

NON-STATE GLOBAL STANDARD SETTING AND THE WTO: LEGITIMACY AND THE NEED FOR REGULATORY SPACE

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ABSTRACT

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

INTRODUCTION

The proliferation of transnational non-state mechanisms designed to create authoritative social and environmental standards in the global marketplace potentially takes the international trade regime into uncharted territory. These mechanisms—usually in the form of producer certification and

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product labelling systems that include third-party auditing—are a sub-set of the broader ‘corporate social responsibility’ (CSR) category, but are remarkable for their similarity to state-based regulatory and legal systems.¹ They aim to be *authoritative* in the sense of creating rules with a sufficient ‘pull toward compliance’—to borrow Thomas Franck’s useful understanding of legitimacy—to create an obligation to comply on the part of firms who sign on.² Institutionally they are notable for establishing their own governing systems, largely independent of state governments, with regulatory capacity to back up those obligations with enforceable rules.³ Scholars in law, political science, and business have variously labelled them ‘transnational regulatory systems’,⁴ ‘non-state market driven’ (NSMD) governance systems,⁵ and ‘civil regulation’.⁶ Here we adopt the NSMD governance label because, although slightly awkward, it has been widely cited and has generated the most detailed and distinct categorization of these mechanisms.⁷ The goal for many NSMD governance systems is not simply to create niche markets that apply their standards, but to promote their standards as appropriate and legitimate across an entire market sector.⁸

Such mechanisms can now be found in sectors including forestry [e.g. Forest Stewardship Council (FSC)], 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 (MSC)]. 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. Because they operate largely independently from states, they differ from more traditional standard setting bodies that derive their authority from governments or intergovernmental organizations, such as Codex Alimentarius (established by the Food and Agricultural Organization and World Health Organization), or from

¹ Errol Meidinger, ‘Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems’, in Christian Brüttsch and Dirk Lehmkuhl (eds), *Law and Legalization in Transnational Relations* (Oxford and New York: Routledge, 2007) 121–43.

² Thomas Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990) at 24.

³ Benjamin Cashore, ‘Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority’, 15 (4) *Governance* 502 (2002).

⁴ Meidinger, above n 1.

⁵ Cashore, above n 3.

⁶ David Vogel, ‘Private Global Business Regulation’, 11 *Annual Review of Political Science* 261 (2008).

⁷ Cashore, above n 3; Benjamin Cashore, Graeme Auld, and Deanna Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-state Authority* (New Haven: Yale University Press, 2004).

⁸ Steven Bernstein and Benjamin Cashore, ‘Can Non-State Global Governance be Legitimate? An Analytical Framework’, 1 (4) *Regulation and Governance* 347 (2007); Margaret Levi and April Linton, ‘Fair Trade: A Cup at a Time?’ 31 (3) *Politics and Society* 407 (2003).

national standard setting bodies, such as the International Organization for Standardization (ISO).⁹ If their standards gain legitimacy and international recognition, they can affect international trade even if no state officially adopts them as a national standard or regulation.

This potential arises because 'civil' regulation can blur the boundaries between voluntary and mandatory regulation, 'public' and 'private', and 'hard' and 'soft' law.¹⁰ Citing a growing body of International Relations scholarship on 'private' authority,¹¹ Vogel notes that these sharp dichotomies may be better viewed as ends on a continuum or they risk obscuring changing relations of power and authority in international relations. For example, a certification system may be ostensibly voluntary to join, but firms may feel threatened by consumer boycotts or other threats to their market position. Once firms sign on, they are subject to governance, rules, and enforcement that have more in common with state regulation than standards of voluntary bodies that can be abandoned with little consequence. In blurring such boundaries, the mechanisms we investigate potentially pose new and complex challenges for the World Trade Organization (WTO).

While a number of studies address how international trade law treats eco-labelling and related CSR mechanisms, and speculate on what might happen if they should be the subject to a trade dispute,¹² they give less attention to whether the specific subset of mechanisms that concern us here could ever produce legitimate international standards. We address two questions in this regard. First, under what conditions will international trade law recognize social and environmental standards developed by NSMD governance systems as legitimate, i.e. as appropriate and justified, and therefore acceptable under international law? Whereas the short answer is that acceptance requires that relevant actors recognize them as international standards, how that happens remains a grey area in 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?

⁹ ISO is a network of national standards institutes that is the world's largest developer and publisher of international standards.

¹⁰ Vogel, above n 6 at 265.

¹¹ Thomas J. Biersteker and Rodney Bruce Hall (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002); A. Claire Cutler, Virginia Haufler and Tony Porter (eds), *Private Authority and International Affairs* (New York: SUNY Press, 1999); Mathias Koenig-Archibugi, 'Transnational Corporations and Public Accountability', in David Held and Mathias Koenig-Archibugi (eds), *Global Governance and Public Accountability* (Oxford: Blackwell, 2004) 110–35 at 122.

¹² See Seung Wha Chang, 'GATTing a Green Trade Barrier: Eco-Labeling and the WTO Agreement on Technical Barriers to Trade', 31 (1) *Journal of World Trade* 137 (1997); Halina Ward, 'Trade and Environment Issues in Voluntary Eco-labelling and Life Cycle Analysis', 6 (2) *Review of European Community and International Environmental Law* 139 (1997); Manoj Joshi, 'Are Eco-Labels Consistent with World Trade Organization Agreements?', 38 (1) *Journal of World Trade* 69 (2004).

We argue that concerted efforts by transnational NSMD governance systems to gain recognition for their standards as legitimate and relevant 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 ‘transnational 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 NSMD governance systems pose to the international trade regime and justify our focus on them. 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 relevant WTO committees. 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 June 2005, and January and February 2006. We conclude with our argument that a norm of ‘transnational regulatory space’ is the most appropriate response if the WTO wishes to avoid further legitimacy challenges on its treatment of environmental and social issues.

I. THE CHALLENGE OF NSMD SYSTEMS TO WTO LEGITIMACY

A. The Nature of the Challenge

The WTO has arguably adapted uneasily to globalization. It has expanded its scope from an institution concerned primarily with controlling barriers at borders to include new issues (intellectual property, technical barriers to trade, trade in services) where removing barriers to access may require ‘behind-the-border’ reforms to domestic legal and regulatory systems.¹³ This shift has been a major source of its legitimacy problems.¹⁴ In particular, environmental, food safety, and health issues have been focal points for criticism as governments increasingly ask the WTO to adjudicate in areas

¹³ Andrew Guzman, ‘Global Governance and the WTO’, 45 (2) *Harvard International Law Journal* 303 (2004).

¹⁴ Sylvia Ostry, ‘The World Trade Organization: System Under Stress’, in Steven Bernstein and William D. Coleman (eds), *Unsettled Legitimacy: Political Community, Power, and Authority in a Global Era* (Vancouver: University of British Columbia Press, forthcoming); Robert Howse, ‘The Legitimacy of the World Trade Organization’, in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (Tokyo: The United Nations University Press, 2001) 355–407.

where the original architects of the GATT system had purposely carved out space for domestic intervention and policy development.¹⁵ 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. It is precisely in these areas that transnational NSMD systems have proliferated, where national regulations and/or international agreements have been perceived as weak or lacking.

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, most analyses agree that they can operate largely unaffected by international trade rules. However, three developments have complicated the picture. First, NSMD governance systems are beginning to gain more legitimacy and widespread support, and many are vying for recognition as international standardization bodies.¹⁶ Second, some governments and commentators are seeing environmental, social, labour, 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, the UN system as a whole where sustainable development is a pervasive discourse, as well as in transnational civil society organizations, many of which are focused on environmental sustainability and human rights.

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. John Ruggie, following Karl Polanyi, has made the argument that such social ‘embedding’—the idea that markets must be embedded in broader societal values or purposes, whether domestically or globally—is necessary for the ongoing legitimacy of an international liberal economic order.¹⁷ More recently, Ruggie has argued that this lesson, learned by the architects of the post-World War II economic order from the experience of the 1930s, may need to be re-learned in an era of increasing globalization.¹⁸ Put another way, while academics and commentators may debate the degree to which new WTO disciplines or

¹⁵ John Gerard Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’, 36 (2) *International Organization* 379 (1982).

¹⁶ Bernstein and Cashore, above n 8; Meidinger, above n 1.

¹⁷ See Ruggie, above n 15; Karl Polanyi, *The Great Transformation* (New York: Farrar & Rinehart, 1944).

¹⁸ John G. Ruggie, ‘Taking Embedded Liberalism Global: The Corporate Connection’, in David Held and Mathias Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (Cambridge: Polity Press, 2003) 93–129; John G. Ruggie, ‘Global Markets and Global Governance: The Prospects for Convergence’, in Steven Bernstein and Louis

jurisprudence spills over into social and environmental regulation, virtually all agree that doing so (or the widespread perception it is doing so), would hurt its legitimacy.

B. NSMD Systems

We focus on transnational NSMD systems because unlike other non-state or public-private mechanisms to promote environmentally and socially responsible behaviour, they have ambitions to reorient marketplace norms of acceptable and appropriate behaviour in entire sectors through the creation of governing arrangements through which standards are developed.¹⁹ Moreover, their regulatory character makes them the most likely of the new breed of CSR initiatives to be scrutinized in the WTO and possibly challenged. Thus, while many parts of the analysis below could apply to other CSR initiatives, our argument focuses on the subset of initiatives most likely to affect social and environmental outcomes and most likely to pose challenges under WTO rules.

NSMD systems can be formally defined as deliberative and adaptive governance institutions designed to embed social and environmental norms in the global marketplace that derive authority directly from interested audiences, including those they seek to regulate, not from sovereign states.²⁰

Their 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. NSMD systems also differ from corporate self-regulation and CSR statements of principles, 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.²¹ To be clear, what defines NSMD governance is not nongovernmental organization (NGO) rather than business sponsorship—business-dominated initiatives may evolve into NSMD systems—but rather between systems that do or do not have the above characteristics.

W. Pauly (eds), *Global Liberalism and Political Order: Toward a New Grand Compromise?* (Albany, NY: SUNY Press, 2007) 23–50.

¹⁹ Bernstein and Cashore, above n 8; Levi and Linton, above n 8, at 419.

²⁰ See Bernstein and Cashore, above n 8 for a detailed discussion of what differentiates these systems from other forms of eco-labeling and CSR.

²¹ 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 existing academic literature.

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, and to gain credibility and legitimacy for its members' standards.²² 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 FSC, which aims to combat global forest deterioration; the International Federation of Organic Agriculture Movements (IFOAM), which certifies organic food; the Marine Aquarium Council (MAC), which targets the hobby aquarium trade to promote sustainable management of marine ecosystems and fisheries; the 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 programmes for a wide range of manufactured products.

ISEAL assists and encourages its members to conform with or surpass any requirements under WTO rules for recognition as legitimate standardization bodies in order to avoid trade disputes. This proactive trade agenda 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.²³

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 published a handbook advising EU member governments on how to develop and implement green procurement policies.²⁴ Still, 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.²⁵ EU officials have also been advising other countries, including Japan, in an effort to promote these policies.²⁶ In addition, the 2005 G8 summit statement included a

²² 'ISEAL Code of Good Practice for Setting Social and Environmental Standards', P005, Public Version 4, January 2006, (hereafter ISEAL 2006) http://www.isealalliance.org/documents/pdf/P005_PD4_Jan06.pdf (visited 14 March 2006).

²³ Confidential interviews with representatives of NSMD systems.

²⁴ European Commission, *Buying Green! A Handbook on Environmental Public Procurement* (Luxembourg: Office for Official Publications of the European Communities, 2004).

²⁵ Ibid.

²⁶ Senior EU official, personal interview, February 2006.

reference to green procurement,²⁷ and multilateral development banks in cooperation with UN organizations, the OECD, the Canadian government, and non-governmental organizations have established an ‘Environmentally and Socially Responsible Procurement Working Group’.²⁸ Relatedly, some governments are seeking certification for state owned or managed resources or services. For example, Meidinger notes that several government agencies in Europe have already obtained certification of state owned or managed forests.²⁹

To the degree that these systems gain more widespread support and governments begin to implicitly or explicitly endorse them, the potential for conflict with the international trade regime is likely to increase.

C. 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, members of local communities where production is located or services provided,³⁰ and social and environmental groups accepting them as appropriate and justified as authoritative arenas in which to develop standards. These broader efforts to gain legitimacy and support, however, are not our focus here.³¹ Instead, we are specifically concerned with efforts to gain legitimacy in the context of international trade law. To capture this understanding of legitimacy, we borrow a definition from the organizational sociology literature, which views legitimacy as rooted in a collective audience’s shared belief, independent of particular observers, that ‘the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions’.³² To this, we add that these actions or policies must be justifiable to relevant audiences. In other words, to be legitimate, rules and institutions must be compatible or institutionally adaptable to existing institutionalized rules and norms already accepted by a society.

²⁷ 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.

²⁸ See <http://www.sustainableprocurement.net> (visited 27 August 2007).

²⁹ Errol Meidinger, ‘The Administrative Law of Global Private-Public Regulation: The Case of Forestry’, 17 (1) *The European Journal of International Law* 47 (2006), at 59.

³⁰ For example, forest or fishing communities in the case of forest and fisheries certification.

³¹ See Bernstein and Cashore, above n 8; Aseem Prakash, *Greening of the Firm: The Politics of Corporate Environmentalism* (Cambridge: Cambridge University Press, 2000); Susan Summers Raines, ‘Perceptions of Legitimacy in International Environmental Management Standards: The Participation Gap’, 3 (3) *Global Environmental Politics* 47 (2003); and Jorge Rivera, ‘Assessing a Voluntary Environmental Initiative in the Developing World: The Costa Rican Certification for Sustainable Tourism’, 35 (4) *Policy Sciences* 333 (2002) who to varying degrees address this question.

³² Mark C. Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’, 20 (3) *Academy of Management Review* 571 (1995), at 574.

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. Though these dimensions are separable analytically, they are interrelated in practice and international trade law treats each as potentially important in determining what counts as a legitimate international standard. For this reason, we are careful not to simply equate law and legitimacy, although law can be an important source and indicator of legitimacy for a rule.

For example, along the first dimension of legitimacy, in addition to conformity with WTO rules, legitimacy is enhanced when systems tap into broader norms explicitly or implicitly endorsed not only by states (whether formally acquiring the status of international law or through declarations or other forms of endorsement that may fall short of law), but also norms that have traction in wider global society, where states interact with a wide range of transnational civil society actors. While these norms are harder to measure, relevant normative trends for this study are easily observable. They include the growing recognition of the legitimacy and importance of addressing global environmental, social, and human rights concerns. There is also increasing pressure to democratize institutions of global governance, although less consensus on the exact mechanisms of accountability, participation, deliberation, or democratic decision-making that would entail.³³ Some evidence of the interrelationship of trade rules and these norms of wider international and global society can be seen in the WTO's 1994 Ministerial Declaration on Environment and Development, which promotes the normative compatibility of liberalized trade and economic development with values such as environmental protection and social cohesion.³⁴

The autonomy of NSMD systems from sovereign states has worked in favour 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

³³ David Held and Mathias Koenig-Archibugi (eds), *Global Governance and Public Accountability* (Oxford: Blackwell, 2005); Roger A. Payne and Nayef H. Samhat, *Democratizing Global Politics* (Albany, New York: SUNY Press, 2004); John G. Ruggie, 'Reconstituting the Global Public Domain – Issues, Actors, and Practices', 10 (4) *European Journal of International Relations* 499 (2004); Ruth Grant and Robert O. Keohane, 'Accountability and Abuses of Power in World Politics', 99 (1) *American Political Science Review* 29 (2005); Karin Bäckstrand, 'Democratizing Global Environmental Governance? Stakeholder Democracy after the World Summit on Sustainable Development', 12 (4) *European Journal of International Relations* 467 (2006); Steven Bernstein, 'Legitimacy in Global Environmental Governance', 1 (1) *Journal of International Law and International Relations* 139 (2005).

³⁴ World Trade Organization, *Decision on Trade and the Environment*, adopted 14 April 1994, by ministers at the meeting of the Uruguay Round Trade Negotiations Committee in Marrakech, http://www.wto.org/english/tratop_e/envir_e/issu5_e.htm (visited 5 June 2008).

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 towards sympathy with market mechanisms, open markets, and an increasingly liberal international economic order more broadly, which has provided a supportive normative environment for market-based governance mechanisms like NSMD systems.³⁵

On the second dimension of legitimacy, democratic norms inform expectations for procedural requirements of systems to gain legitimacy. Again, trade rules reflect this trend. For example, as we elaborate below, rules and guidelines about international standards increasingly encourage stakeholder involvement.

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 dimension of legitimacy 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.

Because trade law reflects these political dynamics, an analysis of what constitutes a legitimate international standard requires both a legal and political discussion.

II. 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 as they become more prevalent in the marketplace, compete with more traditional standard setting bodies, and states or international organizations potentially support or adopt them. Since relevant trade agreements encourage the adoption of only ‘recognized’ international standards, such recognition should shield countries that adopt them from disputes. The stakes are high for NSMD systems since a lack of recognition would leave other standards, frequently in the form of competitor systems with fewer on-the-ground requirements and weaker enforcement mechanisms, as safer alternatives to fill the regulatory gap. Normally, recognition of international standards could either occur through explicit references in relevant international trade agreements, such as TBT or SPS, or through WTO dispute settlement

³⁵ Steven Bernstein, *The Compromise of Liberal Environmentalism* (New York: Columbia University Press, 2001).

rulings. However, as we show below, trade rules do not foreclose the possibility that standardization bodies not explicitly named, including NSMD systems, can be legitimate international standards setters under international law.

A. TBT Agreement

The TBT is the most relevant WTO agreement for NSMD system standards since it includes coverage of non-governmental standardization bodies. The TBT aims primarily to ensure that (mandatory) technical regulations and (non-mandatory) standards³⁶ do not ‘create unnecessary obstacles to international trade’ (preamble and Article 2.2).³⁷ The TBT also incorporates the foundational GATT principles of Most-Favored Nation and National Treatment, but, notably, its provisions prevail over the GATT 1994 provisions in the event of a conflict between the two.³⁸ The TBT permits national technical regulations, including for environmental purposes and including those based on international standards, 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 an NSMD certification system, since the advantage for a product would depend on the free choice of consumers, which the TBT allows.

³⁶ TBT Annex 1 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.’ It 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’.

³⁷ Though Article 2.2 applies only to technical regulations.

³⁸ WTO General Interpretive Note to Annex 1A, available at: http://www.wto.org/english/docs_e/legal_e/05-anx1a_e.htm (visited 5 June 2008). For further discussion, see Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (London: Kluwer International Law, 1997), 120.

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 to trade because it segments the marketplace and denies its exporters access to the ‘non-illegally logged products’ segment.³⁹ Under this interpretation, the standard is *de facto* mandatory. It could be subject to discipline under the TBT, and the EU could be subject to a trade dispute.

Indeed, voluntary standards determined to be mandatory in practice have been the subject of several trade disputes under WTO law. In these cases, the determination of whether a standard or measure was *de facto* mandatory hinged on whether they were considered laws, regulations, or requirements—in other words were or had the effect of being legally binding—and whether there was some trade consequence, for example the withdrawal of a tariff benefit in the case of Canada-Autos⁴⁰ or an investment being disallowed in the case of Canada-FIRA⁴¹—for failing to adhere to it.

Notably, even if interpreted as *de facto* mandatory, only a standard adopted and implemented by a WTO member government provides a target for a trade dispute. Standards that operate independently of governments may produce similar marketplace effects, but provide no such target.

The TBT also states that members ‘shall use’ international standards or ‘relevant parts thereof,’ if available, ‘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 relevant international standard. While it defines a standard (see above n. 36) as a ‘document approved by a recognized body’, it does not specify criteria to qualify as a ‘recognized body’.⁴² Instead, TBT Annex 3 (the Code of Good Practice for the Preparation, Adoption and Application of Standards), which applies to standards at all levels of governance, and the non-binding Annex 4 of the TBT Committee’s Second

³⁹ Switzerland expressed precisely this concern to the Trade and Environment (CTE) and TBT committees [submission by Switzerland in the TBT Committee: Marking and Labelling Requirements. G/TBT/W/162 (2001)].

⁴⁰ WTO Appellate Body Report, *Canada—Certain Measures Affecting the Automotive Industry (Canada—Autos)*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2995.

⁴¹ GATT Panel Report, *Canada—Administration of the Foreign Investment Review Act (Canada—FIRA)*, adopted 7 February 1984, BISD 30S/140.

⁴² 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’.

Triennial Review (2000),⁴³ which specifically concerns principles for the development of 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 documents 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 of the Second Triennial Review specifically encourages multi-stakeholder participation of all interested and relevant parties at every stage of standard development. Both 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.⁴⁴

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

Finally, both documents suggest that standardization bodies should be open to membership from all relevant bodies of WTO members (e.g. national standardization bodies). 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 guidelines contained in Annex 3 or that are developed through the Triennial Review Process 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 (TBT Annex 3),

⁴³ The Triennial Review process is designed to allow Members, by consensus, to agree to recommendations to further the implementation, effectiveness, and operation of the agreement and recommend plans for future work of the TBT committee. Its interpretations and recommendations are non-binding, though offer guidance to Members.

⁴⁴ Food and Agricultural Organization (FAO), *Environmental and Social Standards, Certification and Labelling for Cash Crops* (Rome: FAO of the UN, 2003). <ftp://ftp.fao.org/docrep/fao/006/Y5136E/Y5136E00.pdf> (visited 15 March 2006), at 79.

what constitutes a ‘reasonable measure’ remains undefined.⁴⁵ In practice, WTO members have been reluctant to pressure private bodies to comply with TBT Annex 3 and Annex 4 of the Second Triennial Review.⁴⁶ These ambiguities mean even full compliance with those guidelines would not guarantee an NSMD system recognition as an international standardization body by the WTO or that its 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 use international standards as a basis for their technical regulations, comes from the EC-Sardines case.⁴⁷ The WTO dispute panel and the Appellate Body (AB) found the European Communities (EC) in violation of Article 2.4 of the TBT for failing to use a ‘relevant’ Codex standard⁴⁸ ‘as a basis for’ its regulation of trade in preserved sardines.⁴⁹ The panel and the AB determined that the Codex standard was not ‘ineffective or inappropriate’ to fulfill the ‘legitimate objectives’ pursued by the EC Regulation. Therefore, the EC had an obligation to use the standard as a basis for its community regulation.⁵⁰

Several elements of this case are particularly revealing. First, although the EC argued that only standards adopted by an international standardizing body by consensus should be relevant for the purposes of Article 2.4,⁵¹

⁴⁵ GATT XXIV:12 contains a similar reference to ‘reasonable measures’, which dispute panels have interpreted to mean ‘all constitutionally available measures’. See GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages (US – Malt Beverages)*, DS23/R, adopted 19 June 1992, BISD 39S/206. GATT 1992. However, an earlier panel decision 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’. See GATT Panel Report, *Canada – Measures Affecting the Sale of Gold Coins (Canada – Gold Coins)*, L/5863, 17 September 1985, unadopted.

⁴⁶ Interview, Ludivine Tamiotti, Legal Affairs Officer, WTO Trade and Environment Division, 24 February 2006, Geneva.

⁴⁷ 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. See WTO Appellate Body Report, *European Communities – Trade Description of Sardines (EC – Sardines)*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359; International Institute for Sustainable Development (IISD), ‘WTO Dispute Settlement: Sardines Panel Sides with Peru’, 6 (21) *Bridges Weekly Trade News Digest*, 4 June 2002, <http://www.ictsd.org/weekly/02-06-04/story3.htm> (visited 12 March 2006).

⁴⁸ Codex Alimentarius Commission, Codex Standard for Canned Sardines and Sardine-Type Products (Codex Stan 94 – 1981), Article 2.1.

⁴⁹ Council Regulation (EEC) No 2136/89 of 21 June 1989 laying down common marketing standards for preserved sardines, OJ 1989 L 212.

⁵⁰ There is an extensive literature on the EC-Sardines case. See, for example, Robert Howse, ‘The Sardines Panel and AB Ruling – Some Preliminary Reactions’, 29 (3) *Legal Issues of Economic Integration* 247 (2002); Gregory Shaffer and Victor Mosoti, ‘The EC-Sardines Case: How North-South NGO-Government Links Benefited Peru’, 6 (7) *Bridges Weekly Trade Digest*, October 2002, http://www.trade-environment.org/page/ictsd/Bridges_Monthly/sardines_case_10_02.pdf (visited 4 January 2008).

⁵¹ Chile and the United States shared this view. Furthermore, Chile argued that this point was confirmed in the Second Triennial Review of the TBT Agreement, Annex 4. See *EC – Sardines*.

the AB upheld the Panel's determination that while consensus is preferable, it is not always possible.⁵² The AB confirmed that international standards not adopted by consensus are *within* the scope of the TBT Agreement and can constitute a 'relevant' international standard. Second, the panel and the AB clarified that to be 'relevant,' an international standard must bear upon, be related to, or be pertinent to a national regulation, and that Article 2.4 requires WTO members to use international standards that meet this criterion 'as a basis' for their national regulations.

Third, the AB also upheld the panel's finding 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'.⁵³ 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 there was no known competing *international* standard on Sardines and no question within the WTO, according to WTO legal officials, that Codex is a 'recognized' body.⁵⁴

Thus, how a dispute would turn out if a WTO member adopted or referenced an NSMD governance system's standard in its technical regulations would hinge on whether it would be considered a 'recognized' body. While the EC-Sardines case opens the door for an NSMD governance system to be 'recognized,' it provides little guidance on its chances of succeeding or how it would fare if it had to compete with another standard. Given the very small number of disputes involving the TBT to date,⁵⁵ further clarification on

⁵² It determined that 'the omission of a consensus requirement in the definition of a standard in Annex 1.2 of the TBT Agreement was a deliberate choice on the part of the drafters of the TBT Agreement, and that the last two phrases of the Explanatory note were included to give effect to this choice. Had the negotiators considered consensus to be necessary to satisfy the definition of "standard", we believe they would have said so explicitly in the definition itself, as is the case in the ISO/IEC Guide'. *EC - Sardines*, at 62, para 225.

⁵³ 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.

⁵⁴ Tamiotti interview, above n 46.

⁵⁵ Only two cases involving the TBT have been brought before the DSU – *EC-Sardines* and *EC-Scallops*. The panel findings in *Scallops* are not discussed here because the parties settled. See WTO Panel Report, *European Communities – Trade Description of Scallops – Request by Canada*, WT/DS7/R, 5 August 1996, unadopted, DSR 1996:I, 89; WTO Panel Report, *European Communities – Trade Description of Scallops – Requests by Peru and Chile*, WT/DS12/R, WT/DS14/R, 5 August 1996, unadopted, DSR 1996:I, 93. In *EC-Asbestos*, the dispute settlement panel considered complaints under GATT. See WTO Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, modified by Appellate Body Report, WT/DS135/AB/R, DSR 2001:VIII, 3305.

requirements for recognition and criteria for ‘relevant’ international standards seem unlikely in the near term.

Another source of ambiguity is that while the TBT recognizes labels that include production and processing methods (PPMs),⁵⁶ 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, remains unclear. This matters for NSMD systems since many include npr-PPMs. Whereas the definitions of technical regulations and standards in TBT Annex 1 refer explicitly to product ‘related processes and production methods’, the second sentence in each does not. Interpreting the two sentences together would mean the coverage of technical regulations and standards is limited to product-related PPMs—thus a government reference to npr-PPMs would be covered only by the GATT, and not the TBT Agreement. However, no disputes have addressed this issue.⁵⁷ 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 such a standard is allowable under GATT Article XX—general exceptions including those based on health and safety or environmental criteria.

The most relevant recent case—*Shrimp/Turtle*⁵⁸—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.⁵⁹ It did not directly address the question of how npr-PPMs would be treated if adopted or referenced in national regulations. The AB ruling, in overturning an earlier Panel decision, considered the US measure an exemption permitted by Article XX(g), which allows discriminatory measures deemed to conserve

⁵⁶ On the product/process distinction in WTO Agreements, see Robert Howse and Donald Reagan, ‘The Product/Process Distinction: An Illusionary Basis for Disciplining “Unilateralism” in International Law’, 11 (2) *European Journal of International Law* 249 (2000); John H. Jackson, ‘Comments on *Shrimp/Turtle* and the Product/Process Distinction’, 11 (2) *European Journal of International Law* 303 (2000). On jurisprudence, see Robert E. Hudec, ‘The Product-Process Doctrine in GATT/WTO Jurisprudence’, in Marco Bronckers et al. (eds), *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague, Netherlands: Kluwer Law International, 2000).

⁵⁷ Joshi, above n 12, at 74–5.

⁵⁸ WTO Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp/Turtle)*, WT/DS58/R and Corr.1, adopted 6 November 1998, modified by Appellate Body Report, WT/DS58/AB/R, DSR 1998:VII, 2821.

⁵⁹ 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.

exhaustible natural resources. However, it found the US measure in violation of the chapeau of Article XX, which prohibits 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’.⁶⁰

This landmark ruling for the first time determined that the extraterritorial application of national regulations (in this case including npr-PPMs) is justified under certain conditions, including to achieve environmental or other non-trade-related objectives.⁶¹ However, since the AB considered this case in terms of Article XX and because the United States conceded that its measures violated Article XI,⁶² 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’.

This uncertainty is because existing jurisprudence on ‘likeness’ has used product-related criteria. In *Border Tax Criteria*, the pre-WTO report of the Working Party on Border Tax Adjustments identified three such criteria: the end uses of a product in a given market; consumers’ tastes and habits; and the product’s properties, nature, and quality.⁶³ In *Japan—Alcoholic Beverages II*, the GATT Panel added the tariff classification of a product to the list of criteria. It also emphasized that ‘likeness’ must be determined on a case-by-case basis and involve a ‘discretionary decision that must be made in considering the various characteristics of products in individual cases’.⁶⁴ The AB in *EC—Asbestos* stressed that Panels must look at each criterion separately, and then weigh all relevant evidence in determining whether products are ‘like products’. It also considered health risks, as permitted under Article XX(b), to be a legitimate determinant of ‘(un)likeness’.⁶⁵ In no case, however, were the criteria expanded to include npr-PPMs, but neither were they excluded.

⁶⁰ 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 Article XX.

⁶¹ The Appellate Body upheld this ruling in *EC—Asbestos* (although it reversed the panel decision in other respects). 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 Panel and Appellate Body Reports above n 55.

⁶² Article XI prohibits the use of quotas or measures other than duties to restrict either export or imports.

⁶³ GATT Working Party on Border Tax Adjustments Report, *Border Tax Adjustments (Border Tax Criteria)*, L/3464, adopted 2 December 1970.

⁶⁴ WTO Appellate Body Report, *Japan — Taxes on Alcoholic Beverages (Japan — Alcohol)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97.

⁶⁵ WTO Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products (EC—Asbestos)*, WT/DS135/AB/R, adopted 5 April 2001.

In sum, 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.

B. Government Procurement Agreement (GPA)⁶⁶

The plurilateral GPA may also become relevant—though it only applies to signatories—if NSMD systems pursue a strategy of encouraging governments to adopt their standards in procurement policies, as some systems such as the FSC 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 or text in the GPA qualifying that product or processing method technical specifications should be product related, there is no reason to assume npr-PPMs do not fall within the scope of the GPA. It specifies (Article VI.1) that technical specifications should not create unnecessary obstacles to international trade. Thus, any dispute among signatories on procurement will likely hinge on whether NSMD systems and their standards become recognized.

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, or relevant parts thereof, developed by recognized bodies as a basis for drafting technical specifications on government procurement. However, also like the TBT, the GPA provides little guidance on the meaning of 'recognized body' or 'relevant' international standard.

C. SPS Agreement

The SPS Agreement covers how governments can apply food safety and animal and plant health measures that may affect international trade. It is unique among the WTO Agreements in its goal to ensure governments only impose such measures based on scientific principles (Article 2.2), as a way to guard against unjustifiable restrictions on trade.⁶⁷ Although SPS covers both products and PPMs, in practice most SPS measures are product related since they concern health or food safety risks of imported products within

⁶⁶ This section refers to the GPA 1994. At the time of writing, a significantly revised GPA (2007) had been negotiated, but had not yet entered into force. The relevant provisions cited below on technical specifications are reproduced in the revised agreement in Article X, though, notably, with an additional clause (Article X.6) that explicitly allows parties to 'prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment.'

⁶⁷ For an account of this 'uniqueness' that explores the rationale behind different evidentiary requirements for health and environment, see Tracey Epps and Andrew James Green, 'The WTO, Science, and the Environment: Moving Towards Consistency', 10 (2) *Journal of International Economic Law* 285 (2007).

the territory of the importing state, 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 as a basis for domestic regulations. However, unlike the TBT, SPS 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. They establish benchmark standards for WTO members to reference when developing their regulations, have observer status in the SPS Committee, and are frequently called upon to offer expert advice in WTO dispute settlement procedures.⁶⁸

Under SPS Article 3.3, WTO members may introduce measures that result in more stringent levels of SPS protection than would be achieved if they based their measures on the international standards developed by these three organizations *if* there 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.⁶⁹

⁶⁸ Interview, Michael Roberts, Economic Affairs Officer, Agriculture and Commodities Division, WTO, 24 February 2006, Geneva and confidential interviews.

⁶⁹ In the EC Biotech Products case, the EC questioned whether Article 5.7 permits WTO members to invoke a broader precautionary principle because of scientific uncertainty surrounding environmental and health risks. It argued that ‘scientific uncertainty’ and ‘insufficient scientific evidence’ were interchangeable thereby rendering the requirement for a science-based risk assessment inappropriate. In its September 2006 ruling, a Panel determined that the EC was ineligible to invoke the limited and provisional safeguards contained in Article 5.7 because they failed to satisfy all four cumulative requirements: (1) relevant scientific information must be insufficient; (2) the measure must be adopted on the basis of available pertinent information; (3) the country must obtain additional information necessary for a more objective assessment of risk; and (4) the measure must be reviewed within a reasonable period of time. Moreover, the Panel ruled that scientific uncertainty does not negate the requirement to conduct a risk assessment. See WTO Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (EC – Biotech)*, WT/DS291/R, adopted 21 November 2006. See also, Lawrence Kogan, ‘World Trade Organization Biotech Decision Clarifies Central Role of Science in Evaluating Health and Environmental Risks for Regulation Purposes’, 2 (3) *Global Trade and Customs Journal* 149 (2007).

If a member can provide sufficient scientific justification for developing more stringent measures, it must also consistently apply levels of protection.⁷⁰

In addition, SPS Annex A paragraph 3(d) allows WTO members to reference other 'relevant' international standards where the three recognized standards setters lack coverage. 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 have sought such recognition. Indeed, Marceau and Trachtman have argued that these three standardization bodies have played the role of exclusive quasi-legislators, because in practice they make the rules.⁷¹ Thus, as a practical matter, recognition of an NSMD system under SPS is unlikely since there is little regulatory space not covered by one of the three recognized bodies. Ethical, environmental, or social standards related to food would fall under the rules of the TBT.

However, a close real-world example is GLOBALGAP, a private-sector partnership of major food retailers, which has developed standards for a wide range of agricultural practices including some related to food safety, environmental protection, and worker welfare.⁷² The challenges it faces are similar to what might face an NSMD system. For example, Uruguay and Egypt have led a group of developing countries in the SPS committee who argue private sector food standards are arbitrary and difficult for developing countries to meet.⁷³ For the purposes of our argument (below) on regulatory space, three implications of this example stand out. One, GLOBALGAP standards remain technically outside the scope of SPS (as would an NSMD system's standards) as long as they are marketplace standards not adopted by governments. However, the same arguments discussed above in the context of TBT about *de facto* regulation might be raised. Second, NSMD systems would be well placed to respond to legitimacy concerns raised against GLOBALGAP, which is perceived as serving the interests of food retailers and therefore weak in terms of stakeholder democracy and equity. Our regulatory space argument sets a high bar—meeting TBT-related guidelines as well as the ISEAL code of good practices as a baseline—for recognition as an international standard setting body. Finally, the rising uptake in the marketplace of GLOBALGAP, and the potential of a system closer to NSMD characteristics (e.g. IFOAM) to play a similar role, could put even further pressure on the already recognized standard setters listed in

⁷⁰ WTO Appellate Body Report, *Australia – Measures Affecting Importation of Salmon (Australia – Salmon)*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327.

⁷¹ Gabrielle Marceau and Joel P. Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement and the General Agreement on Tariffs and Trade', 36 (5) *Journal of World Trade* 811 (2002), at 838.

⁷² GLOBALG.A.P. <http://www.globalgap.org> (visited 9 June 2008).

⁷³ WTO, 'Sanitary and Phytosanitary Measures: Members Set to Agree on Regionalization, Improved SPS Transparency,' *WTO: News Items*, 2 and 3 April 2008. http://www.wto.org/english/news_e/news08_e/spis_apr08_e.htm (visited 9 June 2008).

SPS Annex A paragraph 3 to adhere to evolving good practices for standard setting bodies, including openness and transparency, especially if they are perceived as slow to respond to evolving consumer and citizen concerns about food safety risks.⁷⁴ To the degree they do not respond, one could imagine demands for recognition of more responsive bodies, although the legitimating role of science in risk assessments under SPS means that criterion—even as understandings of ‘sound science’ may evolve—will remain for recognition of any alternative standard setter.

III. THE POLITICS OF NSMD SYSTEM RECOGNITION

A. 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 unreasonable to evaluate its traction in the marketplace, and hence its legitimacy, according to its geographical reach. Large marketing budgets or more attractive branding may also advantage some systems, 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. Our interviews with ISEAL and NSMD governance systems’ staff indicate they are engaged in increasingly proactive efforts to show that 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 under the TBT. Indeed, in the absence of an official process or body that determines which standards are authoritative, NSMD systems are engaged in a multi-pronged strategy 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 Second Triennial Review Annex 4, as well as ISO/IEC guide 59: Code of Good Practice for

⁷⁴ For how such pressures might play out in a trade dispute, see Caroline E. Foster, ‘Public Opinion and the Interpretation of the World Trade Organization’s Agreement on Sanitary and Phytosanitary Measures’, 11 (2) *Journal of International Economic Law* 427 (2008).

Standardization.⁷⁵ The Code also goes beyond these documents with additional criteria aimed more specifically at social and environmental standard setting. From ISEAL's perspective, the procedural criteria contained in the other guidelines the Code references 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 Code therefore includes provisions aimed more specifically at PPM-based environmental and social standards.⁷⁶

The ISEAL Code also aims to augment the provisions in TBT Annex 3 and Second Triennial Review Annex 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'. 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.⁷⁷ Strategies through which NSMD systems comply with the provisions of the Code are frequently re-evaluated since meaningful multi-stakeholder participation is among the most difficult requirements to fulfill.⁷⁸

Unlike the TBT and 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'.⁷⁹

⁷⁵ ISO, *ISO/IEC Guide 59: 1994 Code of Good Practice for Standardization* (Geneva, Switzerland: 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.

⁷⁶ 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 actors in the supply chain.' ISEAL, 'Guidance on the Application of the ISEAL Code of Good Practice for Setting Social and Environmental Standards', P020 Version 2, January 2004 (*ISEAL 2004*). http://www.isealalliance.org/documents/pdf/P020_PD2.pdf (visited 14 March 2006). See also ISEAL 2006, above n 22, Sections 1.1 and 1.2.

⁷⁷ ISEAL 2004, *ibid*, Section 7.4.

⁷⁸ ISEAL, 'Stakeholder Consultation Practices in Standards Development. R044, Public Version 1.' http://www.isealalliance.org/documents/pdf/R044_StakeholderConsult_Sept%2005.pdf (visited 14 March 2006).

⁷⁹ ISEAL 2004, above n 73, at Section 5.7.

Finally, Section 6.7 of the ISEAL Code of Good Practices encourages NSMD systems to coordinate their standard setting activities and to reduce overlap of standards.⁸⁰ However, as long as NSMD systems meet the thresholds contained in the Code, ISEAL makes no attempt to adjudicate between NSMD standards. Competition between NSMD systems can be beneficial as long as the standards are credible and will result in positive environmental and social impacts.⁸¹ 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), a publicly accessible network of web servers of standardization bodies, administered by the ISO Information Network.⁸² IFOAM and FSC were the first NSMD systems to do so. However, the significance of meeting WSSN requirements and thereby gaining recognition on its online service remains unclear. A senior ISO official we interviewed 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.

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.⁸³ ISO is a consensus-based non-governmental organization whose membership is comprised of 156 national standardization bodies.

⁸⁰ It 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 harmonization of standards and/or technical equivalence agreements between standards, where there is a possibility of doing so without compromising the standard'.

⁸¹ 'Interview with Patrick Mallet', 24 Organic Standard (2003).

⁸² World Standards Services Network (WSSN), 'About WSSN' <http://www.wssn.net/WSSN/index.htm> (visited 12 March 2006).

⁸³ There are three 'sister' organizations in international standard setting: ISO; International Telecommunication Union (ITU) (inter-governmental); and International Electrotechnical

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.

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 recently, ISO launched a 'social responsibility' initiative, to be published in 2010 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 ISO membership. 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,⁸⁴ NSMD systems should work with or be 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.⁸⁵ According to ISO, only it provides members with well-documented, orderly mechanisms to build and demonstrate a 'double consensus'—among stakeholders (which have in practice been mainly industry) and across countries—on its standards. 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.

Commission (IEC) (non-governmental). The three organizations try to coordinate their standardization activities to ensure complementarity.

⁸⁴ This and the next paragraph are largely based on confidential interviews with senior ISO and NSMD staff.

⁸⁵ There are no current proposals for ISO to develop a sustainable forest management system.

Running counter to these criticisms, ISEAL demands its members comply with its Code of Good Practice, which addresses many of these concerns. 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'.⁸⁶

The criticisms also suggest a need for greater communication among international standard setting organizations, although they might also reflect a turf war. Despite some demonstrated willingness among NSMD systems to cooperate with ISO and to respect its guidelines, 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. Whereas 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 system 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. Moreover, whereas ISO has faced criticism for its domination by industry and the lack of developing countries' influence in standard setting that affects them,⁸⁷ ISEAL encourages its members to 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, observer status (along with IEC) in the Committee on Trade and Environment (CTE), SPS and TBT committees, and generally close relationship with the WTO (with which it shares the common goal of trade facilitation)⁸⁸ mean the burden of proof will likely fall more heavily on NSMD systems to convince governments of their legitimacy. Unquestionably, the TBT committee has thus far regarded ISO as the key international standardization body.

Nonetheless, nothing in the WTO Agreements formally grants ISO status as the pre-eminent international standardization body and officials we interviewed within the Trade and Environment Division of the WTO do not view ISO as necessarily the *de facto* international standard setter. No consensus

⁸⁶ ISEAL 2004, above n 73, at Section 5.6.

⁸⁷ Jennifer Clapp, 'The Privatization of Global Environmental Governance: ISO 14000 and the Developing World', 4 (3) *Global Governance* 295 (1998).

⁸⁸ For details of this relationship and common goals, see ISO/IEC Information Centre, 'WTO, ISO, IEC and World Trade' available at www.standardsinfo.net/info/livelink/fetch/2000/148478/6301438/inttrade.html and ISO 2006.

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 to ensure the interests of all WTO members are represented. As environmental and social concerns mount, it seems likely that other standard setting bodies, including NSMD systems, will challenge ISO's dominance in these areas.

B. 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 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-labelled 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 labelling 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, which have implications for the legitimacy and recognition of NSMD system standards.⁸⁹ For example, governments have been reluctant to choose between various, potentially competing, standards. 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'⁹⁰ owing to developing country concerns it would constitute a non-tariff trade barrier and contravene WTO rules.⁹¹ Similarly, the World Bank had to defend itself against criticism in 2004 from the PEFC for testing an assessment tool for forest certification that PEFC argued had the appearance of favouring one

⁸⁹ For a detailed report on the possible constructive and detrimental effects of governments' use of technical standards see WTO, 'World Trade Report 2005', http://www.wto.org/english/news_e/pres05_e/pr411_e.htm (visited 2 June 2006), at Section II.

⁹⁰ The impetus for the proposal came from the Clinton administration as part of its promotion of labour standard certification, which eventually evolved into the NSMD system FLO; see Tim Bartley, 'Certifying Forests and Factories: States, Social Movements and the Rise of Private Regulation in the Apparel and Forest Product Fields', 31 *Politics & Society* 433 (2003).

⁹¹ Bartley, *ibid.*, at 450.

system, the FSC.⁹² And, in 2003, the European Commission abandoned an initiative in the context of its Sustainable Trade Action Plan to devise a community guideline designed to help consumers select between 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 stakeholder consultation, the European Commission decided it would be inappropriate 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.⁹³

Meanwhile, after years of stalemate, WTO members now show little political inclination to address the legal uncertainty surrounding the TBT's coverage of npr-PPMs in the CTE or TBT Committee.

Until 2004, eco-labelling had been on the agenda of the CTE, though it has no formal negotiating authority (it operates as a convener for discussions on environmental issues). As the issue evolved, the European Communities became increasingly isolated in interpreting the TBT as covering npr-PPMs. Other developed and developing countries alike have staunchly opposed any attempt to work through the CTE to extend the TBT Agreement to permit or legitimize the use of standards based on npr-PPMs.⁹⁴ 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 EC, they argued that the TBT covers npr-PPMs such as eco-labelling schemes and they do not necessarily constitute a violation of WTO rules.⁹⁵ The United States, concerned by the potential market access effects of npr-PPMs, argued only in favour of encouraging full transparency at each stage of an eco-labelling programme's development.⁹⁶ In the end, delegates could not reach consensus and the CTE simply made a general statement attesting to the possible efficacy of

⁹² Global Forest Alliance, *Forest Certification Assessment Guide (FCAG): A Framework for Assessing Credible Forest Certification Systems/Schemes* (Washington, D.C.: WWF/World Bank Global Forest Alliance, 2006). The 2004 letter from the WWF/World Bank Forest Alliance to the PEFC is available online at [http://lnweb18.worldbank.org/ESSD/envext.nsf/80ByDocName/13JulyLettertoPEFC/\\$FILE/AllianceLetterToPEFCJuly132004.pdf](http://lnweb18.worldbank.org/ESSD/envext.nsf/80ByDocName/13JulyLettertoPEFC/$FILE/AllianceLetterToPEFCJuly132004.pdf).

⁹³ Interview, Gareth Steel, Policy Desk Officer, European Commission, DG Trade, Unit G3: Sustainable Development, 3 June, 2005, Brussels.

⁹⁴ Joshi, above n 12, at 82–3.

⁹⁵ Canada's submission to the CTE also argued that TBT Annex 3 applies to npr-PPMs 'whether voluntary or mandatory and whether administered by governmental or non-governmental bodies'. See WTO, *Submission to the CTE by Canada*. WT/CTW/W/21, 21 February 1996; WTO, *Submission to the CTE by Canada*. WT/CTE/W/38, 22 July 1996.

⁹⁶ Committee on Trade and the Environment (CTE). *US Proposal Regarding Further Work on Transparency of Eco-Labelling*. WT/CTE/W/27, 1996; CTE, *Draft Decision on Transparency in Eco-labelling Programmes. Non-paper by the United States*. JOB No. 4704, 1996.

npr-PPM-based mechanisms such as eco-labelling.⁹⁷ Only the US recommendation for increased transparency found its way to the First Triennial Review of the TBT Agreement in 1997.⁹⁸

The mandate granted by the Doha Ministerial Declaration to the CTE to pursue further work on eco-labelling came directly from EC pressure.⁹⁹ Its submission to the CTE in March 2003 included proposals that 'voluntary eco-labelling schemes' are 'legitimate and within the rights and obligations of the WTO Agreements' and for technical assistance for improved access for developing countries and stakeholders.¹⁰⁰ In the months prior to the Cancun Ministerial Conference, the EC called for three dedicated sessions in the CTE in 2004 aimed at increasing the use of voluntary eco-labelling schemes. All non-European and developing countries roundly rejected the proposal.¹⁰¹ No significant further developments on the issue have occurred in the CTE since Cancun.

Notably, when special sessions of the CTE with negotiating authority were launched in 2002 as part of the Doha Round, their mandate did not include eco-labelling.¹⁰² The lack of a clear institutional home for negotiations on voluntary eco-labels, many of which involve standards based on npr-PPMs, has contributed to the lack of resolution on these issues.¹⁰³

The npr-PPM issue has played out in much the same way in the TBT Committee. 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 results of which we outlined earlier in the discussion of the Second Triennial Review (Annex 4). Moreover, the issue of npr-PPMs is completely off the Technical Barriers to Trade Committee (TBTC) agenda in the current round of multilateral trade negotiations.

⁹⁷ CTE, *Conclusions and Recommendations of the CTE to the 1996 Singapore Ministerial Conference*, WT/CTE/1, 1996.

⁹⁸ Technical Barriers to Trade Committee (TBTC), *First Triennial Review of the Operation and Implementation of the Agreements on Technical Barriers to Trade*, G/TBT/5, 1997.

⁹⁹ Joshi, above n 12, at 82. Details of the mandate are available at WTO, *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, adopted 14 November 2001, at para 31.

¹⁰⁰ CTE, *Submission by the European Communities on Labelling for Environmental Purposes*, WT/CTE/W/225+Corr.1, 2003. Eastern European countries that 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 TBTC, *Submission by Switzerland in the TBT Committee: Marking and Labelling Requirements*, G/TBT/W/162, 2001.

¹⁰¹ Joshi, above n 12, at 84.

¹⁰² Instead, the mandate included 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. CTE, *Summary Report on the First Meeting of the Committee on Trade and Environment Special Session*, TN/TE/R/1, 12 April 2002.

¹⁰³ Tamiotti Interview, above n 46.

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 further engage the issue in either the CTE or the TBTC stems from concerns 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 and industrial products exports. The United States has argued that the WTO provides sufficient scope to protect the environment and no further work is required on the subject.¹⁰⁴

Developing countries' opposition to further work on the issue of npr-PPMs is more complex. First, developing countries have strongly resisted any renegotiation of TBT provisions to include npr-PPM-based standards and regulations because they view any such shift as inevitably increasing the likelihood that labour standards could become the basis for labelling or other 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.¹⁰⁵ In addition, they may not reflect the local conditions in developing countries because they reflect 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.¹⁰⁶ 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, and become *de facto* mandatory regulations that would further hamper developing countries' competitive advantage.

¹⁰⁴ The United States made this argument in 1996 in response to some WTO members' (led by the EC) unsuccessful attempt to reform Article XX GATT to accommodate environmental concerns. See Joshi, above n 12.

¹⁰⁵ WTO, 'Committee Tackles Market Access Issues', 32 Trade and Environment Bulletin (17 March 2000), www.wto.org/english/tratop_e/envir_e/te032_e.htm (visited 17 March 2006); CTE, 'Report to the 5th Session of the WTO Ministerial Conference in Cancún', WT/CTE/8, 11 July 2003 (03-3739).

¹⁰⁶ CTE, *Conclusions and Recommendations of the CTE to the 1996 Singapore Ministerial Conference*, WT/CTE/1; Joshi, above n 12, at 72.

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.

IV. 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. 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. Although we have been careful not to equate law and legitimacy, conformity with WTO rules and guidelines is a significant indicator of the minimal requirements for legitimacy in the context of the international trade regime. Our concern driving the legal analysis is that even apparent conformity with the rules will not be enough because of ambiguity around what counts as an international standard and the potential for competition among standards. 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 be developed that 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. Instead, 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 preserved or carved out from WTO disciplines such that NSMD systems can operate—and in effect regulate directly in the marketplace—outside the direct purview of WTO disciplines.

While policy space is a controversial and contested concept, it already has a normative foundation in WTO law.¹⁰⁷ 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. The idea is to carve out space from WTO disciplines to allow developing countries sufficient policy flexibility and time to adjust to new trade rules. Policy 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.¹⁰⁸

Rather than applying the concept to allow developing countries room to develop appropriate domestic policies, the idea here is to preserve transnational 'regulatory' space in environmental and social regulation where states have been unwilling, or found it politically difficult, to make progress in WTO negotiations and/or other forums. We choose the word 'regulatory' rather than 'policy' because the goal of NSMD systems is to regulate directly in the global marketplace. Thus, the analogy to 'policy space' is to the idea of creating 'space' in the pursuit of social values and responsiveness to public demands, which is common to both concepts. The danger our proposal is designed to counteract is that given the poor prospects for the development of positive rules on environmental or social protections in the WTO, existing rules designed for other purposes will be applied to environmental and social regulation of the global marketplace in the absence of a norm like transnational regulatory space. Thus, rather than going the route of creating positive provisions, the idea here is for a 'negative' regulatory space kept clear from further rule development. Such space would allow a range of initiatives to move ahead of current international (i.e. intergovernmental) regulations to socially and environmentally regulate the global marketplace. It might also mean in practice allowing more than one recognized international standard, provided each does not violate trade rules already in place.

Although some of our specific analysis above has suggested ways in which WTO disciplines might not apply to NSMD system's standards, our primary argument has focused on their prospects of being recognized as international standard setters and preserving regulatory space for that to happen. Given

¹⁰⁷ For discussion, see Kevin Gallagher (ed) *Putting Development First: The Importance of Policy Space in the WTO and IFIs* (London: Zed Books, 2005); Bernard Hoekman, 'Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment', 8 (2) *Journal of International Economic Law* 405 (2005); Robert M. Hamney, 'Expanding National Policy Space for Development: Why the Multilateral Trading System Must Change', *Trade Related Agenda, Development and Equity (T.R.A.D.E) Working Papers* 25, (Geneva: South Center, 2005).

¹⁰⁸ Committee on Trade and Development (CTD), 'Work on Special and Differential Provisions', http://www.wto.org/English/tratop_e/devel_e/dev_special_differential_provisions_e.htm (visited 3 May 2006).

our legal analysis, recognition of these standards as international standards is essential for NSMD systems' long-term legitimacy and effectiveness since national regulations based on them would be presumed to be in compliance with WTO disciplines.

While the term 'regulatory space' is our own, it builds on the basic premise of John Ruggie's idea of embedded liberalism that informed the original Bretton Woods negotiations. In that era, the compromise was to allow exceptions and exemptions for national policies to ensure social stability—especially labour and welfare policies—which might be otherwise viewed as protectionist. In a more globalized era, a new locus of attempts to socially regulate or buffer the effects of pure laissez-faire liberalism is transnational environmental and social regulation. In sum, while we agree with commentators such as Susan Aaronson¹⁰⁹ 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, writing about voluntary CSR initiatives more broadly, suggests that members issue a Ministerial Declaration that says such initiatives 'do not inherently impede trade'.¹¹⁰ Our preference, however, is for an even less overtly political response: to simply preserve the space for NSMD systems that current WTO rules and guidelines already allow. An exhortation to refrain from making further WTO rules on standards setting may be sufficient. 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. 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 or risk causing 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 suspicious of any move in this direction. According to Joshi, 'none of the non-governmental bodies administering eco-labelling

¹⁰⁹ Susan Ariel Aaronson, 'A Match Made in the Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO', 41 (3) *Journal of World Trade* 629 (2007).

¹¹⁰ *Ibid.*, at 631.

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 sustainable development'.¹¹¹

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, they should be allowed to operate without the impending risk of Members who adopt or support them being subject to trade disputes. In addition, other, better qualified organizations—both non-governmental and inter-governmental—are filling the regulatory gap and doing so in a way that is consistent with WTO rules. For example, ISEAL's code of good practices or the World Bank's detailed assessment tool for forest certification¹¹² go even further than WTO rules in specifying legitimacy criteria. Thus, the WTO should avoid going further in specifically defining rules on npr-PPMs or explicitly recognizing or privileging specific standardization bodies over others.¹¹³

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 developing country concerns that 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

¹¹¹ Joshi, above n 12, at 88.

¹¹² WWF/World Bank Global Forest Alliance, *Forest Certification Assessment Guide* (Washington, July 2006).

¹¹³ Aaronson, above n 111, 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 thereby help promote CSR. We are more skeptical 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 members endorsing a certification initiative. They did so through a waiver allowed under current rules, not through a new norm or rule that could offer future guidance. Moreover, this example is exceptional owing to its high political profile and narrow target, among other factors, which make it unlikely to be replicated in other sectors.

and balanced base of stakeholders to participate in the formulation of a standard.¹¹⁴

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. Given the controversies over the WTO's record on environmental and social issues—whether criticisms are well deserved¹¹⁵ or not¹¹⁶—simple prudence suggests governments and the WTO secretariat should avoid allowing the institution to be thrust further into the position of having to adjudicate social regulation. In effect, 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, among others, 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.¹¹⁷ 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.

¹¹⁴ Interview, Vincent Paolo Yu, Project Officer on WTO, South Center, February 20, 2006, Geneva. Alejandro Litovsky et al., 'Investing in Standards for Sustainable Development: The Role of International Development Agencies in Supporting Collaborative Standards Initiatives', An AccountAbility Discussion Paper (London, U.K.: AccountAbility, 2007) provide recommendations on how international development agencies can more systematically support collaborative standards initiatives as part of a broader effort to support sustainable development and inclusive globalization.

¹¹⁵ Martin Weber, 'Competing Political Visions: WTO Governance and Green Politics', 1 (3) *Global Environmental Politics* 92 (2001); Gregory Shaffer, 'If Only We Were Elephants. The Political Economy of the WTO's Treatment of Trade and Environment Matters', in Daniel L. M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade Law: Essays in Honour of Robert E. Hudec* (Cambridge: Cambridge University Press, 2002) 349–93.

¹¹⁶ Alasdair Young, 'Picking the Wrong Fight: Why Attacks on the World Trade Organization Pose the Real Threat to National Environmental and Public Health Protection', 5 (4) *Global Environmental Politics* 47 (2005); Eric Neumayer, 'The WTO and the Environment: Its Past Record is Better than its Critics Believe, but the Future Outlook is Bleak', 4 (3) *Global Environmental Politics* 1 (2004).

¹¹⁷ Ruggie, above n 17; Robert Wolfe and Matthew Mendelsohn, 'Values and Interests in Attitudes towards Trade and Globalization: the Continuing Compromise of Embedded Liberalism', 38 (1) *Canadian Journal of Political Science* 45 (2005); Jude C. Hays, Sean D. Ehrlich and Clint Peinhardt, 'Government Spending and Public Support for Trade in the OECD: An Empirical Test of the Embedded Liberalism Thesis', 59 (2) *International Organization* 473 (2005).