International Social and Environmental Production Standards

Should Corporate Social Responsibility Get a Slice of the WTO Pie?

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Introduction

This paper was started with the idea of revisiting international product standards in the WTO – especially the relationship between the WTO Technical Barriers to Trade Agreement (TBT) and the 'recognized' international standard bodies. The idea was to look into how these bodies have evolved in their participation and transparency practices since the WTO Appellate Body Report in *EC-Sardines* was issued.[1] This report, almost ten years old now, illuminated the TBT Agreement in ruling that WTO Members have an obligation to base their technical regulations (mandatory product standards) on existing relevant international standards. The case had a major impact in converting what was thought by many to be 'voluntary' into something that was 'obligatory'. Since that was a significant change in the rules (or the perception of them) of the game, one might be able to document how international standard bodies adjusted to their more prominent international regulatory role. This would discern whether they have opened their institutional processes to accommodate some of the participatory elements of the more representative national standard-setting systems, those systems that the WTO ruling made in some part redundant.

Along the way a gradual awareness set in that the game had changed quite a bit more than this vertical restructuring of international standard setting via the auspices of the TBT Agreement. What was considered by the WTO case and the TBT provisions is at the core a WTO Member and state-centred system of international rule making for product standards, even when many actors in this system

* The author thanks Willemijn Noordhoek for helpful discourse on the subject, although of course, all opinions and conclusions are the responsibility alone of the author.

[1] *European Communities – Trade Description of Sardines*, DS231, Appellate Body Report of 29 May, 2002.

Liber amicorum w. Tom Eijsbouts, 1: 000–000, 2011
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doi:10.1017/S1574019611100012

are private actors. Taking the International Organization for Standardization (ISO) for one example: while that body is a private international organization, and its members, made up of national standard bodies, are also in many cases private bodies, those bodies ultimately represent the interest of their states in a form of delegated activity. Similarly, the guidelines for international standard bodies enunciated by the TBT Committee following the *EC-Sardines* case focus on the concept of 'Member participation' within the standard body in question.

But what we understand as the central components of a state-based (or WTO Member-based) system of international standard setting is now a part of a larger universe including private actors very much disconnected from state authority and engaging in a wide range of social and environmental standard setting. These activities include preparing and adopting standards for certification and labelling of products, examining and certifying producers, and auditing the performance of the standard in the marketplace – all under the moniker of 'Corporate Social Responsibility' (CSR) and its subdivision of 'non-state market driven' (NSMD) standard-setting activities.

What characterizes this group is somewhat the opposite of the TBT Agreement's emphasis. Instead of the focus on 'WTO Members' adopting 'technical (mandatory) requirements', we rather see actors (producers, NGOs and combinations) not representing states and developing inherently 'voluntary' systems of certifying producers and their products on their identified social or environmental criteria. Similarly, where traditional product standards focus on the 'the product' and its characteristics, the activities operating under CSR relate more to the social and environmental practices in the supply lines that form the context of production. The resulting product and its label carry forward into the market its production history, signalling to the consumer that the producer meets the social or environmental criteria the product label is intended to convey. The certification objectives and the standards set are not about 'documents laying down product characteristics', the TBT Annex first-sentence definition for a product standard. They may however, be very much about packaging or labelling requirements 'as they apply to a product, process or production method'. This is the TBT Annex second-sentence definition which also identifies the scope of the TBT Agreement.

So, this raises questions as to how the TBT Agreement, with its guarantees of transparency and non-discrimination, among other attributes, may relate to these predominantly private and voluntary systems. Some argue that the TBT Agreement should be interpreted to stay clear of CSR standard setting – that there be left a 'negative' policy space so that CSR can evolve with the sensitivities of the global marketplace unencumbered by state action and consequently WTO law.[2]

[2] S. Bernstein, E. Hannah, 'Non-State Global Standard Setting And The WTO: Legitimacy And The Need For Regulatory Space', 11(3) *Journal of International Economic Law* (2008) p. 575–608.

Others suggest that there needs to be clarification of the role of WTO in CSR standard setting, at least in the form of studies and with an eye to encouraging Members to promote CSR strategies.[3] Arguably, major environmental or social labelling systems are affecting trade and competition from the producing country perspective. What is voluntary on the surface may be mandatory in the marketplace. The TBT Agreement offers the transparency and non-discrimination rights that are meant to be guarantees for producing countries. CSR systems should not be able to avoid what would clearly be covered by the WTO if the same activities were engaged by states.

This raises one of the contexts for CSR standard setting, as much of it has arisen to close the gap caused by states' understandable reluctance to step into forms of standardizing that deal with production behaviour in foreign countries. The risks of dispute settlement cases for these types of endeavours has a history in the GATT extending from the first *US – Tuna* panels in the early 1990's through the WTO *US – Shrimps* case in the later 1990's. A panel under current consideration, the modern version of *US – Tuna,* may alter this context – possibly clarifying whether the TBT Agreement is applicable to labels dealing with production processes and addressing whether voluntary label systems endorsed or operated by a WTO Member can be rendered '*de facto* mandatory' when failing to obtain the label renders the market non-accessible.[4]

The treatment here of CSR standard setting will stay in the frame of the TBT Agreement's provisions as they stand and how they could likely be applied in a WTO case. This is to ask the question of whether a CSR body can have its standards qualified under the TBT Agreement as 'international standards', a position that could likely be taken by a respondent Member in a case claiming that its reference to a CSR standard constituted an unnecessary obstacle to international trade. While not all CSR standard setting advocates might wish to see that level of WTO legalism enter the field, it is also possible that some WTO Members might find the possibility attractive in legitimizing and regulating a more coherent approach to international production standards and international trade.

The paper goes on by describing the system in the TBT Agreement for international standards, and as this has evolved by the *EC-Sardines* case and the actions of the TBT Committee. Following that, the elements of CSR standard setting are discussed with an eye to determining what issues in the TBT Agreement are confronted in assessing those bodies and their standards as either qualifying as 'international' or not. The examination will be limited to the activities of the ISEAL

[3] S.A. Aaronson, 'A Match Made in the Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO', 41(3) *Journal of World Trade* (2007) p. 629–659 at 650–651.

[4] WT/DS381, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Panel composed 14 December, 2009.

Alliance and its member bodies, anecdotally the organization that is attempting to meet the TBT Agreement's Code of Good Practice requirements for voluntary standard-setting bodies.

I. How the WTO TBT Agreement references international standards

The TBT Agreement addresses technical barriers to trade with the use of quasi-mandatory harmonization.[5] This is found where the criteria for assessing the severity of an obstacle to trade is based upon a definition of what constitutes an 'international standard', a term that is introduced in both the TBT and SPS Agreements.[6] The TBT Agreement brings this concept into the WTO legal domain by two provisions that can be viewed respectively as an inducement and an obligation.

The inducement part comes from TBT Article 2.5, which provides a 'safe harbour' for WTO Members when they conform their domestic regulations to relevant international standards.

> Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.

This acts to promote the use of a relevant international standard when a WTO Member is seeking to impose a technical regulation for one of the listed legitimate objectives.[7] The effect is that conformity with the international standard avoids the risk of a WTO claim under Article 2.2 that the resulting regulation is an unnecessary obstacle to trade. While not mandating that Members have any regulations at all, this provision acts as an incentive for them to use international standards when they choose to regulate.

[5] Or, 'positive harmonization' as Heiskanen puts it; V. Heiskanen, 'The Regulatory Philosophy of International Trade', 38(1) *Journal of World Trade*, (2004) p. 1–36.

[6] WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), WTO Agreement on Technical Barriers to Trade (TBT).

[7] National objectives seeking to ensure the quality exports, the protection of human, animal or plant life or health, the environment, or for the prevention of deceptive practices. TBT Agreement, Preamble.

I.1 *TBT Article 2.4 regime: the obligation to use an international standard 'as a basis'*
A second provision carries the relationship to international standards a step further in obliging Members, when choosing to pass a technical regulation, to apply a relevant international standard as a *basis* for their own product requirements (the obligation). This particular provision benefited from some extensive panel and Appellate Body treatment as a result of the 2002 *EC-Sardines* case, and the elements of the provision can be explained in some detail. Article 2.4 reads as follows:

> (W)here technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.[8]

Failure to use an international standard as a basis for domestic product regulation results in a violation of Article 2.4 of the TBT Agreement.[9]but the obligation to use international standards must also be qualified. First, a member is not obligated to translate international product standards into domestic regulations. The Member can choose not to regulate at all. The expression, 'when technical regulations are required' refers to the Member's own determination to regulate.

At this point, an existing (or imminent) relevant international standard becomes applicable and must then be used 'as a basis' for the domestic law. The term 'basis' appears as a major parameter for establishing some flexibility in the obligation and also acts to distinguish Article 2.4 from the 'in conformity with' text that is employed in the safe harbour provision of Article 2.5. The term was interpreted in both the SPS (*EC-Hormones*) and the TBT (*EC-Sardines*) context to not require a rigid or absolute conformity with the international standard. It is not synonymous with the terms 'in accordance with' (the SPS provision) or 'in conformity with' (the TBT provision).

[8] The provision was also obligatory in the Tokyo Standards Code of 1979. There the phrase was 'shall use them'. There is no record of dispute settlement in the GATT for this or other provisions of the Standards Code.

[9] This holds whether or not the domestic regulation is discriminatory in favouring domestic products (TBT Article 2.1) and, whether or not the regulation might constitute an unnecessary obstacle to trade (TBT Article 2.2), since the *EC-Sardines* reports did not address these other Articles as a matter of judicial efficiency. The burden of establishing that the relevant international standard is appropriate and effective for meeting the claimed domestic objective remains on the complainant as a result of the AB interpretation of the second sentence. See also, Heiskanen, *supra* note 5, p. 8.

Instead, the requirement of 'basis' is understood to reflect the concepts of 'stands', 'founded', 'built upon', or 'supported by'. As the *EC Sardines* panel recited the earlier AB report in *EC Hormones*,

> … we cannot lightly assume the sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating conformity or compliance with such standards…, since 'based on' is not the same as to conform or comply.[10]

One can see that the determination of what constitutes an international standard becomes the significant factor both as to the safe harbour inducement of Article 2.5 and the obligation as stated in Article 2.4. In a dispute settlement case, the question could come up both as a claim and as a response. A claimant could allege, as did Peru in *EC-Sardines*, that the respondent's product regulation was not based on an international standard and therefore a violation. For the respondent, an allegation that the product regulation was an unnecessary obstacle to trade (TBT Article 2.2) could be answered by reference to Article 2.5 – that the regulation was in conformity with an international standard and therefore rebuttably presumed to not be an unnecessary obstacle to trade.

Having set out the implications of an international standard, let us consider how we determine whether such a standard is present and in effect.

I.2 *What is an International standard / body?*

The TBT Agreement refers to 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, marking or labelling requirements as they apply to a product, process or production method.[11]

The TBT Annex does not define 'body', or 'recognized body', but assuming that a 'body' is a standard-setting entity (governmental or otherwise), then an international body, according to the Annex, is a standard-setting 'body or system whose membership is open to the relevant bodies of at least all Members.' This openness

[10] *EC-Sardines*, Supra note 1, Panel Report, paras 7.77–7.79, quoting *EC-Hormones*, AB Report, WT/DS26/AB/R, paras 70 and 71. The final qualification of whether the international standard is inappropriate or ineffective is not taken up here.

[11] TBT Agreement, Annex 1, para. 2. By explanatory note, standards prepared by the international standardization community are based on consensus. The TBT Agreement Annex however also refers and covers standards not based on consensus.

of membership to all WTO Members is the only stated requirement, other than that found in the definition of 'standard' above which refers to a '*recognized* body'.

This becomes a bit circular since bodies (international or otherwise) are not listed or certified by the TBT Committee, and the TBT Agreement does not designate any list, indicative or otherwise, of any recognized international bodies.[12] Given the open nature of the TBT text on this aspect, the concept of international body has to be considered as somewhat organic and with a potential for evolution. In point, it can be suggested that the only 'recognizing' that is likely to occur would be in the course of a dispute panel report where the panel was called upon to assess whether a particular body was 'international' for the purpose of determining whether its generated standard was therefore 'international'.[13]

I.3 *The TBT Committee's principles for the development of international standards*

As a part of its second triennial review, the TBT Committee reported a Decision regarding the appropriate behaviour of standard bodies in order to qualify their resulting standards as 'international' for the purposes of the Agreement.[14] The Report provides the Committee´s own rationale for the Decision.

> In order to improve the quality of international standards and to ensure the effective application of the Agreement, the Committee agreed that there was a need to develop principles concerning transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and developing country interests that would clarify and strengthen the concept of international standards under the Agreement and contribute to the advancement of its objectives.[15]

The clear emphasis throughout is to insure that all WTO Members (or the relevant bodies of WTO Members) have rights of participation in the international bodies, and to raise the participation of developing Members in particular. The value of the document as a possible source (informal or otherwise) of WTO law in dispute

[12] TBT does not use the same approach as the WTO SPS agreement where Codex, the International Office of Epizootics, and the International Plant Protection Convention are specifically referenced in SPS Annex A. The TBT Annex 1 does make a reference to the definitions included in ISO/IEC Guide 2. This recognizes a set of definitions, not the bodies.

[13] The TBT Committee did organize information sessions for its second triennial review, and a list of invited bodies provided for that report provides an indication of the range of possibilities for international standard bodies. Those invited included, FAO, FAO/WHO Codex, IEC, ISO, OIE, OIML, ITU, OECD, UN/ECE, and WHO. WTO, G/TBT/9, Second Triennial Review, 13/11/00, Annex One. The criteria of 'open to the bodies of at least all Members' is also not limited to participation by only governmental bodies.

[14] Generally, WTO, G/TBT/9, Annex 4, *Decision Of The Committee On Principles For The Development Of International Standards, Guides And Recommendations With Relation To Articles 2, 5 And Annex 3 of the Agreement* (TBT, Triennial Review, 2000).

[15] Ibid., WTO, G/TBT/9, at para. 20.

settlement cannot be discounted. It was raised by the EC, without objection, as a part of its argument in *EC-Sardines* that a consensus requirement was obliged in the setting of the Codex Sardine standard.[16]

The Committee's approach in the Decision has been to cover the chronological sequence of standard setting across the terrain from transparency through coherence. Using only transparency as an example, the participation elements required are clearly evident and include:

- publication of a notice at an early appropriate stage, in such a manner as to enable *interested parties* to become acquainted with it, that the international standardizing body proposes to develop a particular standard;
- notification or other communication through established mechanisms to *members* of the international standardizing body, providing a brief description of the scope of the draft standard, including its objective and rationale. Such communications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
- upon request, the prompt provision to *members* of the international standardizing body of the text of the draft standard;
- the provision of an adequate period of time for *interested parties* in the territory of at least all members of the international standardizing body to make comments in writing and the opportunity to have these written comments taken into account in the further consideration of the standard;
- the prompt publication of a standard upon adoption; and
- the publication periodically of a work programme containing information on the standards currently being prepared and adopted.[17]

The resulting picture is that while the TBT Agreement provisions translate the legal value of an international standard into obligations for WTO Members, the Committee has also prescribed its own conditions for the behaviour of standard-setting bodies whose promulgated standards could be at issue in any particular WTO panel case. For this purpose, the Committee has outlined these behavioural conditions, with emphasis on the rights of all WTO Members (or their relevant bodies) to participate in that process. This obligation to respect WTO Member participation appears to inform the scope of WTO law on the matter. To the extent that WTO law determines what is an 'international standard' for

[16] *EC–Sardines* Panel Report, *Supra* note 1, para. 7.90.

[17] WTO, *Supra* note 13, Annex 4, para. 4, italics added. The term 'interested parties' is not defined in the TBT Agreement, though it is also used in the TBT Annex 3 Code of Good Practice, paras. L. M and P.

the purposes of the TBT Agreement, it also operates to determine the qualifications of an 'international body'.

Finally, a linkage to the TBT Agreement's Annex 3 'Code of Good Practice' should be considered.[18] The Code is open to acceptance by any standardizing body within the territory of a WTO Member, whether a central or local government body, or a non-governmental body, and to any governmental or non-governmental regional standardizing body where either a WTO Member is a member, or where a non-governmental members is situated in a WTO Member.[19] This does not apparently accommodate an international body itself as a potential accepter of the Code. This conclusion is somewhat reinforced by the provisions of the Code that mimic those same provisions for the obligatory use of international standards as discussed above for technical regulations under TBT Article 2. This would mean that an international standard body accepting the Code would have an obligation to apply international standards. What one can say is that acceptance and application of the Code by a body is apparently not a prerequisite for the determination of a body as international, either by the terms of the Code or by any other terms of the TBT Agreement. Acceptance of the provisions of the Code might well lend a certain legitimacy to the activities of a body, but adopting the Code or its objectives would appear to be irrelevant for the body's status as international or otherwise.[20]

Having outlined the rules of this particular game, we take the final turn to outline some elements of CSR standard setting that would have to be considered in a determination that the resulting standards might qualify as international. For this, we are going to consider the bodies that operate with the framework of the ISEAL alliance.

II. ISEAL Alliance and its member bodies

The ISEAL Alliance is a United Kingdom not for profit company that describes itself as a 'global association for social and environmental standards'. It was formed by four certification organizations and its 'full member' list consist now of nine certification systems or bodies. These include the Fairtrade Labelling Organization (FLO, social standards); the Forest Stewardship Council (FSC, environmental/sustainable); the International Organic Accreditation Service (IOAS, environmen-

[18] The full title is 'Code of Good Practice for the Preparation, Adoption and Application of Standards'. TBT Agreement, Annex 3.

[19] Ibid., Code of Good Practice, para. B.

[20] On the relevance of the Code of Good Practice for governance and legitimacy issues presented by CSR certification and labelling activities, S. Bernstein, 'When is Non-state Global Governance Really Governance?' *Utah Law Review*, (2010) p. 91 at p. 107 et. seq.

tal / sustainable); the Marine Stewardship Council (MSC, environmental / sustainable); the Social Accountability Accreditation Services (SAAS, social standards); the Union for Ethical Bio Trade (environmental / sustainable); and UTZ Certified (social / environmental / sustainable).[21]

II.1 *Production process standards*

As evident from this listing, all of these bodies are engaged in setting production standards either dealing separately or in a mix with social, environmental or sustainability conditions of production or harvesting. As such, they all encounter the threshold issue of whether or not the scope of the concept of 'standard' in the TBT Agreement covers standards dealing with production processes.[22] While acknowledging this as a threshold question, for the purpose of this exercise it is going to be accepted that the TBT Agreement has the scope to cover these standards, at least as applied to 'terminology, symbols, packaging, marking or labeling requirement', as stated in the TBT Annex 1 for the definition of 'standard'. Since at least some of the ISEAL members originate an identified seal that can be affixed to a product's packaging, these labelling activities should be considered as part of the term 'standard' under the TBT Agreement.[23]

II.2 *'Body or system whose membership is open to the relevant bodies of at least all (WTO) Members'*

We know that this heading demonstrates the critical elements to consider in assessing a standard's international character. We also recognize that in a WTO dispute case, the issue could be raised in challenging a particular standard promulgated by one these organizations listed above, and by some attachment or reference to the standard being made by a WTO Member. This suggests that the issue of 'open to all' would arguably be a matter of the operating charter and practices of the particular standard-setting organization within the ISEAL Alliance, rather than of the 'system' that is originated by it.

For example, the Fairtrade Labelling Organization (FLO) consists of 24 members who either produce certified products or promote the 'Fairtrade Certification Mark'. 19 of these members are referred to as 'fairtrade labelling initiatives'. They consist of nationally-based organizations that are licensed by the FLO to use the certification mark in their territory and to accept requests from potential licensees

[21] Generally, www.ISEALALLIANCE.org, full member descriptions.

[22] As treated in most of the literature as 'non-product related production process methods' (NPR-PPMs), a term not actually employed in the TBT Agreement Annex.

[23] For contra, as based on the TBT Agreement's negotiating history, see M. Joshi, 'Are Eco-Labels Consistent with World Trade Organization Agreements?, 38:1 Journal of World Trade (2004) pp. 69–92, at p. 75.

in that market.[24] For these organizations to be found as 'relevant bodies' one would have to consider whether they are also standard-setting bodies. If they are not, then arguably there are no 'relevant bodies' which are members of the FLO, since none of them are generating standards. For example, the *Max Havelaar Stichting* indicates that the standards are set by the FLO, and that the *Havelaar* organization's role is to educate, market, issue and control the label. As such, it appears more a marketing organization than a standard-setting one.[25] However, this is also not totally accurate in that FLO sets the standards via a process that also utilizes the participation of the member labelling initiative organizations. In this respect. the FLO's 'Operating Procedure' indicates that:

> The Board of Directors of FLO has delegated decision-making authority over Standards to the Standards Committee ('SC') and SU Director. However, the Board may be involved in the development of a Standard, typically in an advisory capacity on strategies and objectives. The Board of Directors of FLO has created a Standards Committee made up of representatives of the key stakeholders of Fairtrade standards. This includes representatives from Producer Networks, traders, Labelling Initiatives ('LI's') and external experts.[26]

To the extent that the various labelling initiatives have pooled their previous standard-setting activities into the FLO for the purpose of establishing a common harmonized set of standards functional in all represented territories, we cannot exclude the possibility that the labelling initiatives are functioning as standard-setting bodies and therefore also as 'relevant bodies' in the meaning of the TBT Agreement. In this sense, the labelling initiative organizations together with the FLO (and other stakeholders) form a 'system' of standard setting and marketing.

The comparative would be to consider the role of national standard bodies who collectively set international standards in organizations such as the International Organization for Standardization (ISO). They can also be (and many times are) non-governmental bodies who set wholly voluntary standards in the own territory. To the extent that they are 'central' they then qualify to become 'Member Bodies' of the ISO.[27] As members, they choose to pool their activities there for

[24] The member organization in the Netherlands is familiar to most residents, the Stichting Max Havelaar. See generally, www.Fairtrade.net, 'Fairtrade Labelling Initiatives'. In addition, a small group of organizations constitute 'producer networks'.

[25] As translated from <www.maxhavelaar.nl/keurmerkvoorfairtrade/fairtradesysteem>.

[26] FLO, 'Standard Operating Procedure Development Of Fairtrade Standards', Fairtrade International Standards Unit, 2011, p.4, para 2.1, available at <www.fairtrade.net/fileadmin/user_upload/content/2009/standards/documents/20110110_SOP_Development_Fairtrade_Standards.pdf>.

[27] From ISO: 'A member body of ISO is the national body 'most representative of standardization in its country.' Only one such body for each country is accepted for membership of ISO.

the purpose of developing common international standards. They clearly remain 'relevant bodies' even though they are no longer setting the standard for that subject area within their territory. They are rather pooling their standard-setting activities into the larger institutional structure of the ISO for the purpose of international standard setting. Arguably, this is the same thing that the FLO is doing in its standard-setting subject areas.

The question whether the labelling initiative organizations need to retain some residual self-declared authority to set their voluntary standards within their territories in order to be qualified as a 'relevant body' has to be considered. But if they have no self-expressed authority under their own rules at the territory level, how could they have authority for their standard setting activities in the institutional context of the FLO at the international level?

One also has to appreciate that this pattern of territory-based organization is not uniformly adopted by other ISEAL Alliance members. For example, the Forest Stewardship Council has a more diffuse system with about a 1000 members listed. The Council states that its members are a mix of

> (I)ndividuals and organizations with a legitimate interest in the goods and services provided by a forest management unit, and those with an interest in the environmental and social effects of a forest management unit's activities, products and services.[28]

Although this constitutes a massive membership, it is also not clear that there are relevant bodies among it that are in the business of setting forestry standards at their own territory level. If there are such bodies operating at a territory level, there is little question that membership of the FSC is open to them as fitting within the stakeholder definition.

In a similar manner, the Marine Stewardship Council (MSC) also does not clearly indicate a membership of 'bodies'. Its Stakeholder Council consists of two chambers with each up to 20 members. The members are identified as

> The Commercial Chamber is made up of interests from the catch, processing, supply, retail, food service sectors and other relevant commercial interests.
>
> The Public Interest Chamber is made up of interests from academia, science, management, the marine conservation community and other relevant public interests.[29]

Member bodies are entitled to participate and exercise full voting rights on any technical committee and policy committee of ISO." At <www.iso.org/iso/about/iso_members/member_bodies.htm>.

[28] FSC stakeholder definition at <www.fsc.org/glossary.html?&tx_datamintsglossaryindex_pi1[uid]=75&tx_a21glossary[back]=8&cHash=41127578f4>.

[29] MSC Stakeholder Council at <www.msc.org/about-us/governance/structure/msc-stakeholder-council>.

This structure reflects well the diffuse nature of CSR standard-setting where a mix of commercial and public interests operate at the international level to set accountability standards that can be identified in the market. It is not a similar approach to what one might traditionally characterize as a regional or international standard body, where well-defined national bodies coalesce together for the purpose of avoiding grossly divergent national standard-setting activities. Here instead, one does not see this traditional set of bodies already operating at territory level. The question has to be however, whether the non-existence of that traditional standard-setting hierarchy is a definitional component to a finding that an organization is 'international'. The TBT text is drafted in a manner to presume that such bodies exist as the underlying foundation of an international body. Fine, but one can also make the argument that 'open to all' is exactly what it says. To the extent that any such body – if it did exist–would be allowed to join the standard-setting organization, then the requirement could be met. The organization is 'open'. Whether or not those bodies need be the prime decision makers of the standards within the larger organization is also not known. Perhaps the TBT text also makes that presumption. Whatever the intended role however, one also reiterates that the underlying bodies need not have any public governmental character. That aspect is clearly irrelevant as a factor.

II.3 *The ISEAL Alliance aspect /transparency and membership*

The ISEAL Alliance has its focus on the process of standard-setting, much along the lines of the TBT Code of Good Practice, from which a number of references in ISEAL's own Codes of Good Practice have been drawn. As such, the ISEAL Alliance claims that its Codes are 'international reference documents for credible social and environmental standards'.[30] Compliance with the Codes is stated to be a membership condition. Since adoption and application of the TBT Code of Good Practice is not a condition for determining a body's status as international, those aspects of the ISEAL Codes are not relevant on that question. Those however dealing with 'openness', transparency and the participation of WTO Members (including the enhancement of developing country participation) are relevant because these elements are also a part of the TBT Committee's guidelines.

As the ISEAL Alliance Code indicates, elements are drawn from the ISO/IEC Guide 59 Code of good practice for standardization, the TBT Agreement Annex 3 Code of Good Practice, and the TBT Committee's second triennial review Annex 4 guidelines.[31] Without detailing each step of the procedure of developing a standard, one can state with some assurance that each element covered by the TBT

[30] ISEAL Alliance, short description, <www.isealalliance.org/content/the-iseal-alliance-in-100-words>.

[31] ISEAL Code of Good Practice, version 5.0, p. 3.

Committee guidelines regarding notification to interested parties, time to comment, decision making, etc., are all covered in detail in the ISEAL Code.[32] Since these rules are undertaken by the individual ISEAL Member organizations, we can conclude that the transparency and participation aspects of the TBT Committee guidelines are able to be met by all of them, although the Code itself does not appear to mandate a complaint or contest procedure in event one of the organizations should not apply the Code provisions.[33]

The ISEAL Alliance also has a membership aspect that could have a bearing on the status of its organization members as international bodies. The member categories of full members and associate members are provided for certification organizations. As indicated above, some operate from territory-based standard bodies and others do not. The category of affiliated members covers the larger stakeholder community that surrounds the standard setting and implementation process, including standard-setting bodies, but also enterprises, consumer groups, consultants, researchers and government. A fee structure is set for these different participants. Affiliates are not involved in the responsibility for decision making within the Alliance. The Alliance itself is not a standard-setting body (except maybe as it is setting standards about standards), and its membership is not 'transmitted' so that it becomes the membership of the other ISEAL member organizations. While there is a platform for government involvement, one cannot say that this membership provision fulfills the 'open to all relevant bodies' criteria in the sense of the TBT Agreement. The ISEAL Alliance itself does not appear to be an international standard-setting body, but along with an arguably open membership for standard-setting bodies operating in its subject areas, it may be claimed to be an integrating part of an overall 'system' that is in principle open to all relevant bodies.

III. Conclusion

From this brief examination, it is evident that a territory-based organization like the FLO comes closer to mimicking the kind of structure that is traditionally recognized in international bodies like the ISO. The other organizations noted, while clearly operating as standard-setting bodies, do not easily fit into this traditional mold of national bodies meeting together as an international body. Since the TBT Agreement turns so much on this structural relationship to generate legal effects for 'international standards', one finally has to ask what this says about the

[32] ISEAL Code, Ibid., generally section 5, 'Standards Development'.

[33] The Code does include a section on 'Review and Revision'. The standard setting organization is to identify a focal point for standards-related inquiries and submission of comments. Standards are reviewed at least once every five years. ISEAL Code, Ibid., section 5.11.1 and 5.11.2.

nature of the game. It appears on the surface as a 'near perfect game' (the rules are set and clear), but perhaps because of those same rules, a portion of the play – or perhaps another game altogether – has formed up outside the parameters of these rules, on an adjoining field so to speak.

This may be the outcome that is contemplated for the TBT Agreement by its WTO Members. All of this CSR standard-setting activity is controversial. Developing countries are in the main opposed to production oriented standards, seeing them as inherently protectionist and an attempt to dethrone what little market access for agriculture and other products they may have already secured. Developed country governments have flirted with some of these standards, in government procurement for example, but by and large know that adopting any of them as technical regulations would generate dispute resolution, and many of the unknowables discussed above would have to raised. Developed country WTO Members may prefer that this market-based approach of producers seeking credibility in the market together with consumers seeking clear signals about how products are made, is exactly the way to proceed. To the extent there is confusion and competition among some of the certifications and their labels, so be it. The market can straighten that out.

But there remains a powerful legal concept behind the meaning of 'international standard' that may not choose to lurk in the background forever. This is the simple idea that if any of these standards were to go 'international', then WTO Member states who choose to adopt them have a strong defense to a trade case. Beyond the presumption that they are not 'unnecessary obstacles to international trade, they would even have the status of being obliged to apply by any Member who was choosing to adopt a regulation in that subject.

That development would be a significant re-ordering of the relationship among products in international economic law. But, as the subject matter of this book reveals, 'In law and politics, the rules of the game are part of the competition and can change as a consequence.'