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Referencing International Standards in Government Procurement R052 - Legal Opinion Summary July, 2006

1. Summary

- 1.1 This paper from the ISEAL Alliance and the Center for International Environmental Law (CIEL) in Geneva summarizes the findings of two legal opinions regarding the ability of governments to reference existing voluntary international standards in relation to government procurement. The initial (broader) legal opinion was completed by independent trade lawyer Michael Rogers, and was formally reviewed by Nathalie Bernasconi-Osterwalder of CIEL. The opinions take account of relevant World Trade Organization (WTO) agreements and associated jurisprudence. The Opinions concentrate primarily on the relevance and application of the WTO Agreement on Technical Barriers to Trade (TBT) and the WTO Agreement on Government Procurement (GPA).
- 1.2 It has often been assumed that governments cannot reference non product related Process and Production Method (npr PPM) standards, such as social and environmental standards, in relation to government procurement. This view is based on the misconception that npr PPM standards *per se* violate WTO rules, including the requirements of the TBT Agreement and the GPA. Legal analysis shows, however, that WTO rules *do* permit references to existing npr PPM standards in laws, regulations, procedures and practices relating to government procurement. Moreover, where there is an international standard (be it product-related or not) WTO law indicates a strong preference for governments to use such international standards where appropriate.
- 1.3 The definition of an international standard depends essentially on its approval by a 'recognized body'. There is no definitive and unique list of international standards or standardizing bodies formally recognised by WTO. Recognition depends on *de facto* recognition demonstrated through such factors as recognition by ISO (including inclusion on the World Standards Services Network list); compliance with agreed general principles of standardization; support and/or funding by governments; and reference and use of the resulting international standards by governmental bodies.
- 1.4 Governments may specify international social and environmental standards as the basis for their procurement.

2. Non-Applicability of the TBT Agreement to Government Procurement

- 2.1 Article 1.4 of the General Provisions of the TBT Agreement specifically excludes government procurement from its scope. Issues relating to government procurement are addressed by a separate Agreement on Government Procurement. The TBT states: "Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage".
- 2.2 In addition to the relationship between the GPA and the TBT Agreement, Article III:8 of the overarching General Agreement on Tariffs and Trade (GATT) also creates an exclusion, or carve out, from the national treatment obligation for government procurement policies. Article III:8(a) differentiates "procurement by governmental agencies of products purchased for governmental purposes" from procurement "with a view to commercial resale or with a view to use in the production of goods for commercial resale." The former does not have a commercial objective, as the products (paper, furniture, hospital material, etc.) are consumed by the government in the course of its normal activities. This type of government procurement is exempted from the application of the principle of national treatment.
- 2.3 Though the provisions of the TBT Agreement are not specifically applicable to government specification of voluntary standards in relation to government procurement, the TBT Agreement and related jurisprudence may nevertheless have some relevance in terms of establishing accepted interpretations of common issues within the WTO.
- 2.4 The TBT *is* applicable to the development of government 'technical regulations' and 'standards'. Technical regulations as defined in the TBT Agreement are documents laid down by governments specifying requirements with which compliance is mandatory. In other words, they specify legal obligations in relation to traded products within the jurisdiction of that government. By contrast, 'standards' are defined as documents approved by a recognized body, including governments, with which compliance is not mandatory. The implications of the TBT Agreement for the use of npr PPM standards are considered in a separate ISEAL-CIEL legal opinion.

3. The Agreement on Government Procurement (GPA)

- 3.1 Within the WTO, government procurement is covered by the plurilateral Agreement on Government Procurement (GPA). 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, given the exclusion noted above.
- 3.2 Article VI of the GPA deals with Technical Specifications. Paragraph 1 states that, "Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, *or the processes and methods for their production* and requirements relating to conformity assessment procedures prescribed

by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.” (Emphasis added).

- 3.3 Article VI.1 of the GPA does not appear to distinguish between product-related and non-product related technical specifications. As a consequence the GPA is likely to cover both product related and non-product related standards. No definitive jurisprudence yet exists to confirm this conclusion, but this would imply that standards relating to the social and environmental impacts of production are within the scope of the GPA.
- 3.4 Article XIII, para. 4(b) states: "Unless in the public interest an entity decides not to issue the contract, the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other Parties, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is *determined to be the most advantageous*". (Emphasis added). The last two words are important because they do not limit the determination only to economic advantages, but permit the inclusion of environmental and social advantages.
- 3.5 Clause (b) of VI.2 requires that “Technical specifications prescribed by procuring entities shall, where appropriate: (b) be based on *international standards*, where such exist;” (Emphasis added). Interpretation of this clause requires consideration of the definition of an international standard in the context of the GPA.

4. The definition of an International Standard within the GPA

- 4.1 Different WTO agreements adopt slightly different definitions of 'standards' and standardizing bodies, and these in turn differ from equivalent definitions currently used by ISO.
- 4.2 The definition of a standard included in the GPA (footnote 4 to Article VI) 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 labelling requirements as they apply to a product, service, process or production method" (Emphasis added).
- 4.3 The GPA does not provide further guidance on the definition of a 'recognised body'. More broadly, within the WTO there has not been an established ruling on the meaning of a 'recognised body'. Consequently, a body seeking to establish itself as a recognised standardising body should draw together all of the elements which could indicate a general recognition in the eyes of the informed public concerned.
- 4.4 Steps taken to increase recognition as a standardising body could include recognition by ISO and inclusion in the World Standards Services Network (WSSN) listing (which is headed "International Standardising Bodies"); being a body that is established or otherwise endorsed by a government (e.g. by funding); recognition (formal or written) by governments, whether local or national, that certification in accordance with the international standard developed by such a body is accepted as formal certification; compliance with the guidance specified in the TBT Annex 3 Code of Good Practice for the Preparation, Adoption and Application of Standards; and compliance with subsequent guidance on the development of international standards, as laid out in the TBT Committee's Second Triennial Review of the TBT Agreement (Annex 4). At a

minimum it would likely require that the organization's incorporation documents include the power to formulate and issue standards.

- 4.5 The GPA does not provide for a definition of an 'international standard' or 'international body'. Thus it is unclear how an international standard is defined under the GPA. Nevertheless, in absence of a definition, it is likely that definitions provided in other agreements in the WTO would inform the meaning under the GPA. The TBT Agreement defers to ISO/IEC Guide 2:1991 on the definition of an international standard as a "standard that is adopted by an international standardizing / standards organization and made available to the public." The TBT Agreement (Annex 1.4) then defines an 'international body or system' as a "body or system whose membership is open to the relevant bodies of at least all Members." The SPS Agreement, on the other hand, refers to standards adopted by the Codex Alimentarius Commission; the International Office of Epizootics; the International Plant Protection Convention; or "other relevant international organizations open for membership to all Members, as identified by the [SPS] Committee."
- 4.6 Clearly, both the TBT and the SPS Agreements emphasize that international standardizing bodies should be open to all WTO Members and their relevant bodies. While the definitions seem to imply that international standardizing bodies are membership-based, the emphasis on openness, however, should lead to an interpretation of an international standardizing body that would include international bodies that are not membership-based, provided that interested parties, including relevant bodies of WTO Members, have an opportunity to participate in the development of standards.

5. The use of international standards for drafting technical specifications

- 5.1 Assuming that an international standard exists, and is appropriate, the GPA goes on to indicate a strong preference for its use in the drafting of technical specifications for government procurement. As mentioned above, Clause (b) of VI.2, states that "Technical specifications prescribed by procuring entities shall, where appropriate: (b) *be based on* international standards, where such exist;" (Emphasis added).
- 5.2 This language indicates a requirement for governments to use international standards where they exist and are considered appropriate. One possible repercussion of the lack of a definitive list of international standardizing bodies is that more than one standardizing body could be recognised as having appropriate international standards for the drafting of procurement specifications.
- 5.3 Furthermore, clause VI.2(b) in the GPA requires only that technical specifications be 'based on' such international standards - not that they adopt or reference such international standards in their entirety. Where an international standard exists and is considered 'appropriate', governments thus have the choice to either define technical specifications that adopt some but not all elements of the relevant international standard(s), or to adopt a single international standard in its entirety.
- 5.4 The TBT Agreement 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' (Article 2.5). A similar provision is also included in the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). Although there is no such specification included in the GPA, it is likely that a similar logic

applies in the context of the GPA. This would mean that a technical requirement that is based on an international standard would be presumed to fulfill the requirement in Article VI.1 of the GPA that 'technical specifications not be prepared, adopted or applied with a view to, or with the effect of, creating *unnecessary obstacles to international trade*'.

6. Conclusions

- 6.1 Where a signatory government develops technical requirements for procurement purposes, the Agreement on Government Procurement applies. Technical specifications laying down the processes and methods for the production of products, including social and environmental processes and methods, fall within the scope of the GPA. These should be based on international standards, where appropriate, including international social and environmental standards.