New Global Regulatory Mechanisms and the Environment

The Emerging Linkage between the WTO and the ISO

Matthias Finger and Ludivine Tamiotti

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1 Introduction

In this article, we try to uncover an emerging relationship between the World Trade Organisation (WTO) and the International Organisation for Standardisation (ISO). We see this relationship as being particularly illustrative of the profound changes which are occuring in international society, in the organisation of global governance more specifically, and in the way environmental and other regulations will be introduced into a liberalised global economy. Not surprisingly, new private actors and corresponding actor arrangements emerge in parallel.

In the first section, we will present the underlying dynamics of both deregulation and environmental protection, leading to the creation of global governance mechanisms, as well as to a re-organisation of international society. In the second section, we will show how standards, and in our case environmental standards, might well appear as being the new, most ideal form of global regulatory mechanisms. In the third section, we discuss the ISO and why standards seem to be ideal for a whole set of global private and public actors. We then show, in section four, the emerging linkage between the WTO, the promoter of global deregulation so far, and the ISO, apparently the solution to global regulatory problems. In the conclusion, the new type of actor arrangements, as promoted by these new regulatory mechanisms, will be highlighted and critically analysed.

2 Liberalisation and the Environment: Global Governance and the Re-Organisation of International Society

The present connection between the WTO and ISO 14'000 – a series of new environmental standards promoted by the ISO – is, in our view, a result of the dual process towards freer trade on the one hand, and the privatisation of global environmental protection on the other. Indeed, international and, increasingly, global trade has grown steadily over the past years, resulting from technological progress, especially in the information technologies, from cheap oil and the subsequent low transport costs, from deregulation and the privatisation in particular of public enterprises, and from trade liberalisation through successive multilateral negotiations in the framework of the General Agreement on Trade and Tariffs

(GATT) and the WTO agreements. Given that tariffs are no longer effective barriers to trade, economists and other promoters of free trade have identified new forms of trade barriers, whose only limit is human imagination and economic theory. As a result, GATT (since the Tokyo Round) and then the WTO, have been looking out for non-tariff trade barriers, such as, for example, technical or regulatory barriers to trade.

On the other hand, environmental degradation has increased parallel to industrial development, and has further accelerated as a result of increased trade. Consequently, since the 1970s, environmental regulations have been introduced, first at national and later at international levels. At the international level environmental problems increasingly appeared overwhelming and the need emerged to overcome fragmented national, regional, and international environmental regulations and to think of new and effective partnerships among all economic actors, including governments, business and NGOs. In other words, and alongside a process of industrial development, trade liberalisation, and deregulation, we observe the growing need to regulate, albeit only in environmental matters. Thus there is a growing tension between the two trends of deregulation on the one hand and re-regulation on the other.

The search for new and private forms and mechanisms of (environmental) regulation, such as for example (environmental) standards, must be seen as an attempt to seek ways out of this *tension* between deregulation and re-regulation. But this solution, if it is one, has a history. There are, in our view, two different elements leading up to this solution, namely (1) the growing privatisation of international (environmental) politics, characterised by the erosion of traditional nation-state 'command and control' policy mechanisms and the growing role of private and non-state actors; and (2) the re-organisation of international society. We will address the latter point in this section and the former point in the next section.

The past 50 years have been characterised by the expansion of international institutions and public actors, carrying out international policies, often on a self-appointed basis. Since the Second World War, the United Nations with its various agencies has been paralleled by the Bretton Woods Institutions, i.e., the World Bank and the International Monetary Fund, and by a process of trade deregulation promoted by the General Agreement on Trade and Tariffs, leading in 1995 to the creation of the World Trade Organisation (Krueger 1998). All three types of institutions have developed in parallel over the past 50 years, sometimes with overlapping missions and activities – a process which can probably best be understood in institutional development terms. For example, the United Nations, with its multiple agencies, became more and more fragmented and spread increasingly thin, which appeared particularly problematic when funds became scarce. On the other hand, the Bretton Woods Institutions, especially the World Bank, increasingly invaded UN development territory by subsuming social development and sustainability into its economic development agenda. The GATT finally developed a powerful dynamic of trade liberalisation and, by so doing, somewhat undermined the agendas of both the UN and the Bretton Woods Institutions.

Today, in the era of economic, ecological, cultural, and technological globalisations, international public actors need to reposition and, to a certain extent, redefine themselves within the parallel emergence of new global governance mechanisms involving, among others, TNCs and NGOs. Such repositioning is made necessary by new challenges resulting from globalisation, but also in the light of public pressure, especially in the case of the World Bank (Cavanagh, *et al.* 1994), as well as in the light of lobbying by TNCs, but also because of serious financial pressures in the case of the UN (Alger, 1998; South Centre 1997). Today we can observe an institutional rearrangement, which makes international public institutions regroup around three key issues, all of which are crucial for the management of international public affairs in the years to come. These issues are security, sustainable development, and trade regulation.

Indeed, it is clear that the UN, under heavy financial pressure, is currently refocusing on issues of security, i.e., basically peace and war, the safeguarding of international boundaries, human rights protection, and humanitarian intervention. Consequently, one of the UN's core mandates, development, is being abandoned and taken over by the Bretton Woods Institutions, especially the World Bank, which is better equipped financially to

do the job. Indeed, the World Bank, the UN Development Programme (UNDP), and the UN Environment Programme (UNEP), already linked through the Global Environmental Facility (GEF), seem to be regrouping around the issue of sustainable development, which might well lead to the formation of a new 'Earth Bank'. Finally, there is the issue of trade and trade regulation. Having actively promoted trade liberalisation, the GATT and the WTO are now increasingly coming under pressure from public opinion, developing countries, and TNCs to reintroduce some sort of trade regulation. In order to do so, however, the WTO will have to regroup with organisations such as the ISO. The remainder of this article will focus on this third dimension of institutional rearrangements, i.e., around issues of trade re-regulation.

The environment, as a cross-cutting issue, relates to all three dimensions. Indeed, environmental degradation has become an issue of security – hence the now famous term 'environmental security' (Finger 1991). Examples are found in the potential conflicts arising from scarcity of natural resources (such as water), or from transnational environmental damage (such as nuclear disasters) (Timoshenko 1992: 426). Second, since the UN Conference on Environment and Development (UNCED), environmental protection has also been reframed in terms of 'sustainable development'. UN bodies such as the UNDP, and in particular the World Bank, have been keen to promote corresponding (sustainable) development projects. Third, the environment also pertains to trade: indeed, while environmental protection was and still is considered to be an impediment to trade, it is also becoming (as we will show below) an argument, or perhaps an excuse, for re-regulating trade.

3 Deregulation and Re-regulation: From Trade Barriers to Standards

In this section we want to trace the fundamental shift from deregulation to re-regulation. Parallel to this change, what were previously labelled as barriers to trade have been reframed as international standards, which are considered beneficial for trade. At the same time, as we will see in the next section, we observe what can be called a process of 'privatisation of international environmental governance' (Clapp 1998). The result of both trends combined will ultimately make privately defined standards acceptable tools for global trade regulation.

Let us recall that the overall trend since the emergence of the GATT has been to liberalise global trade. Starting with agricultural products, the Uruguay Round and the process of liberalisation have gradually embraced all products, including, for instance, services. In this overall process of trade liberalisation, the removal of technical barriers to trade (TBTs) plays an important role. TBTs are currently the main remaining barriers to free international trade. Although many of these barriers are not direct and open measures of protectionism, their effects may be characterised as trade barriers. Within the GATT of 1947, in Article XI, non-tariff or technical barriers to trade were clearly forbidden. Articles XX and XXI only allow the state to use non-tariff measures so as to protect its public order and security interests.

During the Tokyo Round of Multilateral Trade Negotiations, the elimination of TBTs was one of the major concerns for the parties. An agreement on technical barriers to trade was finally concluded in 1979 and entered into force in 1980. This agreement was part of a subsidiary agreement called the Standards Code dealing with the problem of non-tariff barriers to trade. But the Standards Code had two facets: (1) It proposed that product standards, certification systems, test methods, and labelling processes be as 'unrestrictive' to trade as possible (Murray 1997: 605); (2) On the other hand, the Standards Code already encouraged the establishment of international standards and the use of these standards by contracting parties as a basis for national standards. Mobilising this argument in favour of international standards, the Standards Code sought to facilitate the harmonisation of national standards, thereby ultimately facilitating trade (Charnovitz 1993: 274).

The main ideas of the Tokyo Standards Code were included in the GATT 1994, which established the present WTO. Indeed, part of the WTO Agreement is the Agreement on Technical Barriers to Trade, which seeks to ensure that regulations, standards, testing, and certification procedures do not create unnecessary obstacles to trade; and in order to harmonise these technical standards as broadly as possible, Member States should actively participate in

the elaboration of technical rules by relevant international organisations (Article 2.6 and Annex 3). Also, in its preamble, the TBT Agreement clearly recognises the importance of international standards; and under the TBT Agreement national standards-setting organisations are encouraged to employ international standards, which already exist or whose 'completion is imminent' (Article 2.4). Moreover, the Agreement invites the signatory governments to ensure that the standardising bodies in their countries accept and comply with a 'Code of Good Practice for the Preparation, Adoption and Application of Standards', embodied in Annex 3 to the Agreement.

In short, free regional and global trade is making the need for re-regulation increasingly obvious. While the GATT of 1947 was clearly an agreement designed to promote deregulation, the present WTO seeks to prevent or to face some of the consequences of deregulation, especially in the social and environmental areas (e.g., Charnovitz 1997a: 112). An obvious illustration of the change that has occurred recently, and which now seems to push towards re-regulation can be found in the WTO Agreement on Technical Barriers to Trade (TBT), which encourages Member States to use international standards instead of national ones. Consequently, WTO is presently becoming a 'world competition agency', deregulating in some areas and regulating in others (Charnovitz 1997a: 112). However, the re-regulating powers of the WTO are very limited, if not absent. Indeed, while it can make standards acceptable as part of an international trade regime, it cannot set the standards itself. The WTO must, therefore, look for other actors, preferably international ones, and, as we shall see, private ones, who can do the job.

4 The Privatisation of Environmental Regulation

This section will illustrate the process of privatisation of environmental regulation, leading to the definition of environmental standards as currently promoted by the ISO. Not surprisingly, these are precisely the type of standards which the WTO might be looking for when trying to re-regulate global trade.

When looking at the overall history of environmental regulation, it seems obvious that there has been a growth in environment protection measures at the international level and a parallel reduced direct involvement of states. This has occurred in several stages. Originally, international organisations and multilateral conventions used the traditional state machinery to implement environmental measures. In a second stage, international institutions used NGOs for the direct implementation of environment commitments in certain countries. Now we are entering a third stage, whereby states transfer the implementation and sometimes even monitoring of this process directly to private economic actors from business and industry.

As a result, voluntary initiatives by business and industry have been used over the past decade in order to improve environmental performance. Many kinds of such voluntary initiatives are available to companies and governments. Among them, voluntary standards are gradually becoming requirements for access to the international market. There is in fact much support for such voluntary standards. Economic actors (industry and business organisations) support them because they facilitate trade by reducing market fragmentation (Charnovitz 1993: 271), but also because it increases their power along the supply chain. NGOs find them appealing because they offer a relatively easy way to influence environment protection by directly pressuring companies which do not comply with the standards they have committed to. For states, standards and corresponding certification is a way to transfer implementation and monitoring functions (and costs) directly onto the companies. Indeed, voluntary standards which are enforced by indirect pressure (market-based incentives and disincentives) reduce the domestic costs of public legislation and enforcement, by shifting enforcement costs to the producers of pollution, rather than to the taxpayer (Pinckard 1997: 439). Finally, certification bodies such as Société Générale de Surveillance (SGS) or Veritas Ltd. are interested in standards because they can make profits by certifying private companies.

The UNCED was a great opportunity for large enterprises, particularly TNCs, to take steps, endorsed by Agenda 21, to publicly demonstrate that their activities conform and contribute to the goals of sustainable development. It is notable that the majority of the industry association's environmental codes and

guidelines were actually issued in the months before and after the Rio Conference (UNCTAD 1996: 2). Indeed UNCED provided the necessary impetus for action by referring to the need for international standards during various UNCED preparatory committees (Roht-Arriaza 1995a: 501). In response, the ISO and the International Electrotechnical Commission (IEC) established an ad hoc Strategic Advisory Group on Environment (SAGE), which recommended, in its October 1992 session, the establishment of a formal Technical Committee (TC) on the development of environmental standards, to be known as the TC 207. It is in this context and in the aftermath of UNCED, that a new type of environmental regulation, directly promoted by TNCs, has emerged. ISO 14'000 is indeed a new type of environmental regulation, which no longer focuses on the *a posteriori* control of emissions, but rather on operational techniques in the industry (Asher and Gupta 1998: 315). ISO 14'000 is thus the prototype of privatised environmental regulation (e.g., Krut and Gleckman 1998).

Traditionally, ISO, a private body (and not an international organisation, as its name misleadingly implies), set technical standards. However, since the 1980s with the ISO 9'000 series, the ISO embarked on a new trend, evaluating the systems by which products are produced, rather than the products themselves. Owing to the success of ISO 9'000 – the number of ISO 9'000 certificates grew by nearly 40% in 1997 – and in the context of the UNCED process mentioned above, ISO has finally focused its attention on environmental issues with ISO 14000, a series of international and voluntary environmental management standards. To recall, the TC 207 was composed of six sub-committees which addressed the following aspects of environmental management: Environmental Management Systems (EMS), Environmental Auditing & Related Investigations (EA&RI), Environmental Labels and Declarations (EL), Environmental Performance Evaluation (EPE), Life Cycle Assessment (LCA) and Terms and Definitions (T&D). The ISO 14'000 series of standards consists of several guideline standards and one compliance standard, the ISO 14'001 Environmental Management Systems (EMS) (Fredericks and McCallum 1995). The ISO 14'001 specifies the basic requirements of an EMS that a company must meet in order to become ISO 14'000 certified. In order to obtain such a certification, a company can either declare itself in compliance with the 14'001 EMS standard, or it can have an independent third party confirm that the company's management is in conformity with the requirements of the ISO 14'001 (Pinckard 1997: 435).

It appears that for various reasons the ISO 14000 standards have become very successful, not least the fact that ISO is looked at by the WTO as a potential reregulator of global trade, as we demonstrate below.

5 The WTO/ISO Relationship

So far we have identified two parallel, yet still more or less separate trends: on the one hand the trend towards re-regulation as embodied by the WTO and on the other the trend towards the privatisation of environmental regulation as embodied by the ISO 14000 standard. Both trends seem to meet today in an emerging WTO/ISO relationship in which a private body will increasingly become a legitimate actor for setting trade standards. In this section, we would like to illustrate this emerging relationship.

We have already mentioned above the Agreement on TBTs of the WTO, which recognises the importance of international standard-setting. Annex 3 of the TBT Agreement refers to a 'Code of Good Practice for the Preparation, Adoption, and Application of Standards'. On behalf of the WTO, the ISO (and the IEC) is mandated to record the acceptance of this code of good practice by the national institutes (Favre 1998: 2). Furthermore, the monitoring and enforcement of the TBT Agreement is a function assumed by the WTO Committee on Technical Barriers to Trade. In this context, the ISO and IEC are invited to attend the Committee as observers and, through that particular channel, regularly explain the developments occurring in international standardisation to the WTO members (Favre 1998: 2). To further demonstrate the degree of WTO/ISO cooperation, it is worth mentioning that the ISO is jointly organising with the WTO a series of regional seminars to assess market interest for developing international standards so as to facilitate trade. During the second such seminar in Buenos Aires in October 1998, the ISO vice-president highlighted the specific importance of international standards for the

global integration of the different national and regional markets. In parallel, the Advisor to the service trade division of the WTO explained that WTO's objective was to ensure that standards do not create unnecessary barriers to trade, which is the reason why common standards are important. This not only perfectly illustrates the shift from trade barriers to standards, but also the emerging link between the WTO and the ISO.

The argument that international standards are good for free trade, while national standards are trade barriers, is now also made by OECD's Committee on Standards and Conformity Assessment. In a survey which this committee conducted on standards and manufacturers from developed countries, competition on the global market, they say, is restricted by a plethora of national standards, certification and testing requirements applying to consumer goods (Schwamm 1997: 13). A global standard should reduce the risk of countries using environmental restrictions as a pretence for trade restrictions. But what makes the ISO specifically relevant to the TBT Agreement is that the WTO generally considers that voluntary international standards set by a recognised body, such as the ISO, are 'standards' (Clapp 1998: 304). On the contrary, it considers those set by governments, intergovernmental organisations, or UN bodies not as standards but rather as 'technical regulations' (Annex 1), which are seen by the TBT Agreement as creating potential trade barriers (Article 2).

Moreover, environmental standardisation in particular is going to be an integral part of the international trade framework within the WTO. For example, the United States Environmental Protection Agency has already considered a number of options involving ISO 14'000. One of the proposals was to require ISO 14'000 certification as a prerequisite for entrance into regulatory reform pilot programmes such as Project XL (Murray 1997: 608). Consequently, standards may be seen as non-tariff trade barriers, given that foreign companies unable to meet ISO 14'000 certification could be blocked from many US markets. Quite interestingly, the TBT Agreement identifies protection of the environment (Article 2.2.) among the 'legitimate objectives' that can justify the use of trade restrictive regulations by states. Logically, this should not have a legal value, given that the ISO standards are considered to be voluntary standards, and not mandatory technical regulations. However, in the case of domestic authorities including ISO 14'000 as a requirement for foreign companies to get access to domestic markets, the allegation of protectionist barriers to trade could be avoided before a dispute settlement panel, because environment concern is a 'legitimate objective' under the TBT Agreement.

6 Conclusion: Towards New Actor Arrangements

Being of private origin, ISO 14'000 is still a voluntary standard. But, this may only be a matter of time. Indeed, such private standards may affect the public sphere in many ways: global or regional trade agreements may explicitly recognise them, government regulations may refer to them for the definition of terms, and government procurement rules may adopt them (Roht-Arriaza, 1995a: 486). Furthermore, market pressure from consumers, financiers, insurers and competitors may become so strong that corresponding standards turn into prerequisites for companies wanting to do business in larger markets. As a result, ISO 14'000, for example, may de facto become a non-tariff barrier to trade, keeping out small and medium sized enterprises, as well as companies from developing countries[1]. Moreover, there is a 'follow the leader' pattern, which means that more and more companies certify to the standards, and in turn require certification from their suppliers and trading partners (Murray 1997: 614). Consequently, TNCs can establish and enhance a monopoly position by imposing international standards (Finger and Kilcoyne 1997). On the other hand, ISO 14'000 might actually facilitate compliance with environmental laws by leading to uniform approaches to environmental management, as well as by harmonising international environmental commitments and environmental impact assessments worldwide. In addition, the standards call for continual environmental improvement: on the one hand, the certified

[1] Such a de facto consequence is, however, in direct contradiction with Article 12 §3 of the TBT Agreement, which indicates that Contracting Parties, in the process of standards and technical regulations making, must take into account the specific needs of developing members, so that these standards and technical regulations do not create unnecessary barriers to exports from developing members.

company needs to comply with local regulations, while on the other such compliance should result in the continued evolution and improvement of national environmental protection (Pinckard 1997: 440). This is called the 'race to the top' perspective, i.e., a movement towards more and more protective environmental regulation. This, at least, is the argument used to support voluntary environmental standards, such as ISO 14'000.

The emerging relationship between the WTO and the ISO in the field of environment protection is, in our view, a direct result of economic globalisation and the subsequent transformation of the role of the nation-state in international economic policy. Indeed, historically governments have relied upon public commitments such as treaties and domestic regulations in order to address global environmental issues. But the globalisation of economic activity and trade in particular, has somewhat re-arranged the power relationships among the key global actors: if, as highlighted in the first section, the UN is now increasingly focussing on security and the Bretton-Woods institutions on (sustainable) development, the trade arena is being re-arranged among actors such as the WTO, the ISO, TNCs, states, domestic standardisation agencies, and private bodies, such as certification agencies and other business and industry lobbying organisations. Where traditionally states were the main actors, at times through the UN and other international bodies, this will be different in the future. We predict that, as the need for re-regulation grows, states will be only one among many other mostly private actors setting the stage. As we have shown with the example of environmental re-regulation, it is likely that the WTO and the ISO, most likely together with certifying bodies and TNCs, will became the major actors in regulating international trade. States might then simply be used to enforce such re-regulation domestically (Finger 1998).

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