Is the ISO/IEC OOXML Standard an International Standard under the TBT Agreement?

Andrea Barrios Villarreal, Graduate Institute of International Studies and Development, Geneva, Switzerland

ABSTRACT

The Technical Barriers to Trade (TBT) Agreement requires that national regulations and standards are based on international standards; however, it fails to define the terms international standard and international standardizing body (ISB). As of today, the panels and the Appellate Body of the World Trade Organization (WTO) have put more emphasis on the requirement that a standard is adopted by an ISB than the process through which it is adopted to be considered as ‘international’ for the TBT Agreement. This article shows, using the standardization process of the OOXML in the ISO/IEC JTC1 as an example, that an ISB may adopt standards that are not necessarily international for the Agreement purposes. Hence, the importance that in future disputes the panels and the Appellate Body follow the path opened in the US-Tuna II case in which the Appellate Body stated that there may be additional procedural conditions that must be met for a standard to be considered international for the TBT Agreement.

KEYWORDS


INTRODUCTION

Countries use technical regulations and standards as tools to achieve market and policy goals. For example, they use them to diminish information asymmetry between producers and consumers or as a tool to provide the population with the newest medical devices and medicines. In the recent years, the visibility of technical regulations and standards in trade has increased as a result of the reduction in tariffs achieved by the General Agreement on Tariffs and Trade (GATT). To avoid technical regulations being used as protectionist measures and creating unnecessary barriers to trade, parties of the GATT negotiated in the late 1970s, the Standards Code, which later became the Agreement on Technical Barriers to Trade (TBT) with the creation of the World Trade Organization (WTO). The TBT Agreement disciplines the preparation, adoption and application of technical regulations and standards; its main aim is to maintain a balance between the right of WTO Members to achieve legitimate goals through regulation and the disruptive and discriminatory effects this can have on trade. The Agreement establishes harmonization as a tool to achieve this balance. The TBT Agreement stipulates that where technical regulations and standards are required and relevant international standards exist or their completion is imminent, Members shall use them except when they would be an ineffective or inappropriate means for the fulfillment of Members’ legitimate objectives. However, the Agreement fails to define which characteristics a standard and a standardizing body must comply...
to be considered as international for the TBT Agreement purposes. Having a clear definition of both terms is important as every day regulators and standardizers all over the world have to choose in which of the many self-proclaimed ISBs they should play a full part and which standards they should use as basis for their own technical regulations and standards. This is not an easy decision as they have to consider not only the market, economic and political consequences of their choice, but also the fact that a technical regulation which creates more obstacles to trade than necessary could end up in a trade dispute within the WTO.

The panels and the Appellate Body which are in charge of adjudicating disputes between Members have interpreted the concepts of international standard and international standardizing body (ISB). Until now both have put more emphasis on the characteristics of the body that adopts the standard rather than on the procedure through which it is adopted to determine if a standard is an international standard for the purposes of the TBT Agreement. This paper argues that not all standards adopted by ISBs are international standards for the TBT Agreement as some of them fail to comply with the requirements imposed by the Agreement. It also argues that in the case of a dispute, the panels and the Appellate Body should perform a procedural analysis of the standard under dispute. To support this argument, it looks at the standards war that took place between the Open Office Document (ODF) and the Open Office XML (OOXML) standards, both of which were standardized by the ISO/IEC Joint Technical Committee 1 (JTC1) and it focuses on the standardization process of the latter to define if the ISO/IEC 29500, Information technology – Office Open XML file formats standard can be considered as an international standard for the TBT Agreement.

This paper is divided into five parts. The first part briefly explains the TBT Agreement requirement of harmonization of national regulations and standards with international standards and the findings of both the panels and the Appellate Body in the case law. The second part describes the standardization process of the OOXML in the ISO/IEC JTC1, explaining the rules applicable to the process, how the actual process was carried out and the appeals made by some ISO/IEC members. The third part assesses if the OOXML standard can be considered as an international standard for the TBT Agreement purposes, analyzing the alleged irregularities within ISO/IEC members, and the compliance with both the rules of the JTC1 and the requirements established in the TBT Agreement and by the TBT Committee. The fourth part looks into the updates made to the adopted standard as well as to the changes made to the ISO/IEC rules. Finally, some concluding remarks are stated.

The Regulation of International Standardization under the TBT Agreement and the Existing Jurisprudence

Article 2.4 of the TBT Agreement requires that national technical regulations and standards are based on the relevant international standard except when the latter is an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued by WTO Members (WTO, 1994, article 2.4). However, as stated earlier, the TBT Agreement does not have a definition of international standard nor ISB. The Appellate Body has interpreted some aspects of these two concepts, but so far, it has not had the opportunity to analyze from head to toe the whole spectrum of international standardization, the body that develops the standard, the standard, and the procedure through which it was developed.

In the EC-Sardines case, there was an agreement among the parties that the Codex Alimentarius Commission is an ISB and that the standard under dispute, Codex Stan 94, was an international standard because it had been adopted by Codex. In this case, both the panel and the Appellate Body granted the status of ‘international’ to the Codex Stan 94 just because it had been adopted by the Codex Alimentarius Commission, regardless of the process through which it was adopted or the characteristics of the standard per se (Panel Report, EC-Sardines, paras 7.63 and 7.66 and Appellate
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