphin killed or seriously injured, which is in line with the AIDCP labelling standard.\(^{103}\) Also, it has been argued, that there is an interrelation between what is regarded to be necessary according to Article 2.2 TBT and what is regarded to be the relevant international standard according to Article 2.4 TBT.\(^{104}\) In fact, in the report at issue the panel on the one hand accepted that the AIDCP labelling standard was inappropriate to fulfill the legitimate US dolphin protection objectives. Therefore, the US was not required to base their regulation on that standard.\(^{105}\) On the other hand, the US regulation was declared not to be necessary as it only partially achieves its aims, namely the protection of dolphins, as it was not sufficiently ensured that no dolphins were (accidentally) killed or seriously injured outside the ETP. Therefore, the panel argued, it would be equally suitable but less trade restrictive to allow for the AIDCP logo in addition to the official label which is in line with the EII label.\(^{106}\) In effect, the AIDCP label has been used as a benchmark for proportionality.\(^{107}\)

In conclusion, the selection of the appropriate international standard does matter as a benchmark for putting national regulation under justification duties.

a. The “AIDCP dolphin-safe label”

In the case at hand, the WTO Panel regarded the AIDCP standard as the relevant “international standard” and, in effect, used it as a benchmark for putting the US regulation under justification duties, whereas the Appellate Body rejected this approach.

A possible membership in the AIDCP was based on the requirements of either having a coastline bordering the ETP or having vessels fishing for tuna in the ETP or being otherwise invited to join the agreement. First of all, according to the requirements of the TBT Agreement and the Committee Decision, “an international standard” should be drawn up by a body which “should be open on a non-discriminatory basis to relevant bodies of at least all WTO members.”\(^{108}\) The argument of the Panel, “that there were no limitations to or prohibitions of fishing in the agreement area, (...) (and) any country whose fishing fleet was operating in the ETP could have signed the AIDCP” amounts in effect to the requirement of having or having to set up a fishing fleet in the ETP in order to participate in the agreement, which of course is a factual obstacle to non-neighbouring countries.

As far as one could argue that the Panel’s argument is based upon the idea that (at least) all parties concerned could have participated, this would require only (economic) fishing interests in the ETP to be concerned. In fact, as laid out above, as far as an international standard is not only used to justify protection aims but, vice versa, to put national protection aims under justification duties, it is precisely these protection interests that are concerned. Here, the labelling requirements aim at the protection of dolphins and the protection of consumers from misleading statements and half-truths.

The AIDCP standard is mainly based upon an agreement of the nations fishing in the ETP. Without further safeguards this arrangement by no means guarantees the representation of consumer and environmental interests, especially of those situated outside the fishing nations. Therefore, the Appellate Body – in line with the US argument\(^{109}\) – regarded this requirement as an undue preference of fishing interests over consumer or environmental conservation interests.\(^{110}\) This is also reflected by the fact that environmental NGOs call the label a “death certificate” for dolphins\(^{111}\) and that consumer organisations have classified it as not reliable and misleading.\(^{112}\)

\(^{103}\) See Panel Report, WTO Doc. WT/DS381/R, at 7.491 et sqq.

\(^{104}\) See e.g. Erich Vranes, *Trade and the Environment*, supra note 13, at p.308. See also Scott, “International Trade and Environmental Governance”, supra note 72, at pp.328 et sqq.


\(^{107}\) For detailed critique of the argument of the panel, see Arcuri, “Back to the Future”, supra note 19, at V.

\(^{108}\) Annex 1, Art.4 TBT; Section B, Committee Decision.

\(^{109}\) The US argued that “other Members who may have an interest other than fishing (such as consumer or conservation interests) were ineligible to become parties to the AIDCP”, see Report of the Appellate Body, WTO Doc. WT/DS381/AB/R, at para. 34.

\(^{110}\) See supra, at IV.


\(^{112}\) See e.g. http://www.label-online.de/label-datenbank?label=72> (last accessed on 12 July 2012). See also http://www.br.de/fernsehen/sendungen/controvers/thunfisch-delf-in-tierschutz100.html> (last accessed on 12 July 2012).
They argue that by being chased, encircled and netted dolphins are subjected to enormous stress, which leads to health problems and mortality and prevents the recovery of their population even if they are not immediately killed during the fishing. Also, nursing mothers and their calves are separated, which leads to the deaths of the calves. In fact, schools of dolphins are chased with speed boats and helicopters and caught up to three times per day. Accordingly, it has not gained considerable market acceptance.

The legitimacy of the AIDCP-label to limit protection aims is further questioned by the fact that there is another – more protective – label, which not only the majority of the tuna producers adhere to, but which is supported to a higher degree by consumer and environmental organisations.

b. The “Ell dolphin-safe label”

In contrast, the Ell standard was set up by an NGO dedicated to the protection of marine mammals (in co-operation with three tuna producers) not only to protect dolphins in a far reaching way but also to restore consumer confidence in tuna products. It is a voluntary programme that is open to all interested parties, namely producers’ participation and consumers’ choice. By now, it is said to be one of the biggest (private) transnational monitoring and labelling schemes, set up in a great variety of over 50 countries including all relevant markets such as the US, Canada, Europe and Australia. It is supported by different environmental NGOs from different countries, such as Greenpeace (US) and Friends of the Earth (UK), and promoted by consumer organisations from different countries as reliable and not misleading.

Thus, it may be concluded, that the Ell standard seems to reflect not only fishing interests but also dolphin and consumer protection interests, at least to an extent that has been regarded as sufficient by the relevant stakeholders. The consideration of these interests – however limited to the US – is already reflected in the drawing procedure. By now, it has gained ex post transnational recognition by consumers and the relevant stakeholders. The Ell standard could therefore be used far more legitimately as a benchmark for justification duties for stronger national regulation that the AIDCP standard, recalling that labelling requirements constitute a framework for market self-regulation of the parties involved.

In contrast, an international standard cannot constitute a sort of a maximum standard – which is in line with the TBT Agreement anyway – as there could always be good reasons for even higher national protection interests, which are neither emphasised in a private transnational nor in a public international standard.

IX. Conclusion

The example of Tuna-Dolphin II highlights several aspects of the definition of “international standards”. In particular, the Appellate Body’s emphasis on the procedural legitimacy requirements of the Committee Decision has opened the door for a more thorough examination of the legitimacy of regimes or standards in place that claim legal relevance as “international standards”.

The example also nicely demonstrates that a private standard could be superior in terms of participative legitimacy and acceptance than a standard that has been produced by an international organisation if the private standard better reflects the balancing of economic and protection interests. Therefore, a transnational private standard should well be suitable as constituting an international standard in the terms of Article 2.5 TBT justifying measures in accordance with that standard. This justifying function could even be accomplished by a representative business standard. Vice versa, a public international standard should not be used as a limiting benchmark for na-
tional regulation if it does not meet the relevant pro-
cedural legitimacy requirements or if there is a more
legitimate private standard available. In order to gain
more democratic legitimacy the WTO should open
itself to private standards including those that are
not negotiated by national delegates but directly by
the respective stakeholders, which of course presup-
poses that the private standard meets the necessary
legitimacy requirements, depending on the legal ef-
fect in question.