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Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space

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Abstract

The proliferation of transnational social and environmental standards developed by non-state governance systems potentially poses a challenge to international trade law and the legitimacy of the World Trade Organization (WTO). These systems—in areas including forestry, apparel, tourism, labour practices, agriculture, fisheries, and food—operate largely independently of states as well as of traditional standard setting bodies such as the International Organization for Standardization. In lieu of definitive legal rules on recognition of legitimate international standards under relevant trade agreements [e.g., Technical Barriers to Trade (TBT), Government Procurement Agreement (GPA), and Sanitary and Phytosanitary Measures (SPS)], we identify the legal and political dynamics of standards recognition and find good prospects for these new non-state governance systems to successfully navigate them. Since these systems' standards ultimately aim to socially embed global markets, the WTO's legitimacy is at risk if its rules open the door to legal challenges of states that implicitly or explicitly adopt them. To avoid such legitimacy problems, we propose that a norm of leaving 'transnational regulatory space' for social and environmental standard setting should guide the WTO and its members.

...Under the SPS, the only justifications for not using the international standards developed by these three organizations are scientific arguments resulting from a proper assessment of potential health risks and appropriate levels of protection. If “relevant scientific evidence is insufficient,” members have the option under SPS Article 5.7 to invoke limited and provisional safeguards. In particular, WTO members may

...provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary

measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.²²

²² Questions were raised by the EC over whether Article 5.7 permits WTO members to invoke a broader precautionary principle because of the scientific uncertainty surrounding environmental and health risks. The EC argued that “scientific uncertainty” and “insufficient scientific evidence” were interchangeable thereby rendering the requirement for a science-based assessment of the risks inappropriate. In September 2006, the WTO Panel in the EC Biotech Products (WTO 2006) case determined that the EC was ineligible to invoke the limited and provisional safeguards contained in Article 5.7 because they failed to satisfy all four cumulative requirements: (1) relevant scientific information must be insufficient; (2) the measure must be adopted on the basis of available pertinent information; (3) the country must obtain additional information necessary for a more objective assessment of risk; and (4) the measure must be reviewed within a reasonable period of time. Moreover, the Panel ruled that scientific uncertainty does not negate the requirement to conduct a risk assessment. For a deeper discussion of this case and its broader implications for invoking a “precautionary principle” see Kogan 2007. (pp. 21-22)

References

Kogan, Lawrence. 2007. World Trade Organization Biotech Decision Clarifies Central Role of Science in Evaluating Health and Environmental Risks for Regulation Purposes. *Global Trade and Customs Journal* 2(3): 149-155.

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