Private-sector standards as technical barriers in international trade in goods : in search of WTO disciplines

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Summary

Private-sector standards are playing an increasingly important role in international trade. These standards are widely adopted and applied within national and international markets by a large variety of players, including supermarket chains, transnational corporations, and manufacturers of goods. In fact, private-sector standards may be used throughout entire industry sectors under the administration of industry associations or NGOs at national or international levels. In recent years, there has been a significant proliferation of private-sector standards, and the provision of services with respect to certification under such standards has grown into a significant and lucrative business. This is especially true in developed countries and is attributable to globalization, new types of health threats, environmental degradation and global warming which, in turn, has led to ongoing and increasing concerns among consumers about product safety and quality, sustainability, the environmental and social impact of products, and production processes. The requirements of governmental regulations and standards are, in this respect, frequently regarded as insufficient by consumers, corporations and NGOs. These considerations commonly drive private actors to develop, adopt and apply their own, often more stringent or detailed, guidelines, requirements or recommendations, i.e., standards.

The process of proliferation and wide scale use of private-sector standards in the markets of goods generates certain challenges for interested stakeholders. Being adopted and applied by non-governmental entities, private-sector standards are voluntary *de jure*; i.e. their application is not legally mandatory. However, due to the immense purchasing power of large retail chains and multinational corporations which frequently apply such standards, compliance with these standards may become mandatory *de facto* for suppliers in order to gain real market access. In this respect, private-sector standards may, arguably, create both positive effects and pose challenges for international trade and development.

On the one hand, private-sector standards, if properly complied with, may potentially guarantee long-term market access for certified products, appropriate price premiums for producers, enhanced product safety and quality, and the dissemination of modern, efficient and environmentally friendly technologies. Private-sector standards may also contribute to the differentiation of products and the creation of niche-markets which could be favourable for small-scale and developing country producers. However, on the other hand, it seems that this potential of private-sector standards often fails to materialize for many small-scale, medium-sized and developing country producers. Indeed, such standards may present unnecessary, unjustified or inappropriate requirements for local methods of production and, as a result, lead to discriminatory or excessively trade-restrictive

effects. Moreover, the costs of compliance with and certification under private-sector standards may be too expensive for small-scale, medium-sized and developing country producers, especially while there is no guarantee of the fair distribution of a price premium for compliance with a standard along a supply chain. In addition, the diversity of private-sector standards *per se*, as well as their lack of harmonization, pose a serious problem because producers have to comply with multiple and varying private requirements.

The WTO is the main international organization that deals with issues of international trade in goods on a multilateral level. The rules of the WTO establish an important international legal framework for the application of technical barriers to trade in goods by WTO Members, such as regulations and standards. In this regard, the relevant provisions of WTO agreements, such as the GATT 1994, the TBT Agreement, and the SPS Agreement, are often at issue with respect to the topic of the regulation of private-sector standards in order to minimize their negative effects on international trade.

It seems that the wide scale application of private-sector standards presents serious challenges for the WTO system. If compliance with the requirements of private-sector standards becomes a predominant factor for real access to the markets of WTO Members, while the WTO is not able to address it, this may potentially render the WTO regulatory system for technical barriers to trade practically irrelevant. Moreover, if WTO Members are allowed to encourage and provide meaningful incentives for the development, adoption and application of the private-sector standards which are inconsistent with the relevant WTO rules, these rules could be circumvented by the Members through such regulatory policies. Private-sector standards thus arguably pose the risk of "blurring" the existing WTO legal framework for technical barriers to trade in goods. This, in turn, might affect the credibility of the WTO system, especially in the eyes of developing countries which expected to gain real benefits regarding market access for their goods from the WTO rules at the time these rules were negotiated.

Since the WTO is an international intergovernmental organization, the rules of this organization *per se* create rights and obligations only for its Members, and not for private parties. Accordingly, it is quite clear that, at least nowadays, the rules of WTO law on technical barriers to trade in goods may not apply directly to private standard-setting organizations. However, the private conduct under appropriate conditions may, in principle, be attributed to WTO Members. Moreover, the rules of WTO law, whether explicitly or implicitly, might oblige WTO Members to adopt certain measures in order to discipline private trade-restrictive behaviour, including the development, adoption and application of private-sector standards. The WTO rules might also directly prohibit the Members to perform certain actions with respect to such private behaviours, for example, to

support or encourage the development and application of certain private-sector standards.

Thus, in order to gain insight into the implications of the WTO rules for the regulation of private-sector standards and private standard-setting activities in international trade in goods, the present study first discusses the "world" of private-sector standards and the reasons for the proliferation of these standards, and thereafter examines the appropriate provisions of the relevant WTO agreements.

The "world" of private-sector standards

The "world" of private-sector standards is very complex and diverse and, as a result, it is difficult to describe the concept of private-sector standards with precision. Generally, referring to the definitions of a standard in the ISO/IEC Guide 2 and Annex 1 of the WTO TBT Agreement, a private-sector standard may be defined as a document adopted by a private entity, such as an industry association, an NGO, or a business corporation. This document prescribes characteristics of products or PPMs for common and repeated use. By definition, it is not legally mandatory for compliance by market players as it is adopted and applied by private entities.

However, just because a standard is adopted by an NGO, does not necessarily mean that it is a private-sector standard and not a public one. An NGO may, in principle, be authorised by a government to perform elements of public authority by developing and adopting standards and, as such, the standards adopted by such an entity would then be public standards. Accordingly, private-sector standards are developed and adopted by NGOs which act within the private sector without exercising elements of governmental authority. In this respect, the differentiation between private-sector standards and public ones may appear to be quite complex task in certain situations and should thus be done only on a case-by-case basis in the context of the overall regulatory environment of a country.

Although private-sector standards, as well as standards in general, are not legally mandatory for compliance, they may, in principle, become mandatory *de facto* for suppliers who wish to gain or maintain market access. This may be the case if a standard is applied by big corporations, a group of corporations, or even entire industries which, to a large extent, control a market. Moreover, a *de jure* voluntary private-sector standard may gain a *de facto* mandatory character if its application is encouraged through significant support or incentives provided by a government. In fact, such governmental support or incentives may even transform a private-sector standard into a *de facto* mandatory regulation. Thus, the distinction between voluntary and mandatory measures is not always clear cut and may depend on the circumstances of each particular case, taken in the context of a national

regulatory environment. Concluding otherwise could indeed allow States to "camouflage" their mandatory measures as voluntary ones based on their formal appearance.

Due to their voluntary character, private-sector standards, as well as standards in general, have several operational stages which are not the same as the operational stages of mandatory measures. First, a private-sector standard is developed and adopted by a private standard-setting entity; it is then applied by business corporations to their own business activities (i.e. internally applied standards), or to their suppliers who have to implement the standard (i.e. externally applied standards). The conformity assessment and enforcement of private-sector standards are performed by business corporations purchasing a product or, most commonly these days, by independent private organizations – accredited certifiers (i.e. third-party verification or certification).

The typology of private-sector standards offered in this study is based on multiple criteria relevant for the present study, although it is not exhaustive. One of the most important criteria of the typology in the context of the present study is the level of governmental involvement or incentives for the development, adoption and application of private-sector standards. According to this criterion, private-sector standards may be classified into so called "purely" private-sector standards which do not receive any governmental support or incentives for any of their operational stages, and into private-sector standards which do receive some such support or incentives. However, if a private-sector standard receives a considerable or significant amount of governmental support or incentives for some of its operational stages, this may well transform it into a pubic standard or even a mandatory regulation. Accordingly, there is no clear cut border between private-sector standards and public standards or regulations, as there is no clear cut border nowadays between private and public types of regulation.

Private-sector standards may address various objectives which, in principle, may be classified into technical, societal and commercial ones. For example, technical objectives may relate to the establishment of common terminology, the interoperability of products, or the application of know-how and production technologies. Societal objectives may include the safety and quality of products, or the protection of the environment and human rights. Commercial objectives may deal with the differentiation of products and the protection of brand reputation. The information about compliance with private-sector standards may target different clients; this may be business corporations (B2B standards) only; mainly consumers who, as a rule, are targeted through the labelling on a product (B2C standards); or both. Private-sector standards may address product characteristics, PPMs, marking, labelling or the packaging of products. In this respect, one of the distinctive features of private-sector standards is that most of them contain

requirements regarding PPMs, including npr-PPMs; i.e. PPMs which do not affect the physical characteristics of a final product. Arguably, this potentially makes them more trade-restrictive in the eyes of producers who have to adjust their production methods to the requirements of different private-sector standards.

There may be different approaches to meeting the challenges posed by private-sector standards, which includes improving the transparency of standard-setting processes, providing technical assistance to interested smallholders, and imposing rules with respect to the content of the standards. The regulation of the development, adoption and application of private-sector standards may, in principle, be exercised by private standard-setting organizations themselves (individually or collectively), or by governments. In this regard, as has been explained above, the rules of WTO law, and particularly those provided in the GATT 1994, the TBT Agreement, and the SPS Agreement, impose important obligations on governments of WTO Members to discipline measures that create technical barriers to trade in goods.

Private-sector standards and the GATT 1994

The GATT 1994 establishes the general legal framework for the measures of WTO Members that affect international trade, including technical barriers to international trade in goods. In this respect, the relevant requirements of the GATT 1994 include: the MFN treatment obligation (Article I); the national treatment obligation (Article III); the prohibition of quantitative restrictions for import or export (Article XI); transparency, uniformity, impartiality and reasonableness in the administration of trade laws, regulations and decisions (Article X). The possibility of the so-called "non-violation complaints" of WTO Members under Article XIII:1(b) may, arguably, also be relevant. Article XX provides for the justification of trade restrictions imposed to protect public health, morals, exhaustible natural resources, etc. According to the chapeau of Article XX, such trade restrictions may not constitute arbitrary or unjustifiable discrimination, or disguised restrictions on international trade.

There is a rather extensive dispute settlement case law for the interpretation and application of many of these provisions, and a lot of relevant information in this respect may be found in dispute settlement reports of panels or the Appellate Body, as well as in WTO law text books. However, in the context of the present study, the most relevant question to be answered is whether and to what extent these disciplines of the GATT 1994 may be applicable to the development, adoption and application of private-sector standards. In fact, because the development, adoption and application of private-sector standards is a form of private conduct, the question stated

above is indeed part of a more general issue, namely whether, and under what conditions, the GATT 1994 is applicable to private conduct.

Generally, the provisions of the GATT 1994 apply to measures which are employed by WTO Members. Thus, WTO Members are fully responsible under WTO agreements for their own governmental measures which may underpin private behaviour. Indeed, governmental measures may seriously affect the competitive opportunities on a market and force (or provide meaningful incentives for) private actors to act in certain ways. Such governmental measures *per se* may well constitute violations of the appropriate provisions of the GATT 1994.

However, the question remains whether, under certain conditions, private conduct may be directly attributable to a WTO Member, i.e. regarded as the conduct of a Member *per se*. The GATT 1994 does not generally clarify which measures are to be regarded as those of the Members. In other words, the GATT 1994 does not contain its own general norms on the attribution of acts to WTO Members. Since, as has been rightly noted by the Appellate Body, the GATT rules are "not to be read in clinical isolation from public international law", the general customary international law rules on the attribution of acts to States seem to be relevant in this respect. These customary international law rules are reflected in the many provisions of the ILC Articles on State Responsibility.

According to the ILC Articles, States are responsible for the measures adopted or enforced by their organs and persons or entities exercising elements of governmental authority. Furthermore, acts or omissions may be attributable to a State in cases where the measure is adopted by other persons and entities acting under the direction or control of a State, or if a State acknowledged and adopted this measure as its own. However, international courts and tribunals, such as the ICJ and the ICTY, established rather high standards of control to be exercised by a State over private actors for the attribution of their conduct to it; i.e. "effective" and "overall" control tests.

In principle, it seems that the approach taken to the attribution of private actions to WTO Members in the WTO dispute settlement practice under the GATT 1994 and some other WTO agreements, is in line with the general rules of customary international law on the attribution of acts to States. Similarly to the ILC Articles, GATT or WTO panels and the Appellate Body required the existence of an appropriate and sufficient *nexus* between the government of a WTO Member and a private conduct for attribution of the latter to the former. In fact, in several cases considered under the GATT 1994, panels ruled that there are no "bright line rules" allowing automatic exclusion of the acts of private parties from the scope of application of the GATT 1994. And thus private conduct may be attributed to WTO Members if there is sufficient governmental involvement in or incentives for the conduct, which shall be evaluated on a case-by-case

basis. Similarly, under the more specific provisions of Article XVII:1 of the GATT 1994 devoted to the issue of responsibility of WTO Members for the conduct of their STEs, such STEs are meant to enjoy the "exclusive or special rights or privileges, including statutory or constitutional powers" granted to them by Member governments.

It seems, however, that the high standards of control (i.e. "effective" and "overall" control) required by the ICJ and the ICTY in the context of State responsibility for genocide and individual criminal responsibility for the gravest international crimes, are inappropriate for the WTO which mainly deals with issues pertaining to international trade and commerce. In fact, it seems that the "control test" could be more relaxed in the WTO context. At the same time, most likely, WTO panels and the Appellate Body will not easily assume the responsibility of WTO Members for the conduct of private actors without convincing evidence of a sufficient *nexus* between a private action and a Member.

Thus, considering this approach to the attribution of private conduct to WTO Members under the GATT 1994, it seems that the relevant provisions of the GATT 1994 may be applicable to private-sector standards only if there is a sufficient *nexus* between the standard and the government of a WTO Member. In particular, this could be the case due to sufficient governmental involvement in or incentives for the development, adoption and application of a private-sector standard. Establishing the existence of such sufficient governmental involvement or incentives before a WTO panel and the Appellate Body, will be the decisive step to be fulfilled by a complainant. However, it seems justified to conclude that the GATT 1994 may not be applicable to "purely" private-sector standards which are developed, adopted and applied without any meaningful governmental involvement or incentives.

Private-sector standards and the TBT Agreement

The TBT Agreement is applicable to certain types of technical barriers to trade, such as technical regulations, standards, and conformity assessment procedures (i.e. procedures aimed at verifying compliance with the requirements of technical regulations and standards). A technical regulation is defined in Annex 1 to the TBT Agreement as a mandatory measure specified in a document laying down product characteristics and / or PPMs, and which may also include terminology, packaging, marking or labelling requirements. A standard is defined in similar terms, but only as a voluntary measure prescribed in a document and approved by a recognized body for common and repeated use.

Technical regulations and standards may be adopted, and conformity assessment procedures performed, by different types of bodies, including

central or local governmental and non-governmental bodies. A non-governmental body is defined rather broadly in Annex 1 of the TBT Agreement as a body "other than a central government body or a local government body". Moreover, a standard, according to its definition in Annex 1, shall be approved by a "recognized body". However, it is not further explained what constitutes such "recognition" and by whom a body must be "recognized"; e.g. by governmental agencies, markets or society, etc. The unique feature of the TBT Agreement is thus that it is applicable to voluntary measures which may be developed and adopted by non-governmental "recognized" bodies.

The TBT Agreement clearly recognizes that WTO Members have the inherent right to protect their important societal objectives. This inherent right of Members, however, is subject to rather strict requirements. In this regard, the Agreement contains a number of important obligations for WTO Members. The articles of the Agreement *per se* prescribe the disciplines with respect to technical regulations and conformity assessment procedures. The disciplines with respect to standards are provided for in Annex 3 of the TBT Agreement, the Code of Good Practice for the Preparation, Adoption and Application of Standards. The relevant disciplines of the TBT Agreement include the MFN and national treatment obligations, the prohibition of creating unnecessary obstacles to trade, harmonization with relevant international standards, the avoidance of duplications in standard-setting work, equivalence and mutual recognition (which is prescribed only for technical regulations and conformity assessment procedures), transparency and notification, and technical assistance.

Generally, regarding the issue of disciplining private standard-setting activities, it appears that, based on the approach to the attribution of private conduct to WTO Members adopted under the GATT 1994 and certain other WTO agreements, the TBT Agreement may apply to private-sector standards if their development, adoption and application are subject to substantial governmental involvement or incentives. A private-sector standard may then be attributable to a WTO Member. However, the TBT Agreement also contains a number of special obligations with respect to certain types of bodies, including non-governmental bodies. WTO Members are obliged to take available "reasonable" measures in order to ensure that non-governmental bodies developing and adopting technical regulations and standards comply with the requirements of the Agreement. WTO Members are also required to refrain from requiring or encouraging these bodies to behave inconsistently with rules of the TBT Agreement.

It seems justified to argue that the obligation to take available "reasonable" measures is aimed at allowing a certain amount of flexibility to WTO Members with respect to their non-governmental bodies or entities, depending on the level of a Member's development and the technical

feasibility. In this context, these provisions may be interpreted as an obligation of conduct and not as an obligation of result. However, it is also reasonable to argue that the Members shall be obliged to take measures only with respect to those non-governmental entities or bodies which they "recognize" as standardizing bodies and thus meaningfully support or encourage in their standard-setting activities or in the application of their standards in a market. This is, of course, assuming that the term "recognized body" in the definition of a standard in Annex 1 of the TBT Agreement implies the necessary recognition by a government, and not by a market or a society alone.

Under the proposed approach, the amount of reasonable measures available to a WTO Member for disciplining private-sector standards depends mainly on two factors: 1. the level of Member's development and the technical feasibility; and 2. the amount of governmental involvement or incentives provided for the development, adoption and application of a private-sector standard. In this respect, the private-sector standards adopted without any governmental involvement or incentives do not require any available reasonable measures to be taken by WTO Members according to the TBT Agreement. An increase in governmental involvement or incentives for the development, adoption and application of a measure results in an increased level of obligation of a WTO Member for disciplining such a measure. In this regard, the more governmental involvement or incentives are provided in support of the activities of an entity, the more reasonable measures shall be available to a WTO Member to discipline such activities.

Mandatory technical regulations present the highest level of governmental incentives. Therefore, with respect to the technical regulations adopted by central governmental authorities, WTO Members have the obligation of result to ensure that the requirements of the TBT Agreement are complied with. For technical regulations adopted by local governmental and non-governmental bodies receiving high levels of governmental support or incentives, obligations of the WTO Members are very close to those of result, but may still be regarded as obligations of conduct.

The proposed approach seems to suggest a relatively restrictive interpretation of the terms "technical regulation", "standard", and "non-governmental body" in the TBT Agreement, preventing them from capturing "purely" private-sector standards which are developed, adopted and applied without any meaningful governmental involvement or incentives. It indeed seems unfair and unrealistic to oblige WTO Members to ensure that all non-governmental standard-setting entities on their territory, including those which they did not support and might not even be unaware of, comply with the strict disciplines of the TBT Agreement.

Private-sector standards and the SPS Agreement

The SPS Agreement is applicable to a specific kind of measure, namely SPS measures, which are the measures aimed at fulfilling a number of specific objectives, i.e. the protection of human, animal or plant life and health from specific risks, as well as the prevention or limitation of other relevant damage. On the one hand, with respect to the regulation of private-sector standards, this means that all non-SPS-related private-sector standards (or their parts) are not covered by the scope of application of the SPS Agreement. On the other hand, considering the reference to "other damage" in the definition of an SPS measure in Annex A(1)(d), as well as the approach adopted by the Panel in *EC – Approval and Marketing of Biotech Products* in this respect, the definition of an SPS measure in the SPS Agreement may, in principle, be open to a rather broad interpretation.

Similarly to the GATT 1994 and the TBT Agreement, the SPS Agreement does not contain its own rules on the attribution of a conduct to WTO Members. Thus, the customary international law rules on the attribution of acts to governments may be relevant in the context of the SPS Agreement as well. Accordingly, as in the case of the GATT 1994 and the TBT Agreement, for a private-sector standard to be recognized as an SPS measure attributable to a WTO Member under the SPS Agreement, the Member shall provide sufficient governmental support or incentives for the adoption and application of such a standard (this is, of course, if all the criteria of the definition of an SPS measure prescribed in Annex A(1) are met).

Indeed, the fact that the SPS Agreement is applicable to SPS measures attributable to WTO Members is also reflected in the wording of many important disciplines of the SPS Agreement. In this respect, for example, Article 2.1 refers to the right of WTO Members to take SPS measures; and Articles 2.3, 3.1, 5.1, 6.1, 7 refer to the SPS measures of WTO Members ("their" SPS measures). However, considering the possibilities of application of the SPS Agreement to a private conduct (and, in particular, to private conduct such as the adoption and application of private-sector standards), the important question is whether the SPS Agreement is only applicable to SPS measures attributable to WTO Members.

It is hardly possible to give a straightforward answer to this question. In fact, the answer will also depend on the understanding of the notion of "attribution" in the context of WTO agreements in general, and the SPS Agreement, in particular. In any case, it is worth noting that the definition of an SPS measure in Annex A(1) of the SPS Agreement in fact does not provide for the requirement that an SPS measure be attributable to a WTO Member. At the same time, while the TBT Agreement explicitly addresses voluntary measures (standards), the definition of an SPS measure in the

SPS Agreement arguably, by referring to "relevant laws, decrees, regulation, requirements and procedures", denotes the measures, which are not fully voluntary either in law or in practice due to certain meaningful governmental involvement and incentives. At least this seems to be the approach adopted in the rather limited case-law on this issue under the SPS Agreement.

Accordingly, this study argues that an SPS measure under the SPS Agreement may, on the one hand, be developed, adopted and applied by non-governmental entities with certain meaningful level of governmental involvement or incentives but which nonetheless do not necessarily imply or require the attribution of the measure to a WTO Member. On the other hand, however, it appears unlikely that fully voluntary private measures, such as "purely" private-sector standards, which do not receive any meaningful governmental involvement or incentives, may be regarded as SPS measures under the SPS Agreement.

As in case with the appropriate provisions of the TBT Agreement, Article 13 of the SPS Agreement contains the positive and negative obligations of WTO Members with respect to the relevant conduct of non-governmental entities and regional bodies. The positive obligations include the obligation of WTO Members to take available "reasonable" measures in order to ensure compliance of such entities and bodies with rules of the SPS Agreement. The negative obligations prohibit WTO Members to encourage non-governmental entities to act in violation of the SPS Agreement, as well as to rely on their services, if they are inconsistent with the disciplines of the SPS Agreement. In light of the understanding of the definition of an SPS measure as discussed above, and in line with the proposed interpretation of the relevant provisions of the TBT Agreement, it seems justified to view the obligation to take available "reasonable" measures, with respect to the conduct of non-governmental entities and regional bodies under Article 13 of the SPS Agreement, as an obligation of conduct. According to this approach, WTO Members have an obligation of conduct; i.e. the obligation to take available "reasonable" measures with respect to the behaviour of such entities and bodies depending on the level of governmental involvement or incentives provided for this behaviour.

The compliance of WTO Members with the positive obligation provided in Article 13 of the SPS Agreement would therefore depend on the amount of governmental involvement or incentives provided for the conduct of a non-governmental entity, as well as on the level of development and technical capacity of the Member. In this regard, the more governmental involvement or incentives are provided by a Member for such a conduct, the more "reasonable" measures shall be available to the Member for disciplining this conduct. If the governmental involvement or incentives provided by a WTO Member for a private conduct becomes substantial

enough, the obligation of conduct to take available "reasonable" measures may be regarded as something very close, if not identical, to the obligation of result. In practice this would mean the attribution of a private conduct to a Member which is then obliged to ensure the compliance of the conduct with the disciplines of the SPS Agreement. The proposed approach thus also means that if a WTO Member does not provide any meaningful support or incentives for a private conduct (e.g. the adoption and application of a private-sector standard), the Member is not obliged to take any "reasonable" measures in this respect.

The discussion of the main substantive obligations of WTO Members according to the SPS Agreement reveals that the Agreement contains many onerous and specific requirements with respect to SPS measures, for instance, obligations of science based risk assessment, risk management, harmonization, transparency and notification. After considering the nature and the content of these important obligations, it was concluded that many of them are mainly meant for the regulation of governmental measures, or at least for the measures that have a certain *nexus* with a government. Indeed, many of the onerous obligations of the SPS Agreement can hardly be fulfilled with respect to a free private conduct (e.g. the adoption and application of private-sector standards), which is not subject to any meaningful governmental involvement or incentives.

Conclusions

It is a matter of fact that the norms of WTO law are generally aimed at disciplining the behaviour of WTO Members, i.e. States, SCTs and the EU, by providing rules about what Members shall or shall not do in regulating their trade relations with other Members. However, the present study has demonstrated that under certain circumstances, i.e. where there is sufficient governmental involvement or incentives, private conduct may be attributed to WTO Members. In such situations, if the private conduct breaches the provisions of a relevant WTO agreement, WTO Members may be held responsible for the breaches as if the actions were committed by their bodies.

Moreover, as has been discussed, both the TBT Agreement and the SPS Agreement require WTO Members to take available "reasonable" measures with respect to certain non-governmental bodies or entities in order to ensure their compliance with the provisions of these Agreements. The present study suggests that these "due diligence" obligations of WTO Members have important implications for the regulation of private-sector standards whose adoption and application receives meaningful governmental support or incentives. It is argued that these obligations shall be viewed as obligations of conduct which, on the one hand, are aimed at precluding WTO Members from "hiding behind the veil" of a non-governmental

measure and, on the other hand, at providing the necessary flexibility for dealing with the complex issues of Member responsibility for a private conduct. In this regard, the determination about which "reasonable" measures are available to a WTO Member in order to discipline private standard-setting activities may be made only on a case-by-case basis depending on all the relevant circumstances. These relevant circumstances include: 1. the characteristics of the private activities at issue and, in particular, the level of governmental involvement or incentives for those activities; and 2. the regulatory environment of a WTO Member, including its level of development and technical capacity.

It could thus be said that WTO law, arguably, applies to those private-sector standards whose development, adoption and application receives meaningful governmental support or incentives. Concluding otherwise would allow WTO Members to avoid their responsibility by hiding behind a "private veil". WTO Members should therefore be cautious in providing governmental support or incentives for private standard-setting activities as they might appear to be responsible for those activities. If a WTO Member does provide such governmental support or incentives, this shall be at its own risk, since the Member would have to ensure that the relevant private-sector standards are in compliance with the appropriate rules of WTO law. However, those private-sector standards which do not receive meaningful governmental support or incentives will, most probably, not be covered by the existing norms of WTO law. Indeed, it hardly seems realistic to require WTO Members to monitor and control all private standard-setting entities operating in their territories. Imposing such onerous requirements on the Members could, arguably, disturb the subtle balance of their rights and obligations established under WTO agreements.

In any case, it seems that the domestic regulatory tools available to governments in their domestic legal orders for disciplining "purely" private standard-setting activities performed without meaningful governmental involvement or incentives are quite limited. Indeed, in the majority of developed and developing countries with free market economies, governments are confined to rather narrow sets of options with regard to their influence on private entrepreneurial behaviour. These options are usually limited to the protection of important societal objectives, e.g. public health and morals, consumer rights, market competition, etc. The tools which governments may use in this respect thus include the norms of competition law, consumer protection law and administrative law. These tools, however, are only helpful, if at all, in situations of severe and flagrant abuses in private standard-setting and practices of the application of private-sector standards. Such situations are, arguably, not really common as the success of a private-sector standard depends on its popularity among market players; the popularity, in turn, depends on the quality of a standard and on the

reputation of a standard-setting entity. Both of these factors may suffer significantly from a scandal related to competition or consumer rights abuses.

In fact, a large majority of developed countries, as well as many developing countries, have rather advanced laws and enforcement systems devoted to the protection of market competition and consumer rights in place. Nonetheless, this does not resolve problems related to the trade-restrictive effects of private-sector standards which are mostly invoked with regard to developed country markets. In addition, WTO Members, at least currently, are hardly obliged by the rules of WTO law to have and use the legislation on competition and consumer protection in order to remedy the possible problems related to the private technical barriers to trade, including the problems arising from the adoption and application of private-sector standards. It is quite unlikely that the WTO dispute settlement system will be able and willing to bring competition rules into the WTO legal system through a "back door" by interpreting certain existing provisions of WTO law.

Thus, it seems that the main tools available nowadays to governments, with respect to regulation of "purely" private-sector standards, are soft law mechanisms such as creating and promoting voluntary codes of good practice for private standard-setting, facilitating transparency through the exchange of information and establishing enquiry points, and technical assistance for foreign producers. Such mechanisms, on the one hand, are flexible, diverse and allow a wide range of actions by governments. On the other hand, however, the effectiveness of these mechanisms is often at issue.

Based on the discussion of the main disciplines of the three relevant WTO agreements, the present study argues that many of these disciplines are primarily designed for dealing with public measures adopted and applied by WTO Members. It would therefore seem that the WTO is not currently well equipped to address the challenges posed by the proliferation of private-sector standards. On the one hand, it is disputable whether the regulation of "purely" private-sector standards developed, adopted and applied without meaningful governmental involvement or incentives falls, in principle, within the mandate of the WTO which was originally created to address measures taken by its Members. On the other hand, however, it is also quite obvious that the regulatory realities have undergone serious changes since the inception of the WTO. In particular, governments no longer hold the regulatory monopoly, and the process of privatization of market governance is progressing because the application of private regulatory norms, such as private-sector standards, is becoming more and more common. The WTO will thus have to evolve and make certain adjustments to its regulatory framework in future in order to be able to deal with such new realities.

Therefore, to promote the harmonization of domestic soft law tools and improve their effectiveness, the further development of the WTO rules with regard to private-sector standards appears to be desirable. Considering the objectives and the diversity of private-sector standards, these new WTO rules should be specific but flexible. In this respect, the adoption of a voluntary WTO code of good practices specially devoted to private standard-setting would, arguably, be a positive and realistic step. However, the WTO is a Member-driven organization and this step, as such, is a realistic one only if WTO Members recognize the challenges presented by the proliferation of private-sector standards to the WTO legal system and agree to grant the appropriate mandate to the WTO in this regard. Such a voluntary code of good practices could include recommendations on transparency and publication, the recognition of equivalence, technical assistance, and the exchange of information. In contrast to the rules in the GATT 1994, the TBT, and the SPS Agreements, the recommendations in the code would be specifically adapted to the realities of the private standard-setting "world".

In any event, more research is clearly necessary in order to understand the various aspects of the effects of private-sector standards on international trade and the options of addressing the challenges that these standards create, including the options for their regulation by both domestic legal regimes and WTO law.