

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

By

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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 WTO. These systems – in areas including forestry, apparel, tourism, labor practices, agriculture, fisheries, and food safety – 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., the TBT, GPA and 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.

The proliferation of non-state mechanisms designed to create authoritative social and environmental standards in the global marketplace potentially takes the international trade regime into uncharted territory. Such mechanisms can now be found in sectors including forestry (e.g., Forest Stewardship Council), apparel (e.g., Fair Labour Association), tourism (e.g., Sustainable Tourism Stewardship Council), agriculture and food (e.g., Fair Trade Labelling Organization), and fisheries (e.g., Marine Stewardship Council). They aim not only to create standards for products and services, but also to regulate processes of production, environmental and social impacts, and working conditions. These mechanisms are also notable for operating largely independently of states as well as of traditional standard setting bodies such as the International Organization for Standardization. If their standards – often in the form of transnational voluntary eco-labelling or certification systems – gain legitimacy and international recognition, they can affect international trade even if no state officially adopts them as a national standard or regulation.

While a number of studies address how international trade law treats eco-labelling and related corporate social responsibility (CSR) mechanisms and speculate on what might happen if they should be subject to a trade dispute (Chang 1997; Ward 1997; Joshi 2004), they give little or no attention to the deeper question of whether the specific subset of mechanisms that concern us here – those that aim to become authoritative forms of regulation – could ever produce legitimate international standards. This paper addresses two questions that arise in this regard. First, under what conditions will social and environmental standards developed by non-state governance systems be accepted as authoritative under international trade law? Whereas the short answer is that acceptance requires recognition as an international standard, how that happens remains a

grey area in World Trade Organization (WTO) agreements. Second, is the WTO's legitimacy at risk if its rules open the door to legal challenges of states that implicitly or explicitly adopt, or encourage firms to adopt, such a system's standard?

Our argument is that concerted efforts by transnational non-state governance systems to gain recognition as legitimate international standards are likely to succeed, which will pose a more serious challenge to the international trade regime than previous analyses have anticipated. In response, WTO members should ensure that the trade regime leaves "regulatory space" for social and environmental standard setting in the global marketplace rather than try to create additional rules on what standards to accept. This idea builds on the concept of "policy space," which has a normative foundation within the trade regime. However, this concept needs adaptation to global rather than national regulation.

We proceed in four steps. First, we identify the challenge these new forms of non-state regulation pose to the international trade regime and justify our focus on a subset of non-state governing mechanisms that Cashore (2002) has labelled Non-state Market Driven (NSMD) systems. Second, we outline the technical and legal requirements for recognition of international standards in relevant WTO Agreements and assess NSMD systems' standards against these rules. Third, we explore the politics of recognition of NSMD standards along two dimensions: competition among non-governmental standards and political dynamics in WTO committees mandated to address the issue. Our analysis in sections two and three is based on a reading of relevant international trade law and jurisprudence, the secondary literature on NSMD governance, and interviews conducted in Brussels, Geneva, and by phone with officials from the EU, WTO, South Centre, ISO and representatives from a number of NSMD systems in January and February 2006. We conclude with a discussion of the prospects for NSMD systems to

produce legitimate international standards and the most appropriate response if the WTO wishes to avoid further legitimacy challenges on its treatment of environmental and social issues.

The Challenge of NSMD Systems to WTO Legitimacy

The Nature of the Challenge

The problem posed by NSMD systems to the trade regime stems from the latter's uneasy adaptation to globalization. Indeed, the proliferation of transnational non-state standards and governance mechanisms is symptomatic of the fragmentation of regulatory authority in the global marketplace in which states are still the primary, but not the only node. The WTO's response to these globalizing pressures, to shift from an institution concerned with controlling barriers at borders to one focused on domestic legal and regulatory systems, has been the primary source of its legitimacy problems (Ostry 2006; Howse 2001). Environmental, food safety and health issues have been focal points for criticism as governments increasingly ask the WTO to adjudicate in areas where the original architects of the GATT system had purposely carved out space for domestic intervention and policy development (Ruggie 1982). A dilemma is thereby created. At the same time as new agreements on food safety, intellectual property, services, and technical barriers to trade open the door to trade challenges that touch on ostensibly non-trade areas with fragmented regulatory structures, governments show increasing reluctance to advance issues related to the environment or social standards on the agenda of WTO negotiations.

As long as non-state governance systems only affect niche markets for environmentally or socially responsible products and services and are truly voluntary for firms to join, this lack of attention, most analyses agree, means they can operate largely unaffected by international trade rules. However, three developments have complicated the picture. First, a subset of these

mechanisms – NSMD governance systems – is beginning to gain more legitimacy and widespread support and many are vying for recognition as international standardization bodies (Cashore 2002; Cashore et al. 2004; Bernstein and Cashore 2007). These systems have proliferated since the early 1990s in areas that range from sustainable forestry to coffee production, and tourism to mining. Second, some states and commentators are seeing environmental, social, labor and human rights standards as potentially disguised forms of discrimination against developing country products or services. Simultaneously, these same standards and norms tap into increasing social and environmental concerns of publics in both the North and South as well as in transnational civil and even “world” society (Meyer et al. 1997). Third, most NSMD systems have emerged where international agreements are either weak or absent, leaving them as one of the few viable alternatives to regulate or socially embed the global marketplace. Such social “embedding” – the idea that markets must be embedded in broader societal goals or purposes whether domestically or globally – is arguably necessary for the ongoing legitimacy of liberalizing international institutions such as the WTO (Ruggie 1982, 2003, 2007).

NSMD Systems

We focus on transnational NSMD systems because unlike other non-state or public-private mechanisms to promote environmentally and socially responsible behavior, they have ambitions to reorient marketplace norms of acceptable and appropriate behaviour (Levi and Linton 2003, 419) in entire sectors through the creation of adaptive and deliberative governing arrangements through which standards are developed. These governing arrangements usually include stakeholders as well as representation from the targeted firms, owners, service providers

or producers. NSMD systems' goals to transform markets, to establish authority independently of sovereign states, and to develop dynamic and adaptive governance mechanisms differentiate NSMD systems from most traditional eco-labelling initiatives. The latter, Nordic Swan being one well-known example, generally identify a static measure of environmental quality a firm must adopt to receive a label. NSMD systems also differ from corporate self-regulation and CSR initiatives, which frequently involve limited input from stakeholders and produce standards that are voluntary and discretionary. In contrast, NSMD systems use global supply chains to recognize, track and label products and services from environmentally and socially responsible businesses and have third-party auditing processes in place to ensure compliance.¹ To be clear, what defines NSMD governance is not NGO rather than business sponsorship – business-dominated initiatives may evolve into NSMD systems – but rather between systems that do or do not have NSMD characteristics of adaptive governance mechanisms, third-party auditing or similar enforcement mechanisms, and broader transformative goals of establishing non-state authority to socially embed the global marketplace.

The most relevant examples of NSMD systems are members of the International Social and Environmental Accreditation and Labelling (ISEAL) Alliance, an umbrella organization created to develop agreement on “best practices” for its members (ISEAL 2006). Its members include the Fairtrade Labelling Organizations (FLO), which aims to improve conditions for workers and poor or marginalized producers in developing countries through certifying commodities including coffee, cocoa and sugar; the Forest Stewardship Council (FSC), perhaps the first organization to fit the NSMD definition, which aims to combat global forest deterioration; the International Federation of Organic Agriculture Movements (IFOAM), which

¹ As this description suggests, the NSMD acronym is slightly misleading because supply chains, rather than markets, facilitate, rather than drive, the authority generated by these systems. Still we use it here for consistency with

certifies organic food; the Marine Aquarium Council (MAC), which targets the hobby aquarium trade to promote sustainable management of marine ecosystems and fisheries; the Marine Stewardship Council (MSC), which combats fisheries depletion; the Rainforest Alliance, which has developed certification systems for a wide variety of agricultural products from tropical countries to promote sustainable agriculture and biodiversity; and Social Accountability International (SAI), which aims to improve worker rights and community development through certification programs for a wide range of manufactured products.

ISEAL's members seek to differentiate their standards on the basis of quality and credibility from those developed by other standard setting bodies. ISEAL also assists and encourages its members to conform with or surpass any requirements under international law for recognition as legitimate standardization bodies. Its proactive program to buttress its members' legitimacy in order to avoid trade disputes, combined with indications that some members, most notably the FSC, are beginning to target governments to adopt their standards in their procurement policies, suggest NSMD systems have embarked in a serious effort to gain widespread support.

The move towards targeting procurement policies is especially notable given the ability of large states to affect markets through their buying power. In a sign that this strategy will find a receptive audience, the European Commission (2004) published a handbook advising EU member governments on how to develop and implement green procurement policies. EU officials have also been advising other countries, including Japan, in an effort to promote these policies.² In addition, the 2005 G8 summit statement included a reference to green

existing academic literature.

² Senior EU official, personal interview, February 2006.

procurement,³ and multilateral development banks in cooperation with UN organizations, the OECD, Canadian government, and non-governmental organizations have established an “Environmentally and Socially Responsible Procurement Working Group.”⁴ Relatedly, some governments are seeking certification for state owned or managed resources or services. For example, Meidinger (2006, 59) notes that several government agencies in Europe have already obtained certification of state owned or managed forests.

Under these conditions, the potential for conflict with the trade regime is likely to increase. Earlier literatures simply did not anticipate these systems gaining widespread support. As they do, the importance of gaining legitimacy as international standard setting bodies increases.

The Drive for Legitimacy of NSMD Standards

NSMD systems are vying for legitimacy on a range of fronts. For example, their future depends on firms they target, consumer groups, purchasers along the supply chain, local communities and social and environmental groups accepting them as appropriate and justified as authoritative arenas in which to develop policy. These broad efforts to gain political legitimacy, however, are not our focus here.⁵ Instead, we are specifically concerned with efforts to gain legitimacy in the context of international trade law. To capture this idea, we borrow a very broad understanding of legitimacy from organizational sociology, which views it as rooted in a collective audience’s shared belief, independent of particular observers, that “the actions of an

³ The language was carefully negotiated in order to get US agreement. Senior EU official, personal interview, February 2006. The US position was that green procurement had merit if it could significantly influence the market of targeted countries, such as Japan’s ability through its purchasing of forest products to affect the market for illegally logged forest products from Indonesia or Malaysia.

⁴ <http://www.sustainableprocurement.net>. Accessed August 27, 2007.

⁵ See Bernstein and Cashore 2007; Prakash 2000; Raines 2003; Rivera 2002; and Sasser 2002 who to varying degrees address this question.

entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions” (Suchman 1995, 574). To this, we add that these actions or policies must be justifiable to relevant audiences. To be legitimate, rules and institutions must be compatible or institutionally adaptable to existing institutionalized rules and norms already accepted by a society.

In applying this abstract definition to the case of NSMD standards, three dimensions to gaining legitimacy stand out: its fit or dissonance with relevant international rules and norms, especially international trade law; the process through which the standard is developed; and the extent to which the standard has traction in the marketplace.

In our detailed analysis of the legal dimension (below), we find that it would be incorrect simply to equate law and legitimacy, although law can be an important source and indicator of legitimacy for a rule. Notably, trade law itself on the issue of standard recognition is sensitive to the broader social and political context in which standards operate. It implies, for example, that uptake and acceptance by the community are as important as measurable legal criteria. The vagueness of the law means an analysis of what constitutes a legitimate international standard requires both a legal and political discussion of legitimacy dynamics.

Thus, in addition to legal conformity, along the first dimension, we argue that legitimacy is enhanced when systems tap into broader norms of both the state-centric international society and of the norms of “world” society. The latter can include trends such as the increasing recognition of the legitimacy of addressing global environmental and social problems and norms of human rights, as well as support for democratizing institutions of global governance broadly speaking, although little consensus exists on the exact mechanisms of accountability, participation, deliberation, or democratic decision-making that would entail (Held and Koenig-

Archibugi 2005; Payne and Samhat 2004; Grant and Keohane 2005; Bäckstrand and Saward 2004; Vallejo and Hauselman 2004; Bernstein 2005). Democratic norms in particular inform expectations for procedural requirements of systems to gain legitimacy (the second dimension of legitimacy).

The autonomy of NSMD systems from sovereign states has worked in favor of their legitimacy since it has allowed them to tap into many of these emerging norms more quickly than governments. For example, NSMD systems in forestry, fisheries, workers rights, and agricultural production emerged because certification corrected inattention to broadly recognized global problems or provided a way around stalemates in international negotiations. Moreover, their emergence has corresponded with a general shift in global environmental norms toward sympathy with market mechanisms and international liberalism more broadly (Bernstein 2001), which has provided a supportive normative environment for market-based governance mechanisms like NSMD systems.

Finally, the third dimension of legitimacy we identify reflects the pragmatic consideration that legitimacy requires uptake or recognition of a standard in the marketplace. Although this presents somewhat circular reasoning – i.e., recognition of a standard as legitimate requires others to view it as legitimate – it suggests that there is a momentum associated with gaining legitimacy.

Many aspects of these dimensions of legitimacy are in practice interdependent. For example, the trade rules around standards increasingly recognize the importance of stakeholder involvement as well as the importance of values such as human health, the environment, and sustainability more broadly. Moreover, WTO rules are intimately linked to the trend – some would say neo-liberal project – to promote the normative compatibility of liberalized trade and

economic development with values such as environmental protection and social cohesion. In addition, trade law dictates that states or international organizations must recognize an international standard-setting body for the standards it produces to be recognized under international law and the standard must be deemed relevant, a criterion closely linked to uptake of the standard.

Trade Law and International Standards

Below we review relevant international trade law and assess its implications for the prospects of transnational NSMD system standards gaining recognition as legitimate international standards. Whereas NSMD system standards run little risk of being actionable in a trade dispute as long as governments do not adopt them directly as technical requirements, the developments noted above suggest an increased need for international recognition, since such recognition would, at least in theory, shield countries that adopt them from disputes. The stakes are high for NSMD systems since a lack of recognition would leave other standards to fill the void, which supporters would likely evaluate as weaker. A lack of recognition would thus undercut their primary objective in the marketplace. Recognition of international standards could either occur through explicit references in the relevant international trade agreements – Technical Barriers to Trade (TBT), Sanitary and Phytosanitary Measures (SPS) and Government Procurement Agreement (GPA) – or through rulings in the WTO dispute settlement system. Since no trade dispute to date has directly addressed the issue of recognition of NSMD standards, we review relevant jurisprudence in the context of each agreement.

Technical Barriers to Trade (TBT) Agreement

The TBT is the most relevant WTO agreement for NSMD system standards as it includes coverage of non-governmental standardization bodies. Consistent with the norms that underpin the trade regime, the TBT aims primarily to ensure that (mandatory) technical regulations⁶ and (non-mandatory) standards⁷ do not “create unnecessary obstacles to international trade” (preamble and Article 2.2⁸). The TBT also incorporates the foundational GATT principles of Most-Favored Nation and National Treatment, but, notably, takes precedence over the GATT in the hierarchy of WTO Agreements. The TBT permits national programs and standards, including for environmental purposes, as long as they do not discriminate on the basis of national origin, are necessary for the stated objective, and are the least trade restrictive to achieve that objective (Article 2).

Under a strict reading of the TBT, voluntary standards are not actionable even if governments promote or endorse them. For example, one EU official we interviewed argued that the EU’s Forest, Law Enforcement, Governance and Trade Initiative (FLEGT) to combat illegal logging in countries that export to the EU would not violate the TBT because an exporting state is not obligated to sign a FLEGT agreement to have market access to the EU. Thus, FLEGT is voluntary, even though, once signed, forestry products would be tracked and certified, and if found to be illegal, would be banned. The same argument would hold if government policy promoted a non-governmental certification system. The crux is that the advantage for a product depends on the free choice of consumers, which the TBT allows. Indeed, the TBT explicitly

⁶ Annex 1 to the TBT defines a technical regulation as a, “Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marketing or labeling requirements as they apply to a product, production or processing method.”

⁷ Annex 1 to the TBT defines a standard as a, “Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marketing or labeling requirements as they apply to a product, process or production method.”

⁸ Though article 2.2 applies only to technical regulations.

encourages states to reference standards (non-mandatory) rather than technical regulations, which the TBT defines as mandatory.

One could imagine, however, a different interpretation from the perspective of an exporting country government unwilling to sign a FLEGT agreement. It could argue that the policy would act as a *de facto* barrier because it segments the marketplace and denies them access to the “non-illegally logged products” segment.⁹ Under this interpretation, the policy could be subject to discipline under the TBT and the EU subject to a trade dispute. However, even if interpreted as *de facto* mandatory, only a government supported standard provides a target (i.e., a party to the WTO) for a trade dispute. Standards that operate independently of governments may produce similar marketplace effects, but provide no such target.

The TBT also explicitly prefers states to reference an international standard if available (Annex 1.2). Moreover, recognized international standards, or relevant parts thereof, “shall” be used “as a basis for their technical regulations” except when they would be inappropriate or ineffective for the “legitimate” objectives covered by the TBT (Article 2.4). “Legitimate” objectives explicitly mentioned include national security, prevention of deceptive standards, and protection of human health and safety, animal or plant life health, and the environment.

The problem for NSMD systems is that the TBT never explicitly identifies what constitutes a “recognized” body¹⁰ or relevant international standard. Instead, Annex 3 of the Code of Good Practice for the Preparation, Adoption and Application of Standards, which applies to standards at all levels of governance, and Annex 4, the report of the Second Triennial

⁹ Switzerland expressed precisely this concern to the CTE and TBTC (2001). It argued that the distinction between mandatory and voluntary standards is arbitrary when a standard has the effect of segmenting the market and forcing *de facto* mandatory compliance by new exporters wishing to enter the market.

¹⁰ The TBT agreement draws from ISO/IEC Guide 2:2004 for guidance, which defines a standardizing body as a: “Body that has *recognised* activities in standardisation.” There is, however, no WTO ruling on the meaning of “recognised body” and ISO does not define “recognized activities.” Recognition appears to come down to the perception of relevant informed publics.

Review, which specifically concerns international standards, offer guidance on how a standardization body should conduct its work. Their combined guidelines include adherence to the Most-Favored Nation and National Treatment principles and that standardization bodies should not create unnecessary barriers to trade. Both annexes also encourage consensus decision-making and promote transparency through requirements for non-state bodies to publish work programmes at regular intervals, promptly publish standards once adopted, and to provide opportunities for all interested parties to comment on proposed standards. Annex 4 specifically encourages multi-stakeholder participation of all interested and relevant parties at every stage of standard development. Both annexes encourage international harmonization of standards and coordination between standardization bodies to avoid duplication and overlap and to achieve a consensus on the standards they develop. However, this provision has prompted concern that a standard, once established and accepted, would prevent the future adoption of more stringent standards, especially concerning social or environmental issues (FAO 2003, 79).

These annexes also include special provisions for the participation of developing countries in standardization bodies, while Annex 4 adds an emphasis on capacity building to encourage the participation of developing country stakeholders. Both annexes require the provision of technical assistance to ensure standards do not create unnecessary obstacles to trade for developing countries.

Finally, both Annexes suggest that recognition under the TBT requires that a standardization body be open to membership from all relevant bodies of members, which presumably includes national standardization and governmental bodies from WTO members. While openness does not mean governmental bodies must actually participate, this provision

potentially means NSMD systems that want recognition might need to be more open to governmental participation.

Despite these detailed provisions, the TBT contains no direct obligation for non-governmental bodies to comply with the Annexes nor are there any mechanisms for assessing or imposing compliance. Moreover, because only WTO members can be party to a dispute, they cannot directly challenge a non-governmental body. Whereas TBT Article 4.1 requires member states to take “reasonable measures” to ensure standardization bodies within their territories comply with the Code of Good Practices, what constitutes a “reasonable measure” remains undefined.¹¹ In practice, WTO members have been reluctant to pressure private bodies to comply with Annexes 3 and 4.

These ambiguities mean even full compliance with all relevant provisions of Annexes 3 and 4 would not guarantee an NSMD system recognition as an international standardization body by the WTO or that their standards would be considered the “relevant” international standard if a dispute arose. To date, the best guidance on the meaning of “relevant,” and the conditions under which WTO members are obliged to reference international standards in their technical regulations, comes from the EC-Sardines¹² case. The dispute panel found the EC in violation of Article 2.4 of the TBT for failing to apply a “relevant” Codex standard (Codex Stan 94 Article 2.1) for its regulation (EEC No. 2136/89) of trade in preserved sardines. The panel determined that the Codex standard was not “ineffective or inappropriate” to fulfill the “legitimate

¹¹ GATT XXIV:12 contains a similar reference to “reasonable measures,” which dispute panels have interpreted to mean “all constitutionally available measures.” See GATT 1992. However, an earlier panel decision (GATT 1985) interpreted reasonable to mean members are obliged to weigh “the consequences of non-observance...for trade relations with other parties...against the difficulties of securing observance.”

¹² This case involved an EC regulation that only products of one species of sardines, *Sardina pilchardus*, may be marketed in the EC as preserved sardines (WTO 2002; IISD 2002).

objectives” pursued by the EC Regulation. Therefore, the EC had an obligation to reference it in its community regulation.

Four elements of this case are particularly revealing. First, the panel determined that while Annex 4 encourages the adoption of international standards by consensus, it acknowledged that this is not always possible. The Appellate Body confirmed that the TBT might still cover and consider “relevant” international standards not adopted by consensus. Second, the panel clarified that to be “relevant,” an international standard must bear upon, be related to, or be pertinent to a national regulation. It further confirmed that Article 2.4 requires that WTO members must use international standards that meet this criteria “as a basis” for their national regulations.

Third, the panel found that, “Article 2.4 of the TBT Agreement imposes an ongoing obligation on members to reassess their existing technical regulations in light of the adoption of new international standards or the revision of existing international standards.”¹³ Fourth, while the panel clearly considered Codex, which is enshrined in the SPS Agreement, to be a “recognized” body, whether its standards are “relevant” requires evaluation on a case-by-case basis in the context of the TBT. The case also did not provide any insight into how a panel would decide among competing standards, since only Codex produced a standard on sardines.

Given the very small number of disputes involving the TBT to date,¹⁴ further clarification on requirements for recognition and criteria for “relevant” international standards seem unlikely in the near term. And, neither this case nor other existing jurisprudence provides much insight

¹³ Even though the Codex standard in question was only a draft standard and its further adoption was not imminent at the time the EC developed its community regulation (1989), the ruling determined that the EC was required to revise its regulations once the standard was adopted (1994), as are all WTO members when new international standards evolve.

¹⁴ EC-Scallops is the only other dispute decided under the TBT to date. In EC-Asbestos, Canada claimed defendants were in violation of the TBT, but the dispute settlement panel considered complaints under GATT. See WTO 2002; WTO 1996; WTO 1996b.

into how a dispute would play out if a WTO member adopted or referenced an NSMD standard in its technical regulations given uncertainty over whether it would be considered a “recognized” body.

Another source of ambiguity is that while the TBT recognizes labels that include production and processing methods (PPMs),¹⁵ it remains unclear whether non-product related production and processing methods (npr-PPMs) (i.e., life-cycle analysis that takes into account values or effects not directly related to production) are covered and therefore subject to dispute under the TBT. This matters for NSMD systems since many include npr-PPMs. Whereas the definitions of technical regulations and standards found in Annex 1 of the TBT refer explicitly to product “related processes and production methods,” the second sentence in each does not. Most commentators interpret the two sentences together to mean the coverage of technical regulations and standards is limited to product related PPMs¹⁶ – thus a government reference to npr-PPMs would be covered only by the GATT, and not the TBT Agreement, but no disputes have addressed this issue (Joshi 2004, 74-5). If the TBT does cover npr-PPMs then the disciplines of the TBT will apply to npr-PPM based measures. With little progress on the issue in negotiations, and since coverage by the TBT does not exclude coverage by the GATT, clarification will likely only come in the form of trade disputes based on GATT (1994) criteria. For example, such a dispute may address whether a label treated “like” products dissimilarly (GATT Article III), or whether a standard was a legitimate exception based on health and safety or environmental criteria (GATT Article XX).

¹⁵ On the product/process distinction in WTO Agreements, see Howse and Reagan 2000; Jackson 2000. On jurisprudence, see Hudec 2000.

¹⁶ Commentators argue there was never any intent to legitimize the use of npr-PPMs through coverage in the TBT Agreement.

Unfortunately, GATT/WTO jurisprudence provides little insight into how npr-PPMs would be treated if adopted or referenced in a WTO members' national regulations. The most relevant recent case – Shrimp/Turtle (WTO 1998b; WTO 2001c) – provides some guidance, but it dealt with the issue of US attempts to apply and enforce national regulations (Section 609 of the Endangered Species Act) extraterritorially under the GATT 1994 and not the TBT Agreement.¹⁷ The Appellate Body ruling, in overturning an earlier Panel decision, considered the US measure a legitimate exemption covered by Article XX(g) which allows discriminatory measures deemed to conserve exhaustible resources. However, it found the US measure in violation of the chapeau (the preambular language) of Article XX, which states, “the prohibition of the application of a measure ‘in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail’ or ‘a disguised restriction on international trade.’”¹⁸

This landmark ruling for the first time¹⁹ determined that the extraterritorial application of national standards (in this case including npr-PPMs) is justified under certain conditions, including to achieve environmental or other non-trade related objectives.²⁰ However, since the Appellate body considered this case in terms of Article XX and because the United States

¹⁷ In this case, the US sought to restrict imports of shrimp products harvested with methods that resulted in the killing of sea turtles; US measures required importers of shrimp to be certified as having adopted specific conservation measures (turtle exclusion devices (TEDs) designed to avoid the incidental killing of sea turtles.

¹⁸ The US provision of financial and technical assistance to Caribbean countries as well as time allowances granted to Caribbean fishers to implement TED measures discriminated against South East Asian Countries and therefore violated the chapeau of Art. XX.

¹⁹ This case overturned the restrictive interpretation of Article XX by the panel in Tuna/Dolphin I and II to allow the extra-territorial application of national standards. Prior to this ruling, product related standards applied equally to domestic and foreign goods but PPM-related standards could only be applied and enforced domestically. This resulted in what Gstohl and Kaiser (2004) refer to as a “Double Standard on Standards” in the WTO.

²⁰ The Appellate Body upheld this ruling in EC-Asbestos. It determined that a WTO member's otherwise GATT-inconsistent measure could be justified on the basis of non-trade related concerns such as human-health under Article XX (b). However, this case focused exclusively on the physical characteristics of the product, not PPMs. See WTO 2001a; WTO 2001b.

conceded that its measures violated Article XI,²¹ it remains unclear whether npr-PPMs comply with Article III and, therefore, are protected from scrutiny under Article XI or whether differences in npr-PPMs can result in determinations of “unlikeness.”

Ultimately, in the absence of a ruling specifically on npr-PPMs, the TBT provides no definitive answer to what constitutes a recognized body or relevant standard. Still, the issue is only likely to come to a head if a WTO member adopts or references NSMD systems’ standards.

Government Procurement Agreement (GPA)

The plurilateral GPA may also become relevant if NSMD systems pursue a strategy of encouraging governments to adopt their standards in procurement policies, as some systems such as the Forest Stewardship Council have contemplated. The GPA, however, does not distinguish between product-related and non-product related processing methods. In the absence of any WTO case law dealing with the issue, the prevailing assumption is that npr-PPMs fall within the scope of the GPA, which specifies (Article VI.1) that technical specifications should not create unnecessary obstacles to international trade. Thus, any dispute on procurement will likely hinge on whether NSMD systems and their standards become recognized, although only signatories (currently a subset of industrialized countries) could launch a dispute.

Non-signatories are not bound to comply with either the GPA or the TBT Agreement in their procurement policies. The TBT Agreement explicitly carves out government procurement from its scope in Article 1.4. Like the TBT, Article VI.2 Clause (b) of the GPA explicitly encourages states, where appropriate, to use international standards developed by recognized bodies as a basis for drafting technical specifications on government procurement. Like the TBT, the GPA states that governments need not necessarily comply with or directly adopt

²¹ Article XI prohibits the use of quotas or measures other than duties to restrict either export or imports.

existing international standards in their entirety, but should use elements of relevant international standards as a basis for technical specifications in their procurement policies. Moreover, like the TBT, the GPA provides little guidance on the meaning of “recognized body” or “relevant” international standard. Similarly, again like the TBT, it provides no indication of with whom the burden of proof lies to establish that a relevant international standard exists.

Sanitary and Phytosanitary Measures (SPS) Agreement

The SPS Agreement, which covers food safety and animal and plant health standards, is unique among the WTO Agreements in its treatment of international standards because it aims to ensure governments only impose measures based on scientific principles and therefore do not unjustifiably restrict trade. It states that WTO members are free to set their own standards but only to the extent that they are necessary to protect animal, plant, or human health. Although SPS covers both product and production and processing methods, most of its standards are product related since they concern health risks of imported products; the SPS Agreement focuses on health risks within the territory of the importing state, as well as food safety, while most NSMD standards focus on risks in the territory of the exporting state

Like the TBT, the SPS Agreement (Article 3.1) encourages WTO members to use international standards. However, it contains none of the ambiguity found in the TBT regarding relevant international standards or recognized bodies. Annex A paragraph 3 explicitly identifies three “recognized” international standard setting bodies: the FAO-WHO Codex Alimentarius Commission for food safety; the International Office for Epizootics for animal health; and the FAO’s Secretariat of the International Plant Protection Convention for plant health. Commonly referred to as the “three sisters,” these international standard setting bodies establish benchmark

standards for WTO members to reference when developing their regulations. These three organizations are observers in the SPS Committee and are called upon often to offer expert advice in WTO dispute settlement procedures.

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

If a member can provide sufficient scientific justification for developing more stringent measures, it must also consistently apply levels of protection (WTO 1998a).

Unlike the TBT, no textual reference explicitly carves out government procurement from the scope of the SPS Agreement. Thus, both the SPS and GPA would apply for GPA signatories. Under SPS, WTO members are encouraged to reference international standards developed by the relevant international standardization bodies identified in Annex A paragraph 3 in their health-related procurement policies such as food aid.

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

The list of recognized international standardization bodies is not necessarily exhaustive under the SPS Agreement. Annex A paragraph 3(d) allows WTO members to reference other “relevant” international standards where matters are not covered by the “three sisters.” Relevant international standardization bodies must be open to membership by all WTO members and the SPS committee must identify them as relevant. To date, no other international standardizing bodies, including NSMD systems, have sought such recognition nor has any WTO member considered referencing standards developed by a body other than those explicitly identified by the SPS. Indeed it has been argued that these three standardization bodies play the role of exclusive quasi-legislators, at least for the time being (Marceau and Trachtman 2002, 838). Therefore, the SPS Agreement holds little relevance for NSMD systems standards at this time.

The Politics and NSMD System Recognition

Non-Governmental Politics

Since international law is not definitive on the requirements for recognition of international standards, we turn to the politics non-state systems engage in to gain recognition. Recall that market uptake indicated momentum for legitimacy, but currently no way exists to determine by whom a standard needs to be accepted, indicators of what constitutes “sufficient reach,” or tools to evaluate a standards’ market impact. In addition, many standards may be simply inappropriate or irrelevant for certain parts of the world. If a particular standard is not universally applicable it is clearly unreasonable to evaluate its traction in the marketplace, and hence its legitimacy, according to its geographical reach. It may also happen that systems with

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.

the most powerful marketing budget or the most attractive branding will survive, thus creating survival of the fittest conditions that have little to do with the substance of the standards.

Market uptake is therefore a necessary but insufficient measure of a systems' legitimacy. Equally important is an evaluation of its conformity or fit with existing international norms and rules. Thus, we observe NSMD system officials increasingly proactive in their attempts to show they develop their standards through open, transparent and accountable processes and thereby conform to, or even surpass, not only commonly accepted democratic norms, but also specific requirements within TBT Annexes 3 and 4. Indeed, in the absence of an official process or body that determines which standards are authoritative, NSMD systems are increasingly engaged in a multi-pronged approach to conform to every possible relevant international rule to increase their legitimacy, take-up, and the chances their standards would survive a trade challenge. In this regard, ISEAL plays a leading role.

ISEAL's flagship document, the Code of Good Practices for Setting Social and Environmental Standards (2006), encourages members to incorporate many aspects of TBT Annexes 3 and 4, as well as ISO/IEC guide 59: Code of Good Practice for Standardization.²³ The Code also goes beyond these documents in important ways, bringing in additional criteria aimed more specifically at standard setting in the social and environmental areas. From its perspective, the procedural criteria contained in the TBT Annexes and ISO /IEC guide 59 are valuable, but their exclusive emphasis on the use of performance rather than process standards (i.e., how the product performs not how it was produced), or some combination of the two, is inappropriate for the development of standards in social and environmental areas. ISEAL's

²³ See ISO 1994. This is a code of good practices for consensus-based governmental and non-governmental standardization bodies. It covers procedures for development of standards, facilitation of international trade, stakeholder participation, transparency and coordination.

Code therefore includes provisions aimed more specifically at PPM-based environmental and social standards.²⁴

The ISEAL Code also aims to augment the provisions contained in TBT Annexes 3 and 4 for the participation of developing countries. It explicitly requires multi-stakeholder consultations and section 7.2 requires that all interested parties “be provided with meaningful opportunities to contribute to the elaboration of a standard.” The Code (section 7.1) also requires that ISEAL members give special consideration to disadvantaged groups, such as developing country stakeholders and small and medium-sized enterprises, and seek a balance of stakeholder interests among sectors, geography and gender. Specific recommendations include funding to participate in meetings, measures to improve technical cooperation and capacity building and mechanisms that facilitate the spread of information (ISEAL 2004b, Section 7.4). Strategies through which NSMD systems comply with the provisions of the Code are constantly being re-evaluated since meaningful multi-stakeholder participation is among the most difficult requirement to fulfill (ISEAL 2005).

Unlike TBT Annexes 3 and 4, ISO/IEC Guide 59, and the practice of most standardization bodies, ISEAL encourages its members to make social and environmental standards freely available and in the public domain. This should help promote the market uptake of their standards, encourage governments to reference them in the formulation of their national and regional standards or regulations, and “facilitate assessments of the need for new standards and avoid redundancy” (ISEAL 2004b, Section 5.7).

Finally, like TBT Annexes 3 and 4, the ISEAL Code encourages NSMD systems to coordinate their standard setting activities and to reduce overlap of standards.²⁵ However, as

²⁴ Section 6.5 clarifies that the Code applies “to social and environmental standards that focus on the process or production method by which a product is produced, the management system in place, or the relationship between

long as NSMD systems meet the thresholds contained in the Code, ISEAL makes no attempt to adjudicate between NSMD standards. Indeed, competition between NSMD systems can be beneficial as long as the standards are credible and will result in positive environmental and social impacts (Organic Standard 2003). NSMD systems do not necessarily aim to attain monopolies over standards in particular areas but rather to establish freely available benchmarks.

Another prong of the strategy of gaining recognition is to register with the World Standards Services Network (WSSN). IFOAM and FSC are the first NSMD systems to do so. The WSSN is “a network of publicly accessible World Wide Web servers of standards organizations around the world. Through the Web sites of its members, WSSN provides information on international, regional and national standardization and related activities and services” (WSSN 2006). The ISO Information Network (ISONET) administers the network. However, the significance of meeting WSSN requirements and thereby gaining recognition on its online service remains unclear. A senior ISO official characterized WSSN as little more than an information-sharing network and said ISO is not very particular about which organizations it recognizes.

Still, in tandem, NSMD systems hope these efforts will ensure their standards stand up to the legal scrutiny they will inevitably encounter if referenced by governments. According to officials of NSMD systems we interviewed, once confident their standards could constitute “international” standards, they plan to ramp up efforts to encourage market uptake. Some, for example, are planning advocacy campaigns to encourage governments to reference NSMD standards when developing legislation, regulatory mechanisms or procurement policies.

actors in the supply chain.” ISEAL 2004b. See also sections 1.1, 1.2 of ISEAL 2006.

²⁵ Section 6.7 of the Code of Good Practice states, “In order for standards to be mutually consistent and free from contradiction for the largest number of user communities, standard-setting organizations shall actively pursue

Whereas referencing NSMD standards could greatly increase the social and environmental impact of NSMD systems, our interviewees indicated that competing claims to offer “the” international standard in a particular area might undercut NSMD systems’ attempts to be recognized. Such conflict already exists over who is the appropriate body to set international standards in the environmental and social areas.

To date, ISO has enjoyed a nearly unchallenged position as an international standard setting body, at least for standards covered by the TBT Agreement.²⁶ ISO is a consensus-based non-governmental organization whose membership is comprised of 156 national standardization bodies. Its primary stakeholder is industry, although members of civil society – consumers groups, NGOs, and trade unions – are beginning to play a modest role, most notably in recent workshops on social responsibility. Since its inception in 1947, ISO has been the principal organization working to systematize and harmonize technical standards adopted nationally or within the private sector. The ISO system involves procedures, tools, consensus-building mechanisms and technical committees designed to build and demonstrate consensus around practices. To date, ISO has produced 15 000 standards and has 4000 items in progress. On average, ISO produces 1200 standards per year.

While ISO’s principal activity and distinct expertise is the development of technical standards, market demand (the guiding principle of ISO’s work) has prompted it to enter into new areas such as quality management principles (ISO 9000 series), environmental management systems (ISO 14000 series) and food safety management systems (ISO 2200 series). Most

harmonization of standards and/or technical equivalence agreements between standards, where there is a possibility of doing so without compromising the standard.”

²⁶ There are three “sister” organizations in international standard setting: ISO, which is multi-disciplinary; International Telecommunication Union (ITU) (inter-governmental); and International Electrotechnical Commission (IEC) (non-governmental). The three organizations try to coordinate their standardization activities to ensure they are complementary, which is increasingly important with converging technologies.

recently, ISO launched a “social responsibility” initiative, to be published in 2008 as ISO 26000, aimed at developing a series of guidelines and recommendations to help corporations streamline their response to pressures from ethical rating agencies. This effort differs from NSMD standards. Although ISO has made a significant effort to put in place rules and procedures to ensure multi-stakeholder input into the development of the standards, there are no plans to include an adaptive *governing* arrangement in which all stakeholders participate in policy decisions once the standard has been agreed to by a consensus of membership of the ISO (i.e., national standards bodies). In addition, it will have no procedural or on-the-ground requirements (only voluntary guidelines) and will not be a certification standard.

From the perspective of ISO, NSMD systems should be working with or subsumed under it, and ISO is the appropriate body to resolve conflict between competing NSMD systems in the same sector, such as between the FSC and the Program for the Endorsement of Forest Certification (PEFC), a European based umbrella group for a number of national systems. According to a senior ISO official, the solution is to produce an ISO standard in an area such as sustainable forest management; this streamlined approach would establish a single economic mechanism in which the use of timber coming from sustainably managed forests is privileged.²⁷ ISO’s main criticisms of NMSD systems, and indeed of all NGO-led standard setting initiatives, concern the procedures through which standards are developed. According to ISO, it provides members with well-documented, orderly mechanisms to build and demonstrate consensus around practices and it builds standards on “double consensus” – among stakeholders (which have in practice been mainly industry) and across countries. ISO’s position is that NSMD systems lack the capacity or requisite mechanisms to document the consensus or to prove that they develop standards democratically. In sum, ISO questions the capability of NSMD systems to live up to

their claims of transparency, openness, or unbiased decision-making, with the conclusion that if NSMD systems want to develop international standards, they ought to work with ISO.

Running counter to these criticisms, ISEAL's membership includes some of the most prominent and well-developed NSMD systems. All ISEAL members must comply with ISEAL's Code of Good Practice, which conforms to, or surpasses, most aspects of TBT Annexes 3 and 4 as well as ISO/IEC Guide 59, as discussed above. The ISEAL Code also contains clear provisions for the documentation of the development of a standard and consensus building. However, it concedes that, "given the range and diversity of interested parties related to social and environmental standards, the likelihood of reaching consensus is very low" (ISEAL 2004b, Section 5.6).

To the degree NSMD systems can live up to these practices, they will undercut ISO criticism. The criticisms also suggest a need for greater communication among international standard setting organizations, although they might also reflect a genuine turf war. Despite some demonstrated willingness among NSMD systems to cooperate with ISO and to respect its guidelines and technical regulations, many believe ISO is ill equipped to deal with standard setting in social and environmental areas. The general view of NSMD systems is that ISO is involved in a fundamentally different enterprise. Where ISO aims to develop standards that firms and states will adopt, NSMD systems aim to regulate and set up authoritative systems where regulation is lacking; their standards aim to socially embed global markets. Along these lines, NSMD supporters point to their tougher compliance rules, more inclusive governance, and on-the-ground requirements as opposed to a focus on management systems in the ISO 14000 series standards. Criticism has also been levelled at ISO for its domination by industry and the lack of developing countries' influence in standard setting that affects them (Clapp 1998),

²⁷ There are no proposals for ISO to develop a sustainable forest management system at this time.

whereas ISEAL argues that NSMD systems such as FSC include a wider base of multi-stakeholder participation and representation from developing countries. The harshest critics charge that ISO's move into social and environmental standards is because it presents a market opportunity. Believing that environmental and social standards in particular should be freely available, they object to ISO being proprietorial and charging 'rents' to use its standards.

Still, ISO's long history, technical capacity, and close relationship with the WTO (with which it shares the common goal of trade facilitation)²⁸ mean the burden of proof will likely fall more heavily on NSMD systems to convince governments of their legitimacy. Unquestionably, the WTO community (especially the TBT committee) has thus far regarded ISO as the key international standardization body.

Nonetheless, although ISO and IEC have observer status in the CTE, SPS and TBT committees, nothing in the WTO Agreements formally grants ISO status as the pre-eminent international standardization body and officials within the Trade and Environment Division of the WTO do not view ISO as necessarily the *de facto* international standard setter. No consensus exists on whether ISO standards even constitute "relevant" international standards. In the view of WTO officials, designating one organization to set international standards in almost every area covered under the TBT is neither desirable nor manageable. Given the massive scope of the TBT Agreement, they question whether such an organization could ensure the interests of all WTO members are represented. As concerns turn more and more to environmental and social issues, it seems likely that other standard setting bodies, including NSMD systems, will challenge ISO's dominance, at least in these areas.

²⁸ According to ISO (2006), it and its two sister organizations, "have the complementary scopes, the framework, the expertise and the experience to provide this technical support for the growth of the global market."

Intergovernmental Politics

While intergovernmental forums within the WTO have made some limited progress on general principles around trade issues potentially raised by the application of NSMD standards, governments have been reluctant to move decisively on more politicized or controversial questions. For example, discussions in the WTO Committee on Trade and Environment (CTE) suggest a general consensus that eco-labels and standards are acceptable as long as they are developed in a transparent, non-discriminatory (e.g., consistent with rules of national treatment), and least trade restrictive manner to achieve the policy objective. Voluntary standards and labels are, arguably, not trade restrictive because they do not hamper imports of non-labeled products and the right to use the label is not considered an advantage granted from the government as long as the criteria for certification and labeling is applied in a non-discriminatory way by all applicants. Any advantage depends on the free choice of consumers.

Lurking barely beneath the surface of this general consensus, however, lay a host of sensitive political issues that governments have shown little willingness or ability to confront.²⁹ For example, fearing politicization, governments have been reluctant to choose between various, potentially competing, standards. The problem is compounded by the legal uncertainties surrounding the TBT's coverage of non-product related production and processing methods (npr PPMs), discussed above. As a result, to date, governments and international organizations have simply avoided referencing or adopting NSMD standards. In one notable case, the International Labour Organization (ILO) considered, but rejected a proposal to certify countries rather than firms with a "global social label"³⁰ owing to developing country concerns it would constitute a

²⁹ For a detailed report on the possible constructive and detrimental effects of governments' use of technical standards see WTO 2005b, section II.

³⁰ The impetus for the proposal came from the Clinton administration as part of its promotion of labor standard certification, which eventually evolved into the NSMD system FLO.

non-tariff trade barrier and contravene WTO rules (Bartley 2003, 450). Moreover, most WTO members have shown little political inclination to make progress on the issue in the Trade and Environment (CTE) or TBT Committees. Virtually all non-European developed countries and all developing countries view npr-PPM-based standards as a Pandora's box. This concern has serious implications for the legitimacy and hence recognition of NSMD standards.

Outside the WTO dispute settlement process, the only way to establish new guidelines or concrete rules on npr-PPMs is either through re-opening the TBT Agreement or through the Triennial Review Process. The CTE has no formal authority but rather operates as a convener for discussions on eco-labelling (among other environmental issues). Whereas parties did launch special sessions of the CTE beginning in 2002 with negotiating authority as part of the Doha round, their mandate does not include eco-labelling.³¹ The lack of a clear institutional home for negotiations on voluntary eco-labels, many of which involve life-cycle analysis, i.e., standards based on npr-PPMs, has contributed to the lack of resolution on these issues. A look at the history of discussions and negotiations on eco-labels offers a window into government preferences and intergovernmental dynamics on these issues.

Eco-labelling has been part of the work plan of the CTE since 1994, but the Doha Declaration gave the CTE an explicit mandate to make specific recommendations to the TBT Committee (TBTC). Once the CTE makes a recommendation, the TBTC has discretion to either address it or give the CTE a mandate to address it. The TBTC addresses other types of labels and standards in the first instance (Rotherham 2005).

³¹ Their mandate includes negotiations on the relationship between trade measures in multilateral environmental agreements (MEAs) and the WTO, information exchange between MEAs and the WTO, criteria for observer status in the WTO, elimination of trade barriers for environmental goods and services, and to "clarify and improve" WTO rules on fisheries subsidies.

With the exception of the European Communities, developed and developing countries alike do not consider npr-PPMs covered nor do they want them covered by the TBT Agreement. They staunchly oppose any attempt to work through the CTE to extend the TBT Agreement to permit or legitimize the use of standards based on npr-PPMs (Joshi 2004, 82-3). A telling illustration of this opposition occurred in the run up to the Singapore Ministerial Conference (1996) when Canada and Switzerland took a much softer position on the issue. Together with the European Communities, they argued that the TBT Agreement covers npr-PPMs such as eco-labelling schemes and they do not necessarily constitute a violation of WTO rules.³² The EC made a similar proposal (CTE 1996c). The United States, concerned by the potential market access effects of npr-PPMs, argued only in favor of encouraging full transparency at each stage of an eco-labelling programme's development (CTE 1996a; 1996b). In the end, delegates could not reach consensus and the CTE simply made a general statement attesting to the possible efficacy of npr-PPM-based mechanisms such as eco-labelling (CTE 1996d). The CTE made no recommendations to the TBTC to pursue further work on the subject. Only the US recommendation for increased transparency found its way to the First Triennial Review of the TBT Agreement in 1997 (TBTC 1997).

The mandate the Doha Ministerial Declaration granted to the CTE to pursue further work on eco-labelling came directly from EC pressure. Its submission to the CTE in March 2003 included the following proposals:³³

³² Canada made a submission to the CTE arguing that the scope of the TBT Agreement should be interpreted to include coverage of npr-PPMs in eco-labelling schemes and to confirm that TBT Annex 3 applies to npr-ppms "whether voluntary or mandatory and whether administered by governmental or non-governmental bodies" (WTO 1996c; WTO 1996d).

³³ Eastern European countries who were either in the process of accession or aspirants to becoming EU members supported or did not oppose the proposal. Norway and Switzerland also supported it. Switzerland had made a submission to the TBTC in June 2001 stating that Annex 1 of the TBT Agreement should be interpreted to include npr-PPMs in the definition of technical regulations. See the Swiss position in TBTC 2001.

- a) The use of voluntary eco-labelling schemes based on life-cycle analysis approach is legitimate and within the rights and obligations of the WTO Agreements
- b) Technical assistance should be provided to developing countries, producer organizations and other relevant stakeholders to encourage their participation in and use of eco-labelling schemes
- c) Those using such schemes should, to the extent possible, be encouraged to reflect the principles of the TBT Code of Good Practice (CTE 2003b)

In the months prior to the Cancun Ministerial Conference, the EC made further proposals calling for three dedicated sessions in the CTE in 2004 aimed at increasing the use of voluntary eco-labelling schemes.³⁴ All non-European and developing countries roundly rejected it. No significant further developments on the issue have occurred in the CTE since Cancun.

The npr-PPM issue has played out in much the same way in the TBT Committee. WTO members show no willingness to re-open the TBT Agreement even if it would mean clarifying its scope. The only modest progress to date on labelling and the question of what constitutes a ‘relevant’ international standard occurred through the Triennial Review Process; the Second Triennial Review (TBT Annex 4) responded to WTO members’ concern over the ambiguity of what constitutes a ‘relevant’ international standard by establishing six principles³⁵ that international standard setting bodies should observe. However, it made no progress clarifying whether governments can and should reference npr-PPM based international standards in the formulation of their standards or technical regulations.

According to WTO officials, Annex 4 of the TBT Agreement is more an indicative tool than a solid legal interpretation of the TBT Agreement’s coverage. Moreover, the TBTC is unlikely to offer further clarification in the short term. The issue of npr-PPMs is completely off

³⁴ According to Joshi 2004, the EC proposed the CTE “pay particular attention to the issues of technical assistance to developing countries, studying the existing voluntary eco-labels and reviewing how these schemes can foster trade in environmentally friendly products, examining ways to increase transparency and publicity for existing and new schemes and considering the issue of mutual recognition/equivalency agreements for voluntary eco-labeling schemes” (84).

the agenda in the current round of multilateral trade negotiations. Therefore, the work program of the Fourth Triennial Review, which began in January 2006, does not address the scope of the TBT Agreement or any related issue pertaining to non-state voluntary standards or labelling.

Developed country reluctance to engage in further work or discussions in the context of either the CTE or the TBTC stems from a concern over the market access effects of npr-PPMs. For instance, the increased production of genetically modified crops has influenced the position of most Cairns Group members. This helps explain why Canada withdrew its 1996 submission to the CTE. Similarly, US opposition to an interpretation of the TBT Agreement's definition of standards to include npr-PPMs has only hardened in light of concerns over the market access effects for agricultural exports and exports of industrial products. The United States has argued that the WTO provides sufficient scope to protect the environment and no further work is required on the subject.³⁶

The reasons behind developing country opposition to further work on the issue of npr-PPMs are somewhat more complex. First, developing countries have strongly resisted any renegotiation of TBT provisions to extend the scope to include npr-PPM-based standards and regulations because they view any such shift in the area of environmental issues as inevitably increasing the likelihood that labor standards could become the basis for labeling or other types of trade-related measures. Developing countries are also concerned that npr-PPM-based standards and regulations potentially violate their sovereignty because they involve guidelines on practices within an exporting state, not just the nature of a product (WTO 2000; CTE 2003a). In addition, they may not reflect the local conditions in developing countries because they reflect

³⁵ As discussed above, these principles include: transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and the development dimension.

³⁶ The United States made this argument in 1996 in response to some WTO members' (led by the EC) unsuccessful attempt to reform Art. XX GATT to accommodate environmental concerns.

the conditions, preferences and priorities of importing countries. Moreover, many developing country governments view npr-PPM-based standards as inherently discriminatory. They denounce discrimination between products on the basis of consumer perception or environmental and social objectives as latent forms of green protectionism (CTE 1996d; Joshi 2004, 72). Underlying these concerns, developing countries worry that they lack the resources and technological capacity to adapt their production methods to meet the criteria of such standards and regulations. Even where environmental and social standards are voluntary, they argue, their acceptance would ultimately serve to segment the market. This means voluntary environmental and social standards are likely to become *de facto* mandatory regulations and would therefore further hamper developing countries' competitive advantage.

Finally, developing country governments have expressed a general feeling of exclusion from the standards development process. Proponents of NSMD systems argue that npr-PPM-based standards have the potential to be effective and beneficial in the South but only to the extent that they are developed in a transparent, accessible and open process. There must be ample and equal opportunities for meaningful participation by all interested parties in the formulation of such standards, combined with mechanisms (mentioned earlier) to facilitate participation in standard development and to develop expertise and capacity in implementation.

A general unwillingness to clarify the scope of the TBT Agreement and address the npr-PPM issue means that governments and intergovernmental bodies operate under considerable legal uncertainty on this issue. Moreover, given the uncertainties regarding what constitutes a 'relevant' international standard or 'recognized' body, governments and intergovernmental organizations are also reluctant to appear to favor one NSMD system over another. The World Bank recently faced criticism for testing an assessment tool for certification because some parties

viewed it as favoring one system, the Forest Stewardship Council (FSC), over another, the Programme for the Endorsement of Forest Certification Schemes (PEFC). Similarly, the European Commission (2003) recently abandoned an initiative in the context of its Sustainable Trade Action Plan to devise a community guideline designed to help consumers select between the various systems. The guideline would have included a set of benchmark standards that systems would have to comply with in order to attain a Community seal of approval. After extensive consultation with various stakeholders, the European Commission decided that it would not be appropriate for a governmental body to interfere with or select between systems. Ultimately, the Commission decided that such a guideline would be unduly discriminatory, may actually serve to dilute standards or may lead to a situation where the EU would demand more from already well developed systems, such as FLO, than they are able to do.

In terms of government procurement, no government has yet indicated it is considering adopting or referencing international standards in their procurement policies (at least where they do not concern plant, animal or human health). Currently, this remains an untapped market that could significantly widen the impact of NSMD systems' standards. While the European Union favors the green procurement concept, the EU position is that members should develop parallel standards on their own and then evaluate whether they are consistent with existing international standards such as those promoted by NSMD systems (European Commission 2004).

Conclusion: The Creation of Transnational Regulatory Space

Two general conclusions follow from this analysis. First, WTO Agreements as currently formulated do not prevent NSMD systems – despite the many hurdles outlined above – from gaining recognition as international standardization bodies. At least in terms of international

trade law and politics, their multi-pronged approach to gaining legitimacy shows good prospects of being compatible with international rules and norms, legitimate process, and sufficient recognition or uptake to succeed in this goal. However, there is also enough trade law surrounding the issue that the temptation will be to develop it further to gain jurisdiction over non-state social and environmental standardization systems and their standards. This is especially the case as NSMD systems gain support and potentially move into areas such as government procurement. Yielding to this temptation would be a mistake in our view.

The second conclusion, following from the above argument, is that WTO rules should not militate against the use or adoption of NSMD standards. Neither should the WTO let itself be pulled into the political game of overtly deciding which standards are authoritative. In other words, as much as possible, the WTO should adopt something akin to the notion of “policy space”, but for transnational non-state governance in the environmental and social areas, not simply for national governments and policy development. Essentially, transnational regulatory space should be carved out from WTO disciplines such that NSMD systems can operate outside the direct purview of WTO disciplines.

While it is certainly a controversial and contested concept, the notion of policy space already has a normative foundation in WTO law.³⁷ At its core, this concept is founded on the premise that the burden of adapting to new trade disciplines falls most heavily on developing countries with the least capacity to do so. It recognizes that international trade rules and globalizing forces more generally place downward pressure on developing countries’ ability to regulate domestically thereby constraining their ability to pursue sustainable development. The idea is to carve out space from WTO disciplines to allow developing countries sufficient policy

³⁷ For further elaboration and discussion of policy space as it pertains to developing countries see Gallagher 2005; Hoekman 2005.

flexibility and time to adjust to new trade rules. Such space is most commonly manifested in the form of special and differential treatment for developing countries, including longer time periods to implement agreements and support to help developing countries build infrastructure for WTO work, handle disputes, and implement technical standards (CTD 2005).

Rather than applying the concept of policy space to buffer developing countries from WTO disciplines that create a large regulatory burden, the idea here is to preserve regulatory space in an area where so far states have not been willing, or have found it politically difficult, to push WTO disciplines. The danger our proposal is designed to counteract is that given the poor prospects for positive rules in these areas, rules designed for other purposes will be applied to environmental and social regulation of the global marketplace in the absence of a clear position on such a notion of transnational regulatory space. Thus, rather than going the route of creating positive provisions such as special and differential treatment, the idea here is for a “negative” policy space. In sum, while we agree with commentators such as Susan Aaronson (2007) that trade and social and environmental regulation in the marketplace should be linked, our view is that the approach should be to carve out “negative” space rather than take “positive” action that will require active policy making or high-level political consensus on specific CSR or NSMD mechanisms.

This notion of transnational regulatory space could be implemented in a number of ways. For example, Aaronson (2007, 631), writing about voluntary CSR initiatives more broadly, suggests that members issue a Ministerial Declaration that says such initiatives “do not inherently impede trade.” Our preference, however, is for an even less overtly political response to simply preserve the space for NSMD systems that current guidelines may already allow. It may be enough, therefore, to exhort members to refrain from making further rules on standards

setting. Or, a simple endorsement of existing rules for non-state standards that preserves room for experimentation and promotes good practices may suffice. We favour a non-interventionist approach based on our reading of WTO negotiating history on environmental and social concerns. It suggests that more overt action, such as amending the exceptions delineated in GATT article XX, are not only unlikely to succeed, but will unnecessarily politicize the issue. Moreover, such a positive intervention itself could cause undesirable spillovers in the eyes of many members.

Consistent with the minimalist approach, we found a general consensus among European Commission, WTO, and NGO officials we interviewed, as well as many commentators, that the WTO is not the appropriate body to develop social and environmental standards. Environmental and social policies are simply outside its competency. When it tries to address these issues, it engenders conflict and challenges to its legitimacy. Moreover, many developing countries will be suspect of any move in this direction. According to Joshi (2004, 88), “none of the non-governmental bodies administering eco-labelling schemes have highlighted that they are not able to develop or administer these schemes in the absence of their coverage by the WTO Agreements. Rather, absence of interference by the WTO rules enables such standardization bodies to implement them in a way that optimizes the benefits to the sustainable development.”

Some may suggest that carving out transnational regulatory space from WTO disciplines will lead to the widespread proliferation of standards with no concrete or effective way of adjudicating between them. Our proposal should not be read as encouraging a thousand flowers to bloom. On the contrary, we suggest that existing rules already offer sufficient leeway and guidance. Where standardization bodies meet or exceed commonly accepted norms of democratic procedures and comply with relevant WTO provisions such as the TBT’s Code of

Good Practice and Annex 4, they should simply be allowed to operate without the impending risk of being subject to trade disputes. Governments should avoid going further in specifically defining rules on npr-PPMs or explicitly recognizing or privileging specific standardization bodies over others.³⁸

Developing countries may also benefit from such an approach. As we argue above, many predominant standardization or regulatory bodies such as ISO and Codex are largely expert based and dominated by northern interests. In contrast, most NSMD governance systems' efforts to meet or exceed relevant WTO and ISO guidelines respond to the stated concern of many developing countries and commentators that the proliferation and operation of international standardization bodies should have higher requirements for multi-stakeholder participation. A number of our interviewees indicated that non-state standards have the potential to be both effective and beneficial in the South if they respond to local circumstances and provide meaningful opportunities for a broad and balanced base of stakeholders to participate in the formulation of a standard. NSMD systems are well positioned to achieve these goals.

In sum, a norm of transnational regulatory space prevents WTO members from being drawn into collectively having to pick and choose among potential international social and environmental standards. Although such a process might seem attractive because it creates a basis for states to be able to adopt or incorporate these standards into their policies, it could have the ironic consequence of increasing the likelihood of trade disputes. Given the WTO's poor record on environmental and social issues, this would be an unfortunate outcome. In effect,

³⁸ Aaronson (2007), in contrast, argues that WTO members and staff can actively research and provide clarity on which CSR initiatives ought to be supported and which are trade distorting, rationalize the plethora of initiatives, and can thereby help promote CSR. We are more sceptical that such efforts would lead to rules or processes to clearly differentiate or choose among mechanisms, with anything but a lowest common denominator outcome. In only one sector – “conflict diamonds” – has anything approaching such a process led to the endorsement of a certification initiative by members. However, this was achieved through a waiver allowed under current rules, not

allowing regulatory space is one more way to help reinvigorate the “embedded liberalism” compromise that underpinned and helped legitimate the post-World War II trade regime. As Ruggie (2003), among others (Wolfe and Mendelsohn 2005; Hays et al. 2005) have argued, the basic norms of embedded liberalism – that global liberalism ought to be predicated on domestic political interventionism to cushion its impact and socially embed markets – still have resonance. If globalization and the regulatory reach of new WTO disciplines have eroded those norms, allowing transnational social and environmental regulatory space is one concrete way to shore them up, but at the global level.

owing to a new norm or rule that could offer future guidance. We believe this example is exceptional owing to its high political profile, among other factors, which make it unlikely to be replicated in other sectors.

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