

# **Standards for Sustainable Trade**

## **A RING-IISD Capacity Building Project**

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## 1. INTRODUCTION

Trade liberalization is often described today as being a critical driving force for economic development in the modern, globalised world. The expansion of international and regional trade rules is intended to allow goods produced in more countries to access more markets around the world. For developing countries, it is argued, this should provide opportunities for economic development as the goods they have a competitive advantage in producing gain access to more markets.

This simple theory is fraught with complications and difficulties. The most relevant for purposes of this background paper, and the project it relates to, is that simply promoting economic development in today's world is not enough. Rather, the international community has recognized that the promotion of sustainable development must be the ultimate goal of all economic policy. Indeed, the preamble to the 1994 Agreement Establishing the World Trade Organization (WTO) and the 2001 Doha Ministerial Statement of the WTO both support this critical distinction between promoting economic development and promoting sustainable development: the ultimate goal is the promotion of sustainable development.

In this context, processes that support trade growth and the trade rules themselves must go beyond simply promoting more trade to supporting trade growth that is sustainable in both environmental and social terms, as well as according to the traditional economic measurements. This paper provides the background to a project that looks at how one important process that supports trade growth – the development and use of national and international standards – can be enhanced so that it supports sustainable trade growth in developing countries. In particular, this project is interested in standards for sustainable trade.

### *1.1 What are Standards for Sustainable Trade?*

The title of this project is “Standards for Sustainable Trade”. No single definition for sustainable trade can be found. As a result, no single definition of standards for sustainable trade can be found either. Thus, it is important to identify what standards for sustainable development means for the purposes of this project. There are two key elements to this (please also see section 2.):

First, when we speak of standards, we speak of non-legally binding instruments. This distinguishes them from laws and regulations that are legally binding. So a standard is any document approved by a recognized body that provides rules, guidelines or characteristics for products or production processes, and for which compliance is voluntary. This includes voluntary requirements related to terminology, symbols, packaging, marking and labeling.

Second, when we speak of sustainable trade, we speak of the concept of sustainable development. While this concept originally began with a singular focus on development that was environmentally sustainable, today a broader conception of environmental and social sustainability has emerged. This includes the protection and promotion of human rights, maintenance of local and indigenous communities, equity issues, as well as the traditional focus on environmental protection.

The project participants are not of the view that private welfare and profit are necessarily in opposition to the promotion of sustainable development. Similarly, the promotion of trade growth is not viewed here as necessarily in opposition to sustainable development. Indeed, the participants understand that trade growth can be a significant contributor to achieving a broader, more sustainable development

model. But this will require that the processes and instruments that promote increased trade also promote sustainable trade.

Our focus on this interconnection is justified by the fact that, in a growing number of sectors, consumer concern for sustainable development is increasingly being expressed through purchasing preferences. As policy-makers have sought to expand the number of policy tools available to efficiently and effectively address sustainability issues beyond traditional “command and control” type regulations, standards have emerged as one form of non-legally binding instruments that can do just that, in particular, by using market forces to reward sustainable production processes, and to encourage sustainable consumption patterns.

Access to certain markets, particularly in OECD countries, increasingly depends on demonstrating to customers – be they corporate clients or individual consumers – that products have been produced according to the principles of sustainable development. Compliance with relevant standards – be they on fisheries or forest management, energy efficiency, human health and safety, hazardous waste management or labour standards – has become a symbol in the marketplace for compliance with the principles of sustainable development. The core value here is the promotion of more than private welfare or private profit, more than technical engineering compatibilities, and so on.

Standards for sustainable trade, or sustainable development standards, promote a broader and longer-term sense of the public welfare in direct and express terms, thereby integrating these elements directly into the trading process. The Standards for Sustainable Trade project explores how developing countries can effectively participate in the development and application of standards for sustainable trade in order to increase their future development opportunities.

## ***1.2 Market Access and Standards for Sustainable Trade***

Even though they are not legally binding, standards can have important impacts on market access. For example, in 1999 the Big Three car manufacturers, Ford, General Motors and Chrysler, indicated that as of 2003 they would only do business with suppliers certified to the ISO 14001 Environmental Management System standard. Any auto-parts manufacturer that wants to access this huge market must implement the ISO 14001 standard: even though it is not a formal legal requirement, ISO 14001 has become an economic requirement for companies in the automotive sector. Similarly, Nike, the Gap and many other textiles retailers impose supplier conditions relating to workplace standards and worker treatment, and refuse to do business with companies that are unable to comply.

Of course, environmental and social requirements are intended to restrict market access: if you do not comply with the standard, you do not have access to the marketplace. In this sense, they are no different from other quality standards, such as voltage ratings (e.g. for hair dryers), materials strength (e.g. for pipeline valves), or dimensions (e.g. A4 paper size). But as with other traditional quality standards, there are a number of reasons why a standard can keep a company out of a market, some fair and some unfair.

The primary concern of this project is how standards can *unfairly* limit or preclude market access. This can occur, for example, when meeting the standard requires investments in new and expensive technology to address an environmental concern relevant to the importing country but that may not be relevant to the producing country – or simply due to a lack of information on the existence of the standard or of its specific requirements. Complicating this is the fact that, because standards are not governed by trade law in the same way as legally-binding laws and regulations (more on this in Annex 2), exporters are less able to rely on trade law to address the barriers to market access that they impose.

This paper will explore possible ways to address these types of constraints through effective capacity building programmes.

One should also remember the second aspect of the relationship between standards and market access: that adhering to sustainable trade standards can enhance opportunities for market access to retail, corporate and government consumers who are concerned about the sustainability of the products they purchase and the resources they consume in production, use and disposal. Increasing developing countries' capacity to seize such opportunities is an important focus of this paper and the project as a whole.

### ***1.3 The RING-IISD Standards for Sustainable Trade Project***

The RING-IISD Standards for Sustainable Trade project is the first phase of what is intended to be a long-term capacity building project. This phase seeks to identify what types of capacities are needed for producers in developing countries to better participate in those export markets that are concerned with sustainable development and, hence, sustainable development-related standards. In some cases, there may be a need for individual producer capacities. In other cases, there may be a more fundamental weakness in institutional capacity: government agencies, standards bodies, certification and other institutions. While insufficient company capacity will hurt a company's export prospects, insufficient institutional capacity can hurt the entire sector's export prospects. National, regional and international capacity requirements will be considered, with a considerable focus on the question of whether a strong regional capacity building program would be an effective option to follow.

The project is intended to identify what is **needed** in order to make a capacity building or technical assistance program effective and efficient over the longer term. Thus, an essential feature of this project is that it is to focus on identifying demand-driven needs. Subsequent phases of the project will, it is hoped, work to implement programs that meet these identified needs.

The project participants have recognized that a demand driven capacity building project must respond to the needs of important and potentially important economic actors who can benefit from a sound assistance program that increases their exports. Thus, the project will focus on economic sectors with actual or potentially significant export capacity, and the standards relevant to the principal export markets. This has the added benefit of exploring needs in different sectors as well as different regions, and searching for commonalities as well as differences in capacity building needs.

The International Institute for Sustainable Development (IISD) is coordinated the project on behalf of the participating Ring members. The participating members are providing the on-the-ground research capacity and contacts to identify needs in three to five countries in three different regions, as seen in Table 1.

Table 1: The Participants in the Project

Region	Lead Ring Member	Countries
South America	Recursos e Investigacion para el Desarrollo Sostenible (RIDES)	Chile, Paraguay, Brazil
Eastern and Southern Africa	African Centre for Technology Studies (ACTS)	Kenya, Uganda, Namibia, Zimbabwe, South Africa
South Asia	Bangladesh Centre for Advanced Studies (BCAS)	Bangladesh, Pakistan, India, Nepal

The lead Ring Member in each region will ensure that the outreach and research involves all appropriate organizations and technical expertise in the countries under review in order to make judgments on the need for technical assistance and capacity building in these areas. They will also work to improve awareness of the standards and sustainable trade linkages within the government, business and NGO communities. Please see Annex 3 for a list of contacts of our regional partner organizations.

As the volume of work in the standards field is growing, IISD has taken on the role of ensuring that this project does not duplicate work already underway elsewhere. At the same time, this growing volume indicates a greater interest in the field, and hence the likelihood of greater opportunities to implement the findings of this research.

The current needs identification project is expected to conclude with a series of Regional workshops in March 2003. This will be in time to ensure implementation of the recommendations can be started prior to the Cancun, Mexico, Ministerial Meeting of the World Trade Organization in September 2003.

#### **1.4 The Role of this Background Paper**

This paper sets out some background information and parameters for the regionally based research project. The following two sections of the paper focus more specifically on the standards process and its capacity requirements. What capacities are required to effectively participate in the making and use of international and national standards? And what options are available for developing countries to promote increased access to this trade promotion process? They also provide an indication of the research needs that might be subject to assessment by each regional group. Section 4 then suggests some ways in which these standards can restrict market access for goods from developing countries. Annex 1 proposes a research agenda that will allow common elements to be identified, while still providing the flexibility to accommodate regional differences. Annex 2 then provides a review of the relationship between standards for sustainable trade and the WTO, in particular the Agreement on Technical Barriers to Trade. Annex 3 includes contact information for the project partners and advisory committee.

## **2. THE IMPORTANCE OF STANDARDS FOR SUSTAINABLE TRADE**

*As the 21<sup>st</sup> century approaches, environmental regulation around the world is slowly moving away from simple reliance on “command-and-control” rules toward approaches like taxes, tradable permits, auditing and management schemes, and eco-labels. A salient feature of this shift is the increased use of self-regulatory, consumer-based, and voluntary mechanisms to allow enterprises to move “beyond compliance.”<sup>1</sup>*

This 1995 prognosis perhaps even understates the importance of the shift to “beyond compliance” tools and thinking. Indeed, many of the instruments that are used to implement sustainable development policy today do not just “allow for”, but actually require a commitment to going “beyond compliance”.

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<sup>1</sup> Naomi Roht-Arriaza, “Private Voluntary Standard-Setting, the International organization for Standardization, and International Environmental Lawmaking”, at p. 107, pp. 107-163 in Vol. 6 *Yearbook of International Environmental Law*, Oxford University Press, 1995. Emphasis added.

This is inherent in the nature of standards: if all they did was duplicate existing national laws, then their role would quickly become meaningless.

Also overstated is the “voluntary” status of many emerging sustainable development standards. While standards are not legally binding, and hence in legal terms whether a business applies one is a voluntary decision, economic factors often mean that the decision is not really voluntary. Indeed, Roht-Arriaza notes:

*As these private sources of standards and rules begin to be implemented, they may well become increasingly less “voluntary” as pressure from consumers, suppliers, competitors, banks, insurance companies, and the like make them de facto mandatory in one or more major markets.<sup>2</sup>*

This assessment is undoubtedly accurate and explains efforts by industry and environmental NGO’s to understand and effectively use the new tools in a way that meets their own goals. The challenge of this project is to help identify ways for developing countries to become stronger and more effective actors in these processes, both in their development and their implementation, so that their goals can also be reflected in this important, growing toolbox of instruments.

It has already been suggested that standards for sustainable trade are standards that include at least two dimensions – the promotion of trade and the express integration into the trade element of public welfare aspects of environmental and social sustainability. This still leaves the question of what standards are, and what they try to do.

As mentioned, standards are non-legally binding instruments that set guidelines or criteria for certain purposes. Standards are created by standard setting bodies, as opposed to public government bodies or intergovernmental bodies that make legally binding laws or agreements. While governments do participate in many standard-setting bodies, and some of these may even be located in government agencies, they are not public law-making activities. This non-governmental nature means that a wide range of bodies or organizations can become active in the standards-making process. Government approval is not needed, and is often not sought. It is the market, and its reliance on the standard, which is the main mechanism through which standards obtain their influence. Indeed, standards may be developed precisely because a commercial or non-governmental organization has disapproved of government actions, or inactions, and has sought to supplement them with “beyond compliance” market-based tools. This is clearly what a growing number of NGO’s are now doing, with well-know examples such as the Forest Stewardship Council demonstrating the potential market power of these tools.

The content of standards is also changing. Standards originated in the technical areas, for example promoting common engineering standards to allow for cross-uses of tools, equipment, electronics, etc. between products from different companies. From early days they also included a large consumer safety purpose, for example standards to ensure that children’s pajamas are fire retardant. These types of standards are traditional, product-related standards that define qualities and characteristics of a product, and are often expressed in technical language that industry participants can clearly understand and consistently apply. By the turn of the millennium, there were over 9500 standards adopted by international standards organizations addressing a wide range of these kinds of technical issues.

Social and environmental standards, however, can be markedly different. Most importantly, standards for sustainable trade almost invariably include a concern for the processes for production of the different

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<sup>2</sup> Ibid, p. 108.

products, processes that often do not have a large impact on the final qualities or characteristics of the product as traditionally conceived in trade and standards thinking. This moves into the controversial area of non-product-related process and production method (PPM) standards that the WTO has had much difficulty wrestling with. Some of the legal issues are noted in Annex 2. For present purposes it is sufficient to note that recent decisions of the WTO Appellate Body make it clear that PPM-related standards are not per se inconsistent with WTO rules, and that because standards are not treated the same way as legally-binding laws or regulations, the legal impact of the WTO in defining conditions for process and production method standards is much reduced. (See Section 4 below)

Over the course of time, a complex, formal institutional structure has evolved at the national and international level to develop and implement technical standards. At the national level, national standards bodies – of which each country has a limited number, each with a specific scope of activity – work with a network of national stakeholders. These stakeholders have traditionally been primarily from the private sector. At the international level, international standards bodies – of which there are a limited number, each with a specific scope of activity – work with a network of national standards bodies. However, as the scope of standards began to evolve, so too did the type of organizations developing them.

Sustainable development standards are at an early stage of their evolution and so the organizations developing them have not yet created a formal, structured institutional base<sup>3</sup>. Most of the organizations developing sustainable development standards have also not integrated with the existing formal national or international standards bodies. There are a few exceptions, such as the International Organization for Standardization (ISO), whose international environmental management system standards are developed with the involvement of a number of NGOs, and the Codex Alimentarius Commission, whose food-safety standards are developed by governments, often with NGO involvement. But the lion's share of new sustainable development standards is being developed outside of the traditional standardization infrastructure. For example, in the case of standards for sustainable forest management, only one of the roughly 20 competing standards has been created by a national standards body: the Canadian Standards Association; industry associations or NGOs have developed the others.

To understand the scope of standards for sustainable trade, it is useful to illustrate the range of sources, scope, and types of instruments involved (see Annex I: Sources and Scope of Standards for Sustainable Trade).

### **3. MARKET ACCESS**

Although all of these sustainable development standards are intended to improve social welfare, either in terms of social development, environmental conservation or both, they can also create obstacles to trade. Indeed, as mentioned, this is the main objective of these tools: to reward “good” producers with access to markets that are subsequently closed to “bad” producers. But in some cases, the barriers to trade are not created by a company's inability or unwillingness to comply with the standard, but by procedural or institutional issues. There are many reasons for potentially significant market access problems due to sustainable trade standards including:

- Information on the standard is just not available;

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<sup>3</sup> Although many of the main NGO bodies involved in the development of sustainable development standards have joined in a coalition to begin developing a common institutional framework. See [www.isealalliance.org](http://www.isealalliance.org) for more information.



- The content of a standard may simply not be relevant to a given exporter due to different environmental or social circumstances from the purchaser applying the standard;
- The standard is applied without adequate warning, or without a phase-in period for developing country producers;
- Different export markets apply different standards, meaning that producers seeking to export to more than one market must comply with many – perhaps conflicting – standards;
- Small and medium size companies may not have the resources to meet the technical requirements of some standards or the costs associated with developing their components or meeting third party auditing requirements; or
- A potential exporter cannot show that the standard is actually met through a required certification process due to lack of certifiers or because of high costs.

If market access is restricted to products that do not comply with sustainable development standards that are set at reasonable levels, then the tool is achieving its intended purpose. But if market access is unfairly restricted because of issues like those listed above, then they can unfairly restrict economic development, one of the pillars of sustainable development. The Standards for Sustainable Trade project seeks to identify this range of issues and to develop technical assistance strategies to address them, particularly in ways that promote regional and South-South cooperation.

These specific concerns reflect a deeper issue that must be addressed by the standards community. A key factor in understanding the impact of standards on market access today is the very nature of globalization and trade. A standard developed in the context of one country's environmental concerns that becomes important to access that country's marketplace has an impact on potential exporters to that market. As markets globalize, the application of a standard will increasingly be between a private purchaser in one country and a private producer in another country. Thus, all standards are becoming transnational in impact. This simple, and increasingly inevitable, leap outside the borders now occurs whether a standard is made at the national or the international level. Undesirable market access impacts can occur whether biases are deliberately or accidentally embedded in a standard.

There is an additional factor of great importance in this area. Trade law and policy under the WTO both place a high reliance on promoting the harmonization of standards as a way of reducing or eliminating market access barriers. The primary focal point for harmonization under the WTO regime is around international standards. Under this harmonization approach, national technical regulations and standards that are consistent with international standards are presumed to be consistent with trade law. This importance of this fact is underlined by the reality that many developing countries do not have the financial, technical or institutional capacity to develop a host of domestic rules and so often must turn to existing international standards instead. This places a high premium on the ability of developing countries to participate in international standards processes – something that they are often unable to do.

One might also note in this regard that there is no fixed list of what constitutes an international standards body, and only a very rough outline defining what constitutes an international standard<sup>4</sup>. There are several recognized international standards organizations. However, except in the case of the WTO Agreement on Sanitary and PhytoSanitary Measures (SPS Agreement), which lists three relevant international standards bodies, there are no legal or other restrictions that maintain these existing organizations as the only bodies that can develop international standards. Today, there are increasing standards roles for non-governmental organizations, industry associations and other bodies, many of which are international in nature, and most of which are developing standards to be applied on an international basis. Regardless of the expectations in this field a decade ago, it is clear today that both

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<sup>4</sup> Annex 4 of the Second Triennial Review of TBT Agreement includes a list of principles for the development of international standards.

the number and diversity of sources for both international and national standards will grow in the foreseeable future.

One might also recall, however, that the expansion of standards for sustainable trade can also have positive market access impacts for participating producers. Just as technical standards can improve communication and confidence, and hence facilitate trade, so too can sustainable development standards. First, application of these standards has the capacity to promote market access, especially in markets where environmental and social considerations are a larger factor for consumers. Indeed, this is their primary attraction for most developing country producers. In some cases this involves niche markets, such as fair trade coffee or natural cosmetics. In other cases, it can be major markets such as for forest products or auto-parts.

Second, the use of such standards allows individual producers to access markets on their own merits, rather than be punished for the problems other producers in their country may have. Looking at it the opposite way, it allows the denial of market access to be focused on non-performing producers, not on countries. The recent case in which the California Public Employees Retirement Savings Fund (Calpers) – the single largest pension fund in the US – decided on ethical grounds to stop all investments in Thailand and Myanmar (Burma) is a clear indication of the importance of this sort of safeguard for producers.

#### **4. CAPACITY REQUIREMENTS**

There are two possible tracks for addressing the growth in standards for sustainable trade and their potential negative impacts on market access for developing country producers. One track is to develop new rules to constrain the development of standards for sustainable trade and their application or, alternatively, to establish non-binding guidelines for the making and application of such standards. The second track is to improve the capacities of developing countries and their producers to participate in the standards process and to implement these standards. This project is directed at the second track.

This project does not seek to restrain the development of sustainable development standards, or to limit their application in developing countries. Instead, it focuses on building up the capacity needs so that they do not unfairly restrict market access. However, because sustainable development standards and more traditional technical standards both rely on a common institutional framework, and both are important for market access, reference to the capacities required to implement and benefit from more traditional standards is also made in this project.

Some reference is also made here to capacities required to meet foreign laws and regulations – technical regulations in WTO terminology. This is primarily because the capacities for meeting these legally-binding foreign rules can often be similar to those required for meeting foreign or international standards. Table 3 shows the areas where capacity development is considered relevant for this project.

Table 3: Focus on Market Access to Developed Country Markets

<b>Standards</b>	<b>Binding Technical Regulations</b>
Writing standards	Writing technical regulations
Applying and Implementing standards	Applying domestic technical regulations
	Applying foreign domestic regulations
Demonstrating compliance with standards	Demonstrating compliance with domestic technical regulations
	Demonstrating compliance with foreign technical regulations

While specific capacity needs will reflect the types of standards and economic areas involved, it is possible to understand the different requirements based on the basic features found in Table 3. Each of these is considered below. What is also revealed below is that many of the same infrastructure requirements that underpin the effective implementation of the TBT Agreement also underpin the development of sound standards for sustainable trade. Assessment capacity, linkages with relevant industry groups and government agencies, awareness and consideration of existing international standards – all part of the TBT Agreement structure – are also important elements of environmental policy development in developing countries and for ensuring market access to developing country producers. Consequently, while this project focuses on the capacities to achieve trade growth through participation in sustainable trade standards and not on the technical legal requirements of the TBT or SPS agreements per se, a guiding premise is that the results should be consistent with the provisions of these agreements – which also requires a comprehensive legislative framework at the national level.

#### **4.1 The development of international and national standards**

The development of international and national standards requires the following capacities, at a minimum:

- Understanding of relevant provisions in international and regional trade agreements;
- Access to a well-resourced standards body that can write standards to address national concerns;
- Existence of a strong network between all concerned domestic stakeholders;
- Ability to identify private and public concerns for new standards;
- Access to information on existing national or international standards, including those being planned or developed;
- Ability to participate effectively and consistently in international and regional standard bodies;
- Scientific assessment processes to consider appropriateness of existing or new standards (including foreign and international standards);
- Economic assessment processes to assess possible trade impacts of existing or new standards (including foreign and international standards);
- Capacity to assess technical equivalency of domestic standards with other similar foreign or international standards;
- Relevant authorities with ability to interact and negotiate with foreign standards bodies;

- Enquiry points to notify WTO Members of standards being developed which will be applied domestically;

#### **4.2 *Applying and implementing standards***

- Capacity to identify and understand the standard, usually through a central authority;
- Ability for central authority to communicate requirements for different export markets to all relevant domestic producers;
- Potential for central authority, or other, to provide implementation training and assistance to export sector;
- Relationship with foreign or international standard developer to obtain clarifications, information on implementation techniques and conformity assessment;
- Technical and institutional ability to consider technical equivalency between foreign requirements and existing national standards;
- Access to private sources of training, information and capacity development;
- Metrology / Testing equipment, especially for product-related standards

#### **4.3 *Applying and implementing foreign technical regulations***

- Capacity to identify and understand the technical regulations, usually through a central agency;
- Ability for central authority to communicate requirements for different export markets to all relevant domestic producers;
- Potential for central authority, or other, to provide implementation training and assistance to export sector;
- Relationship with foreign or international standard developer to obtain clarifications, information on implementation techniques and conformity assessment;
- Awareness of “soft rights” to technical assistance from country imposing the technical regulation;
- Awareness of rights under WTO for negotiation of technical equivalence agreements;
- Technical and institutional ability to consider and negotiate technical equivalence agreements;
- Access to private sources of training, information and capacity development;
- Metrology / Testing equipment, especially for product-related standards

#### **4.4 *Demonstrating compliance with standards***

- Access to affordable private conformity assessment services, or to public services;
- Awareness of international or foreign conformity assessment (testing) procedures;
- National agency able to communicate conformity assessment procedures to domestic service providers;
- Availability of necessary testing and metrology equipment;
- Availability of trained, certified professionals to undertake tests and audits;
- Legal infrastructure establishing national accreditation agency;
- Competent accreditation agency able to approve of and oversee domestic conformity assessment service providers;

- Participation of national accreditation body in relevant regional and international accreditation cooperation and mutual recognition programs;
- Relationship between relevant accreditation agency and foreign accreditation agencies, particularly for information on testing procedures.

#### **4.5 *Demonstrating compliance with foreign technical regulations***

- Access to affordable private conformity assessment services, or to public services;
- Awareness of international or foreign conformity assessment (testing) procedures;
- National agency able to communicate conformity assessment procedures to domestic service providers;
- Availability of necessary testing and metrology equipment;
- Availability of trained, certified professionals to undertake tests and audits;
- Legal infrastructure establishing national accreditation agency;
- Competent accreditation agency able to approve of and oversee domestic conformity assessment service providers;
- Participation of national accreditation body in relevant regional and international accreditation cooperation and mutual recognition programs;
- Awareness of rights under relevant regional and international trade agreements, including for technical assistance, technical equivalence and mutual recognition agreements;
- Relationship between relevant accreditation agency and foreign accreditation agencies, particularly for information on testing procedures.

#### **4.6 *Some further considerations***

The project team believes that capacity building must be tailored to the needs of the recipients. Thus, the research will consider the capacity needs indicated above in the context of the types of standards most relevant to the existing and potential export sectors of their economies.

The team will also pursue their research based on a “sound foundations” approach. The project team believes it is important that needs assessment begin from the foundations, and gradually move up to subsequent levels if the existing capacity is sufficient. For example, a competitive private certification infrastructure is needed if a producer or country wishes to be able to certify organic food products. And more specialized certification services, and related capacities, may be needed for more specific organic standards. This approach will allow levels of capacity to be assessed and then built in effective and efficient ways.

In addition, inter-relationships between different types of standards and associated capacity needs are important. For example, basic metrology equipment is critical for a vast number of technical, product-related standards, but may be less critical for sustainability-related standards. Still, the ability to access export markets will depend on the availability of the entire package of tools to meet the technical and sustainability standards relevant to a product and market. Consequently, one may see that the framework for implementing standards requires a range of interconnected activities and organizational capacities. Because of this interconnectedness, it is important to assess each component at the national and/or regional level, as required. For example, investments to help national standards bodies participate in the development of international standards would not amount to very much if there were not a competitive and competent certification industry as well. Likewise, there would be little point in

building up a testing and metrology facility if there were not a well-functioning enquiry point and information system to assess what the relevant standards are in the first place.

An additional operating thesis of this project is that the TBT and SPS Agreements are policy frameworks that can help the trade and environmental communities work together to each other's mutual advantage. However, this project takes on only a small portion of the TBT issues, those related to standards. This project will undertake to clarify where areas of complementarity exist, and how targeted, integrated technical assistance can benefit both trade and environmental policy objectives. Without a targeted investigation aimed at bringing out such complementarities, they are likely to be missed.

The above considerations will help guide researchers in undertaking and evaluating their research.

## **5. CAPACITY BUILDING OPTIONS FOR IMPROVING THE ROLE OF STANDARDS FOR SUSTAINABLE TRADE**

With this common understanding of the required capacities, researchers will explore options for capacity building in their respective regions. A primary concern of this project is the unavoidable fact that funding for technical assistance will never match the needs in developing countries. We believe that there is a need to also reconsider the strategies used to deliver technical assistance on standards and technical regulations. As a result, this project will assess whether capacity building of this kind must be done at the national level for all countries, or whether economies of scale can be obtained by focusing on regional institutions and South-South cooperation. Due to our own natural financial constraints, each regional project partner will focus on a selection of countries, and will extrapolate from that research to propose lessons that apply to the region as a whole. In each region, we have included in our country studies the largest national economic power in the region in order to identify how their relatively higher capacity might be used as a foundation for spreading capacity throughout the region. In South America, this is Brazil; in Eastern and Southern Africa, this is South Africa; in South Asia, this is India.

Such regional cooperation is already underway in the field of accreditation, and it might be possible to extend this to other areas, such as regional communication centers to identify and explain relevant market access requirements. It may also be worth investigating whether regional bodies may be better able to represent a collection of national interests in the development of international standards, for example, in the large number of bodies developing sustainable forest management standards.

A second concern arises from the recognition that market access is ultimately a private sector issue, and so efforts to address capacity building needs will not be sustainable unless they involve the private sector. Therefore, the project will also consider how best to pique the interest of, and mobilize, the private sector. In many cases, there already exist national, regional and international private sector associations that can be used to improve communication and cooperation on these matters. In many cases, these associations are organized on the basis of industry sector; in other instances, they are organized around thematic topics. The project partners will assess how existing private sector associations and organizations, if they exist, can be used to increase private sector involvement not only in capacity building programs, but also in standardization and the development technical regulations that influence their market access.

There are certainly a host of activities that can – in theory – be undertaken at the regional level, and that can benefit from increased private sector involvement. The closing regional workshops will help to identify where obstacles to improved cooperation can be overcome.

## ANNEX 1: SOURCES AND SCOPE OF STANDARDS FOR SUSTAINABLE TRADE

Sources	Examples	Scope	Type of instrument
International standard making bodies	<ul style="list-style-type: none"> <li>ISO: ISO 14001 Environmental Management System Standard</li> </ul>	<ul style="list-style-type: none"> <li>Generic international standard that can be applied to any sector in any country</li> <li>Takes a process-based approach to improving corporate environmental management.</li> <li>No performance requirements</li> </ul>	<ul style="list-style-type: none"> <li>Voluntary management system certification;</li> <li>No product labeling permitted</li> <li>Becoming a supplier requirement in some industries</li> </ul>
	<ul style="list-style-type: none"> <li>FAO's Codex Alimentarius Commission</li> </ul>	<ul style="list-style-type: none"> <li>Food safety standards, pesticide residue limits, etc.</li> <li>Performance requirements</li> </ul>	<ul style="list-style-type: none"> <li>International standards that are often mandatory;</li> <li>No labeling; frequently "credible" conformity assessment is required for import permit</li> </ul>
	<ul style="list-style-type: none"> <li>Environmentally Sound Management (ESM) of Hazardous Waste – Basle Convention</li> </ul>	<ul style="list-style-type: none"> <li>Responsible production, storage, transport and handling of hazardous waste, particularly during trade</li> <li>No detailed standard exists</li> </ul>	<ul style="list-style-type: none"> <li>Mandatory, but undefined requirements</li> <li>Required for import and export licenses</li> <li>In practice, not used due to lack of detailed standard</li> </ul>
National standards making bodies	<ul style="list-style-type: none"> <li>Japanese national organic regulation within the Law Concerning Standardization and Proper Labeling of Agricultural and Forestry Products</li> </ul>	<ul style="list-style-type: none"> <li>Sets mandatory standards for organic agriculture</li> <li>Performance requirements</li> </ul>	<ul style="list-style-type: none"> <li>Mandatory ecolabel program for all domestic production and imports</li> <li>Possibility of recognition for standards set in other national programs</li> </ul>
	<ul style="list-style-type: none"> <li>US EPA Energy Star Program</li> </ul>	<ul style="list-style-type: none"> <li>Performance standards for energy efficiency in electronic goods and household appliances.</li> </ul>	<ul style="list-style-type: none"> <li>Voluntary environmental label</li> <li>Integrated into all US public procurement decisions</li> </ul>
National and international industry associations	<ul style="list-style-type: none"> <li>International Council of Chemical Associations – Responsible Care Program</li> </ul>	<ul style="list-style-type: none"> <li>Minimum management guidelines for sector;</li> <li>No performance requirements.</li> </ul>	<ul style="list-style-type: none"> <li>Management certification program</li> <li>Required for membership in the industry association</li> </ul>
	<ul style="list-style-type: none"> <li>American Forest &amp; Paper Association (AFPA) Sustainable Forest Initiative</li> </ul>	<ul style="list-style-type: none"> <li>Sets principles, criteria and indicators for sustainable forest management</li> <li>Applies to US companies only</li> </ul>	<ul style="list-style-type: none"> <li>Management certification program</li> <li>Required for membership in AFPA</li> </ul>



NGO standards	<ul style="list-style-type: none"> <li>• Forest/Marine Stewardship Council</li> </ul>	<ul style="list-style-type: none"> <li>• Sets international principles for sustainable forest/fisheries management</li> <li>• International standard is refined at national level by multi-stakeholder group</li> </ul>	<ul style="list-style-type: none"> <li>• Voluntary ecolabel program</li> <li>• Buyers groups set up by concerned companies and NGOs</li> </ul>
	<ul style="list-style-type: none"> <li>• Social Accountability (SA) 8000</li> </ul>	<ul style="list-style-type: none"> <li>• International workplace standard that covers all labor rights issues, including child labor, right to organize and discrimination</li> </ul>	<ul style="list-style-type: none"> <li>• Voluntary certification system with no label permitted</li> </ul>
Individual corporations	<ul style="list-style-type: none"> <li>• Gap International Code of Vendor Conduct</li> </ul>	<ul style="list-style-type: none"> <li>• Corporate guidelines on community relations, employee rights, environmental management</li> </ul>	<ul style="list-style-type: none"> <li>• Mandatory for all suppliers</li> <li>• Gap operates auditing itself. No third-party certification or labeling.</li> </ul>
	<ul style="list-style-type: none"> <li>• Nike International Code of Conduct</li> </ul>	<ul style="list-style-type: none"> <li>• Sets standard obligations to workers</li> </ul>	<ul style="list-style-type: none"> <li>• Required of all contractors</li> <li>• Nike audits and works with suppliers to ensure compliance; no labeling.</li> </ul>

## **ANNEX 2: STANDARDS FOR SUSTAINABLE TRADE AND THE WTO**

### **I. STANDARDS AND TECHNICAL REGULATIONS: DIVISIONS AND LINKS**

The main source of WTO law and policy relating to standards for sustainable trade is the 1994 Agreement on Technical Barriers to Trade (TBT). Technical barriers to trade are essentially any form of non-tariff or non-quota rule that might prevent a product from being traded. The WTO system also has a special agreement for food, the Agreement on Sanitary and Phytosanitary Measures (SPS). The main focus of the discussion here will be the TBT Agreement, which has the predominant role in this area.

The TBT Agreement has a specific dividing line in its legal scheme between two categories of measures: what it refers to as technical regulations and what it refers to as standards. The former are legally-binding laws and regulations issued by governments. The latter are non-legally-binding measures issued by governmental and/or non-governmental standards makers.<sup>5</sup>

This dividing line is very important in terms of seeing what legal provisions are applicable in the two different contexts, as seen below. But this dividing line is also important for understanding how the TBT Agreement tries to link the two kinds of measures. As already noted in the background paper, the TBT Agreement requires both domestic technical regulations and domestic standards to be based upon international standards where they exist. This is subject to the proviso that domestic measures may differ from the international when there is a legitimate public policy reason for doing so. This can include different social or environmental factors that lead a country to establish a higher level of protection than might be reflected in the international standard. To back up this approach, two things are done in the TBT Agreement. First, a domestic measure that applies an international standard is rebutably presumed to be consistent with trade law. Second, a country adopting a measure that deviates from an international standard may be called upon to justify the differences between the international standard and its own technical regulation both in the drafting process and in any subsequent challenges in the WTO dispute resolution process. This imposes a preference for the adoption of international standards whenever possible.

This approach reflects the underlying objective of using international standards as the basis for harmonizing standards and technical regulations on a global basis. Such harmonization, it is argued, is the best way to reduce technical barriers to trade arising from multiple, and differing, standards and technical regulations. This, however, places a very significant burden on the capacity of all countries and stakeholders to be effectively represented in the international standards-making process, and to have the capacity to implement the results of these processes.

This approach also highlights a singular problem in the field: there is no definition or legal limitation on what constitutes an international standard or international standards making body. As already noted in the background paper, standards can come from recognized international standards making bodies, but also from business and other non-governmental groups. As long as they are left at the voluntary level, there is little outside of the market that constrains or directs their development and application.<sup>6</sup> This

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<sup>5</sup> TBT Agreement, Annex 1.

<sup>6</sup> Some efforts to establish “standards for standards makers” are underway. The WTO Committee of Technical Barriers to Trade, adopted Decision IX, “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

again places a significant burden on the capacity to know what is being developed internationally and to be able to participate in the relevant processes.

A related type of linkage between standards and technical regulations arises from the possible transformation of standards into binding measures. While standards are developed outside the normal law-making process, they can, indeed, become mandatory in some contexts. One is for a standard to be adopted in a regulation, as one often sees in the safety area. For example children's clothing must often meet fire-retardant standards before they can be sold. Or there may be situations where an activity is voluntary, for example seeking a government procurement contract. But once one tries to enter this area compliance with a standard may be required. (Selling computer equipment to the United States government, for example, is a voluntary act, but a product must meet the Energy Star efficiency ratings to compete in this market.) As a result of these types of overlaps between purely voluntary standards and "required" standards, the TBT Agreement divides standards into two categories: those for which compliance is required to access a market, and those for which compliance remains fully voluntary or based solely on market factors. Each of these categories is regulated differently:

- Technical regulations are subject to binding law relating to their preparation, their administration within government, and the procedures for assessing conformity with them.
- Standards for which compliance is required to access a market are subject to rules on conformity assessment procedures and their administration, and to the Code of Good Practice of the TBT on their generation.
- Standards that are not legally binding and for which there is no legal requirement for market access are covered by the Code of Good Practice.

In addressing all of these areas, the foremost concern the TBT Agreement addresses is that standards and technical regulations can be adopted and applied in such a way as to create a protectionist barrier to trade in support of domestic producers. The legal and policy elements of the TBT Agreement are constructed to prevent, or at least reduce the risk, of this happening.

## **II. THE LEGAL AND POLICY ELEMENTS OF THE TBT REGIME**

The bulk of the TBT Agreement is directed at the processes for making technical regulations, and the impacts they may have. This reflects their binding nature, as well as their continued prevalence as the major form of technical barriers to trade.

The fundamental principles for making and implementing technical regulations revolve around three main constraints:

- Regulations shall treat imported products no less favourably than domestic products or products made in a third country;
- Regulations shall not create unnecessary obstacles to trade; and
- They shall not be more trade-restrictive than necessary to meet the objective sought.

In order to achieve these fundamental principles, the TBT sets out certain procedural steps for making technical regulations:

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Agreement" in 2001, which sets out basic principles for international standards bodies to apply. And NGO groups working in this field have begun to undertake a similar effort among themselves, apparently in order to align themselves better with the TBT Agreement approaches to standards-making (see [www.isealliance.org](http://www.isealliance.org))

- Technical regulations shall be based on international standards where they exist except where they would be ineffective or inappropriate in meeting the objective;
- Regulations should be based on performance requirements rather than design characteristics;
- Risk assessment is not strictly required, but in practice the absence of a risk assessment will make any deviations from an international standard much more difficult to justify;
- Where a risk assessment is done, it should include available scientific and technical information, related processing technology or intended end uses of products;
- When a regulation is being prepared that might have a significant trade impact, the country should explain the justification for the measure;
- Where a regulation is not based on an international standard, even where one does not exist, the measure shall be notified, including through the WTO notification process, to other states, and comments from others shall be considered; and
- WTO members shall participate as fully as possible in preparing international standards in areas where they may have or adopt regulations.

The preparation and adoption of standards, by contrast, is treated through a separate Code Of Good Practice, contained in Annex 3 of the TBT Agreement. Members of the WTO are obliged to ensure that central government standardizing bodies apply the Code. Thus, a failure by a central government standards body to do so is fully subject to the dispute resolution process of the WTO. But in relation to other standards-making bodies, the obligation on states is to take “such reasonable measures as may be available” to have them apply the Code. Exactly what this obligation means is not fully clear, but it is something less than “ensure”. Thus, the TBT Agreement sets out a strong policy direction for adoption of the Code by all standards-making bodies, but does not make this a fully applicable legal obligation.

The requirements of the Code of Good Practice are similar to those of the Agreement relating to the preparation of technical regulations:

- Foreign producers should receive treatment no less favourable than domestic producers or producers in a third country;
- The standards should not create any unnecessary obstacles to trade;
- Domestic standards should be based on international standards where they exist;
- Domestic standardization bodies should play as full a role as possible in international standardization bodies in areas of their concern;
- Standards should be based on performance requirements, not descriptive characteristics;
- Every standardization body shall publish its work plan every six months;
- Notice of drafting processes and draft standards shall be given, and a minimum 60 day comment period allowed for;
- Comments received during this period shall be considered in further preparation of a standard; and
- Final standards shall be promptly published.

With similar principles in place, what changes as between the provisions on technical regulations and those on standards is that the latter are not automatically binding on standards-making bodies, other than central government bodies. Rather, standards bodies have to notify the ISO/IEC Information Centre in Geneva of their acceptance of these provisions. As of February 2002, 138 standards bodies from 94

countries had provided this notification, but this includes very few of the private organizations that develop sustainable development standards.<sup>7</sup>

In addition to the above, the TBT Committee issued a Decision on Principles for the Development of International Standards in 2001, at the Second Triennial Review of the Agreement.<sup>8</sup> This Decision sets out a number of principles that international standard setting bodies should follow, principles which assume a significant degree of importance given the key role international standards play in the WTO scheme. These key principles fall into six areas, noted below with a brief description of its goal:

- Transparency: essential information on work programs, proposals for standards and final results should be made easily available. There should be adequate time to be notified and to make comments on proposed standards.
- Openness: membership and full opportunity to participate in the international standardization body should be open to all relevant bodies on a non-discriminatory basis. This openness should extend from the stage of proposal and acceptance of work items to the dissemination of adopted standards.
- Impartiality and consensus: Opportunities for meaningful participation should ensure that the interests of certain suppliers, countries or regions are not favoured, and that final results are based on consensus.
- Effectiveness and relevance: International standards need to be relevant and to effectively respond to regulatory and market needs, and to scientific and technological developments in various countries. They should not distort trade.
- Coherence: International standards bodies should avoid duplication or overlap with other bodies.
- Development dimension: The constraints on participation by developing countries should be taken into account, and de facto exclusion avoided. Technical assistance may be relevant here.

These principles do not add new elements to the Code of Good Practice, but go some way to complete the policy of trying to cover all bodies with similar principles.

When implementing technical regulations or standards for which compliance has become required (as discussed above), the TBT Agreement requires states to:

- Give “positive consideration” to accepting as technically equivalent the regulations of other states if they fulfill the same objectives;
- Any procedures to assess conformity with the regulation or required standards should be available to and applied to foreign producers in a manner no less favourable than what is accorded to domestic producers;
- The procedures shall not create an unnecessary obstacle to trade;
- Information requirements are to be limited to what is necessary to assess conformity;
- Confidential business information is to be protected;
- A complaints procedure must be available to traders.

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<sup>7</sup> Source; “List of Standardizing Bodies that have accepted the Code of Good Practice for the preparation, adoption and application of standards since 1 January 1995”, Committee on Technical Barriers to Trade, G/TBT/CS/2/Rev.8, 13 February 2002.

<sup>8</sup> The WTO Committee of Technical Barriers to Trade, adopted Decision IX, “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” in 2001.

As regards this last point, the TBT notes that where international guidelines on conformity assessment procedures exist and are followed, then it is presumed they do not create an unnecessary obstacle to trade. Harmonization with any relevant international standards for assessing conformity is again a feature of the TBT, just as it is with the substance of standards and technical regulations. The Agreement also promotes a mutual recognition process for conformity assessment procedures, so that producers need only undertake one assessment process.

Finally, the TBT Agreement places a high premium on transparency. Technical regulations, standards and conformity assessment procedures are all to be published and notified to other states. This information requirement is both to allow for comments to be made, and to ensure that all producers worldwide are aware of the relevant laws and standards when seeking to access a market. In addition, each WTO member is required to have an “enquiry point” where those seeking information on standards, technical regulations or conformity assessment requirements can go for further information.

#### **IV. THE WTO AND NON-PRODUCT PROCESS AND PRODUCTION METHOD STANDARDS**

The WTO and many analysts have argued that the provisions of the TBT apply only to standards and technical regulations that address product characteristics or process and production methods that relate directly to product characteristics.<sup>9</sup> For example, a standard may address the lead levels in paints, or the exclusion of lead in the process of making paint. Both relate to the characteristic of toxic levels of lead in paint. On the other hand, a technical regulation or standard may relate to how a product is made or a natural resource harvested, but have no relation to the final characteristics of the ultimate product a consumer purchases. For example, a sheet of newsprint has the same uses and qualities whether it is made from wood that is harvested under a sustainable forest management plan or not, or with recycled content or not. These types of standards or technical regulations are referred to as non-product-related standards or technical regulations.

Because non-product-related process and production methods are a key feature, and often the central feature, of standards relating to sustainable trade, it is important to understand the nature of the legal debate in the WTO on PPMs. As the text of the Agreement refers to product-related standards and technical regulations, the question has arisen as to whether non-product-related standards are prohibited by the TBT Agreement, are covered by it if not prohibited, or are simply outside its scope completely.

1990 era analyses suggested that, at least as far as legally-binding technical regulations were concerned, non-product PPM measures could not be applied to imported products under what was then GATT law.<sup>10</sup> This view remained current in the WTO after it was established in January 1995, until the decision of the Appellate Body in the so-called Shrimp-Turtle case.<sup>11</sup> That 1998 decision makes it clear that PPM-related laws and regulations can be applied to imported products, subject to a number of conditions being met. These conditions are not particularly relevant to the present discussion, except to

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<sup>9</sup> This is seen in the *A Training Package, Module 3: Goods: rules on NTMs*, 15 December 1998, WTO, as accessed on August 30, 2002, [http://www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto03/wto3.pdf](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto03/wto3.pdf)

<sup>10</sup> This is the effective result of the famous Tuna-Dolphin case between Mexico and the United States. United States – Restrictions on Imports of Tuna, GATT, Mexico, complainant: Panel ruling 1991. (not adopted), 30 International Legal Materials, pp. 1594-1623, 1991.

<sup>11</sup> United States – Prohibition of Shrimps and Certain Shrimp Products, Wt/DS58/AB/R (98-000), 12 October 1998.

say that they are consistent with the general principles of seeking full participation of all relevant countries, opportunities for effective input, consideration of the particular development concerns of developing countries, and a focus on performance rather than technologies. In addition, fairness in the conformity assessment process is also critical. These and other conditions set out in the decision are consistent with many of the regulation-making requirements already noted above.

As it is now clear that the WTO does not *a priori* prohibit PPM-oriented technical regulations, it is equally clear no such prohibition could apply to the lesser-regulated standards. This leaves two remaining questions: are they regulated by the TBT Agreement at all, including through the Code of Good Practice, in the same way as other standards would be, or are they fully outside its scope. Arguments have been made both ways on this point, but no attempt to answer this question will be made here. Rather, the point of much of this project is that standards for sustainable trade should support both the development and sustainability elements of their core purpose. Thus, irrespective of the legal niceties, standards makers, even in the voluntary market-based fields, should strive to apply the same principles that help promote open trade.

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