

# Non-Governmental Bodies in the Agreement on Technical Barrier on Trade

*Apurba Khatiwada\**

## 1. Introduction

The General Agreement on Tariffs and Trade (GATT) and its successor, the World Trade Organisation (WTO), have been quite successful in reducing tariff barriers in international trade.<sup>1</sup> However, the successful reduction of tariff barriers can result, and indeed did result, in the use of various nontariff barriers to trade as an alternative form of trade protectionism.<sup>2</sup> The remarkable success in tariff cuts, combined with the failure to eliminate nontariff barriers during the Kennedy Round of negotiations, meant nontariff barriers have proved to be major impediments to international trade in the post-Kennedy Round era. As observed by a writer after the end of the Kennedy Round, 'the lowering of tariffs has, in effect, been like draining a swamp. The lower water level has revealed all the snags and stumps of non-tariff barriers that still have to be cleared away...'<sup>3</sup> Thus, the negotiators in the Tokyo and Uruguay Rounds started the task of clearing away the so-called snags and stumps and concluded various Agreements to eliminate nontariff barriers.

The negotiators in the Tokyo and the Uruguay Rounds were concerned that the lowering of tariff rates and increase in regulation and standardisation activities among states could spell the use of non- tariffs, such as technical

---

\* Assistant Professor, Nepal Law Campus, Faculty of Law, Tribhuwan University, & Advocate.

<sup>1</sup> MICHAEL KOEGELE & WOLFRUM et al. (eds.) *WTO – TECHNICAL BARRIERS AND SPS MEASURES*, Koninklijke Brill NV, Lieden, 170, (2007), PETRIS C MAVROIDIS, *THE GENERAL AGREEMENT ON TARRIFS AND TRADE*, OUP, Oxford, 7-9, ( 2005).

<sup>2</sup> Alan O. Sykes, *The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets*, 2 *JOURNAL OF INTERNATIONAL ECONOMIC LAW* 49, (1999).

<sup>3</sup> B.A. Jonejs, *New York Times*, July 10, 1968 qtd. in Robert E. Baldwin, *Non-tariff distortions of International Trade*, The Brookings Institute, Washington DC, 2, ( 1971).

barriers to trade, to further protectionist objectives<sup>4</sup>. Mindful of the risks of reversing past successes in opening up of the international trade, the Agreement on Technical Barriers to Trade (TBT) was concluded during the Tokyo Round and was further improved, clarified and expanded during the Uruguay Round negotiations.<sup>5</sup>

The TBT Agreement essentially prohibits Members from using technical barriers to 'create unnecessary obstacles to international trade'<sup>6</sup> and to discriminate between products of different national origins,<sup>7</sup> while acknowledging the rights of the Members to determine adequate levels of protection of life, health, and environment. As such, the TBT Agreement seeks to balance a Member's right to prepare and assess technical regulations, standards and conformity assessment procedures (hereinafter, technical barriers) with market access. The TBT Agreement also tries to ensure the harmonised use of technical barriers by requiring Members to adhere to relevant international standards.<sup>8</sup>

A more slippery issue under the TBT Agreement, however, is the disciplining of noncompliance with the provisions of the TBT Agreement by non-central government bodies, especially non-governmental bodies (NGBs). Only countries or custom unions can be Members of the WTO. The WTO Agreements, including the TBT Agreement, can only define the obligations of Members and cannot directly enforce obligations of non-state entities such as NGBs.<sup>9</sup> In addition, save for those Members that have a constitutional framework for the direct implementation of the Agreement, the Agreement does not allow a direct effect. Nevertheless the TBT Agreement makes unprecedented reference to NGBs and rules relating to their standardisation activities. Perhaps, no other WTO Agreement has such detailed and extensive provisions dealing with NGBs as has the TBT Agreement. Therefore, the legal status and the role of NGBs in the TBT Agreement have become central to understanding the nature of and the obligations provided in the TBT Agreement.

<sup>4</sup> KOEGELE *Supra* note 2, SUSAN G MARKEL, MTN AGREEMENT, TERENCE P. STEWART (ed), THE GATT URUGUAY ROUND: A NETOTIATING HISTORY(1986-1992), Kluwer Law and Taxation Publishers, Boston, (1993).

<sup>5</sup> *Ibid.*

<sup>6</sup> AGREEMENT ON TECHNICAL BARRIERS ON TRADE Article 2.2.

<sup>7</sup> *Ibid.*, Art. 2.1.

<sup>8</sup> *Ibid.*, Art. 2.4., *European Communities – Trade Description of Sardines* WT/DS231/AB/R adopted on 26 September 2002.

<sup>9</sup> Petros C. Mavroidis & Werner Zdouc, *Legal Means to Protect Private Parties' Interests in the WTO – The Case of EC New Trade Barriers Regulation*, 1 *Journal of International Economic Law* 407 (1998).

Since NGBs are not party to the TBT Agreement and as such cannot be bound by the provisions of the Agreement, the TBT Agreement only defines the obligations of Members. Therefore, so far as the TBT Agreement is concerned, the regulation of NGBs takes the form of the regulation of Members. However, it is not so simple in practice.

The TBT Agreement distinguishes a Member's obligations in relation to central government bodies and non-central government bodies, including NGBs. The obligations of a Member to ensure compliance with the provisions of the TBT Agreement by NGBs are also scattered in the Agreement and, unlike the direct language used in defining a Member's obligations in relation to central government bodies, qualified language has been used in defining obligations of a Member in relation to NGBs.<sup>10</sup> Hence, obligations of a Member to ensure compliance with the provisions of the TBT Agreement by NGBs are only viewed as "best effort" or "aspirational" rather than hard or justiciable obligations.<sup>11</sup> In the same vein, the qualified language and the non-party-status of NGBs have also prompted some to reject any possibility of holding a Member responsible for the nontariff barriers created by NGBs. For instance, the European Communities have stated that 'Global GAP standards were not official EU requirements and even if they went beyond official EU regulations, they were not in conflict with EU legislation.' (Wolff and Scannell 2008). Santiago M. Villalpando writes:

...the Members' obligations under the Agreement on Technical Barriers to Trade are worded in such terms that they appear to uphold a criterion of attribution with regard to conduct of territorial units and other entities that is far more restrictive than the general principles of the law of responsibility.... This approach ... holds some analogy with the classic "federal clause" in other treaties and could be considered to set aside the application of the general rules of attribution in this regard.

In addition to the confusion prevalent in regard to possible regulatory space available to govern NGBs, there is another fundamental problem in the TBT Agreement regarding the role of NGBs itself. The TBT Agreement defines NGBs very narrowly as requiring features uncharacteristic of a non-state private

<sup>10</sup> AGREEMENT ON TECHNICAL BARRIERS ON TRADE, Arts. 2, 3, 4, 5, 6, 8, and 10.

<sup>11</sup> Santiago Villalpando, *Attribution Of Conduct To The State: How The Rules Of State Responsibility May Be Applied Within The WTO Dispute Settlement System*, 5 JOURNAL OF INTERNATIONAL ECONOMIC LAW, 393 (2002); Steven Bernstein & Erin Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 JOURNAL OF INTERNATIONAL ECONOMIC LAW, 575 (2008).

entity. In fact, this problem of definition is so acute that it leaves almost all private standardising bodies, including those registered in the TBT Committee as “Non-Governmental Bodies”, outside the scope of the TBT Agreement itself. There is a stark normative incoherence between the definition and the real nature of ‘Non-Governmental Bodies’ and their functions. This, in turn, is dangerous as technical barriers created by most of the private standardising bodies cannot be regulated.

Bearing this in mind, this essay studies the nature of NGBs and the possible regulatory space available to regulate NGBs in the TBT Agreement. It first identifies the potential problems that arise out of the nature of NGBs as defined in the TBT Agreement along with the potential implications of these problems. Then, notwithstanding the flawed definition of NGBs, it proceeds by using the existing provisions in the TBT Agreement and analyses the regulatory space available in regard to NGBs. In doing so, this essay first argues against the interpretation of a Member’s obligations as mere “best effort”. Second, corollary to the first argument, the essay shows that the breach of a Member’s obligations in regard to NGBs is justiciable according to the TBT Agreement.

## 2. Technical Barriers to Trade and NGBs

Standardisation ensures product compatibility by the harmonisation of standards which, in turn, contributes to the better economies of scale, and improvement in the functioning of the market<sup>12</sup>. On the consumer side, standardisation is closely associated with consumer welfare, human health and safety, simplified transaction<sup>13</sup>, assurance of low risk, predictability, information and so forth.<sup>14</sup>

In this context, product standards around the world are increasingly written by private or semi-private organisations<sup>15</sup>. Governments trust private

<sup>12</sup> Alessandra Casella, *Product Standards and International Trade. Harmonization through Private Coalitions?* 54 KYKLOS 243, 245 (2001).

<sup>13</sup> OECD, Working Party on Agricultural Policies and markets: Interaction of Public and Private Standards in the Food Chain, OECD Doc. No. AGR/CA/APM, 21, 5. (2006)

<sup>14</sup> John S. Wilson, *Standards and Developing Country Exports: A review of Selected Studies and Suggestions for Future Research*, 4 JOURNAL OF INTERNATIONAL AGRICULTURE TRADE AND DEVELOPMENT 35 (2008); Spencer Henson, *The Role of Public and Private Standards in Regulating International Food Markets*, 4 JOURNAL OF INTERNATIONAL AGRICULTURE TRADE AND DEVELOPMENT 63, 64 (2008); World Bank, *Food Safety and Agricultural Health Standards: Challenges and Opportunities for Developing Country Exports*, January 10, 2005, available at (on March 6, 2017).

<sup>15</sup> HARM SCHEPEL, CONSTITUTING PRIVATE GOVERNANCE REGIME: STANDARD BODIES IN AMERICAN LAW qtd. CHRISTIAN JOERGES et al. (eds.), TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, Hart Publishing, Oxford, 164, (2004).

standards<sup>16</sup>; Freeman 2000, 636-49), academics generally defend their legitimacy<sup>17</sup>, markets rely on them to function properly<sup>18</sup>, and national standards are formulated with their cooperation. The author presents empirical evidence on how private firms have helped formulate national standards in some of the biggest markets in the world, such as the United States of America, United Kingdom, Germany.<sup>19</sup> According to Schepel 'very few domestic regulatory standards are written by public agencies under administrative procedure: they usually draw extensively on private standards. This is mainly a matter of convenience and of lack of public resources and expertise'<sup>20</sup>. Many developed economies, such as the United States and the EU, place great value on private standardisation. The US law even gives primacy to the standards developed by private consensus organisations over standards adopted or recognised by the federal government. United States Code, 15 USCS § 272 para 3. The provision reads, '... to coordinate the use by Federal agencies of private sector standards, emphasizing where possible the use of standards developed by private, consensus organizations'.<sup>21</sup> The EU largely benefited from private standardisation in achieving 'common rules for the single market'<sup>22</sup>. Such developments in the US and the EU suggest their increasing willingness to trust private standardisation and the growth and influence of private standardisation in international trade.

The extensive references and provisions relating to NGBs in the TBT Agreement is, therefore, essentially a recognition of one important fact: NGBs are crucial to the problem of technical barriers to trade. Leaving NGBs outside the scope of the TBT Agreement may prove detrimental to the very objectives of the

<sup>16</sup> Alessandra Casella, *Product Standards Coalitions in a Market without Borders*, NBER Working Paper Series, National Bureau of Economic Research, December 1996; SCHEPEL, Supra note 16, Jody Freeman, *The Private Role in Public Governance*, 75 N. Y. U. L. Rev. 543, 636-649 (2000).

<sup>17</sup> SCHEPEL, supra 28; HARM SCHEPEL, *The Empire's Drains: Sources of Legal Recognition of Private Standardisation Under the TBT Agreement* qtd Christian Joerges and Ernst-Ulrich Petersmann (eds.) *Constitutionalism, Multilevel Trade Governance and Social Regulation* Hart Publishing, Oxford, (2006); Errol Meidinger, *Law and Constitutionalism in the Mirror of Non-Governmental standards: Comments on Harm Schepel* in Christian Joerges et al. (eds.) *Transnational Governance and Constitutionalism*, Hart Publishing, Oxford, (2004).

<sup>18</sup> SCHEPEL, supra 18, Stephen J. Kobrin, "The Architecture of Globalization: State Sovereignty in a Networked Global Economy," JOHN DUNNING (ed.), *GOVERNANCE, GLOBALIZATION AND INTERNATIONAL BUSINESS*, OUP, Oxford and New York, (1997) 154 qtd. Rodney Bruce Hall & Thomas J. Biersteker (eds.), *THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE*, CUP, Cambridge, at 9, (2002).

<sup>19</sup> CASSELLA Supra note 13, 257-262.

<sup>20</sup> SCHEPEL, supra 18, 397.

<sup>21</sup> United States Code, 15 USCS § 272 para 3. .

<sup>22</sup> Michelle Egan, *Constructing a European Market – Standards, Regulation, and Governance* (OUP, Oxford, 133-165, 2001) 133-165; Jeanne-Mey Sun and Jacques Pelkmans, *Regulatory Competition in the Single Market*, 33 JOURNAL OF COMMON MARKET STUDIES 67 (1995)

Agreement. NGB's involvement in the standard-setting process is common. Since the establishment of the WTO, 162 standardizing bodies from 122 Members have accepted the Code of Good Practice for the Preparation Adoption and Application of Standards in Annex 3 of the TBT Agreement (Code of Good Practice), and among them, 64 are non governmental standardizing bodies.<sup>23</sup> Apart from private standardising bodies, individual firms such as supermarkets and other retailers also set their own standards. For example, according to the SPS Committee, many supermarket and retail chains such as, TESCO, Heinz, McDonalds, Carrefour, Marks and Spencer, have their own private product standards.<sup>24</sup>

However, private standardisation poses few distinct difficulties in reconciling the rationale of standardisation and enforcement of such standardisation in the form of binding rules of international trade. Firstly, unlike governmental standardisation, private standardisation does not have a separate source of legitimacy under international law. They have to rely upon international agreements concluded by states. Such international agreements, in turn and like the TBT Agreement, only define rights and obligations of state parties not private standardising bodies, making it difficult to regulate them.

Secondly, the trade restrictive effects of technical barriers created by NGBs are the same as that of governmental technical barriers.<sup>25</sup> Technical barriers can become instruments of protectionism when they are used to discriminate between domestic and foreign products. The compliance costs of technical barriers, which according to the World Bank, could be 'decisive for particular firms and countries'<sup>26</sup>, may also prove trade-restrictive. Alan O. Sykes has broken down the compliance cost of meeting regulations in context of what he calls 'Regulatory heterogeneity' into: Inherent differences in compliance

<sup>23</sup> WTO-Committee on Technical Barriers to Trade, List of Standardizing Bodies that have Accepted the Code of Good Practice for the Preparation, Adoption and Application of Standards since 1 January 1995, G/TBT/CS/2/Rev.16 (1 February 2010).

<sup>24</sup> WTO-Committee on Sanitary and Phytosanitary Measures, Effects of SPS-Related Private Standards – Descriptive Report, G/SPS/GEN/932 (15 June 2009).

<sup>25</sup> Miet Maertens & Johan F.M. Swinnen, *Standards as Barriers and Catalysts for Trade, Growth and Poverty Reduction*, 4 JOURNAL OF INTERNATIONAL AGRICULTURE TRADE AND DEVELOPMENT 47, 49-51 (2008); Grace Chia-Hui Lee, *Private Standards and their Impacts on Developing Countries*, European Commission DG Trade Unit G2, available at [http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc\\_127969.pdf](http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_127969.pdf) (accessed on March 4, 2017); Samir R. Gandhi, *Disciplining Voluntary Environmental Standards at the WTO: An Indian Legal Viewpoint*, INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATION, WORKING PAPER No. 181 (2006).

<sup>26</sup> Keith E. Maskus et al, *The cost of Compliance with Product Standards for Firms in Developing Countries: An Econometric Study*, The World Bank, Policy Research Working Paper Series #3590 (2005).

costs due to differences in regulatory stringency, Added requirements for foreign firms, costs of ‘surprise’, Redundancy costs, Loss of scale economies and input economies, Information costs, Conformity assessment costs. Sykes (1999), since many small producers, especially those from developing countries, may not be able to invest to meet the standard. Similarly, an OECD study<sup>27</sup> has also shown that such additional compliance costs can be as high as 10 percent of the total investment made by the producer. Technical barriers may also prove trade restrictive when applied inconsistently, which may deny manufacturers economies of scale and create market fragmentation.<sup>28</sup>

Apart from the general trade restrictive effects, private technical barriers may exist in a situation of policy void, that is, when national and international regulation is absent or weak<sup>29</sup>. Thus, they may have to function in the absence of national or international reference and scrutiny, which may leave room for unfettered discretion in determining the level of regulations. Furthermore, private technical barriers are likely to be more specific, prescriptive, extensive, and stringent than governmental regulation and may also expand the scope of activities regulated.<sup>30</sup>

The complain that Saint Vincent and the Grenadines’ brought before the SPS Committee regarding the operation of a EurepGAP scheme in relation to trade in bananas with supermarkets in the United Kingdom,<sup>31</sup> is a particularly telling example of the potential impact and significance of this increasing use

<sup>27</sup> OECD, *An Assessment of the Costs for International Trade in Meeting Regulatory Requirements*, TD/TC/WP(99)8/FINAL (OECD, Paris 2000).

<sup>28</sup> Damien A. A. Geradin, *Trade and the environment in European Community and United States law. A study of the tension between free trade and state environmental policies with particular reference to the areas of waste, product standards and process standards*, Ph.D. Dissertation Submitted to the University of Cambridge, 2, ( 1996).

<sup>29</sup> Steven Bernstein & Benjamin Cashore, *Can non-state global governance be legitimate? An analytical framework*, 1 *Regulation & Governance* 347 (2007); Bernstein & Cashore cite M Howlett, *Managing the “Hollow State”: Procedural Policy Instruments and Modern Governance*, 43 *Canadian Public Administration* 412–431(2000); V Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment for International Peace, Washington, DC. 2001); N Gunningham, RA Kagan, D Thornton, *Shades of Green: Business, Regulation, and Environment* (Stanford University Press, Stanford 2003); JG Ruggie, *Reconstituting the Global Public Domain – Issues, Actors, and Practices*, 10 *European Journal of International Relations* 499–531 (2004).

<sup>30</sup> Spencer Henson & John Humphrey, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, Joint FAO/WHO Food Standards Programme 2009, Executive Summary para 10, 3-4; Chia-Hui Lee, *supra* (n. 41); WTO-Committee on Sanitary and Phytosanitary Measures, *Effects of SPS-Related Private Standards – Descriptive Report*, WTO Doc. No. G/SPS/GEN/932 (15 June 2009).

<sup>31</sup> WTO-Committee on Sanitary and Phytosanitary Measures, *Summary of Meeting held on 29-30 June 2005*, G/SPS/R/37/Rev.1 (18 August 2005).

of private standards. Not only was this case the first of its kind, namely a complaint against a private entity's rather than a Member's measure, but the subsequent discussions of the issue have also indicated that it is a concern many Members share, and that it is not just an isolated instance but can have considerable consequences beyond the SPS Agreement.<sup>32</sup> Since the filing of the complaint in the SPS Committee, many issues, such as the role of private entities in the WTO, especially in the implementation of the SPS and the TBT Agreement, have come to the forefront of discussions and the whole issue has invited serious attention.

Private entities that create technical barriers have become important actors in the regulation of international trade. According to the TBT Agreement, NGBs can exercise almost the same authority as the central government bodies of Members. In addition, NGBs can assess standards and technical regulations prepared by central government bodies.<sup>33</sup> And given that technical barriers can have serious effects on international trade, it makes the role of NGBs all the more significant.

However, the very definition of NGBs in the TBT Agreement may pose a challenge in their regulation. The TBT Agreement defines NGBs as 'body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.'<sup>34</sup> Legal power to enforce a mandatory technical regulation suggests exercise of a public power. For example, in *EC – Asbestos (European Communities – Measures Affecting Asbestos and Asbestos-Containing Products)* adopted on 5 April 2001, WT/DS135/AB/R) the Appellate Body found the French Decree concerning asbestos as a technical regulation according to the TBT Agreement. And the Decree was, according to the French Penal Code, enforceable through criminal sanctions. For a private standardising body to be defined in such a manner is bit odd. The definition suggests NGBs should have the legal power to carry out a function normally undertaken by governments. This may not, necessarily, be a problem if Members grant such authority to NGBs. However, in practice, private standardising bodies do not generally exercise such power. In fact, none of the standardising bodies

---

<sup>32</sup> WTO-Committee on Sanitary and Phytosanitary Measures, Private Standards and the SPS Agreement G/SPS/GEN/746 (24 January 2007); Submission by the United Kingdom to the Committee of Sanitary and Phytosanitary Measures, G/SPS/GEN/802, (9 October 2007); Statement by Uruguay at the Meeting of 2-3 April 2008, G/SPS/GEN/843 (21 May 2008).

<sup>33</sup> TBT Agreement, Articles 5, 6, and 8.

<sup>34</sup> *Ibid*, Annex I para 8.



registered in the TBT Agreement as an NGB even prepare, adopt and implement, let alone enforce technical regulation. This is very significant. It means those standardising bodies do not fall under the definition of the TBT Agreement and thus cannot be regulated, nor does a Member have any obligation to ensure compliance with the TBT Agreement by such bodies. Therefore the present definition of NGBs threatens the efficacy of the entire set of rules provided in the TBT Agreement to regulate private technical barriers.

It is difficult to understand why the TBT Agreement defines a Non-Governmental Body in the manner it does. The definition was accepted in the Tokyo Round without any debate. For the majority of the Tokyo Round negotiations, the drafts of the Code used the expression 'Regulatory Body' instead of 'Non-Governmental Body'. Regulatory body, on the other hand, was defined to include either a governmental or non-governmental body having the legal power to enforce technical regulation.<sup>35</sup> Then, at the very last stage of negotiations, the expression 'Regulatory Body' was replaced by 'Non-Governmental Body'. However, the definition retained the section regarding legal power to enforce technical regulation. That is, the final text implicitly accepted that NGB should have the same substantive power as a 'Regulatory Body' (which by definition could include governmental bodies).

Notwithstanding the existing perplexity apparent due to the definition, the nature of a Member's obligation in relation to is dealt with in the following chapter. However, beyond legal obligations of Members to ensure compliance, the definition of NGBs can have an important bearing on the implementation of the Agreement itself. The necessity of possessing the legal power to enforce technical regulation, even when a standardising body only prepares, adopts and implements standards defeats the very purpose of private standardisation. It excludes most of the standardising bodies from the application of the TBT Agreement and also makes it very difficult for those standardising bodies to satisfy the terms of the definition. Furthermore, it is difficult to understand why a standardising body needs to have any legal power to enforce technical regulations. Such a requirement has only served to make the TBT Agreement non-applicable in the case of most private standards and technical regulations.

Perhaps during the Tokyo Round, provisions relating to NGBs were not considered that significant, therefore a negligent and deeply problematic definition found its way into the TBT Agreement. What is even more astonishing

---

<sup>35</sup> GATT, Draft Code of Conduct for Preventing Technical Barriers to Trade, MTN/NTM/W/150 (29 March 1978), Annex I para. 8.

is that during the Uruguay Round, when there was so much discussion on private standardising bodies and some important amendments to the Agreement, the definition of NGBs managed to avoid any scrutiny. As stated earlier the flawed definition of the NGBs has the potential to make the provisions intended to govern private technical barriers inapplicable in practice.

### 3. The Nature of a Member's obligation

The TBT Agreement provides that Members 'shall take such reasonable measures as may be available'<sup>36</sup> to ensure compliance by NGBs with the provisions of Article 2, 5, 6 and the Code of Good Practice. This language differs from the more direct and clear language used while defining the obligations of Members in relation to central government bodies. The TBT Agreement in relevant provisions provides that Members 'shall ensure'<sup>37</sup> compliance with the provisions of the TBT Agreement by central government bodies. This difference in language has prompted interpretation of a Member's obligation in relation to NGBs as simply "best effort" or "secondary" obligation.<sup>38</sup> Thus, an obligation limited only to the extent of a *bona fide* attempt to ensure compliance, without much regard to the actual compliance by NGBs.

Indeed, the two descriptions of obligations are different. On their own, obligations of Members with respect to central government bodies are clearer than obligations with respect to NGBs. Thus, simply on the basis of the difference in language, it can be argued that obligations of Members with respect to NGBs are "best effort" obligations, requiring a mere *bona fide* attempt to ensure compliance. But in reality the TBT Agreement does not leave obligations of a Member in respect to NGBs to a *bona fide* attempt or best effort.

The TBT Agreement has two very crucial features that flout the idea of merely aspirational or "best effort" obligations of a Member. Firstly, apart from the obligation to notify, the TBT Agreement stipulates the same standard of compliance for central government bodies and NGBs. Secondly, a Member is equally responsible for the failure of both central government bodies and

<sup>36</sup> TBT Agreement, Articles 3.1, 4.1, 8.1.

<sup>37</sup> Ibid Articles 2.1, 4.1, 5.1.

<sup>38</sup> WTO: Note by the Secretariat on the Negotiating History of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards, and Process and Production Methods unrelated to Product Characteristics WTO Doc. No. WT/CTE/W/10-G/TBT/W/11, (29 August 1995); WTO, Submission by the United Kingdom to the Committee of Sanitary and Phytosanitary Measures, WTO Doc No. G/SPS/GEN/802, (9 October 2007); Markel (1993), *supra* (n. 5), 1069; Ludivine Tamiotti, Article 3 TBT, in Rudiger Wolfrum et al. (eds) *WTO – Technical Barriers and SPS Measures*, (Koninklijke Brill NV, Lieden 2007) 238.

NGBs in abiding by the TBT Agreement.<sup>39</sup> In fact, the Agreement judges the compliance with the obligations of Members in relation to NGBs in terms of the ‘satisfactory results’ and effects on trade interest of other Members.<sup>40</sup> Furthermore, the results should be the same as a Member is expected to obtain under the TBT Agreement.<sup>41</sup>

### 3.1. Nature of Obligation

The disparate language that defines obligations of Members with respect to NGBs in qualified terms, is an introductory or preambulatory provision and does not reflect the entire obligation. In addition to the indirect language the TBT Agreement provides clear, determinate and direct provisions that reject the idea of mere “best effort” obligations and suggests that Members have direct, positive and enforceable obligations, even in relation to NGBs. These provisions also hold Members responsible for the noncompliance of NGBs with the provisions of the TBT Agreement.

Article 3.1 stipulates that NGBs should abide by the same standard as laid down in Article 2, except the obligation to notify under paragraphs 9.2 and 10.1. That is, there is no difference in the substantive obligations of NGBs from those of the central government bodies. The qualified language in the first part of Article 3 is directed at Members which provides flexibility in ensuring compliance with the provisions of Article 2 by NGBs. In other words, the qualified language leaves open the question of how to ensure compliance by NGBs to a Member. However, there is no flexibility in what to comply with and whether or not Members have discretion to ensure compliance. The TBT Agreement further sets the end result, which Members have to achieve without any qualification. Thus, reading the qualified language in the TBT Agreement as commending a merely “best effort” obligation does not represent the true essence of the provisions. The Australian High Court, when faced with a similar provision<sup>42</sup> in the World Heritage Convention, has also noted ‘there would be little point in adding the qualifications “in so far as possible” and “as appropriate for each country” unless the Article imposed an obligation.’ The High Court then held that such language creates discretion as to the manner of performance and not discretion as to performance itself.<sup>43</sup>

<sup>39</sup> TBT Agreement Article 14.

<sup>40</sup> *Ibid* Article 14.4.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid* Article 5 of the Convention on the Protection of the World’s Cultural and Natural Heritage, 11 I.L.M. 1367(Paris 1972).

<sup>43</sup> *Commonwealth v Tasmania* (1983) 57 Austl. L.J.R. 450, 489 (per Mason, J.) available at <http://www.austlii.edu.au/au/cases/cth/HCA/1983/21.html>(accessed on 11 April 2017).

The same language has also been used in Articles 4.1, 7.1, 8.1 of the TBT Agreement. And again, the qualified language only provides flexibility and discretion to Members on how to achieve the end result.

Flexibility and discretion to employ reasonable means, on the other hand, have been profoundly restricted by the TBT Agreement. Notwithstanding qualified language in Article 3.1, Article 3.5 requires Members to be fully responsible for the observance of all provisions of Article 2 – in relation to NGBs. Therefore, in addition to the qualified obligation to ensure compliance, Members are responsible for the observance of all the provisions with respect to NGBs. Article 3.5 also defines obligation of Members to ‘formulate and implement positive measures and mechanisms’ in support of compliance by NGBs. The TBT Agreement also explicitly prohibits Members from taking measures that require or encourage NGBs to act in a manner inconsistent with the provisions of the TBT Agreement.<sup>44</sup> Furthermore, in regard to standards, Members have an obligation to ensure compliance with the Code of Good Practice by NGBs even when the concerned NGB has not accepted it.<sup>45</sup> All these obligations of Members, if read together, take away much of the flexibility and discretion available to Members under Article 3.1 and indicate a deliberate design to limit the flexibility and discretion of Members in ensuring compliance with the TBT Agreement by NGBs.

Hence, irrespective of the internal legal structure and regulatory means available to govern NGBs, Members have obligations beyond “best effort” to ensure compliance of NGBs. The reading of obligations of Members in relation to NGBs as merely “best effort”, therefore, denies legal effect and useful scope to clear and specific provisions and does not fully reflect the meaning and purpose of the obligations in the TBT Agreement.

It is a rule of interpretation that a provision should be read in the context of other relevant provisions of the legal text and the meaning of the provision can only be ascertained after reading the text as a whole. Similarly, the principle *effet utile*, which is also regarded as a ‘corollary’ to Article 31(1) of the Vienna Convention on law of Treaties, requires that, while interpreting an international treaty ‘the words of a substantive treaty provision should be given some rather than no effect....’<sup>46</sup> Therefore, the obligations of Members

<sup>44</sup> TBT Agreement , Articles 3.4, 4.1, 8.1.

<sup>45</sup> Ibid, Article 4.1.

<sup>46</sup> James Crawford, *Treaty and Contract in Investment Arbitration*, 24 *Arbitration International* 351, 355 (2008).

should be read as a whole and therefore, should not be limited merely by a provision or a qualification therein.

The interpretation of Members' obligations as mere "best effort", in effect, makes Articles 3.4, 3.5, 7.5, 8.1, and 14.4 of the TBT Agreement completely ineffective.

### 3.2. Obligation of Result

According to Article 14.4, a Member also has an obligation to ensure achievement of 'satisfactory results' under Articles 3, 4, 7, 8 and 9. 'Satisfactory results' on the other hand, correspond to effects on trade interest of other Members and results a Member is expected to obtain under the TBT Agreement,<sup>47</sup> which boils into absence of 'unnecessary obstacles to international trade'<sup>48</sup>. That is, under the TBT Agreement a Member has a separate and strict obligation of result<sup>49</sup> to ensure that the technical barriers of NGBs do not create unnecessary obstacles to international trade or affect other Members' trade interest. Article 21 of the ILC draft articles provisionally adopted by the International Law Commission on first reading 1996, had also recognized such of obligation.

Furthermore, the fact that a Member has a strict obligation to ensure achievement of satisfactory results, where the satisfactory results correspond to the same results as that which a Member has to achieve, suggests same level and nature of a Member's obligation in regard to central government bodies and NGBs.

### 3.3. Negotiating History

The level of obligations of Members in relation to non-central governmental bodies under the TBT Agreement was perhaps the single most debated issue during the negotiations of the TBT Agreement.<sup>50</sup> From the preparatory phase of the negotiations to the last moment prior to the adoption of the Agreement, the nature of a Member's obligations in relation to non-central governmental

<sup>47</sup> TBT Agreement Art. 14.4.

<sup>48</sup> Ibid, Preamble para 5, Art. 2.2, 5.1.2, Code of Good Practice para E.

<sup>49</sup> ILC Art. 21 draft articles provisionally

<sup>50</sup> GATT, Meeting at Technical level of September/October 1975: Note by the Secretariat, MTN/NTM/W/25/Add.2 (21 January 1976); GATT, Points Before the Sub-Group: Note by the Secretariat, MTN/NTM/W/50 (16 June 1976) 6-10; GATT, Points Before the Sub-Group: Note by the Secretariat, MTN/NTM/W/72 (21 January 1977) 6-10; GATT, Australian Statement at Sub-Group Meeting on Technical Barriers to Trade – 26 March 1979, MTN/NTM/W/234 (5 April 1979); GATT, Proposal of the European Communities for the Draft Code for Preventing Technical Barriers to Trade, MTN/NTM/W/135 (13 January 1978).

bodies was strongly debated. On the one hand, countries like the United States, Australia and albeit initially, the EEC, tried strenuously to limit the obligations of Members in relation to non-central governmental bodies. On the other hand, countries such as Japan advocated for the same level of obligations of Members in relation to both central and non-central governmental bodies.<sup>51</sup> Japan along with Members with unitary structure of state, argued incessantly that any difference in the levels of obligations in relation to central and non-central governmental bodies would in effect result in substantial inequality between countries with a federal structure and countries with a unitary structure.<sup>52</sup> However, the United States and Australia not only argued for the limited obligations of Members but also tried to limit some of the substantive contents of the obligations concerning non-central governmental bodies. For instance, the United States and Australia persistently argued against defining an obligation of harmonization in respect to non-central governmental bodies. See, GATT, Points before the Sub-Group, Note by the Secretariat, MTN/NTM/W/37 (10 March 1976); GATT, Points Before the Sub-Group, Note by the Secretariat, MTN/NTM/W/95 (20 May 1977).

After nearly three years of negotiations, Members could not reach an agreement with respect to the obligation of Members in relation to non-central governmental bodies. It was only after the European Community's proposal which tried to correct the 'imbalance' created by the different levels of obligations that the negotiators could conclude the Agreement. The EEC first, accepted that the draft Code had 'one important aspect of imbalance' created by the difference in 'the obligations of the Code (first level obligation) and [the] obligation to use "best endeavours"'.<sup>53</sup> Second, it proposed that Members 'would be responsible to other [Members] in regard to failure to achieve results identical to those imposed under the first level obligations, under the 'best endeavours' provisions'.<sup>54</sup> Third, the EEC proposed the right of Members to invoke dispute settlement provisions when another Member fails to achieve results identical to the first level obligation under the 'best endeavours' obligations.<sup>55</sup>

<sup>51</sup> GATT, Points Before the Sub-Group: Note by the Secretariat, MTN/NTM/W/50 (16 June 1976) 6-8; GATT, Points Before the Sub-Group: Note by the Secretariat, MTN/NTM/W/72 (21 January 1977) 6-9.

<sup>52</sup> GATT, Standards; Packaging and Labelling; Marks of Origin (Report of the Group 3 on Standards), Background Note by the Secretariat, MTN/NTM/W/5 (21 April 1975) 7; GATT, Meeting at Technical Level of September/October 1975, Note by the Secretariat, MTN/NTM/W/25/Add.2 (21 January 1976); GATT, Points Before the Sub-Group, Note by the Secretariat, MTN/NTM/W/120 (18 November 1977).

<sup>53</sup> GATT, Proposal of the European Communities for the Draft Code for Preventing Technical Barriers to Trade, MTN/NTM/W/135 (13 January 1978).

<sup>54</sup> Id.

<sup>55</sup> Id.

The EEC's proposal was later incorporated into the final Agreement adopted on 12 April 1979, with only one amendment which instead of using the expression 'results identical to the first level obligations' used 'satisfactory results' in the relevant dispute settlement clause.<sup>56</sup> In addition, another obligation was added which prohibited Members from taking 'measures which have the effect of, directly or indirectly, encouraging bodies, other than central government bodies, to act in a manner inconsistent with provisions of [the] Code which apply to their central government bodies'.<sup>57</sup>

The negotiating history of the TBT Agreement suggests that the delegates at the Tokyo Round did not intend to leave NGBs outside the Members' sphere of obligations, nor did they do so. The Agreement certainly does not accept the idea of "best effort" obligation of Members in relation to NGBs. By the time the TBT Agreement was concluded in April 1979, the imbalance in Members' obligations in relation to central government bodies and non-central government bodies was largely corrected, which was the only substance of the final compromise struck by the EEC proposal.

The same debate continued in the Uruguay Round of negotiations. Members were still wary of the potential "best effort" interpretation of Members' obligations in relation to NGBs and thus imbalance in Members' obligations, and the effectiveness of the TBT Agreement. Members knew any limited or mere "best effort" obligations would not cover NGBs who, by the early 1990s, had become one of the important actors in the preparation of technical regulations and standards.

In this context, on the proposal of European Community, the "Code of Good Practice" was incorporated in the TBT Agreement. The EC, which had earlier submitted a similar proposal in the Code Committee under the TBT Agreement of 1979<sup>58</sup>, proposed the Code of Good Practice 'to make the obligations ... more concrete, and to provide some yardstick by which the performance of both Parties and private bodies could be measured...'<sup>59</sup>

Similarly, another obligation was agreed during the Uruguay Round requires Members to 'formulate and implement positive measures and mechanisms

<sup>56</sup> GATT, Technical Barriers to Trade, Addendum, MTN/NTM/W/192 Add. 2 (29 November 1978).

<sup>57</sup> Id.

<sup>58</sup> GATT, Statement by the Delegation of the European Community, TBT/23 (November 13, 1985).

<sup>59</sup> GATT, Communication from the European Community, MTN.GNG/NG8/W/8. (September 15, 1987).

in support of the observance of the provisions of Article 2 by other than central government bodies.<sup>60</sup> The Uruguay Round also agreed to what now forms the last sentence of Article 4.1 of the TBT Agreement, which requires a Member to bear obligation irrespective of whether or not NGBs has accepted the Code of Good Practice. These additional obligations of Members in relation to NGBs suggest that the delegates, and more importantly the TBT Agreement, intended Members to have more direct and positive obligations to ensure NGBs comply with the provisions of the TBT Agreement than a merely “best effort” obligation.

### 3.4. Federal Clause Defence?

The indirect and qualified expression of obligations of Members in relation to NGBs has been used to raise a more general and principled argument for the limited obligations of Members. This reading equates the obligations of Members, in relation to NGBs, with a federal state clause, so that the qualified expression of obligations can be interpreted as creating an exception to the unity of state principle. Therefore, ultimately the application of the federal clause principle would also mean that Members have no more than mere “best effort” obligations to ensure compliance with the provisions of the TBT Agreement by NGBs.

It is indeed true that a federal clause in an international treaty functions as an exception to the general rule of attribution or ‘to create a disparity of obligations between federal and unitary’<sup>61</sup> state parties. However, in the case of the TBT Agreement, obligations of Members in relation to NGBs are not federal clauses. A federal clause is only applicable when a certain international legal obligation falls exclusively within the purview of regional or local governments, over which no legal or constitutional authority can be exercised by the central government bodies. In case of the TBT Agreement, it will be a semantic leap to term provisions defining obligations of Members with respect to NGBs as ‘federal clauses’, since such constitutional limitation is generally not known in the context of NGBs. In addition, concerns of federalism in the implementation of international treaties are now, according to (Kierstead 1993, 323), ‘more focused on political harmony than on constitutional incapacity....’ Furthermore, even in countries where there is strict federal structure, domestic courts have been quite reluctant to give effect to federal clauses in international treaties.

<sup>60</sup> TBT Agreement, Art. 3.5.

<sup>61</sup> Robert B. Looer, *‘Federal State’ Clauses in Multilateral Instruments*, 32 Brit. Y.B. Int’l L. 162, 164 (1955-1956).



A number of decisions of American courts are good examples of this trend (particularly in the implementation of GATT).<sup>62</sup> Just because an NGB happens to operate in a Member state which has a federal structure of governance does not automatically mean the application of the federal clause exception in relation to the Member's obligation to ensure compliance with the provisions of the TBT Agreement by NGBs.

### 3.5. The GATT and the WTO Jurisprudence.

Another source of confusion as to the obligations of Members to ensure compliance by NGBs involves the relation of the provisions relating to the NGBs in the TBT Agreement to a superficially similar clause in Article XXIV:12 GATT. During the Tokyo Round of Negotiations, delegates agreed to borrow the language used in Article XXIV:12 GATT to define obligations of Members to ensure compliance with the Agreement by NGBs and local governmental bodies.<sup>63</sup> However, unlike the GATT, the final Agreement on Technical Barriers to Trade provided additional provisions that further expand Members' obligations. Thus, when the final draft was adopted, Australia made its displeasure known at the 'levels of obligation [in the TBT Agreement in regard to NGBs] which might be considered as going beyond the scope of Article XXIV:12 of the GATT....'<sup>64</sup>

Be that as it may, since then, the GATT and the WTO jurisprudence relating to Article XXIV:12 GATT has itself developed quite narrowly. The GATT and the WTO Panels have interpreted Article XXIV:12 restrictively and in a way 'to minimize the disparity in obligations between contracting parties' (Trone 2001, 15). In addition, all the cases decided by the GATT Panels and the WTO Panel, have rejected the claim that Article XXIV:12 can be a defence of Members whose local government fails to abide by the GATT provisions. The WTO Panel in *Canada – Dairies* made it quite clear by holding:

'...provisions imply that all GATT provisions apply to "regional and local governments and authorities" within a WTO Member, in accordance with the general principle of public international law that a party to a treaty "may not

<sup>62</sup> *Baldwin-Lima-Hamilton v Superior Court*, 208 Cal. App. 2d 803 (1962); *Bethlehem Steel Corp. v Board of Comm'rs* (Super. Ct., County of Los Angeles 1966); *Territory v Ho*, 41 Hawaii 565 (1957) cited in (Jackson 1967-68, 269).

<sup>63</sup> GATT, Technical Barriers to Trade Revision, Proposed Draft GATT Code of Conduct for Preventing Technical Barriers to Trade, MTN/NTM/W/192/Rev.1 (5 December 1978); GATT, Technical Barriers to Trade Revision, Proposed Draft GATT Code of Conduct for Preventing Technical Barriers to Trade, MTN/NTM/W/192/Rev.4 (21 March 1979).

<sup>64</sup> GATT, Australian Statement at Sub-Group Meeting on Technical Barriers to Trade – 26 March 1979 MTN/NTM/W/234 (5 April 1979).

invoke the provisions of its internal law as justification for its failure to perform a treaty” (set out in Article 27 of the Vienna Convention on the Law of Treaties). Article XXIV may act to limit the obligation of a WTO Member, which is a federal State, to secure the *implementation* of its GATT obligations. However, in our view, it does not limit the *applicability* of the provisions of GATT 1994.<sup>65</sup>

The indirect language of Article XXIV:12 GATT was, hence, interpreted as providing discretion to Members in deciding the proper process of implementation and does not qualify the applicability of the GATT 1994. The GATT Panel in *Canada – Gold Coins* interpreted Article XXIV:12 as not limiting the levels of government or other authorities to which GATT was applicable. Rather, the GATT Panel held that the ‘purpose of the provision was to qualify the basic obligation to ensure the observance of the GATT by the local government authorities....’<sup>66</sup>

The GATT Panel also rejected Canada’s argument that it had full discretion in deciding what action amounts to ‘such reasonable measures’ under XXIV:12. The Panel took the view that the effects of non-observance by the local government on the federal governments’ trade relations with other contracting parties must be weighed against the domestic difficulties of securing observance in interpreting the meaning of “reasonable measures”.<sup>67</sup> The Panel in *Canada – Gold Coins* essentially restricted the central government’s discretion in deciding the ‘reasonable means available’ to it to ensure compliance by local governmental bodies and authorities and indicated that the impact on the trade relations among Members is an equally important factor as the domestic structure of a Member State in determining ‘reasonable measures’.<sup>68</sup> According to such view, the potential impact on trade relation with other Members should be one of the factors that determines the extent and nature of a Member’s obligations in relation to NGBs, which is what the obligation of result and Article 14.4 also suggest.

In addition, the GATT Panel in *United States – Malt Beverages* held that ‘the [Article XXIV:12 GATT] was designed to apply only to those measures by regional or local governments or authorities which the central government cannot control because they fall outside its jurisdiction under the constitutional

<sup>65</sup> *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Report of the Panel adopted on 17 May 1999, WT/DS103/R, WT/DS113/R, para 7.73.

<sup>66</sup> *Canada – Measures Affecting the Sale of Gold Coins*, Sept. 17, 1985, L/5863(Unadopted) para 53.

<sup>67</sup> *Ibid*, para 69.

<sup>68</sup> *Ibid*, para 70.

distribution of powers.<sup>69</sup> Thus, Members are only excused from their obligations when they are legally incapable of regulating activities of non-central government bodies relating to relevant provisions of GATT.

Therefore if the jurisprudence of Article XXIV:12 GATT were to be relied in context of the TBT Agreement then it can be concluded that, first, the purpose of the qualified language is to make it easier for a Member to ensure compliance by NGBs and as such, is not a defence when an NGB fails to comply with obligations defined in the Agreement. Second, the presence of a Member's authority to regulate NGBs and the impact on trade relations with other Members suffices to hold a Member responsible.

#### 4. Conclusion

The growing reluctance of governments to become involved in the process of standardisation and regulation has been matched by their willingness to allow private entities to carry out such task. However, even after private entities have taken over the government's role in standardisation, the potential trade restrictive impact of private technical barriers remains the same. In fact, it has been found that private standards are generally higher or more stringent than public standards.

The TBT Agreement acknowledges the potential trade restrictive nature of technical barriers developed by NGBs and provides extensive provisions relating to them. However, the very definition of NGBs in the TBT Agreement is problematic. The narrow definition of NGBs has, in effect, excluded most private standardising bodies, making rules governing such bodies inapplicable. This, in turn, poses a great risk of reversing the successes of the GATT and the WTO in the elimination of technical barriers to trade. Members may simply leave domestic private standardising bodies to create technical barriers in the local market and may never have to be accountable for the acts of those standardising bodies.

In addition, the obligation of Members to ensure compliance by NGBs with the TBT Agreement has been couched in qualified terms, leading many to question the enforceability of the obligation. However, notwithstanding these qualifications, Members still have to ensure that technical barriers developed by NGBs are not trade restrictive. The qualified language only provides flexibility

---

<sup>69</sup> *United States – Measures Affecting Alcoholic and Malt Beverages*, Report of the Panel adopted on 19 June 1992, DS23/R - 39S/206, para 5.79.

and discretion to Members in the manner of performance of their obligation to ensure compliance by NGBs. In addition, the responsibility of a Member in ensuring compliance with the provisions of the TBT Agreement by NGBs is judged on the basis of the satisfactory results. Similarly, Members have a specific and direct obligation to formulate and implement positive measures and mechanisms in support of compliance with the provisions of the TBT Agreement by NGBs. Thus, even the flexibility in choosing the manner of performance of their obligation by Members is restricted by the obligation to formulate and implement positive measures and mechanisms.

The negotiation history of the TBT Agreement also provides clear evidence that the Agreement does not intend to limit Members' obligations to mere "best effort". In fact, there are clear indications of the contrary. In addition, the negotiation history and the provisions of the TBT Agreement indicate deliberate expansion of the scope of a Member's obligation under the Agreement in comparison to Article XXIV:12 GATT. Indeed, the WTO and the GATT jurisprudence of Article XXIV:12 GATT are also clear that the language in itself does not excuse a Member from ensuring compliance by non-central government bodies.

□□