

INTERNATIONAL STANDARDS AND TRADE BARRIERS

MATTHEW WENBAN-SMITH

KATHRYN FERNHOLZ

DR. JEFF HOWE

DR. JIM BOWYER

JUNE 14, 2006



DOVETAIL PARTNERS, INC.



International Standards and Trade Barriers

Introduction

Certification of consumer goods based on environmental and/or social responsibility standards, such as certification of forests and forest products, can be used as an effective and cost efficient tool by governments and inter-governmental organizations to improve compliance with a wide variety of social and environmental policies and commitments. However, thus far governments around the globe have generally been reluctant to show strong support for forest certification and other certification programs despite the growing evidence of their positive impacts. For the most part certification is having these impacts despite, not because of, government policy.

Individuals within departments of the environment, departments of international development, parliaments and even forestry departments are often extremely supportive of forest certification. But there are few governments prepared to openly endorse forest certification as delivering the social, environmental and economic objectives that they have agreed to promote, domestically and internationally, in numerous international treaties and national regulations. Even those governments that do have departments with supportive policies seem to find it extremely difficult to support specific certification schemes even when there is clear evidence that they contribute to specific policy needs and objectives.

Certification is certainly not a silver bullet that can quickly solve every conceivable problem related to forests worldwide. The challenges facing the world's forests and its forest dependent peoples are the kinds of challenges that need decades, not years, to correct. Nonetheless, forest certification could greatly help in addressing a wide array of problems with the caveat that it is extremely hard for forest certification to work effectively in the absence of an enabling national policy environment.

In addition to action through policy development, governments can have a significant and direct influence on supply chain behavior through their own procurement behavior. As an example, figures presented to the UK government Environmental Audit Select Committee in July 2002 stated that the public sector as a whole used up to 40% of all timber and wood products (construction timber, furniture, and paper) consumed in the UK, and central government contracts accounted for approximately 14% of UK timber use. Lenient government procurement policies continue to provide a ready market for cheaper products whose production does *not* comply with social or environmental standards, or even legal requirements in the countries of origin. These policies directly undermine the social and environmental efforts of responsible producers, manufacturers and traders in their own countries and others. It is worth asking why such policies are not changed, and why forest certification isn't embraced as a mechanism to reduce and discourage harmful trade practices.

When pressed on such questions, a common theme emerges. Governments imply that even if they want to implement such policies they cannot, in case they are interpreted as being 'barriers to trade'. Thus it is suggested that any government which endorses, actively supports, or preferentially purchases certified forest products might be held liable by the World Trade Organization (WTO) and face lawsuits, fines, or other penalties.

In some contexts this theme is so widespread that it has become unquestioned conventional wisdom. Governments tie their own hands, and stop themselves from using forest certification as a tool to deliver their own social and environmental policies to avoid the risk that such actions, though effective, could be perceived as a barrier to trade.

This Dovetail Report suggests that international standards for the responsible trade in forest products could provide a way out of this cul de sac. Reference to international standards would allow governments to specify and implement procurement policies that favor socially and environmentally friendly products, while making use of a non-governmental mechanism for verifying compliance. International social and environmental standards present an under-utilized opportunity for improving people's lives around the world.

Governments should however be very wary of basing their national regulations on *regional* or *national* rather than *international* standards, and especially so in cases where there is in fact an existing international standard that could already be considered appropriate. In these cases governments *are* running a relatively high risk of creating technical barriers to trade (TBT).

International Standards

The potential of standardization to facilitate trade is clear: buyers can refer to standards to specify what they want to buy, and producers and manufacturers worldwide can offer products that meet the specification at the best possible price. If necessary, both buyers and sellers can seek independent confirmation that a product meets the specified standard. Certification (also based on international standards) provides a widely accepted methodology to confirm compliance.

ISO's definition of 'standardization' explicitly references its positive contribution to trade: *"Important benefits of standardization are improvement of the suitability of products, processes and services for their intended purposes, prevention of barriers to trade and facilitation of technological cooperation."* (ISO/IEC GUIDE 2:1996(E/F/R)).

Why some who generally appear to support the precepts of ISO should also suggest that forest certification based on international standards might be a 'technical barrier to trade' – and therefore cannot or should not be supported – is a question worth exploring.

International standards and GATT

The 'Uruguay Round' of discussions on world trade culminated in 1994 with the establishment of the World Trade Organization (WTO) and the signing of a series of agreements designed to promote and facilitate world trade. The basis of the agreements was the earlier General Agreement on Trade and Tariffs (GATT), signed in 1947. The GATT established the basic principles of 'most favored nation' (MFN) status and 'National Treatment' (NT). In essence, these say that a country should treat products imported from all other GATT signatory countries with equal favor, and no less favorably than products produced within the country itself. In other words a GATT signatory country should not discriminate unfairly against the products from any other GATT signatory country. Some

149 countries are now members of the WTO, and thus bound by these provisions (see www.wto.org for complete list).

Specifying trade requirements based on international standards should be fully compatible with these principles – in fact, such specification should reinforce these principles by providing an internationally recognized and transparent point of reference which is not unfairly dominated by the interests of any one country. Realistically, safeguards may be needed to ensure that reference to an ‘international standard’ does not provide a country with an opportunity to create unfair barriers to trade, disguised as technical measures. The Agreement on Technical Barriers to Trade (TBT) is designed both to promote the use of international standards and to ensure that they are not used inappropriately. Box 1 reproduces the preamble to the TBT agreement in full.

“Having regard to the Uruguay Round of Multilateral Trade Negotiations;

“Desiring to further the objectives of GATT 1994;

“Recognizing the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade;

Desiring therefore to encourage the development of such international standards and conformity assessment systems;

Desiring however to ensure that technical regulations and standards, including packaging, marking and labeling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade;

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied 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, and are otherwise in accordance with the provisions of this Agreement;

Recognizing that no country should be prevented from taking measures necessary for the protection of its essential security interest;

Recognizing the contribution which international standardization can make to the transfer of technology from developed to developing countries;

Recognizing that developing countries may encounter special difficulties in the formulation and application of technical regulations and standards and procedures for assessment of conformity with technical regulations and standards, and desiring to assist them in their endeavors in this regard;

Hereby agree as follows....

The TBT agreement spells out measures to encourage countries to make use of international standards as the basis for their own (national) technical regulations while ensuring that such regulations and standards do *not* create unnecessary barriers to trade.

For example, TBT Article 2.4 provides: “*Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.*”

And TBT Article 2.5 specifies that the adoption of international standards in relation to the specification of technical regulations is ‘*rebuttably presumed not to create an unnecessary obstacle to international trade*’.

In other words, the TBT establishes a strong presumption *in favor* of the use of international standards. The burden of proof rests with the party that contends that adoption of an international standard *is* an unnecessary obstacle to trade, not with the party that contends it is not.

The scope of the TBT agreement includes the use of international standards in relation to the drafting of national technical regulations (i.e. national legal obligations). Rules for government procurement are explicitly excluded from the scope of the TBT, and are addressed separately (for signatory countries¹) in the Agreement on Government Procurement (GPA). However, the GPA agreement also references and encourages the use of international standards where they exist. Its Article VI specifies that:

“*Technical specifications prescribed by procuring entities shall, where appropriate: be in terms of performance rather than design or descriptive characteristics; and be based on international standards, where such exist; otherwise, on national technical Regulations,³ recognized national standards,⁴ or building codes.*”

The TBT and GPA agreements are the places to look to decide whether forest certification based on an international standard could be considered a technical barrier to trade. But to address the question one has to know what ‘an international standard’ actually is.

What is an international standard?

A Google search for a definition of the term “international standard” yields the following:

- A standard published by the International Organization for Standardization and commencing with ISO (e.g. ISO 16929).
www.deh.gov.au/settlements/waste/degradables/glossary.html
- An ISO standards document that has been approved in final balloting.
www.iec-usa.com/Browse02/GLSI.html

¹ The GPA applies only to its signatory countries, which are: the United States, Canada, Aruba (signed by the Netherlands), the countries of the European Union, Iceland, Norway, Liechtenstein, Switzerland, Japan, Korea, Hong Kong and Singapore. Non-signatory countries are not constrained in their procurement policies by the provisions of the GPA, nor are they covered by the TBT Agreement for their procurement policies, since these are explicitly excluded from its scope.

- Standards are produced by many organizations, some for internal usage only, and others for use by groups of people, groups of companies, or a subsection of an industry. A problem arises when different groups come together, each with a large user base doing some well established thing that between them is mutually incompatible.

en.wikipedia.org/wiki/International_standard

Two of the definitions propose ISO as being the exclusive publisher of ‘international standards’. In contrast Wikipedia notes that standards are produced by many organizations, and then provides a reference to a (non-ISO) international standard list of terms, which perhaps illustrates the point. ISO’s own definition of an international standard is not referenced – possibly for copyright reasons.

The Australian Government even recognizes the concept of a “de facto” international standard as “A standard, which in the absence of an International Standard, is so widely used internationally that it is generally recognized as being a de facto International Standard (various CEN and ASTM standards have achieved this status).”

www.deh.gov.au/settlements/waste/degradables/glossary.html

In 1996 the ISO definition of a standard was a “*document, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context. NOTE: - Standards should be based on the consolidated results of science, technology and experience, and aimed at the promotion of optimum community benefits.*” (ISO/IEC GUIDE 2:1996(E/F/R)).

But none of these definitions are necessarily relevant to a discussion of international trade and technical barriers. In any discussion of a legal document the first place to check for meaning of key terms is within the document itself. So, to understand the TBT (Technical Barriers to Trade) and GPA definitions one needs to refer to their texts.

The relevant definitions are reproduced in the table below, together with the definitions from ISO/IEC Guide 2:1991. The 1991 version of the Guide is used because it is specifically referred to in the TBT itself as a general reference for terms which are not otherwise specified: “*The terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement.*”

	TBT (Technical Barrier to Trade)	ISO/IEC Guide 2:1991	GPA (Government Procurement Agreement)
International standard	Not explicitly defined. Deferral to ISO/IEC Guide 2 would mean using its definition (see next column).	“International standard: standard that is adopted by an international standardizing/standards organization and made available to the public.”	No further guidance
standard	<p>“Standard. 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 labeling requirements as they apply to a product, process or production method.”</p> <p>(TBT Annex I, Paragraph 2.)</p>	<p>“Standard: Document established by consensus and approved by a recognized body that provides for common and repeated use rules, guidelines, or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context. Note: Standards should be based on the consolidated results of science, technology and experience, and aimed at the promotion of optimum community benefits.”</p>	<p>“For the purpose of this agreement, a standard is a document approved by a recognized body that provides, for common and repeated use, rules, guidelines or characteristics for products or services 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 labeling requirements as they apply to a product, service, process or production method.”</p> <p>(GPA Article VI footnote 4.)</p>

Although the definitions are generally similar, the differences can be significant. For example, the omission of the word ‘consensus’ from the TBT definition of standard means that standards not based on consensus can sometimes be recognized as standards in the context of the TBT.

Notably, both the Agreement on Technical Barriers to Trade (TBT) and Agreement on Government Procurement (GPA) definitions define a ‘standard’ with reference to the ‘recognized body’ that approves it. This shifts the discussion of the definition of a ‘standard’ to the definition of a ‘recognized body’ as understood for the purposes of the TBT and GPA respectively. This shift is discussed in subsequent paragraphs. But first, is there any reason why ‘social and/or environmental’ standards should not be considered as legitimate international standards in the context of the TBT or GPA? Or, are there other reasons why social and/or environmental measures should be considered *de facto* as technical barriers to trade?

Are social and environmental measures *de facto* barriers to trade?

The preamble to the TBT explicitly states that countries should not be prevented from taking measures “*necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive*

practices, at the levels it considers appropriate...” This reference is subject to the requirement that such measures are “*not applied 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, and are otherwise in accordance with the provisions of this Agreement*”.

There is scope for legal argument about what measures are ‘necessary’, and what would constitute ‘arbitrary or unjustifiable’ discrimination. But the proposition that social or environmental measures including trade-related measures are *de facto* technical barriers to trade does not seem to be supported by the text of the relevant agreements.

Are social and environmental standards international standards?

Governments regularly refer to social and environmental standards, and the TBT recognizes the importance and use both of international standards and of social and environmental measures in relation to world trade. There are also examples of governments recognizing specific international standards for environmental protection in relation to trade. Signatory governments have agreed, for example, to develop and implement an international standard for the labeling of caviar in order to implement obligations in relation to CITES (the International Convention on Trade in Endangered Species).

There is nothing obvious in the TBT or GPA that might lead one to think that social and/or environmental standards are for some reason excluded from the definition of an ‘international standard.’ Why, then, are social and environmental standards sometimes considered to be questionable “international standards?”

The answer to this question turns on the awkwardly named concept of ‘non product related Process and Production Method standards’ – “npr” PPM standards for short. A PPM standard is one which relates to the way a product is produced, but not necessarily to the physical characteristics of the product itself. In principle the physical characteristics of a product produced in compliance with a PPM standard may be identical to the physical characteristics of another product that was produced in a process that did not comply with such a standard.

It is theoretically possible that the production method may change the physical characteristics of a product without having any significant difference on the product’s performance or fitness for purpose – a physically distinguishable product might be a by-product of compliance with a PPM standard. A crude example could be that treatment with an environmentally-friendly reagent colors one product red, while a reagent with more negative environmental impacts colors the resulting product blue. It would be easy to tell the products apart by their color, but the color difference itself has no relevant impact on the product’s performance and is not the intended purpose of compliance with the PPM standard.

It is also possible, at least in theory, that a PPM standard might (intentionally or unintentionally) result in a product with significantly different performance characteristics, and that specifying compliance with the PPM standard might provide a simple tool to specify a different product. Trade lawyers have therefore developed the concept of the ‘non product

related' npr PPM standard, to try to describe a standard for which the products are, *in principle*, indistinguishable from others that are not produced in accordance with the standard.

A quality management standard within the ISO9000 series could be considered an npr PPM standard. Standards which are designed to affect the social or environmental impacts of a manufacturing process are examples of npr PPM standards. A Picasso and an identical copy of a Picasso, or a Rolex watch and a perfect replica of a Rolex watch could be considered to be identical products except in relation to the non product related aspects of their production. One could even argue that a US dollar bill and its perfect copy are identical products in npr PPM terms.

It is argued by some trade lawyers that npr PPM standards are, by their nature, excluded from the concept of 'international standards' as defined by the TBT.

The argument arises because provisions relating to 'most favored nation' or 'national treatment' status of the GATT have been interpreted in the past (prior to 1994) as ruling out distinctions between 'like products'. However, in contrast to the GATT, the TBT *explicitly includes* PPM within its definition of a standard. It is therefore difficult to claim that PPM standards cannot be considered as standards within the meaning of the TBT.

Is it still possible to argue that *non product related* PPM standards are excluded from the TBT definition? Some developing countries argue for this position. The argument hinges on the words "*for products or related processes and production methods*" and on the contention that the word 'or' implies that the 'processes and production methods' referred to relate only to product-related PPMs (Cook, G., D. Downes, Van Dyke, B., and Weiner, JB, 1997. Applying Trade Rules to Timber Ecolabeling. Center for International Environmental Law, 1997, Draft). However, the strength of this argument can be questioned, particularly in view of the sentence which immediately follows, which states that standards "may *also* include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method." It is difficult to see how this language can be interpreted to exclude npr PPM standards, or indeed standards for labeling products in relation to compliance with npr PPM standards from the scope of the definition of a 'standard'.

Ultimately, only a WTO panel can definitively resolve the issue. But, given the chilling effect that the words 'technical barrier to trade' can engender it is worth questioning the strength of the argument on which the concern is based.

This is *not* to say that reference to npr PPM standards in world trade is necessarily a good thing, nor to argue that governments should be *obliged* to reference npr PPM standards in their procurement policies or technical regulations. Many developing countries have expressed concerns about the economic and social implications this would have in their own countries. One may or may not agree that these concerns are well-founded, but they at least raise serious issues that have to be answered.

One may also argue about the advantages or disadvantages, and the political and/or social implications of referencing *particular* social and/or environmental standards. But such arguments are exactly that: political arguments. The sphere for resolving these arguments is the political sphere. The argument that there is currently a *technical, legal* basis that *prohibits* governments from referencing international social and/or environmental standards in their procurement policies or technical regulations is perhaps surprisingly weak.

Recognized bodies

Earlier in the discussion (page 10) the question of what constitutes a ‘recognized body’ was raised. Neither the TBT nor the GPA defines the term. Nor is there a definition of ‘recognized body’ in ISO/IEC Guide 2:1991.

The TBT does provide a definition of an “International Body or system” as a “Body or system whose membership is open to the relevant bodies of at least all Members.” (TBT Annex 1, Paragraph 4). ISO/IEC Guide 2: 1991 provides definitions of a ‘body’, of a ‘standardizing body’, and of a ‘standards body’ (see box 2).

Box 2

Body: (responsible for standards and regulations) legal or administrative entity that has specific tasks and Composition NOTE - Examples of bodies are organizations.

Standardizing body: body that has recognized activities in standardization

Standards body: standardizing body recognized at national, regional or international level, that has as a principal function, by virtue of its statutes, the preparation, approval or adoption of standards that are made available to the public NOTE - A standards body may also have other principal functions.

ISO/IEC Guide 2: 1991

Whether these are relevant would ultimately have to be determined through an appeal to the WTO. Short of an appeal one has to consider the common understanding of the words themselves, and the evidence of the TBT’s content.

One possibility would be that a ‘recognized body’ implies a list of the bodies that are formally ‘recognized’. However, whereas the Agreement on Sanitary and Phyto-Sanitary Measures (SPS) includes such a list, no similar list is referenced by the GATT, TBT or GPA.

Rather than provide or reference a list of formally recognized bodies, the TBT and its annexes go to some lengths to define the procedures that any organization should follow to develop international standards. These details would not be necessary if an agreement rested on reference to an existing list of bodies. They could only be relevant as criteria for subsequent evaluation or recognition of standards/standardizing bodies, or their resulting standards.

Thus, Article 4 of the TBT deals expressly with requirements for the “*Preparation, Adoption and Application of Standards*”, and codifies these requirements by reference to a “Code of Good Practice for the Preparation, Adoption and Application of Standards”, presented as

Annex 3 to the TBT (and subsequently referred to as Agreement as the "Code of Good Practice"). In addition, paragraph 4.2 states that "Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement [i.e. the TBT agreement]".

Compliance with Code of Good Practice appears to be a relevant criterion in relation to 'recognition', as a standards/ standardizing body though it is not clear whether compliance with the code is either necessary or on its own sufficient for a body to be 'recognized'. It is likely that other factors relating to the generally understood definition of 'recognized' would be considered relevant: such factors might include recognition of a body's standardizing activities by other international bodies, such as ISO; recognition by governments (e.g. in relation to a body's standards or standardization activities); and of course public recognition.

The Bottom Line

Unless a government acts and is subsequently challenged in relation to TBT compliance, it is not possible to resolve TBT issues definitively. In the meantime, governments and their partners need to act on the basis of their own understanding of the issues, and consider the relative costs, benefits and risks of acting (or not acting) in terms of their own objectives – including their own social and environmental objectives.

The Agreement on Technical Barriers to Trade (TBT) *encourages* governments to reference international standards in relation to their procurement specifications or technical regulations. There is little if any reason to believe that international social or environmental standards, including international forest certification standards, are excluded from this provision.

Whether governments *wish* to reference social or environmental standards within their trade policies is a legitimate political question. There are certainly political and economic arguments against the specification of social and environmental standards in world trade. However, reference to international standards also creates wide scope for producer country governments to strengthen the implementation of their own domestic social and environmental policies while simultaneously promoting exports. There is also a growing body of evidence that specifying social or environmental standards in international trade can have major positive social and environmental impacts, as is increasingly being recognized by bodies such as the ILO.

Whether governments *choose* to align their technical regulations or procurement policies with forest certification schemes based on international standards is, rightly, a domestic political decision. But there is little reason to think that if they did choose to do so it would be considered a technical barrier to trade.

This report was prepared by
DOVETAIL PARTNERS, INC.

Dovetail Partners is a 501(c)(3) nonprofit corporation that collaborates to develop unique concepts, systems, programs, and models to foster sustainable forestry and catalyze responsible trade and consumption.

FOR MORE INFORMATION OR TO REQUEST
ADDITIONAL COPIES OF THIS REPORT,

CONTACT US AT:

INFO@DOVETAILINC.ORG

WWW.DOVETAILINC.ORG

651-762-4007

© 2006 Dovetail Partners, Inc.

This Dovetail Report is made possible through the generous support of the Rockefeller Brothers Fund, Surdna Foundation, McKnight Foundation and individual donors.



DOVETAIL PARTNERS, INC.

4801 N. Highway 61, Suite 108

White Bear Lake, MN 55110

Phone: 651-762-4007

Fax: 651-762-9642

www.dovetailinc.org