The New Global Environmental Standards

Stepan Wood
*Osgoode Hall Law School of York University, swood@osgoode.yorku.ca*

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social choice, public choice and game theory, as well as other social scientists. Lawyers may
join in this work to help to establish institutions that dynamically “do subsidiarity.”

Institutional design of international organizations involves deciding whether social rules
will be established legislatively or judicially. For example, should the dispute resolution
procedure of the WTO establish the trade-off between trade and environment, or should the
terms be set through the treaty process? If the trade-off is to be done through dispute
resolution, under what standard? Is it national treatment, proportionality, cost-benefit analysis
or a more abstract balancing test similar to that used in the recent shrimp/turtle decision of the
WTO Appellate Body?2

These institutional decisions must be seen as subtle, socially immanent mechanisms for
vertical allocation of power. It is difficult for me to see them as containing a particular bias
toward globalitarianism. I, for one, would not foreclose the right of developed countries to
negotiate with developing countries for greater environmental protection. I see the democracy
deficit as a design question about the degree of representative democracy we desire,
recognizing that we use delegated authority in many circumstances. Finally, I am not so
worried as some about the potential functional globalitarianism of the WTO: There may be
sound reasons to avoid a proliferation of multilateral functional organizations, and to
concentrate functions in a single organization. The WTO and the United Nations are the likely
candidates.

The New Global Environmental Standards

by Stepan Wood

In recent years, numerous industry groups and standards-setting bodies have developed
voluntary standards for environmental management systems (EMS), including the
International Organization for Standardization’s ISO 14001 standard and the European
Union’s Eco-Management and Audit Scheme (EMAS). What do these voluntary standards
mean for international environmental law? They are seen by many as part of a broader trend
of privatization and regulatory “reinvention,” a move away from coercive, “public,”
command-and-control regulation toward voluntary, market-driven, “private” standards.
Depending on one’s viewpoint, these developments either open the ecological henhouse to the
corporate foxes or inaugurate a new paradigm of efficient environmental governance.

There are two reasons to be cautious about this “privatization” thesis. First, the
relationship between these “private” norms and state regulation is complex and ambivalent,
preventing any straightforward conclusions about the privatization of environmental
governance. Second, the real change heralded by voluntary EMS regimes may lie not in their
tendency toward “privatization” but in the idea and practice of standardization.

The “Privatization” Thesis

EMS standards are seen as a “private” alternative to government regulation mainly
because they are voluntary and created by non-state actors. While non-state actors such as
industry representatives and management consultants have dominated the negotiation and
drafting of most EMS standards, however, standardization bodies include a range of
governmental, quasi-governmental and nongovernmental actors and organizations.
Additionally, numerous governments play an active strategic role in the international
standards-setting process.

WT/DS38/AB/R (Oct. 12, 1998)
While EMS standards are usually “voluntary” in that adherence is not legally required, it is problematic to base important conclusions on this fact. A major reason for the development of voluntary EMS standards was to preempt more stringent governmental regulation in the wake of such disasters as Bhopal. The threat that EMS standards may be made legally mandatory is ever present and has been realized in some cases. Moreover, several governments have made it clear that voluntary EMS standards are no substitute for robust regulation and enforcement, and most companies adopt an EMS mainly to demonstrate regulatory compliance. Finally, adherence to EMS standards may become a de facto requirement for doing business in certain markets because of supply chain demands or industry group membership requirements. In sum, voluntary EMS standards occupy a hybrid arena which is neither clearly governmental nor clearly “private.”

The “Standardization” Thesis

The real significance of voluntary EMS standards may lie in the fact that they are the products of deliberate, organized systems of industrial standardization. The case for standardization is familiar: It reduces production costs, promotes fair dealing and facilitates trade. But applying the logic of standardization to generic environmental management systems represents a significant departure for standardization and raises important questions for international law. Are business administration experts and management consultants taking over global environmental protection? Does conceiving of environmental problems as matters for standardized technocratic management, bureaucratic organization and expert knowledge threaten to demobilize democratic deliberation and fundamental normative debate, or simply replace one technocratic expert discourse (international law) for another? Is the paradigm on which EMS standards are based, the large-scale industrial organization, appropriate for individuals, small enterprises, peasant or indigenous communities or governments? Finally, does EMS standardization proclaim an ideology of uniformity and minimal variation while obscuring vast variation in corporate environmental policies and practices?

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