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## International Standards and Technical Barriers to Trade R053 - Legal Opinion Summary July, 2006

### 1. Introduction

- 1.1 This paper from the ISEAL Alliance and the Center for International Environmental Law (CIEL) in Geneva summarizes the findings of two legal opinions regarding the ability of governments to reference existing voluntary international standards in relation to technical regulations relating to trade and, in particular, the implications in terms of possible 'technical barriers to trade'. The initial legal opinion was completed by independent trade lawyer Michael Rogers, and was formally reviewed by Nathalie Bernasconi-Osterwalder of CIEL. The opinions take account of relevant World Trade Organization (WTO) agreements and associated jurisprudence. They concentrate primarily on the relevance and application of the WTO Agreement on Technical Barriers to Trade (TBT) and, specifically, on the implications for non-product related Process and Production Method (npr PPM) standards.
- 1.2 The TBT Agreement recognises the positive contribution that international standards and conformity assessment systems can make to facilitate international trade. The Agreement aims to encourage the development of international standards and conformity assessment systems while ensuring that they do not create unnecessary obstacles to international trade.
- 1.3 It has often been assumed that governments cannot reference existing non product related Process and Production Method (npr PPM) standards, such as social and environmental standards, with respect to labelling of products. However, legal analysis shows that, depending on the interpretation of the TBT Agreement, the disciplines of the TBT Agreement either do not apply to voluntary or mandatory standards that are not product related, or, if they do apply, they *do* permit references to existing PPM standards (both product-related and not). Moreover, where an *international standard* already exists, WTO law indicates a strong preference for governments to use such international standards where appropriate.
- 1.4 The TBT explicitly excludes government procurement from its scope. Government procurement is addressed by the WTO under the Agreement on Government Procurement (GPA). ISEAL and CIEL have provided separate legal advice on referencing international standards in the GPA.

## 2. Scope of the TBT Agreement

- 2.1 At least two legal issues are worth considering in relation to the TBT Agreement. One is whether npr PPM standards fall within the scope of the TBT Agreement. The second is the extent to which national technical regulations and standards can and should reference existing international npr PPM standards.
- 2.2 As set forth in Annex 1 to the TBT Agreement, a technical regulation is defined 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, marking or labelling requirements as they apply to a product, process or production method.” (Emphasis added).
- 2.3 Similarly, a standard is defined 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, marking or labelling requirements as they apply to a product, process or production method.” (Emphasis added).
- 2.4 Both definitions are often understood to imply that only product-related PPM-based measures are covered. This understanding is widely held, though it has not yet been confirmed by jurisprudence. The implication of this is that non-product related PPM-based measures, such as social and environmental standards, would be beyond the scope of the TBT Agreement. By extension, this means that a *technical regulation* or *standard* that is based on, or in accordance with an international npr PPM standard is not covered by the TBT Agreement, and that the *voluntary international standard* itself is not covered by the TBT Agreement.

## 3. Considering npr PPM measures outside the TBT Agreement

- 3.1 The TBT Agreement sets limits as to what governments and, to some extent, private bodies can do to protect the environment or set social standards. If the TBT Agreement does not apply to PPM-based standards, these restrictions will not apply. In this case, the GATT could still apply to certain measures, particularly Article III of the GATT, which incorporates the central national treatment obligation and imposes the principle of non-discrimination between domestically produced goods and “like” imported goods.
- 3.2 It is important to remember that the product-process debate found its origin in the context of the ‘likeness’ question of Article III. To date, the relevant WTO jurisprudence involving a non-product related measure only includes the *US-Shrimp* decisions, which avoided dealing with the ‘like products’ question directly, and concluded that the US npr measure at issue could be, and ultimately was, justified under the Article XX general exceptions clause.
- 3.3. The conclusion to draw from WTO jurisprudence is that the GATT does not disallow non-product related PPM measures *per se*. In addition, it is worth noting that the Appellate Body indicated a strong preference for measures that have at least some international acceptance.

#### **4. Considering npr PPM measures within the TBT Agreement**

- 4.1 If it were to be determined that the TBT Agreement did cover npr PPM standards, then both voluntary international npr PPM standards and any voluntary standards or mandatory regulations based on, or in accordance with them would be subject to the conditions of the Agreement, albeit to varying sets of rules. The question may then be asked whether and to what extent a government can and should use international npr PPM standards as a basis for their own government-set standards (voluntary) or technical regulations (mandatory).
- 4.2 To encourage the use of international standards, TBT Article 2.4 provides: “Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.”
- 4.3 In the case of a governmental voluntary standard, Article 4.1 of the TBT Agreement refers to another set of rules: the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 of the TBT Agreement. Clause F of the Code of Good Practice includes a provision for standards almost identical to TBT Article 2.4. Furthermore, clause H of the Code of Good Practice requires that: “The standardizing body within the territory of a Member shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies.” This requirement applies to all standardizing bodies covered by the Code of Good Practice, including governments.
- 4.4 Finally, it is important to note that under the TBT Agreement, a government that uses an international standard is in a stronger position to prove compliance of its technical regulation with TBT requirements. Article 2.5 provides that a technical regulation that is in accordance with relevant international standards “shall be rebuttably presumed not to create an unnecessary obstacle to international trade”. This provision seems to imply that a technical regulation in accordance with international standards is presumed not to be “more trade-restrictive than necessary to fulfil a legitimate objective”, as required under Article 2.2 of the TBT Agreement. If a government adopts a technical regulation that is in accordance with relevant international standards, it would thus greatly strengthen the status and acceptance of that technical regulation. While the Code of Good Practice does not include a similar presumption, a similar logic would likely apply to voluntary standards adopted by governments.

#### **5. Recognizing International Standards**

- 5.1 Different WTO agreements adopt slightly different definitions of 'standards' and standardizing bodies and these, in turn, differ from equivalent definitions used by ISO. The definition of a standard in TBT Annex I, Paragraph 2, starts with the words "document approved by a *recognised* body". (Emphasis added). Furthermore, ISO/IEC Guide 2:2004 defines a standardising body as a: "Body that has *recognised* activities in standardisation." (Emphasis added).

- 5.2 Within the WTO there has not been an established ruling on the meaning of 'recognised body'. Consequently, any body seeking to establish itself as a recognised standardising body would have to draw together all of the elements which could indicate a general recognition in the eyes of the informed public concerned, i.e. recognised as a body and having recognised activities.
- 5.3 Steps taken to increase recognition could include recognition by ISO and inclusion in the World Standards Services Network (WSSN) listing, which is headed "International Standardising Bodies"; being a body that is established or otherwise endorsed by a government (e.g. by funding); recognition (formal or written) by governments, whether local or national, that certification in accordance with the international standard is accepted as formal certification; compliance with the guidance specified in the TBT Annex 3 Code of Good Practice for the Preparation, Adoption and Application of Standards; and compliance with subsequent guidance on the development of international standards, as laid out in the TBT Committee's Second Triennial Review of the TBT Agreement (Annex 4). At minimum it would likely require that the organization's incorporation documents include the power to formulate and issue standards.
- 5.4 The TBT Agreement defers to ISO/IEC Guide 2:1991 on the definition of an international standard: "Standard that is adopted by an international standardizing / standards organization and made available to the public." The WSSN list is a list of international standardizing bodies as opposed to a list of international standards. Thus it also becomes important to comply with the TBT Annex 1 definition of an international body or system: "Body or system whose membership is *open to* the relevant bodies of at least all Members." (Emphasis added). The implication of this is that the organization may not prevent relevant bodies of WTO Member countries (including government bodies) from becoming members. The emphasis on openness, however, should lead to an interpretation of the TBT Annex 1 definition of an international body or system that would also include international bodies that are not membership-based, provided that interested parties, including relevant bodies of WTO Member countries, have an opportunity to participate in the development of standards.

## **6. Showing relevance of International Standards**

- 6.1 Once an international body has established itself as a recognized standardizing body, it is still necessary, on a case by case basis, to show that the international standard is relevant to the specific situation. Article 2.4 of the TBT Agreement requires that "Where... *relevant* international standards exist or their completion is imminent, Members shall use them, or the *relevant* parts of them, as a basis for their technical regulations..." (Emphasis added). The provision in Clause F of the Code of Good Practice omits the first reference to relevant in the context of international standards.
- 6.2 The *EC-Sardines* case provides some guidance as to the meaning of 'relevant'. In that case the EC argued that only standards adopted by an international body by consensus could be relevant for the purposes of Article 2.4. However, the Appellate Body rejected the EC's argument and instead supported the panel's reference to the ordinary meaning of the term "relevant", as: "bearing upon or relating to the matter in hand; pertinent." Thus, a standard is relevant if it bears upon, relates to or is pertinent to the situation.

- 6.3 With respect to the issue of consensus, the Appellate Body in *EC-Sardines* referred to the Explanatory note to the definition of ‘Standard’ in the TBT Agreement Annex 1, which states that “[t]his Agreement covers also documents that are not based on consensus”, and concluded that even if not adopted by consensus, an international standard could constitute a relevant international standard.
- 6.4 In analysing the part of Article 2.4 which states that international standards or relevant parts do not have to be used where they would be “an *ineffective or inappropriate* means for the fulfilment of the legitimate objectives pursued” (Emphasis added), the Appellate Body in *EC-Sardines* decided that the burden of proof lies with the claimant.

## 7. Conclusions

- 7.1 It is widely assumed that the language of the TBT Agreement indicates that the Agreement is not applicable to processes and production methods ‘not related to the product’. In this case, the Agreement could not prohibit governments from adopting mandatory npr PPM technical regulations or voluntary npr PPM standards, including those based on an existing international standard. These technical regulations or standards may still fall within the scope of the GATT.
- 7.2 However, if it is found that npr PPM standards *are* within the scope of the TBT, then the Agreement calls on governments to use relevant international standards, or the relevant parts of them, as a basis for their technical regulations or standards except where they would be ineffective or inappropriate. The TBT also provides that a technical regulation that is in accordance with such relevant international standards is presumed not to be more trade restrictive than necessary.