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*Voluntary Environmental Standards: The Interplay Between Private Initiatives, Trade Rules And The Global Decision-Making Processes*

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# Voluntary Environmental Standards: The Interplay Between Private Initiatives, Trade Rules And The Global Decision-Making Processes

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## Synopsis:

Certain voluntary environmental standards such as eco-labeling, packaging and recycling requirements are formulated and administered by non-governmental organizations and are adopted by retailers as *de facto* industry standards (*Private Standards*). Such Private Standards are perceived as being consumer-driven initiatives that are not supported by any governmental intervention but are nevertheless capable of restricting non-compliant manufacturers from selling their products into important markets. As a consequence of their ability to restrict market access and the somewhat opaque process through which such Private Standards are formulated, member countries of the World Trade Organization (WTO) have argued that WTO trade rules should regulate the use of Private Standards. The regulation of Private Standards by world trade rules would effectively extend the role of global administrative law to the choices of individual consumers and make national governments responsible for the actions of private organizations. This paper proposes to look into how WTO trade rules are likely to effect environmental standards formulated and administered by private standard-setting organizations.

## Introduction

Product requirements- environmental and otherwise are used to address a variety of concerns-ranging from food safety to ensuring plant and animal health. Environmental product requirements such as eco-labelling schemes, environmental product charges,

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packaging and recycling requirements to name a few, are aimed at preserving the environment and are used by countries and organizations alike to educate consumers and promote sustainable forms of production and consumption. As testament to their growing importance, it is useful to note that from the year 2000 until 2003, WTO member countries have notified 268 environment-related requirements under the provisions of the Agreement on Technical Barriers to Trade (TBT Agreement) and the number of such notifications has steadily increased from 58 in the year 2000 to 89 notifications in 2003, with environmental protection being the stated objective[1].

Alongside this growing State involvement in environmental product regulation, the last decade has also seen a significant proliferation in the number of *voluntary* environmental standards formulated and implemented by non-governmental organizations (NGOs)-either entirely independently or with varying degrees of governmental participation[2]. The World Trade Report, 2005 issued by the WTO Secretariat highlights the role played by NGOs in standard-setting. NGOs, it is noted, are "working with industry and international organizations to develop standards in such areas as environment and corporate social responsibility. Among the factors accounting for heightened standardization activity are demand by consumers for safer and higher quality products, technological innovations, the expansion of global commerce and increased concern over social issues and the environment."[3]

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1 The number is an estimate based on Notification details provided in the Sixth Annual Review of the TBT Agreement (G/TBT/10, 6 February 2001); Seventh Annual Review (G/TBT/11, 18 February 2002); Eight Annual Review (G/TBT/12, 21 February 2003); and the Ninth Annual Review (G/TBT/14, 5 March 2004). Only notifications with "Environment" as their stated objective have been included. Other potentially related categories of notifications such as "Protection of Animal or Plant Life or Health" have not been counted.

2 Many such Private Standards tend to be voluntary eco-labelling and certification schemes such as the "Nordic Swan". The Nordic Swan program receives some support from Scandinavian Governments (including modest budgetary assistance). For details, see: http://www.svanen.nu/Eng/default.asp.Other schemes are initiated by local manufacturers, such as the Sustainable Forestry Initiative (SFI), which is a scheme launched by the American Forest & Paper Association (AF&PA) which awards a "SFI Product Label" to its members who can show compliance with its standards. Likewise, there is a proliferation of local–level, private voluntary eco-labels in the United States which have been established by local producer groups designed for local conditions and circumstances, e.g. "Salmon-Safe" in Washington, "Predator Friendly Wool" in Montana and "Tall Grass Beef" in Kansas. For more details, see: Vangelis Vitalis, *Private Voluntary Eco-Labels: Trade Distorting, Discriminatory and Environmentally Disappointing*, Roundtable on Sustainable Development, OECD, Paris, 2002, pg. 5.

3 WORLD TRADE REPORT 2005, Exploring the links between trade, standards and the WTO, WTO Secretariat, Geneva, 2005, pg. xxv.

This steady proliferation of *voluntary* environmental requirements that are formulated and administered by non-governmental organizations and adopted by several manufacturers and industry groups as *de facto* product standards has raised the question of whether global trade rules should extend their discipline to Private Standards? While most Private Standards are perceived as being purely consumer and market-led initiatives and therefore beyond the purview of WTO rules, they are in some instances capable of being misused for purely protectionist purposes. Powerful domestic industry groups can use Private Standards with oblique or expressed government support, to deny market access and impose "disguised" restrictions on imports. Many WTO Members argue that such restrictions that would otherwise fall foul of WTO trade rules should not go unregulated merely because of their non-governmental nature.

The WTO dispute settlement mechanism (and the occasional GATT Panel) has in the past been asked to adjudicate directly or indirectly upon the validity of several environmental requirements, including: the eco-labelling of products[4]; and the requirement of using turtle-friendly nets while fishing[5]. However, the ambit of their analysis has not yet extended to checking the WTO compatibility of a Private Standard. Their reluctance to do so could in part be explained by the (un-adopted) decision of the GATT Panel in the *Tuna-Dolphins* dispute where while deciding on whether the provisions of a voluntary, federally promulgated, US eco-labelling scheme[6] were consistent with Article I:1 of the GATT Agreement (MFN Clause), the Panel reasoned that: (a) the Dolphin Protection Consumer Information Act (DPCIA) eco-labelling scheme could not be said to constitute a market restriction because it does not prevent a manufacturer from selling his product in a marketplace *without* complying with the environmental requirement; and (b) it did not establish requirements that have to be met in order to obtain an advantage from the government, in fact the DPCIA scheme was dependent on the free choice of consumers and is not a *government conferred advantage*.

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4 See *United States-Restrictions on Imports of Tuna*, Report of the Panel, GATT Document DS21/R, 3 September 1991 (unadopted), BISD 40S/155 (*Tuna Dolphin* Case) at paragraphs 5.41 to 5.44.

5 See the report of the Appellate Body in *United States-Import Prohibition of Certain Shrimp & Shrimp Products*, WT/DS48/AB/R, 12 October 1998 (*Shrimp-Turtles* Case).

6 The Dolphin Protection Consumer Information Act (DPCIA) was the measure in question. See *Tuna-Dolphins* Case, Supra note 1, at paragraphs 5.41 to 5.44.

The rationale behind the GATT Panels ruling in Tuna-Dolphins has been whittled down by subsequent WTO Panel and Appellate Body decisions and it is now reasonably clear that are no "bright line rules" that automatically exempt an action as being non-governmental, just because it was taken by a private party (*Japan-Films*). Given the increasingly wide ambit of the types of "measures" that can be subject to WTO scrutiny, and the proliferation of Private Standards, it is quite probable that the WTO dispute settlement system will be called upon to adjudicate on Private Standards in the near future. What will the impact of such scrutiny be on global administrative law, as we know it? Will the WTO become the final arbiter of what constitutes a "legitimate" consumer preference? How will national governments -particularly those from developing countries, regulate the formulation of Private Standards and the actions of private standard-setting organizations within their territory? These are some of the key governance questions that are likely to shape the contours of Global Administrative Law in the future and this paper shall attempt to outline the application of trade rules to private initiatives and its consequent impact on the global law-making process.

**Global Administrative Law and its interplay with private initiatives**

The emergence of "global administrative law" has largely been attributed to two key-factors: the proliferation of international agreements aimed at regulating interdependent issues of global significance such as international trade and environmental protection; and the corresponding inability of any single national government to effectively address these global issues through its domestic laws. The resultant system of global laws and regulations has been loosely labelled as "Global Administrative Law" (Kingsbury et. al, 2005). The evolution of this set of global rules has lead to national governments playing a diminished role in their formulation and implementation of such rules; instead private bodies or a hybrid of public-private organizations are beginning to influence regulation in certain areas such as international standard-setting. These public-private standard-setting bodies may include, representatives of businesses, NGOs, national governments, and intergovernmental organizations and are the most visible in the formulation of international environmental standards.

Private standard-setting organizations represent divergent interests ranging from industry groups and manufacturers associations to non-profit environmental activists[7]. The range of actors involved in the process of standard-setting is extensive, and depends largely on the nature of the standard itself and the method of its implementation. Private Standards are set, implemented and monitored by private businesses, NGOs, trade unions and public sector organizations such as local and national governments. These actors operate at the local, national and international levels and form the backbone of a parallel "standard-setting administration" whose objective is to address a wide-ranging set of concerns-from food safety to environmental concerns.

The growing influence of such non-state actors in the development and formulation of Private Standards has resulted in what some call the "privatization of environmental governance" [8]. This is widely attributed towards increased environmental awareness combined with the failure of governments to create and implement adequate environmental regulations. Consumers are thought to have become increasingly interested in understanding the effects of their individual purchasing decisions on the environment, and producers have adopted Private Standards to cater to the growing "green-consumerism" and extract a price premium. A recent UNCTAD study estimates the number of private schemes currently in existence at being 400 and rising[9]. These schemes range from being developed by individual firms: such as Tescos'-a British Supermarket; to collective industry-wide international schemes such as EurepGAP. The resultant web of Private Standards has created a new set of (possibly conflicting) trade requirements, the compliance with which is seen as playing an increasingly important role in the global marketplace. The role of the private sector may differ widely in each scheme, with private organizations playing the role of standard-setters, certifying authorities or monitoring agencies. Like-wise, the relationship between Private

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7 In the forestry sector for example, environmental labelling and certification programs were developed by NGOs such as the Forest Stewardship Council (FSC) and the World Wildlife Fund for Nature (WWF) as a result of popular dissatisfaction over the absence of binding international rules. Whereas other private environmental schemes such as the Sustainable Forest Initiative (SFI) were created by industry associations such as the American Forest and Paper Association (AF&PA) to ensure the sustainable utilization of forestry resources by American manufacturers. Details on the SFI are available at: http://www.aboutsfi.org/core.asp.

8 B. Cashore, *Legitimacy and Privatization of Environmental Governance: How Non-State Market Driven Governance Systems Gain Rule-Making Authority,* Governance: An International Journal of Policy, Administration and Institutions Vol.15, No.4, October 2002 (pp.503-529).

9 *See* Private Sector Standards and Developing Country Exports of Fresh Fruits & Vegetables, Communication from UNCTAD to the SPS Committee, G/SPS/GEN/761.

Standards vis-à-vis government regulations may also differ, with some Private Standards being backed by explicit government support and others sharing a "tacit alliance".

The proliferation of Private Standards and standard setting coalitions-both national and international, often overlapping and sometimes conflicting, has become a cause of some concern to several WTO Members, particularly developing countries. Many developing countries have voiced there concerns at meetings of the WTO Committee on Sanitary and Phyto-Sanitary Measures (SPS Committee), where the issue has been discussed as recently as in its meeting on the 1st of March, 2007. Concerns raised by developing countries range from difficulties on account of increased costs of compliance and the formulation of inappropriate standards. Developing countries point out that Private Standard-setters need not disclose the interests they represent and are not necessarily accountable for the standards they set, monitor or implement which makes them potentially opaque and yet influential players in the international standard-setting process. Many developing countries also argue that the very process through which some Private Standards are formulated is potentially exclusionary and is capable of being misused to represent vested interests[10]. Other commentators have acknowledged that a lack of transparency and accountability in the standard-making process could leave some Private Standards open to abuse by interest groups such as powerful manufacturers associations, which could use such Private Standards to promote a non-governmental form of protectionism[11].

Private Standards in other words, could be used as disguised restrictions on trade, and Private Standard-setters as well as the standards they formulate may escape WTO discipline only on account of their voluntary, non-governmental nature. Global trade rules, which were framed with the objective of disciplining non-tariff barriers such as restrictive standards and technical regulations may be effectively circumvented by a new network of private alliances supported tacitly in some instances by governmental regulation. Consequently several WTO Member countries, particularly developing and least developing nations have sought the extension of WTO rules to regulate the misuse of those Private Standards, which are designed to be discriminatory and are more trade restrictive than are

10 V. Vitalis, Supra note 5, at 6.

11 See V.Vitalis, Supra note 5, at 5.

necessary. The extension of WTO disciplines to this new breed of non-state actors and their activities will allow developing countries to used global trade rules to remove market hindrances and in doing so will enhance the role of Global Administrative Law in resolving private trade disputes.

**Using World Trade Rules to Regulate Private Standards**

Private Standards are accused of being discriminatory because of the economic burden they place upon some manufacturers-particularly those from developing countries who can ill-afford to comply with their requirements and for whom the increased cost of compliance could substantially diminish their competitive advantage[12]. WTO Members have over the years, used various negotiating groups and WTO committees available to them to identify Private Standards that have trade-restricting elements, the effect of which is to discriminate amongst those exporters who can afford to meet such standards, and those who cannot. In its submission to the WTO Committee on Trade & Environment (CTE), India chose to highlight the issue of high costs of compliance in relation to the use of voluntary eco-labelling schemes in the textile and leather sectors and pointed out that the labelling criteria were themselves inherently flawed and favoured those manufactures (from countries) that have access to technology and testing facilities. Other WTO Members including the E.U, Phillipines, Colombia and New Zealand have also commented on the trade effects of Private Standards at the CTE as well as at the WTO Committee on Technical Barriers to Trade (TBT)[13].

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12 See A. Kaushik & M. Saqib, *Market Access Issues: Impact of Environmental Requirements on India's Export Performance* in V. Jha (ed.), Trade & Environment-Issues & Options for India, UNCTAD, New Delhi, 2003. See also, V. Vitalis, Supra note 5, at 5 where the author gives an example of the market restriction faced by Thai textile manufacturers on account of the high costs of compliance involved in complying with private voluntary eco-labelling requirements in the EU.

13 Discussions at the **TBT** Committee as represented in each of its triennial review reports *(G/TBT/5, G/TBT/9, G/TBT/13*) reflect the growing and divergent concern of WTO Members. The Committee has on various occasions discussed the issue of voluntary standard making by non-governmental bodies but WTO Members seem content to limit discussions "for a better understanding of the issues". For a general summary of the concerns raised, see Note by the Secretariat "*Specific Trade Concerns Related to Labelling Brought to the Attention of the Committee Since 1995*" (*G/TBT/W/184, 4 October 2002*).

An often cited and well-documented example of how a Private Standard can restrict market access for developing countries is the case of the cut flower industry in Colombia. In this case, Colombian exporters of cut flowers were adversely affected by the introduction of a private, voluntary eco-labelling program-the Flower Label Program (FLP), which was a German industry-led NGO initiative aimed at restricting the use of toxic chemicals and pesticides for the cultivation of such flowers[14]. Colombia is a significant exporter of cut flowers accounting for 10% of the global market, and cut flowers are Colombia's third most important agricultural export. While Colombia's global flower exports showed an upward trend between 1992 and 1996, exports to Germany declined significantly which was widely attributed to the proliferation of Private Standards such as the FLP within German markets. The FLP was heavily criticized by the Colombian Government on the grounds that the criteria used in the eco-labelling scheme were arbitrary; the scheme itself was applied in a discriminatory manner; imposed significant compliance costs; and was in effect a mandatory measure since anyone who did not accept the FLP scheme was subject to "negative pressure".[15] WTO Members were reluctant to discuss this issue any further since it raised "systemic" concerns. However, these systemic issues are unlikely to remain unquestioned or unresolved and the growing instances in which Private Standards are being questioned on account of their trade-restricting effects makes it very likely that the issue will at some juncture, require intervention by the WTO dispute settlement system.

WTO rules regulate the use of standards that are "more trade restrictive than is necessary" to achieve a legitimate objective or standards that are not based on science, and the effect of which is to discriminate. The non-discrimination provisions of the GATT 1994 Agreement (GATT Agreement) and provisions of the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on Sanitary & Phyto-Sanitary Measures (SPS Agreement) may be invoked to discipline the discriminatory application of an environmental standard or a technical regulation. While the application of global trade rules to Private environmental Standards is yet untested, the following sections analyzes whether WTO provisions can be extended to regulate the use of Private Standards.

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14 See details of the objectives of the FLP available at: http://www.flower-label-program.org/.

15 See Colombia's submission to the CTE- *Environmental Labels and Market Access: Case Study of the Colombian Flower Growing Industry*, WT/CTE/W/76, 9th March 1998.

## 1. Non-Discrimination Provisions:

The provisions of GATT Article I which contains the MFN requirement effectively prohibits a WTO member country from using a domestic environmental requirement in such a way that it discriminates against a "like product" from another country. This essentially means that a government-promulgated eco-labelling or recycling requirement-whether voluntary or mandatory, should be equally applicable to imported "like products" from every country[16]. However, the applicability of the MFN requirement in the case of Private Standards, which are not promulgated by a government but may nevertheless be capable of discriminating against exporters from certain lower income countries, is not clear.

While GATT/WTO jurisprudence has not had an opportunity to analyze the applicability of the MFN provision specifically in the case of a Private Standard, the reasoning adopted by the GATT Panel in the *Tuna-Dolphins* dispute suggests that the MFN Clause may not be triggered in the absence of an explicit requirement restricting a manufacturer from selling his product in a marketplace *without* complying with the Private Standard; and a corresponding *government conferred advantage*. Therefore by implication, the GATT Panel held that the mere existence of the possibility that an exporter *can* sell his products in a marketplace overrides the very real market restrictions he faces on account of the application of the Private Standard. Additionally, the Panel suggests that the MFN Clause disciplines only advantages, which are "government conferred".

The implicit requirement that in order for a measure to restrict access to a market, it must leave an exporter with no choice but to comply with it is questionable. Environmental requirements-even if voluntary, can impose additional costs upon exporters, thereby effectively preventing them from selling their products in certain markets. While such a requirement may not be a binding law, which altogether *precludes* a small manufacturer from accessing a market, it could nevertheless make it entirely uncompetitive for her to sell her products. Factors such as the increased costs of compliance and logistical difficulties create unnecessary obstacles to trade for those manufactures that are unable to afford them and the

16 See Appleton, A.E, Supra note 32, at 247.

consequent advantage to local industry may be interpreted as being discriminatory. WTO Panels have in the past looked into costs of compliance when determining whether a trade measure is more restrictive than is necessary. The Panel in the *Korea Beef*[17] dispute upheld Australia's claim that a Korean labelling requirement was an impractical and expensive measure, which was more restrictive than necessary. Such requirements it was argued would entail additional costs, which would in turn serve to make the imported product less competitive[18]. In the case of manufacturers in developing and least developed countries who can ill-afford the increased costs of compliance, a Private Standard formulated without taking into account the excessive burden imposed upon them, could constitute a discriminatory market restriction.

The second requirement discussed in the *Tuna Dolphin* case, stipulates that any advantage gained by an exporter from one country over an exporter from another country, must be conferred by the government (of the country responsible for the measure) and not by consumer preference. The GATT Panel was not called upon to consider whether market access may be restricted as the result of possible industry collusion, or implicit government backing for a Private Standard which effectively confers a *de facto* advantage to producers from certain countries. In essence, it ignored the possibility that not every market advantage was the result of genuine consumer preference and that Private Standards could be misused by governments and industry associations to discriminate against products originating in certain countries.

While the facts in the *Tuna Dolphins* case did not require the GATT Panel to look into these issues, it is quite possible that future WTO Panels will be called upon to look into whether advantages conferred upon manufactures in certain countries are the result of implicit State support or industry collusion-the "tacit alliance" referred to in earlier sections. The Appellate Body has in the past, broadly interpreted the term "advantage" conferred

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17 Panel Report in *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS 169/R, 31st July 2000 (*Korea Beef* Case), at paragraphs 706-710.

18 It should be noted however, that in the facts of the *Korea Beef* dispute (a) the measure was a *mandatory* eco-labelling scheme; and (b) arguments were advanced under Article III.4 which requires that imported products not be subject to more stringent requirements affecting their distribution than domestic products. The Panel found in favour of Australia.

under Article I:1[19] and it is quite possible that it will further widen its ambit in future disputes involving the application of Private Standards which result in *de facto* discrimination between manufacturers from different countries. However, even if future WTO Panels are willing to do so, they would still need to associate the advantage conferred, with an act of a government in order to find a violation of the MFN Clause.

**Extending WTO Rules to Actions of Private Parties**

Establishing a violation of the MFN Clause in the case of a Private Standard is particularly problematic since the MFN Clause and indeed the entire GATT 1994 Agreement is binding only upon the 150 countries that are members of the WTO (*WTO Members*). Disputes between private entities and non-state organizations are largely thought to be beyond the purview of the GATT Agreement and private business operators do not have any direct role in the WTO's decision-making process, although they are the main beneficiaries of the multilateral trading system[20]. What legal option does this leave a private exporter with, when faced with a discriminatory and trade-restrictive Private Standard? Generally, private parties who have experienced market access problems would first have to petition their governments, which may then decide whether or not to lodge a formal complaint at the WTO[21]. Manufacturers in developing countries are less likely to be able to use the WTO legal system to advance their commercial ambitions and suffer a further disadvantage when compared to their better-connected and organized counterparts in wealthier countries[22]. In the case of a Private Standard, the problem is further exacerbated by the absence of a State-entity against whom WTO proceedings may be launched. Attributing

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19 See the Appellate Body report in *Canada-Certain Measures Affecting the Automotive Industry,* WT/DS139/AB/R & 142/AB/R, 31st May 2000 (*Canada Autos*), at paragraph 78, where the Appellate Body was called upon to adjudicate whether Canadian import restrictions discriminated against car manufacturers from certain countries and held that the ambit of Article I:1 extends to cover both *de facto* and *de jure* discrimination.

20 E. Kessie, Enhancing Security and Predictability for Private Business Operators under the Dispute Settlement System of the WTO, 34 J.W.T.6, December 2000, pp. 1-18. Also see Alemanno, Alberto, *Private Parties and WTO Dispute Settlement System*, Cornell Law School LLM Papers Series, Paper 1, 2004 available at http://lsr.nellco.org/cornell/lps/clacp/1

21 E. Kessie, Supra note 41, at 3.

22 G.C Schaffer, *The Public and the Private in International Trade Litigation*, (August 16th 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=531183.

the actions of an organization, particularly an international NGO to any one country is likely to be difficult.

Several authors have argued in favour of extending the ambit of the WTO legal regime to cover trade-restricting actions of private parties[23]. One argument is that the concept of "State Attributability" within the WTO system should be broadly interpreted to include in certain cases, the actions of private parties. Private parties can generally be categorized into: (a) entities which are not organs of the State but which nevertheless exercise elements of governmental authority, e.g. a state trading enterprise[24]; or (b) private corporations or individuals that are not organs of State under internal law and that do not exercise elements of governmental authority[25]. The actions of such non-State entities could be attributed to the State, according to the yardsticks prescribed by individual WTO agreements[26]. In the case of the second category of private corporations or individuals, into which NGOs such as the World Wildlife Fund for Nature (WWF) and the Marine Stewardship Council (MSC) would probably fall, the question of attributing their actions to States is more problematic since there is no linkage between the organization and the authority it exercises, with the State.

**State Responsibility in WTO Law:**

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23 See Carmen Otero García-Castrillón *Private Parties under the Present WTO (Bilateralist) Competition Regime*, 35 J.W.T.1, February 2001, pp.99-122, where the author argues that "in relation to competition laws, the recognition of private parties' defence of their own competitive interests within national jurisdictions merits attention. It reveals the WTO system concern on private parties as the ultimate addressees of the Agreements and reveals a definitive governing of the rule of law."

24 The GATT Panel decision in the *Japan-Restrictions on the Import of Certain Agricultural Products* case, BISD 35S/163, adopted 2 February 1988 (*Japan Agricultural Products*), at paragraph 5.2.2.2, points out that GATT rules governing private trade extend to state trading enterprises to ensure that a Member doesn't escape its obligations by establishing such state trading enterprises. See S.M Villalpando, *Attribution of Conduct to the State: How the Rules of State Responsibility May Be Applied Within the WTO Dispute Settlement System*, Journal of International Economic Law (2002) 393-420, at pg.400.

25 Villapando, Supra note 45, at 400; The Panel decision in the *Japan Agricultural Products Case*, Supra note 39, at paragraph 5.2.2.2, points out that GATT rules governing private trade extend to state trading enterprises to ensure that a Member doesn't escape its obligations by establishing such state trading enterprises.

26 Under Article I:3(a)(ii) of the General Agreement for Trade in Services (GATS) for instance, the definition of "measures by members" covers measures taken by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities". Under Article 11.3 of the Agreement on Safeguards, Members undertake the limited obligation to abstain from encouraging or supporting "the adoption or maintenance by public and private enterprises of non-governmental measures".

Since the WTO only imposes obligations upon its Member States, any WTO Member could potentially circumvent the restrictions placed upon them by instructing, or simply allowing private entities to conduct activities which would otherwise be WTO-inconsistent[27]. An NGO for example, could theoretically be allowed to develop an environmental standard which discriminates against exporters from outside its country thereby conferring a *de facto* market advantage to developed countries; and still continue to go unchallenged within the WTO. In the *Japan Films* case, a WTO Panel acknowledged that there were no "bright line rules" that allowed it to rule out an action as being non-governmental, just because it was taken by a private party. Any such finding, ruled the Panel, should be arrived at on a case-by-case basis after looking into the level of governmental involvement[28]. Would this mean therefore, that not *all* Private Standards are exempt from WTO scrutiny? What is the degree of governmental involvement in the organization or ownership of a private standard-setting organization that will potentially render a Private Standard as the action of a State?

Since there can be no clear and uniform rule for deciding how a Private Standard may be attributed to a State, it has been suggested that instead of looking at responsibility within the WTO system from the point of view of how a private standard-setting organizations activities can be attributed to a State; to look at it as a States' responsibility for a WTO-inconsistent act carried on by *de jure* organs of the State and catalyzed by private sector activities[29]. In the *Korea Beef Case* for example, retailers in Korea reacted to a Government law introducing a dual retail system, by voluntarily renouncing the sale of imported beef because of commercial considerations. The action of the retailers was voluntary and could not have been attributed to the State. Nevertheless the Appellate Body held Korea responsible for a violation under Article III:4 (National Treatment) because domestic law gave sufficient incentive (or disincentive) for its retailers to act in a WTO-inconsistent way. If we were to apply this principle in the case of trade restrictive and discriminatory Private Standards, it would be unnecessary to establish that the actions of a

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27 Villapando, Supra note 45, at 408.

28 See the WTO Panel report in *Japan-Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, 31 March 1998 (*Japan Films* Case), at paragraph 10.12.

29 See Villapando, Supra note 45, at 414 where the author makes a convincing argument along these lines.

private standard-setting organization are attributable to a State. It will instead, be sufficient to show that the State in which such Private Standards operate, provide manufacturers or retailers a sufficient incentive or disincentive to act in a discriminatory way. Such government incentives or disincentives could be binding and non-binding laws or policies of the State[30] and could perhaps be logically extended to apply to legislative *in*action or omission which results in the creation of a WTO-inconsistent incentive or disincentive. This proposition has presented itself in different forms in previous WTO disputes but has not yet been sufficiently addressed. In the case of regulating Private Standards however, the rationale behind extending WTO sanction to legislative inaction is strong since what a State cannot achieve directly, i.e. formulating discriminatory standards, it should not be permitted to achieve indirectly i.e. by allowing private standard-setting organizations to formulate and apply such standards in their territory.

Over-extending the ambit of state attribution would not however, be without its share of problems. A widened concept of state responsibility will effectively make the government of a country responsible for all WTO-inconsistent Private Standards that are formulated within its territory irrespective of whether it actually or obliquely supports such a standard. This will put a heavy administrative burden on governmental authorities; particularly on developing countries which can least afford it.

Clearly there is a need for identifying specific situations in which States can be held accountable for the misuse of Private Standards within their territory. Perhaps an acceptable solution would be to follow the approach taken in this respect by the SPS Agreement and the TBT Agreement respectively. Article 13 of the SPS Agreement (relating to implementation), comprehensively deals with the issue of compliance by non-governmental entities. Members are held "fully responsible" for the observance of the obligations under the Agreement; and are expected to take reasonable measures to ensure that such non-governmental entities comply with the provisions of the SPS Agreement. Most significantly,

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[30] In the *Japan Films* Case, the WTO Panel interpreted the term measure under Article XXIII:1(b) to include governmental policy and action which imposed binding or non-binding government action. Also see the earlier decision of the GATT Panel in *Japan-Trade in Semi-Conductors*, BISD 35S/116, 26 March 1988 (hereinafter the *Japan Semi-Conductors Case*) which supplied the proposition that non-binding governmental actions may have an effect similar to a binding one.

under Article 13, Members "shall not take measures which have the effect of directly or indirectly, requiring or encouraging…such non-governmental entities…to act in a manner inconsistent with the provisions of this Agreement".

The TBT Agreement uses a practical system of affixing gradual levels of state responsibility according to the level of control that a State can exercise over a non-governmental body. Such a system of affixing responsibility will perhaps ensure that the principle of state attribution is not over-extended; and that future WTO Panels are equipped to discipline the misuse of Private Standards. However, to argue that States should in no circumstances be held responsible for discriminatory Private Standards is leaving the door open to abuse and will run contrary to the principles of non-discrimination in the WTO.

However, past WTO Panels have been reluctant to extend the scope of State responsibility under the GATT Agreement to actions of private parties. In the *Argentina-Hides Case*, a WTO Panel chose not to hold a State responsible for the trade-restricting activities of private parties within its territories, even if such activities were directly or indirectly supported by a governmental measure[31]. The Panel agreed with the decision in the *Japan Films case* that there were no "bright line rules" which exempted actions taken by private parties from WTO scrutiny, but nevertheless refused to interpret Article XI:1 of the GATT Agreement as incorporating a "due diligence" requirement which would oblige States to ensure that their laws did not enable private parties to restrict trade. The Panel went on to say that the (Argentine) government had no "due diligence obligations" to investigate or prevent even private cartels from functioning as export restrictions although it acknowledged that a government's measures could assist such cartels by limiting exports[32].

The "due diligence" obligations which the GATT Panel was reluctant to incorporate into its interpretation of GATT Article XI in *Argentina-Hides*, is arguably inbuilt into the TBT and the SPS Agreements which both contain a general requirement of "due diligence" to be exercised by governments to ensure that private initiatives do not contravene the provisions

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31 Report of the Panel in *Argentina-Measure Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, 19th December 2000 *(Argentina Hides)*, at paragraph 11.19.

32 Supra Note 52, at paragraph 11.52.

of the respective Agreements[33]. WTO Panels and the Appellate Body must in future disputes, be willing to look beyond an obvious nexus between a Private Standard and the State. The increasing threat faced by exporters on account of the use of non-tariff measures will necessitate a closer scrutiny into the more innovative mechanisms used to promote protectionism in domestic markets. Since Private Standards can potentially have the same market-effect as mandatory domestic laws and can be misused by governments and industry associations to protect domestic industry, WTO Panels must not allow what cannot be done directly to be achieved indirectly. It is true that the WTO dispute settlement mechanism has not had occasion in the past to look into the specific legitimacy of a Private Standard under the GATT Agreement and consequently the outcome of any future dispute along these lines is difficult to predict. Some scholars argue that it is unlikely that the WTO will involve itself in adjudicating upon an area as contentious as this, given the large number of Private Standards already in existence and its reputation concerning environmental issues. Instead, it has been proposed that any opposition to a Private Standard should be based upon a challenge of the standard itself under the Agreement on Technical Barriers to Trade (TBT Agreement)[34]. Does the TBT Agreement regulate the use of Private Standards; and if so to what extent?

## 2. Using the TBT Agreement to regulate the use of Private Environmental Standards

The TBT Agreement ensures that mandatory "Technical Regulations" and voluntary "Standards" (as well as testing and certification procedures) used by countries do not create unnecessary obstacles to trade. The scope of the TBT Agreement extends to disciplining the use of eco-labels, environmental standards and other product requirements and is likely to

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[33] Article 3 of the TBT Agreement squarely places the onus for observing the provisions of (Article 2) the Agreement upon WTO Members and requires that they formulate and implement positive measures and mechanisms that support compliance with by non-governmental bodies. Article 3.4 of the TBT Agreement also restricts WTO Members from taking measures which require or encourage non-governmental bodies within their territories to act in a manner inconsistent with its provisions. And finally, under Article 4.1 of the TBT Agreement, all WTO Members are required not take measures which have the effect of, directly or indirectly, requiring or encouraging standardizing bodies to act in a manner inconsistent with the Code of Good Practice. Article 13 (Implementation) of the SPS Agreement prescribes similar requirements which make it incumbent upon WTO Members to conduct an effective due diligence on its governmental measures to ensure that it does not fall foul of the provisions of these Agreements.

[34] Appleton, Supra note 32, at 254.

form the basis for any future challenge on Private Standards. However, in order to make out a case for a violation of the provisions of the TBT Agreement, it must first be established that the Private Standard in question is either a voluntary "Standard" or a mandatory "Technical Regulation".

The TBT Agreement distinguishes between product regulations that require mandatory compliance, i.e. "Technical Regulations" and all other requirements with which compliance is voluntary, i.e. "Standards". Technical Regulations are broadly subject to stricter scrutiny under the Agreement, whereas voluntary Standards are obliged only to comply with the TBT Agreements' Code of Good Practice-a guiding framework for the formulation and application of standards[35]. Even amongst mandatory Technical Regulations, the TBT Agreement implicitly draws a distinction between two categories of Technical Regulations on the basis of the entity that is responsible for formulating and implementing them, i.e. Technical Regulations that are formulated by the "Central Government Bodies" [36] of WTO Member Countries (Article 2); and those that are formulated and applied by either "Local Government Bodies"[37] or "Non-Governmental Bodies" (Article 3). In making such a distinction, the TBT Agreement effectively *extends* the ambit of a Members' responsibility to cover even those actions, which may not be directly attributable to it. The extension of the principle of State responsibility in Article 3 of the TBT Agreement to cover the acts of Non-governmental Bodies is accompanied by a corresponding dilution in the level of a States' obligation to ensure compliance. Article 3 only requires WTO Member States to take "reasonable measures" available to them to regulate Technical Regulations that are formulated by Local Government Bodies or Non-Governmental Bodies, in stark comparison with the more onerous obligation contained in Article 2, which stipulates that Members "shall ensure" compliance with the obligations contained therein.

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35 Code of Good Practice for the Preparation, Adoption and Application of Standards contained in Annex 3 of the TBT Agreement (hereinafter *Code of Good Practice*). Note however, that a violation of the Code of Good Practice is grounds for invocation of dispute settlement under Article 14.

36 A "Central Government Body" is defined in Annex 1 of the TBT Agreement as a "Central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question."

37 Defined in Annex 1 to the TBT Agreement as a "Government other than a central government (e.g. states, provinces, Lander, cantons, municipalities etc.) its ministries or departments or any body subject to the control of such a government in respect of the activity in question."

Although "Technical Regulations" formulated by Non Governmental Bodies may be subjected to TBT Discipline, it must also require mandatory compliance. In the absence of any judicial interpretation on what constitutes "mandatory compliance"[38]it seems unlikely that Private Standard will be termed as Technical Regulations. Additionally, many Private Standards such as those formulated by the WWF and the Forest Stewardship Council (FSC) use criteria which are based on (what are arguably) NPR-PPMs. As it stands today, the use of NPR-PPMs within the WTO legal regime is a hotly debated issue and many developing countries continue to be averse to their use. This would probably imply that all Private Standards to the extent that they are based on NPR-PPM criteria, would not qualify as Technical Regulations.

Assuming that a Private Standard is not considered as being "mandatory enough" to qualify as a Technical Regulation, then can it be disciplined as a voluntary Standard under Article 4 of the TBT Agreement? After all, voluntary Standards are also disciplined under the TBT Agreement and "standardizing bodies" are obliged to comply with the Code of Good Practice. In order for a measure to qualify as a "Standard" under the TBT Agreement, it must: (a) be approved by a recognized body; (b) provide for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods; and (c) the compliance with such rules must not be mandatory. The interpretation of the term "Standard" has not yet been examined in any great detail by the WTO dispute settlement system and consequently it is unclear what constitutes an approval by a "recognized body"; or whether the rules and guidelines that are referred to, could also include those prescribed by NGOs or other private sector participants such as industry organizations and trade unions.

As is the case with the regulation of Technical Regulations, the disciplines imposed on the use of voluntary Standards is also graded. Under Article 4 of the TBT Agreement, WTO Members must ensure that central government standardizing bodies comply with the TBT Code of Good Practice; whereas for the same voluntary Standards that are set by either local governments or non-governmental standardizing bodies, a WTO Member may only

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38 The EC in the EC *Sardines* Case did not argue before the Appellate Body that the measure was not "mandatory". See Supra note 74, at 42.

take reasonable measures available to them to ensure compliance. Consequently, it would seem that even requirements that are not formulated or implemented by the government of a WTO Member state, could qualify as voluntary Standards under the TBT Agreement. However, whether Private Standards formulated by non-governmental entities such as the FSC and the MSC, will be interpreted as Standards will depend on the interpretation of the term "non-governmental standardizing body", and whether such Private Standards are based on NPR-PPM criteria.

Clearly the TBT Agreement allows WTO Members several possible grounds on which they can base a future challenge to the use of trade-restricting Voluntary Standards, but the uncertainty surrounding the interpretation of this "unused" WTO Agreement, and the larger question of whether WTO disciplines should extend to non-state actors makes it difficult to predict the extent to which such a challenge will succeed.

**Conclusion**

The proliferation of Private Standards and their potential for misuse as "non-tariff barriers" makes it inevitable that WTO Members will in the future attempt to utilize world trade rules to regulate the use of such Private Standards. The growing willingness of WTO dispute Panels and the WTO Appellate Body to extend the concept of State attribution and consequently the application of world trade rules to include the actions of non-state actors is an indication that Private Standards are likely to be subjected to WTO discipline. As a result of such WTO scrutiny, private standard-setting organizations will be required to adhere to world trade rules and the principle of non-discrimination. Private standard-setters are consequently subjected to a system of global laws and regulations, which are in essence the characterization of Global Administrative Law, as we understand it.

Given the complexity of the private standard-setting process and the numerous constituencies to which private standard-setting bodies are answerable, the impact of Global Administrative Law cannot be overstated. Consumer groups, environmental lobbies, industry associations and others will directly and indirectly be affected by the global rules which demand adherence to principles of non-discrimination, transparency and

accountability. In addition to the systemic changes that this will imply for private standard-setters, the application of trade rules will also change the way that national governments relate to what were initially seen as being purely non-governmental activities. Since the actions of private standardizing bodies are eventually attributed to the national governments in whose territory they operate, it is likely that governments in turn will introduce rules to discipline private standardizing activities to avoid WTO sanction. The efficacy of national laws over private standardizing agencies with international operations and origins (such as the WWF and FSC) can at best be limited and nations or groups of nations are likely to require a set of global rules through which they may regulate the formulation and administration of Private Standards. In some sense, the emergence of international organizations such as the Codex Alimentarius (Codex) and the International Standards Organization (ISO) and other such transnational standardizing bodies is recognition of the need for standard-setting bodies across the world to adhere to a certain set of acknowledged "rules of the game".

The increased importance accorded to international standards, such as those formulated by the Codex is arguably a direct consequence of the presumption of their legitimacy under WTO rules. Article 3.2 of the SPS Agreement and a corresponding Article 2.5 of the TBT Agreement extend the benefit of a presumption of legitimacy to national laws that are formulated in accordance with such international standards. The logical consequence of such a benefit available under WTO rules, is that national governments will take greater interest in the participation and formulation of the rules and regulations set by international organizations such as the ISO and Codex and simultaneously encourage private standardizing bodies within their territory to adhere to this set of rules.

The ultimate outcome of extending the applicability of world trade rules to Private Standards is the emergence of a web of international laws and regulations all operating across national borders to ensure that standards and standard-setters alike adhere to a set of global rules. In this way, the contours of Global Administrative Law are being constantly re-shaped and re-worked to meet the requirements of international trade rules and the challenges posed by the process of private standard-setting.

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