

Introduction

Standards generally go unnoticed. They are mostly quiet, unseen forces, such as specifications, regulations and protocols, which ensure that things work properly, interactively, and responsibly. How standards come about is a mystery to most people should they even ponder the question.

Global Standards: Building Blocks for the Future
US Congress Office of Technological Assessment, 1992

Technical regulations and standards have existed since antiquity.^{1 2} They are the invisible gears that shape the world we live in. “They shape not only the physical world around us, but our social lives and even our very selves.”³ All the products that are traded and available at stores comply with technical regulations and standards. Among other things, they enhance food safety and product compatibility, while providing consumers with important information and establishing a common trade language. Technical regulations and standards are instruments for governments to implement economic, social and health policies and to foster development. For example, they are used to diminish information asymmetry between producers and consumers, and as part of public health policy goals, like providing consumers with information on the nutritional value of processed food through labeling and frontal labeling standards.

¹ For example, the standardization of coins and coinage in the Roman empire or the standardization of bricks in ancient Egypt that made the construction of the pyramids possible.

² Technical regulations and standards are documents that establish characteristics for products, services, processes, production methods and systems. Although there is no unique definition for “technical regulation” or “standard,” for the purpose of this book, technical regulations and standards are understood as defined in Annex 1 of the TBT Agreement. A technical regulation is a document that lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. A standard is 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. Both “may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.” WTO, Agreement on Technical Barriers to Trade (TBT Agreement), 1994, Annex 1.

³ L. Busch, *Standards: Recipes for Reality*, Cambridge, MA: MIT Press, 2011, p. 2.

In international trade law, the Agreement on Technical Barriers to Trade (TBT) disciplines the preparation, adoption and application of technical regulations and standards. Its main aim is to maintain a balance between the right of the World Trade Organization (WTO) Members to achieve legitimate goals through regulation and the disruptive and discriminatory effects this can have on trade. The Agreement establishes harmonization as one tool to achieve this balance. Article 2.4 of the TBT Agreement stipulates that when technical regulations and standards are required, Members shall use as a basis for them the relevant international standards when they exist or their completion is imminent, unless they are ineffective or inappropriate for the fulfilment of their legitimate objectives.⁴ Also, Article 2.6 requires WTO Members to “play a full part ... in the preparation by appropriate international standardizing bodies of international standards.”⁵

The requirements in Articles 2.4 and 2.6 of the TBT Agreement provide international standards with binding effects over countries, legal entities such as companies, nongovernmental organizations (NGOs), etc., and individuals. Directly, international standards constrain the behavior of governments (they have to use them as a basis for their technical regulations and standards), and indirectly, the behavior of markets (they decide what can be sold and bought and how) and consumers (they determine the variety, quality and safety of products). The quasi-regulatory power that the WTO delegated to international standardizing bodies (ISBs) has also had consequences for them. ISBs, which were established as voluntary standard setters, were upgraded to world regulators, and the WTO provided them with new responsibilities.

This poses two problems. First, although the TBT Agreement demands harmonization with international standards, it fails to actually define international standard and ISB. Unlike the Sanitary and Phytosanitary Agreement (SPS), which explicitly mentions the Codex Alimentarius Commission (CAC), the International Office of Epizootics (OIE), and the International Plant Protection Convention (IPPC) as “relevant international organizations in the field of sanitary and phytosanitary protection ... in which members shall play a full part,”⁶ the TBT Agreement does not mention any ISB or include a list such as this one. The Appellate Body has attempted to define these concepts and the elements that constitute them, but this has led toward greater confusion, controversy and, some will argue, contradiction.

The lack of definition is very problematic. Regulators and standardizers all over the world are faced with the daily challenge of deciding which “international” standard to use as a basis of their technical regulations and standards and in which bodies they shall play a full part. Also, it has created ambiguity, misunderstanding and unpredictability for WTO Members, national standards bodies (NSBs) and the

⁴ *Ibid.*, WTO, TBT Agreement, Article 2.4. ⁵ *Ibid.*, Article 2.6.

⁶ WTO, Agreement on the Application of Sanitary and Phytosanitary Measures, 1994, Articles 3.4 and 12.3.

international standardizing system. Particularly for WTO Members and NSBs it has led to two contradictory effects. On the one hand, the lack of clarity creates regulatory divergence; what might be considered an ISB or an international standard by a WTO Member might not be considered as such by another, creating more barriers to trade. On the other hand, participation in ISBs is costly as it requires human, time, technical and financial resources, and WTO Members seek to avoid the risk of a trade dispute. Members and NSBs want to play safe and participate in and use the standards of those bodies that have been *de facto* recognized as *the* global standardizers. This has a negative effect on the international standardizing system, providing certain bodies with a privileged status and discouraging participation in other bodies that might be more transparent and inclusive or develop better standards.

The second problem is that traditional sources of international law cannot accommodate international standards under the scope of international law. International standards have become *de facto* binding instruments and their scope of application has become wider than the scope of the TBT Agreement. International standardization has gone beyond technical issues and has moved toward social, environmental and policy issues. Nowadays, we have international standards on social responsibility, sustainable fishery management, carbon and water footprints and reliability of local governments' practices.⁷ International standards are covering areas in which governments have been unable to achieve agreements, like sustainable forest management. It can be said that in some issues, they are replacing traditional sources of international law, not only because they are faster to adopt but also because states are using them as a tool to circumvent stalemate. It is not impossible to think that the lack of compliance with an international standard could be invoked in a dispute outside of the WTO by one of the parties. Because of this, it is essential that international law embraces them and locates them within its scope.

Addressing these problems is very important for trade law and international law. Having a clear definition of international standard and ISBs, and locating international standards under international law, will provide clarity and predictability to both international law and ISBs. Clarity, in particular, will also help in providing a better understanding of the bodies that develop international standards, making them more inclusive, transparent and responsive to the needs of regulators, the markets and international law. This book does not address in depth the second problem as the topic deserves a book of its own. It only presents some of the new theories of international law and how international standards fit within them.

International standardization has been studied from the economic and political science perspectives, but it has rarely been analyzed from an international trade law

⁷ See ISO 18091:2014 *Quality Management Systems – Guidelines for the Application of ISO 9001:2008 in Local Government*.

or multidisciplinary perspective, which is the goal of this book. Moreover, there is a lack of understanding or a misunderstanding among scholars, WTO Members and even practitioners concerning ISBs and the way they operate. The questions this book looks to address are: How did the international standardizing system come into existence? How the bodies that form it were created, and what are their rules and procedures? What is an ISB and which characteristics must a body comply with to be considered as such for TBT Agreement purposes? What is an international standard and which characteristics must it comply with to be considered as such for TBT Agreement purposes? Are all the bodies studied here ISBs under the TBT Agreement? Are all the standards adopted by these bodies international standards under the TBT Agreement?

The main aims of this book are, first, to draw attention to the importance that international standards have for international law and economics (trade, economic growth and innovation); second, to provide a realistic approach to international standardization, demystifying it and making it understandable to international lawyers, practitioners and the general public; third, to construct tentative definitions of international standard and ISB using the TBT Agreement, the Standards Code and their negotiation texts, the case law and the TBT Committee Decision; fourth, to test these definitions against the bodies under study as well as some of the standards they have adopted. The goal is to determine if all of these bodies comply with the TBT definition of ISB and if all the standards adopted by these bodies can be considered international standards under the Agreement.

SCOPE

This book focuses on the lack of definition of ISB and international standards within the TBT Agreement and does not discuss the SPS Agreement, though when necessary, the SPS Agreement is mentioned. The reason behind this is because while the SPS Agreement and its relationship with the ISBs it enlists have been addressed on several occasions by law scholars, the TBT Agreement and its lack of a definition for international standard and ISB, and a listing of these bodies, have been scarcely addressed.

Many bodies define themselves as ISBs; however, this book focuses only on six bodies that are some of the most widely recognized bodies, and at the same time they have not been deeply studied (except for the CAC, the International Organization for Standardization [ISO], and the Forest Stewardship Council [FSC] to some extent). These bodies are: the CAC, the Working Party on Agricultural Quality Standards (WP.7) of the UNECE (United Nations Economic Council for Europe), ISO, the International Electrotechnical Commission (IEC), the American Society for Testing and Materials (ASTM International, hereinafter ASTM) and the FSC.

Some initial clarifications are needed. First, these bodies were chosen because they all describe themselves as ISBs, and they represent the entire spectrum of

international standardization, from a clearly international intergovernmental body, the CAC, to a purely private body, the FSC. Second, although Codex is well known for its work in developing food safety standards that fall under the scope of the SPS Agreement, it also develops quality food standards and other measures such as labeling, packaging and traceability that fall under the scope of the TBT Agreement. Third, although the UNECE has other Working Parties that develop standards, such as the WP.29 (the World Forum for Harmonization of Vehicle Regulations) and the WP.15 (the Working Party on the Transport of Dangerous Goods), only the WP.7 is addressed due to its overlap with Codex. Third, ISO and the IEC were both chosen because although they are governed by the same Directives, they were created under different circumstances, with different purposes and by different actors. They also have specifications that only apply to each of them and they have implemented different policies, resulting in two different organizations. Finally, although the FSC has national structures, this book only focuses on FSC International.

STRUCTURE

This book is divided into three main parts. The first part, which is comprised of Chapters I, II and III, explores the world of standards, which includes the international standardizing system and some of the bodies that comprise it, and the economic and legal effects of international standards. Chapter I provides a brief overview of the history of the international standardizing system and the bodies under study in this book, along with a deeper scrutiny of the structure, governance and rules of procedures of the latter. An extensive analysis of these issues is important as much misunderstanding and mysticism surrounds international standardization. Most of it comes from the idea that standardization is a technical venture in which only experts are engaged, without considering its economic and political implications.

Chapter II departs from the idea that international standards have binding effects and therefore should be considered as part of international law. However, traditional sources of international law cannot embrace international standards because they do not meet the legal valid form they require. The chapter turns to the new theories of international law as tools for placing international standards under the spectrum of international law.

Chapter III explores the economic effects of national standards. It describes their classification from an economic perspective and the impact they have on trade, growth and innovation and how developed and developing countries and large and small companies are differently affected. It also looks into the idea that international standards are potentially global public goods and it goes on to compare the benefits of harmonization with those of mutual recognition.

The second part of this book, Chapter IV, studies the discipline of international standardization under the WTO. It explains the negotiating history of both the Standards Code and the TBT Agreement and the provisions they established. This chapter focuses on the lack of an explicit definition of international standard and ISB in the adopted agreements, and it explores the negotiation history and definitions in some drafts that provide guidance on the meaning negotiators intended for these two concepts. It relies on the information provided by the texts and their drafts, the case law and the principles in the TBT Committee Decision to provide an analysis of the characteristics that an ISB and an international standard should have under the TBT Agreement.

Finally, the last part of this book describes the international standardizing system and some of the bodies that comprise it and provides a practical application of the findings of Chapter IV. In Chapter V, the characteristics of the bodies explained in Chapter I are contrasted with the constructed characteristics that an ISB must have to determine if the bodies under study are actual ISBs for TBT Agreement purposes. Chapter VI explains the standardization process of two standards, the Office Open XML (OOXML) standard by the ISO/IEC Joint Technical Committee 1 (JTC1) and the natural mineral waters standard by the CAC, to define if they are international standards under the TBT Agreement definition.

METHODOLOGY AND LIMITATIONS

This book heavily relies on primary sources that include documents adopted by the organizations under study. Among these documents are decisions of the General Agreements on Tariffs and Trade (GATT) and WTO Committees; the reports of the meetings of the CAC and its Committees, and the WP.7 and its specialized sections; other documents elaborated by the bodies under study; and the legal framework of the bodies. Another important source of information was direct participation in the meetings of some of these bodies and the author's personal experience. The author participated in the CAC from 2011 to 2016 in different capacities: as a national delegate, an observer, general public and Codex Trust Fund consultant; in the 2011 and 2013 Codex Committee on Fresh Fruits and Vegetables (CCFFV) as chair; the 2015 Meat Specialized Section and the WP.7 meetings and the meeting of the Fresh Fruits and Vegetables Section of 2016; the ISO General Assembly of 2012 and the meeting of the Technical Committee (TC) – 229 Nanotechnologies in 2013; and the IEC General Meetings of 2012. Interviews were performed with staff from all the bodies under study and with national delegates to Codex, UNECE, ISO and the IEC, as well as other experts in the field.

The biggest limitation of this book is the lack of public information on some of these bodies, particularly ISO, the IEC and ASTM, which do not issue public reports on their meetings and most of the documents that are prepared by their secretariats are not publicly available. The progress and work on the standards and

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discussions that are carried out during the meetings are also confidential; even final standards are for sale. Although some of the loopholes were filled with information provided through the interviews, many remain. To this lack of transparency it should be added that there is a certain complexity to these bodies, which have a set of written rules that are sometimes unclear as well as unwritten ones that take time to uncover.