Legal Backgrounder

Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Ave., NW
Washington, D.C. 20036
202.588.0302

Vol. 18 No. 36 September 5, 2003

RESOLVING STANDARDS CONFLICTS KEY TO U.S.-EUROPE FOREIGN TRADE

by

William E. Kelly, Ph.D.

One key to understanding the love-hate relationship between the United States and Europe on trade issues is appreciating the fundamental differences between the U.S. and European systems of standards development and adoption.

Europe is by every measure the United States' largest trading partner and in some ways the European Union's (EU) "New Approach" to standards has led to fewer standards and certification regimens for American businesses to deal with when selling in the European market. At the same time, this "New Approach" has led Europe to become more assertive within international standards forums, initiating concerns about the more closed, less transparent nature of European standards development. This LEGAL BACKGROUNDER will explain the background, and some of the issues, that are essential to understanding and resolving these conflicts.

BACKGROUND

Standardization Processes. The European and United States standards systems lead the world in the development of standards and wield significant influence over the standards setting processes in both the International Organization for Standardization (ISO) and the International Electro-Technical Commission (IEC). There is no agreed upon definition of a standard, but for the purposes of this paper, the World Trade Organization defines a standard as "a 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 labeling requirements as they apply to a product, process or production method."

The American National Standards Institute (ANSI) represents the United States in non-treaty standards activities and is the U.S. member of the ISO. Membership in ISO is by country, and is in fact one of the issues of concern to some in the U.S. standards developing community. ANSI is not a government agency and is not

---

William E. Kelly, Ph.D. has been a Professor of Civil Engineering at Catholic University of America since 1966. Dr. Kelly served as Dean of the School of Engineering from 1996 to 2001. He has served as a Member of the Board of Directors of the American National Standards Institute (ANSI), since 2000, where he also Chairs the ANSI Education Committee. Dr. Kelly is a Co-Director of the Center for Global Standards Analysis based at Catholic.

a standards developing organization. The IEC is the electrical counterpart of ISO and develops and publishes standards for electric and electronic technologies — areas not covered by ISO. The U.S. National Committee, a part of ANSI, represents the United States in the IEC. Finally, the International Telecommunications Union (ITU) recommends and publishes standards but is fundamentally different from the ISO and IEC. Like the ISO and IEC, the ITU is headquartered in Geneva but governments, rather than private sector entities, are the members. The ITU is a treaty organization and coordinates global telecommunications services. The U.S. Department of State advocates for policies in the telecommunications area including the acceptance of technical standards.

Role of the World Trade Organization. The World Trade Organization (WTO) Technical Barrier to Trade (TBT) Agreement encourages development of international standards and efforts to ensure that technical regulations and standards do not become unnecessary barriers to trade. World Trade Organization, 2002, The WTO Agreement on Technical Barriers to Trade, http://www.wto.org/english/tratop_e/tbt_e/tbtagr_e.htm. It encourages use of international standards in technical regulations except where they would be ineffective. Annex 3 of the TBT Agreement is a code of good practice for standards. WTO members are required to notify the WTO Secretariat of all proposed government regulations and conformity assessment procedures that might significantly affect international trade. The National Center for Standards and Certification Information (NCSCI) at the National Institute of Standards and Technology (NIST) maintains information on notifications of proposed foreign regulations issued through the WTO Secretariat and disseminates them to interested parties in the U.S. for their review and comment. NCSCI staff are responsible for notifying the WTO Secretariat of proposed U.S. technical regulations which may affect trade. An annual report is available describing TBT Agreement activities.

European Standards Bodies. There are two European standards organizations that parallel ISO and IEC. The European Committee for Standardization (CEN) develops standards in the areas of the ISO and the European Committee for Electrotechnical Standardization (CENELEC) develops standards in the areas of the IEC. The European Telecommunications Standards Institute (ETSI) develops telecommunications standards for the European Union. In the European "New Approach," the EU issues a directive, the European standards bodies develop the standards, and the standards becomes European Standards (EN). These harmonized standards carry the presumption of conformity throughout the European Union. The New Approach deals with "essential requirements" affecting health, safety and the environment, so not all areas are covered.

EU Principles of Standardization. In the EU, the government, as suggested above, has the central role in setting the standards agenda particularly in areas affecting health, safety and the environment. In areas where health, safety, environment and public interest are not of concern, and in areas where speed is paramount, the EU recognizes a lead role for industry. The EU acts primarily through the European Commission (EC) which does not itself develop standards.

The New Approach. The EU uses standards as an integral part of its economic development strategy and for achieving government goals in health, safety and the environment. In the summer of 2002, a consultation meeting was held to look at the integration of environmental aspects into standardization. The EC paper on international standardization summarizes some of the positions that are the source of conflict. European Policy Principles on International Standardization, SEC (2001) 1296, http://europa.eu.int/comm/enterprise/standards_policy/international/eur_policy_principles_info.htm (hereinafter "European Principles, 2001"). As part of its outreach to third countries, the EU is actively promoting its New Approach system which is consistent with statements on international standardization.

United States Standardization Processes. In the United States, most standards are developed in the private sector. The National Technology Transfer and Advancement Act (NTTAA) requires federal government agencies to use private-sector consensus standards where possible and authorizes agency personnel to participate in the development of standards relative to agency mission. The updated OMB Circular A-119 provides additional guidance for the use of voluntary consensus standards by federal agencies

National Standards Strategy. The U.S. National Standards Strategy (NSS) was adopted by ANSI in 2001 and can be compared with the EC's statement on international standardization to underline where there

  ISBN 1056 3059

are differences. ANSI National Standards Strategy for the United States, http://www.ansi.org/Public/nss.html.

AREAS OF CONFLICT

Some areas of conflict include: what constitutes an international standard; the Vienna agreement — and its perceived bias towards European standards development organizations; participation in European standards development and conformity assessment activities; and voting in ISO committees.

Definition of International Standard. What are international standards? The ISO Guide 2 definition is keyed to membership by a national body in an international organization. This definition became more important when this language was included in the WTO Technical Barriers to Trade Agreement. Standards developed by major U.S. standards development organizations such as ASTM International (ASTM) and ASME International (ASME) are used worldwide and are considered by many to be *de facto* international standards. However, by definition, they would not be officially recognized as international standards and thus might not be adopted where there is a need for an international standard in, for example, a technical regulation.

The EC's stated position is that if regulatory bodies use international standards, "it is important that they can make use of standards from standards bodies which can be held accountable for establishing consensus between all national positions and interested parties." European Principles, 2001. By implication, this can only be done by the national standards bodies. Further, "if standards bodies were to produce simultaneously international and regional or national standards, some partiality, incoherence and conflict in the set of international standards could arise. Such a situation would be confusing for businesses, users and public authorities, and the latter would risk creating regulatory barriers if using conflicting international standards as a basis for technical regulation." *Id*.

This basically says that a standards body can not be both national and international. And "the WTO principles taken as a whole ensure that international standardizing bodies are open to participation by national standards bodies and produce international standards that do not conflict with each other. Another important element is the participation of all stakeholders including environmental and consumer interests in international standardization."

The American National Standards Institute's International Committee (IC) has taken the position that an international standard should be defined by the process that is followed which would be less restrictive than the ISO Guide 2 definition and current WTO usage. ANSI IC N2382 http://www.asme.org/codes/pdfs/icn2382Final.pdf.

Unfair Advantage for European Standards Bodies. The Vienna and Dresden Agreements between ISO and CEN and the IEC and CENELEC are ostensibly efforts by the EU to speed up standards development and improve the quality of standards. They provide for development by one body and approval by parallel voting in both. Where international standards do not exist and where regulatory requirements in the EU require standards development, CEN or CENELEC can take the lead. Since European standards bodies are not open to outside participation, direct participation by interested U.S. parties is not possible. ANSI does get the opportunity to comment on draft European Standards (prEN) during the six months comment period, but this is generally too late for meaningful input. The Dresden Agreement allows the IEC the right of first refusal on all new work proposals, a clause not included in the Vienna Agreement.

The EU is effectively setting standards for all its members states in the ISO where all of the EU member states have a separate vote, while the U.S. has a single vote. On such potential block voting by European nations, the EC states that "it can be of particular value to consult between stakeholders nationally and represent national positions independently in the international context." European Principles, 2001. Further, "for that purpose . . and that national positions are coherent with European policies and legislation, if existing." *Id*. One frequently cited example of the unfairness of the current voting system is the rejection of a draft ISO standard on criteria for recognition of international pressure equipment codes and standards due to apparent block voting by EU member states.

Transparency in Standards Making Processes. Standards making is complicated on both sides of the

  ISBN 1056 3059

Atlantic and the United States National Standards Strategy notes that "Standards developers should initiate education processes worldwide for their sectors to ensure that opportunities for direct participation in U.S.-based activities are available to all."

The European system has changed dramatically over the last ten years and there is an increased need to better understand the European system in the U.S. As noted earlier, the involvement of the EU in standardization is very significant and very different from the involvement of the U.S. government in standards development in the U.S. In fact as the European systems have been evolving, the U.S. government has been disengaging itself further from standards development activities. In its statement on international standardization, the EC states, "for governments, standards offer an opportunity for deregulation and improved governance as they help to reduce the level of regulatory detail to the essential requirements needed to attain legitimate objectives such as the protection of health, safety and the environment. There is generally a great deal of detail in the directives that define the need for standards and standards development process in reality involves both the development of the directive and the implementing standards." *Id.*

POLICY ASPECTS

Over the last ten years, there have been major changes in European standards processes as the EU has implemented its New Approach. The initial objective was to improve the market within the EU but because of the size of the market the EU effort has had intended and unintended consequences globally. The EC states in its statement on international standardization that "the European side can share with third countries and other regions more than 15 years experience on its New Approach to technical harmonization and standardization which was a significant step in the implementation of the Single Market in Europe" *Id.*

A key element in the EU's New Approach is that when an European National standard is developed and approved, competing national standards must be withdrawn. In the U.S., even though a standard is an American National Standard (ANS), there still can be competing standards.

The WTO Agreement on Technical Barriers to Trade Annex 3 is the code of good practice for standards to which any standards body within the territory of a WTO member body may subscribe. ANSI has notified acceptance of the WTO TBT *Code of Good Practice for the Preparation, Adoption and Application of Standards* for all American National Standards developed by accredited standards developers. The Code expects that standards bodies in member subscribing countries will fully participate in the development of relevant standards. This is true for both standards and technical regulations which are defined separately in Annex 1. Since the U.S. system is private-sector driven and has relatively little government funding relative to other countries, this poses special challenges for the U.S. in ensuring appropriate participation.

Although larger companies have tended to support standards work internationally, continuing globalization will make international codes and standards more relevant to firms of all sizes. The high cost of international participation is a barrier to participation but it can be expected that the growing use of the Internet in all its forms will make doing so more affordable. The incentive to make more effective use of electronic tools is not only to reduce cost but also to speed up the processes.

CONCLUSIONS

While their standards cultures are fundamentally different, the U.S. and the EU dominate standards development processes globally and advocate competing approaches. The EU and the U.S. are also major trading partners so that standards and conformity assessment processes that could become technical barriers to trade come under the WTO. For these reasons, U.S. policymakers need to become better informed about the U.S. and European standards systems to understand the forces at work. While the law has recognized the value of government use of voluntary standards in the 1995 NTTAA, the low level of knowledge of standards leads to legislative and regulatory proposals and enactments at odds with established and accepted standards, at both the federal and, more often, at the state level. Such enactments cause problems not only for those directly affected, but also can cause trade problems as such enactments are not harmonized with international standards.

ISBN 1056 3059