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Public play upon private standards

How European and international economic law enter into voluntary regimes for sustainability

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Chapter 5
VSS and WTO law
Attribution of private conduct and the extent
of the obligation for WTO Members

1 Introduction

The issue of rules designed by private actors, their trade restrictiveness and the potential of WTO discipline, has been the subject of debate for more than a decade in several competent fora in the WTO. The matter was first addressed in the SPS (Sanitary and Phytosanitary Measures) Committee, with a focus on private standards in the domain of food quality and safety. The trade barrier effect of such instruments was denounced for the first time in 2005 by St. Vincent and the Grenadines with regards to EurepG.A.P. (now GlobalG.A.P.) certification for bananas.¹ The discussion of private standards has focused since then on market access problems engendered by the stringency of private standards, which oftentimes go beyond mandatory requirements, and the risk of becoming a *de facto* prerequisite for acceding to a market. Both factors have a considerable impact on many small and medium size producers in developing countries. Debate is ongoing in the SPS Committee to find agreement on a definition of private standards, but consensus has not been yet reached.²

The discussion on environmental measures in the Committee on Trade and Environment (CTE)³ has highlighted the potential protectionist effects of environmental regulation. Private standards, specifically in the form of VSS, have been prominently on the agenda of the CTE since 2007, when several members, in their acknowledgement of the potential for trade and development, expressed concern for several forms of certification and, in general, for the proliferation of private standards on the market. The CTE advocated setting standards at a level which is appropriate both for the protection of the environment and other public objectives pursued, and for the compliance capacity of developing countries.⁴ Some VSS, such as GlobalGAP, could indeed be caught under the SPS Agreement as they could be seen as SPS Measures to be treated exclusively under

¹ Committee on Sanitary and Phytosanitary Measures. Summary of the meeting held on 29-30 June 2005. Note by the Secretariat, 24 January 2007. G/SPS/R/37. Since then, the SPS Committee has accepted discussion on private standards to the extent they fall within the scope of application of the SPS. G/SPS/55 devised an action plan that, among other issues, should result in a working definition of the term private standards. See Committee on Sanitary and Phytosanitary Measures. Actions regarding SPS-related private standards 6 April 2011. G/SPS/55. For subsequent discussion in the TBT Committee see Committee on Technical Barriers to Trade. Fifth triennial review on the implementation and operation of the TBT Agreement. 13 November 2013. G/TBT/26.

² See Committee on Sanitary and Phytosanitary Measures. Second report of the co-stewards of the private standards e-working group on Action 1. 30 September 2014. G/SPS/W/281.

³ The Doha Declaration designated the CTE as competent forum for the discussion of (i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development; [...] (iii) labelling requirements for environmental purposes. See Doha WTO Ministerial 2001: Ministerial Declaration. 14 November 2001. WT/MIN(01)/DEC/1, para. 32. Some WTO Members however believe that the discussion should take place within the TBT Committee which, by virtue of its Code of Good Practices, is better placed to deal with environmental measures and labelling in particular, both public and private. See https://www.wto.org/english/tratop_e/envir_e/labelling_e.htm.

⁴ Report (2007) of the Committee on Trade and Environment. 4 December 2007. WT/CTE/14.

the SPS Agreement.⁵ Notwithstanding this, most VSS do not address food safety issues. VSS are standards drafted by non-governmental bodies, potentially falling within the scope of application of the TBT Agreement, and the GATT. However, the application of the TBT Agreement, and generally of GATT provisions, to private instruments cannot be taken for granted, but instead requires careful examination.

WTO Agreements only apply to the activities of Members. All private activity is subject to the discipline of WTO law only to the extent that it can be attributable to a Member which is a contracting party to the WTO. For this purpose, the rules on State responsibility in combination with the jurisprudence of the WTO panels and the Appellate Body can assist in the determination of which private measures can be attributed to the Members, especially under the GATT. It cannot however be excluded that the WTO Agreements provide for stricter conditions for attribution of private party conduct, meaning that more private activities can be attributed to a WTO Member than under the customary rules for State responsibility. This is arguably the case for the TBT Agreement, which provides that Members are under an obligation to ensure that also non-governmental bodies *in their territory* comply with certain provisions of non-discrimination and unnecessary trade-restrictiveness, as well as other TBT obligations. The extent of such provisions is however unclear, and which bodies would qualify as non-governmental for the purpose of the TBT Agreement still remains a matter of speculation. The issue is further complicated from the fact that, at least theoretically, a possibility is left open that VSS are considered as technical regulations in light of the Appellate Body's interpretation of the 'mandatory' requirement in Annex 1.1 of the TBT Agreement.⁶ As the extent of the substantive obligation could differ if the contested measure is considered a technical regulation or a standard,⁷ a careful examination of this issue of scope is therefore crucial.

This Chapter aims at bringing clarity over the personal scope of application of the WTO Agreement *vis-à-vis* VSS, with particular attention for the GATT, the TBT Agreement and the SPS Agreement. It is structured as follows. Section 2 discusses the customary rules on state responsibility as codified by the International Law Commission (ILC) in the Articles on Responsibility of States for Internationally Wrongful Acts (ASR).⁸ The assessment is limited to the Articles which are directly relevant for the potential application of WTO rules to private parties' activity in the regulatory domain, such as Articles 4, 5, 8 and 11.

⁵ Art. 1.5 of the TBT Agreement provides that measures falling under the definition of 'SPS measures' contained in Annex A of the SPS Agreement shall be excluded from the scope of the TBT Agreement. Whether private SPS measures could fall under the definition of SPS measures is debated.

⁶ Appellate Body Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna Products (US - Tuna II)*, WT/DS381/AB/R, adopted 16 May 2012, paras. 187-195.

⁷ See in particular Sections 3 and 4 of Chapter 6.

⁸ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries. Yearbook of the International Law Commission, 2001, vol. II, Part Two, 31.

Subsequently, Section 3 discusses WTO positive law and case-law on private measures with the objective of assessing whether WTO law has different rules in place concerning State attribution of private conduct. Section 3.1 addresses the applicability of the ASR to the WTO system. Section 3.2 disentangles the private and public elements and effects of a measure according to WTO and GATT case-law, in order to offer guidance on the proper manner to categorise a measure as public or private. Section 3.3 attempts to link WTO and GATT case-law to the categories for attribution discussed in the ASR, as such a distinction is not so explicit in panel rulings. In general, attribution under WTO law seems to be aligned to attribution under the ASR, also because the Appellate Body is under an obligation to interpret WTO law in accordance with customary international law. Differences are however present, which can better be framed as adaptation of the public international law rules of attribution to the specific features of international economic law. The focus of the analysis will be limited to private parties' regulatory activities, which are therefore potentially subject to Art. I:1, III:4 and XI:1 of the GATT. The WTO rules of attribution are then applied to VSS in Section 3.4, in order to assess under which circumstances responsibility arises, by considering the specific forms of interaction between public and private authorities discussed in the previous Chapters, and the most frequent scenario under which no interaction can be observed.

Section 4 addresses the special regime of attribution under the TBT Agreement. After discussing in Section 4.1 the dividing line between technical regulations and standards, the two types of measures covered by the Agreement, Section 4.2.1 and Section 4.2.2 analyse the regime of attribution and responsibility under Articles 3 and 4 of the TBT Agreement with respect to non-governmental bodies enacting, respectively, technical regulations and standards. It will illustrate which types of standardising bodies are covered by the Agreement and capable of preparing, adopting and applying technical regulations and standards. Section 4.2.2.3 discusses the extent of the obligation imposed on the Members to ensure private bodies' compliance with the provisions of the TBT Agreement. Section 4.2.2.4 will devote particular attention to investigating the extent of the obligation imposed on Members to ensure that non-governmental bodies in their territory act in compliance with the TBT Agreement, and which measures may be considered as reasonably available to ensure compliance with the provisions of the Agreement by non-governmental bodies. Section 4.2.3 discusses the requirement international standardising bodies must possess to qualify as such. Section 4.3 then applies the findings of the previous sections to VSS bodies, with the objective of identifying which VSS bodies are covered by Art. 3 as bodies setting technical regulations, by Art. 4 as bodies setting standards, and considered as international standard setting bodies in the meaning of Art. 2.4 TBT. Section 5 moves on to the SPS Agreement, and similarly analyses its scope of application *vis-à-vis* private SPS measures. The focus of the analysis will be on Art. 13 SPS, apparently establishing an extent of responsibility for non-public bodies. Section 6 concludes by summarising the findings which set the ground for the substantive analysis of WTO discipline of Chapter 6.

2 Relevant Articles on State Responsibility for Internationally Wrongful Acts

The Articles on State Responsibility for International Wrongful Acts (ASR) are the final outcome of a lengthy codification process that culminated with their adoption by the General Assembly of the United Nations in 2001.⁹ It is accepted that at least some Articles of the ASR, such as those on attribution here discussed, constitute customary international law.¹⁰ The ASR constitute the principles, formulated by way of codification and progressive development, under which a State is to be held responsible for a breach of international law. The Articles address the secondary rules of State responsibility, i.e. the general conditions under which a State is to be considered as responsible for a breach of its international obligations, without attempting to define the actual content of such obligations.¹¹ Chapter II of the ASR illustrates a situation under which conduct not *prima facie* from the State can nevertheless be attributed to it. Attribution to the State constitutes the first of the two elements that give rise to State responsibility, the second being the presence of an internationally wrongful act.¹²

It is acknowledged in the commentary to the ASR that, in principle, all conduct from individuals or juridical persons linked to a State by nationality, residence or incorporation can be attributed to the State. It is however recognised that, under international law, such an approach is to be avoided in order to give due recognition to the autonomy of individuals acting exclusively on their own account, and not 'at the instigation of public authority'.¹³ As a general rule, it is therefore stipulated that conduct is to be attributable to the State if it is the conduct of a State organ, or of bodies or persons that acted under the direction, instigation or control of these organs - for example, in the capacity of agents of the State.¹⁴ For the purpose of assessing whether private parties' regulatory activity could be attributed to the State under WTO law, only the relevant Articles will be discussed; general issues of State responsibility, as well as other Articles covering attribution, will not be addressed. The analysis will thus focus on Art. 4 (conduct of organs of a State); Art. 5 (conduct of persons or entities exercising elements of governmental authority); Art. 8 (conduct directed or controlled by a State); and Art. 11 (conduct acknowledged and adopted by a State as its own). Although potentially attributable private conduct can occur in several areas of international economic law, implicit reference will be made to the domain of regulation.

⁹ United Nations General Assembly Resolution 56/83 (Dec. 12, 2001).

¹⁰ Also acknowledged by explicit reference from international arbitration tribunals. See for example *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 Jun. 2006), at para. 89.

¹¹ Yearbook of the International Law Commission, 2001, vol. II, Part Two, 31.

¹² Art. 2 of the ASR. Yearbook of the International Law Commission, 2001, vol. II, Part Two, 34.

¹³ Yearbook of the International Law Commission, 2001, vol. II, Part Two, 38.

¹⁴ *Ibid.*

2.1 Article 4 - Conduct of organs of a State

The simplest, and most straightforward, scenario concerns attribution of conduct by organs of the State. Article 4 ASR explicitly provides for the internal law of a State to confer the status of 'State organ' upon a certain entity. 'State organ' encompasses all 'individual or collective entities which make up the organisation of the State and act on its behalf'.¹⁵ Explicit constitutional or legal conferral constitutes strong evidence in determining whether an organ can be considered as an organ of the State. However, practice matters as well in certain contexts.¹⁶ Local government or regional entities also qualify, on the basis of the principle of unity of the State.¹⁷ It is also clear from the Commentary to the ASR that the reference to State organs is not limited to governmental organs, but it extends to all organs exercising any function and at all levels. Traditional tripartitions of power between executive, legislative and judiciary do not matter for the purpose of Art. 4 ASR. In order for the conduct of an organ to be considered as State conduct it must also be assessed whether that organ is actually acting in that capacity. This problem is particularly evident for persons who are State organs.

Art. 4 ASR refers therefore to State organs representing constitutive elements of the State. Unless a standard-setter is established by law and, consequently, it is arguable that it constitutes a State organ since it exercises legislative functions, Art. 4 ASR would not be relevant for private bodies undertaking more or less explicit regulatory activity. Voluntarily and privately established VSS bodies would undoubtedly not be considered State organs. Section 4.2.1 will discuss that Art. 4 ASR is of assistance in the interpretation of Art. 3 and 4 of the TBT Agreement, not strictly with respect to attribution, but in the identification of the extent of State responsibility for the activities of non-governmental bodies.

2.2 Article 5 - Conduct of persons or entities exercising elements of governmental authority

Art. 5 ASR addresses attribution of conduct of bodies which are not State organs in the meaning of Art. 4 ASR, but are nevertheless authorised to exercise governmental authority. The Article refers to 'entities', as many different types of body can be empowered to exercise elements of governmental functions. Bodies that exercise governmental authority can be parastatal entities, semi-public entities, private companies and corporations which have been privatised but still retain regulatory functions. Specific examples include private security firms contracted as prison guards, or airlines exercising powers in relation to immigration control.¹⁸ The dispositive element is, however, the

¹⁵ Yearbook of the International Law Commission, 2001, vol. II, Part Two, 40.

¹⁶ Yearbook of the International Law Commission, 2001, vol. II, Part Two, 42.

¹⁷ *Ibid.*

¹⁸ Yearbook of the International Law Commission, 2001, vol. II, Part Two, 42-43.

presence of legal empowerment, or delegation of power by the law of the State to exercise functions that would normally be performed by a State organ. This element supersedes all other possible criteria in classifying a given entity as public or private according to internal law, such as ownership, State participation, composition, or control.¹⁹ The actual extent of governmental authority is not defined in Art. 5 ASR. The Commentary clarifies that what can be considered as 'governmental' is strictly dependent on a society's history and traditions. What matters particularly are therefore not just the actual powers being delegated, but especially the way the conferral of powers is made, the purpose for which the powers are exercised, and the extent to which an entity remains accountable to the government.²⁰

A relevant difference between Art. 4 and Art. 5 appears thus to be the reference to 'organs' in the former and to 'entities', or 'bodies' in the latter. Under Art. 4 ASR, the conferral upon an organ of governmental power occurs by means of law. It seems that the State organs covered by Art. 4 ASR must be created *ex novo* by means of law. Conversely, under Art. 5 ASR, an already existing 'body' is vested of governmental authority by means of delegation. It could be said that, in such a case, the State strips itself of certain powers to include situations where bodies exercise regulatory powers in the public interest - a function typically connected with governmental authority in modern Western States. The conduct of standard-setters which is based on directly delegated powers, or conferred as a special task in the public interest, could be attributable to the State under Art. 5 ASR. This could be the case, for example, of the European system for technical standardisation. Concerning the governmental function being delegated, the purpose for which conferral is made and the extent of accountability to the State, it is rather uncontroversial to consider regulation as a typical governmental function. Furthermore, delegation occurs with the purpose of regulating in the public interest²¹ and under a system of control from the legislator.²² The same could not be said for VSS, which are created by private actors independently from public approval and control.

2.3 Article 8 - Conduct directed or controlled by the State

Art. 8 ASR requires a specific factual relationship between the conduct of a private entity and the State. Art. 8 ASR addresses cases of *de facto* empowerment, which is different

¹⁹ Yearbook of the International Law Commission, 2001, vol. II, Part Two, 43.

²⁰ *Ibid.*

²¹ See Commission Decision COMP/F-2/38.401 *EMC/European Cement Producers* [2005] D/205249. See also Section 2.1.1 of Chapter 4.

²² Regulation 1025/12 of the European Parliament and of the Council of 25 October 2012 on European standardisation L 316/12; See also Schepel, H. (2005) *The constitution of private governance. Product standards in the regulation of integrating markets*. Hart Publishing, 238; Hofmann, H.C.H., Rowe, G.C., Turk, A.H. (2011) *Administrative law and policy of the European Union*. Oxford: Oxford University Press, 600-601.

from the *de iure* delegation at issue in Art. 5 ASR.²³ Two different situations are relevant under Art. 8 ASR: when private persons act on the *instruction* of the State and, more in general, when private persons are under the *direction* or *control* of a State. Both situations, in addition, mandate the existence of a real factual link between the private actor(s) and the State for a finding of attribution.²⁴ Proving either instruction, direction or control is sufficient for attributing conduct.²⁵ Another difference with Art. 5 ASR appears to be that it is not required that the conduct of the private entities includes elements of governmental authority.

Although the Commentary often refers to the activity of a person or a group of persons exercising military or paramilitary functions, it is made clear that Art. 8 ASR applies also to legal entities such as corporations and companies.²⁶ State-owned and State-controlled corporate entities are not *prima facie* considered to be acting under control from the State, as international law generally recognises the separation of corporate entities at the national level, unless the company is exercising forms of governmental authority in the meaning of Art. 5 ASR. In such cases, it is assumed that the State-owned company is acting under control of the State.²⁷

The test to determine whether private conduct is in fact under the direction or control of a State appears strict: conduct can be attributed to the State only if the State effectively controlled the specific operation or conduct; incidental or peripheral control, or even support and dependence, do not suffice to trigger attribution.²⁸ In the *Nicaragua* case, extensive financing and other forms of support provided by the United States to contras in Nicaragua was not considered by the ICJ to constitute incontrovertible evidence of US control such as to justify State attribution of the day-to-day activity of the paramilitary group under Art. 8 ASR.²⁹ The standard of 'effective control' with respect to each action in which the alleged violation occurred was confirmed by the ICJ in the *Genocide* case. There, the more relaxed standard of 'overall control' of private action was explicitly rejected.³⁰

A conceptually similar form of attribution involving economic actors can be found in EU competition law and US antitrust law in the State action doctrine. As seen in Section 4 of Chapter 4, private action distorting competition can be attributed to EU Member States,

²³ De Frouville, O. (2010) 'The sources of international responsibility. Attribution of conduct to the State: Private individuals'. In Crawford, J., Pellet, A., Olleson, S., Parlett, K. (Eds.) *The law of international responsibility*. Oxford: Oxford University Press, 265.

²⁴ *Ibid.*

²⁵ Yearbook of the International Law Commission, 2001, vol. II, Part Two, 48.

²⁶ Yearbook of the International Law Commission, 2001, vol. II, Part Two, 48-49.

²⁷ Yearbook of the International Law Commission, 2001, vol. II, Part Two, 48.

²⁸ Yearbook of the International Law Commission, 2001, vol. II, Part Two, 47.

²⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgement, I.C.J. Reports 1986, p 62-67, paras. 109-115.

³⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, I.C.J. Reports 2007, 43, paras. 408-413.

and thereby escapes competition scrutiny. This occurs in the presence of procedural obligations imposed by the State, which ensure that private actors operate in the public interest, and provides that the final responsibility falls on the State. Similarly, in US antitrust law, *Parker* immunity is granted to private parties if the private measures can be brought back to a clearly articulated and affirmatively expressed state policy, and that policy is actively supervised by the State.³¹ Although not explicitly referred to as instances of 'direction and control', these two examples - especially the US case³² - are illustrative of a common strictness in attributing private actions to the State where the borders of delegation are blurry.

Finding instruction, direction of control by a State over private standard-setters is hard to prove, in light of the strict test spelled out above. Even technical standard-setters operating within a legal framework of explicit delegation are entirely unconstrained by the State in their daily action. In such cases, independence from public interference and the necessity to operate free from the constraints normally imposed on national legislatures are in fact some of the underlying rationales behind technical standard-setting. It should be noted that, whereas Art. 5 implies that the private body being delegated powers may then act independently from the State, Art. 8 requires that a private body is not independent in its actions from the State at issue. Forms of financing, or even mechanisms for *ex-post* legislative control on the standard-setting outputs may be observed, but such actions would hardly meet the stringent test as set forth by Art. 8 ASR. It will be seen that WTO law has elaborated its own criteria for cases of direction and control, which have been described as being more relaxed.³³ Attribution of VSS bodies' action must be assessed by looking at specific forms of interactions between governments and standard-setters such as financing and endorsement, but also, especially, a general policy preference and occasional incentives for companies implementing CSR and sustainability-related schemes, as Section 3.4 will elucidate.

2.4 Article 11 - Conduct acknowledged and adopted by the State as its own

Different from Art. 4, Art. 5 and Art. 8 ASR, which describe a situation in which the status of the private bodies or the organ of the states, or its legal mandate to act, are clear and established at the moment the contested act is committed, Art. 11 ASR refers to (exceptional) situations in which the private conduct could not be attributed to the State

³¹ *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980), para 105, quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978).

³² The *Midcal* test is lenient concerning the concept of 'delegation' as to include not only cases where certain regulatory functions were conferred on private actors, as under Art. 5 of the ASR but also to include cases where private actors were merely permitted to regulate. See *Southern Motor Carriers Rate Conference v US*, 471 US 48, 57 (1985). Hence the necessity of a second, stricter, requirement assessing supervision.

³³ Zedalis, R. (2007) When do the activities of private parties trigger WTO rules. *Journal of International Economic Law* 10(2), 358.

at the time of its commission, but that is, at some point, nevertheless acknowledged and adopted by the State as its own.³⁴ An example of such State acknowledgement and adoption can be found the *United States Diplomatic and Consular Staff in Tehran* case.³⁵ The decision to maintain the occupation of the US embassy and the detention of the consular staff was complied with by Iranian authorities and repeatedly endorsed by means of public statements.³⁶

It is made clear in the Commentary that ‘acknowledging and adopting’ entails a stricter test than mere ‘approval or endorsement’. A change in the legal nature of the private action at issue is required in order to give rise to attribution under Art. 11 ASR.³⁷ The meaning of adoption itself carries the idea that a certain conduct is identified and acknowledged by the State as its own actual conduct. Private conduct can be attributed to the State only to the extent of its acknowledgement and adoption. It should be kept in mind that the two conditions are cumulative.³⁸

A situation of acknowledgement and adoption of private conduct arguably occurs when a public authority recognises, requires or mandates in its legislation compliance with a private regulatory scheme. Within the domain of VSS, this could happen, for example, in the domain of public procurements, by requiring suppliers to employ a VSS scheme for demonstrating sustainable features of their products. Also employing a private regulatory scheme for the purpose of demonstrating compliance - as the EU biofuel sustainability requirements discussed in Section 3.1 of Chapter 3 - could constitute an act of sufficiently strict acknowledgment, since the State recognises the existence, validity and effectiveness of a private regulatory scheme for the pursuit of public goals. Adoption is then made in a highly formal manner by means of an official act of the State, such as a law or decree establishing that a certain scheme will grant evidence of compliance with regulatory requirements. Since ‘approval or endorsement’ would not be deemed to be sufficient to trigger State attribution, other forms of support, or participation of the State in the standard-setting activities of a VSS body would not give rise to a finding of attribution under the scope of Art. 11 ASR. According to this standard, it seems that forms of ‘use’ of VSS, and possibly certain ‘facilitations’, are likely to result in attribution.

3 The WTO rules on attribution: VSS under the GATT

The following sections analyse GATT case law on attribution in light of the ASR, in order to assess the extent of consonance between the interpretation of WTO law and its

³⁴ Yearbook of the International Law Commission, 2001, vol. II, Part Two, 52.

³⁵ *Case Concerning United States Diplomats and Consular Staff in Teheran (USA v Iran)*, Merits, Judgement, I.C.J. Reports 1980, 3, paras. 73-74.

³⁶ Yearbook of the International Law Commission, 2001, vol. II, Part Two, 53.

³⁷ *Case Concerning United States Diplomats and Consular Staff in Teheran (USA v Iran)*, Merits, Judgement, I.C.J. Reports 1980, 3, para. 74.

³⁸ *Ibid.*

specific features, and the rules for attribution contained in the ASR. It begins by discussing the applicability of the ASR for the purpose of interpreting WTO law, and subsequently it disentangles mere elements of private choice from public measures. Formal cases of delegation of governmental authority and less formal cases will be studied, which correspond to the situations under Articles 5 and 8 ASR, respectively. WTO dispute settlement bodies have not had yet the opportunity to address the equivalent situation of Art. 11 ASR. By broadly interpreting the term 'requirements' under Art. III:4 GATT, panels and the Appellate Body have ensured in practice that situations corresponding to Art. 11 ASR also are covered, and private measures 'acknowledged and adopted' are attributable to Members. Finally, Art. 4 ASR will be discussed in the context of WTO law, but only limited to a peculiar element of the WTO Agreements, which provide in Art. XXIV:12 GATT and elsewhere - for example in Art. 3 and 4 of the TBT Agreement - that *reasonable measures* should be taken *vis-à-vis* the conduct of regional and local governments and authorities, i.e. of State organs.³⁹ Generally, it can be concluded that measures attributable under WTO law reflect those attributable under general international law, but under an all-encompassing standard of 'dependance from governmental action'. Having assessed the WTO practice concerning rules of attribution, such framework addressing GATT discipline will be then applied the three public-private authorities forms of interaction, and to the most frequent scenario where no interaction is present.

3.1 WTO law and the Articles on State Responsibility

The obligations contained in the WTO Agreements are only binding on the signatory States and separated customs territories. Obligations are directly imposed on the Members, and State measures are the acts that must be in compliance with the provisions of the Agreements. 'Measures' were defined very broadly by the Appellate Body as, in principle, able to encompass any act or omission attributable to a WTO Member.⁴⁰ However and unsurprisingly given their role in economic and trade regulation, private parties and their measures have been the subject matter of a number of disputes. For the purpose of State responsibility and, specifically, of attribution of conduct, WTO law constitutes *lex specialis* to the ASR which precludes the application of the ASR in case of conflict, to that extent only. Art. 55 ASR explicitly recognises for States the possibility to contract out from the provisions of the ASR.⁴¹ WTO law is mentioned as a prime example, as it contains provisions in express derogation from the ASR, for example

³⁹ The Understanding on the Interpretation of Article XXIV has clarified the extent of the obligation as imposing full responsibility on the Member. Further discussion will be performed in Section 3.3.4.

⁴⁰ Appellate Body Report, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 15 December 2003, para. 81. The scope of State measures however differs from Article to Article.

⁴¹ Yearbook of the International Law Commission, 2001, vol. II, Part Two, 141.

concerning remedies and compensations,⁴² or concerning attribution in the TBT Agreement, as it will be seen in Section 4.2. The TBT Agreement's special rules of attribution apply cumulatively in addition to the 'traditional' WTO rules of attribution as elaborated on the basis of the ASR, and thus do not replace them altogether.

However, in case no divergence exists with the ASR or WTO law is silent, the ASR are relevant in the *interpretation* of the WTO Agreements, as interpretation of WTO law shall be in line with the content of the ASR. As provided in the Dispute Settlement Understanding (DSU), panels and the Appellate Body are under the obligation to interpret the provisions contained in the Agreements in accordance with the customary rules of interpretation of international law.⁴³ Art. 31.3(c) of the Vienna Convention on the Law of the Treaties, the main instrument concerning the interpretation of international law, provides that any relevant rules of international law applicable in the relations between the parties shall be taken into account, which include also customary international law.⁴⁴ At least the rules of attribution contained in the ASR enjoy a well-accepted status of customary law.⁴⁵ In any case, several Articles of the ASR have been invoked in a number of WTO cases.⁴⁶

One may question the appropriateness of a transposition of the ASR rules of attribution from the context of public international law to the specific context of economic law, in particular for situations of State instruction, direction or control. There undoubtedly are

⁴² Marrakesh Agreement establishing the World Trade Organisation, annex 2, Dispute Settlement Understanding, in particular Art. 3.7.

⁴³ DSU, Art. 3.2. Recall, to this extent, also the often-cited remark by the Appellate Body that WTO law shall not be read 'in clinical isolation' from public international law. Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline (US - Gasoline)*, WT/DS02/AB/R, adopted 29 April 1996, p. 17.

⁴⁴ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331. With specific reference to customary international law, the panel in *Korea - Procurements* held that 'to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO. Panel Report, *Korea - Measures Affecting Government Procurement*, WT/DS/163/R, adopted 1 May 2000, para. 7.96.

⁴⁵ United Nations Legislative Series. Materials on the Responsibility of States for Internationally Wrongful Acts ST/LEG/SER B/25, 27-81.

⁴⁶ Arbitration Panel Report, *Brazil — Export Financing Programme for Aircraft (Article 22.6 – Brazil)*, WT/DS46/ARB, adopted 28 August 2000, para. 3.44; Appellate Body Report, *United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (US – Cotton Yarn)*, WT/DS192/AB/R, adopted 8 October 2001, para. 120; Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 15 February 2002, para. 259; Panel Report, *United States Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 10 November 2004, paras. 6.128 - 6.129; Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 7 October 2005, para. 8.180; Panel Report, *EC-Selected Customs Matters*, WT/DS315/R, adopted 16 June 2006, para. 7.552; Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 12 June 2007, para. 7.305; Appellate Body Report, *Canada - Continued Suspension of Obligations in the EC - Hormones Dispute*, WT/DS321/AB/R, adopted 16 October 2008, para. 382; Panel Report, *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 November 2010, para. 7.120; Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, paras. 305-316; Appellate Body Report, *European Communities - Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 18 May 2011, para. 685.

different levels of concern between the attribution to the state of military and paramilitary activities of individuals which can harm the physical integrity of persons, and attribution of trade-restrictive activities from private parties or economic operators. The differences are particularly evident when it comes to the test to identify a sufficiently strong factual nexus between private conduct and the State, such as for situation of instruction, direction of control at issue under Art. 8 ASR. It has been argued that such nexus should be found more easily for cases where private conduct puts the life of individuals at stake than in cases where it restricts, for example, market access or market participation.⁴⁷

It will be seen that WTO case-law has recognised that some Members, traditionally, may play a greater role in the direction of private parties' regulation of economic activity, whereas others value market independence and autonomy. Diversity in regulatory cultures is therefore to be taken into account for a finding of attribution. The rationale is to prevent Members from escaping the application of their international obligations by informally delegating governmental authority to private parties, or otherwise controlling their actions. As an outcome, the transposition of the attribution standard under Art. 8 ASR by panels and the Appellate Body differs from what is envisaged in the ASR, to the extent it appears to be less demanding than the test contained therein. Consequently, more types of private actions could be attributable to the State than under the Art. 8 ASR test. Rather than questioning the opportunity of a more relaxed approach to attribution than under other branches of international law, one could better observe that the different attribution regime of WTO law constitutes more of a necessary refinement of the customary rules for attribution, and their adaptation to the specificity of international trade law.⁴⁸

3.2 Private and public elements of a measure and its effects

Detrimental effects on competitive opportunities can stem both from private and public actions, which can as well be intermingled to each other. Only public activity is however caught by the scope of WTO law, as genuinely autonomous and free-standing private action is not to be subject to WTO discipline. As held by the Appellate Body in *Korea - Beef*, changes in the competitive conditions in a marketplace which are 'not imposed directly or indirectly by law or governmental regulation, but [are] rather solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits', cannot be the basis for a finding that a measure treats imported products less

⁴⁷ Zedalis, R. (2007) *Supra* at 33, 333-335.

⁴⁸ Kuijper, P.J. (1995) The law of the GATT as a specialised field of international law. Ignorance, further refinement or self-contained system of international law? *Netherlands Yearbook of International Law* XXV, 256. Also supporting the view that the *Japan - Semiconductor* test is broadly in line with public international law: Tietje, C. (1995) Voluntary eco-labelling programs and questions of State responsibility in the WTO/GATT legal system. *Journal of World Trade* 29(5), 149.

favourably than domestic like products.⁴⁹ Pure private behaviour unconnected to the State is never attributable to a Member for a finding of WTO-inconsistency, in line with the customary rules of international law. In other cases, there might be a combination of elements of private choice and public measures that, taken together, have the effect of discriminating against foreign products.

The clearest example of such interaction between private choice and a public measure can be found in *Korea - Beef*. At issue was a Korean measure imposing a dual-retail system, whereby retailers were mandated to choose whether to store Korean beef or foreign beef only. South Korea claimed that any discriminatory element arising from the regulatory regime was the result of purely private choice. The Appellate Body criticised such reasoning and noted that the legal necessity to make a choice 'was, however, imposed by the measure itself', and therefore the presence of 'elements of private choice does not relieve Korea from responsibility' for the measure.⁵⁰ The decision stands for the fact that private parties and private choice - by retailers in that case, but theoretically it can also be from producers, or consumers - can play a role in the effective functioning of a regulatory regime. However, this does not suffice to escape responsibility. In *Korea - Beef*, private parties were mandated to choose between exclusively storing local beef or exclusively storing foreign beef.⁵¹ In other cases, however, the contested measure provided private parties the opportunity to make a choice, in particular to producers to comply with certain requirements and to consumers to purchase certain products, or was facilitating an unintended discriminatory outcome by means of private conduct. Such factual situations were at issue, respectively, in *US - Tuna II* and *US - COOL*, and were dealt with the same outcome as in *Korea - Beef*.

In *US - Tuna II*, the US government set certain requirements concerning fishing methods in order for producers to qualify for a voluntary 'dolphin-safe' label for tuna products. In assessing whether it was actually the measure that modified the condition of competition in the US market to the detriment of Mexican tuna products, the Appellate Body was required to address elements of private choice in the operation of the labelling scheme. Several elements of private choice were at issue there, including the very strong preference of US retailers and consumers for 'dolphin-safe'-certified tuna, which rendered compliance with the measure an indispensable condition to accede to the market, and the possibility for Mexican producers to adapt at least part of their production methods to meet the requirements of the measure.⁵² The Panel cited *Korea - Beef* and noticed

⁴⁹ Appellate Body Reports, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea - Beef)*, WT/DS161/AB/R, adopted 11 December 2000, para. 146.

⁵⁰ *Korea - Beef*, WT/DS161/AB/R, para. 146.

⁵¹ Some commentators have instead characterised the decision as a case of attribution to the Member of the retailers' measure by noting that that action could have never occurred had it not been for a system of incentives given by State Measures. See Gandhi, S.R. (2005) Regulating the use of voluntary environmental standards within the World Trade Organisation legal regime: Making a case for developing countries. *Journal of World Trade* 39(5), 866. It should be noted that the AB expressly denies attribution of conduct in the cases in question in this Section.

⁵² *US - Tuna II*, WT/DS381/AB/R, para. 221.

that the requirements for 'dolphin-safe' tuna were actually set by the US measure and, even if consumers were purchasing tuna as the result of their own choice, it was the measure which allows consumers to express their preference for a specific kind of tuna products.⁵³ The Appellate Body confirmed the validity of the panel's reasoning.⁵⁴ With respect to the second element of private choice, the Appellate Body was critical of the panel's finding that detrimental impact arising from the US measure was due to the behaviour of private economic operators, as Mexican fishermen were not prevented from complying with the measure, and could simply adapt their fishing techniques and production methods. The Appellate Body therefore concluded that, as in *Korea - Beef*, it was the contested measure that nevertheless modified the conditions of competition to the detriment of imported products.⁵⁵

Similarity, in *US - COOL*, a country of origin labelling requirement for beef cuts required display of the country (or countries) where the animal was born, raised and slaughtered. The burdensome requirements mandated by the measure, combined with the cost of the segregation of cattle, however, had the effect of compelling economic operators to process either exclusively domestic or imported beef.⁵⁶ The panel noted that, as the cost of processing domestic beef was considerably lower, the measure created a strong incentive for US market participants to solely process domestic beef.⁵⁷ The Appellate Body had no doubts that it was the measure itself that created a strong incentive for the behaviour of private economic operators. Whenever a measure creates incentives for private actors to take certain decisions, such decisions are not independent from that measure.⁵⁸ The Appellate Body also noted that the 'market's response to the application of a governmental measure is always relevant to an assessment of whether the operation of that measure accords *de facto* less favourable treatment',⁵⁹ and therefore was important indicia, among other elements, of less favourable treatment.

Situations such as those described above indicate that elements of private choice are present in many State measures and work together for the accomplishment of their objective. It should be kept in mind that the contested measures in *Korea - Beef*, *US - Tuna II*, and *US - COOL* were WTO-inconsistent in the first place. Such WTO inconsistency was made apparent by means of private parties' actions. It should be clear that no attribution of private conduct was at issue in the cases above: the elements of

⁵³ Panel Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, WT/DS381/R, adopted 15 September 2011, para. 7.287-7.289.

⁵⁴ Appellate Body Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US - Tuna II)*, WT/DS381/AB/R, adopted 16 May 2012, para. 239.

⁵⁵ *US - Tuna II*, WT/DS381/AB/R, para. 221.

⁵⁶ Appellate Body Report, *United States - Certain Country of Origin Labelling (COOL) Requirements (US - COOL)*, WT/DS384/AB/R and WT/DS386/AB/R, adopted 29 June 2012, para. 287.

⁵⁷ Panel Report, *United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, adopted 18 November 2011, para. 7.350.

⁵⁸ *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, para. 291.

⁵⁹ *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, para. 289.

private choice were merely separated from the State measure that actually made them possible. As will be shown in the sections below, most of the WTO case-law where issues of attribution were raised stands for the hypothesis that private conduct is attributable when it 'reveals the existence of another, different, action or omission by governmental authorities relevant under the WTO Agreements'.⁶⁰ WTO Members are however not under an obligation to exclude 'any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade-restrictive'.⁶¹ Private action can legitimately restrict trade, as WTO law ensures *formal* market access, and not *actual* market access.⁶² If, for example, retailers and consumers do not want to stock and purchase certain products, no breach is to be found, unless a WTO-inconsistent conduct of a Member can be linked to the contested private action. Could the same be said of private regulatory schemes established spontaneously and which affect the competitive relation between products?

3.3 WTO law and private parties' actions

The starting point of a disquisition over State attribution of private conduct under WTO law is an oft-cited paragraph of the panel Report in *Japan - Film*. The fact that 'an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it'.⁶³ Unsurprisingly, the statement is in line with the acknowledgement in the ASR that private parties may act under the instigation of public authority. The panel clarified that it is impossible to establish bright-line rules, and therefore an assessment shall be performed on a case-by-case basis. The finding resonates with similar language found in the first case addressing private conduct under the GATT regime. In a 1960 Panel Report on the notification of subsidies, the obligation to notify subsidies financed by a non-governmental levy was discussed. There, the Panel held that non-governmental subsidies would be under a notification obligation when the State in fact contributes to their financing, or when the function of taxation and subsidisation is entrusted to a private body. Notification was therefore required for all schemes which are 'dependent for their enforcement on some form of governmental action'.⁶⁴

The statement above, and the standard of 'dependance on governmental action', has profoundly informed subsequent GATT and WTO case law on attribution of conduct. A test of 'dependance on governmental action' forgoes the division set forth by the ASR

⁶⁰ Villalpando, S.M. (2002) Attribution of conduct to the State. How the rules on state responsibility may be applied within the WTO dispute settlement system. *Journal of International Economic Law* 5(2), 418.

⁶¹ Panel Report, *Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather (Argentina Hides and Leather)*, WT/DS155/R, adopted 19 December 2000, para. 11.19.

⁶² Wlostowski, T. (2010) Selected observation on regulation of private standards by the WTO. *Polish Yearbook of International Law* 30, 205.

⁶³ Panel Report, *Japan - Measures Affecting Consumers Photographic Film and Paper (Japan - Film)* WT/DS44/R, adopted 31 March 1998, para. 10.56.

⁶⁴ Panel Report, *Subsidies and State Trading*, L/1160, adopted 23 March 1960, para. 12.

between cases of explicit delegation, cases of *de facto* delegation, and cases of subsequent acknowledgement and adoption. The next sections attempt to allocate cases into the situations identified by the ASR. Rather than each case falling neatly into a specific ASR Article, it will be seen that most of GATT and WTO case-law can be classified under the standard of 'direction and control'. Under this standard, GATT and WTO cases can be situated on a continuum ranging from cases comparable to delegation of powers, where the link between the State and private parties is the strongest, to cases comparable to acknowledgement and adoption of private conduct, where the link with the State, at least at the moment private conduct occurred, is at its weakest. It will be seen that, in general, WTO case law on attribution can also be described along the lines of a 'but / for' test, whereby had it not been for governmental influence or pressure, the private action at issue would have not occurred. In practice, it must be proven that private action is effectively influenced and determined by the government.⁶⁵

3.3.1 WTO law and private parties - Situations falling under Art. 5 ASR

In *EEC - Apples*, a case, among the other claims, about the role non-governmental producer groups played in the market withdrawal of apples, the panel outlined three requirements for governmental attribution under delegation of powers. The scheme at issue must be established by the government; it must be dependent on governmental financing; and must carry out its operations in a way which is mandated by governmental regulations. All three elements were fulfilled in that case.⁶⁶ In particular, it was undisputed that producers groups were established by regulation and mandated to withdraw products from the market whenever prices were likely to fall.⁶⁷ It should be noted that governmental control is not a requirement in Art. 5 ASR.⁶⁸ Such a requisite resonates with administrative tests for lawful delegation of executive powers, such as that spelled out by the CJEU in the *Meroni* case.⁶⁹ The test as elaborated by the panel is however difficult to apply to cases with less straightforward facts, where panel practice has instead adopted a rather expansive reading of delegation. Those cases shall however be better considered in the next section under the corresponding test of Art. 8 ASR.

In *Canada - Dairy*, the Appellate Body discussed also the second important element concerning Art. 5 ASR-situations, i.e. which powers can be considered as 'governmental'

⁶⁵ Tietje, C. (1995) *Supra* at 48, 150.

⁶⁶ Panel Report, *European Economic Communities - Restrictions on Import of Dessert Apples (Complaint by Chile)* L/6491, GATT B.I.S.D. (36th Sup) at 93, adopted 22 June 1989, para. 12.9.

⁶⁷ Panel Report *European Economic Communities - Restrictions on Import of Dessert Apples (Complaint by Chile)* L/6491 (22 June 1989), GATT B.I.S.D. (36th Sup) at 93, para. 2.2.

⁶⁸ 'For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State.' Yearbook of the International Law Commission, 2001, vol. II, Part Two, 43.

⁶⁹ Case C-9/56 *Meroni v High Authority* [1958] ECR I-0135. See, for discussion, footnote 169 and Section 3.1 of Chapter 3.

and therefore capable of delegation. The Appellate Body held that the exercise of powers to “regulate”, “control”, or “supervise” individuals, or to otherwise “restrain” their conducts through the exercise of lawful authority’ construes the essence of government.⁷⁰ In line with Art. 5 ASR, the Appellate Body concluded that an assessment is required over both the *source* of delegation and the *functions* performed by the bodies enjoying such delegation.⁷¹ In applying its standard to the facts of the case, the Appellate Body demonstrated a rather expansive understanding of what constitutes governmental function. The stated mission of the Canadian regional marketing boards was the promotion of the interest of the dairy industry. The Appellate Body noted that the promotion of perceived interests - such as traders’ economic interests - is part and parcel of the normal functioning of governments.⁷²

3.3.2 WTO law and private parties - Situations falling under Art. 8 ASR

Whereas Art. 5 ASR covers situations of formal delegation, Art. 8 ASR addresses situations of factual delegation. Factual, or *de facto*, delegation can take many forms, some of which can be considered as rather close to expressed, formal delegation, because of the presence of a strong and formal(ised) link between governmental and private action, for example by means of legal instruments such as the retailer code at issue in *Japan - Film* discussed below. In other cases, private action is attributed on the basis of direction and control, which in WTO law takes the form of an assessment over governmental incentives and disincentives behind private actions. Most of WTO case law on attribution concerns situations where actions of governments direct the behaviour of private economic operators. It is thus under this scenario that the most detailed elaboration of the rules of attribution under WTO law has been made.

In *Japan - Film*, the US raised a non-violation complaint on the basis of Art XXIII:1(b), the contested measure being - among the many - a code of conduct drafted and enforced by a private council of retailers of photographic products which in the complainant’s view should be attributable to the Japanese government.⁷³ The code, altogether with several other governmental and non-governmental measures was, in the view of the US, *de facto* preventing the access of non-Japanese film producers to the Japanese market.⁷⁴ The claim made by the US concerned the Japanese practice of ‘administrative guidance’ in directing private parties’ action in a way which is aligned to governmental will. This would not occur by means of formal and legally binding instruments, but by means of several informal enforcement mechanisms such as warnings, threats and peer pressure, in a socio-cultural context where economic operators are highly exposed, and willing to

⁷⁰ Appellate Body Report, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Canada - Dairy)*, WT/DS/103/AB/R, adopted 13 October 1999, para. 97.

⁷¹ *Canada - Dairy*, WT/DS/103/AB/R, para. 98.

⁷² *Canada - Dairy*, WT/DS/103/AB/R, para. 101.

⁷³ *Japan - Film*, WT/DS44/R, para. 2.51.

⁷⁴ *Japan - Film*, WT/DS44/R, para. 4.2.

follow such forms of governmental guidance.⁷⁵ The US claimed that Japan ought to take responsibility for the actions of a private trade council, and especially its code of conduct, because State approval of the code was mandated by Japanese law.⁷⁶ By means of such approval, the US also argued that enforcement of the code was conferred on private parties, which could act unhampered in their capacity of quasi-prosecutors.⁷⁷

The panel in *Japan - Film* ultimately found in favour of attribution of the code to the Japanese government, but not just on the basis of effective State control. Instead, the presence of a 'more or less' explicit delegation and the connection of the retailers' code to Japanese legislative instruments were considered as the dispositive element, in a guise not dissimilar to the test in Art. 5 ASR under an expansive interpretation. The panel found it useful to 'focus on the status these actions are given in the eyes of the Japanese government and the photographic industry'.⁷⁸ The panel looked specifically at governmental approval of the private code; governmental supervision of its operation; and exemption from the applicability of competition law provisions to the companies subscribing to the code.⁷⁹ The panel concluded that, by virtue of those elements, there was a sufficient likelihood that private parties will comply with the retailers' code as it was a legally binding measure from the State.⁸⁰ The employment of a test along the lines of Art. 5 ASR is confirmed by the concluding remarks of the panel which noted that, by means of delegation of powers, WTO Contracting Parties could evade WTO obligations in the case that private parties' actions were not attributable to the State.⁸¹ The panel, however, did not investigate which specific governmental powers were at issue.

The panel in *Japan - Film* drew extensively from the GATT-era panel report in *Japan - Semiconductor*, where a standard addressing the concept of control in a meaning more explicitly aligned to Art. 8 ASR was elaborated for the first time. In the framework of an Art. XI complaint, the European Communities argued that Japan engaged in administrative guidance and directed private companies with the outcome of controlling export prices and restricting export volumes of nationally-produced semi-conductors.⁸² The practice began after the conclusion of a notified agreement with the US concerning trade in semi-conductors that had the objective of favouring market access of foreign producers in Japan, and putting an end to the frequent dumping from the Japanese industry.⁸³ In its claims, the EC argued that it did not matter whether the measures were

⁷⁵ *Japan - Film*, WT/DS44/R, para. 5.527.

⁷⁶ *Japan - Film*, WT/DS44/R, para. 6.221.

⁷⁷ *Japan - Film*, WT/DS44/R, para 6.228.

⁷⁸ *Japan - Film*, WT/DS44/R, para. 10.327.

⁷⁹ *Ibid.*

⁸⁰ *Japan - Film*, WT/DS44/R, para. 10.328.

⁸¹ *Ibid.*

⁸² Panel Report, *Japan - Trade in Semiconductor (Japan - Semiconductors)*, L/6309 - 35S/116, adopted 4 May 1988, paras. 34-35.

⁸³ *Japan - Semiconductors*, L/6309 - 35S/116, paras. 13-15.

effectively binding or not-binding. What matters would not be the form, but only the intended outcome.⁸⁴

The EC further suggested three conditions that a measure prompting private parties to undertake certain actions must fulfil to be covered by the Agreements: the measure at issue must be taken in order to achieve an outcome which could have not been achieved in a GATT-consistent manner by means of legally binding measures; the measure must be effective; and the measure must implement expressed governmental policies.⁸⁵ The test would correspond to Art. 8 ASR as it includes situations of *de facto* governmental instruction, direction or control. The focus of the analysis is however different from Art. 8 ASR. Since WTO law requires State measures in order to give rise to a possible infringement - both under violation and non-violation complaints, with the exception of situation complaints - the reasoning of panels has focused on the characteristics State measures must possess to give rise to attribution of private parties conduct. Conversely, Art. 8 ASR looks at factual elements of direction and control that, as such, are difficult to be transposed directly to the WTO context. It is therefore the concept of 'measure' that is expanded to accommodate several governmental 'behaviours' and 'actions' 'instructing, directing or otherwise controlling' private parties.

The panel in *Japan - Semiconductor* looked specifically at two elements: whether there are 'reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect'; and, secondly, whether 'the operation of the measures [...] was essentially dependent on Government action or intervention'.⁸⁶ All measures underpinning private action that meet these two criteria, whatever their legal form, would render such private action as attributable to the State. These two elements appear to be in line with the test of control under Art. 8 ASR. The standard of 'essentially depending' on governmental action is aligned with the strict test of Art. 8 ASR. The reference to the system of incentives seems however to introduce an additional element into the analysis, as to acknowledge that the manner in which state control is exercised on economic actors can be subtle, and includes 'carrots' as well as 'sticks'. It must however be clear to private parties that they are guided in their actions by an explicit governmental policy preference.⁸⁷ Administrative guidance, by creating a system of incentives and disincentives, could qualify as a governmental measure. Indeed, mandatory character is not determinative of a governmental measure.⁸⁸ Effectiveness of control seemed to be the crucial element in determining whether administrative

⁸⁴ *Japan - Semiconductors*, L/6309 - 35S/116, para. 51.

⁸⁵ *Ibid.*

⁸⁶ *Japan - Semiconductors*, L/6309 - 35S/116, para. 109.

⁸⁷ *Japan - Semiconductors*, L/6309 - 35S/116, para. 110.

⁸⁸ *Japan - Film*, WT/DS44/R, para. 10.45.

guidance can qualify as State measure, as held by the panel in *Japan - Restrictions on Import of Certain Agricultural Products*.⁸⁹

Looking just at a system of incentives and disincentives could suggest a lower degree of control required to trigger attribution, as it does not immediately follow from it that private actors are acting under the continuous control of the State, but they are merely conforming to its will, possibly out of self-interest. The second element seems to acknowledge this situation and therefore looks at the operation of the measure. By considering administrative practices, and formal and informal procedures, the panel concluded that an entire administrative structure was created to exert the maximum possible pressure on economic actors to act in compliance with governmental will and, ultimately, found in favour of attribution to Japan.⁹⁰ Citing *Semiconductors*, the panel in *Japan - Film* stressed the importance of the peculiar context in which governmental guidance was taking place, and retained the possibility of looking also at other elements constituting evidence for attribution.⁹¹

Although in not such an explicit manner, a conceptually similar test addressing effective control was applied by the WTO panel in *Argentina - Hides and Leather*. At issue was the presence of representatives of the tanning industry in Argentinean customs control procedures.⁹² The EC alleged that peer pressure was used by the tanning industry representatives on the customs officers with the effect to restrict bovine hide exports. The panel focused on the actions of the tanning industry representatives and found no decisive evidence that could support the EC claim that private measures were trade-restrictive. There was therefore no need to address whether Argentina could exercise control on private activities, and therefore appraise whether the underpinning State measure - the authorisation to participate in customs procedures - was 'effective' in controlling private action as in the meaning of the test in *Japan - Agricultural Products*.⁹³ Different from *Semiconductors*, here the claimant focused on the activities of the private parties, and not on the manner under which the State exercised controls on the private party at issue, probably because it could not identify specific means to prove continuous governmental control, except a mere authorisation to certain private actors to attend customs procedures.

⁸⁹ Panel Report, *Japan - Restrictions on Imports of Certain Agricultural Products (Japan - Agricultural Products)*, 35S/163, adopted 22 March 1988, p. 242.

⁹⁰ *Japan - Semiconductors*, L/6309 - 35S/116, para. 117.

⁹¹ *Japan - Film*, WT/DS44/R, para. 10.48.

⁹² It shall be noted that no delegation of power under an Art. 5 ASR situation was at issue here. An Argentinian decree allowed representatives of the Association of Industrial Producers of Leather, Leather Manufactures and Related Products (ADICMA) to participate to customs controls of bovine raw hides, but no power concerning custom clearance was delegated to them. ADICMA representatives only accompanied the appointed inspector in charge of ascertaining exporter's declarations and goods inspections. The Argentinian decree explicitly provided that objections from the ADICMA representatives could not result in the shipment being stopped. A possibility to file a subsequent complaint was however permitted. See *Argentina - Hides and Leather*, WT/DS/155/R, paras. 2.31 - 2.44.

⁹³ *Argentina - Hides and Leather*, WT/DS/155/R, paras. 11.28 - 11.35.

It can therefore be concluded that private action is attributable under a test of 'control' - that can be assimilated to, or seen as a refinement of Art. 8 ASR - after a consideration is made of whether private behaviour has the same effect as public behaviour, and whether the State has played a role in its formulation. In the words of the panel in *Japan - Film*, a sufficient level of governmental involvement must be found.⁹⁴ It has been claimed convincingly that the current case-law seems to point at whether private actions can be said to reflect the expressed will of governmental authority.⁹⁵ Within such framework, even cases concerning delegation of power could be seen as 'reflecting' what governmental authority wants, since the private conduct would be aligned to and dependent from the governmental preference expressed by the delegating measure. Such a test is however more relaxed than that under Art. 8 ASR, and potentially results in attribution to the State of several types of private behaviour.

At least in those contexts where economic operators are inclined to follow more or less explicit governmental preferences, actions conforming to governmental preferences shall be attributable. Conversely, where economic operators are traditionally autonomous and independent, the analysis shall also assess whether conformance between private action and governmental policy preference does not occur because of other factors, like-mindedness or, simply, coincidence.⁹⁶

3.3.3 WTO law and private parties - Situations falling under Art. 11 ASR

WTO case law has not yet explicitly addressed situations that correspond entirely to Art. 11 ASR, where private conduct is subsequently acknowledged and adopted by the State as its own when, at the time of the conduct, no link existed between the private actor and the State. Restricting the analysis to the regulatory domain, and referring to the ASR for interpretative guidance, it is expected that endorsement or recognition by means of formal or semi-formal statements would not suffice. A transformation of the legal nature of the otherwise private measure must occur.⁹⁷ In the domain of international economic law, this happens by means of a national law or decree addressing the consequences of compliance with the private measure. As will be discussed at the end of this Section, WTO law has however introduced an additional requirement to attribute private measures, resonant of the 'system of incentives and disincentives' in *Japan - Semiconductor*, which is the condition that a voluntary measure must confer an advantage. The measures at issue in cases of arguable acknowledgement and adoption, all concerned more or less voluntary private undertakings and commitments that were made binding by governmental recognition or enforcement. This additional requirement would result in the lack of attribution for voluntary private measures not conferring an

⁹⁴ *Japan - Film*, WT/DS44/R, para. 10.16.

⁹⁵ Zedalis, R. (2007) *Supra* at 33, 357.

⁹⁶ Zedalis, R. (2007) *Supra* at 33, 360.

⁹⁷ *United States Diplomatic and Consular Staff in Tehran, Judgement*, I.C.J. Reports 1980, 15, para. 74.

advantage, but for VSS and private standards in general, for compliance with which is presumed to confer an advantage, attribution may arise.

Case law clarified that it is not problematic to consider mandating compliance with a private measure a 'requirement' in the meaning of Art. III:4 GATT. A 'requirement' implies 'governmental action involving a demand, request or the imposition of a condition'.⁹⁸ A formalistic application of the test in *Japan - Semiconductor* is however problematic, as it cannot be held that, by requiring compliance with a private regulatory scheme such as a VSS, the State is capable of directing and controlling the activity of the VSS body - which is anyway not a requirement under Art. 11 ASR. Not to provide for attribution under a test aligned to Art. 11 ASR, however, would permit Members to circumvent WTO obligations by *de facto* delegating to private parties important regulatory functions, specifically in connection with the implementation of legislative requirements.

Under certain circumstances, conversely, it is difficult to discern the difference with Art. 8 ASR-situations described above. As seen in Section 3.3.2, in *Japan - Film*, no expressed delegation of regulatory powers was made to the retailer organisation, but a sufficient degree of connection with the government was found - to the point that the panel expressly referred to the concept of delegation. It is arguable that, in the lack of previous administrative guidance, the approval of the retailer code could be seen as a case of subsequent acknowledgment and adoption, as Member approval of the code took place, unsurprisingly, after its adoption by the retailer organisation. The dividing line between instances of effective delegation and acknowledgement and adoption may be, on occasions, a blurred one. There is a further difficulty in pinpointing whether WTO law treats attribution in the sense of Art. 11 ASR or under Art. 8 ASR in situations where the law provides for approval or enforcement of a private measure by the Member. Private action can therefore be affected by the scope of incentives and disincentives a Member may establish, and there could be potentially overlap with the test established by Art. 8 ASR.

GATT panels have attributed measures by private parties that were approved and/or enforced by a Member but, arguably, such private measures were not elaborated free from any governmental influence. In *Canada - FIRA*, a Canadian governmental practice required foreign investors to enter into undertakings providing for, *inter alia*, purchase provisions that would favour Canadian over foreign products. National law made such undertakings binding for the investors. The Panel noted that undertakings shall be considered as 'requirements' in the meaning of Art. III:4 of the GATT, because private contractual obligations entered into by investors should not affect the rights possessed

⁹⁸ Panel Report, *Canada - Certain Measures Affecting the Automotive Industry (Canada - Autos)*, WT/DS139/R, adopted 11 February 2000, para. 10.107.

by the Contracting Parties.⁹⁹ It is however doubtful that the investor's undertaking could be considered as conduct disconnected from the State at the time of its occurrence, and therefore considered it as covered under Art. 11 ASR, given its *de facto* compulsory character for investors willing to enter the Canadian market. In this sense, the measure in *Canada - FIRA* brings to mind the 'system of incentives and disincentives' at issue in *Japan - Semiconductor*. In *EEC - Parts and components*, the EC was granting more favourable treatment with respect to anti-dumping anti-circumvention rules to foreign companies which entered into undertakings limiting the import of parts and components. Such undertakings were considered as State measures for the purpose of the GATT.¹⁰⁰ Also in this case, however, given the conferral of an advantage and the presence of incentives, the actual lack of connection of the measure to the State is debatable.

The WTO panel in *Canada - Autos*, however, by referring to the GATT panels in *Canada FIRA* and *EEC - Parts and Components*, disagreed with the findings in those two cases, and drew a line concerning the extent of governmental connection to private actions necessary for attribution. The panel noted that the nexus necessary to give rise to attribution would not be sufficiently strong if governments simply make undertakings of private parties legally enforceable. In the panel's view, and as seen above, a 'requirement' under Art. III:4 implies 'governmental action involving a demand, request or the imposition of a condition'.¹⁰¹ The panel therefore assessed the available evidence to come to the conclusion, coherently with previous case law on Japanese administrative guidance, that a system of incentives rendered the actions of the companies dependent upon action from the Canadian government, and therefore attributable.¹⁰² The reasoning of the panel in *Canada - Autos* appears thus difficult to reconcile with the test of Art. 11 ASR, whereby a change in legal status of a private action would arguably suffice to constitute subsequent State acknowledgement and adoption.

The later WTO panel in *India - Autos* decided to follow more closely the approach from the two GATT panels. It identified two distinct situations that would satisfy the term 'requirement' in Art. III:4 of the GATT: 'obligations which an enterprise is "legally bound to carry out"; and those which an enterprise voluntarily accepts in order to obtain an advantage from the government'.¹⁰³ The enforceability of a measure, regardless of the means actually employed (or not employed) to enforce it, constitutes a sufficient basis for a voluntary measure to constitute a 'requirement' in the meaning of Art. III:4.¹⁰⁴ The panel however still included the additional requirement of an advantage needed to be

⁹⁹ Panel Report, *Canada - Administration of the Foreign Investment Act (Canada - FIRA)*, L/5504 - 30S/140, adopted 7 February 1984, paras. 5.5-5.6.

¹⁰⁰ Panel Report, *EEC - Regulation on Imports of Parts and Components*, L/6657 - 37S/132, 16 May 1990, paras. 5.21 and following.

¹⁰¹ *Canada - Autos*, WT/DS139/R, para. 10.107.

¹⁰² *Canada - Autos*, WT/DS139/R, para. 10.115.

¹⁰³ Panel Report, *India - Measures Affecting the Automotive Sector*, WT/DS146/R, adopted 21 December 2001, paras. 7.190 - 7.191.

¹⁰⁴ *Ibid.*

generated by the voluntary measure in order to be attributable for measures acknowledged and adopted which are not mandatory. In an attempt to bring the test in *India - Auto* in line with Art. 11 ARS, one may argue that indeed a requirement, however voluntary, to employ a private measure for a specific purpose mandated by a public act changes the private measure's legal status. Different legal consequences are generated from its compliance, such as for example a presumption of conformity with regulatory requirements.

3.3.4 WTO law and local governmental bodies - Situations falling under Art. 4 ASR

Since WTO law applies to State measures, given the breadth of the interpretation of such a concept, it has hardly been debated whether acts from regional entities or organs of the State are to be attributed to the Contracting Parties. As public international law provides for the doctrine of State unity, no distinction between the different constituent parts of the State matters for the purpose of the establishment of State responsibility. The letter of certain provisions of the WTO Agreements seems however to partially deviate from such a principle. For example, Art. XXIV:12 of the GATT provides that 'each Contracting Party shall take such reasonable measure as may be available to it to ensure observance of the provisions of this Agreement by regional and local governments and authorities within its territory'.

It has been observed that a literal interpretation of that Article would be against the customary rules of international law, as a State which demonstrates that it had taken all reasonable measures to ensure compliance would still be discharged from responsibility in the event its local authorities are acting in breach of WTO law.¹⁰⁵ GATT panel practice and an Understanding on the Interpretation of Article XXIV to the GATT 1994 have clarified that Members are fully responsible for the observance of all provisions of GATT 1994, in line with the customary rules of international law. However, the difficulties that may be encountered for ensuring compliance by certain local bodies seem to be acknowledged, as the Understanding still makes reference to the 'reasonable measures' that Members are required to take to ensure compliance by regional and local governmental authorities.

The provision was designed to apply limitedly to measures by local governments which cannot be under the control of the central government because they fall outside its jurisdiction under the constitutional distribution of powers. The obligation was interpreted narrowly so as to grant a special right to federal states without offsetting privileges to unitary states.¹⁰⁶ A similar approach can be found in the GATS. The

¹⁰⁵ See Kuijper, P.J. (1995) *Supra* at 48; Villalpando, S.M. (2002) *Supra* at 60, 401.

¹⁰⁶ See Panel Report, *United States - Measures Affecting Alcoholic and Malt Beverages* DS23/R - 39S/206, adopted 19 June 1992, para. 5.79. It is open to discussion whether such an interpretation is still valid nowadays.

definition of measures in Art. 1:3(a)(i) includes measures taken by central, regional or local government bodies and authorities but, again, a qualification is present relieving the State from responsibility in case reasonably available measures to ensure compliance are taken. Art. 3 of the TBT Agreement, discussed in Section 4.2.1, is also worded in a similar fashion.

An interesting discussion has taken place with respect to the expansive interpretation of 'public body' in the meaning of Art. 1.1(a)(1) of the SCM Agreement, whereby the tests under Art. 4 ASR on the one hand, and under Articles 5 and 8 ASR on the other, have been conflated and mingled by Appellate Body jurisprudence. Such case-law results in an unnecessary spillover of an ownership test into the Art. 4 ASR test.¹⁰⁷ Art. 4 entails automatic attribution, without assessing whether the functions performed are governmental and if delegation was made, which pertain to a proper Art. 5 assessment, let alone an assessment of ownership, which at best may be relevant under Art. 8, but does not *per se* prove effective control. The outcome is however of limited relevance for the topic at issue here, as in none of the VSS studied, can State ownership be found. In general, the extension of such a test from the specific SCM Agreement to the more general GATT is far from being taken for granted. The approach is not likely to apply to the TBT Agreement either, as the latter contains its own special rules of attribution.

3.4 Attribution of VSS to a Member under the GATT

The Sections above have concluded that, in spite of cases of overlap, which would, in any event, lead to attribution under a test of 'direction and control', customary international law and WTO practice itself, support an approach that treats the situations of delegation of power, direction and control, and acknowledgement and adoption, in the same manner. In the context of international economic law, the interplay between States and private parties include both *ex ante* delegation and *ex post* recognition of private parties' actions. The rules of attribution discussed above are particularly important under the GATT. Private measures in the form of regulatory schemes such as VSS are not covered by the GATT unless attributable to the State. Under the GATT, the establishment of a sufficiently robust link with the State is therefore required to apply WTO discipline, under an all-encompassing test of 'dependence from governmental action'.

A clarification is required at this juncture concerning the scope of the measure at issue, which varies within the WTO Agreements, and the elaboration of WTO rules of responsibility. Most of the GATT cases discussed in Section 3.3.2 were litigated under Art. XI GATT. The scope of the measures covered by Art. XI is possibly the broadest, as it

¹⁰⁷ Lee, J. (2015) State responsibility and government-affiliated entities in international economic law. The danger of blurring the Chinese wall between 'state organ' and 'non-state organ' as designed in the ILC Draft Articles. *Journal of World Trade* 49(1), 117-152. See also Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, paras. 317-318.

covers 'all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges',¹⁰⁸ and therefore comparable to 'all measures' that can be subjected to a non violation complaint under Art. XXIII:1(b). By means of comparison, the scope of Art. III:4, which the following analysts focuses on, appears narrower and limited to 'laws, regulations and requirements affecting¹⁰⁹ [foreign like products'] internal sale, offering for sale, purchase, transportation, distribution or use'. In *Japan - Film*, however, the panel noted that for the purpose of that dispute the scope of Art. III:4 overlaps with that of XXIII:1(b).¹¹⁰ It can therefore be assumed that the same 'system of incentives and disincentives' that was at issue under Art. XI in most of the attribution case-law discussed above, can be considered under Art. III:4, and thus also Art. I:1 GATT.

Of particular pertinence under WTO law¹¹¹ are the different types of interaction between public authorities in the performance of market regulatory tasks and VSS described in Section 4 of Chapter 2, which may be considered as 'links' for a possible finding of attribution. The following Sections therefore discuss three distinct scenarios, with respect to the EU-VSS interactions previously studied under EU law: EU use of VSS; EU facilitation of VSS; and cases of support and lack of connection with a private scheme.

3.4.1 WTO Members as users

The most structured, and arguably the strongest connection between governmental activities and VSS is observable where governments are 'users', as explained in Section 4.1 of Chapter 2, and Section 3.1 of Chapter 3, specifically when public authorities mandate the employment of a VSS. Theoretically, this can happen in three possible ways which generate different extents of concerns under WTO law. From the most to the least problematic: compliance with a VSS could be required to obtain market access; compliance with a VSS could entitle products or producers to a more favourable treatment;¹¹² compliance with a VSS could give rise to a presumption of conformity with (WTO-compliant) regulatory requirements. The EU Renewable Energy Directive (RED), as seen, gives rise to producers in compliance with VSS a presumption of compliance with

¹⁰⁸ *Japan - Semiconductors*, L/6309 - 35S/116, para. 108.

¹⁰⁹ 'Affecting' in the context of Art. III GATT has been interpreted as having a broader meaning than 'regulating' and 'governing'. *EC - Bananas III*, WT/DS27/AB/R, para. 217.

¹¹⁰ *Japan - Film*, WT/DS44/R, para. 10.376

¹¹¹ As seen in Chapter 3, EU law only partially requires a test of attribution for private measures hindering the freedom of movement of goods. What matters particularly under Art. 34 TFEU is the capacity to obstruct market access, regardless of whether such a capacity can be linked to a State. Different rationales may be behind this 'power', and relate to the ability to regulate mandatorily a given sector or activity, or to exercise functionally equivalent forms of State authority. The capacity to restrict trade results in the imposition of the obligation on the private actor at issue.

¹¹² Provided that such favourable treatment does not stem from factors *de jure* or *de facto* origin-based. *Canada - Autos*, WT/DS139/R, paras. 10.22–10.25.

legislative requirements. Depending on the case, States may indicate which specific VSS is required, or may allow producers¹¹³ to choose which scheme to employ.

As seen, expressed delegation of power in the meaning of Art. 5 ASR does not occur for VSS. By definition, VSS bodies are not established by the government; the outcome of standard-setting, if so, is recognised only *ex post*, and incorporated into legislative instruments. The test in *EEC - Apples*, assessing the establishment by law of the private body at issue, governmental financing, and control of the operations, is therefore not relevant. The situation in the three scenarios above is much more akin to that in *Japan - Film*. The employment of VSS in legislation in the forms described above will give rise to a sufficient level of connection to the State. Attribution, however, depends also on the effects of compliance, or non-compliance, with the VSS at issue.¹¹⁴ In case compliance with a scheme was *de jure* mandatory for market access, there is little doubt that economic operators would comply with the VSS as it was a legally binding measure of the State. In other words, despite its private nature, actions of the VSS body would look, in the eye of economic operators, as they were actions from the regulating government.¹¹⁵ Conversely, in case compliance with a scheme was not mandatory, but was instead a possible means to prove compliance with regulatory requirements, or to qualify for more favourable treatment, a more thorough analysis would be required which looks at the specific factual elements of the measure in question.

Regardless of whether a State expressly mentions which schemes to employ, the situation resembles Art. 11 ASR, i.e. arguably constitutes an instance of subsequent acknowledgment and adoption of private action in the form of VSS schemes. It has been seen above that *India - Autos* stands for the proposition that any governmental action involving the imposition of a condition constitutes a requirement - also voluntary ones as long as enforceable and conferring an advantage on entities in compliance with it - and therefore would be covered by the GATT. In the presence of a system of incentives and

¹¹³ It is here assumed that measures requiring VSS either address the production of products or some characteristics of producers. According to a well-accepted taxonomy of PPMs by Charnovitz, the situations above can be defined, respectively, as 'how-produced standard' and 'producer characteristics standards'. A measure requiring products to be in compliance with a VSS would fall within the first group; a measure permitting products only from producers which are VSS-certified would fall in the latter group. Albeit the difference from choosing either approach may not always be apparent in every situation, a measure requiring the employment of VSS and, in general, forms of product certifications, is normally a 'how-produced standard'. Such was the design, for example, of the US measure in *US-Tuna II*. Mandating requirements with schemes that certify companies, such as ISO 14000 or SA8000 has the effect of turning the measure into a 'producer characteristics standards'. Whether a measure is considered as a 'product characteristic standard' or a 'how-produced standard' depends more on the characteristics of the VSS at issue rather than by the choice of the regulating governments. In any case, both types of measures are less of a concern under WTO law than the 'government policy standard' at issue, for example, in *US - Shrimp*, which linked market access to a country's policy, disregarding the specificities and possible redeeming features of single products and producers. See Charnovitz, S. (2002) The law of environmental 'PPMs' in the WTO: Debunking the myth of illegality. *Yale International Law Review* 59(1), 59-110.

¹¹⁴ To this extent, the findings of the panel in *India - Autos* are aligned with the requirements for attribution elaborated in *Japan - Semiconductors*.

¹¹⁵ *Japan - Film*, WT/DS44/R, paras. 10.327-10.328.

disincentives for compliance, the measure would be attributable to the State on the basis of the reasoning of the GATT panels in *Canada - FIRA* and *EEC - Parts and Components*. For VSS within the framework of the RED, compliance with private standards generates benefits and more favourable treatment for producers. Producers in compliance with the greenhouse gas emissions requirements which are demonstrable by means of VSS are entitled to financial support.¹¹⁶

There could be doubts concerning attribution in the event the State measure at issue permits producers to choose between more than one VSS, or allows for recognition of equivalence. In this case, possible trade-restrictiveness caused by one specific VSS could be discounted if producers are given the opportunity to employ another, WTO-compliant, VSS. However, it shall be noted that expressed mention of a certain VSS scheme in the measure at issue does not need to be made for a finding of attribution, as long as an advantage is conferred by complying with a VSS, or the voluntary requirements are enforceable. The Appellate Body held that, for the purpose of challenging under WTO law measures which implement or supplement a certain regulatory regime, it is not required for the claimant to explicitly indicate the implementing or supplementing instrument.¹¹⁷ Detrimental effects generated by the implementing instruments of a measure, are attributable to the regulatory regime as a whole. It can thus be concluded that to recognise specific VSS schemes for the purpose of demonstrating compliance with legislative requirements, as under the framework of the RED, is likely to in attribution to the WTO Member in question of the private schemes recognised. It is even possible that attribution would occur in the absence of formal recognition of the schemes, but merely in the presence of a requirement which generally permits the employment of private standards. Forms of governmental use of VSS are thus likely to render public authorities fully responsible for WTO-inconsistent behaviour of the scheme holders.

3.4.2 WTO Members as facilitators

The instances of EU facilitation described in Section 4.2 of Chapter 2 and in Section 3.2 of Chapter 3 present a higher degree of diversity which does not always result in attribution of the schemes at hand to the EU. For example, cases of harmonisation such as the organic product Regulation do not entail any employment of VSS, but instead set requirements for private standards. Indeed harmonisation influences the substance of the standards. Issues of GATT-inconsistencies may obviously arise, but

¹¹⁶ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L-140, Art. 17.1. This is different to say, however, that compliance with the scheme would automatically be beneficial for producers, as the costs of compliance may not be offset by the increase market opportunities.

¹¹⁷ Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III)*, WT/DS27/AB/R, adopted 9 September 1997, para. 140.

attribution would never result from the measure. Conversely, under forms of interaction which more clearly allocate and coordinate regulatory effects, it is more likely that the VSS employed would be attributed to the WTO Members in question. The reasoning would not differ much from that discussed in the Section above for instances of use.

This could arguably be the case of the FLEGT Regulation's requirement permitting trade operators to employ VSS to demonstrate that timber is in compliance with all country of origin's laws and regulations. The Regulation does not mention which schemes can be employed. Such mechanism however transforms the legal nature of the private action in question (i.e. the scheme to be employed). It has the effect of formally turning the VSS employed into a tool of verification of legality, with typically public administrative functions. Compliance with a scheme does not just generate a comparative advantage among consumers or retailers, but it is also equated with regulatory compliance, in a similar fashion to the RED. Indeed, the possibility to employ private schemes to demonstrate due diligence constitutes a voluntary requirement. As the requirement is voluntary, it must confer an advantage to be attributable. Arguably, the VSS constitutes an easier means for producers to demonstrate full compliance with the Regulation's requirements.

The employment of VSS in public procurement as in the framework of the EU public procurement Directive discussed in Section 3.2. of Chapter 3 deserves a different treatment. In such a case, the Revised WTO Agreement on Governmental Procurement (GPA) is applicable, provided that the State is party to the Agreement, and both the contracting agency and the good at issue are covered. Art. III:8(a) of the GATT excludes from the national treatment obligation laws, regulation and requirements governing procurements by governmental agencies. Although this Section addresses attribution under the GATT, it is nonetheless important to discuss the special regime of the GPA given its potential to influencing VSS. The revised GPA permits WTO Members and their contracting agencies to employ different types of requirements, or 'technical specifications' in their procurements - which can include quality, safety, dimension, performance characteristics of goods (and services), including processes and methods for their production, and all labelling requirements.¹¹⁸ Requiring a VSS contemplating a label among the technical specifications of the contracted goods is thus possibly permitted to Members.

Although it is prohibited to prescribe technical specifications requiring the use of specific intellectual property - and VSS' labels and logos can be considered as trade-marks and protected designs - Members can do so in the lack of alternative precise and intelligible means for describing the requirements. In such cases, however, equivalent requirements

¹¹⁸ Revised GPA, Art. I(u).

must be accepted.¹¹⁹ It seems therefore possible for Members to employ the requirements contained in a VSS to define technical specifications, provided that equivalence is accepted. It should not be forgotten that the Agreement explicitly allows the inclusion of technical specifications whose objective is the promotion of the conservation of natural resources or the protection of the environment.¹²⁰ Technical requirements shall however not discriminate between foreign goods, nor accord a less favourable treatment than that enjoyed by national goods.¹²¹ Under the GPA, therefore, Members are fully responsible for the content of their technical specifications, which can also be based on the requirements of a VSS. As a pre-existing private measure changes its legal status by means of a public act, such as the tender notice, which indeed confers a benefit, the VSS is attributed to the Member under an Art. 11 ASR reasoning. In case the content of the scheme is discriminatory, the WTO Member at issue will be held fully responsible. VSS employed by contracting authorities within the EU public procurement Directive are therefore integral part of the technical requirements, for which contracting authority retain full responsibility.

3.4.3 WTO Members as supporters and lack of interaction

The three situations described above for cases of ‘use’, and ‘facilitation’ give rise to attribution to the extent that they coordinate the regulatory effects VSS exercise in tandem with the public measure in question. The formal status of the VSS has changed insofar compliance with it now generates also a presumption of compliance with regulatory requirements, and an advantage is conferred. At present there are, however, relatively few instances of such structured interactions between public authorities and VSS. The link between VSS and governments is generally weaker. Governments can express varying degrees of support for a VSS scheme, either by participating to standard-setting activities or by granting financial support to a scheme or to the firms seeking certification. Much more frequently, VSS schemes rise to prominence simply because of market forces in the lack of a direct governmental connection. However, a certain extent of connection with public authorities is still arguably present. At the very least, many developed countries have created a policy environment which is favourable to private regulation of social and environmental practices, and which more or less expressly supports and encourages CSR initiatives such as the establishment of, and compliance with, VSS schemes. It could therefore be argued that a system of incentives and disincentives is established. However, whether these measures possess a sufficient degree of connection to the VSS body is doubtful.

In other words, either of these two scenarios must be proven: i) that a relation of dependence exists between State pro-CSR and pro-sustainability policy preference on

¹¹⁹ Revised GPA, Art. X:4.

¹²⁰ Revised GPA, Art. X:6.

¹²¹ Revised GPA, Art. IV.

the one hand, and the establishment of VSS on the other; or ii) the request from retailers or the strong consumer preference for VSS-compliant products is also caused by, and dependent upon, a State policy preference as defined by State measures. It has been explained above that private action is attributable whenever it reflects the expressed will of governmental authority, and does not occur because of like-mindedness or coincidence. The test in *Japan - Semiconductor* did not just assess the presence of incentives, but also of an 'essential dependence' from governmental action. It seems that, in the case of VSS, the presence of like-mindedness can be observed, rather than actual State direction of control of private conduct. As discussed at length in Chapters 1 and 2, several rationales lie behind the establishment of and compliance with VSS schemes. Multi-stakeholder VSS arise out of civil society's concerns over the common good, on occasions because of governmental failure to provide for effective means of regulation. Sectoral schemes indeed pursue similarly public goals, but are normally underpinned also by the need of retailers to avoid liability; company schemes also respond to the need of companies to protect their branded image and to differentiate their products.

Indeed, the social and environmental goals pursued by VSS are aligned with Members' policy objectives of environmental protection and compliance with international labour law provisions. WTO Members, on the one hand, may have the means to create incentives for establishing private regulators but, on the other hand, to control their activities in the meaning of *Japan - Semiconductor* is hard, if not impossible, to prove. All VSS are generally independent from State influence; in many cases public authorities do not even participate in standard-setting activities. It is equally implausible that governments can control the purchase preferences of retailers and consumers to such an extent. Even in the case of financing and support stemming from the presence of governments in standard-setting activities, proving 'essential dependence' will most likely require the production of considerable evidence about the extent of control exerted by the State in order to succeed.¹²²

Finally, concerning a situation in which no governmental control is at issue, and restrictive practices are entirely the result of private actions, it must be noted that the panel in *Argentina - Hides and Leather*, an Art. XI case, held that governments are not under the obligation 'to assume a full "due diligence" burden to investigate and prevent cartels

¹²² On a similar position: Vidal-Leon, C. (2013) Corporate social responsibility, human rights, and the World Trade Organisation. *Journal of International Economic Law* 16(4), 902. For a different view with respect the WTO attribution of EU measures supporting sustainable forest management which led to the creation of certain private standards, see Kogan, L.A. (2007) Discerning the forest from the trees: How governments use ostensibly private and voluntary standards to avoid WTO culpability. *Global Trade and Customs Journal* 2(9), 319-337. The author confuses the requirements in the TBT Agreement not to encourage non-governmental bodies to act inconsistently with the TBT Agreement in Art. 3 and 4 with the general requirements for attribution under the WTO Agreements. See Section 4.2 for further discussion. In addition, funding of a private organisation would not automatically imply attribution under the WTO rules discussed in the Section above as the author suggests, unless essential dependence from governmental action is proven.

from functioning as private export restrictions'.¹²³ Extending such a finding to Art. III:4 at issue here is indeed possible; that *dictum* is however difficult to reconcile with the general statement that also *omissions* attributable to a Member can be subjected to WTO discipline.¹²⁴ The problem becomes then the identification of a threshold above which certain private actions hindering trade must be remedied by a Member. This issue will be discussed in Section 3.2.2 of Chapter 6, in the context of the TBT Agreement, and in the presence of a specific WTO obligation addressing private action.

All in all, it can be concluded that VSS are attributable to a Member and therefore considered as covered by the scope of Articles I:1, III:4 and XI GATT in cases where governments provides by law for mandatory or voluntary compliance with a VSS. The request of compliance may be made with the purpose of market access or to qualify for special treatment but, in any event, a sufficiently strong link would need to be found and the VSS would be attributed to the Member. It has been argued that public use of a scheme, and facilitations which result in the coordination of regulatory effects would meet the criteria. Attributing to Members the actions of VSS bodies which operate independently from any form of regulatory recognition, however, is not possible under the WTO rules of attribution of the GATT. This provides environmentally and socially conscious regulators with the opportunity to support by different means private regulators such as VSS bodies without WTO discipline being triggered. Financing and participating to the standard-setting, altogether with all conceivable forms of support which do not result in actual control of the VSS body' activity, will escape WTO scrutiny under the GATT. Needless to say, the effectiveness of such VSS' support is strictly connected to the market success of a scheme, which is a function of firms' uptake and consumer preferences. However, as the next Section shows, the TBT Agreement does potentially impose responsibility on WTO Members for the activities of a large number of private standard-setters which are not under their control.

4 VSS under the special rules of attribution of the TBT Agreement

From the assessment of attribution of private conduct under WTO case law performed in the sections above it could be concluded that, in line with the customary rules of international law, genuinely autonomous and free-standing private action shall not be subject to WTO discipline.¹²⁵ In the specific domain of regulation and quasi-regulatory measures, lacking a sufficiently strong link with the government, private action cannot be challenged under GATT rules even if it has gained a *de facto* equivalent role to State rules to accede to a market. The outcome under the TBT Agreement is not necessarily

¹²³ *Argentina - Hides and Leather*, WT/DS/155/R, para. 11.52.

¹²⁴ Appellate Body Report, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 15 December 2003, para. 81.

¹²⁵ See also Zedalis, R. (2007) *Supra* at 33, 339.

the same, as the Agreement constitutes a partial exception to or, better, a further refinement of, the rules of attribution described above.

The TBT Agreement applies cumulatively with the GATT.¹²⁶ By constituting *lex specialis*, it prevails over the GATT to the extent of a possible conflict.¹²⁷ The scope of the TBT Agreement partially overlaps with the GATT's, being applicable to public and private technical regulations and standards. At least public technical regulations and standards are a specific subclass of the 'laws, regulations and requirements affecting internal sale' at issue under Art. III:4 of the GATT. Excluding possible differences concerning the substance of the measures covered, and in particular, the issue of PPMs, which will be discussed in the next Chapter,¹²⁸ a main difference between the two Agreements concerns the inclusion under the TBT Agreement of private measures as well, in the lack of clear connecting elements with the State. This Section therefore departs from the WTO rules of attribution discussed before and analyses the specific situation of the TBT Agreement. It will then apply the resulting framework to VSS schemes to identify which bodies are covered by the personal scope of the Agreement and what is the extent of the obligations imposed on the Members.

An analysis of the provisions of the TBT Agreement shall start with the definition of its scope. The vexed question of process and production methods (PPMs) will be set aside for the moment and dealt with in the next Chapter, while the focus here is on other elements. In the end, what constitutes a standard covered by the Agreement (i.e. the PPM-scope of standards) is a different issue from defining to which standardising bodies the TBT Code apply. The TBT Agreement applies to two different categories of measures, which can both be the output of public and private bodies. Such measures are technical regulations and standards.

Both technical regulations and standards are documents laying down product characteristics and their related process and production methods, the only difference being that compliance with the former is mandatory, whereas compliance with the latter is voluntary. Both types of measure have to be in compliance with similar substantive obligations, which are codified in Art. 2 TBT for technical regulations, and in the Code of Good Practice for the Preparation, Adoption and Application of Standards contained in Annex 3 TBT (hereinafter: the 'TBT Code of Good Practice', or the 'TBT Code') for standards. Both types of measures shall be based, if feasible and appropriate, on the relevant international standard. Sections 3 and 4 of Chapter 6 will illustrate in greater detail the divergence in substantive scope between the provisions for technical

¹²⁶ *US - Tuna II*, WT/DS381/AB/R paras. 405; Appellate Body Report, *United States - Certain Country of Origin Labelling (COOL) Requirements (US - COOL)*, WT/DS384/AB/R and WT/DS386/AB/R, adopted 29 June 2012, para. 492; Appellate Body Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products (EC- Seals)*, WT/DS401/AB/R, adopted 22 May 2014, para. 5.71 and following.

¹²⁷ General interpretative note to Annex 1A.

¹²⁸ Section 2.1.1 and Section 2.2.2 of Chapter 6.

regulations and standards. For the purpose of this Chapter, suffice it to say that the discipline for standards appears to be more relaxed than that for technical regulations.

4.1 Mandatory versus voluntary character of a measure

Because of the different scope of the substantive obligation for technical regulations and standards,¹²⁹ the Appellate Body's interpretation in *US - Tuna II* of the term 'mandatory', constituting the dividing line between the two types of measures, has been met with a great deal of criticism.¹³⁰ The Appellate Body recognised from the outset that the identification of a measure as a technical regulation or a standard can be a difficult exercise depending on its characteristics and on the circumstances of the case. Certain 'compulsory' or 'binding' elements can be found in both technical regulations and standards.¹³¹ The presence of certain mandatory elements is all the more evident for measures requiring certification in order to employ a label, or lawfully to make claims pertaining to certain product characteristics. Compliance with the requirements of the labelling scheme is, to this extent, mandatory to obtain the label; nevertheless, the employment of the label itself is not required by law, however advantageous it may be for producers.

The measure at issue in *US - Tuna II* possessed the features described above. The labelling scheme for dolphin-safe tuna products established by the United States was not *de jure* mandatory to market tuna in the US market, which still could be sold as 'regular' tuna. It may have been *de facto* mandatory because of the very intense consumer and retailers' preference for labelled tuna products,¹³² but the Appellate Body did not attach particular importance to this point. The bulk of its analysis focused instead on whether the labelling scheme established by the US constituted a 'single and legally mandated set of requirements for making any statement with respect to the broad subject of "dolphin-safety" of tuna products in the US'.¹³³ The contested measure did not just provide for requirements that 'dolphin-safe' tuna products must be in compliance with in order to be marketed under such denomination. It also prohibited any reference to

¹²⁹ See Sections 3 and 4 of Chapter 6.

¹³⁰ See Mull, K.T. (2013) Making sense of 'mandatory' measures in the TBT Agreement: Why the majority panel's determination in *US Tuna II* rendered the distinction between technical regulations and standards to be meaningless. *Georgetown International Environmental Law Review* 25(2), 367-388; Mavroidis, P.C. (2013) Driftin' too far from shore - Why the test for compliance with the TBT Agreement developed by the WTO Appellate Body is wrong, and what should the AB have done instead. *World Trade Review* 12(3), 522-523; Crowley, M.A. Howse, R. (2014) Tuna - Dolphin II: A legal and economic analysis of the Appellate Body Report. *World Trade Review* 13(2), 324-325; Delimatsis, P. (2015) 'Relevant international standards' and 'recognised standardisation bodies' under the TBT Agreement. In Delimatsis, P. (Ed.) *The law, economics and politics of international standardisation*. Cambridge: Cambridge University Press, 118. On a more nuanced position, albeit overlooking the different substantive treatment between technical regulation and standards, see Davies, A. (2014) Technical regulations and standards under the WTO Agreement on Technical Barriers to Trade. *Legal Issues of Economic Integration* 41(1), 37-64.

¹³¹ *US - Tuna II*, WT/DS381/AB/R, para. 188.

¹³² *US - Tuna II*, WT/DS381/R, para. 7.352.

¹³³ *US - Tuna II*, WT/DS381/AB/R, para. 187.

dolphins, porpoises or marine mammals on the label for tuna products if tuna was not harvested in compliance with the requirements spelled out by the scheme. In fact, it represented the only possible means to make claims of 'dolphin-safety' for tuna products to be marketed in the US. The Appellate Body supported this finding by noting the specific enforcing mechanisms, going well beyond normal instruments of consumer protection that are used to ensure compliance with labelling schemes. The US measure enforced a prohibition against the use of any alternative labelling or certification scheme making claims of dolphin-safeness.¹³⁴

The Appellate Body rejected the claim made by the US, which was broadly comparable to the position of the dissenting Panelist in the Panel report,¹³⁵ that mandatory should be interpreted as referring to the possibility of selling a non-compliant product on the market at issue. Since it was still permitted to market non-certified tuna products, the US measures should have been found to be a standard.¹³⁶ The Appellate Body disagreed and noted the lack of any textual base supporting such an approach, as nowhere is it provided that mandatory should be interpreted as mandatory for the purpose of market access.¹³⁷ It further pointed at *EC - Sardines* as supporting the finding that 'the fact that it is legally permissible to sell a product on the market without using a particular label is not determinative when examining whether a measure is a "technical regulation" within the meaning of Annex 1.1'.¹³⁸

The analysis of the Appellate Body should however be put in perspective and assessed against the specific facts of the case. Most times, a State measure will be easily classifiable as a technical regulation or a standard, simply on the basis of its legally binding character. However, on occasion, a measure, compliance with which is not mandatory, may be classified as a technical regulation because the document at issue prescribes in an exhaustive, exclusive and univocal manner certain product characteristics or their related process and production methods, in the same manner the US measure did in *US - Tuna II*. Unnecessary criticism has met the Appellate Body's interpretation which, according to some commentators, would have the perverse effect of turning every standard into a technical regulation.¹³⁹

Allegedly, the argument goes, all standards would constitute, in the Appellate Body's wording, the only means to make a specific claim, i.e. that specific claim to which the standard refers. It is indeed the underlying rationale behind standard-setting to uniform product characteristics or processes and production methods, possibly even to a point

¹³⁴ *US - Tuna II*, WT/DS381/AB/R, para 195.

¹³⁵ *US - Tuna II*, WT/DS381/R, para. 7.150.

¹³⁶ Delimatsis, P. (2014) 'Relevant international standards' and 'recognised standardisation bodies' under the TBT Agreement. TILEC Discussion Paper DP, 2014-031, 14.

¹³⁷ *US - Tuna II*, WT/DS381/AB/R, para. 196.

¹³⁸ *US - Tuna II*, WT/DS381/AB/R, para. 198.

¹³⁹ Mavroidis, P.C. (2013) *Supra* at 130, 522-523.

where the resulting standard represents the only means to define them. This is particularly evident for technical standards, whose efficiency rationale begs for a single, uniform technical solution to be employed instead of several, diverging options. Such technical standards remain entirely voluntary *de jure*; although there may be a complete lack of alternative measures to achieve the same purpose, this does not mean that producers cannot design their products in alternative ways. Such alternatives may not be accepted by the market, but that element alone cannot turn standards into technical regulations. There is no disagreement that, in spite of the *de facto* mandatory character and exclusivity of its standards, ISO would qualify as international *standardising* body, whose output are *standards*, and not technical regulations.¹⁴⁰

A document laying down product characteristics and related process and production methods drafted by a *non-governmental* body independently from State delegation can nonetheless become *de facto* mandatory to accede to a market because of reasons that are to be found in the market itself, such as consumer or retailer preferences. Standard-setting activities by sectoral organisations may result in standards which, albeit *de facto* voluntary, may become indispensable requirements, where market access is sought. This phenomenon is particularly evident for certain food health and safety standards which, although addressing SPS issues, are potentially caught by the TBT as well. Retailer's preference, if sufficiently wide-spread among market participants, can turn a voluntary standard such as GlobalG.A.P. into an essential requirement which a producer must comply with if entrance on a certain market is sought.¹⁴¹ At the same time, however, such standards do not prescribe the only possible way to make a product claim, since (normally less stringent) national requirements would still be applicable. Indeed, the latter are of limited relevance; products must comply with the retailers' standards to have their products accepted on the market. In such a scenario, the retailer standards would fall within the definition of 'mandatory' explicitly rejected by the Appellate Body, i.e. mandatory for market access. Such measures shall therefore be categorised as standards. Conversely, national requirements that constitute the baseline which private standards build on, qualify as technical regulation because, even in the presence of other, more stringent requirements, their mandatory character sanctioned by law cannot be questioned.

The peculiarity of the US measure was the prohibition of other similar labelling schemes on the market; therefore, it was the only instrument producers were allowed to resort to in order to assert the 'dolphin-safety' of their products. Within the domain of labelling

¹⁴⁰ Fontanelli, F. (2011) ISO and CODEX standards and international trade law: What gets said is not what's heard. *International and Comparative Law Quarterly* 60(4), 895-932; Howse, R. (2011) 'A new device for creating international legal normativity: the WTO Technical Barriers to Trade Agreement and 'international standards'. In Joerges, C., Petersmann E.U. (Eds.) *Constitutionalism, multilevel trade governance and international economic law*. Oxford and Portland: Hart Publishing, 383-395; see also Charnovitz, S. (2006) Taiwan's WTO Membership and its international implications. *Asian Journal of WTO and International Health Law and Policy* 1(2), 401-432.

¹⁴¹ Liu, P. (2009) Private standards in international trade: Issues and opportunities. Paper presented at the WTO's Workshop on 'Environment-related private standards, certification and labelling requirements'. Geneva, 9 July 2009.

schemes, it could be observed that most of other public labelling schemes will instead still qualify as standards, simply because they do not constitute the only means to define, or to make a claim related to, product characteristics or related process and production methods.¹⁴² Generally, to provide for the possibility to follow possible alternative documents providing for product characteristics or related process and production methods, will suffice to qualify the measure as a standard. Conversely, if the document represents the only legally allowed option to determine the characteristics of a product or its related process and production methods, the measure is classifiable as a technical regulation. This would arguably be the case for the EU organic product Regulation discussed in Section 3.2.1.1 of Chapter 3, which prohibits all organic-related product claims which are not aligned to the requirements spelled forth in the Regulation.¹⁴³ Nonetheless, both the EU organic certification scheme, and private and public voluntary schemes whose requirements comply with the Regulation, are standards, as they are voluntary and do not represent the only means to make claims about organic qualities of products. This example is a further illustration of how the characterisation of a measure may be complicated by the concurrence of mandatory and voluntary features.

The outcome of the Appellate Body's interpretation of 'mandatory' is therefore absolutely reasonable. It prevents requirements drafted by private actors in order to structure their business relations, which may become *de facto* indispensable condition for market access, from qualifying as technical regulations that would be subject to a stricter discipline than standards.

4.2 Bodies covered by the Agreement

Different types of bodies can draft technical regulation and standards. The Agreement explicitly mentions three categories of bodies that are capable of drafting technical regulations: central governmental, local governmental, and non-governmental bodies. Similarly, three types of bodies can draft standards: central governmental, local governmental and non-governmental standardising bodies. In addition, reference is made in Article 2.4 TBT to international standards, which are drafted by international standardising bodies. The Appellate Body has provided guidance over the features a body must possess. According to the ISO/IEC Guide 2:1991,¹⁴⁴ a 'body' is a 'legal or administrative entity that has specific tasks and composition'. The Appellate Body also assessed the definition of 'organisation', as a 'body that is based on the membership of

¹⁴² See for example the EU Ecolabel, certifying products with a reduced environmental impact. Producers still retain the possibility to comply with alternative private certification programs to communicate to consumers environmental claims about their products. See Regulation (EC) 66/110 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel. L 27/1.

¹⁴³ Council Regulation (EC) 834/2007 of 28 June 2007 on organic production and labelling of organic products. L 189/1, Art. 23.

¹⁴⁴ Annex 1 of the TBT Agreement provides that the terms used in the TBT Agreement that are also presented in the ISO/IEC Guide 2:1991 should be used as having the same meaning provided in the Guide.

other bodies or individuals and has an established constitution and its own organisation'.¹⁴⁵ The requirements to qualify as a 'body' are thus much less demanding than those to qualify as an 'organisation'.¹⁴⁶ In particular, the definition of 'non-governmental body' is indeed still broad, as it includes all legal or administrative entities with specific tasks and compositions, which are not governmental.

As far as *standardising* bodies are concerned, the Appellate Body noted that standardisation consists of the 'activity of establishing with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of order in a given context'.¹⁴⁷ The Appellate Body also noted that a standardising body does not have to draft standards as its primary occupation, nor does it have to be involved in drafting multiple sets of standards.¹⁴⁸ Central governmental, local governmental, and non-governmental standardising bodies must therefore simply engage at least once in standardisation activities to be qualified as such. As an additional definitional requirement, standards must be adopted by a body which is 'recognised'. We shall return on that requirement in due course.

4.2.1 Which bodies can draft technical regulations? The extent of the 'personal' scope in Art. 3 of the TBT Agreement

Technical regulations prepared, adopted and applied by central governmental bodies have to be in compliance with the obligations under Art. 2 of the TBT Agreement, which include, *inter alia*, substantive obligations such as MFN, national treatment and an obligation to employ international standards, a mutual recognition provision, and a host of transparency obligations. Art. 3 of the TBT Agreement provides that technical regulations that are prepared, adopted and applied by local governmental bodies and non-governmental bodies, to some extent, have to be in compliance with the provisions of Art. 2 as well. Members are fully responsible for the actions of local governmental and regional bodies, must take measures to ensure that such bodies are in observance of the substantive provisions of Art. 2, and must not take measures which require those bodies to act inconsistently with said provisions.

The question arises of whether it is only for governments to prescribe product characteristics or their related process and production methods, compliance with which is mandatory. In other words, can only governmental bodies prescribe in a mandatory and exhaustive way product characteristics and how products shall be produced? The text of Art. 3 TBT, against common sense, indicates otherwise as it explicitly lists non-governmental bodies among the bodies that can prepare, adopt or apply technical

¹⁴⁵ *US - Tuna II*, WT/DS381/AB/R, para. 355.

¹⁴⁶ *US - Tuna II*, WT/DS381/AB/R, para. 356.

¹⁴⁷ *US - Tuna II*, WT/DS381/AB/R, para. 360.

¹⁴⁸ *US - Tuna II*, WT/DS381/AB/R, para. 360.

regulations. This begs the question over which grounds, and how, a non-governmental body, in the absence of governmental intervention, becomes capable of drafting documents, compliance with which is mandatory. Or does the Article only cover cases of delegation?

The definition of a non-governmental body is not of great assistance for this purpose, as it provides that such body is a 'body other than a central governmental body or a local governmental body, including a non-governmental body which has the legal power to enforce a technical regulation'.¹⁴⁹ The letter of Art. 3 TBT read in conjunction with the definition of a non-governmental body suggests that also non-governmental bodies can at least prepare and adopt technical regulations, without delegation being a requirement. Art. 3.5 TBT stipulates that Members are fully responsible for the observance of all substantive obligations contained in Art. 2 of the TBT Agreement, and positive measures shall be taken to ensure compliance from all bodies which are not central bodies in a Member's territory. This represents an extension of the customary rules for attribution, both as provided by the ASR and by WTO case-law, as a State could become responsible for actions of non-governmental bodies even in the absence of any form of 'link' with such bodies, except their mere presence in its territory. Although Art. 3.1 provides that Members shall take reasonably available measures to ensure compliance with the TBT Agreement by central, local and non-governmental bodies, Art. 3.5 clarifies that Members are fully responsible. In addition, the 'best endeavour' wording of Art. 3.1¹⁵⁰ is made more binding by the provision in Art. 3.5 TBT that Members shall take positive measures as well to ensure that bodies other than central governmental bodies comply with the substantive provisions of Art. 2 TBT.

The above appears in line with the customary rules of attribution, at least for regional bodies, as it is provided that States are fully responsible for the actions of their organs. The inclusion of non-governmental bodies as well seems an extension of such principles. It shall not be forgotten, however, that the derogation from the ASR does not appear exhaustive, and thus the attribution categories that would normally be applicable still give rise to attribution under the TBT Agreement. It must however be taken into account that a non-governmental body which has the power to prepare, adopt or apply technical regulations must have received some form of delegation from the State in order to draft 'documents [...] compliance with which is *mandatory*'.¹⁵¹ If this point is taken into account, attribution to the State is not questioned; as by means of an interpretation in conformity

¹⁴⁹ Annex 1 TBT Agreement. The punctuation of the sentence, and in particular the presence of just one comma, seems to suggest a two-fold definition of non-governmental bodies: i) residual, i.e. any body which is not a central governmental body or a local governmental body; and ii) specific, i.e. any non-governmental body with delegated authority to enforce technical regulations (arguably corresponding to 'apply', as in the heading of Art. 3), and not to 'prepare' or 'adopt' them.

¹⁵⁰ The concept of 'reasonable measures as may be available' will be discussed in Section 4.2.2.4.

¹⁵¹ Annex 1 TBT Agreement, *Italic added*. On the same position: Arcuri, A. (2013) 'The TBT Agreement and private standards'. In Epps, T., Trebilcock, M.J. (Eds.) *Research Handbook on the WTO and technical barriers to trade*. Cheltenham: Edward Elgar, 499.

with Art. 5 ASR, a State must be held fully responsible for the activities of all bodies it delegates rule-making authority to.

From the negotiating history of the TBT Agreement and its predecessor, the Tokyo Round Standard Code, it seems that the parties always had in mind a clear-cut distinction between mandatory technical regulations issued by governments, and voluntary standards issued by private organisations.¹⁵² The only case where non-governmental rules (arguably standards) can be considered as technical regulations is in the presence of a subsequent State request of mandatory compliance with them by means of a State measure. Such a scenario is arguably comparable to Art. 11 of the ASR, whereby a State acknowledges and adopts conduct of a private party as its own. For those situations, as well as for cases of delegation and other instances of attribution of private conducts, since the measures at issue are mandatory and comparable in their entirety to State measures, it is submitted that 'reasonable measures' for ensuring compliance should be interpreted strictly, and differently from Art. 3. Members shall therefore be held fully responsible for technical regulations, regardless of the body which drafted them.

In the light of the above, and especially the broad definition of non-governmental body, had the Appellate Body defined 'mandatory' along the lines of 'mandatory for market access' as suggested by the US, it would have turned into technical regulations a large number of private rules and requirements that are *de facto* mandatory conditions for market access, such as retailers requirements and even certain company standards.¹⁵³ Non-governmental bodies can, of course, draft technical regulations on the basis of state delegation but, as noted, delegation is not required by the text of the Article. In practice, however, the definition of mandatory given by the Appellate Body, by disconnecting the concept of mandatory to market access, has the effect of restricting the scope of Art. 3 TBT only to non-governmental bodies whose actions are attributable to the State under the customary rules for attribution. Such cases include bodies which enjoy delegated rule-making authority, or whose measures have been subsequently made mandatory by a State measure.

4.2.2 Which bodies can draft standards? The extent of the 'personal' scope in Art. 4 of the TBT Agreement and State responsibility obligation

Art. 4 of the TBT contains a mirror obligation addressing standards. Firstly, it shall be noted that, under Art. 4 TBT, exactly like under Art. 3 TBT, Members are fully responsible for compliance with the substantive provisions of the TBT Code of Good Practice by

¹⁵² Negotiating history on the coverage of the Agreement on Technical Barriers to Trade with regard to labelling requirements, voluntary standards, and processes and production methods unrelated to product characteristics. Note by the Secretariat. WT/CTE/W/10 - G/TBT/W/11, 29 August 1995, para. 26.

¹⁵³ Ignoring the arguments of the AB concerning the relation between mandatory and market access, some have suggested that private standards may not be voluntary because of the strong pressure private coercion can exercise on compliance with certain measures. See Vidal-Leon, C. (2013) *Supra* at 122, 913.

central governmental standardising bodies. Art. 4.1 TBT provides that Members 'shall ensure that their central governmental standardising bodies accept and comply' with the TBT Code. The parallel with Art. 3 TBT continues, as Art. 4 further provides for limited State responsibility for standards adopted by local governmental and non-governmental standardising bodies.¹⁵⁴ Standardising bodies' acceptance and compliance with the TBT Code grants them a presumption of conformity with the provisions of the TBT Agreements. The binding nature of the TBT Code of Good Practice is however left entirely to the bodies which accept it. Point Q of the TBT Code contains a rudimentary enforcement mechanism, but it is hortatory at best.¹⁵⁵

It should be stressed that the obligation imposed on Members is enforceable. Indeed States can exercise a high degree of deference towards private standardising bodies by allowing them to fill-in a regulatory vacuum. Nonetheless, it seems reasonable that Members can be held accountable under WTO law for the terms under which such deference, or 'delegation by omission', has been exercised.¹⁵⁶ Further, the obligation to take measure explicitly refers to standardising bodies, and not to their standards. Members must therefore take reasonably available measures to ensure standardising bodies' compliance with the TBT Code regardless of whether these bodies' standards are covered by the TBT Agreement.

4.2.2.1 Recognised standard-setting bodies

Given that compliance with standards is not mandatory, the problem concerning delegation arising under Art. 3 TBT is not an issue under Art. 4 TBT. Indeed, a large number of bodies can qualify as standardising bodies for the purpose of the Agreement. Different from Art. 3 TBT, the problem becomes the identification of a bright-line establishing which bodies *shall not* be considered as standardising bodies for the purpose of the TBT Agreement. Since a body simply is a 'legal or administrative entity that has specific tasks and compositions', and standardisation activities involve the establishment 'with regard to actual or potential problems, provisions for common and repeated use, aimed at the achievement of the optimum degree of order in a given context', by a recognised body, a very broad range of bodies can be caught by the definition. Quite telling to this extent is a paragraph in the 2003 Third Triennial Review on the Implementation and Operation of the TBT Agreement, which states that 'with regard to the Code of Good Practice for the Preparation, Adoption and Application of

¹⁵⁴ The distinction is already clear from the negotiating history of the Tokyo Round Standard Code, where initially a second level of obligation was introduced for non-governmental bodies separately from the first level obligation for central governmental bodies. Note by the Secretariat. WT/CTE/W/10 - G/TBT/W/11, 29 August 1995, para. 56.

¹⁵⁵ 'The standardising body shall afford *sympathetic consideration* to, and *adequate opportunity* for, consultation regarding representations with respect to the operation of the Code presented by standardising bodies that have accepted this Code of Good Practice. It shall make an *objective effort* to solve any complaints.' *Italic added.*

¹⁵⁶ Mavroidis, P.C., Wolfe, R. (2016) Private standards and the WTO: Reclusive no more. EUI Working Paper RSCAS 2016/17, 3 and 8. See also, for a comparable claim at the national level, Sunstein, C.R. (2002) State action is always present. *Chicago Journal of International Law* 3(2), 465-470.

Standards, the Committee notes that in some cases (for instance with respect to voluntary labelling requirements), standards are developed by bodies that are not commonly considered as standardising bodies and which have not accepted the Code. The Committee calls on Members to draw the attention of these bodies to the Code, and to encourage them to follow its provisions'.¹⁵⁷ Furthermore, and somehow contradicting the first part of Art. 4.1, the last sentence of Art. 4.1 requires Members to ensure that also standardising bodies which have not accepted the Code of Good Practice comply with the Code. As the WTO list of standardising bodies which have notified the Code's acceptance only includes national technical standard-setters,¹⁵⁸ this can be seen as further evidence of a potentially broad obligation to ensure compliance from many types of bodies.

A clarification is required concerning which bodies must be taken into account. Standardising organisations are normally composed of several subcommittees, or group of experts, which discuss and eventually approve the standards. None of such entities is a 'legal or administrative entity'; it is the standard-setter itself that can be seen as such. When looking at the body that drafts the standards, the focus must therefore be on the broader organisation. By means of example, these could be ISO for technical standards, FSC for sustainably harvested timber; GlobalGAP for food health and safety standards required by retailers; Tesco for its own fruit and vegetable requirements; etc.

The definition provides that a standard is a 'document approved by a recognised body'.¹⁵⁹ Firstly, and concerning 'approval', it must be kept in mind that the requirement of consensus as a voting procedure present in the Explanatory note in Annex 1.2 is limited to international standardising bodies.¹⁶⁰ All other standards do not have to be approved by consensus to fall under the scope of the TBT Agreement, but consensus shall be the procedure normally employed for adoption.¹⁶¹ Secondly, and concerning the element of a 'recognised body', the question is whether a standardising body is deemed to be recognised whenever it has 'recognised activities in standardisation', as in *US -*

¹⁵⁷ Committee on Technical Barriers to Trade Third Triennial Review on the Implementation and Operation of the TBT Agreement. 11 November 2003. G/TBT/13, para. 25. The paragraph constitutes probably the first time private standards appear, albeit without being expressly defined as such, in the work of a WTO Committee. It shall be noticed that WTO Members themselves consider the extent of the obligation in Art. 4 extremely broad, as the Committee expressly calls upon active efforts from WTO Members to ensure that all forms of standardisation do not hinder trade. It therefore constitutes evidence supporting a wide interpretative approach over the bodies covered by the scope of the TBT Agreement.

¹⁵⁸ Note by the Secretariat. Standardising bodies that have accepted the code of good practice for the preparation, adoption and application of standards. 23 February 2015. G/TBT/CS/2/Rev.21.

¹⁵⁹ Annex 1.2 TBT.

¹⁶⁰ See Panel Report, *European Communities - Trade Description of Sardines (EC - Sardines)*, WT/DS231/R, adopted 29 May 2002, para. 7.90; Appellate Body Report, *European Communities - Trade Description of Sardines (EC - Sardines)*, WT/DS231/AB/R, adopted 26 September 2002, paras. 222-223.

¹⁶¹ Schepel, H. (2012) 'Private regulators in law' In Pauwelyn, J., Wessel, R., Wouters, J. (Eds.) *Informal international lawmaking*. Oxford: Oxford University Press, 363-364.

Tuna II for international standardising bodies. It is here argued that the threshold for recognition should be lower.

The test of 'recognised activities in standardisation' has the objective of designating international standardising bodies which, because of the special status they are granted under the TBT Agreement, have to additionally comply with the procedural requirements of the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendation with Relation to Articles 2, 5, and Annex 3 to the Agreement (the 'TBT Committee Decision').¹⁶² Since international standards give rise to a presumption of conformity with WTO obligations to Members that employ them as a basis for their technical regulations, it is assumed that they are WTO-consistent.¹⁶³ It is therefore appropriate to establish a stricter test. For 'regular' standards, such prerequisites arguably are not necessary. For a body to be considered as a 'standardising body' factual recognition would therefore be sufficient, which requires that Members be aware of its standardisation activities. Disseminating information, and generally making public the outcome of standard-setting activity is likely to suffice for this purpose.

4.2.2.2 Companies as recognised standard-setting bodies

The TBT Agreement was negotiated under the awareness of the important role played by private standardising bodies in setting, applying and assessing conformity with standards.¹⁶⁴ Under the approach described above, it is in line with negotiating history and Membership's practice in the TBT Committee to consider, for example, FSC and GlobalG.A.P. as non-governmental recognised standardising bodies. The activities in standardisation of multi-stakeholder and many sectoral VSS are well known and sufficiently public. However, it is more controversial to hold that single companies can qualify as recognised non-governmental standardising bodies, and that single company standards shall be covered by the scope of the TBT Agreement, irrespective of the size of the company and the acceptance of the standards. Indeed, companies too can fall within the definition of a 'standardising body' set forth by the Appellate Body. Specifically, with regards to the concept of a 'body', there is little argument against the fact that a company is a legal entity with specific composition. It is more complex to pinpoint which specific 'tasks' a company holds; however, among the many tasks a company performs, the presence of standard-setting, albeit a one-off, suffices to qualify a company engaging in standard-setting as a standardising body.

¹⁶² It shall nevertheless be kept in mind that the TBT Agreement does not contain any substantive provision addressing international standardising bodies. The Code of Good Practices for standardising bodies does not apply to international standardising bodies according to Annex 3.B.

¹⁶³ Although the TBT Agreement does not impose obligations directly on international standardising bodies as it does for 'regular' standards, certain procedural requirements are set forth by the TBT Committee Decision, international standardising bodies must be in compliance with in order to be recognised as such.

¹⁶⁴ Wouters, J., Geraets, D. (2012) Private food standards and the World Trade Organisation: Some legal considerations. *World Trade Review* 11(3), 486-487.

The outcome seems to correspond to the intention of the negotiations, which points in favour of the inclusion of company standards under the scope of the TBT Agreement, and is thus evidence of a very broad scope of application of the TBT Code. Negotiating history suggests that several delegations were concerned with the trade barrier effects generated by non-governmental bodies unconnected with governments which were capable of drafting product standards.¹⁶⁵ The definition of standards in the Tokyo Round Standards Code explicitly excluded 'technical specifications prepared by an individual company for its own production or consumption requirements.'¹⁶⁶ Such an exclusion was not reiterated in the final text of the TBT Agreement, arguably showing the intention of covering also company standards. This seems to be supported by the fact that neither the ISO/IEC Guide 2:1991¹⁶⁷ exclude company standards from the definition of 'standard'.¹⁶⁸

However, not all company standards are falling under the scope of application of the TBT, since factual recognition of the non-governmental body at issue constitutes an additional requirement. This implies that standards used by companies in their commercial transactions, and normally incorporated in contractual provisions, are not covered by the TBT Agreement if the WTO Member at issue cannot be aware of their factual existence. The situation may, however, change whenever companies' standards are publicly known, for example because they are promoted in light of their specific features. Sustainability requirements set by retailers may be advertised and promoted as a marketing tool; in such a scenario it could be argued that the threshold for factual recognition is met. However, it should be noted that company's standards compliance with certain procedural obligations of the TBT Code may be either difficult or unduly hindering private autonomy, as Section 2.3.3 of Chapter 6 will discuss.

The bodies potentially caught by the TBT Agreement are therefore countless,¹⁶⁹ ranging from governmental standardising bodies drafting standards on a day-to-day basis, to medium-sized companies only incidentally engaging in standard-setting and applying their standards only to a few economic transactions, as long as the standards are public. The TBT Code is open for acceptance to all of these standardising bodies.¹⁷⁰ Indeed, many standard-setters adopt the TBT Code and commit to comply with it;¹⁷¹ it shall

¹⁶⁵ Vidal-Leon, C. (2013) *Supra* at 122, 907.

¹⁶⁶ Explanatory note to Annex 1.3 to the 'Standards Code'.

¹⁶⁷ Annex 1 to the TBT Agreement provides that 'the terms presented in the sixth edition of the ISO/IEC Guide 2:19912, General Terms and Their Definitions Concerning Standardisation and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide'

¹⁶⁸ ISO/IEC Guide 2: 2004, art. 3.2

¹⁶⁹ See also, supporting a broad interpretation, Gandhi, S.R. (2005) *Supra* at 51, 876; Szewo P. (2013) Water footprint and the law of WTO. *Journal of World Trade* 47(6), 1280-1281; Arcuri, A. (2013) 'The TBT Agreement and private standards'. In Epps, T., Trebilcock, M.J. (Eds.) *Supra* at 151, 505.

¹⁷⁰ Annex 3.B of the TBT Code of Good Practice.

¹⁷¹ The list of bodies which have notified acceptance of the TBT Code of Good Practice is available at <http://tbtime.wto.org/web/pages/report/PreDefined.aspx>. As will be explained in Section 2.2 of Chapter 6, the list includes only technical standard-setters at national levels. Additionally, and specifically with respect to VSS, bodies in

however not be forgotten that standardising bodies are conferred no direct obligations under the TBT Agreement.

4.2.2.3 Extent of the obligation imposed on Members

Coherently with the applicability of WTO law only to States, the actions of private parties are attributable to the Contracting Parties. Under the TBT Agreement, the link required to attribute private conduct to the State is rather weak: the only requisite is the presence of a standardising body in a Member's territory.¹⁷² Assessing in which territory a transnational standard-setters is actually present, and therefore which WTO Member shall be responsible for its actions, can be difficult, and impose asymmetrical obligations on certain WTO Members. The direct effects doctrine of jurisdiction as applied, for example, in the area of competition law, could provide a viable solution. Under Art. 4 TBT, a Member would be responsible for the activities of a standardising bodies as long as its activities have effects in its territory. If products from Member A experience detrimental treatment in the market of Member B caused by standards X,¹⁷³ it is the obligation of Member B to ensure that the standard-setter X acts in compliance with the Code. Indeed Art. 4.1 seems to suggest a criterion of real activity of a standardising body, and not a criterion of registration or establishment.¹⁷⁴

The burden on WTO Members (which, in turn, affects also the autonomy of private standardising bodies) is however made more bearable by the imposition of a 'second level of obligation', i.e. the requirement only to take reasonably available means to ensure compliance.¹⁷⁵ Although the actual extent of such a positive obligation has never been addressed in any dispute under the TBT Agreement, it is sensible to assume that States shall not be subject to the same degree of responsibility for all standard-setters in their territory. It would be unreasonable to subject States to the same level of responsibility with respect to standardising bodies, whose standards have a limited impact or presence in the market, acting in breach of the TBT Code of Good Practice, as of governmental standardising bodies, whose standards are widespread and on occasions *de facto* mandatory, are infringing the provisions of the TBT Agreement.¹⁷⁶

Notwithstanding this, under Art. 4 TBT, as under Art. 3 TBT, a negative obligation is imposed on Members as well, i.e. not to take measures requiring or encouraging standardising bodies in their territory in a manner inconsistent with the TBT Code of Good Practice. Different from Art. 3.5 TBT, however, explicit positive measures to be

compliance with the ISEAL Code are presumed to be in compliance with the TBT Code as well. The full list is available at <http://www.isealalliance.org/our-members/full-members>.

¹⁷² Art. 4.1 TBT Agreement.

¹⁷³ To put it differently, an alleged infringement of 3.D of the TBT Code of Good Practices.

¹⁷⁴ Szewedo, P. (2013) *Supra* at 169, 1282.

¹⁷⁵ Gandhi, S.R. (2005) *Supra* at 51, 867.

¹⁷⁶ Vidal-Leon, C. (2013) *Supra* at 122, 904; Davies, A. (2014) *Supra* at 130, 44.

taken are not mentioned. The wording of the obligation under Art. 4.1 TBT seems in any event potentially far-reaching, as Members must also ensure that not just the measure itself, but also its *effects* do not encourage standardising bodies to act in breach of the TBT Code. Members are required not to *directly or indirectly* encourage standardising bodies to act in breach of the TBT Code of Good Practice. This obligation has never been subject to the Appellate Body's interpretative guidance, and its actual extent remains unexplored. Indeed, it has the potential to impose a substantial burden on the Contracting Parties in case of an expansive reading. At a very minimum, it seems to imply that Members cannot require by law for the standardising bodies to deviate from the provisions of the TBT Code of Good Practice. Offering incentives of any type would also appear to be included in the meaning of 'encouraging'. Conversely, to merely *allow* private parties to deviate from the provisions of the Agreement would hardly constitute a breach of Art. 4.1.

It seems therefore reasonable to expect flexibility in giving rise to State responsibility according to the type of body whose standards are contested, with the largest leeway for company standards. Indeed, doing otherwise would be against the level of governmental intervention which is expected in market economies, which should not exceed the level sufficient to enforce, for example, law aimed at protecting consumers, and preventing anticompetitive practices such as those discussed in Chapter 4.¹⁷⁷ An undifferentiated enforcement obligation would also represent an unreasonable - and arguably unenforceable - hindrance of private autonomy. It would be unacceptable to require Members to strictly enforce standardising bodies' compliance with, for example, 3.F of the TBT Code of Good Practice, which provides that international standards shall be used as a basis for the standardising body at issue. As standardising bodies also include single companies, the outcome would constitute a severe intrusion from WTO Members into companies' freedom to structure their business and their commercial relations with suppliers, and to respond to consumer demand for products and specific features thereof. Flexibility for for company standards may also be implementing by interpreting the TBT Code provisions as simply imposing an obligation on Members not to encourage TBT Code-inconsistent behaviour, and Members do not actually have to take measures to ensure compliance, or cannot be held responsible for such standards.

4.2.2.4 Reasonable measures which may be available for compliance

The extent of the obligation to take reasonable measures as may be available to ensure compliance with the obligation in Art. 4 TBT is crucial to identify the expected level of enforcement by WTO Members. The standard of reasonable availability does not entail

¹⁷⁷ Prevost, D. (2008) Private sector food-safety standards and the SPS Agreement. Challenges and possibilities. *South African Yearbook of International Law* 3, 23.

any obligation of a result but, far from being hortatory,¹⁷⁸ implies an obligation of conduct on the side of the State to actively attempt to address the alleged breach by a standard-setting body covered by the TBT Agreement.¹⁷⁹ However, the Appellate Body has never provided interpretative guidance over what would constitute a reasonable measure in the meaning of Art. 4 TBT.

'Reasonable' implies 'a degree of flexibility that involves consideration of all of the circumstances of a particular case'.¹⁸⁰ What is reasonable must thus be assessed case by case. The concept of 'reasonable availability' (of a measure) in the footnote of Art. 5.6 of SPS Agreement has been interpreted by considering the economical and technical feasibility which would make the measure a reasonable option to take.¹⁸¹ In the context of Art. XXIV:12 GATT, it has been held that, in order to determine which measures are reasonable, 'the consequences of their non-observance by the local government for trade relations with other contracting parties are to be weighed against the domestic difficulties of securing observance'.¹⁸² Arguably, a measure cannot be considered as reasonably available in case of substantial costs or technical difficulties in its implementation and enforcement.¹⁸³

It seems, therefore that there are different factors that shall be taken into account to identify a potential measure as reasonably available in the context of the TBT Agreement. Such factors include the cost of enforcement and implementation; the capacity of the

¹⁷⁸ For an interesting comparison to provisions concerning special and differential treatment to developing countries, see the interpretation of the panel in *EC - Bed Linens* of a similarly allegedly hortatory provision in Art. 15 of the Antidumping Agreement. There, it is provided that developing countries shall be given special regard when considering the application of anti-dumping measures. Furthermore, it is stated that 'possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.' The panel decided that such a provision has a substantive character, in spite of its open-ended language. It ruled that the 'exploration of possibilities' 'may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the "exploration" of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome.' Panel Report, *European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, para. 6.233. A similar approach was followed by the panel in *EC - Biotech* where it ruled that taking into account developing countries' needs requires Members to 'consider along with other factors before reaching a decision' the need of developing countries. Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products (EC - Biotech)*, WT/DS291/R, adopted 29 September 2006, para. 7.1620. Similarly, taking reasonably available measure in the meaning of Articles 3 and 4 TBT does not require an obligation of a result, but it implies an obligation of conduct.

¹⁷⁹ Bohanes, J., Sandford, I. (2008) The (untapped) potential of WTO rules to discipline private trade-restrictive conduct. Paper presented at the Society of International Economic Law Inaugural Conference. Geneva, 15-17 July 2008. Online Proceedings Working Paper No. 56/08

¹⁸⁰ Appellate Body Report, *Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 24 July 2001, para. 84.

¹⁸¹ Panel Report, *Australia - Measures Affecting Importation of Salmon. Article 21.5 DSU Recourse (Canada)*, (*Australia - Salmon 21.5 (Canada)*), WT/DS18/RW, adopted 18 February 2000, para. 7.146.

¹⁸² Panel Report, *Canada - Measures Affecting the Sale of Gold Coins*, L/5863, 17 September 1985 (unadopted), para. 69.

¹⁸³ Appellate Body Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China - Audiovisuals)*, WT/DS363/AB/R, adopted 21 December 2009, para. 318.

Member at issue, which is a direct function of its level of economic development; and the restrictive effect of the contested standard. The latter is strictly dependent on its stringency, acceptance and, whenever that may be the case, consumer preference. Further, a reasonably available measure must also guarantee an appropriate scope of autonomy and freedom to private actors concerned.¹⁸⁴

As seen, under the TBT Agreement, many bodies can theoretically qualify as 'standardising bodies' in a Member's territory. Clearly this has an impact on the extent of the expected level of enforcement for Members, which shall remain technically and economically feasible, and not to constitute an undue burden on Members, especially those in whose territory several standard-setters are established. Examples of reasonably available measures, which may be considered as such under certain circumstances and for certain Members, include the dissemination of information and the provision of training about the obligations of the TBT Agreement to non-governmental bodies; the development of national policies in relation to compliance with TBT substantive provisions; entering into agreements with certain non-governmental bodies to ensure that they act in compliance with the TBT Agreement; and to encourage, by different means, behaviour which is in line with the TBT Agreement, such as for example by means of financial incentives for compliance and dialogue with non-governmental standard-setting bodies.¹⁸⁵

It is helpful to look at the forms of interactions highlighted in Chapter 2 and 3 to identify other specific measures which could constitute reasonably available means for compliance. The establishment of requirements in line with those of the TBT Code private standards must respect in order to qualify for the incentive offered by public procurements, arguably constitutes such a measure. Indeed, to generally require compliance with good administration principles to standardisation bodies which aim at being recognised for a specific purpose, such as it occurs in the EU RED, could also qualify as reasonably available measure for compliance. Harmonisation, either mandatory or by softer means could also, in certain cases, qualify as such - on condition that it addresses possible trade barrier effects of standards such as discrimination, unnecessarily trade-restrictiveness, or deviation from international standards provided for in the TBT Code.

Competition law enforcement is not *per se* required by the WTO Agreements to remedy a breach. Nowhere in the Agreements can an obligation to even set up competition authorities be found. The panel in *Argentina - Hides and Leather* expressly held that, under Art. XI GATT, there is no obligation to investigate private cartels to ensure they do

¹⁸⁴ Lopez-Hurtado, C. (2002) Social labelling and WTO law. *Journal of International Economic Law* 5(3), 740.

¹⁸⁵ Gascoine, D., Vergano, P. Carreno, I. (2007) Private voluntary standards within the WTO multilateral framework. Submission by the United Kingdom to the Committee on Sanitary and Phytosanitary Measures. 9 October 2007, G/SPS/GEN/802, 33.

not result in import restrictions.¹⁸⁶ Within the framework of the TBT Agreement, it does not seem unreasonable to nonetheless consider competition law enforcement, in the presence of competition authorities, as a 'reasonably available' measures to ensure compliance. The measures covered by the TBT Code of Good Practice, as seen in Chapter 4, are normally falling under the scrutiny of competition law as well. Breaches of the non-discrimination obligation contained in Annex 3.D may result in breaches of competition as well, to the extent that the trade distortions have a negative impact on competition itself and on consumer welfare. An arguable consonance between the objective of (EU) competition law and WTO rules for standards renders therefore competition enforcement a reasonable tool to ensure compliance with the TBT Code of Good Practice. Granted, in line with the very concept of 'reasonably available' measures, and a differentiated obligation depending on the extent of the trade restriction, Members are not under the obligation to actually enforce competition law in all instances where private standards affect trade, or in general outside the scope of the TBT Agreement.

Finally, the extent of the obligation on the Members is also limited by the presence of a peculiar provision in Art. 14.4 TBT, concerning 'Consultation and Dispute Settlement'. It is there provided that a dispute settlement can be invoked when a Member considers that another Member has not achieved satisfactory results under *inter alia* Articles 3 and 4 TBT, but only if its trade interests are significantly affected. Unclearly over what constitutes a 'satisfactory result' aside, this provision appears to limit the access to dispute settlement only in cases where Members are actually affected by a technical regulation or a standard that can be connected to another Member. By means of comparison, under the GATT, no requirement of being affected by a measure exists, and in theory any Member can file a dispute under Art. XXIII:1.¹⁸⁷ The same seems to hold true at least for Art. II of the GATS.¹⁸⁸ Such a provision also has the effect of limiting the circumstances under which a State could be held responsible for breaches of the TBT Agreement committed by a private standard setter in its territory.

¹⁸⁶ *Argentina - Hides and Leather*, WT/DS155/R, para. 11.52. See also Fox, E.M., Arena, A. (2013) 'The international institutions of competition law: The systems' norms'. In Fox, E.M., Trebilcock, M.J. (Eds.) *The design of competition law institutions. Global norms, local choices*. Oxford: Oxford University Press, 455.

¹⁸⁷ As benefits accruing to a Member directly or indirectly under the GATT Agreement are considered nullified or impaired simply by 'the failure of another contracting party to carry out its obligations under this Agreement'. Also consultation under Art. XXII GATT can be initiated 'with respect to any matter affecting the operation of this Agreement'.

¹⁸⁸ Panel Report, *Argentina - Measures Relating to Trade in Goods and Services*, WT/DS453/R, adopted 30 September 2015, para. 7.196. Indeed, it seems that the reasoning of the panel can be extended to other provisions of the GATS, since Art. XXIII:1 on Dispute Settlement and Enforcement provides that a recourse to the DSU can be initiated by any Member which considers that another Member has failed to carry out its obligation or specific commitments under the GATS.

4.2.3 Which bodies can draft international standards?

Both WTO Members and standardising bodies must base their technical regulations and standards on international standards.¹⁸⁹ Such a harmonisation objective, however qualified, probably constitutes the most salient element of the TBT Agreement.¹⁹⁰ International standardising bodies, to qualify as such under the TBT Agreement, must comply with the additional requirements of being actively involved into recognised activities in standardisation, which entails: i) openness to at least all WTO Members; ii) the presence of standardisation activities; iii) recognition of those activities. The interpretative approach chosen by the Appellate Body is far from being excessively strict. To be considered as 'open', a standardising body must be 'accessible or available without hindrance', 'not confined or limited to a few', 'generally accessible or available'.¹⁹¹ Openness, altogether with consensus, arguably ensure that the international standard will be considered as valid for a longer period of time than standards adopted under closed procedures or majority voting, thereby guaranteeing stability and predictability.¹⁹² Concerning recognition, the Appellate Body held that the concept ranges on a spectrum spanning from the mere acknowledgement of the existence of the standard, to a more normative acknowledgement of the validity and legality of the standard.¹⁹³ State participation in the standardisation activities of the body at issue, combined with the body's compliance with the stipulations of the TBT Committee Decision are conclusive indicia that a standardising body is in fact an 'international standardising body'.

International standards lower transaction costs and facilitate trade. The delegation of such standard-setting to international fora insulates Members from the pressure of domestic industry. Democratic process may however be undermined.¹⁹⁴ This is why the TBT Committee Decision establishes a series of procedural requirements concerning principles and procedures that international standardising bodies should follow to be defined as such.¹⁹⁵ Such bodies shall operate in a transparent manner, by publishing

¹⁸⁹ International standards should be 'used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation'. Appellate Body Report, *European Communities - Trade Description of Sardines (EC - Sardines)*, WT/DS231/AB/R, adopted 26 September 2002, para. 243. See for in-depth discussion Section 5.1 of Chapter 6.

¹⁹⁰ Du, M.M. (2007) Domestic regulatory autonomy under the TBT Agreement: From non-discrimination to harmonisation. *Chinese Journal of International Law* 6(2), 269-306.

¹⁹¹ *US - Tuna II*, WT/DS381/AB/R, para. 364.

¹⁹² Zúñiga Schroder, H. (2009) Definition of the concept 'international standard' in the TBT Agreement. *Journal of World Trade* 43(6), 1251.

¹⁹³ *US - Tuna II*, WT/DS381/AB/R, para. 361.

¹⁹⁴ Leebron, D.W. (1996) 'Lying down with Procrustes: An analysis of harmonisation claims'. In Bhagwati, J., Hudec, R.E. (Eds.) *Fair trade and harmonisation: Prerequisites for free trade? Vol. 1: Economic analysis*. Cambridge: MIT Press, 41.

¹⁹⁵ The Appellate Body qualified the TBT Committee Decision as a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' in the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties, as it 'bears specifically on the interpretation of the term "open" in Annex 1.4 to the TBT Agreement, as well as on the interpretation and application of the concept of "recognised activities in standardisation" *US - Tuna II*, WT/DS381/AB/R, para. 372.

information at appropriate stages in the standard-setting process, and proving for the possibility of commenting on draft standards. Membership shall be open without hindrance at any stage to the relevant bodies of all WTO Members. International standards shall be impartial by not favouring the interests of certain countries, regions, or suppliers. International standards must also respond to specific regulatory needs, and shall not distort the global market, negatively affect competition or stifle innovation. International standards should not overlap with other international standards, and coordination between bodies shall be sought. Finally, special attention to developing countries' needs shall be given during the standard setting process, and efforts should be made to ensure their active participation.¹⁹⁶ It has been noted that, by bringing the requirements of the TBT Committee Decision into the equation, the AB embraced a much more hands-on approach towards international standardisation than under the *Sardines* case, and it is now willing to closely scrutinise whether a body complies with the requirements of the Decision.¹⁹⁷

The Appellate Body in *US - Tuna II* suggested that the spirit of the TBT Agreement encourages the development of international standards even by bodies that were not in existence, or that were not engaging in standard-setting, at the time of its adoption.¹⁹⁸ Further, as provided in the explanatory note to the definition of a standard in Annex 1.2, international standards prepared by the international standardisation community must be based on consensus, although the TBT Agreement also covers standards which have not been approved by consensus. In *EC - Sardines*, this requirement has been interpreted as meaning that international standards are normally drafted with consensus being the normal voting procedure for approval by the international standardising body at issue. However, in order to avoid deadlock in a case in which it is impossible to achieve consensus on a specific standard, a majority vote will be employed for approval. That circumstance would not disqualify the standard at issue from being an international standard.¹⁹⁹

4.3 VSS bodies under the TBT Agreement

Having assessed which types of bodies are covered by the obligations of Articles 3 and 4 of the TBT Agreement, and what are the requirements to qualify as an international

¹⁹⁶ TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendation with Relation to Arts. 2, 5, and Annex 3 to the Agreement, in WTO document G/TBT/1/Rev.10, Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade since Jan. 1, 1995, June 9, 2011, 46–48.

¹⁹⁷ Pauwelyn, J. (2014) Rule-Based Trade 2.0? The rise of informal rules and international standards and how they may outcompete WTO Treaties. *Journal of International Economic Law*, 17(5),750; Du, M.M., Deng, F. (2016) International standards as global public goods in the world trading system. *Legal Issues of Economic Integration* 43(2), 115-116.

¹⁹⁸ *US - Tuna II*, WT/DS381/AB/R, para. 379. The statement also suggests that the TBT Agreement 'regulates for the future', and that new international standards Members States shall employ as a basis for their legislation can make their appearance on the international regulatory arena.

¹⁹⁹ *EC - Sardines*, WT/DS231/AB/R, para. 227.

standardising body which drafts international standards in the meaning of Art. 2.4, this Section applies the legal framework above to VSS, with the aim to identify which VSS bodies are subject to TBT discipline. Preliminary, it shall be noticed that under the TBT Agreement, different from the GATT, it is not necessary to assess the two different situations whereby a link with the State could be established or not. As the rules for attribution under the TBT Agreement expand on those of the ASR, and States are also responsible for the activities of all non-governmental bodies and standard setters in their territory in addition to the traditional attribution categories, Articles 3 and 4 encompass also instances whereby VSS are, mandatorily or voluntarily, employed in legislation by means of incorporation. In addition, Art. 4 covers the actions of standard-setters which are not connected to the State by any means. The mandatory employment or reference to VSS in legislation, with the same purposes as under the GATT, would result in an assessment of the substance of the scheme under Art. 2.1 and 2.2 TBT.

4.3.1 VSS under Articles 3 and 4 of the TBT Agreement

As explained above, Art. 3 requires delegation in order to impose on a Member an obligation to ensure compliance with the TBT Agreement by a non-governmental body. In the alternative, a situation comparable to Article 5 or 11 ASR must be present to turn a private measure into a technical regulation in the meaning of the TBT Agreement. In both scenarios, the State is fully responsible for the activities of the VSS body at issue, must take positive action to ensure its compliance with the substantive provisions of Art. 2 and must not require or encourage that body to act inconsistently with the TBT Agreement. Art. 3 therefore applies only to VSS that enjoy delegated powers or that are, to some extent, mandatorily employed in legislation which qualifies as technical regulation. All other cases must be assessed under Art. 4 TBT, to which now we turn.

In the light of the breadth of the definition of standardising body, both multi-stakeholder, sectoral and company VSS fall within the scope of application of the TBT Agreement.²⁰⁰ The breadth of the definition of standardising body in Art. 4, should not impose on Members an unreasonable obligation. Not all company standards should be covered, it has been argued, in order not to result in an undue burden on certain Members, and to ensure enforceability of the TBT provisions. Company VSS which constitute part of supply requirements, but are not made public by the retailer, and public authorities, by no reasonable means, can be aware of their existence, are not covered by the scope of the TBT Agreement.

Crucially for the enforceability of the obligations under Art. 4 TBT, WTO Members are responsible for the activity of standard-setters *within their territories*. This requirement appears problematic in the light of the transnational dimension of modern standard

²⁰⁰ On the same position: Cardwell, M., Smith, F. (2013) 'Contemporary problems of climate change and the TBT Agreement: moving beyond eco-labelling. In Epps, T., Trebilcock, M.J. (Eds.) *Supra* at 151, 418-419.

setting, and in particular of certain VSS. It is difficult to determine in whose Member's territory certain transnational multi-stakeholder schemes are established. FSC Principles, by means of example, are established by FSC International, which is based in Bonn, Germany. However, standards are operationalised and adapted to the local specificities by the national organisations federated to the FSC. Marine's Stewardship Council's Main Office is in London, but the actual standards are drafted by the fishery auditors, who transpose the general principles to the specific context. Which countries should be held responsible for possible infringements by the VSS body/bodies? It is here submitted that, whenever VSS are composed of local standards implementing broader principles - such as in the cases above - responsibility shall fall on the State where the local organisations implement the standards. It can be assumed that possible infringements would occur at the moment of the operationalisation of the principles which, by being broad and basically unenforceable, can hardly constitute a breach of the TBT Agreement. In case the restrictive effect is generated by the request for compliance by consumers or by retailers in a specific territory, an effect-based approach could be of assistance, and thereby responsibility would be imposed on the State where consumers and retailers preference for a VSS exists.

The finding that many VSS bodies are covered by the scope of the TBT Code contradicts the claim that WTO law should take positive action requiring active policy making in favour of specific CSR instruments.²⁰¹ It does, however, also partially go against the suggestion that regulatory space should be carved out to permit private rules which are followed because of the lack of multilateral alternatives to operate unconstrained.²⁰² The approach chosen by the AB is less deferential, and subjects to the scope of the TBT Agreement a large number of private regulators in the domain of sustainability, albeit through the mediation of Members' measures.

4.3.2 VSS as international standardising bodies under Art. 2.4 of the TBT Agreement

As seen above, the normative side of recognition appears to be fulfilled as long as the standardising body complies with the principles of the TBT Committee Decision, so no further action is needed. With the action of recognition not being entirely dependent on Members' actions, and presuming awareness of the existence of reasonably successful multi-stakeholder initiatives, the democratic and inclusive procedural requirements many multi-stakeholder VSS bodies abide to, have the potential to turn them into international standardising bodies in the meaning of the TBT Agreement. As many multi-stakeholder

²⁰¹ Aaronson, S.A. (2007) A match made in the corporate and public interest: Marrying voluntary CSR initiatives and the WTO. *Journal of World Trade* 41(3), 629-659.

²⁰² Bernstein, S., Hannah, E. (2008) Non-state global standard setting and the WTO: Legitimacy and the need for regulatory space. *Journal of International Economic Law* 11(3), 606; Moody, M.N. (2012) Warning: may cause warming. Potential trade challenges to private environmental labels. *Vanderbilt Law Review* 65(5), 1442.

VSS such as Fairtrade and FSC adhere to the ISEAL Alliance's Codes of Good Practice,²⁰³ to a large extent compliance with the provisions of the TBT Agreement's Code of Good Practice, and the 'Transparency', 'Impartiality and Consensus', and the 'Development Dimension' provisions of the TBT Committee Decision appears to be ensured.

Assessing compliance with other requirements is, however, more complex. Following the ISEAL Code would not necessarily ensure that VSS bodies are open at all stages to the relevant bodies of at least all WTO Members,²⁰⁴ for the purpose of the TBT Committee Decision. The standard-setting process for the sustainability standard and certification schemes is normally led by private actors, whereas governments traditionally prefer to refrain from influencing stakeholders, and would rather allow them to define the standards they deem necessary for their needs. Nonetheless, nothing in the statutes and rules of certain VSS bodies appears to prevent governments from participating in the standard-setting process. FLO even mentions governments as a possible stakeholder to be consulted in the standard setting process.²⁰⁵ Technical standard setting taking place at the ISO is mainly conducted by the private sector, at least in certain Members. This has not prevented ISO from being considered as an international standardising body. The body should be open, but it is not necessary that participation of all Members actually have to occur. Arguably no WTO Member has the capacity to participate effectively in the development of all standards among all possible fora.²⁰⁶

Other requirements of the TBT Committee Decision, if taken literally, appear difficult to be satisfied by VSS, but indeed the same could be held also for other types of standards. For example, 'Effectiveness and Relevance', provides that standards need to be relevant and effectively respond to regulatory and market needs, as well as scientific and technological developments in various countries. Standards should not distort the global market, have adverse effects on competition, or stifle innovation and technological development. Furthermore, standards should not give preference to the characteristics or requirements of specific countries or regions where different needs or interests exist.

Such requirements are of difficult application to social and environmental standardisation. The unavoidable effect of VSS is to distort the market and impact competition, by intentionally conferring an advantage to products qualifying for the scheme, and by

²⁰³ See, generally, Mathis, J. (2011) 'International social and environmental production standards. Should corporate social responsibility get a slice of the WTO pie?' In Reestman, J.H., Schrauwen, A. van Montanans, M. and Jans, J. (Eds.) *De regels en het spel: Opstellen over recht, filosofie, literatuur en geschiedenis aangeboden aan Tom Eijssbouts*. Den Haag: T.M.C. Asser Press, 245-259.

²⁰⁴ TBT Committee, Decisions and Recommendations Adopted by the Committee since Jan. 1, 1995 – Note by the Secretariat, 28 November 2000 G/TBT/1/Rev.7, 27.

²⁰⁵ Fairtrade International, Standard Operating Procedure Development of Fairtrade Standards (2012), Art. 2.3. Similarly, FSC allows for governments to provide input. See Cadman, T. (2011) *Quality and Legitimacy of Global Governance. Case Lessons from Forestry*, Basingstoke: Palgrave Macmillan, 53.

²⁰⁶ Wijkström, E., McDaniels, D. (2013) Improving regulatory governance: International standards and the WTO TBT Agreement. *Journal of World Trade* 47(5), 1041.

subordinating free trade to other higher societal values.²⁰⁷ It is also debatable whether VSS really respond to the market needs of all WTO Members, or only to the needs of the more environmentally-conscious Western countries, given developing countries' generally critical outlook on VSS. Furthermore, a passage in the *US-Tuna II* decision seems to suggest that the AB adopted a rather broad view of the concept of impartiality and interest representation, by agreeing with the US' statement suggesting that, since certain interests such as consumers and environmental groups' were not allowed by the AIDCP, its activities would be disqualified from the domain of international standardisation.²⁰⁸ Notwithstanding this, it should not be forgotten that an extent of distortion of competition is generated also by technical standards whose objective is economic efficiency, and which favour a specific technical solution over another. It is equally debatable whether technical standard-setters, including ISO, arguably the international standardising body in the eyes of the TBT drafters, have effective mechanisms into play to ensure interest representation also from developing countries, and other civil society interest groups.²⁰⁹

In any case, it seems that it cannot be excluded that, under specific circumstances and being certain conditions fulfilled, Members may be required to employ as a basis for their technical regulations standards elaborated by VSS bodies under a limited governmental participation.²¹⁰ This outcome confirms the view that Article 2.4 TBT has a broad implication on the overall scope of application of TBT provisions. As observed, the TBT Agreement has the potential to function as an automatic law-making mechanism that does not simply incorporate existing international law, but turns a broad corpus of normative material, which was not created with the intention to constitute binding norms, into international legal obligations.²¹¹ Extending its application also to bodies entirely outside a Member's control, and with the act of recognition requiring a mere passive role from Members, significantly curtails regulatory autonomy at the national level, especially in the domain of sustainability. To hold that many types of standards can constitute international standards is in line with a decentralised view over international standardisation which the US has consistently supported in the TBT Committee, as

²⁰⁷ Lopez-Hurtado, C. (2002) *Supra* at 184, 719-746; Cheyne, I. (2009) Proportionality, proximity and environmental labelling in WTO law. *Journal of International Economic Law* 12(4), 927-952.

²⁰⁸ *US - Tuna II*, WT/DS381/AB/R, paras. 383-384.

²⁰⁹ McDonald, J. (2005) Domestic regulation, international standards, and technical barriers to trade. *World Trade Review* 4(2), 267; Zúniga Schroder, H. (2009) *Supra* at 192, 1233-1242; Delimatsis, P. (2014) *Supra* at 136.

²¹⁰ On a similar conclusion with respect to non-state market-driven (NSDM) schemes see Bernstein, S., Hannah, E. (2008) *Supra* at 202, 604; Arcuri, A. (2013) 'The TBT Agreement and private standards'. In Epps, T., Trebilcock, M.J. (Eds.) *Supra* at 151, 510. Holding the view that private industry consortia in the ICT sector constitute international standards in the meaning of the TBT Agreement: Liu, H.W. (2014) International standards in a flux: A balkanised ICT standard-setting paradigm and its implications for the WTO. *Journal of International Economic Law* 17(3), 551-600. Denying the status of international standards of CSR standards such as ISO 26000 because of the inherently contestable nature of non-technical issues: Wijkström, E., McDaniels, D. (2013) *Supra* at 206, 1038.

²¹¹ Howse, R. (2011) 'A new device for creating international legal normativity: The WTO Technical Barriers to Trade Agreement and 'International Standards'', in Joerges, C., Petersmann, E.U. (Eds.) *Supra* at 140, 384.

opposed to the EU centralised approach which considers only ISO, IEC and ITU as relevant international standardisation bodies under the TBT Agreement.²¹²

From the perspective of VSS, as some could qualify as relevant international standards, it can be assumed that such a 'qualification' must be highly coveted, particularly so from standardising bodies competing on a market for standardisation. This would ensure not just economic benefits from the increased uptake, but would also enhance their legitimacy to operate on the transnational regulatory domain. In areas where more than one VSS operates, however, 'picking the winner' is a task reserved to the Appellate Body, and only in case a dispute arises under Art. 2.4 of the TBT Agreement. In the absence of a ruling, WTO Members are free to determine which body, in their view, is the relevant international standardising body and on whose standards to base their technical regulations and standards. It is therefore equally possible that, with the lack of a more easily accessible 'mechanism' for selecting the international standard, a relatively relaxed approach to the identification of international standardising bodies may sort out the effect of contributing to the proliferation of initiatives which aim at advancing a claim of international regulatory legitimacy.

5 VSS under the SPS Agreement

The SPS Agreement applies to measures protecting human, animal and plant life and health from risks arising from pests and diseases, and food-borne health issues,²¹³ which directly or indirectly affect international trade.²¹⁴ Different from the TBT Agreement, the SPS Agreement does not explicitly provide that private measures fall within its scope, but it simply refers to SPS measures as 'all relevant laws, decrees, regulations, requirements, and procedures' which aim at the protection of human, animal or plant life or health from food or food-borne risks and the spreading of pests.²¹⁵

²¹² Liu, H.W. (2014) *Supra* at 210, 574-575.

²¹³ As provided in Annex A.1, the SPS Agreement covers four different types of SPS measures, i.e. any measure applied:

- (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
- (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
- (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
- (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

²¹⁴ Such a requirement has been interpreted broadly, and it is not required to demonstrate actual effects on trade. Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products (EC - Biotech)*, WT/DS291/R, adopted 29 September 2006, paras. 7.434 - 7.435.

²¹⁵ Annex A.1 of the SPS Agreement. Differently from the TBT Agreement, however, the SPS Agreement provides for a closed list of relevant international standardising bodies on which SPS measures shall be based whenever possible. See Annex A:3 SPS.

5.1 Personal scope of application of the SPS Agreement

Theoretically, as the SPS Agreement does not contain special rules for attribution as the TBT Agreement, the same findings made in connection to private party attribution under the GATT can be transposed to the SPS Agreement. This is to say that Members are not responsible for private SPS measures unless they provide for their employment, either voluntarily or mandatorily, in legislation, or if private measures are attributable under the other traditional criteria for attribution. The applicability of the SPS Agreement only to public SPS measures is also supported by the fact that Art. 2.1 of the SPS Agreement explicitly refers to Members as the entities which have the right to take SPS measures. Moreover, reference is made to the ‘appropriate level of sanitary and phytosanitary protection’, which shall be based on scientific assessment.²¹⁶ Setting such a level of protection is, by definition, a prerogative of WTO Members,²¹⁷ and indeed is intimately connected to the exercise of public authority and the sovereign right to regulate.

5.2 Art. 13 of the SPS Agreement

In spite of the above, it must be noted that the SPS Agreement contains an obligation addressing SPS measures drafted by private bodies, albeit indirectly. Art. 13 SPS resonates of a similar language of Art. 4 TBT, in so far it provides that i) Members shall implement positive measures aiming at ensuring SPS-compliance by bodies other than central governmental bodies; ii) shall not take measures which, directly or indirectly, require or encourage non-governmental entities²¹⁸ to act inconsistently with the Agreement; iii) must not take measures which have the effect to require or encourage regional, local and non-governmental bodies to act inconsistently with the Agreement; and iv) must ensure that they rely on the services of non-governmental entities in the implementation of SPS measures only if those entities are in compliance with the SPS Agreement.

As under the TBT Agreement, the extent of the obligation imposed on WTO Members is unclear and, so far, unexplored by case law. The main difference with the TBT Agreement is that the SPS Agreement does not provide for a definition of the private bodies that would be covered by its scope of application, nor does it expressly provide that its application includes measures which are *de jure* voluntary. On this specific point, it must be noted that, albeit the terms in the definition of ‘measure’ under Annex A.1 of the SPS Agreement could encompass both voluntary and mandatory measures, the panel in *Japan - Agricultural Products II* noted that no requirement of enforceability or mandatory

²¹⁶ Art. 5 of the SPS Agreement.

²¹⁷ Annex A:5 of the SPS Agreement.

²¹⁸ Although the TBT Agreement refers to bodies and not to entities, it seems that the two words can be used interchangeably as synonyms, especially since the Appellate Body has defined a body as a ‘legal or administrative *entity* that has specific tasks and compositions’ (italic added).

character is present in the definition of SPS measure. The panel therefore noted that, as other WTO Agreements, the SPS also applies to non-mandatory measures conferring an advantage upon compliance.²¹⁹

In *Australia - Salmon (Article 21.5 - Canada)*, the panel held that Art. 13 establishes an obligation of result. It must, however, be taken into account that at issue there were SPS measures taken by the Regional Government of Tasmania, a body for which Australia was fully responsible, and whose actions were attributed under the most classic attribution principle of the indivisibility of the State.²²⁰ It seems, therefore, that also Art. 13 could contain separate levels of responsibility as in Art. 4 of the TBT Agreement, whereby Members are fully responsible for the activities of regional and otherwise local bodies but, conversely, are conferred a best efforts obligation with respect to the activities of non-governmental bodies. However, the lack of specific obligations private parties must be in compliance with - i.e. an SPS-version of the TBT Code of Good Practice, coupled with the lack of boundaries over which private entities are to be covered by the scope of the Agreement, renders problematic the acceptance of a potentially broad best endeavour obligation for Members to address private parties' compliance in situations other than the employment of private entities in the implementation of SPS measures, and to cases of attribution of private SPS measures to a Member.²²¹

It must therefore be concluded that the application of the SPS Agreement to at least certain private parties' SPS measures is in theory open,²²² but arguably limited to cases of attribution of private SPS measures to the Member at issue under the WTO rules of attribution. Therefore, VSS standards addressing SPS issues may be subjected to the substantive discipline of the SPS Agreement indirectly, through an obligation of means imposed by Art. 13 SPS on WTO Members. Notwithstanding this, private SPS standards may still qualify as standards in the meaning of the TBT Agreement, and are therefore subject to its discipline.²²³

5.3 Private standards within the SPS Committee

The matter of private standards has been the subject of controversy and discussion in the SPS Committee, as explained in the introduction to this Chapter. The SPS Committee's latest developments seem to suggest that the impasse concerning a working definition

²¹⁹ Panel Report, *Japan - Measures Affecting Agricultural Products*, WT/DS76/R, adopted 27 October 1998, para. 8.111.

²²⁰ Panel Report, *Australia - Measures Affecting Importation of Salmon. Article 21.5 DSU Recourse (Canada)*, WT/DS18/RW, adopted 18 February 2000, paras. 7.12 - 7.13.

²²¹ It shall be noted that the outcome described here, i.e. an obligation of result imposed on Members with respect to bodies other than central governmental bodies whose actions are attributed to the Member at issue, appears to be in line with the general rules of responsibility as it is provided, in the first sentence of Art. 13, that Members remain fully responsible for the observance of all obligations set forth in the Agreement.

²²² Wouters, J., Geraets, D. (2012) *Supra* at 164, 485-486.

²²³ Prevost, D. (2008) *Supra* at 177, 1-37.

for private standards is, for the time being, difficult to overcome. The working definition of a private standard under the SPS Agreement currently reads as follow:

*"An SPS-related private standard is: a written requirement or a set of written requirements of a non-governmental entity which are related to food safety, animal or plant life or health and for common and repeated use." (Optional footnote: "This working definition or any part of it shall be without prejudice to the rights and obligations of Members under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures or the views of Members on the scope of this Agreement.").*²²⁴

The definition above tried to accommodate the concerns of the parties, by removing a reference to 'development and application' of standards, arguably the problematic stages in private standard-setting according to developing countries. Arguably the major issues are perceived to arise because of non-transparent standard-setting, discriminatory application, and lack of mutual recognition, or recognition of equivalence. Still, both the EU and the US remain preoccupied with the employment of the terms 'non-governmental entity' and 'requirement'.²²⁵

The works of the 'electronic working group' have however stopped at the beginning of 2015 due to insurmountable disagreement between WTO Members, and a 'cooling off' period has been called upon by Members.²²⁶ The major disagreement concerns the perceived risk by developed countries, such as the EU and the US, that a working definition, whose purpose is however limited to the works of the SPS Committee, could affect the scope of the SPS Agreement and thus open its application also to private SPS measures.²²⁷ How a 'working definition' could be used by the Appellate Body to interpret the scope of the SPS Agreement cannot be predicted. The impact of a formal definition of private standard in the SPS shall however not be underestimated, as it may also affect the practice under the TBT Agreement. It cannot be excluded that it could be considered as a 'subsequent agreement by the parties' in the guise of the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendation with Relation to Articles 2, 5, and Annex 3 to the Agreement, in the context of the definition of 'international standardising body'.²²⁸ To this extent, the Appellate Body decision in *US - Tuna II* may have had a chilling effect on the Committees' definitional efforts.

²²⁴ SPS Committee. Second report of the co-stewards of the private standards e-working group on Action 1 (G/SPS/55) 30 September 2014. G/SPS/W/281.

²²⁵ SPS Committee. Report of the co-stewards of the private standards e-working group to the March 2015 meeting of the SPS Committee on Action 1 (G/SPS/55). 17 March 2015. G/SPS/W/283, para. 8.

²²⁶ SPS Committee. Report of the co-stewards of the private standards e-working group to the March 2015 meeting of the SPS Committee on Action 1 (G/SPS/55). 17 March 2015. G/SPS/W/283.

²²⁷ *Ibid.*

²²⁸ *US - Tuna II*, WT/DS381/AB/R, para. 372.

6 Conclusion

This Chapter has addressed the WTO rules for attribution of private conduct in the GATT, the TBT Agreement and the SPS Agreement. The aim was to identify which VSS are subject to WTO law, under which obligations and circumstances, and which level of responsibility do WTO Members assume, before discussing substantive WTO discipline. GATT and WTO law have been interpreted in a way which is broadly aligned to the customary rules for attribution, and corresponds to a standard of overall dependance from governmental action. Such a standard varies to encompass more or less clear cases of delegation of power, and also cases of direction and control of private conduct under a system of incentives and disincentives dependent from governmental action. A private measure which is perceived in the same manner as public behaviour is likely to be attributable. Also acknowledgement and adoption of private conduct results in attribution under the WTO regime. Arguably, the concept of 'requirement' includes compliance with private requirements as well, which change their legal status and compliance with and generate different effects if employed in a public measure. The voluntary character of a private requirement would not *per se* constitute an obstacle to GATT discipline, as also voluntary measures generating an advantage have been considered as covered by GATT and WTO adjudicatory organs.

The above has certain legal implications for the WTO treatment of VSS. Structured legal relations between public and private authorities, which prescribe however voluntarily the employment of a VSS by allocating and coordinating regulatory effects of public and private measures, are likely to result in attribution of the schemes in question. Two conditions must be fulfilled: compliance with the VSS generates specific different consequences for the certified entities, such as demonstrating compliance with certain requirements; and compliance with a VSS results in an advantage being conferred on the economic operators at hand. This is arguably the case for cases of VSS use in a similar fashion as under the EU RED, and also certain forms of facilitation which coordinate regulatory effects of VSS such as the FLEGT Regulation and the public procurement Directive (which is however to be appraised under the GPA).

Other forms of interaction would not give rise to attribution. Importantly, under the most frequent case where VSS operate without public involvement, VSS cannot be attributed to a WTO Member. It is impossible to identify a sufficiently strong link between governmental measures generally supporting CSR practice and compliance with private regulation on the one hand, and the establishment of VSS schemes, or the demand by retailers and consumers for VSS-compliance on the other. In a similar guise, support in the form of financial contributions, financial assistance to entities seeking certification, and a general policy climate favourable to corporate social responsibility practices are not going to constitute a sufficiently strong link capable of attributing private action to WTO Members.

From a policy perspective certain consequences can be drawn. Policy makers are free to stimulate support and even regulate the production of global public goods by different means in the domain of transnational regulation and sustainability under a limited risk of WTO scrutiny under the GATT. Financial support and a commitment towards a policy environment, which is conducive to private regulation, are unlikely to constitute a problem under the GATT. In a similar fashion, VSS which operate without links to public authorities are unconstrained by WTO law. This holds true under the GATT and, at least formalistically, also under the TBT Agreement - as its obligation of compliance is imposed on WTO Members.

However, as soon as Members formally acknowledge that VSS constitute a valuable tool in regulation and employ them in a formalised manner within State measures, then the scope of WTO review is extended to such private schemes constituting 'requirements' in the meaning of GATT provisions. As discussed in the previous Chapters, it is in VSS' interest to interact with legislators to enhance their legitimacy. Such legitimacy may however be hindered considerably if WTO review of a private scheme employed in a WTO Member's measure results in a finding of a breach. Indeed the responsibility for a breach would still fall on the Member, but the effects on future uptake may be detrimental to the scheme in question. Scheme holders should therefore be extremely careful in assessing their WTO-compliance before entering into structured relations with public authorities - and so should the public authorities, by exercising a sufficient extent of control on the substance of the schemes as well and ensuring WTO consistency.

The TBT Agreement represents a powerful tool to indirectly regulate private standards by means of the meta-requirements of the TBT Code of Good Practice, which the next Chapter will discuss in depth. It does so by imposing on Members an obligation to take reasonably available measures to ensure that standardising bodies in their territory comply with the provisions of the TBT Code. Recent TBT case law has provided guidance on several elements required for a legal analysis, although other elements remain to be addressed and are thus here discussed from a more normative standpoint. Debate in literature over the dividing line between mandatory and voluntary measures aside, *US - Tuna II* stands clear for the proposition that VSS are voluntary standards, however *de facto* mandatory for market access may they be. Members are fully responsible for technical regulations and standards enacted by public bodies and arguably also by private bodies under their delegation. The level of responsibility of Members for private standards which can not be attributed is lower but, importantly, is still enforceable and requires that they take reasonably available measures to ensure standardising bodies' compliance with the TBT Code.

To apply the framework of the TBT Agreement to VSS requires a number of minor assumptions that, in the lack of explicit interpretative guidance, currently pertain to the normative level. The first one is the determination of the actions necessary for a

standardising body to be 'recognised'. It has been argued that the action of recognition should be much less demanding than for international standards, and therefore being limited to factual recognition of the existence of standardising bodies. This would imply that not just multi-stakeholder and sectoral VSS bodies are considered as standardising bodies covered by the TBT Agreement, but that also many company VSS which are made public and well-known are likely to be included. This is supported by the negotiating history of the TBT Agreement, the practice in the TBT Committee, and an expansive interpretative approach of the AB over certain features of the definition of international standardising bodies which matter for the definition of non-governmental standardising bodies.

Another set of assumptions is necessary concerning WTO Members' enforcement of such obligations. Given the transnational character of VSS, it may be difficult or unfair for certain Members to identify in which Member's territory is a standardising body established. It is submitted that an effects approach to the trade restrictions could be appropriate to ensure that the Member in whose territory negative effects on trade are felt would have a remedy. A similar approach would also apply to schemes consisting of a broad set of general requirements, which are then operationalised and implemented at national levels. Also in this case enforcement should be imposed on the Member where the implementing initiative is established.

Finally, the very concept of reasonably available measures for compliance deserves clarification. It was submitted that the measures which should be considered as available is dependent on factors such as their cost, the capacity of the WTO Member in question, and the seriousness of the breach committed by the standardising body. In addition, it was submitted that the type of body generating restrictions should also be given a weight, in order not to encroach upon private autonomy. Dissemination of information, training, and the provisions of incentives for compliance are likely to be considered as reasonable measures. More specifically, such measures arguably include as well the establishment of requirements in line with those of the TBT Code, and which private standards must respect in order to qualify for the incentive offered by public procurements. In general, to require compliance with good administration principles for standardisation bodies which aim at being recognised for a specific purpose arguably constitutes measures WTO Member can reasonably take. Also competition law enforcement may on occasions be required provided that it can address the market barrier problems generated by a private standard. Members are also mandated to refrain from encouraging standardising bodies to act in breach of the TBT provisions, under an obligation which clearly would not cover the fact that Members may merely allow private bodies to be in breach.

The interpretation provided by the Appellate Body is sufficiently clear to conclude that at least multi-stakeholder bodies in compliance with the ISEAL Code, which allow public

bodies to participate in the standard-setting, can possibly be considered as international standardising bodies for the purpose of the TBT Agreement. This means that Members must employ their standards as a basis for a technical regulation or in their domain of operation, provided that they are effective and appropriate for their means. WTO litigation over specific measures may contribute to establishing which bodies in which issue areas are international standardising bodies. Until then, it is up to WTO Members to decide whether certain standards should be employed as a basis for their measures. Indeed, one may even conclude that Members already employ VSS in their measures, for example in EU measures such as the FLEGT Regulation, in spite of whether the TBT Agreement applies or not to such an act.

All in all, the traditional public international law rules of attribution, as codified in the ASR and transposed to the specificities of economic law, appears to struggle with addressing the growing number of regulatory processes taking place at the transnational level, and with the lack of a strong link to the State. Whether, on the one hand, this ensures that private actors are not unduly hindered by international law in their activities, it has the effect of offering venues for the circumvention of GATT obligations and, of course, only permits the imposition of private restrictions to international trade in a limited fashion. The TBT Agreement seems to offer a substantial solution to this problem by requiring a weak link with private actions, limited to the establishment in a Member's territory and, perhaps, an effects doctrine. This is combined with a broad definition of which types of private conduct can be considered as regulatory behaviour subject to TBT discipline, by means of an arguably wide interpretation of the concept of a standardising body. Remarkably, principles of good administration are required, albeit through the mediation of Members' measures, also from bodies which do not show any element of a formal public nature. One may even hold that the broad interpretation provided by the AB over elements in the definition of international standards, and over the PPM-scope of standards which will be illustrated in the next Chapter, are evidence of the intention to expand the reach of the TBT Agreement to tackle, albeit indirectly, transnational private regulators in a host of regulatory issue areas. In other words, an obligation to remedy certain issues resulting from a private ruling has been established.

The effectiveness of this *sui generis* regime of attribution must however be tested. Its success depends to a large extent on the Appellate Body's approach towards the concept of reasonably available measures for compliance - which identifies the extent of the effort Members must engage in order to ensure TBT-conformity - as well as its specific applications, such as for example the extent to which competition enforcement would be considered as a possible measure. A case-by-case assessment is required, and it is likely to be intimately connected with the kind and extent of the TBT breach committed by the private body. For now, implementation and enforcement of the TBT Code requirements rests on Members' goodwill.

The obligations of the TBT Code are of fundamental importance for addressing the negative effects of private standards. A broad approach to the standardising bodies covered by the TBT Agreement, and consequently by the TBT Code, is therefore welcome. Given the enforceability of the obligation imposed on Members, it is however crucial that clarity over the expected behaviour of private standardising bodies is not limited to the TBT Code's procedural requirements. As seen above, some of the interactions described in Chapter 2 and 3 may be considered as reasonably available means for ensuring compliance, in particular those imposing certain requirements on VSS for recognition. As recalled from the Conclusion in Chapter 3, none of the legal instruments reviewed requires that the recognised VSS must be no less trade restrictive than necessary. The RED even fails to require that the schemes must not be discriminatory. Both discrimination and unnecessary trade-restrictiveness are the cornerstone of the TBT Code. Could their exclusion be indicative of an inherent tension between such requirements and certain standards? In other words, could it be impossible for VSS not to be discriminatory and necessary in the classic understanding under WTO law? Chapter 6 now turns to these questions, by showing that the interpretation of the TBT Code of Good Practice is not just unexplored, but also more problematic than it may seem at first sight.