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DISCIPLINING VOLUNTARY  
ENVIRONMENTAL STANDARDS AT THE  
WTO: AN INDIAN LEGAL VIEWPOINT

Samir R. Gandhi  
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## Foreword

Environmental product standards are viewed by several developing countries, including India, as potentially discriminatory, trade restrictive and as non-tariff measures that deny access to important markets. The WTO legal instruments discipline the use of such standards by Member Countries. The GATT-WTO dispute settlement mechanism has in the past been asked to adjudicate directly or indirectly upon the validity of several such environmental requirements, including: the eco-labelling of products; use of turtle-friendly fishing nets; etc. However, the steady proliferation of voluntary environmental requirements that are formulated and administered by non-governmental organizations (NGO Standards) and adopted by several manufacturers and industry groups as de facto product standards, has become a cause for concern for many Indian exporters. Several submissions made by India to the WTO Committee on Trade and Environment (CTE) have highlighted the problems faced by Indian manufacturers when confronted with voluntary environmental standards, particularly 'eco-labels'.

While NGO Standards are often perceived as being consumer-driven initiatives not supported by any government-conferred advantage, Indian manufacturers are nevertheless apprehensive of their potential misuse as 'disguised protectionism' against Indian exports. Such restrictions, which could otherwise fall foul of WTO trade rules may go unregulated given the ambiguity surrounding their legal status.

This paper by Samir Gandhi evaluates whether the WTO dispute settlement mechanism offers India an effective remedy against the misuse of NGO Standards or does India need to adopt an alternate strategy to address such concerns. The paper argues that an amendment to the text of the TBT Agreement is perhaps the most effective way regulating the growth of NGO Standards and for removing any ambiguity in or misinterpretation by the dispute settlement mechanism. In addition, India could push for a more ambitious work agenda at the CTE within the ongoing Doha Round negotiations.

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**Rajiv Kumar**  
Director & Chief Executive  
ICRIER

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## **Abstract**

This paper looks into the proliferation of privately-formulated environmental product standards and analyses whether Indian industry has a legal recourse under the WTO dispute settlement mechanism if such standards are used as “disguised” restrictions on trade.

The paper highlights some of the issues faced by Indian manufacturers when confronted with voluntary product requirements such as eco-labeling, packaging and recycling requirements in markets of key export interest to them and highlights the role of non-state actors in the formulation of such environmental product standards. Since some of these product standards are capable of being misused as protectionist devices, the paper examines whether the WTO dispute settlement mechanism can be used to resolve an issue which cannot be directly attributed to governmental action (or inaction).

In doing so the paper studies the representations made by India and other developing countries at meetings of various WTO Committees; and past decisions of WTO Panels and the Appellate Body to establish the magnitude of the problem and look for possible legal solutions. The paper looks at the issue from a developing country perspective- the assumption being that developing countries are standard-takers, not standard-setters; and are unable to afford the “costs of compliance” associated with voluntary environmental standards. The analysis focuses predominantly on the use and interpretation of the GATT Agreement and the Agreement on Technical Barriers to Trade and discusses a possible legal strategy that may be adopted in any future dispute.

# DISCIPLINING VOLUNTARY ENVIRONMENTAL STANDARDS AT THE WTO: AN INDIAN LEGAL VIEWPOINT

Samir R. Gandhi\*

## 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,<sup>1</sup> environmental product charges,<sup>2</sup> packaging and recycling requirements are used 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<sup>3</sup>.

Alongside growing state involvement in environmental product regulation, the last decade has also witnessed proliferation in the number of voluntary environmental

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\* The Author is presently an External Consultant with ICRIER and a consultant attorney with Economic Laws Practice, New Delhi. Much of the background work on this paper was done while the author was a Visiting Scholar at the Columbia University School of Law and while working at the Trade and Environment Division of the WTO Secretariat in Geneva. An earlier version of the paper was published in the *Journal of World Trade*, 39(5) as 'Regulating the Use of Voluntary Environmental Standards within the WTO Legal Regime: Making a Case for Developing Countries'. The author would like to thank Petros Mavroidis and Erik Wijkström and an anonymous referee for their valuable comments and guidance. The views and opinions expressed here are the authors' alone, and he remains entirely responsible for any omissions or errors.

<sup>1</sup> 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 para 5.41 to 5.44.

<sup>2</sup> 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*).

<sup>3</sup> 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.

standards formulated and implemented by NGOs, either independently or with varying degrees of governmental participation<sup>4</sup>. 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.’<sup>5</sup>

Standard-setting NGOs could represent divergent interests ranging from industry groups and manufacturers associations to non-profit environmental activists. Unlike national standardizing agencies or even large corporations, there are no checks and balances in the process of defining the interests that an NGO may choose to advance and often no requirement for transparency or accountability to either civil society or shareholders. This makes NGOs potentially opaque and yet influential players in international standard-setting. The growing influence of such non-state actors in the development and formulation of NGO Standards has resulted in what some call the ‘privatization of environmental governance’<sup>6</sup>. This is widely attributed to 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

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<sup>4</sup> Many such NGO Standards tend to be voluntary eco-labelling and certification schemes such as the ‘Nordic Swan’. The Nordic Swan programme 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, for example, ‘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.

<sup>5</sup> *World Trade Report 2005: Exploring the Links Between Trade, Standards and the WTO*, WTO Secretariat, Geneva, 2005, pg. xxv.

<sup>6</sup> 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.503–29).

decisions on the environment; and producers have adopted NGO Standards to cater to the growing ‘green-consumerism’ and extract a price premium. The proliferation of privately formulated environmental standards which guide consumer behaviour has been criticized by manufacturers in many developing countries who argue that several private ‘standard-setters’ are themselves prone to being influenced by Western standards and lack the credibility, accountability or transparency required of them.

Developing countries such as India have tended to take a dim view of the increased use of NGO Standards partly because they could be based upon requirements which discriminate against their own producers; and partly because certain NGO Standards could be disguised restrictions on trade which escape WTO discipline only on account of their voluntary, non-governmental nature. Several submissions made by India to the WTO Committee on Trade and Environment (CTE) have highlighted the problems faced by Indian manufacturers when confronted with voluntary environmental standards, particularly ‘eco-labels’<sup>7</sup>. It is often contended that the very process through which some NGO Standards are formulated is potentially exclusionary and is capable of being misused to represent vested interests<sup>8</sup>. Lack of transparency and accountability in the standard-making process could leave some NGO Standards open to abuse by interest groups such as powerful manufacturers associations, which could use NGOs to promote a non-governmental form of protectionism<sup>9</sup>. Consequently, Indian manufacturers who may otherwise be willing to comply with genuine consumer demand-driven environmental initiatives, seek WTO disciplines to regulate the misuse of those NGO Standards that are designed to be discriminatory and more trade restrictive than are necessary.

NGO Standards are accused of being discriminatory because of the economic burden they place upon poorer manufacturers who can ill-afford to comply with their requirements as compared to manufacturers from developed countries who can usually absorb such costs. For a small Indian manufacturer, increased costs of compliance with

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<sup>7</sup> See India’s Submission to the CTE-’The Study Of The Effects Of Environmental Measures On Market Access’, WT/CTE/W/177, dated 27.10.2000 at paragraph 13; and India’s Submission to the CTE on the ‘Cluster on Market Access’, WT/CTE/W/82, dated 7.4.1998 at paragraphs 4 and 12.

<sup>8</sup> V. Vitalis (2002), *Supra* note 5, at 6.

<sup>9</sup> See V. Vitalis (2002), *Supra* note 5, at 5.

NGO Standards could substantially diminish the competitive advantage it enjoys<sup>10</sup>, and non-compliance with these standards could result in a significant denial of access into markets where major suppliers and retailers require them.

In its submission to the CTE, India chose to highlight the issue of high costs of compliance in relation to the use of voluntary standards, particularly voluntary eco-labelling schemes. The Indian submission was based on a close analysis of voluntary environmental standards affecting market access of Indian products where it was found that the most extensively used voluntary environmental standard was eco-labelling. India pointed out that the costs of compliance with eco-labelling criteria in the textile and leather sectors particularly were found to be prohibitive, and the problems faced by Indian manufacturers was further compounded by difficulties in accessing technologies, developing testing facilities and verifying compliance. India requested the CTE to scrutinize emerging voluntary arrangements for their potential impact on market access.

While increased costs of compliance could arguably be off-set by the price premium earned through the manufacture of an eco-friendly product, it has been shown that price-premiums for goods which comply with voluntary environmental requirements are not as significant as they are thought to be.<sup>11</sup> Small and medium scaled enterprises (SMEs) in India are unlikely to be able to afford the increased costs of compliance and the small price premiums, unlike their larger counterparts in developed countries. Further, preferences for different environmental policy instruments are likely to differ across countries. Some governments are more able than others to absorb the costs of environmental policies. Producers and consumers with lower average incomes are also less able and willing to incur such costs. Members of lower income societies often face greater uncertainty about the future and therefore are more reluctant to invest in it<sup>12</sup>.

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<sup>10</sup> 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.

<sup>11</sup> See V. Vitalis (2002), *Supra* note 5, at 2.

<sup>12</sup> *World Trade Report 2005*, *Supra* note 6 at xxvii.



In light of the concerns voiced by Indian manufacturers, the use of trade-restricting, voluntary environmental requirements has become a somewhat contentious issue within the international trading system. Discussions at various committees of the WTO reflect the growing concern with which some NGO Standards are viewed<sup>13</sup>. India in its submission to the CTE felt that voluntary environmental requirements should not impede market access for developing countries, and that a package of measures was required to enable developing countries to increase market access<sup>14</sup>. Misgivings on the use of environmental product standards *per se* and the reluctance to discuss non-product related process and production methods (NPR-PPMs)<sup>15</sup> in the fear that it would open the door to labour and human-rights related standards has added to the general reluctance of WTO member countries to engage in further discussions on this issue<sup>16</sup>. However, the growing number of instances in which potentially trade-restricting, discriminatory NGO Standards are becoming dominant industry standards, makes it inevitable that the question be addressed.

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<sup>13</sup> Discussions at the TBT Committee as represented in each of its Triennial Review reports (G/TBT/5; GTBT/9 & G/TBT/13) reflect the growing and divergent concerns 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<sup>th</sup> October 2002). The CTE has also played an active role and discussions surrounding the issue of voluntary, eco-labelling schemes were highlighted most recently in its *Report to the 5th Session of the WTO Ministerial Meeting at Cancun* (WT/CTE/8, 11<sup>th</sup> July, 2003) under Paragraph 32(iii) on Labelling. For discussions on voluntary eco-labelling at its early meetings, see discussions at *Paragraphs 145-162, WT/CTE/M17 9 April 1998* where the Columbia cut-flower industry was discussed; and *Paragraphs 16-20 of WT/CTE/M19, 30 November 1998* where New Zealand even suggested that 'equivalency' be observed for voluntary schemes, just as it was for 'technical regulations' under the TBT Agreement. More recently, see discussions under Paragraph 32(iii) of the Doha Declaration, where in *Paragraphs 57-58 of WT/CTE/M34, dated 29 July 2003*, the EU proposed dedicated sessions of the CTE to look at ways to ensure that voluntary eco-labelling schemes were administered and run in a non-discriminatory or WTO compatible way; and the Philippines assertion that the WTO could not intervene in the non-governmental or private standard-setting process. It should also be noted that the discussions reveal that not all developing countries share the same view on this issue and there is a divergence of views across developed and developing countries.

<sup>14</sup> See the Minutes of the Meeting of the CTE on 19 March 1999, *WT/CTE/M20*, at Paragraphs 8-26.

<sup>15</sup> The use of criteria based on non-product related process and production methods (NPR-PPM) has been the centre of significant policy and legal debate. For a better understanding of the key issues, and the positions taken by developed and developing countries see: *Report on Process and Production Methods (PPMs): Conceptual Framework and Considerations on the use of PPM-based Trade Measures*, OECD, Paris, 1997 (OECD/GD(97)193).

<sup>16</sup> The paper does not discuss in any detail the extensive debate surrounding the acceptability of NPR-PPM criteria. For a thorough analysis and an interesting point of view on the legality of the use of environmental PPMs, see S. Charnowitz, 'The Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality', *Yale Journal of International Law*, 59 (Winter 2002), p.62.

This paper attempts to focus the discussions surrounding the use of NGO Standards by examining whether the WTO provides India with a legal remedy against the misuse of those NGO Standards that are discriminatory and are used as disguised instruments of protectionism. In doing so, the paper shall first discuss how NGO Standards could fall foul of WTO trade rules on account of being discriminatory (either in their formulation or application), and being disguised restrictions on trade. The next section will examine whether the relevant WTO legal texts provide India with a sufficient remedy under the WTO dispute settlement mechanism, against the use of those NGO Standards which are discriminatory or act as disguised protectionist instruments. The paper will conclude by discussing the legal and policy options that are available to India in order to resolve some of the ambiguity in this area.

## **1 Can NGO Standards restrict market access for Indian exporters?**

Private initiatives at developing environmental standards are motivated by various factors, represent different interest groups and are often sector or product specific<sup>17</sup>. As a result of the multiple (and often competing) players responsible for the proliferation of such NGO Standards in the market-place today, manufacturers worldwide are faced with numerous hurdles when exporting their products<sup>18</sup>. The high cost of compliance, the adoption of a ‘one size fits all’ approach while formulating these standards and the lack of transparency in the entire process are all factors which restrict the ability of Indian manufacturers to access important markets.

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<sup>17</sup> In the forestry sector for example, environmental labelling and certification programmes 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>.

<sup>18</sup> See J. Earley and L.K Anderson, *Developing Country Access to Developed Country Markets under Selected Eco-Labeling Programmes*, OECD, Paris, 2003 (COM/ENV/TD(2003)30/FINAL), p.13 where the authors observe that there are too many eco-labels in the market-place and that the standards in a dozen companies are likely to set the norm for the next 20 years. The authors also point out that various standards adopted by non-governmental organizations and private agencies show that there can arise competition between certification and labelling schemes addressing the same environmental problem.

While the precise extent to which NGO Standards are capable of influencing consumer behaviour is debatable, there are numerous instances where such requirements have proven to be excessively burdensome for manufacturers in several developing countries, including India. Voluntary, non-governmental standards, it has been observed, can sometimes be as constraining as mandatory governmental regulations<sup>19</sup> and numerous instances have been documented where requirements formulated by manufacturers and NGOs have imposed significant costs, time and logistical difficulties on manufacturers, particularly those in developing countries who are unable to absorb such costs or comply with such requirements<sup>20</sup>. NGO Standards such as voluntary eco-labelling schemes may well give Indian exporters the *option* of which production process to apply, but independent of their decision, they may continue to be *affected* if the eco-labelling scheme has an effect on the relative price of labeled and unlabelled products.<sup>21</sup>

An often cited and well documented example of how a voluntary NGO Standard can affect 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

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<sup>19</sup> D. Andrew, K. Dahou and R. Steenblik, *Address Market Access Concerns of Developing Countries Arising From Environmental & Health Requirements: Lessons from National Governments*, OECD, Paris, 2003 (COM/ENV/TD(2003)33/FINAL), p.15 where the authors mention that buyers or final retailers that choose to conform to a voluntary standard may insist that certain environmental conditions be met along the production chain, and the producer has little choice but to meet them. Also note that private, *voluntary* standard-setting and product certification activities undertaken by private trade associations in the US has historically been the object of antitrust scrutiny under US antitrust law. The rationale being that even voluntary standards when formulated collectively by some dominant firms could quickly develop into industry standards and be misused against competing firms for whom such standards become a market requirement. However, since standard-setting and certification activities by private trade associations may also benefit competitive conditions in a marketplace, US courts typically evaluate the pro-competitive benefits of a product standard against any anti-competitive implications under what is termed as the ‘rule of reason’ analysis (see *Consolidated Metal Products, Inc. v American Petroleum Institute*, 846 F2d 284 (5th Cir. 1988) and *Allied Tube and Conduit Corp. v Indian Head, Inc.*, 484 US 814).

<sup>20</sup> In the fisheries sector for example, the standards for responsible fishing practices set by the Marine Stewardship Council (MSC)—a joint creation of Unilever and the World Wildlife Fund (WWF), numerous difficulties in qualifying for the label were documented by poor fisherman in developing countries. See D. Andrew *et. al* 2003, *Supra* note 19, at 9.

<sup>21</sup> See a similar point raised in the World Trade Report 2005, *Supra* note 6 at xxviii.

toxic chemicals and pesticides for the cultivation of such flowers<sup>22</sup>. Colombia is a significant exporter of cut flowers accounting for 10 per cent 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 NGO 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'.<sup>23</sup> In its submission to the WTO Committee on Trade and Environment, Colombia emphasized what it considered were the inherent dangers of private eco-labelling schemes and sought the WTO's intervention to ensure that 'the proliferations of private environmental labels without common standards or monitoring of any kind do not create market distortions'.<sup>24</sup>

The market restriction faced by Colombian flower exporters on account of NGO Standards is not an exceptional occurrence as several eco-labelling and certification schemes across the world have been documented to have potentially discriminatory and trade restricting effects for developing countries<sup>25</sup>. India has, for instance pointed out that compliance with voluntary labelling schemes in the footwear industry has raised the costs of compliance to Indian footwear exporters by approximately 33 per cent of the export price<sup>26</sup>. Furthermore, as displayed in the Colombian case, the close involvement of local producers in the formulation of an NGO Standard could potentially lead to the adoption of protectionist requirements as *de facto* market standards and could constitute a

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<sup>22</sup> See details of the objectives of the FLP available at: <http://www.flower-label-program.org/>.

<sup>23</sup> See Colombia's submission to the CTE, *Environmental Labels and Market Access: Case Study of the Colombian Flower Growing Industry*, WT/CTE/W/76, 9 March 1998.

<sup>24</sup> Colombia's Submission to the CTE, Supra note 23, at 41.

<sup>25</sup> The OECD and UNCTAD have spearheaded the work in this area. For details, see: *The Development Dimension of Trade and Environment: Case Studies on Environmental Requirements and Market Access*, OECD, Paris, 2002 (COM/ENV/TD (2002)86/FINAL). Also see *Environmental Requirements and Market Access for Developing Countries: Note by the UNCTAD Secretariat*, TD/(XI)/BP/1, 20 April 2004, available at [http://www.unctad.org/en/docs/tdxibpd1\\_en.pdf](http://www.unctad.org/en/docs/tdxibpd1_en.pdf); and UNCTAD's trade and environment website for its extensive work on environmental requirements and market access available at [http://r0.unctad.org/trade\\_env/index.htm](http://r0.unctad.org/trade_env/index.htm).

<sup>26</sup> India's Submission to the CTE, Supra note 14 at 13.

disguised restriction on trade. Brazil has for instance, sharply criticized an EU voluntary eco-label for paper products as an attempt to protect domestic pulp and paper manufacturers from more efficient and cheaper competitors in developing countries<sup>27</sup>. While it is true that all NGO Standards could potentially restrict market access for some country which is unable to comply, India has argued for a WTO discipline on the use of those standards which are designed to provide an advantage to rich manufacturers and which may represent domestic protectionist interests.

In addition to the market restrictions that Indian manufactures may face, NGO Standards could erode the value of the concessions made and the benefits obtained by developing countries during multilateral tariff reduction negotiations<sup>28</sup>. Successive rounds of tariff negotiations have resulted in a significant drop in tariff barriers over the years but the corresponding increase in the use of non-tariff measures (NTMs) such as product standards and technical regulations have in some cases nearly neutralized the value of tariff reductions<sup>29</sup>. Since Indian exporters are often at the receiving end of having to comply with such NTMs which they can ill-afford, they stand to lose from participating in the multilateral tariff reduction process unless their manufacturers are offered some protection against their use. Developed countries on the other hand, possibly stand to benefit from the use of private, voluntary environmental requirements which are often formulated keeping in mind their specific circumstances; thereby giving their producers an advantage and consequently helping to alleviate the impact of tariff reductions<sup>30</sup>. Therefore, NGO Standards can potentially affect the ability of Indian manufacturers to access significant export markets and if allowed to go un-checked, the use of such standards could result not only in a substantial market restriction, but could

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<sup>27</sup> *Eco-Labeling Actual Effects of Selected Programmes*, OECD, Paris, 1997 (OCDE/GD(97)105).

<sup>28</sup> Under Article XXIII of the GATT Agreement, a case for non-violation, nullification or impairment may be argued if a Member considers that the attainment of the objectives of the Agreement is being impeded as a result of the application of any measure—whether or not it conflicts with the provisions of the Agreement.

<sup>29</sup> For instance, in the late 1990s tariffs on certain textiles (garments) and cut flowers in the European Union were progressively reduced in line with WTO Commitments. At the same time, there was an increased use of private voluntary eco-labels for these goods. The negative impact on the use of such voluntary eco-labels was felt by the Columbian flower industry which highlighted its difficulties in its submission to the Committee for Trade and Environment (WT/CTE/W/76, 9 March 1998) and to the TBT Committee (G/TBT/W/60, 9 March, 1998). Also see V.Vitalis, *Supra* note 5, at 4.

<sup>30</sup> V.Vitalis, *Supra* note 5, at 4.

also render multilateral tariff negotiations ineffective. The WTO is responsible for the regulation of trade-restricting NTMs, but does its dispute settlement mechanism provide legal recourse against the use of NGO Standards?

## **2 The WTO Legal System and disciplining the use of NGO Standards**

India is no stranger to the use of the WTO dispute settlement system to address trade imbalances arising out of the application of environmental standards. It was one of four developing countries (along with Pakistan, Malaysia and Thailand) which successfully challenged a US environmental law which required that shrimp sold in the United States were to be caught only by fishing nets using turtle extruder devices (TEDs). The now much-written-about *Shrimp Turtles* dispute was one of the first few brought before the WTO dispute settlement system (as opposed to its precursor the GATT Panels) and established India as an active participant in the WTO dispute settlement process. Given its familiarity with the WTO dispute settlement system and the difficulties faced on account of misuse of some trade-restricting NGO Standards, India must evaluate whether it has legal recourse against the use of such NGO Standards under the WTO legal regime.

The non-discrimination provisions of the GATT 1994 Agreement (GATT Agreement) regulate the discriminatory application of a measure; and the Agreement on Technical Barriers to Trade (TBT Agreement) disciplines the use of product standards which are ‘unnecessary restrictions on trade’ or are ‘more trade restrictive than necessary’. The TBT Agreement is the specific WTO Agreement which disciplines the use of voluntary ‘Standards’ and mandatory ‘Technical requirements’, including environmental standards; and the GATT 1994 is the more general instrument. Both Agreements overlap in their coverage to a certain extent—for instance a challenge on a measure banning asbestos could be susceptible to scrutiny as a Technical Regulation which violates Article 2 of the TBT Agreement; and could equally be said to fall outside the scope of the General Exception prescribed in GATT Article XX(b). Nevertheless, the General Interpretative Note squarely resolves the issue and indicates that the TBT

Agreement would on account of its specificity, prevail in the event of a conflict.<sup>31</sup> However, it is important to note that this does not entirely preclude an analysis under the GATT Agreement and that those measures which do not fall specifically within the ambit of the TBT Agreement would still have to comply with the provisions of the GATT Agreement<sup>32</sup>. On account of its more general nature and to better understand some of the basic applicable principles, I shall start by analysing the non-discrimination provisions of the GATT Agreement and see whether they could form the potential basis for a legal challenge on the use of NGO Standards.

### 3 Non-Discrimination Provisions

The non-discrimination provisions of the GATT Agreement ensure that once a WTO member country adopts a product standard or regulation, it does not discriminate between products that are ‘like’ and that are sold by one WTO member in favour of like products from another member (MFN) nor does it apply its domestic standards and technical regulations in such a way so as to afford protection to its own industry (National Treatment)<sup>33</sup>. Together, these legal provisions restrict the use of tariff and non-tariff measures, including environmental requirement from acting in a trade-restrictive or discriminatory manner<sup>34</sup>. But do such disciplines extend to NGO Standards?

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<sup>31</sup> The General Interpretive Note to Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization*. However increasingly, the Appellate Body has tended to interpret all the WTO Agreements as one Agreement with many Annexes. See: Report of the Appellate Body in *Argentina-Safeguard Measures on the Import of Footwear*, WT/DS135/AB/R, 12 March 2001.

<sup>32</sup> However, given the reluctance of past Panels to base their rulings on that TBT Agreement when confronted with a the possibility of basing a decision on the GATT Agreement (see the Appellate Body Report in *EC-Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS121/AB/R, 14 December 1999, at paragraphs 82 & 83) (hereinafter the *Asbestos Case*), developing countries are likely to be better served by basing their challenge on both Agreements. See A.E. Appleton, ‘Environment and Labelling Schemes: WTO Law and Developing Country Implications’ in G.P Sampson and W.B Chambers (eds.), *Trade Environment and the Millennium* (2<sup>nd</sup> edition), United Nations University Press, Hong Kong, 2001, p.257.

<sup>33</sup> In addition to its non-discrimination clauses, the GATT Agreement offers WTO Members possible recourse against the use of NGO Standards through two other provisions, i.e. GATT Article XI (Quantitative Restrictions), which prohibits the use of import restrictions other than tariff measures, including the use of most non-tariff measures (such as NGO Standards), from being applied against imports at the point of their importation; and GATT Article XX (General Exceptions) which can be invoked by a country to justify its measures on the basis of certain grounds, including the protection of exhaustible natural resources, plant and animal life.

<sup>34</sup> Article XX, sub-clauses (b) and (g) of the GATT Agreement, allow WTO Members to deviate from their National Treatment and MFN obligations under the GATT Agreement on environmental grounds.

### **3.1 The MFN Requirement**

The provisions of GATT Article I which contains the MFN requirement effectively prohibit 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<sup>35</sup>. However, the applicability of the MFN requirement in the case of NGO Standards, which are not promulgated by a government but may nevertheless be capable of discriminating against Indian exporters, is not clear.

While GATT/WTO jurisprudence has not had occasion to analyse the applicability of the MFN provision in the case of an NGO Standard, the reasoning adopted by the GATT Panel in the *Tuna-Dolphin* case<sup>36</sup> may shed some light on the thinking on this issue. The Panel while deciding on whether the provisions of a voluntary, federally promulgated, US eco-labelling scheme<sup>37</sup> were consistent with Article I:1 of the GATT Agreement (MFN Clause), 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*. When applied in the context of a NGO Standard, the first part of the Panels' reasoning implies that the mere physical possibility

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The application of the introductory paragraph of Article XX (the Chapeau) nevertheless checks whether a measure, even if justified under one of the two environmental exceptions is arbitrary, unjustified or a disguised restriction on international trade. A discussion on the scope of Article XX is beyond the scope of this paper, but nevertheless, since Article XX is likely to provide content to a potential defence, its provisions must be kept in mind.

<sup>35</sup> See Appleton, A.E, Supra note 32, at 247.

<sup>36</sup> The *Tuna-Dolphin* report was never adopted by the GATT contracting parties but un-adopted GATT panel reports may nevertheless provide useful guidance although they have no legal status. See the report of the Appellate Body in the *Japan-Taxes on Alcoholic Beverages Case*, AB-1996-2, WT/DS8, 10 & 11/AB/R, 4 October, 1996, at p. 13.

<sup>37</sup> 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.



that an exporter *can* sell his products in a marketplace overrides the very real market restrictions he faces on account of the NGO Standard. Additionally, the Panel by implication suggests that only advantages which are ‘government conferred’ are hit by the MFN requirements. Let us address each of these issues in the context of NGO Standards.

The GATT Panel followed a strict approach when determining whether a voluntary eco-label (much less an NGO Standard) is capable of restricting market access. 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. As we have seen in the preceding paragraphs, environmental requirements, even if voluntary, can impose additional costs upon Indian manufacturers, 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 Indian manufacturer from accessing a market, it could nevertheless make it entirely unfeasible for him to sell his products. Factors such as the increased costs of compliance and logistical difficulties create unnecessary obstacles to trade for those Indian manufactures that are unable to afford them and the consequent advantage to local manufacturers may be interpreted as being discriminatory. Therefore, such factors must be taken into consideration while determining whether a measure is market restrictive and to not do so would run contrary to the reasoning used by WTO Panels in other decided cases. In the *Korea Beef Case*<sup>38</sup> for example, Australia’s claim that a Korean labelling requirement was an impractical and expensive measure which was more restrictive than necessary was upheld by the Panel. Such requirements it was argued would entail additional costs, which would in turn serve to make the imported product less competitive<sup>39</sup>. In the case of Indian manufactures who can ill-afford the increased costs of compliance unlike their richer counterparts, an NGO Standard formulated

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<sup>38</sup> Panel Report in *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS 169/R, 31 July 2000 (*Korea Beef Case*), at paragraphs 706-710.

<sup>39</sup> 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.

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 not only is it necessary for a measure to restrict market access, but also, 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 voluntary environmental standard which effectively confer 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 voluntary environmental requirements could be misused by governments and industry associations alike, to discriminate against products originating in certain countries. While the facts in the *Tuna Dolphin* 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 Appellate Body has in the past, broadly interpreted the term ‘advantage’ conferred under Article I:1<sup>40</sup> and it is quite possible that it will further widen its ambit in future disputes involving the application of voluntary environmental requirements 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.

Establishing a violation of the MFN Clause in the case of an NGO Standard is particularly problematic since the MFN Clause and indeed the entire GATT 1994 Agreement is binding only upon the 149 States that are members of the WTO (*WTO*

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<sup>40</sup> See the Appellate Body report in *Canada-Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R & 142/AB/R, 31 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.

Members). Disputes between private entities, NGOs 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<sup>41</sup>. What legal option does this leave an Indian manufacturer with, when faced with a discriminatory and trade-restrictive NGO 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<sup>42</sup>. 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<sup>43</sup>. In the case of an NGO Standard, the problem is further exacerbated by the absence of a State-entity against whom WTO proceedings may be launched. Attributing the actions of an organization, particularly an international NGO to any one country is likely to be difficult.

Several authors and scholars have argued in favour of extending the ambit of the WTO legal regime to cover trade-restricting actions of private parties<sup>44</sup>. 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, for example, a state trading enterprise<sup>45</sup>; or (b) private corporations or individuals that are not organs of State under

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<sup>41</sup> 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.

<sup>42</sup> E. Kessie, *Supra* note 41, at 3.

<sup>43</sup> G.C Schaffer, *The Public and the Private in International Trade Litigation*, 16 August 2002, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=531183](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=531183).

<sup>44</sup> 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.'

<sup>45</sup> 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

internal law and that do not exercise elements of governmental authority<sup>46</sup>. The actions of such non-State entities could be attributed to the State, according to the yardsticks prescribed by individual WTO agreements<sup>47</sup>. 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.

### **3.2 State Responsibility in WTO Law**

Since the WTO only imposes obligations upon 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<sup>48</sup>. An NGO for example, could theoretically be allowed to develop an environmental standard which discriminates against Indian exporters 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<sup>49</sup>. Would this mean therefore, that not *all* NGO Standards are exempt from

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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 p.400.

<sup>46</sup> Villalpando, *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.

<sup>47</sup> 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’.

<sup>48</sup> Villalpando, *Supra* note 45, at 408.

<sup>49</sup> 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.

WTO scrutiny? What is the degree of governmental involvement in the organization or ownership of an NGO that will potentially render an NGO Standard as the action of a State?

Since there can be no clear and uniform rule for deciding how an NGO 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 an NGO's 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 catalysed by NGO activities<sup>50</sup>. 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 NGO Standards under the WTO legal regime, it would be unnecessary to establish that the actions of an NGO are attributable to a State. It will instead, be sufficient to show that the State in which such NGO 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<sup>51</sup> and could perhaps be logically extended to apply to legislative *inaction* or omission which results in the creation of a WTO-inconsistent incentive or disincentive. As discussed in subsequent sections of this paper, this proposition has presented itself in different forms in previous WTO disputes but has not yet been sufficiently addressed. In the case of regulating NGO Standards however, the rationale behind extending WTO sanction to legislative inaction is strong since what a State cannot be allowed to achieve directly, that is, formulating

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<sup>50</sup> See Villapando, *Supra* note 45, at 414 where the author makes a convincing argument along these lines.

<sup>51</sup> In the *Japan Films Case*, the WTO Panel interpreted the term measure under Article XXIII:1(b) to include governmental policy 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.

discriminatory standards, it must not be allowed to achieve indirectly, that is, by allowing NGOs 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 NGO 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 the Indian administrative mechanism which can least afford it. Clearly there is a need for identifying particular situations in which States could be held accountable for the misuse of NGO Standards. Perhaps an acceptable solution would be to follow the approach taken in this respect by the Agreement on Sanitary and Phyto-Sanitary Measures (*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, 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 (as discussed later in section 4 of the paper) 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 NGO Standards. However, to argue that States should in no circumstances be held responsible for discriminatory NGO Standards is leaving the door open to abuse and will run contrary to the principles of non-discrimination in the WTO.

India is nevertheless likely to face some difficulties in arguing for an extended form of State responsibility in future WTO disputes. It is possible that reluctance by WTO Panels to extend the scope of State responsibility under the GATT Agreement may override the need to discipline the discrimination faced by developing countries such as India on account of the misuse of some NGO Standards. In the *Argentina-Hides Case*, a WTO Panel displayed its reluctance 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<sup>52</sup>. 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<sup>53</sup>. The Panels reasoning seems to have been based on a rather strict interpretation of the ambit of State responsibility which appears to run contrary to previous GATT/WTO decisions. Nevertheless, India must be prepared to rebut such arguments in future cases challenging the use of NGO Standards. Perhaps one way to do so would be to point out that both the TBT and the SPS agreements contain a general requirement of ‘due diligence’ to be exercised by governments to ensure that private initiatives do not contravene the provisions of the respective Agreements<sup>54</sup>. While the absence of such unequivocal ‘due-diligence’ provisions within the GATT Agreement

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<sup>52</sup> Report of the Panel in *Argentina-Measure Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, 19 December 2000 (*Argentina Hides*), at paragraph 11.19.

<sup>53</sup> *Supra* Note 52, at paragraph 11.52.

<sup>54</sup> 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 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 to 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 each WTO Member to conduct an effective due diligence on its governmental measures to ensure that it does not fall foul of the provisions of these Agreements.

may make it a somewhat less effective tool in challenging NGO Standards, India could nevertheless contend that the principle of State responsibility within the GATT Agreement must be interpreted in line with the decision in the *Japan-Films* case and that States must be held accountable for a failure to discipline the use of WTO-inconsistent measures within their territory.

Notwithstanding the uncertainty surrounding the ambit of State responsibility, there is a strong need to provide India and its numerous adversely effected exporters with recourse to the WTO dispute settlement system against the misuse of trade-restrictive NGO Standards—not against the NGO which formulated the standards, but against the country or countries which allow such NGO Standards to operate within their jurisdictions in a WTO inconsistent way.

In the event that a WTO Member discriminates between its domestic producers and producers from other countries by directly or indirectly allowing trade-restrictive or discriminatory NGO Standards to operate within its territory can such a measure be regulated under the GATT Article III (National Treatment) requirement?

### ***3.3 The National Treatment Requirement***

The GATT Agreement provides recourse to WTO Members against the discriminatory use of trade measures to favour local producers. In the event that India's exports suffer a market restriction on account of the operation of an NGO Standard which favours local products, would the WTO legal system offer a remedy? Article III of the GATT Agreement contains the National Treatment (NT) requirement, the broad purpose of which is to avoid protectionism in the application of internal taxation and regulatory methods<sup>55</sup>. The NT requirement is aimed at ensuring that domestic laws are not applied in such a manner that they afford protection to domestic industry, so that all WTO Members are provided equal competitive conditions in each others markets. Article III:4 is particularly relevant to the regulation of environmental requirements since it is aimed at

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<sup>55</sup> Report of the Appellate Body in *Japan-Taxes on Alcoholic Beverages*, WT/DS8, 10 & 11/AB/R, 4 October 1996.



ensuring that domestic laws, regulations and requirements affecting the internal sale, purchase, transportation or distribution of a product are not used in a manner that accords ‘no less favourable treatment’ to imported over ‘like’ domestic products. For India to establish that an NGO Standard falls foul of the provisions of Article III:4, it has to prove that: (a) the NGO Standard constitutes a law, regulation or requirements which affects internal sale etc.; (b) the NGO Standard discriminates between like products; and (c) the application of the NGO Standard results in an imported product being accorded less favourable treatment than its domestic counterpart.

The term ‘law, regulation or requirements’ has in the past, been interpreted to encompass a broad range of government action and the actions of private parties that may be assimilated to government action.<sup>56</sup> Therefore actions of private parties, including NGOs are not *prima facie* excluded from the ambit of a ‘regulation or requirement’ under Article III:4. In the *Canada Autos* case, the Panel found that ‘[n]either legal enforceability [n]or the existence of a link between a private action and an advantage conferred by a government is a necessary condition in order for an action by a private party to constitute a ‘requirement’<sup>57</sup>. A determination of whether private action amounts to a ‘requirement’ under Article III:4 rests, according to the Panel, on a finding that ‘there is a nexus between that action and the action of a government such that the government must be held responsible for that action.’<sup>58</sup> To establish such a nexus, India must show some degree of governmental intervention, direct or indirect, which resulted in the private action. In the case of those NGO Standards which are supported by governmental legislation or participation, such as the Nordic Swan Program which is supported by some Scandinavian Governments<sup>59</sup>, this nexus may be successfully established. But where an NGO Standard has been formulated with no direct governmental participation, establishing a nexus may be somewhat more difficult.

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<sup>56</sup> Report of the Panel in *United States-Tax Treatment for Foreign Sales Corporations*, WT/DS109/R, 8 October 1999, at paragraph 5.4. The Panel applied its previous rulings in the *Japan-Semi-conductors Case* on the scope of a ‘measure’ under Article XXIII:1(b) to determine the scope of the term ‘laws, regulations and requirements’.

<sup>57</sup> See the Report of the Panel in *Canada-Certain Measures Affecting the Automotive Industry*, WT/DS139/R, 11 February 2000, at paragraph 10.106 & 10.107.

<sup>58</sup> *Supra* note 57, at paragraph 10.106 & 10.107.

<sup>59</sup> See V.Vitalis, *Supra* note 5, at 2.

The term ‘like-product’ under Article III:4 should be interpreted in light of the over-arching purpose of the NT Clause and should therefore be understood as having a wider coverage than the term ‘like’ under Article III:2<sup>60</sup> The test laid down by the Appellate Body in the *Asbestos* Case for ‘like products’ under Article III:4 is four-fold, that is, products may be said to be like if they share the same physical properties, end uses, consumer perceptions and tariff classification. However, in the case of environmental requirements which share most if not all these characteristics, the predominant issue has been whether products which are essentially alike can be distinguished on the basis of the NPR-PPMs used in manufacturing them. The decision of the GATT Panel in the *Tuna Dolphins* case, although not binding, suggests that the ambit of Article III:4 extends only to measures that are applied to the *product* as such, and not to the process used to manufacture it<sup>61</sup>. While the issue has been a subject of intense debate, India has consistently maintained that product distinctions based on NPR-PPMs are not permissible under the WTO<sup>62</sup>. Consequently, India may, while questioning an NGO Standard (whether based on the use of NPR-PPMs or not), contend that products in question are ‘alike’ under Article III:4.

It is important to establish that the imported product has been accorded ‘less favourable treatment’ than the domestic product, in order to meet the requirements of Article III:4. The meaning of the term ‘less favourable treatment’ has been equated to the interpretation of the Article III:1 requirement that internal regulations are not applied so as to afford protection to domestic production<sup>63</sup>. Since the purpose of Article III is to protect *expectations* as to particular behaviour and not actual trade outcomes, it is not

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<sup>60</sup> See the *Asbestos Case*, Supra note 32, at paragraph 35.

<sup>61</sup> See the decision of the GATT Panel in the *Tuna Dolphins* case, Supra note 1, at paragraphs 5.41 to 5.44.

<sup>62</sup> Neither the WTO Panel nor the Appellate Body addressed the issue directly in the *Shrimp Turtles Case*, perhaps well aware of the sensitivity of the issue.

<sup>63</sup> See the *Asbestos* case, Supra note 32, at paragraph 100. Also see: B.M Hoekman and P.Mavroidis, *The WTO Legal Discipline*, unpublished Reading Materials, Columbia University School of Law, 2004 (available on file) where the authors comment that existing jurisprudence surrounding the use of the term ‘so as to afford protection’ (SATAP) is ‘probably one of the weakest areas in GATT/WTO jurisprudence’. Clearly, all parties to a dispute are disadvantaged by the lack of clarity on what constitutes SATAP.

necessary for a country to establish that an internal regulation either results in or was intended to promote protectionism<sup>64</sup>. Consequently, it is irrelevant whether (a) the application of a regulation within the markets of a particular country *results* in any actual ‘trade effect’; or (b) the application of a regulation was actually *intended* by its authors to be a protectionist measure. Instead, the benchmark for determining whether a measure accords less favourable treatment to an imported product is judged by whether both imported and domestic products are afforded an *effective equality of competitive conditions*<sup>65</sup>. Consequently, in the case of NGO Standards, India is free to argue that even if the actual application of such NGO Standards does not result in a significant denial of market access; and even if national governments in which such standards operated did not intend to restrict access to their own markets, as long as the NGO Standards result in discriminatory competitive conditions which deny them effective equality, they could fall foul of Article III:4<sup>66</sup>.

India could therefore, have possible recourse against the use of an NGO Standard under the National Treatment clause, if in addition to the other requirements, they are able to establish the existence of a nexus between the NGO Standard and the action (or inaction) of a State. The willingness of a WTO Panel to extend the scope of this ‘nexus’ beyond self-evident, government affiliation will determine whether even those NGO Standards with oblique governmental support; or the support of industry associations, can be regulated under the National Treatment clause. Consequently, the success of a contention made out under Article III:4 is dependent on how widely state attribution is interpreted. As discussed earlier, WTO Panels may be reluctant to look into the more

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<sup>64</sup> See the report of the GATT Panel in *US-Taxes on Petroleum and Certain Imported Substances*, L/6175, GATT Doc. BISD 34S/136, adopted on 17 June 1987 (hereinafter *Superfund Case*) at paragraph 5.1.9, where the Panel dismissed an argument by the US that their discriminatory taxation scheme did not constitute an Article III violation since the effects on the marketplace were negligible in light of the minor tax differential.

<sup>65</sup> See the Report of the Appellate Body in *Japan-Taxes on Alcoholic Beverages*, at p.15.

<sup>66</sup> While there is no precise definition of what constitutes an ‘unequal competitive condition’, in *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 25 September 1997, DSR 1997:II, 591 (hereinafter *EC Bananas III Case*), the Appellate Body noted that as a result of an EC practice relating to ‘hurricane licences’ whereby producers, producer organizations or operators were compensated for losses incurred during a hurricane, operators were provided an incentive to market EC bananas to the exclusion of third-country bananas thereby affecting competitive conditions in the market in favour of EC bananas.

oblique forms of governmental nexus; or examine whether the support of industry associations is responsible for the misuse of some discriminatory NGO Standards.

WTO Panels and the Appellate Body must in future disputes, be willing to look beyond an obvious nexus between an NGO Standard and the State. The increasing threat faced by Indian 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 NGO 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 an NGO 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 NGO Standards already in existence and its reputation concerning environmental issues. Instead, it has been proposed that any opposition to an NGO Standard should be based upon a challenge of the standard itself under the Agreement on Technical Barriers to Trade (TBT Agreement)<sup>67</sup>. Does the TBT Agreement regulate the use of NGO Standards; and if so to what extent?

#### **4 Using the TBT Agreement to regulate the use of NGO Standards**

The TBT Agreement replaced the GATT-era ‘Standards Code’ formulated during the Tokyo Round, and was introduced with the objective of ensuring 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 TBT Agreement is widely considered as being the most appropriate WTO Agreement, on the basis of which India can challenge product requirements; and TBT related claims are usually reviewed first in a dispute related to the use of Standards or Technical

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<sup>67</sup> Appleton, *Supra* note 32, at 254.

Regulations<sup>68</sup>. The TBT Agreement has however, remained relatively under-utilized by WTO Members; and the WTO dispute settlement mechanism has not examined the scope of its provisions despite having had occasion to do so in the past<sup>69</sup>. While a detailed analysis of the TBT Agreement is beyond the scope of this paper, the following section will look into the relevant provisions of the TBT Agreement and analyse whether Indian exporters have a remedy against the use of NGO Standards.

The TBT Agreement is based on the principle that WTO-member countries are free to apply product regulations to fulfil legitimate policy objectives such as protecting human health or the environment, provided that such regulations are not ‘more trade restrictive than is necessary’ and that they do not create ‘unnecessary obstacles to international trade’. The Agreement therefore effectively prevents product regulations from being used as disguised instruments of protectionism by looking into whether a less trade-restrictive mechanism could have been utilized to achieve the same policy objective. Countries are encouraged to utilize existing ‘international standards’ while formulating their domestic legislation; and any legislation made in accordance with such international standards is presumed (albeit debatably) to not constitute an unnecessary obstacle to trade. The scope of the TBT Agreement goes one step beyond the GATT Agreement since it does not confine its analysis only to whether a product regulation is trade restrictive; it also determines whether the product regulation *is not more trade restrictive than is necessary* for achieving a legitimate policy objective. The ‘Necessity Test’ provision in the TBT Agreement effectively allows India to contest the standard itself as being ill-suited to their conditions and consequently more trade restrictive than is necessary. NGOs could instead be persuaded to adopt less restrictive standards, adopt

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<sup>68</sup> The ‘obvious overlap’ between the operation of the GATT Agreement and the TBT Agreement makes it inevitable that claims are often made under both. The provision of specific agreements such as the TBT would prevail over the GATT Agreement in case of a conflict (according to the General Interpretative Note in Annex 1A to the Agreement Establishing the WTO). Furthermore, the decision of the Appellate Body in the *Asbestos* Case implies that TBT claims are examined before claims under the GATT Agreement.

<sup>69</sup> In the *Asbestos* Case the Appellate Body refrained from examining Canada’s claims under Articles 2.2, 2.3, 2.4 & 2.8 of the TBT Agreement, although it found the TBT Agreement to be applicable. The Appellate Body refrained from doing so because of the ‘novel’ character of Canada’s claims under the TBT Agreement which it had not explored earlier in any depth; and because the Appellate Body had not yet decided on the reach of the TBT Agreement, see the *Asbestos* Case, *Supra* note 32, at paragraphs 82 & 83.

relevant international standards where available, and to consult with domestic ‘standards regulators’ such as the Bureau of Indian Standards (BIS) in India when formulating standards that are likely to affect Indian industry. This would ensure that to the extent possible, NGO Standards conform to internationally accepted norms as accepted by international standard-setters such as the Codex Alimentarius Commission (Codex) and the International Standards Organization (ISO) and will reduce the potential for their misuse.

However, for NGO Standards to be disciplined under the TBT Agreement, the product regulations that they are responsible for formulating would first need to qualify as either a Technical Regulation or a Standard.

#### **4.1 NGO Standards as ‘Technical Regulations’ or ‘Standards’**

In order to make out a case for a violation of the provisions of the TBT Agreement, India must first establish that the NGO Standard in question is either a Standard or a Technical Regulation. The TBT Agreement distinguishes between product regulations that require mandatory compliance, that is, ‘Technical Regulations’ and all other requirements with which compliance is voluntary, that is, ‘Standards’<sup>70</sup>. The distinction between Standards and Technical Regulations extends beyond mere nomenclature as the TBT Agreement treats the two differently<sup>71</sup>. Technical Regulations

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<sup>70</sup> The term ‘Technical Regulation’ is defined in Annex 1 of the TBT Agreement as a ‘Document which lays down the product characteristics or their related processes and production methods, including the applicable administrative provision, 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.’ The term ‘Standard’ is also defined in Annex 1 as a: ‘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.’ *Explanatory note:* The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.

<sup>71</sup> Another important difference between a regulation being categorized as a Technical Regulation as compared to a Standard, is that under Article 2.9 of the TBT Agreement, Technical Regulations (but

are subject to stricter scrutiny under the Agreement, and for example, must comply with a two-fold test for trade restrictiveness under Article 2 of the TBT Agreement<sup>72</sup>; whereas in contrast, voluntary Standards do not have to comply with such stringent requirements and are instead obliged only to comply with the TBT Agreements' Code of Good Practice—a guiding framework for the formulation and application of standards<sup>73</sup>.

In order to establish that a measure is a Technical Regulation, it must satisfy three criteria: (a) the measure must be applicable to an identifiable set of products; (b) the measure must lay down more than one characteristic of the product concerned; and (c) compliance with it must be mandatory<sup>74</sup>. 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, that is, Technical Regulations that are formulated by the 'Central Government Bodies'<sup>75</sup> of WTO Member Countries (Article 2); and those that are formulated and applied by either 'Local Government Bodies'<sup>76</sup> or 'Non-Governmental Bodies' (Article 3). In making such a distinction, the TBT Agreement effectively *extends* the ambit of a States' 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 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'

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not Standards) that are adopted by Members must be notified by Members to each other through the WTO Secretariat, if such Regulations are not in conformance with international standards, or if the introductions of such Technical Regulations could result in a trade restriction.

<sup>72</sup> Article 2.2 of the TBT Agreement requires that: (i) Technical Regulations 'not be more trade restrictive than is necessary to fulfil necessary objectives', such as national security requirements, environmental protection etc.; and Article 2.4 & 2.5 when read together, require Technical Regulations to be in accordance with 'relevant international standards' to benefit from a rebuttable presumption of legitimacy.

<sup>73</sup> 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.

<sup>74</sup> See the Appellate Body Report in the *EC-Trade Description of Sardines*, WT/DS231/AB/R, 26<sup>th</sup> September, 2002 (*EC Sardines*), at paragraphs 175 and 176.

<sup>75</sup> 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.'

<sup>76</sup> Defined in Annex 1 to the TBT Agreement as a 'Government other than a central government (for example 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.'

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.

Therefore, it would seem that that the broad ambit of the term ‘Technical Regulations’ is not limited to governmental measures alone and measures that are adopted and implemented by other non-governmental entities can also be regulated as such under the TBT Agreement. Does this mean that all NGO Standards can potentially be regulated as Technical Regulations? In order to categorize an NGO Standard as a Technical Regulation, it would be necessary that in addition to satisfying the two general criteria first laid down in the *Asbestos* Case and described above, it must: (a) require mandatory compliance (according to the *Annex 1* definition of a Technical Regulation); (b) be formulated and implemented by a Non-Governmental Body (for it to qualify as a Technical Regulation under Article 3 of the TBT Agreement); and (c) not be based on the use of NPR-PPMs (the interpretation of the term ‘Technical Regulation’ favoured by most developing countries, including India). In the absence of any judicial interpretation on what constitutes ‘mandatory compliance’<sup>77</sup>; or what kinds of organizations could constitute a ‘Non-Governmental Body’, it is difficult to make out a watertight case for an NGO Standard to be termed as a Technical Regulation. Additionally, many NGO 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 India continues to be averse to their use. This would imply that all NGO Standards to the extent that they are based on NPR-PPM criteria, would not qualify as Technical Regulations and would therefore fall outside the scope of regulation under the TBT Agreement.

Notwithstanding the inherent definitional difficulties posed by the language of the TBT Agreement, India may perhaps argue that an NGO Standard is in effect a Technical

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<sup>77</sup> 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.



Regulation and should accordingly be regulated under Article 3 of the TBT Agreement on the grounds that: (i) their potentially trade-restricting effects do not leave Indian manufacturers with any real choice but to adhere to them, that is, they are *de facto* mandatory measures; and (ii) the term ‘Non-Governmental Body’ contained in Annex 1 should be broadly interpreted to include NGO Standards<sup>78</sup> since the objective of the TBT Agreement is to discipline the use of all trade-restricting product regulations. However, the exclusion of NPR-PPMs from the scope of the TBT Agreement would mean that only those NGO Standards (or parts of them) which are not based on such criteria, could be challenged as being inconsistent. India may also encounter considerable resistance to their categorization of NGO Standards as mandatory Technical Regulations as they are often perceived as being voluntary, consumer-driven initiatives and in the absence of any WTO precedent it would probably require a high degree of proof; and a pro-active WTO Panel to interpret them as mandatory instruments.

Assuming then, that India is unable to establish that an NGO Standard is mandatory and it consequently does not qualify as a Technical Regulation under Article 3 of the TBT Agreement, could it argue that the NGO Standard be termed as a voluntary Standard? After all, the use of Standards is 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.

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<sup>78</sup> A ‘Non-Governmental Body’ under the TBT Agreement, could be any entity ‘other than a central government body or a local government body, including (but not limited to) a non-governmental body which has the legal power to enforce a technical regulation’. The use of the word ‘including’ within the definition signifies that the categories and/or characteristics of a Non-Governmental Body are not exhaustive and could include organizations such as the FSC which have the legal power to enforce their standards upon signatories, through legally enforceable contracts.

In the absence of a clear definition, it is useful to look towards the operative provisions of the TBT Agreement in order to determine whether NGO Standards could fall within the ambit of its regulation. A plain reading of Article 4 of the TBT Agreement, which deals with the preparation, adoption and application of Standards, reveals that Standards set by central government standardizing bodies; local governments; or non-governmental standardizing bodies are all within the scope of regulation by the TBT Agreement. As is the case with the provisions relating to Technical Regulations discussed earlier, the level of obligations imposed upon Member countries depends on the entity responsible for the formulation of the standard. So while Members are on the one hand obliged to ensure that central government standardizing bodies accept and comply with the Code of Good Practice; they need only take reasonable steps to ensure that other standardizing bodies within their territory adopt and comply with the Code of Good Practice<sup>79</sup>. Therefore, from the construction of Article 4, it would seem that even requirements which are not strictly speaking formulated or implemented by the government of a WTO Member state, could qualify as a Standard under the TBT Agreement. However, whether requirements formulated by non-governmental entities such as the FSC and the MSC, could qualify as Standards would depend on the interpretation of the term ‘non-governmental standardizing body’; and whether such NGO Standards are based on NPR-PPM criteria.

It would seem that an NGO Standard (or parts of it) could indeed be challenged as a Standard under the TBT Agreement, provided that it did not use NPR-PPM related criteria. India can argue that the term ‘non-governmental standardizing body’ should be interpreted broadly to include NGOs since the opening paragraph of the Code of Conduct clearly states it is open to acceptance by ‘any standardizing body within the territory of a Member of the WTO’. Implicitly therefore, were an NGO such as the FSC which is responsible for the formulation of standards related to forestry products to operate within the territory of a WTO-Member country, it would be eligible to accept the Code of Good Practice; and it would be incumbent upon that WTO-Member country to use all

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<sup>79</sup> This differing level of obligation is analogous to the treatment of Technical Regulations under Articles 3 & 4 as discussed above and indicates the extension of a States’ responsibility over actions which are strictly speaking, not attributable to it; and a corresponding dilution in its obligations.

reasonable measures available to it, to ensure that the FSC complied with the Code of Good Practice. The failure by a WTO Member to ensure that a non-governmental standardizing body has complied with the Code of Good Practice is by itself sufficient grounds for a complaining WTO Member to invoke the dispute settlement mechanism under Article 14.4 of the TBT Agreement if it feels that its trade interests are significantly affected by such a failure.

### **Conclusion: Regulating NGO Standards - Doha and Beyond**

The past few years have seen developing countries including India make active use of the WTO dispute settlement mechanism to resolve several contentious trade issues. As tariff barriers are being knocked down in successive rounds of trade negotiations, India's attention is now being turned to non-tariff barriers which by very definition come in various shapes and sizes. Product standards, particularly those related to the protection of human health, safety and the environment are potential non-tariff measures, the use of which can severely undermine the trade advantage derived by Indian exporters from the multilateral trading process. The WTO legal instruments are likely to be used with increasing frequency to address such NTMs, and future cases will test the understanding of how far the WTO can go in regulating market activity, if the effect of such activity is detrimental to the trade interests of a majority of its' members. Past decisions of the GATT/WTO Panels and the Appellate Body indicate a willingness on their part to generously apply WTO trade rules to cases where some form of trade restriction or market distortion is established. Voluntary environmental standards are perceived by many developing countries, including India as market restricting mechanisms which distort consumer demand and present discriminatory and unnecessary obstacles to trade.

Nevertheless, as it stands today India has yet to make a single request for consultations or mount a legal challenge on the formulation or application of a NGO Standard within the WTO legal system. One of the factors which could account for the reluctance of most countries, including India to do so is that they are wary of legitimizing the use of NPR-PPM criteria within the WTO. Their apprehension is that by challenging

NGO Standards which are based on such criteria, as being either discriminatory or trade restrictive, they are implicitly acknowledging that *not all* NPR-PPMs are WTO-inconsistent *per se*. Since this could open the floodgates to the use of ‘non-trade related’ standards, such as labour and human rights, the inclusion of which India has repeatedly opposed within the WTO, it is averse to going down this route. The second reason why the use of NGO Standards continues to go unchallenged at the WTO could be certain inherent limitations within the TBT Agreement which make such a challenge difficult and which has resulted in the Agreement itself remaining vastly under-utilized. Various factors including the PPM controversy; the ambiguity in the interpretation of its terms, and an inadequate mechanism for risk assessment has made countries wary of invoking its provisions in disputes. So what does India need to do in order to formulate a consistent and effective strategy to discipline the use of errant NGO Standards?

To start with, it should acknowledge that not every legal challenge of a standard that is based upon NPR-PPM criteria is prejudicial to its traditional position on their non-acceptability within the WTO system. The Appellate Body has shown itself as remarkably adept at exercising judicial economy in past cases where environmental product requirements were challenged. In the *Shrimp–Turtles* dispute for example, the measure that was challenged by India and others was a US ban on the import of shrimp harvested without using turtle extruder devices (TEDs)—arguably a non-product related PPM criteria itself. Nevertheless, the Appellate Body was able to rule, based on the individual merits of the measure (and the application of the Chapeau to GATT Article XX) that it was arbitrary, discriminatory and consequently WTO-inconsistent. In doing so, the Appellate Body’s decision neither legitimized the use of NPR-PPM criteria; nor did it create a legal precedent for the future use of product standards based on such criteria. Instead it evaluated the measure as it would any other, against the parameters contained in the GATT Agreement. There is every likelihood that the Appellate Body will show similar regard for India’s sensitivities in future disputes, and will judge a complaint relating to the use of an NGO Standard under the GATT Agreement on the basis of the restriction that the NGO Standard represents, and not the criteria used in setting that standard.

The controversy surrounding the use of NPR-PPM criteria is also in some part, responsible for the reluctance shown by India to base its legal challenges upon the TBT Agreement in a dispute. This scepticism is because the TBT Agreement as it stands today is read by many developing countries, including India to *exclude* any product standard or regulation which is based on NPR-PPM criteria. What this effectively means is that product requirements (including NGO Standards) which use NPR-PPM criteria may not, to the extent that they are based on such NPR-PPM criteria, be disciplined under the TBT Agreement. Clearly, the efficacy of the TBT Agreement as an instrument to curb the use of trade-restricting NGO Standards shall remain limited until such time that the PPM-debate is not resolved satisfactorily.

Despite its inherent limitations, the TBT Agreement was intended to be the primary instrument by which WTO Member countries could discipline technical barriers to trade and it has been suggested and rightly so, that it offers the soundest basis for mounting a legal challenge against the use of NGO Standards. The structure of the TBT Agreement indicates that its drafters had clearly identified the risks presented by the arbitrary use of technical barriers, including those created by non-governmental entities; and had affixed varying degrees of responsibility upon WTO Members to regulate the use of such barriers to trade. Any ambiguity in the interpretation of its provisions should be resolved keeping this in mind. To restrict the interpretation of terms such as ‘non governmental bodies’, ‘standardizing bodies’, ‘Standards’ and ‘Technical Regulations’ in such a manner that NGO Standards are wholly exempted from regulation, would subvert the very purpose for which the TBT Agreement was formulated. However, any interpretation of these terms is likely to raise larger questions of policy, including whether WTO Members had intended for their responsibility to be extended to standards formulated by non-governmental organizations. Issues of such wide-ranging consequence would best be addressed by the WTO and its membership, instead of being left to the dispute settlement mechanism.

The drafters of the TBT Agreement seem to have foreseen such an eventuality and took the unusual step of providing for a ‘review’ mechanism under Article 15 of the

Agreement which finds no equivalent in the SPS Agreement. Under Article 15, the TBT Committee (established by the TBT Agreement) provides WTO Members with an opportunity to ‘review the operation and implementation of this Agreement’ once every three years (the Triennial Review of the TBT Agreement), with a view to ‘recommending an adjustment of the rights and obligations of this Agreement...to ensure mutual economic advantage and balance of rights and obligations’. After conducting such a review, the Committee may make proposals for the amendment of the text of the TBT Agreement to the Council for the Trade in Goods. The review mechanism allows India the opportunity to resolve the ambiguities surrounding the interpretation of some contentious terms of the Agreement and propose the introduction of amendments to the text of the Agreement itself. However, in the past the TBT Committee has failed to suggest any amendments to the text of the Agreement during the course of its triennial reviews. Discussions on the issue were first initiated at the First Triennial Review<sup>80</sup> but no amendments or concrete solutions have been proposed as yet. The Third Triennial Review went to the extent of acknowledging that some standards (particularly those related to voluntary labelling requirements) were being formulated by bodies that are not commonly recognized as standardizing bodies but stopped short of proposing an amendment to the text. Instead, WTO Members were called upon to encourage such organizations to adhere to the Code of Good Practice<sup>81</sup>. The report of the CTE to the Cancun Ministerial highlights the need for clarification on some basic issues such as: the role of the WTO in facilitating the use of voluntary eco-labels; the feasibility of suggesting that voluntary eco-labels be subject to a notification procedure; and what contribution, the WTO could provide considering work done in other fora, such as the ISO<sup>82</sup>.

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<sup>80</sup> Report of the TBT Committee on The First Triennial Review, G/TBT/5, 19 November 1997, at paragraph 16; and in the Report of the TBT Committee on the 2<sup>nd</sup> Triennial Review, G/TBT/9, 13 November 2000 at p. 10; and the TBT Committee noted the concern voiced by several Members on the use of eco-labelling requirements and emphasized that they should not become disguised restrictions on trade.

<sup>81</sup> See Report of the TBT Committee on its Third Triennial Review, G/TBT/13, 11 November 2003, at p.5.

<sup>82</sup> See Report of the Committee for Trade and Environment, WT/CTE/8, Supra note 13, at pg.9.

If India is resolved to regulate the proliferation of NGO Standards, then an amendment to the text of the TBT Agreement is perhaps the most effective way of removing any ambiguity or allowing scope for any subsequent misinterpretation by the dispute settlement mechanism. Previous discussions at the CTE and the TBT Committee reflect a desire on the part of many WTO Members to address this issue, and India would do well to take the lead. A good starting point would be to discuss how the SPS Agreement deals with voluntary, private initiatives aimed at formulating standards related to human health or safety. The SPS Agreement has been far more widely invoked in disputes than the TBT Agreement, contains a stringent risk assessment procedure and contains less definitional ambiguities. Perhaps a reflection of some of the mechanisms and language contained in the SPS Agreement would go a long way in strengthening the provisions of the TBT Agreement and consequently, in ensuring that NGO Standards are not misused as disguised instruments of protectionism.

In addition to discussions at the TBT Committee, India could push for a more ambitious work agenda at the CTE within the ongoing Doha round negotiations. Paragraph 32(i) and (iii) of the Doha work programme could both be utilized as the basis for far-reaching discussions on how the WTO should address the market restrictions faced on account of voluntary environmental standards, including eco-labelling schemes. Paragraph 32(i) of the Doha Declaration mandates discussions on the effect of environmental measures on market access, and could be used to discuss generally, the effect of NGO Standards on market access for Indian manufacturers; and Paragraph 32(iii) could be used to highlight the specific problems that India and other developing countries face as a result of the increasing use of voluntary eco-labelling schemes. While past discussions at the CTE on Paragraph 32(iii) have included discussions on the use of voluntary standards such as eco-labelling, India needs to make efforts to use its considerable negotiating clout to focus the attention of several developing country Members towards clarifying the contentious provisions within the TBT Agreement; and towards resolving the PPM controversy. Such work will involve the joint efforts of the CTE and the TBT Committee, and both should be involved in discussing these issues. In order to achieve this, India and other developing countries would do well to abandon

their traditional reluctance to engage pro-actively in environmental negotiations at the WTO and productively utilize the various WTO negotiating groups and committees in order to advance their agenda. It is time that India went from being a defender to a *demandeur* on trade and environment issues such as these, which are of vital significance to it.



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