

Legal Opinion: WTO Conformity of Private Sustainability Standards and the ISEAL Standard-Setting Code¹

Executive Summary

The ISEAL Standard-Setting Code serves as a means to evaluate and strengthen the sustainability standard-setting process. It aims to build on Annex 3 to the WTO's TBT Agreement (the Code of Good Practice). By using the ISEAL Standard-Setting Code, standard-setters can ensure that their standards are set in a manner that is transparent, open and sustainable.

The WTO is composed of Members who must comply with the obligations provided for in the WTO Agreement. In principle, the WTO Agreement does not impose obligations on private actors. It does not use or indeed define the term "private standards". Therefore, private initiatives such as Voluntary Sustainability Standards ("VSS") as adopted by ISEAL members are not covered by the provisions of the GATT 1994.

The WTO TBT Agreement lays down additional disciplines in respect of technical regulations, standards and conformity assessment procedures. Compliance with the standards adopted by ISEAL members is not "mandatory" and therefore these standards do not constitute technical regulations. At most, standards adopted by ISEAL members are "standards" in the sense of Annex 1.2 of the TBT Agreement.

This legal opinion establishes that adherence to the ISEAL Standard-Setting Code to a large extent signals compliance with the TBT Agreement's Code of Good Practice, as contained in Annex 3 to the Agreement. Governmental recommendation for adherence to the ISEAL Standard-Setting Code would arguably be one possible way of ensuring that WTO Members comply with their obligation under Article 4.1 of the TBT Agreement "to take such reasonable measures as may be available to them to ensure that [...] non-governmental standardizing bodies" comply with the Code of Good Practice as set out in Annex 3 of the TBT Agreement.

Consequently, Members of the WTO do not run a significant risk of being challenged under WTO dispute settlement proceedings if they were to recommend adherence to ISEAL's Standard-Setting Code. On the contrary, support for the ISEAL Standard-Setting Code could be seen as a reasonable measure to ensure

¹ This Legal Opinion has been prepared for ISEAL Alliance by Mayer Brown. The authors of the Legal Opinion are Paulette Vander Schueren, Partner, Mayer Brown and Dylan Geraets, Associate, Mayer Brown

that standardising entities within their territories accept and comply with the Code of Good Practice as laid down in Annex 3 to the TBT Agreement. There is a significant degree of overlap between the Six Principles as developed and adopted by the TBT Committee, and the Credibility Principles and ISEAL Codes of Good Practice that underpin the standard-setting activities of ISEAL members and serve as requirements for ISEAL membership.

The introduction to the Standard-Setting Code refers to “standard-setting procedures as a means to avoid the creation of unnecessary barriers to trade” and ISEAL’s Credibility Principles are specifically designed to avoid standards from constituting unnecessary barriers to trade. Indeed, ISEAL’s commitment to principles such as relevance, rigour, engagement, transparency, and accessibility is already aimed at ensuring that the standards developed by its members do not result in such unnecessary barriers. In this regard, future revisions of the Standard-Setting Code could highlight practices and membership requirements that contribute to this specific objective.

I. Introduction

This legal opinion provides an analysis of the claims that ISEAL Alliance (“ISEAL”) can make in respect of the conformity of private sustainability standards with the principles and disciplines as laid down by the World Trade Organization (“WTO”). In particular it assesses the extent to which the ISEAL Code of Good Practice for Setting Social and Environmental Standards (“the Standard-Setting Code”) is consistent with these disciplines.² The legal opinion provides an update to the 2006 ISEAL – CIEL Legal Opinion entitled “International Standards and Technical Barriers to Trade”.³

The WTO is based upon the Marrakesh Agreement Establishing the World Trade Organization (“the WTO Agreement”) which contains several annexes, containing numerous agreements, which together contain the body of rights and obligations that Members of the WTO are under. States and customs territories can be Members of the WTO, and it is, in principle, these entities that have to comply with the obligations provided for in the WTO Agreement. This is confirmed by the fact that, under the WTO’s Dispute Settlement Understanding, i.e. Annex 2 to the WTO Agreement, only measures taken “by Members” of the WTO can be challenged. This context is relevant as the Agreement on Technical Barriers to Trade (“TBT Agreement”) prescribes the way in which certain entities, such as standardising bodies, operating within a WTO Member must conduct their activities, in order for that WTO Member to be in compliance with its WTO obligations.

The summary of the 2006 ISEAL – CIEL Legal Opinion concluded that “depending on the interpretation of the TBT Agreement, the disciplines of the TBT Agreement either do not apply to voluntary or mandatory standards that are not product related, or, if they do apply, they do permit references to existing process

² The ISEAL Standard-Setting Code is available at https://www.isealalliance.org/sites/default/files/resource/2017-11/ISEAL_Standard_Setting_Code_v6_Dec_2014.pdf (“The ISEAL Standard-Setting Code”). The Legal Opinion is based on version 6 of the ISEAL Standard Setting Code. V6.0 of the Code was approved by the ISEAL Board of Directors on 10 December 2014 and has been effective as of 1 January 2015. Where reference is made to the ISEAL Standard-Setting Code, the page numbers refer to the .pdf mentioned in this footnote.

³ CIEL-ISEAL Alliance, International Standards and Technical Barriers to Trade R053 - Legal Opinion Summary July, 2006. Available at https://www.isealalliance.org/sites/default/files/resource/2017-12/ISEAL_CIEL_Legal_Opinion.pdf.

and production method standards”, regardless of whether they are product-related or not. The present legal opinion answers three questions:

1. To what extent are private standards covered by the obligations laid down in the GATT 1994 and in the TBT Agreement?
2. Do non-product-related processes and production methods (NPR-PPMs) fall within the scope of the GATT 1994 and that of the TBT Agreement?
3. Can compliance with ISEAL’s Code of Good Practice for Setting Social and Environmental Standards and other requirements of ISEAL membership (namely the ISEAL Assurance Code and Impacts Code) be considered as sufficient and relevant evidence for assessing whether a standard-setting body complies with the Code of Good Practice for the Preparation, Adoption and Application of Standards (“the Code of Good Practice”) as contained in Annex 3 of the TBT Agreement?

In order to provide answers to these questions, this legal opinion begins by providing an overview of ISEAL’s Standard-Setting Code, including its objectives, its operation, and the requirements it imposes on ISEAL members. Thereafter the nature and scope of the GATT 1994 and the TBT Agreement are discussed. Subsequently, the opinion examines whether compliance with the ISEAL Standard-Setting Code can be considered as relevant evidence of a standard-setting body’s compliance with the Code of Good Practice, as included in Annex 3 to the TBT Agreement. In this regard the opinion also addresses “The Six Principles” on the development of international standards as established by TBT Committee Decision in 2000.⁴ Finally, in the conclusion, the legal opinion presents a basic analysis of the likelihood of WTO dispute settlement complaints being filed against Members who have made private sustainability standards a part of policy implementation or who recommend adherence to the ISEAL Standard-Setting code.

II. The Nature of the ISEAL Code of Good Practice for Setting Social and Environmental Standards

1. About ISEAL

ISEAL Alliance is the global membership association for sustainability standards.⁵ It is a non-governmental organization with the mission of strengthening sustainability standard systems for the benefit of people and the environment. ISEAL is the global leader in defining and communicating what good practice looks like for sustainability standards through guidance and credibility tools such as the Codes of Good Practice. The ISEAL Standard-Setting Code is one of three Codes of Good Practice that each can contribute to strengthening components of standards systems.⁶ The Standard-Setting Code serves as a means to

⁴ WTO, TBT Committee, 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, G/TBT/9, 13 November 2000, para. 20 and Annex 4.

⁵ The ISEAL Standard-Setting Code, p. 3.

⁶ The other two codes are The ISEAL Code of Good Practice for Assuring Compliance with Social and Environmental Standards (Assurance Code) and the ISEAL Code of Good Practice for Assessing the Impacts of Social and Environmental Standard System (Impacts Code).

evaluate and strengthen the process for setting sustainability standards. According to the introduction of the Code, “it can serve as a minimum bar against which to measure processes to develop sustainability standards”.⁷ In simple terms, by using the ISEAL Standard-Setting Code, standard-setters can ensure that their standards are set in a manner that is transparent, open and sustainable.

ISEAL acknowledges that standard-setting practices should be based on relevant international normative documents. Annex 3 to the TBT Agreement (the Code of Good Practice) is one of these relevant international normative documents.⁸ Therefore, “[t]he Standard-Setting Code aims to build on these documents by including additional requirements that are specific to the development and revision of sustainability standards and that are based on more current understanding of good practice”.⁹ Consequently, the code specifies general requirements for transparent and accountable preparation, adoption and revision of sustainability standards.

2. The ISEAL Code of Good Practice for Setting Social and Environmental Standards

This section describes the objectives, content and scope of the ISEAL Standard-Setting Code. The Standard-Setting Code’s normative sections are based on ISEAL’s “Credibility Principles”. The six principles that underpin the Code most strongly are: improvement, relevance, rigour, engagement, transparency, and accessibility.¹⁰

The substantive provisions of the Standard-Setting Code are contained in Sections 4, 5, and 6. Section 4 contains General Provisions, Section 5 deals with the development and revision of standards and Section 6 contains provisions on the structure and content of standards. The main content of each section are discussed in turn.

2.1. Section 4: General Provisions

Section 4 contains two clauses.¹¹ Clause 4.1 provides that there must be documented standard-setting procedures that form the basis for the process by which these standards are developed. Furthermore, these procedures shall be made available through the organisation’s website. The second subparagraph of clause 4.2 requires standard-setting organisations to carry out a regular review of these procedures, thereby taking into account comments from stakeholders. Clause 4.2 is aimed at ensuring consistency between standards and provides the steps a standard-setting organisation shall take at the beginning of a new standards development process in order to do so. Thereto the clause provides that the standard-setting organisation shall consult other organisations that have developed standards in the same field and that it shall prepare and publish a work programme.

2.2. Section 5: Standards Development and Revision

⁷ The ISEAL Standard-Setting Code, p. 5.

⁸ For ease of reference, Annex 3 of the TBT Agreement is attached to this Legal Opinion in Appendix 1.

⁹ The ISEAL Standard-Setting Code, p. 5.

¹⁰ The ISEAL Standard-Setting Code, p. 8-9. The other four Credibility Principles are sustainability, impartiality, truthfulness, and efficiency.

¹¹ The ISEAL Standard-Setting Code, p. 10-11.

Section 5 of the Standard-Setting code provides for requirements that standardising organisations have to fulfil when developing and revising standards.¹² Clause 5.1 requires them to determine or update the terms of reference, in order to ensure that it is clear what the standard aims to achieve and why the standard is needed. Clause 5.2 requires the standardising organisations to identify stakeholders in order to ensure that they can be involved in the public consultation (Clause 5.4). Section 5 also lays down requirements for a feasibility assessment in order to assess the extent to which “enterprises can implement the standard and assessors can evaluate compliance with it” (Clause 5.5) and a decision-making process (Clause 5.6). Finally, Section 5 lays down transparency requirements (Clause 5.7), review and revision procedures (Clause 5.8), rules on transitions periods (Clause 5.9) and record-keeping (Clause 5.10), and a complaint procedure (Clause 5.11).

2.3. Section 6: Standards’ Structure and Content

Section 6 provides four clauses relating to the performance of standards and the way standards should be interpreted and applied.¹³ Clause 6.1 requires standard-setting organisations to ensure that the standard only contains requirements that support achievement of the defined sustainability outcomes. Clause 6.2 requires that requirements in the standard are set at a performance level that results in significant positive sustainability impacts. Clause 6.3 aims at ensuring the consistent interpretation and application of standards across their full geographic scope. To that end, the clause imposes requirements on the language used, requires the establishment of performance requirements, and refers to international standards as the basis for developing corresponding national or regional standards. Finally, Clause 6.4 requires standard-setting organisations to ensure that the standard is relevant in the local contexts where it is applied. Thereto the input of local stakeholders should be taken into account.

The legal opinion assesses the extent to which the ISEAL Credibility Principles that underpin the Standard-Setting Code are equivalent to “The Six Principles” on the development of international standards as established by TBT Committee Decision in 2000.

3. The Rights and Obligations in the GATT 1994 and the TBT Agreement

Annex 1A to the WTO Agreement contains the multilateral agreements on trade in goods. The General Agreement on Tariffs and Trade 1994 (“GATT 1994”) incorporates, by reference, the old General Agreement on Tariffs and Trade 1947 (“GATT 1947”). The GATT 1994 therefore contains the original cornerstones of the multilateral trading system, such as the non-discrimination principles and the market access principle. Since GATT Contracting Parties felt that these initial disciplines were insufficient to address the rise in non-tariff barriers, several new agreements on trade in goods were negotiated. With the establishment of the WTO in 1995, agreements such as the Agreement on Technical Barriers to Trade (“TBT Agreement”) and the Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”) entered into force.¹⁴ In this section answers are provided to the first two questions:

¹² The ISEAL Standard-Setting Code, p. 11-17.

¹³ The ISEAL Standard-Setting Code, p. 18-20.

¹⁴ There is considerable debate as to whether private standards are covered by the SPS Agreement. WTO Members have different opinions on this issue and have tried to find common ground on how to approach it. Discussions in the SPS Committee have resulted in an action plan of which one of the

To what extent are private standards covered by the obligations laid down in the GATT 1994 and in the TBT Agreement?;

Do non-product-related processes and production methods (NPR-PPMs) fall within the scope of the GATT 1994 and that of the TBT Agreement?;

Since the drafting of the 2006 legal opinion, the WTO's Dispute Settlement Body ("DSB") has resolved several disputes that involved claims arising under the TBT Agreement.¹⁵ This updated legal opinion

objectives is the development of an agreed definition of the concept "private standard". However, so far these discussions have not led to any tangible results. The remainder of this Legal Opinion focuses on the relevance of the GATT 1994 and the TBT Agreement to private standards and does not address the question of whether private standards fall within the scope of the SPS Agreement.

¹⁵ Since 1 January 1995, there have been 53 requests for consultations in which a WTO Member has indicated that a provision of the TBT Agreement has been violated. In 6 instances the dispute went beyond the request for consultations stage and onto an appeal. In two of these disputes the complaining Member had recourse to Article 21.5 of the DSU in order to complain about the inconsistency of measures taken to comply with the findings of the DSB in the initial proceedings. The disputes in which Panel and Appellate Body Reports have been issued are the following: Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R (Panel Report, *EC – Asbestos*); Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/R, adopted 5 April 2001 (Appellate Body Report, *EC – Asbestos*); Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R (Panel Report, *EC – Sardines*); Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002 (Appellate Body Report, *EC – Sardines*); Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R (Panel Report, *US – Clove Cigarettes*); Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012 (Appellate Body Report, *US – Clove Cigarettes*); Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R (Panel Report, *US – Tuna II (Mexico)*); Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012 (Appellate Body Report, *US – Tuna II (Mexico)*); Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 21.5 of the DSU by Mexico)*, WT/DS381/RW, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW (Panel Report, *US – Tuna II (Article 21.5 -Mexico)*); Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 21.5 of the DSU by Mexico)*, WT/DS381/AB/RW (Appellate Body Report, *US – Tuna II (Article 21.5 -Mexico)*); Panel Reports, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 21.5 of the DSU by the United States)* and *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Second Recourse to Article 21.5 of the DSU by Mexico)*, WT/DS381/RW/USA and WT/DS381/RW/2, circulated 26 October 2017; Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R WT/DS386/AB/R (Panel Reports, *US – COOL*); Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R WT/DS386/AB/R, adopted 23 July 2012 (Appellate Body Reports, *US – COOL*); Panel Reports, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R WT/DS401/R, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R WT/DS401/AB/R (Panel Reports, *EC – Seal Products*); Appellate Body Reports, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R WT/DS401/AB/R, adopted 18 June 2014 (Appellate Body Reports, *EC – Seal Products*).

therefore takes into account the relevant findings made by panels and the Appellate Body in respect of those provisions of the TBT Agreement that are relevant to ISEAL Alliance and its members. Although strictly speaking, previous panel and Appellate Body reports do not constitute precedents, they are considered as creating “legitimate expectations” on the part of WTO Members.¹⁶ Hence, although not binding, they do have significant legal value.

3.1. The GATT 1994

The obligations contained in the WTO Agreement apply to WTO Members. They have to conduct their trade policy in a manner that is consistent with their obligations under the law of the WTO. In principle, the WTO Agreement does not prescribe the way in which private actors should conduct themselves. The WTO Agreement also does not use, let alone define, the term “private standards”. Consequently, the answer to the **first question**, insofar as it covers the *GATT 1994*, is that the law of the WTO, in principle, does not prescribe or prohibit the actions of private actors that operate within the territory of its Members. Therefore, private initiatives such as Voluntary Sustainability Standards (“VSS”) are not covered by the provisions of the *GATT 1994*. As will be described in below, there are exceptions to this general rule in the context of the TBT Agreement. However, even in the case of these exceptions, it is ultimately the WTO Member that will be responsible for these actions and that will be confronted with a complaint in WTO dispute settlement proceedings in the event of perceived non-compliance.

The **second question** asks whether non-product-related processes and production methods (NPR-PPMs) fall within the scope of the *GATT 1994*. Again, it should be emphasized that WTO obligations apply to WTO Members.¹⁷ The scope of the *GATT 1994* is not clearly defined but, generally speaking, covers measures taken by Members that apply to trade in goods. To the extent that these measures discriminate between domestic and imported products, or between imported products of different origins, they may violate the substantive obligations of the *GATT 1994*. Hence, a measure by a Member that – by imposing NPR-PPMs – affects trade in goods, would fall within the scope of the *GATT 1994*. The *GATT 1994* does not prohibit measures solely because of the fact that they contain or refer to NPR-PPMs. The question that a WTO panel in the event of a complaint by another Member will have to answer is whether, by adopting the measure containing the NPR-PPM, the WTO Member adopting the measure acted inconsistently with its rights and obligations under the WTO Agreement. To the extent that a Member discriminates between domestic and imported goods based on the way they have been produced, this would arguably constitute a violation of the relevant WTO obligations.

However, the foregoing is only relevant when a measure adopted by a WTO Member is what is at issue. In other words, only measures that are attributable to a WTO Member fall within the scope of the *GATT 1994*. Moreover, in recent years, the attention of WTO Members has shifted from the NPR-PPM debate to the standard development process. Thus, Members are far more focused on ensuring that standards – which may address NPR-PPMs – are developed in a manner that is transparent, impartial, coherent and takes into account developmental concerns.

3.2. The TBT Agreement

¹⁶ Appellate Body Report, *Japan — Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 14.

¹⁷ According to Article XII of the WTO Agreement, membership to the WTO is open to states and customs territories.

In order to provide an answer to the second part of the **first** and **second question**, i.e. whether private standards and NPR-PPMs fall within the scope of the *TBT Agreement*, and to the **third question**, this legal opinion presents an overview of the TBT Agreement and the interpretation of that agreement by panels and the Appellate Body. The TBT Agreement builds upon the provisions of the GATT 1994 and lays down more detailed disciplines in respect of technical regulations and standards.

3.2.1. Object and Purpose and the relevance of “The Six Principles”

3.2.1.1. The Object and Purpose of the TBT Agreement

The preamble of the TBT Agreement explicitly recognizes the important contribution that international standards and conformity assessment systems can make by improving efficiency of production and facilitating the conduct of international trade. Whilst encouraging the development of such international standards and conformity assessment systems, the preamble also cautions against technical regulations, standards and conformity assessment procedures creating unnecessary obstacles to international trade. The TBT Agreement should be read with these considerations in mind. In other words, international standards and conformity assessment procedures are generally considered beneficial, but they should be implemented in a manner that does not unnecessarily hamper international trade.

3.2.1.2. The Six Principles

It is with these considerations in mind that, in 2000, the TBT Committee agreed on six principles that should be observed when international standards, guides and recommendations are developed (‘the TBT Committee Decision’).¹⁸ The six principles that were identified are: transparency; openness; impartiality and consensus; effectiveness and relevance; coherence; and developing country interests. According to the TBT Committee Decision “[t]he dissemination of such principles by Members and standardizing bodies in their territories would encourage the various international bodies to clarify and strengthen their rules and procedures on standards development, thus further contributing to the advancement of the objectives of the Agreement”. The Six Principles are briefly described below in order to subsequently establish how the ISEAL Standard-Setting Code enables its Members to put them into practice.¹⁹

Transparency

The principle of transparency applies throughout the standard-setting process and includes open access to information or documents needed for the participation in technical committees. Moreover, the principle promotes the idea of providing the opportunity for early-stage comments and the publication and adoption of work programmes relating to standard-development.

Openness

The principle of openness encapsulates the idea that the standard-setting process shall be open, on a non-discriminatory basis, to participation of relevant bodies of at least all WTO Members at policy

¹⁸ WTO, TBT Committee, 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, G/TBT/9, 13 November 2000, para. 20 and Annex 4.

¹⁹ WTO, International Standards and the WTO TBT Agreement: Improving Governance for Regulatory Alignment, Staff Working Paper ERSD-2013-06, 25 April 2013.

development level and throughout the standard-setting process, which includes the proposal, technical discussions, comments, the review of existing standards, voting and adoption, and dissemination.

Impartiality and Consensus

The principle of impartiality and consensus entails that a standard or standard-setting process should be neutral. It should not favour the interests or privileges of a particular supplier, country or region. Furthermore, the development of standards should be based on consensus, whereby the views of all parties concerned are taken into account and the aim is to reconcile conflicting arguments.

Effectiveness and Relevance

The principle of effectiveness and relevance is aimed at the facilitation of trade and the prevention of unnecessary barriers to trade. The concept of relevance includes the idea that standards should address regulatory and market needs, as well as scientific and technological developments. The concept of effectiveness is defined as the idea that standards and the standard-setting process should be performance, rather than design based.

Coherence

The principle of coherence requires standard-setters to ensure that conflict, overlap and duplication between international standards are avoided. Thereto it encourages cooperation and coordination between standard-setters and other relevant international bodies.

Developing Country Interests

The principle of developing country interests (or “the development dimension”) is an explicit recognition of the constraints that developing countries face to effectively participate in standards development. It requires standard-setters to consider tangible ways to ensure their participation, such as the use of technical assistance and capacity building.

As discussed above, the ISEAL Standard-Setting Code is based on the following six principles: improvement, relevance, rigour, engagement, transparency, and accessibility. Therefore, to a large extent, these principles overlap with the Six Principles as adopted by the TBT Committee.

The Six Principles	Equivalent ISEAL Credibility Principle
Transparency	Transparency
Openness	Accessibility / Engagement
Impartiality and Consensus	Impartiality / Engagement
Effectiveness and Relevance	Improvement / Relevance / Rigour
Coherence	Rigour

Developing Country Interests	Accessibility / Engagement
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3.2.2. The Scope of the TBT Agreement

3.2.2.1. Technical Regulations and Standards

In line with the objective of promoting international standards as a means to facilitate international trade, Article 1.1 of the TBT Agreement refers to the United Nations system and international standardising bodies as the source of the definitions applicable for determining the meaning given to the general terms for standardisation and conformity assessment procedures. Article 1.2 of the TBT Agreement qualifies this statement by providing that one should refer initially to Annex 1 in order to find the meaning of the terms used in the TBT Agreement. Annex 1 thereby defines the scope of the TBT Agreement and in order to determine whether the rights and obligations contained in the TBT Agreement are applicable, an initial assessment of whether a particular measure falls within the scope of the Agreement has to be carried out.

Annex 1 defines the concepts “technical regulation” and “standard” as follows:

“Annex 1.1 Technical regulation

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is *mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (emphasis added).

Annex 1.2 Standard

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is *not mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method”. (emphasis added).

(i) *Mandatory vs Not Mandatory*

A textual comparison reveals that the main difference between a technical regulation and a standard, for the purpose of the TBT Agreement, is their mandatory or voluntary character. Whereas technical regulations require compliance, standards are voluntary in nature. The distinction between mandatory and voluntary has been clarified by the Panel in *US – Tuna II (Mexico)* by reference to the ISO/IEC Guide 2. As per Annex 1 to the TBT Agreement, “[t]he terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definition Concerning Standardization and Related Activities” (“ISO/IEC Guide 2”), shall have the same meaning when used in the context of the TBT Agreement. The Panel noted that “the ISO/IEC Guide 2 establishes that the expression ‘mandatory requirement’, should be used to

mean only ‘a requirement made compulsory by *law or regulation*’ (emphasis added).²⁰ Further, when a measure is legally enforceable and binding under domestic law (i.e., it is issued by the government and includes legal sanctions), this will likely indicate its mandatory character.²¹

Importantly, the Appellate Body in *US – Tuna II (Mexico)* clarified that “[c]ertain features exhibited by a measure may be common to both technical regulations falling within the scope of Article 2 of the *TBT Agreement* and, for example, standards falling under Article 4 of that Agreement.”²² Therefore it is necessary to “consider additional characteristics of the measure in order to determine the disciplines to which it is subject under that Agreement”.²³ This involves a consideration of “whether the measure consists of a law or a regulation enacted by a WTO Member, whether it prescribes or prohibits particular conduct, *whether it sets out specific requirements that constitute the sole means of addressing a particular matter*, and the nature of the matter addressed by the measure” (emphasis added).²⁴ The italicized consideration is relevant for ISEAL, as a governmental measure that were to refer to adherence to a VSS adopted by an ISEAL member as the only means of addressing a particular matter may be considered to be a technical regulation, thereby triggering the application of the relevant obligations in the TBT Agreement. In this regard it has been observed that “most VSS seem to be comfortable with being outside the scope of the TBT Agreement”.²⁵ Since the obligations in the WTO Agreement, including the GATT 1994 and the TBT Agreement, apply to WTO Members, voluntary schemes such as those adopted by members of the ISEAL Standard-Setting Code, are not directly subject to them.

As will be further examined below, the majority of the substantive obligations of the TBT Agreement apply to technical regulations. In other words, since most – if not all – of the standards prepared by the ISEAL membership are of a non-mandatory nature, they do not qualify as technical regulations. This will only be different where the government of a WTO Member adopts that particular standard and makes it legally enforceable under domestic law, and to the extent that it lays down product characteristics or their related processes and production methods. It is therefore the fact that ISEAL Members provide “standards” rather than “technical regulations” that results in only a limited set of obligations contained in the TBT Agreement being relevant.

(ii) *Standard: document approved by a recognized body*

For a document to be considered a standard for the purpose of the TBT Agreement, it has to have been “approved by a recognized body”. The question therefore is whether ISEAL members are in fact such “recognized bodies”. Albeit in a different context, namely in determining when an international body has recognised activities in standard setting, the Appellate Body considered that “[t]he term “recognize” is defined as “[a]cknowledge the existence, legality, or validity of, [especially] by formal approval or sanction; accord notice or attention to; treat as worthy of consideration”.²⁶ These definitions fall along a spectrum that ranges from a factual end (acknowledgement of the existence of something) to a normative end (acknowledgement of the validity or legality of something). According to the Appellate

²⁰ Panel Body Report, *US – Tuna II (Mexico)*, para. 7.103.

²¹ Panel Body Report, *US – Tuna II (Mexico)*, para. 7.142.

²² Appellate Body Report, *US – Tuna II (Mexico)*, para. 188.

²³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 188.

²⁴ Appellate Body Report, *US – Tuna II (Mexico)*, para. 188.

²⁵ Delimatsis, Panos (2016), *Sustainable Standard-Setting, Climate Change and the TBT Agreement*, in Delimatsis, Panos (ed.) (2016), *Research Handbook on Climate Change and Trade Law*, Edward Elgar Publishing, Cheltenham, p. 179.

²⁶ Appellate Body Reports, *US – Tuna II (Mexico)*, para. 361.

Body, “evidence of a body's compliance with procedural and substantive safeguards formulated by WTO Members would be relevant for the question of whether its standardizing activities are "recognized" for the purposes of the *TBT Agreement*.”²⁷ In this regard the Appellate Body had already observed that “the standardizing activities of a body that disseminates information about its standardization activities, as envisaged by the transparency procedures of the TBT Committee Decision, would presumably be acknowledged to exist, accorded notice or attention, and treated worthy of consideration by all WTO Members that make a good faith effort to follow international standardization activities”.²⁸

Whether an ISEAL member is to be considered as being a recognized body for the purpose of Annex 1.2 of the TBT Agreement will be subject to the outcome of a case-by-case analysis. However, given ISEAL's efforts to disseminate information about the standardizing activities of its Members, a Panel is likely to find that the ISEAL member in question is recognized as being engaged in such activities. This implies that the standards adopted by ISEAL members may come within the scope of the TBT Agreement.

(iii) Document approved by a recognized body

In addition to the question whether compliance with a particular document is mandatory or not mandatory and whether ISEAL's members are recognized bodies in the sense of the TBT Agreement, it is important to determine the scope of the concepts “product characteristics or *their* related processes and production methods” and “rules, guidelines or characteristics for products or related processes and production methods” in order to determine which substantive obligations contained in the TBT Agreement are applicable. In this regard the Reports of the panel and Appellate Body in *EC – Seal Products* are relevant. In the context of determining whether the EU Seal Regime constituted a “technical regulation”, the Appellate Body determined whether it laid down “product characteristics”.²⁹ The Appellate Body found that the EU Seal Regime did “not prohibit seal-containing products merely on the basis that such products contain seal”, but rather that “such prohibition is imposed subject to conditions based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived”.³⁰ The Panel had found that

“only seals obtained from the specific type of hunter and/or the qualifying hunts may be used in making final products. These criteria in our view constitute "objectively definable features" of the seal products that are allowed to be placed on the EU market and consequently lay down particular "characteristics" of the final products.”³¹

The Appellate Body however considered the Panel to have erred and found instead that it saw

“no basis in the text of Annex 1.1, or in prior Appellate Body reports, to suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics.”³²

In other words, neither the identity of the hunter nor the type or purpose of the hunt constitute product characteristics. If this finding is extrapolated, one can reasonably conclude that neither the identity of a

²⁷ Appellate Body Reports, *US – Tuna II (Mexico)*, para. 377.

²⁸ Appellate Body Reports, *US – Tuna II (Mexico)*, para. 376.

²⁹ Appellate Body Reports, *EC – Seal Products*, paras. 5.25-5.60.

³⁰ Appellate Body Reports, *EC – Seal Products*, para. 5.41.

³¹ Panel Reports, *EC – Seal Products*, para. 7.110.

³² Appellate Body Reports, *EC – Seal Products*, para. 5.45.

producer, nor the way in which a product is produced constitute a product characteristic in the sense of Annex 1.1 of the TBT Agreement. Based on this finding, the Appellate Body concluded that

“to the extent that the measure *regulates* the placing on the EU market of pure seal products, which is a part of the integral and essential aspects of the measure, it does *not* prescribe or impose any “characteristics” on the products themselves.”³³

In setting out the legal standard under Annex 1.1 of the TBT Agreement, the Appellate Body had already noted that a technical regulation exists when a document lays down product characteristics *or* their related process and production methods. According to the Appellate Body, “the disjunctive “or” indicates that “related [PPMs]” may play an additional or alternative role vis-à-vis “product characteristics” under Annex 1.1.”³⁴ Moreover, the Appellate Body found that

“[a] plain reading of Annex 1.1 thus suggests that a “related” PPM is one that is “connected” or “has a relation” to the characteristics of a product. The word “their”, which immediately precedes the words “related processes and production methods”, refers back to “product characteristics”. Thus, in the context of the first sentence of Annex 1.1, we understand the reference to “or their related processes and production methods” to indicate that the subject matter of a technical regulation may consist of a process or production method that is *related* to product characteristics. In order to determine whether a measure lays down related PPMs, a panel thus will have to examine whether the processes and production methods prescribed by the measure have a sufficient nexus to the characteristics of a product in order to be considered related to those characteristics.”³⁵

Therefore, even after *EC – Seal Products*, there is no definitive answer to the question which PPMs would amount to a technical regulation in the sense of Annex 1.1 of the TBT Agreement. Obviously, to the extent that the document in question includes or deals exclusively with “terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method”, these pure, non-product related PPMs would qualify as a technical regulation by virtue of the text of Annex 1.1 of the TBT Agreement.

The *second part* of the **first** and **second question** inquires whether

- 1) private standards are *covered by* the obligations laid down in the TBT Agreement?; and
- 2) whether non-product-related processes and production methods (NPR-PPMs) *fall within the scope of* the TBT Agreement?;

In respect of the **first question**, where compliance with such a standard is not mandatory, i.e. not enforceable by means of a law or regulation adopted by a WTO Member, the standard (or document) will not constitute a technical regulation in the sense of Annex 1.1 of the TBT Agreement. The remainder of this legal opinion proceeds on the assumption that ISEAL members’ standards are **not** technical regulations in the meaning of Annex 1.1 of the TBT Agreement and that the substantive obligations of the TBT Agreement inasmuch as they apply to such technical regulations are not applicable. However, it should be cautioned that to the extent that a governmental measure identifies VSS such as the standards adopted by ISEAL members as “*specific requirements that constitute the sole means of addressing a*

³³ Appellate Body Reports, *EC – Seal Products*, para. 5.58.

³⁴ Appellate Body Reports, *EC – Seal Products*, para. 5.12.

³⁵ Appellate Body Reports, *EC – Seal Products*, para. 5.12.

particular matter”, this may lead a WTO panel to conclude that the governmental measure is a technical regulation. For this reason, Section 2.3.1 briefly describes the disciplines applicable to technical regulations in order to provide a comprehensive overview.

Moreover, there is still uncertainty as to whether the norms laid down by ISEAL members have a sufficient nexus to the characteristics of a product in order to be considered as laying down *related* processes and production methods. This question has not been resolved by the Appellate Body in *EC – Seal Products*. In other words, the answer to the second part of the **second question**, i.e. whether non-product-related processes and production methods (NPR-PPMs) *fall within the scope* of the TBT Agreement, can therefore not be given definitively. Nevertheless, what is certain is that there must be a sufficient nexus between the product characteristics and the product in order for there to be “related processes and production methods”.

Consequently, whether the disciplines of the TBT Agreement are relevant to the standards adopted by ISEAL’s members is still not certain, however, all indications point towards non-applicability. Importantly, however, as observed above, for the purpose of standard-setting, WTO Members appear to have moved on from the NPR-PPM debate and seem to be far more concerned with avoiding that standards constitute unnecessary barriers to trade. Therefore, an analysis of the principles that should guide the standard-setting process is carried out below.

3.2.2.2. Conformity Assessment Procedures

Annex 1.3 defines a conformity assessment procedures as

“Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.”

Although the ISEAL Standard-Setting code does not in itself constitute a conformity assessment procedure, ISEAL’s Code of Good Practice for Assuring Compliance with Social and Environmental Standards (“the ISEAL Assurance Code”).³⁶ The relevant obligations can be found in Articles 5 to 9 of the TBT Agreement. Article 8 requires WTO Members to “take such reasonable measures as may be available to them to ensure that non-governmental bodies within their territories which operate conformity assessment procedures comply with the provisions of Articles 5 and 6”. Thus, if ISEAL members are considered as constituting such non-governmental bodies, the WTO Members in which they operates are expected to “take such reasonable measures” to ensure that the ISEAL Assurance Code is compliant with the provisions of Articles 5 and 6 TBT Agreement. However, it is as of yet unclear what such “reasonable measures” may encompass and, in any event, it appears that the Assurance Code operates based on similar principles as enshrined in the relevant WTO provisions, thereby pointing towards consistency of the ISEAL Assurance Code with the requirements in Articles 5 and 6 of the TBT Agreement.

3.2.3. The Substantive Obligations of the TBT Agreement

As noted, the TBT Agreement – like all WTO agreements – lays down obligations that apply to Members of the organisation. In other words, it describes actions that Members have to undertake or refrain from. Section 2.2.1, above, concluded that since the standards adopted by ISEAL members do not constitute technical regulations in the sense of Annex 1.1 of the TBT Agreement, the only obligations that are

³⁶ See the ISEAL Code of Good Practice for Assuring Compliance with Social and Environmental Standards (Assurance Code) referred to on p.3 of the Standard-Setting Code.

relevant are those related to standards as defined in Annex 1.2 of the TBT Agreement. Nevertheless, for completeness sake, this section also discusses the obligations contained in the TBT Agreement that apply to technical regulations.

3.2.3.1 Obligations in respect of Technical Regulations

The TBT Agreement mainly lays down obligations in respect of the Technical Regulations that Members may adopt. The main obligations are laid down by Article 2 of the agreement. Its chapter reads “[w]ith respect to their central government bodies:”, before laying down twelve subparagraphs with obligations in respect of technical regulations. Article 2.1 of the TBT Agreement for example reads

“Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.”

Importantly, Article 2.4 of the TBT Agreement requires WTO Members to use “relevant international standards” as the basis for technical regulations, “except when such international standards ... would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued ...”.

Thus, the question is whether a standard adopted by an ISEAL Member could constitute such a “relevant international standard”? If this question were to be answered in the affirmative, WTO Members would be obliged to base their technical regulations on that particular standard to the extent that it is an effective and appropriate means for the fulfilment of the legitimate objective pursued by that WTO Member. In this regard, the Six Principles as identified in Section 2.1.2, above, are relevant. Indeed, the principles of transparency; openness; impartiality and consensus; effectiveness and relevance; coherence; and developing country interests should be taken into account when developing “international standards”. Thus, where ISEAL practices ensure that these principles are taken into account, this may mean that ISEAL standards could constitute “international standards” in the sense of Article 2.4 of the TBT Agreement.

The principle of “openness” means that an international standard must be “open to the relevant bodies of at least all WTO Members”. Thus, standard-setting organizations (for example standard-setting organizations that are Member of ISEAL), may not discriminate based on the origin of a producer that wishes to become a Member of that organization. In other words, they must accept applications from “the relevant bodies of at least all WTO Members” and may not deny membership based on the origin of an applicant. In *US – Tuna II (Mexico)* the Appellate Body clarified that in order to constitute an “international standard”, a standard has to be adopted by an “international standardizing body”. In order to be considered a “relevant international standard”, the body adopting the standard has to be “open to the relevant bodies of at least all [WTO] Members”.³⁷ In this regard, according to the Appellate Body, a “body will be open if membership to the body is not restricted” and it will “not be open if membership is *a priori* limited to the relevant bodies of only some WTO Members.” Moreover, “provisions for accession that *de jure* or *de facto* disadvantage the relevant bodies of some Members as compared to other Members would tend to indicate that a body is not an “international” standardizing body for the purposes of the *TBT Agreement*.”³⁸

³⁷ Appellate Body Report, *US – Tuna II (Mexico)*, para. 364.

³⁸ Appellate Body Report, *US – Tuna II (Mexico)*, para. 375.

In this regard, according to the Appellate Body, “in examining whether an international body has “recognized activities in standardization”, evidence of recognition by WTO Members as well as evidence of recognition by national standardizing bodies would be relevant.”³⁹ Therefore, it will not be straightforward for a VSS to constitute a “relevant international standard” in the sense of Article 2.4 TBT Agreement, as the threshold for recognition seems to be rather high. There may also be significant opposition from WTO Members to the idea of having essentially “private” standards become “relevant international standards” that they are required to base their technical regulations on. This would impede significantly on their regulatory autonomy. Nevertheless, the Appellate Body has recognised that “the *TBT Agreement* also aims to encourage the development of international standards by bodies that were not already engaged in standardizing activities at the time of the adoption of the *TBT Agreement*.”⁴⁰ Thus, it cannot be categorically excluded that a particular standard developed by one of ISEAL’s members could constitute a “relevant international standard”. In this regard, the equivalence of ISEAL’s Credibility Principles with the Six Principles developed by the TBT Committee is essential.

Article 3 of the TBT Agreement is entitled “Preparation, Adoption and Application of Technical Regulations by Local Government Bodies and Non-Governmental Bodies”. It imposes obligations on WTO Members that are aimed at ensuring that these local government and non-governmental bodies also comply with the obligations enshrined in Article 2.

However, to the extent that the standards adopted by ISEAL’s members are not mandatory for lack of them laying down requirements made compulsory by, and enforceable under, domestic laws or regulations, these provisions applicable to technical regulations would appear to be of limited relevance.

3.2.3.2 Obligations in respect of Standards

Depending on whether ISEAL members are considered as “recognized bodies” in the sense of Annex 1.2 of the TBT Agreement, the standards they adopt might qualify as standards in the sense of Annex 1.2 of the TBT Agreement. Article 4 of the TBT Agreement contains the main obligations in respect of standards as defined in Annex 1.2 of the agreement. It provides the following:

“4.1 Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the “Code of Good Practice”). They shall take such reasonable measures as may be available to them to ensure that local government and *nongovernmental standardizing bodies* within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.

4.2 Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement.”

³⁹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 363.

⁴⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 379.

There are three obligations contained in Article 4.1 that are relevant to ISEAL's members. Whereas the first sentence of the article merely refers to the Code of Good Practice contained in Annex 3 as an instrument that central government standardising bodies have to accept and comply with, the second sentence imposes an obligation on WTO Members to "take such reasonable measures" to ensure that local government and "nongovernmental standardizing bodies" accept and comply with the Code of Good Practice. In other words, although the scope of the term "reasonable measures" is as of yet unknown, WTO Members must actively ("take ... measures") seek for acceptance of the Code of Good Practice by nongovernmental standardising bodies. The third sentence of Article 4.1 imposes a negative obligation that requires Members to abstain from taking "measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice". The drafters of the TBT Agreement thus explicitly envisaged a role for WTO Members in the promotion of the Code of Good Practice as contained in Annex 3 of the agreement.

The Code of Good Practice for the Preparation, Adoption and Application of Standards ("the Code of Good Practice") as contained in Annex 3 of the TBT Agreement contains 16 paragraphs containing instructions that standardizing bodies have to follow when engaging in the preparation, adoption or application of standards. An integral copy of Annex 3 is attached to this Legal Opinion in a comparison table contained in **Appendix 1**.⁴¹ The column on the left contains all provisions of Annex 3, with the column on the right indicating which provisions of the Standard-Setting Code mirror these provisions and to what extent.

Paragraph F of the Code of Good Practice provides that "where international standards exist or their completion is imminent, the standardizing body shall use them ... as a basis for the standards it develops". Thus, the question is whether a standard adopted by an ISEAL Member could constitute such an "international standard" that must be used as a basis for the standards developed by a standardising body of a WTO Member? If this question were to be answered in the affirmative, standardising bodies of WTO Members would be obliged to base their standards on that particular standard to the extent that it is effective and appropriate.

In this regard, the Six Principles as identified in Section 2.1.2, above, are relevant. Indeed, the principles of transparency; openness; impartiality and consensus; effectiveness and relevance; coherence; and developing country interests should be taken into account when developing "international standards".

To the extent that ISEAL members were to be considered as "nongovernmental standardizing bodies" as referred to in Article 4.1 of the TBT Agreement, the TBT Agreement imposes an obligation upon WTO Members to ensure that the ISEAL members comply with the Code of Good Practice as laid down by Annex 3. Consequently, it can be assumed that any further improvements to the Code, as envisaged by the ISEAL Standard-Setting code, will only be looked upon in a favourable manner as a means of contributing to the achievement of the objective of improving efficiency of production and facilitating the conduct of international trade. This legal opinion therefore assesses the extent to which the ISEAL Standard-Setting Code builds upon the Code of Good Practice and determines whether, in some respects, it might run counter to the Code.

⁴¹ Appendix 1 contains a table comparing the provisions of Annex 3 to the TBT Agreement with the relevant provisions of the ISEAL Standard-Setting Code.

III. The ISEAL Standard-Setting Code and the TBT Agreement

The **third question** asks whether compliance with ISEAL’s Code of Good Practice for Setting Social and Environmental Standards (the Standard-Setting Code) can be considered as sufficient and relevant evidence for assessing whether a standard-setting body complies with the Code of Good Practice as contained in Annex 3 of the TBT Agreement.

In general the ISEAL Standard-Setting Code refers to reference documents such as Annex 3 of the TBT Agreement in the context of the standard-setting organisations’ obligation to “strive for practices that are as consistent as possible with the reference documents”.⁴² The table provided in **Appendix 1** enables an assessment to what extent full compliance with the ISEAL Standard-Setting Code also guarantees full compliance with a standardizing body’s obligations under Annex 3 of the TBT Agreement.

The comparison shows that with a few exceptions, every provision of Annex 3 to the TBT Agreement has an equivalent in the Standard-Setting Code. The first category of exceptions relates to substantive provisions D and E of the Annex. Paragraph D lays down an obligation on the standardising body to “accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country”. Paragraph E requires standardizing bodies to “ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade”. These provisions essentially mirror Articles 2.1 and 2.2 of the TBT Agreement, which apply in respect of technical regulations. Hence, by virtue of Article 4, 5 and 6 of the TBT Agreement, WTO Members are required to “take such reasonable measures” to ensure that standardizing bodies comply with these obligations.

Although there is no direct equivalent to these provisions in the Standard-Setting Code, ISEAL membership requirements and the Standard-Setting Code are both aimed at reducing unnecessary barriers to trade. Indeed, the introduction to the Standard-Setting Code refers to “standard-setting procedures as a means to avoid the creation of unnecessary barriers to trade”. Moreover, as observed earlier and as evidenced by Appendix 1, the principles of improvement, relevance, rigour, engagement, transparency, and accessibility are specifically designed to avoid standards from constituting unnecessary barriers to trade. It is precisely ISEAL’s commitment to these principles that is aimed at ensuring that the standards developed by its members do not result in constituting such barriers.

Annex 3 to the TBT Agreement lays down an explicit obligation on standardising bodies to accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country. Such a non-discrimination obligation appears to be absent from the ISEAL Standard-Setting Code. Nevertheless, governmental recommendation for adherence to the ISEAL Standard-Setting Code would be one way of ensuring that WTO Members comply with their obligation under Article 4.1 of the TBT Agreement “to take such reasonable measures as may be available to them to ensure that [...] non-governmental standardizing bodies” comply with the Code of Good Practice as set out in Annex 3 of the TBT Agreement. Thus, indeed, based on the finding that the ISEAL Standard-Setting Code mirrors – to an

⁴² The ISEAL Standard-Setting Code, p. 5.

almost full extent – the TBT’s CGP, governmental recommendation of the ISEAL Code would be a means of ensuring compliance with their obligation to ensure compliance under WTO law, i.e. Article 4.1 of the TBT Agreement.

The other two substantive provisions of Annex 3 to the TBT Agreement that do not have a direct equivalent in the Standard-Setting Code are paragraphs G and K. Paragraph G lays down an obligation to “play a full part” in the preparation of standards by relevant international standardising bodies. Such representation of ISEAL Members in international standardising bodies is not foreseen in the Standard-Setting Code. Similarly, paragraph K refers to national members of ISO/IEC. Since ISEAL is a different platform than ISO/IEC, for obvious reasons an equivalent reference is missing in the Standard-Setting Code.

In respect of all other provisions, however, the ISEAL Standard-Setting Code imposes more detailed requirements on the standardizing bodies that accept the Code, and would therefore ensure adherence to the baseline obligations of the TBT Agreement’s Code of Good Practice. Moreover, ISEAL and its members do engage in ISO standard-setting processes whenever these are relevant. This practice serves as further confirmation that adherence to the ISEAL Standard-Setting Code signals compliance with the TBT Agreement’s Code of Good Practice.

Conclusion

The ISEAL Standard-Setting Code serves as a means to evaluate and strengthen the process for setting sustainability standards. It aims to build on Annex 3 to the WTO’s TBT Agreement (the Code of Good Practice). The WTO TBT Agreement lays down additional disciplines in respect of technical regulations, standards and conformity assessment procedures. Compliance with standards adopted by ISEAL members is not “mandatory” and therefore these standards do not constitute technical regulations. At most, standards adopted by ISEAL members are “standards” in the sense of Annex 1.2 of the TBT Agreement.

By using the ISEAL Standard-Setting Code, standard-setters can ensure that their standards are set in a manner that is transparent, open and sustainable. The standards adopted by ISEAL members do not per definition qualify as either technical regulations or as standards under the TBT Agreement. Since compliance with these standards is not mandatory, i.e. enforceable by law or regulation, at most they will qualify as standards under Annex 1.2 of the TBT Agreement. This would only be different should a governmental measure refer to adherence to a standard adopted by an ISEAL member as the only means of addressing a particular matter. In such a situation, the Appellate Body has indicated that this may be considered as evidence of the existence of a technical regulation, thereby triggering the application of the relevant obligations in the TBT Agreement.

Governments of states that are Members of the WTO do not run a significant risk of being challenged under WTO dispute settlement proceedings should they recommend adherence to ISEAL’s Standard-Setting Code. On the contrary, support for the ISEAL Standard-Setting Code could be seen as a reasonable measure to ensure that standardising entities within their territories accept and comply with the Code of Good Practice as laid down in Annex 3 to the TBT Agreement. There is a significant degree of overlap

between the Six Principles as developed and adopted by the TBT Committee and the Credibility Principles that underpin the standard-setting activities of ISEAL members.

This legal opinion has established that adherence to the ISEAL Standard-Setting Code to a large extent signals compliance with the TBT Agreement's Code of Good Practice, as contained in Annex 3 to the Agreement. Arguably, governmental recommendation for adherence to the ISEAL Standard-Setting Code would be one possible way of ensuring that WTO Members comply with their obligation under Article 4.1 of the TBT Agreement "to take such reasonable measures as may be available to them to ensure that [...] non-governmental standardizing bodies" comply with the Code of Good Practice as set out in Annex 3 of the TBT Agreement.

The ISEAL Standard-Setting Code could be further improved by including a specific clause stipulating that standardizing bodies shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary barriers to international trade. In this regard, future revisions of the Standard-Setting Code should highlight practices and membership requirements that contribute to that specific objective.

* * * * *

Appendix 1

Comparison of Annex 3 to the TBT Agreement (Code of Good Practice for the Preparation, Adoption and Application of Standards) and ISEAL’s Code of Good Practice for Setting Social and Environmental Standards (the Standard-Setting Code)	
Annex 3 to the TBT Agreement	ISEAL Standard-Setting Code
General Provisions	
A. For the purposes of this Code the definitions in Annex 1 of this Agreement shall apply.	Page 7. Paragraph 3. Definitions. The definitions follow the wording of Annex 1.2 TBT Agreement in respect of standards. It also lays down additional definitions for “consensus”, “outcome”, “publicly available”, “stakeholder”, standard-setting organisation”, “standards system”, and “sustainability standard”.
B. This Code is open to acceptance by any standardizing body within the territory of a Member of the WTO, whether a central government body, a local government body, or a non-governmental body; to any governmental regional standardizing body one or more members of which are Members of the WTO; and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO (referred to in this Code collectively as "standardizing bodies" and individually as "the standardizing body").	Page 3. ISEAL’s membership, and hence acceptance of the Standard-Setting Code, “is open to all multi-stakeholder sustainability standards and accreditation bodies that demonstrate their ability to meet the ISEAL Codes of Good Practice and accompanying requirements, and that commit to learning and improving.
C. Standardizing bodies that have accepted or withdrawn from this Code shall notify this fact to the ISO/IEC Information Centre in Geneva. The notification shall include the name and address of the body concerned and the scope of its current and expected standardization activities. The notification may be sent either directly to the ISO/IEC Information Centre, or through the national member body of ISO/IEC or, preferably,	Page 10. Clause 4.2 2. The standard-setting organisation shall: a. on at least an annual basis, prepare a work programme that includes its contacts information, the standards it is currently preparing, and the standards which it has adopted in the preceding period; and

<p>through the relevant national member or international affiliate of ISONET, as appropriate.</p>	<p>b. publish the work programme at a minimum through its website (the Guidance to this clause refers to publication through an international standardising body's website such as the ISO/IEC Centre)</p>
<p>Substantive Provisions</p>	
<p>D. The standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.</p>	<p>No equivalent</p>
<p>E. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.</p>	<p>Page 5. No direct equivalent, but the introduction refers to standard-setting procedures as a means to avoid the creation of unnecessary barriers to trade.</p>
<p>F. Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.</p>	<p>Page 10. Clause 4.2</p> <p>1. At the outset of a new standards development process, the standard-setting organisation shall:</p> <p>a. inform organisations that have developed similar international standards of its intention to develop a new standard;</p> <p>b. shall seek input from them on the terms of reference; and</p> <p>c. shall encourage their participation in its development.</p> <p>Page 19. Clause 6.3</p> <p>3. International standards shall be used as the basis for developing corresponding national or regional standards, except where they would be ineffective or inappropriate. The Guidance to this clause provides that a local standard-setting organisation is not required to use an international standard as the basis for a local or national standard if the international standard is</p>

	<p>not applicable and cannot be adapted to the local context.</p> <p>4. National or regional standards shall be as consistent as possible with relevant international standards and at least as stringent.</p> <p>Clause 6.4</p> <p>1. Where international standards are to be adapted for direct application at the national or regional level, the standard-setting organisation shall develop interpretive guidance or related policies and procedures for how to take into account local economic, social, environmental and regulatory conditions.</p> <p>2. Alternatively, where national or regional standards are prepared by the standardsetting organisation as interpretations of international standards, these shall be developed through multi-stakeholder processes</p>
<p>G. With a view to harmonizing standards on as wide a basis as possible, the standardizing body shall, in an appropriate way, play a full part, within the limits of its resources, in the preparation by relevant international standardizing bodies of international standards regarding subject matter for which it either has adopted, or expects to adopt, standards. For standardizing bodies within the territory of a Member, participation in a particular international standardization activity shall, whenever possible, take place through one delegation representing all standardizing bodies in the territory that have adopted, or expect to adopt, standards for the subject matter to which the international standardization activity relates.</p>	<p>No equivalent</p>
<p>H. The standardizing body within the territory of a Member shall make every effort to avoid duplication of, or overlap with, the work of other standardizing bodies in the national territory or with the work of relevant international or regional standardizing bodies. They shall also make every</p>	<p>Page 10. Clause 4.2</p> <p>The standard-setting organisation seeks to avoid duplication and to be consistent with standards that have overlapping scopes, while not limiting innovation and improvement.</p>

<p>effort to achieve a national consensus on the standards they develop. Likewise the regional standardizing body shall make every effort to avoid duplication of, or overlap with, the work of relevant international standardizing bodies.</p>	
<p>I. Wherever appropriate, the standardizing body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics.</p>	<p>Page 19. Clause 6.3</p> <p>1. Standards shall be consistent with the following requirements:</p> <p>[...]</p> <p>b. be expressed in terms of process, management and performance criteria, rather than design or descriptive characteristics;</p>
<p>J. At least once every six months, the standardizing body shall publish a work programme containing its name and address, the standards it is currently preparing and the standards which it has adopted in the preceding period. A standard is under preparation from the moment a decision has been taken to develop a standard until that standard has been adopted.</p> <p>The titles of specific draft standards shall, upon request, be provided in English, French or Spanish. A notice of the existence of the work programme shall be published in a national or, as the case may be, regional publication of standardization activities. The work programme shall for each standard indicate, in accordance with any ISONET rules, the classification relevant to the subject matter, the stage attained in the standard's development, and the references of any international standards taken as a basis.</p> <p>No later than at the time of publication of its work programme, the standardizing body shall notify the existence thereof to the ISO/IEC Information Centre in Geneva. The notification shall contain the name and address of the standardizing body, the name and issue of the publication in which the work programme is published, the period to which the work programme applies, its price (if</p>	<p>Page 10. Clause 4.2.1</p> <p>1. At the outset of a new standards development process, the standardsetting organisation shall:</p> <p>a. inform organisations that have developed similar international standards of its intention to develop a new standard;</p> <p>b. shall seek input from them on the terms of reference; and</p> <p>c. shall encourage their participation in its development.</p>

<p>any), and how and where it can be obtained. The notification may be sent directly to the ISO/IEC Information Centre, or, preferably, through the relevant national member or international affiliate of ISONET, as appropriate.</p>	
<p>K. The national member of ISO/IEC shall make every effort to become a member of ISONET or to appoint another body to become a member as well as to acquire the most advanced membership type possible for the ISONET member. Other standardizing bodies shall make every effort to associate themselves with the ISONET member.</p>	<p>No equivalent</p>
<p>L. Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments on the draft standard by interested parties within the territory of a Member of the WTO. This period may, however, be shortened in cases where urgent problems of safety, health or environment arise or threaten to arise. No later than at the start of the comment period, the standardizing body shall publish a notice announcing the period for commenting in the publication referred to in paragraph J. Such notification shall include, as far as practicable, whether the draft standard deviates from relevant international standards.</p>	<p>Pages 12-14. Clause 5.4</p> <p>1. a. The public consultation phase for standards development or revision shall include at least one round of 60 days for comment submissions by stakeholders.</p>
<p>M. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or arrange to provide, a copy of a draft standard which it has submitted for comments. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.</p>	<p>Page 15. Clause 5.7</p> <p>1. All approved standards shall: a. be published promptly; and b. shall be made available for free, in electronic format.</p> <p>4. The standard-setting organisation shall make draft and final standards available at least in their official language(s).</p>
<p>N. The standardizing body shall take into account, in the further processing of the standard, the comments received during the period for commenting. Comments received through standardizing bodies that have accepted this Code</p>	<p>Page 12-13. Clause 5.4</p> <p>5. The standard-setting organisation shall:</p>

<p>of Good Practice shall, if so requested, be replied to as promptly as possible. The reply shall include an explanation why a deviation from relevant international standards is necessary.</p>	<ul style="list-style-type: none"> a. compile all comments received during a consultation period; b. prepare a written synopsis of how each material issue has been addressed in the standard revision; c. make the synopsis publicly available; <p>and</p> <ul style="list-style-type: none"> d. send it to all parties that submitted comments.
<p>O. Once the standard has been adopted, it shall be promptly published.</p>	<p>Page 15. Clause 5.7</p> <ul style="list-style-type: none"> 1. All approved standards shall: <ul style="list-style-type: none"> a. be published promptly; and b. shall be made available for free, in electronic format. 2. The standard-setting organisation shall make hard copies of public summaries, standards and other related materials available upon request at as low a cost as possible, and covering only reasonable administrative costs. 3. Standards and supporting documents shall each include: <ul style="list-style-type: none"> a. contact information for the standardsetting organisation; b. the formal status of the document; c. the official language(s) of the standards system; and d. a note that, in the case of inconsistency between versions, reference shall default to the official language version. 4. The standard-setting organisation shall make draft and final standards available at least in their official language(s).
<p>P. On the request of any interested party within the territory of a Member of the WTO, the standardizing body shall promptly provide, or</p>	<p>Page 10. Clause 4.2.2</p> <ul style="list-style-type: none"> 2. The standard-setting organisation shall:

<p>arrange to provide, a copy of its most recent work programme or of a standard which it produced. Any fees charged for this service shall, apart from the real cost of delivery, be the same for foreign and domestic parties.</p>	<p>a. on at least an annual basis, prepare a work programme that includes its contact information, the standards it is currently preparing, and the standards which it has adopted in the preceding period; and</p> <p>b. publish the work programme at a minimum through its website.</p> <p>Guidance on Clause 4.2.2 : The work programme does not need to be a separate document, e.g. it can appear as a page on the organisation’s website. Where the standard-setting organisation has a national or regional scope, it should publish the work programme through an international standardising body’s website, such as the ISO/IEC Information Centre.</p>
<p>Q. The standardizing body shall afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code presented by standardizing bodies that have accepted this Code of Good Practice. It shall make an objective effort to solve any complaints.</p>	<p>Page 17. Clause 5.11</p> <ol style="list-style-type: none"> 1. The standard-setting organisation shall make impartial and documented efforts to resolve procedural complaints related to standard-setting, based on a publicly documented complaints resolution mechanism. 2. The standard-setting organisation shall disclose, at least to interested parties, decisions taken on procedural complaints.