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Public play upon private standards

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

Partiti, E.D.

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Chapter 6
VSS and WTO law
Relevant rules under the TBT Agreement and
the SPS Agreement

1 Introduction

The previous Chapter illustrated that the TBT Agreement's special rules for attribution of private conduct result in the imposition of State responsibility for standard-setting activities of several non-governmental standardising bodies active in WTO Members' territories. These include multi-stakeholder and sectoral VSS, regardless of whether their standards fall under the definition of a standard for the purpose of the TBT Agreement. Also company VSS are included, provided that the employment of a standard not only occurs, for example, within the domain of a contract of supply or for exclusively internal use but, conversely, it determines important product features and is actively advertised to an extent which necessarily results in State awareness. A differentiated obligation imposing State responsibility for the actions of standardising bodies was also advocated, leaving a greater margin of manoeuvre to Members (and, consequently, on the standardising bodies) for company standards. Private autonomy for company standards could be operationalised by imposing on Members an obligation not to allow or require behaviour which is inconsistent with the TBT Code of Good Practice for the Preparation, Adoption and Application of Standards (hereinafter: the 'TBT Code of Good Practice', or the 'TBT Code').

Be that as it may, at least for multi-stakeholder and sectoral VSS, Members are required to take reasonably available measures to ensure compliance with the meta-rules of the TBT Code. To clarify the scope of the substantive and procedural obligations of the TBT Code is therefore of paramount importance for such schemes. The TBT Code of Good Practice contains a host of provisions that can be divided into two groups. The first concerns substantive provisions (from point 3.D to point 3.I), the most important of which are a non-discrimination obligation, a necessity obligation, and an obligation to base standards on international standards. The second group contains transparency obligations (from point 3.J to point 3.Q), providing, *inter alia*, for the publicity of the standard-setting works, the possibility to comment on the draft standards, and its publication. These provisions, taken together, constitute an attempt to instil basic principles of good administration as well as substantive discipline on private standardising bodies. The WTO thus acts as a meta-regulator which sets the broad coordinates within which private standardising bodies operate, and at the same time it sets the conditions necessitating public intervention. In spite of the importance of the TBT Code's provisions, the actual character of these obligations has never been addressed by WTO adjudicatory bodies. The issue remains seriously underdeveloped and ignored even by academic research. Particularly important and equally lacking investigation are the substantive provisions, which determine when a standard is not in line with fundamental WTO principles such as the national treatment (NT) and most-favourite nation (MFN) obligations. Most of this Chapter therefore sheds light on the possible substantive WTO discipline for private standards, keeping in mind that such obligations are imposed on WTO Members, and not on the standardising bodies.

To determine precisely which substantive features of standards may result in a breach of the TBT Code is crucial in order to establish State responsibility and, in general, for the predictability of the whole WTO regime. At the same time, it is equally important that the obligation respects private autonomy and, in turn, it does not confer such a burdensome obligation on Members as to become unenforceable. Finally, several standardising bodies have adopted and accepted the TBT Code of Good Practice. Although it lacks enforcement mechanisms, standardising bodies should understand fully the scope of its provisions. This issue matters particularly for multi-stakeholder VSS bodies which are ISEAL Full Members, and therefore in compliance with the ISEAL Code of Good Practice, which builds upon the requirements of the TBT Code of Good Practice. Different interpretations of the latter can deeply influence the procedural and substantive requirements of the former, which has a stronger and direct mechanism for compliance and enforcement,¹ and thus directly affects the practice of standard-setting in the domain of sustainability.

The aim of this Chapter is to normatively identify a test for private standards, against which VSS can be assessed. The elaboration of a non-discrimination and necessity test for standards will be done with the invaluable assistance of the recent interpretation of the Appellate Body (AB) provided over the corresponding obligations for technical regulations, and of general GATT law. The differences between public mandatory measures on the one hand, and private voluntary ones pursuing specific objectives on the other, are too large to be ignored. Private party autonomy and the specific purposes behind private rulemaking must be reconciled with certain features of the TBT provisions as applied to public measures. In particular, there are major problems with the non-discrimination test as designed by the AB under Art. 2.1 TBT, including the presence of specific 'legitimate objectives' behind private standards, and a relatively strict approach towards the overall 'even-handedness' of the regulatory distinctions at hand which could undermine private autonomy. A conceptual problem with a necessity test aligned to that of Art. 2.2 TBT is that it would disregard the fact that private standards, and in particular quality standards, can be legitimately set at a high level without a close connection to the objective.

Section 2 begins by clarifying an important issue of scope, which was not discussed in Chapter 5, i.e. the PPM scope of the TBT Agreement. It will be seen that regardless of the actual content of a standard, as long as a label is involved, VSS are considered as standards for the purpose of the TBT Agreement. Conversely, in the lack of a label, it seems that the definition of a standard is limited to those voluntary measures which define product characteristics and *related* process and production methods. Section 2.1 also discusses the implications of the discrepancy between the definition of standards and the obligation imposed on WTO Members to ensure compliance with the TBT Code,

¹ Compliance with the ISEAL Code is ensured by peer review, by review from the independent ISEAL Secretariat, and by an independent auditor. See <http://www.isealalliance.org/about-us/frequently-asked-questions>.

which is not connected to the standards drafted by the standardising body in question. Section 2.2 then discusses the substantive and the procedural provision of the TBT Code of Good Practice, by focusing on the implications of subjecting under the Code's discipline a broad group of standards.

Section 3 begins the substantive analysis by looking at first at the non-discrimination obligation in Annex 3.D. A digression is necessary into the domain of the corresponding obligation under Art. 2.1 TBT, and Articles I:1 and III:4 GATT. Several issues will be addressed in Section 3.1, such as the assessment of likeness in Section 3.1.1, and the concept of treatment no less favourable in Section 3.1.2. Section 3.1.2.1 and 3.1.2.2 discuss the respective GATT obligations, whereas Section 3.1.2.3 studies the specific test for treatment no less favourable under Art. 2.1 TBT, and Section 3.1.2.4 the crucial criterion of even-handedness of the regulatory distinction. Section 3.1.2.5 addresses the relation between TBT and GATT by looking at the common features between the TBT even-handedness test and the test under the Chapeau of Art. XX. Section 3.2 then highlights the major problems in transposing the TBT test to the domain of standards, distinguishing between private and public standardising bodies, and by discussing three specific issues: the legitimate objectives pursued by VSS in Section 3.2.1; the problem in applying a treatment no less favourable test to certain standards in Section 3.2.2; and the outcome of an even-handedness inquiry applied to VSS in Section 3.2.3. Section 4 addresses the necessity provision of the TBT Code of Good Practice in Annex 3.E, on the basis of the guidance offered by the necessity test Art. 2.2 TBT, and the necessity test in certain subparagraphs of Art. XX GATT. Similarly to Section 3.2, Section 4.3 addresses problems in the application of a test along the lines of that under Art. 2.2 TBT to private standards, and suggests that a reasonable test for standards should be a suitability test. Finally, Section 5 discusses the application of the obligation to base standards on the relevant international standards in Annex 3.E, by looking at the mirroring provision for technical regulations.

The remainder of the Chapter briefly addresses in Section 6 the possibility that VSS are considered as SPS measures in case of attribution. The major issues resulting from the application of the SPS Agreement will be addressed. Finally, Section 7 concludes. Cases of acknowledgement and adoption under the GATT, or the employment of VSS in technical regulations will not be discussed. However, given connections and similarities between TBT and GATT tests, the discussion in Sections 3 and 4 covers to a large extent those circumstances.

2 Applicability of the TBT Agreement and relevant provisions of the TBT Code of Good Practice

The TBT Agreement partially overlaps with and pursues similar objectives as the GATT and it further develops the discipline of the latter with respect to a specific class of

measures, namely, technical regulations and standards.² To this extent, it can be considered as *lex specialis* to the GATT.³ From its Preamble it can be inferred that the purpose of the Agreement is to strike a balance between trade-liberalisation goals, such as the avoidance of discriminatory measures and unnecessary trade-restrictiveness, and the right of WTO Members to regulate.⁴ The resulting balance is not, 'in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exception provision of Article XX'.⁵ Elements from the GATT therefore can be employed in the interpretation of the TBT provisions, as done by panels and the AB. Somewhat cryptically, the AB clarified that the non-discrimination obligations of Art. 2.1 of the TBT Agreement are different than those under Art. I:1 and III:4 GATT.⁶ The AB has also refused to allow a measure assessed under the TBT to be exempted from a GATT assessment.⁷ This outcome contradicts, to a certain extent, the finding in *EC- Bananas III* where it was held that in case of double applicability of the GATT and another agreement in Annex 1A of the WTO Agreement, the measure should be examined on the basis of the Agreement dealing 'specifically and in detail' with that type of measure.⁸

Recent AB practice has in fact applied the two Agreements together, with the TBT Agreement taking precedence and then the GATT.⁹ Measures must thus be in

² Appellate Body Report, *United States - Measures Affecting Production and Sale of Clove Cigarettes (US - Clove Cigarettes)*, WT/DS406/AB/R, adopted 4 April 2012, para. 91.

³ TBT claims made by a complainant shall be assessed first by a panel, and possible GATT claims shall only be subsequently addressed. 'The provision of the agreement that "deals specifically, and in detail" with a question should be examined first', according to the Appellate Body Report, *United States Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada (US - Softwood Lumber IV)*, WT/DS257/AB/R, adopted 19 January 2004, para. 134. The AB arguably defined the TBT Agreement as *lex specialis* in *EC - Asbestos*. Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products (EC - Asbestos)*, WT/DS135/AB/R, adopted 12 March 2001, para. 80. The AB in *EC - Hormones* however neglected to apply its own reasoning (i.e. that *lex specialis derogat generalis*) and did not address the TBT claims because they were not addressed sufficiently in depth by the panel.

⁴ *US - Clove Cigarettes*, WT/DS406/AB/R, paras. 92-95.

⁵ *Ibid.*, para. 96.

⁶ 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. 405. The AB in that paragraph seems to be implying that, as Art. 2.1 TBT contains elements of Art. XX GATT, the equation 2.1 TBT = I:1+III:4 GATT suggested by the panel was not correct. However, the AB has subsequently held that the test in the Chapeau of Art. XX GATT does not correspond entirely to the 'even-handedness' test of Art. 2.1 TBT. 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. 5.311.

⁷ *US - Tuna II*, WT/DS381/AB/R paras. 405 - 406. The rationale of the AB's reasoning is to allow measures to be assessed also under the GATT in appeal, in the event of an AB's decision overruling a panel's finding that a measure constitutes a technical regulation or otherwise falls under the scope of the TBT Agreement. It will be seen that the scope of the substantive obligations of the two Agreements may not perfectly overlap, and therefore requires a double assessment. In addition, a major difference between the two Agreements concerns the different grounds under which a measure can be justified as permissible.

⁸ 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, paras. 155 and 204.

⁹ *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; *EC-Seals*, WT/DS401/AB/R, paras. 5.71 and following. As the TBT Agreement contains different and additional rules to

compliance with both agreements.¹⁰ The application of the TBT Agreement, as hinted at in Chapter 5, may also overlap with the SPS Agreement. To this extent, the SPS Agreement takes precedence and becomes exclusively applicable¹¹ whenever measures¹² have as their objective the protection of human, animal and plant life or health in the regulating Member's territory.¹³ Measures presenting both SPS and TBT components can be separated and assessed under both Agreements.¹⁴

Annex 1 of the TBT Agreement contains the definitions of technical regulations and standards. As the previous Chapter already discussed the dividing line between the concepts of mandatory and voluntary, the bodies the Agreement applies to, and what is tantamount to a 'recognised body', the focus in Section 2.1 will be on the remaining element of the definitions which has not been addressed yet, and specifically the PPM-scope of the TBT Agreement. Section 2.1 therefore identifies which standards are covered by the scope of the TBT Agreement. Section 2.2 will then address the provisions of the TBT Code in Annex 3, and their potential application to a large group of standardising bodies.

2.1 VSS as standards under the definitions in Annex 1

The analysis of whether a measure constitutes a technical regulation involves a three-step assessment that investigates whether i) the measure applies to an identifiable groups of products; ii) lays down one or more characteristics of the product; and, iii) compliance with which is mandatory.¹⁵ Arguably, given the textual similarities, the test for standards does not seem to differ, if not for iii), which provides that a standard is not mandatory. In order to assess the applicability of the TBT Agreement to VSS, both i) and iii) are rather uncontroversial. VSS apply to an identifiable group of products, which is the group of products to which the scheme applies (for example, timber products for FSC; or a specific fishery for MSC). It is also fair to assume that compliance with VSS is *de jure* non mandatory, as discussed in the previous Chapter.

those of the GATT (for example the obligation to base technical regulations and standards on the relevant international standards), a GATT assessment would not exhaust the obligation under the TBT Agreement. On the other hand, the question is left open why a TBT assessment would not exhaust the GATT obligations.

¹⁰ Appellate Body Report, *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, paras.74 and 75.

¹¹ Articles 1.5 TBT Agreement and Art 1.4 SPS Agreement.

¹² Different than under the TBT Agreement, the scope of application of the SPS Agreement to private parties is less explicit, as discussed in Section 5 of the previous Chapter.

¹³ Annex A SPS. Measures addressing human, animal and plant life or health extraterritorially, i.e. not in the territory of the importing country, are subject to the TBT Agreement - provided that all other requirements of scope are fulfilled.

¹⁴ Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products (EC - Biotech)*, WT/DS291/R, adopted 29 September 2006, para. 7.167.

¹⁵ Appellate Body Report, *European Communities - Trade Description of Sardines (EC - Sardines)*, WT/DS231/AB/R, adopted 26 September 2002, para. 176, citing Appellate Body Report, *EC - Asbestos*, WT/DS135/AB/R, paras. 66-70.

More problematic is the assessment of whether VSS lay down product characteristics. Annex I of the TBT Agreement defines the boundaries of its scope of application. A problematic issue of scope concerning PPMs, yet to be solved, arises in the first sentence of Annex 1.1, and the mirroring provision for standards in Annex 1.2, which define technical regulations and standards as documents laying down characteristics for products and their *related* process and production methods. On the one hand, such a definition seems to limit the scope of the Agreement to product-related PPMs (according to a distinction between product-related and non-product related process and production methods which is not explicitly present in the WTO Agreements¹⁶). A difference between the definitions of technical regulations and standards seems to support this view. The former reads: 'document which lays down *product characteristics* or their related processes and production methods'. The definition of standard instead reads: 'document [...], that provides [...] *rules, guidelines or characteristics for products* or related processes and production methods' (italic added). This seems to imply that processes and production methods must relate to a product. On the other hand, the word 'related' is not present in the second sentence of the definition, which provides that a technical regulation may also include, *inter alia*, labelling requirements as they apply to a product, process or production method.

2.1.1 Second sentence and labelling requirements

The second sentence seems to imply that for a specific type of technical regulations and standards, i.e. labelling requirements, all PPMs are covered. Without much discussion, the AB's practice has confirmed that, for labelling requirements, *all* types of PPMs are subject to the application of the TBT Agreement, seemingly implying that a label

¹⁶ Such a distinction between product-related PPMs and non-product related PPMs differentiates on the basis of whether the PPM at issue leaves a tangible trace in the final product. An example of product-related PPM would therefore be the prescription of provisions concerning the use of pesticides in the production of agricultural products, as residues can be found in the final good. Measures defining labour conditions or environmental features in the production of goods would be non-products related PPMs, as they would not result in differences being noticeable to the final consumers between products in compliance and products not in compliance. It should be noted that an expansive approach to product characteristics blurs the difference with product-related PPMs. Howse, R., Regan, D. (2000) The product/process distinction - An illusory basis for disciplining 'unilateralism' in trade policy. *European Journal of International Law* 11(2), 249-289; Charnovitz, S. (2002) The law of environmental 'PPMs' in the WTO: Debunking the myth of illegality. *Yale Journal of International Law* 27(1), 59-110; Gaines, S.A. (2002) Processes and production methods: How to produce sound policy for environmental PPM-based trade measures. *Columbia Journal of International Law* 27(2), 384-432; Kysar, D.A. (2004) Preferences for processes: The process/product distinction and the regulation of consumer choice. *Harvard Law Review* 118(2), 526-642. Van den Bossche, P., Schrijver, P., Faber, G. (2007) Unilateral measures addressing non-trade concerns. A study on WTO consistency, relevance of other international agreements, economic effectiveness and impact on developing countries of measures concerning non-product-related processes and production methods. Report for the Ministry of Foreign Affairs of The Netherlands; Potts, J. (2008) The legality of PPMs under the GATT. Challenges and opportunities for sustainable trade policy. International Institute for Sustainable Development; Kapoor, A. (2011) Product and Process Methods (PPMs): 'A losing battle for developing countries', *International Trade Law & Regulation* 17(4). Conrad, C.R. (2014) *Processes and production methods (PPMs) in WTO law*. Cambridge: Cambridge University Press.

constitutes a product characteristic.¹⁷ In *US - Tuna II*, for example, requirements addressing fishing methods of tuna resulting in the award of a label were considered as a technical regulation falling under the TBT Agreement.¹⁸ Similar was the outcome of the country of origin requirements at issue in *US - COOL*, which defined conditions for access to a label informing consumers about beef origin that, without any doubt, did not bear any connection with the physical characteristics of the product.¹⁹ It can actually be argued that the conditions in *US - COOL* were not PPM-based at all,²⁰ and therefore any requirement appears to be covered by the TBT Agreement as long as it takes the form of a labelling requirement.²¹ The outcome constitutes a notable broadening of the scope of the Agreement, which is, in theory, capable of including all labelling requirements affecting products' 'internal sale, offering for sale, purchase, transportation, distribution or use', therefore partially overlapping with the scope of Art. III:4 of the GATT.

It is debatable whether the outcome of case-law reflects the intention of the drafters²² or whether the inclusion of npr-PPMs, whenever the measure takes the form of labelling requirement, is in line with the overarching objective of the TBT Agreement to apply to technical regulations, i.e. measures with a technical element.²³ The outcome is however consistent with a TBT Committee Decision establishing a notification requirement for all mandatory labelling schemes, regardless of 'the kind of information which is provided on

¹⁷ Norpoth, J. (2013) Mysteries of the TBT Agreement resolved? Lessons to learn for climate policies and Developing Countries exporters from recent TBT disputes. *Journal of World Trade* 47(3), 580.

¹⁸ *US - Tuna II*, WT/DS381/AB/R, para. 186. See also Partiti, E. (2013) The Appellate Body Report in *US - Tuna II* and its impact on eco-labelling and standardisation. *Legal Issues of Economic Integration* 40(1), 73-94.

¹⁹ Panel Report, *United States, Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R and WT/DS386/R, para. 7.212.

²⁰ As they do not identify any process or production methods, but merely a set of administrative requirements to comply with in order to accede to a mandatory label providing consumers information about the origin of beef cuts.

²¹ Levy, P.I., Regan, D.H. (2015) EC - Seal Products: Seals and sensibilities (TBT aspects of the Panel and the Appellate Body Reports). *World Trade Review* 14(2), 355.

²² It probably does not, given that the intention of the parties arising from the negotiating history 'had not been to include all kinds of PPMs, but only those that were necessary to ensure certain legitimate objectives of quality in a final product such as its strength, purity or safety. A PPM that was required for religious purposes, for example, did not have any direct effect on the quality or the final characteristics of a product and would therefore not be covered.' 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. 131. Yet, the significance of negotiating history is reduced when it is considered that at the time of the Uruguay Round, a wide-spread belief considered PPMs *per se* as in violation of GATT law. Panel Report, *United States - Restrictions on Imports of Tuna*, DS21/R - 39S/155, 3 September 1991 (unadopted). Also supporting a narrow PPM scope of the TBT Agreement Joshi, M. (2004) Are eco-labels consistent with World Trade Organisation Agreements. *Journal of World Trade* 38(1), 75.

²³ It can be argued that the application of TBT should be limited to measures with a technical content, in line with the wording used in Art. 2.9 TBT ('Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards...'). Keeping this in mind, in that scenario, the proper understanding of a labelling requirement should have been limited to technical aspects of labelling such as the definition of terms, requirement concerning which information shall be displayed on labels, and so on. Also this criterion of 'technical content' seems to suggest that the PPM-scope of technical regulations and standards was intended to be limited to related PPMs, at least in the first sentence. It should not be forgotten that also standards defined under a narrow PPM-scope can contribute to, or even directly pursue certain public policy objectives such as environmental protection.

the label'.²⁴ As many VSS contemplate the employment of a label to signal to consumers certain sustainable product features, all their standards can be seen as labelling requirements.²⁵ The TBT Agreement would therefore be applicable - regardless of the fact that many requirements underpinning access to the label are PPMs which do not leave a tangible 'trace' in the final product, such as those addressing environmental or social features associated to the production process.

2.1.2 First sentence and all other types of standards

If, and how, the PPM-scope as interpreted in the second sentence should influence the first sentence is a matter of speculation and remains as such after the AB recently declined to put an end to the question.²⁶ It has been argued that, by relying only on the second sentence of the definition and by neglecting to look into the first,²⁷ the AB has implicitly discarded the argument holding that the second sentence of Annex 1.1 should be read as subordinate to the sentence before.²⁸ Prominent WTO scholars, noting how the distinction between product-related and non-product related PPMs is an academic construct the AB has no obligation to follow,²⁹ have instead suggested that since the scope of the Agreement concerns trade in goods and their competitive opportunities, only PPMs that *do not relate* to goods are excluded.³⁰ The PPM-scope of the TBT Agreement would therefore be wide enough to cover npr-PPMs *also* in the first sentence of the definition of technical regulations (and arguably standards). In other words, all PPMs relating to *any* product characteristics would be covered and 'product characteristics' should be interpreted broadly as to encompass all features of a product capable of affecting its competitiveness.

²⁴ TBT Committee, Decisions and Recommendations Adopted by the Committee Since 1 January 1995 - Note by the Secretariat, G/TBT/1/Rev.7, 28 November 2000, section III:10.

²⁵ Including life-cycle analysis based eco-labels - which were considered as outside the scope of the WTO Agreements in Joshi, M. (2004) *Supra* at 22, 69-92. In fairness, the author appears to reach that conclusion from the untenable assumption that PPM-based measures would not be permissible under WTO law.

²⁶ EC- Seals, WT/DS401/AB/R, para. 5.69.

²⁷ '...since . . . the terms of the second sentence make it clear that the subject-matter of a technical regulation may be confined to one of the items enumerated in the second sentence'. US - Tuna II, WT/DS381/AB/R, para. 7.79.

²⁸ Norpoth, J. (2013) *Supra* at 17, 581.

²⁹ It should not be forgotten that the AB had the opportunity already in US - Shrimp to elaborate on the concept of npr-PPM with respect to the 'turtle extruder devices' at issue in the dispute. It nonetheless carefully avoided any reference to the 'PPM lexicon', but rather discussed the US 'policy' provided for in the contest measures. Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 22 October 2001, 91-93.

³⁰ Crowley, M., Howse, R. (2014) *Tuna - Dolphin II*: A legal and economic analysis of the Appellate Body Report. *World Trade Review* 13(2), 326-327. According to the authors, a PPM measure could concern trade in services and would thus be excluded by the scope of the TBT Agreement. This would be the case, for example, of norms addressing how engineers and architects might design a nuclear power plant, which can affect the competitive opportunities of service providers from other WTO members. This argument also finds support in the explanatory note to the definition of technical regulations and standards, which notes that the definition of standards in the ISO/IEC Guide 2 covers products, processes and services but, for the purpose of the TBT Agreement, technical regulations and standards concerning services are excluded.

The interpretation provided more recently by the AB in *EC - Seals* over 'product characteristics or their *related* process and production methods' leaves the possibility above entirely open. 'Process' has been interpreted as 'a course of action, a procedure, a series of actions or operations directed to some end, as in manufacturing'. 'Production' refers to the 'process of being manufactured commercially, esp[ecially] in large quantities', whereas the word 'method' has been interpreted as 'a (defined or systematic) way of doing a thing'.³¹ The AB suggested that 'a [product] related PPM is one that is "connected" or "has a relation" to the characteristics of a product'.³² No mention has been made as to whether the PPM at issue should be found in the final product or not, entirely disregarding one of the longest-lasting academic debates in WTO law. The only problem with such an approach is that the AB, already in *EC - Asbestos*, appeared to have limited the definition of product characteristics to arguably *technical* features of a product, which are objectively definable.³³ The AB has however also described these characteristics as 'features and qualities intrinsic to the product itself', and the definition can also cover 'related "characteristics"',³⁴ apparently allowing for a broader interpretation. Still, it is unsettled whether, for example, environmental friendliness can be considered as a product characteristic, and the requirements for producing environmentally-friendly goods can be considered as PPMs *related* to that product characteristic.

It must be noted that at least some processes and production methods affect the final quality, a tangible characteristic of the product.³⁵ This could be the case of 'hidden' product features such as environmental attributes, which EU competition law, for example, considers as directly affecting the quality of the product at issue. Crucial here is a broad interpretation of quality, which may have implication for the likeness assessment as well to the extent that consumer choice can be affected. Furthermore, at least some environmental qualities can be seen as directly determining the performance of the product, and therefore constituting product characteristics covered by the scope of the TBT Agreement. Whether this statement seems uncontroversial for environmental characteristics which take the form of energy efficiency features, it is difficult to claim that changes in the product quality are directly observable for other environmental features, such as the sustainable gathering of timber and fish resources. Also for PPMs relating to animal welfare, evidence supporting an actual change in quality and physical

³¹ *EC - Seals*, WT/DS401/AB/R, para. 5.12.

³² *Ibid.*

³³ 'The characteristics of a product include "objectively definable 'features', 'qualities', 'attributes', or other 'distinguishing mark' of a product'. *EC - Asbestos*, WT/DS135/AB/R, para. 67.

³⁴ *Ibid.*

³⁵ It has been noted that to the extent that a PPM affects the quality of a product it can be considered as tantamount to a product standard. See Cottier, T., Oesch, M. (2012) 'Direct and indirect discrimination in WTO and EU law'. In Gaines, S.E., Olsen, B.E., Sorensen, K.E. (Eds.) *Liberalising trade in the EU and WTO: A legal comparison*. Cambridge: Cambridge University Press, 166.

characteristics is not conclusive.³⁶ It would surely be very difficult to claim that PPMs addressing labour conditions or other social requirements affect product quality or other tangibly definable characteristics.

For VSS which do not entitle producers to the employment of a label, an overall assessment of the standard may identify a sufficient number of process and production methods requirements relating to product characteristics, or affecting the quality of the product, which would lead panels to accept the measure under the scope of the TBT Agreement. VSS exclusively requiring a company to have a CSR strategy or a management plan in place, in the absence of a label, would not be falling under the scope of the TBT Agreement because such PPMs do not directly relate to any product characteristics.³⁷ This would be the case, for example, for schemes along the lines of ISO 14001 or the EU EMAS. These systems allow producers to display a label to signal that they are certified, but the label is not affixed to the products, nor does it affect product characteristics.³⁸ Similarly, VSS addressing labour conditions that do not envisage a label are covered by the TBT Agreement but only to the extent that those labour conditions with which products have been made in accordance can be considered as product characteristics in themselves. The same considerations apply to standards addressing animal welfare, but in those cases the employment of a label is more frequent.

It is appropriate to elaborate on the repercussions on State responsibility for non-governmental bodies which stems from a broad scope of the definition of a standard. There is a tension between the universality of the obligation in Art. 4 TBT to take measures to ensure compliance by standardising bodies with the TBT Code provisions - which is unrelated to the nature of their standard - and the narrower definition of standards for the purpose of the TBT Agreement. Does this mean that Members are responsible only when standardising bodies draft standards covered by the scope of the

³⁶ Chambers, P.G., Grandin, T. (2001) Guidelines for humane handling, transport and slaughter of livestock. Food and Agriculture Organisation of the United Nations. RAP Publication 2001/4. Similar consideration applies for organic agriculture. See Dangour, A., Lock, K., Hayter, A., Aikenhead, A., Allen, E., Uauy, R. (2010) Nutrition-related health effects of organic foods: a systematic review. *American Journal of Clinical Nutrition* 92(1), 203-210; Altroconsumo (2015) Non crediamo in Bio. Available at <http://www.altroconsumo.it/alimentazione/prodotti-alimentari/news/prodotti-bio>.

³⁷ And, to be clear, not because they do not constitute PPMs. For an interesting and illustrative comparison, see how the EU has defined the admissible criteria governments can require in their public procurement concerning sustainability features of products. The definition of technical specifications, i.e. the product and service requirements mandated by contracting authorities, include characteristics that 'may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors *do not form part of their material substance* provided that they are linked to the subject-matter' (Art. 42 of Directive 2014/24/EU). It should be noted that the CJEU has considered as early as 1981 PPMs to be 'objective criteria' on the basis of which discrimination can be based - in the case at issue in the form of different taxation. See Case C-140/79 *Chemical Farmaceutici SpA v DAF SpA* [1981] ECR I-0001, para. 14.

³⁸ It shall not be forgotten that the second sentence of Annex I requires that labelling requirements *apply* to a product, process or production method. Concerning the possibility for a management plan to affect product characteristics, there is no correlation between the two. At best there is a presumption that the processes affected by the management plan would differ, but there is no explicit connection with a product characteristic, let alone overall product quality.

Agreement? This tension could be resolved by concluding that, while Members must ensure that all standardising bodies' standards comply with the TBT Code, Members would however be responsible for breaches of the TBT Code only when these bodies' standards are standards for the purpose of the TBT Agreement.

This would be logical. A private standardising body whose actions are not attributable to a WTO Member is anyway not directly under the provisions of the TBT Agreement, and its standards cannot ever be challenged. From the perspective of a private standardising body, the breadth of the scope of the definition of a standard is irrelevant for the purpose of the Agreement. The standards which can be the direct subject of a dispute are public standards and standards which can be attributed, which are covered by the scope of the definition above. It should not be forgotten that the provisions of the TBT Code are unenforceable against private parties and thus they constitute meta-rules or meta-requirements. As such, there is no reason why these requirements should apply to certain standards only, and not to others. The promotion of good administration principles should not depend on the mere fact that the output of a body addresses certain PPMs instead of others, or that a standard takes the form of a labelling requirement but rather, arguably, on the impact and effects of private rules.

From the perspective of the State, a Member cannot be held responsible for a standard not covered by the Agreement. A narrower definition of a standard for the purpose of the TBT Agreement cannot however lead to the complete exclusion from the TBT Code discipline of a standardising body whose drafts standards fall short of such a definition. Many bodies, including international standardising bodies such as ISO, routinely draft standards covered by the definition in Annex 1 and standards excluded by the scope of the Agreement. This approach would indeed render hortatory part of the obligation imposed on Members, which would in any case still be responsible for a large number of standards.

2.1.3 Consequences of an expansive PPM-scope

An often-raised critique to an expansive approach to PPMs-based public measures is that they would be tantamount to an exercise of extraterritorial jurisdiction, since they result in the regulation of processes and production methods located in foreign countries. According to this view, the principle of non-intervention would render unlawful the legislation which regulates, or has the effect of regulating, the conduct of foreigners in foreign countries.³⁹ However, public international law allows such situations whenever a 'genuine connection'⁴⁰ can be established between the competence of the regulating State and the conduct it attempts at governing. Such a connection or link is not limited to the territory, but can also be another constituting element of the definition of a State,

³⁹ Ryngaert, C. (2008) *Jurisdiction in international law*. Oxford: Oxford University Press, 29.

⁴⁰ International Court of Justice, *Nottebohm* (Liechtenstein v Guatemala), ICJ Rep 4 (1955).

such as its population or its sovereign authority.⁴¹ Under economic law, the effects of an act felt on a State's territory⁴² or the implementation of an agreement in a specific State⁴³ are claimed to constitute a sufficient link to lead to the extraterritorial application of certain rules, under a State's exercise of legislative, or prescriptive, jurisdiction.⁴⁴ A narrow understanding of extraterritoriality suggests that business actors are not subject to extraterritorial application of trade rules as long as they chose not to enter the regulating State's market.⁴⁵ A trade measure may therefore permissibly affect nationals or the interest of another State if the regulating State has a sufficient interest in the matter at hand, and its legislation does not amount to an abuse of rights.⁴⁶

Extraterritoriality arguments before WTO panels and the AB had little success in the recent past, because it is relatively unproblematic to identify a connection with the population of the regulating State, all the more so in the presence of global interests such as the preservation of endangered species or the protection of the environment, or international agreements to pursue that aim.⁴⁷ The protection of consumers from practices they deplore or preventing the importer's market from being used to encourage economic activities and practices that harm the environment, can also be seen as fundamental 'internal' component of measures having also extraterritorial effects.⁴⁸ Since technical regulations and standards oftentimes pursue or can be construed as pursuing such policy objectives, the inclusion of PPMs in WTO law and an expansive approach under the TBT Agreement is not problematic *per se*. A PPM-based measure does not directly regulate any behaviour abroad as it obviously does not impose criminal or civil sanctions on foreign producers.⁴⁹ Also coercion arguments are prevented entirely

⁴¹ Ryngaert, C. (2008) *supra* at 39, 31. Meng, W. (1994) *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrechts*. Berlin, Heidelberg, New York: Springer, 547. See also, for an approach requiring more than a political, economic, commercial or societal interest, but a legal connection instead: Mann, F.A. (1964) The doctrine of jurisdiction in international law. *Recueil de Cours* 111, 49.

⁴² *US v Aluminium Co. of America* 148 F.2d 416 (1945), 443.

⁴³ *Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85. Ahlström v Commission (Wood Pulp)* [1988] ECR I-5233, paras. 12-13.

⁴⁴ Such jurisdiction refers to the power of a State 'to make its law applicable to the activities, relations, or status of persons, or the interests of persons in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination by a court'. See American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, § 401 (a). The approach grounds its basis on the controversial *Lotus* case, providing in principle for the exercise of legislative jurisdiction unless a prohibitive rule could be identified. PCIJ, *SS Lotus*, Permanent Court of International Justice Reports, Series A, No. 10, 18-19 (1927).

⁴⁵ *C-366/10 Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-13755, para. 127.

⁴⁶ Bartels, L. (2002) Article XX of GATT and the problem of extraterritorial jurisdiction. The case of trade measures for the protection of human rights. *Journal of World Trade* 36(2), 366.

⁴⁷ See generally, Ryngaert, C., Koekoek, M. (2015) 'Extraterritorial regulation of natural resources: A functional approach. In Wouters, J., Marx, A., Geraets, D., Natens, B. (Eds.) *Global governance through trade. EU policies and approaches*. Cheltenham: Edward Elgar, 245-271.

⁴⁸ Howse, R., Regan, D. (2000) *Supra* at 16, 277. More recently, see Scott, J. (2014) Extraterritoriality and territorial extension in EU law. *American Journal of Comparative Law* 62(1), 87-125. See also Ankersmit, L., Lawrence, J., Davies, G. (2012) Diverging EU and WTO perspectives on extraterritorial process regulation. *Minnesota Journal of International Law Online* 21(1), 28.

⁴⁹ Howse, R., Regan, D. (2000) *Supra* at 16, 274.

as long as the regulating State does not condition market access to the requirement that exporting States must adopt the same policy of the importing State.⁵⁰ The compatibility with WTO law of the approach above has been entirely confirmed in *US - Tuna II*.⁵¹ Still, public PPM-based measures may raise problems in their justification under the Chapeau of Art. XX GATT because of their unilateral character. Indeed, such problems only marginally affect private measures.

From a different perspective, a broad scope of the TBT Agreement at least for labelling requirements ensures that a wide range of technical regulations and standards, measures which are particularly trade restrictive,⁵² would be subject to the specific discipline of the TBT Agreement which, differently from the GATT, incorporates autonomous necessity and harmonisation requirements.⁵³ PPM-based measures such as VSS cannot be enforced in the country of import, but must be assessed directly on the production site with costs normally borne by the producer, and thus are particularly burdensome and potentially trade-restrictive. It would therefore be all the more reasonable to have all sorts of PPM-based measures subject to the specialised regime of the TBT Agreement. Still, the scope of the TBT Agreement should not be equated to that of Art. III:4 GATT, as the latter covers all measures affecting the internal sale, offering for sale, purchase, transportation, distribution or use. The TBT Agreement, if one excludes labelling requirements, is concerned with the more limited group of PPMs related to product characteristics. The group of measures that qualifies as technical regulations and standards encompasses some, but not all, measures addressing the sale, offering for sale, purchase, transportation, distribution or use at issue in Art. III:4 GATT; in particular it includes measures with a 'technical component'.⁵⁴

⁵⁰ *US - Shrimp*, WT/DS58/AB/R, para. 177. The measure in *US - Shrimp* prohibited the importation of shrimp originating from countries which did not have a regulatory framework in line to that of the US. This prevents fishermen employing fishing techniques aligned to the US' regulatory requirements to market in the US unless their countries change their regulations. In *US - Tuna II*, on the other hand, no requirement addressing Mexican legislation was at hand. The panel acknowledged that the importing WTO Member was not required to comply with the US measure, but it is the products themselves that need to satisfy the measure's conditions. *US - Tuna II*, WT/DS381/R, para. 7.372. See on the different types of PPM measures and their consequences Charnovitz, S. (2002) *Supra* at 16. See also Footnote 112 of Chapter 5.

⁵¹ Where the policy objective of 'contributing to the protection of dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins', it is accepted as legitimate. 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. 7.425.

⁵² As the Preamble prescribes that technical regulations and standards shall not create unnecessary obstacles to international trade, it is presumed that they do necessarily generate a certain amount of trade-restrictiveness. In a similar guise, the AB in *US - Clove Cigarettes* gave due weight to the Preamble when ruling that a certain amount of disparate impact due to a technical regulation would be reconcilable with the spirit of the Agreement, as long as it stems exclusively from a legitimate regulatory distinction. This specific issue will be further discussed *infra*. See *US - Clove Cigarettes*, WT/DS406/AB/R, para. 174.

⁵³ Low, P., Marceau, G., Reinaud, J. (2012) The interface between the trade and climate change regimes: Scoping the issues. *Journal of World Trade* 46(3), 522.

⁵⁴ See Articles 2.8 and 2.9 of the TBT Agreement.

2.2 The provisions of the TBT Code of Good Practice

The TBT Code of Good Practice in Annex 3 to the TBT Agreement contains specific discipline applying to the development, setting and administration of standards. The fact that Members explicitly considered the inclusion of a separate Code within the TBT Agreement for the purpose of enhancing the legal discipline of standards⁵⁵ should not be discounted as a factor confirming its binding nature on WTO Members. Annex 3.B provides that the TBT Code is open for acceptance to all types of standardising bodies within the territory of a Member, including local and regional non-governmental bodies, regardless of Members' participation to standard-setting activities. Annex 3.C provides that bodies accepting or withdrawing from the Code must notify the ISO/IEC notification centre in Geneva. The remainder of the Code is under the heading of 'Substantive provisions', which can be divided in two groups. There are six actually substantive provisions and eight procedural and transparency-related obligations, discussed respectively in Section 2.2.1 and Section 2.2.2.

2.2.1 Substantive provisions

The substantive provisions of the TBT Code of Good Practice do not seem to differ much from those applying to technical regulations. However, as will be seen, the desirability and even the possibility to transpose certain legal tests designed for public mandatory measures to voluntary private measures must be carefully appraised. Annex 3.D contains a non-discrimination obligation worded very similarly to Art. 2.1 TBT. It requires that, with respects to standards, 'the standardising body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country'. Annex 3.E contains a necessity provision which presents a number of differences with Art. 2.2 TBT, which will be discussed in Section 4.1. It provides that 'the standardising body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade'. These two provisions will be explored in detail in Sections 3 and 4. Annex 3.I contains another obligation which can also be found for technical regulations under Art. 2.8 TBT, i.e. the requirement to draft standards in terms of performance rather than design or descriptive characteristics, whenever appropriate.

Three provisions concern harmonisation of standards and participation in international standard-setting activities. Annex 3.F provides that standardising bodies shall use international standards, or a relevant part thereof, as a basis for the standards which are being developed. A body is not required to base its standards on international standards in the event the latter would be ineffective or inappropriate, for example because of an

⁵⁵ Wolfrum, R., Stoll, P.T., Seibert-Fohr, A. (Eds.) (2007) *WTO - Technical Barriers and SPS Measures*. Leiden and Boston: Martinus Nijhoff Publishers, 247.

insufficient level of protection, or different relevant conditions, or because of technological differences. Section 5 devotes a separate analysis to this important obligation. Annex 3.G further provides that standardising bodies should participate in international standard-setting activities in their area of operation. A final obligation concerning harmonisation is in Annex 3.H, and provides that standardising bodies shall make every effort to avoid duplication or overlap with the work of other standardising bodies, either at the same level, for example at the national stage, and also at other levels, such as at the regional or international stage.

2.2.2 Procedural provisions

The procedural provisions of the TBT Code of Good Practice show a greater degree of variation with respect to the comparable transparency obligations for technical regulations laid down in Articles 2.9 to 2.12, and Art. 10 of the TBT Agreement. Annex 3.J requires standardising bodies to publish a work program addressing the standards under preparation and those which have been adopted in the previous period. The program must indicate reference to international standards when present, the expected working period and other information, and must be notified to the ISO/IEC Information Centre. Annex 3.J has been implemented by means of a WTO-ISO Memorandum of Understanding establishing an information system between the two Organisations.⁵⁶ Annex 3.K provides that standardising bodies shall become members of ISONET, ISO's decentralised system for exchange of information for national standards and related documents.⁵⁷ Annex 3.L requires a 60 day period for comments on a draft standard. Given the recent commitment of the TBT Committee to further encourage publication of a working program and to share information about the commenting period, it can be presumed that the implementation of the obligations under Annex 3.J, and Annex 3.L in particular is not yet satisfactory to WTO Membership.⁵⁸ Indeed, such provisions concerning the provision of information concerning standard-setting activities and the possibility for interested parties to comment are crucial to prevent possible trade-barriers effect at the earliest stage.⁵⁹

Annex 3.M provides that draft standards shall be made public in a non discriminatory manner upon request of any interested party. Annex 3.N provides that standardising bodies must take into account the comments received on the draft standard. Annex 3.O provides for prompt publication of the adopted standards. Annex 3.P requires that the

⁵⁶ According to the to the Ministerial Decision taken in Marrakesh on 15 April 1994 on "Proposed Understanding on WTO-ISO Standards Information System". The "Memorandum of Understanding (MoU) on WTO Standards Information Service Operated by ISO" was concluded between the Secretary-General of the ISO Central Secretariat and the Director-General of the WTO.

⁵⁷ See ISONET Manual, available at http://www.iso.org/iso/prods-services/otherpubs/pdf/isonetmanual_1998-en.pdf.

⁵⁸ Committee on Technical Barriers to Trade. Seventh Triennial Review of the Operation and Implementation of the TBT Agreement. 3 December 2015 G/TBT/37.

⁵⁹ Mavroidis, P.C., Wolfe, R. (2016) Private standards and the WTO: Reclusive no more. EUI Working Paper RSCAS 2016/17, 12-13.

working program of a standardising body shall be made public to all interested parties. Annex 3.O, finally, establishes a rudimentary enforcement mechanism of the Code's provision, requiring that standardising bodies shall afford sympathetic consideration to consultation with other parties concerning the operation of the Code, and shall make an objective effort to solve complaints.

2.3.3 Different types of standards under the TBT Code of Good Practice

Negotiating history suggests that the intention of the parties was to subject *all* standardising bodies to the Code's discipline.⁶⁰ Nonetheless, some elements of the TBT Code of Good Practice seem to suggest that, originally, the drafters of the Agreement considered that the measures subject to the scope of the TBT Code of Good Practice, in the same manner as technical regulations, must possess a technical component, thereby limiting its application to technical standardising bodies. The situation resembles therefore that of the Commission Guidelines for Horizontal Agreements *vis-à-vis* standardisation agreements discussed in Sections 2.3.3 and 2.3.4 of Chapter 4. Indeed, environmental standards in the form of eco-labels, let alone sustainability standards, were not an issue at all during the Uruguay Round's years.⁶¹ It seems therefore that the TBT Code's addressees which the WTO Members had in mind were standard-setting bodies at the national and transnational levels, that set standards for the purpose of product interoperability, and possibly health and safety. This was also probably due to the fact that WTO Membership understood the definition of a standard as narrower than that resulting from the AB's interpretation of an international standard.

The list of standardising bodies which have notified compliance with the TBT Code includes only technical standard setters at the national level.⁶² This is not surprising, as access to ISONET is permitted only to ISO Members,⁶³ which are technical standard-setters established in a Member's territory active in technical standardisation.⁶⁴ This

⁶⁰ 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. 71.

⁶¹ Granted, the first (public) eco-label, the German Blue Angel, dates back to 1978, but the issue appeared on the WTO agenda only when, as a consequence of the 1992 failure from Austria to ban illegally logged timber, the FSC was established. In the same years, also the EU eco-label was established and the earliest literature on voluntary standards and trade can be found. See, among the first, Tietje, C. (1995) Voluntary eco-labelling programs and questions of State responsibility in the WTO/GATT legal system. *Journal of World Trade* 29(5), 123-158.

⁶² With very few exception, the list includes one standard-setter per WTO Member. The exceptional cases include specialised standard-setters in the technical and health and safety domain. See ISO (2015). WTO TBT Standards Code Directory. Standardising bodies having accepted the WTO TBT Code of Good Practice for the Preparation, Adoption and Application of Standards. Available at http://www.standardsinfo.net/info/docs_wto/20151210/wto%20directory%202015%20rev1%20en.pdf.

⁶³ See ISO (2001) - ISONET - ISO Information Network Manual. Available at <http://www.iso.org/iso/prods-services/otherpubs/pdf/informationisonet.pdf>.

⁶⁴ ISO can only have one Member per country which, if necessary, coordinates and represents the other national standardising bodies. See ISO (2015) ISO Membership Manual. Available at http://www.iso.org/iso/iso_membership_manual.pdf

requirement seems therefore to support a *prima facie* impression that bodies engaging in technical standardisation were initially the intended addressees of the TBT Code. This argument is supported also by Annex 3.G, providing that participation in international standardisation shall occur through one national delegation representing all standardising bodies in a Member's territory which draft standards in the same domain. The purpose of this provision, addressing the possibility that more standard-setters are established in the same domain within one Member, is arguably to cover the US system for technical standardisation (and other comparable systems), which is highly decentralised, with around 600 different bodies in competition. The American National Standards Institute (ANSI) coordinates the activities of those bodies and represents them at the ISO level, the relevant international standardising bodies for many technical standards.⁶⁵ Clearly, both the US system and Annex 3.G, seem to be difficult to reconcile with 3.H, which stipulates that national bodies shall make every effort to avoid overlap with the standardising activities of other bodies in the same territory. Arguably, that provision aims to cover regulatory arrangements whereby a single (public or private) standard-setter is conferred standard-setting authority in a Member's territory, as it occurs in the EU and its Member States.

The above did not prevent other types of standard-setters, such as VSS bodies, from basing their standardisation activities on the Code's requirements, or the TBT Committee to plead for ensuring the application of the TBT Code by a large number of private standardising bodies drafting not just technical standards.⁶⁶ At the same time, the AB expansive approach to certain definitional elements in Annex 1, especially concerning the PPM-scope of labelling requirements, determined State responsibility to take reasonable measures with respect to many different types of standards, including VSS.

As discussed in the Introduction, ISEAL Code-compliant VSS are presumably in compliance with the provisions of the TBT Code as well. Further, the enforcement mechanism of the ISEAL Code, different from Annex 3.O, has a direct impact on standardisation practices. It therefore constitutes a powerful mechanism to transpose and render more binding the TBT Code's provisions. This is particularly evident from the alignment of the procedural obligations, which reflect and further elaborate on those expressed in the TBT Code.⁶⁷ The ISEAL Code acknowledges that VSS should not create unnecessary barriers to international trade, but it does not affirm explicitly the non-discriminatory character of standards. Possibly, the reason is to be found in the expectation that non-discriminatory and effective access to the standard-setting, coupled with other requirements of good administration, suffice to avoid discrimination.

⁶⁵ Bütte, T., Mattli, W. (2012) *The new global rulers. The privatisation of regulation in the World economy*. Princeton and Oxford: Princeton University Press, 148-151.

⁶⁶ 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

⁶⁷ ISEAL Alliance, Setting social and environmental standards. ISEAL Code of Good Practice. Version 6.0 - December 2014, clauses 5.2 to 5.8 and 5.11.

Nonetheless, it is remarkable that the TBT Code does not expressly contain a requirement for standard-setting to be open at all stages in order to permit interested parties' participation (included, and especially, economic operators), as provided in the safe-harbour requirements in the Commission Guidance on standardisation agreements, or in the TBT Committee Decision on international standards.⁶⁸ The obligation to allow for comments in Annex 3.L should not be confused with an openness requirement; standardising bodies merely have to take into account the comments received. The lack of an openness requirement arguably signals that the focus of procedural obligations is on *ex ante* and *ex post* transparency of the standard rather than on participation in its drafting. If the main trade concerns stemming from private measures is perceived as being their lack of transparency and difficulty in access which may determine discriminatory design and other trade issues,⁶⁹ effectively open participation could have been a valuable requirement to avoid discriminatory and unnecessary standards.

However, here we are not in the domain of competition law but in the area of international trade, where many of the addressees of the Code are national standardising bodies directly contributing to the legislative process. Issues of sovereignty evidently prevent a requisite of openness to apply to these bodies. Further, given the broad coverage of application of the TBT Code, a requisite of openness for company standards would constitute an undue, and unenforceable, interference with private autonomy. In the end, only bodies possessing formal public features should be required to take into account different interests and consistencies.⁷⁰ Also other procedural provisions are difficult to transpose to company standards, including the obligation to provide for comments. As explained in Section 4.2.2.3 of Chapter 5, flexibility can be expected in the application of the TBT Code on the basis of the body in question, which results in the largest margin of manoeuvre for company standards to deviate from its provisions and at the same time in the lowest level of State responsibility.

Among all TBT Code's provisions, substantive requirements of non-discrimination and unnecessary trade-restrictiveness are crucial for the discipline of standards addressing public policy concerns, arguably even more than procedural obligations. A disparate impact for technical standards is less likely, unless the standard has protectionist motivations. A certain technical solution, however controversial and necessarily

⁶⁸ Which anyway limits openness to WTO Members, and not to other private stakeholders. 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.

⁶⁹ A claim is made that it would be possible, at least in theory, to discern protectionist motivated standards if the drafting process is open and accessible. Du, M.M. (2007) Domestic regulatory autonomy under the TBT Agreement: From non-discrimination to harmonisation. *Chinese Journal of International Law* 6(2), 282; Prevost, D. (2013) 'Transparency obligations under the TBT Agreement'. In Epps, T., Trebilcock, M.J. (Eds.) *Research Handbook on the WTO and technical barriers to trade*. Cheltenham: Edward Elgar, 120-159.

⁷⁰ Stewart, R.B. (2014) Remedying disregard in global regulatory governance: Accountability, participation, and responsiveness. *American Journal of International law* 108(2), 225.

generating 'losers', is unlikely to put a whole group of foreign producers at a disadvantage. Conversely, a standard addressing risks and threats which are specific and more likely to arise in certain WTO Members, such as standards pursuing social and environmental objectives, may structurally generate detrimental impacts defined in those terms. Even if it is hard to maintain that technical matters never hide questions of politics,⁷¹ it is safe to hold that the more a standard moves away from the domain of technology towards the domain of politics, the more challenges to its legitimacy will be expected to arise.⁷²

As the following Section illustrates, an ever-clearer focus of WTO law on discriminatory effects uncoupled from any purpose or origin inquiry may lead to situations where the simple presence of a disparate impact could bring about a *prima facie* finding of discrimination. As the TBT Code has the potential to apply to almost all VSS, determining the precise scope of its obligations is therefore of paramount importance, in particular for its non-discrimination provision. Furthermore, discrimination under the TBT Agreement has acquired peculiar elements in the even-handedness inquiry, which can be particularly problematic for certain private standardising bodies.

3 Annex 3.D of the TBT Code of Good Practice - Non-discrimination

Except minor textual differences, the literal meaning of the non-discrimination provision in letter D of the TBT Code does not seem to differ from that under Art. 2.1 TBT. The obligation is addressed to standardising bodies, which are required - similarly as Members, the addressees of Art. 2.1 TBT - to grant treatment no less favourable than that accorded to like domestic or foreign products. No case law has hitherto clarified the actual extent of this provision, and one can only speculate about the kind of test panels would employ to assess discrimination resulting from the setting, adoption and application of standards.

This Section starts from the assumption that the test elaborated for Art. 2.1 is theoretically transposable to the domain of standards. The negotiating history of the TBT Agreement shows that an earlier draft of the TBT Code of Good Conduct neither include a non-discrimination nor a necessity provision, but only a requirement for standardising bodies to base their standards on international standards. The appearance in the final draft of a non-discrimination provision in the same wording as Art. 2.1 TBT, coupled with

⁷¹ Vos, E. (1999) *Institutional frameworks of Community health and safety regulations: Committees, agencies and private bodies*. Oxford: Hart Publishing, 252; Schepel, H. (2005) *The constitution of private governance. Product standards in the regulation of integrating markets*. Oxford and Portland: Hart Publishing, 256; 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), 597.

⁷² Wijkström, E., McDaniels, D. (2013) Improving regulatory governance: International standards and the WTO TBT Agreement. *Journal of World Trade* 47(5), 1037.

a necessity obligation, shows the parties' intention to align, if to a certain extent only, the substantive discipline for standards to that of technical regulations.⁷³ The TBT Code is part and parcel of the TBT Agreement, whose objective is to strike a balance between trade liberalisation and regulatory space.⁷⁴ There is no reason why the approach to pursuing such goals should differ, especially since the responsibility for breaches of the TBT Code falls on WTO Members.

It shall be given the proper weight to the fact that no obligation is imposed directly on the standardising bodies. In addition, as seen in Chapter 5, certain thresholds for restrictive effects are expected before the obligation to take reasonably available measures for ensuring compliance is triggered for a WTO Member. Such reasonably available measures, provided that they are taken, may also not be effective. This would nonetheless extinguish State responsibility and at the same time ensure private autonomy. This considerable 'buffer' of sorts ensures that the gist of the transposition of a test designed for public mandatory measures remains in theory appropriate also for private voluntary ones, even if certain adjustments are to be made to accommodate the particular features of standards.

Section 3.1 addresses in detail all elements of the non-discrimination test for technical regulations, with a necessary digression into GATT Articles I:1, III:4 and certain elements of the Chapeau of Art. XX to assist in illustrating the obligation. Section 3.2 then discusses the problems that would arise in the transposition of certain elements of a test designed for mandatory public technical regulations to the domain of private voluntary standards. It will focus specifically on three elements: the objective private parties must be allowed to legitimately pursue; the problems which may arise in applying the concept of less favourable treatment to quality standards, in particular for *de facto* breaches; and the features of an even-handedness inquiry for VSS.

3.1 Guidance offered by Art. 2.1 TBT and the GATT

Transposing the test for technical regulations⁷⁵ to the domain of standards, it could be expected that the three-step test under Art. 3.D would require that (i) the measure at issue must be a standard; (ii) the imported and domestic products at issue must be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products. Having discussed in Section 2.1 the scope of the definition of standards, Section 3.1.1 focuses on likeness. Section 3.1.2 discusses the peculiar interpretation of the concept of less favourable treatment elaborated in the

⁷³ 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. 72.

⁷⁴ *US - Clove Cigarettes*, WT/DS406/AB/R, paras. 92-95.

⁷⁵ *US - Clove Cigarettes*, WT/DS406/AB/R, para. 87.

domain of the TBT Agreement, which allows for a detrimental impact, provided it stems exclusively from a legitimate regulatory distinction.

3.1.1 Likeness

It is reasonable to assume that the concept of likeness under 3.D of the TBT Code follows the same criteria as under Art. 2.1 TBT. Noting the similarity between Art. 2.1 TBT and III:4 GATT, both built around the core terms of 'like products' and 'treatment no less favourable',⁷⁶ the AB observed that under the TBT Agreement the assessment of likeness is about the 'nature and extent of a competitive relationship between and among products',⁷⁷ not dissimilarly from the GATT. The AB has thus rejected the resurrection of an aim-and-effect⁷⁸ approach to likeness in the TBT Agreement, as supported by the panel in *US - Clove Cigarettes*.⁷⁹ Instead, the four 'traditional' Border Tax Adjustment criteria⁸⁰ - physical characteristics, end-uses, consumer tastes and habits, and tariff classification - still constitute relevant factors to assess the presence of a competitive relation between domestic and imported products. Distortive effects on competition caused by the measure itself must be separated and assessed in the course of the less favourable treatment analysis, as the competitive relation between products shall thus be assessed 'in isolation from the measure at issue'.⁸¹

Still, regulatory concerns which lie behind technical regulations (and standards) may matter in the determination of likeness, but only in so far as they might affect the competitive relationship of the products; in the same guise as in *EC - Asbestos* it was found that, under the GATT, health and safety concerns play a role in the assessment of the 'physical characteristics' and 'consumer preferences' criteria.⁸² The assessment of likeness requires therefore an examination and weighing of all criteria on the basis of all evidence, and then an overall determination of whether products are to be characterised as like.⁸³ Generally, a distinction based only on origin is presumed to identify like products.⁸⁴

⁷⁶ *US - Clove Cigarettes*, WT/DS406/AB/R, para. 100.

⁷⁷ *US - Clove Cigarettes*, WT/DS406/AB/R, para. 120.

⁷⁸ Hudec, R.H. (1998) GATT/WTO Constraints on national regulation: Requiem for an 'aim and effects' test. *International Lawyer* 32(3), 619-649. See also Appellate Body Report, *Japan - Taxes on Alcoholic Beverages (Japan Alcoholic Beverages II)*, WT/DS08/AB/R, 4 October 1996, para. 115.

⁷⁹ Panel Report, *United States - Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R, adopted 2 September 2011, paras 7.240 - 7.248.

⁸⁰ Report of the Working Party on *Border Tax Adjustment*, BISD 18S/97, para. 18.

⁸¹ *US - Clove Cigarettes*, WT/DS406/AB/R, para. 111.

⁸² *US - Clove Cigarettes*, WT/DS406/AB/R, para. 117; *EC - Asbestos*, WT/DS135/AB/R, para. 113. See also Broude, T., Levy, P.I. (2014) Do you mind if I don't smoke? Products, purpose and indeterminacy in *US - Measures Affecting the Production and Sale of Clove Cigarettes*. *World Trade Review* 13(2), 383.

⁸³ *EC - Asbestos*, WT/DS135/AB/R, para. 109.

⁸⁴ 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. 11.168; Panel Reports, *China - Measures Affecting Imports of Automobile Parts*, WT/DS339/R, adopted 12 January 2009, para. 7.216.

For VSS under the provisions of the TBT Code, the assessment of likeness can involve several couples of products, depending on the facts of the case. It can involve domestic products and imported product *at large* or, more specifically in a national treatment claim, 'sustainable' (most likely domestic) products and 'conventional' (most likely foreign) products.⁸⁵ Among the four likeness criteria discussed above, particularly relevant is the criterion of consumer tastes and habits. Such a criterion has been considered as a possible avenue to permit discrimination on the basis of npr-PPMs: as long as consumers do not substitute products because of their npr-PPMs, revealing for example a very strong presence for environmental-friendly over non environmental-friendly goods, then the products at issue may not be considered as like.⁸⁶ The decisive criteria for a finding of likeness then becomes whether it is possible to identify a subset of consumers which is willing to substitute products on the basis of npr-PPMs, and an answer to the question of how large such a subset should be.

In *Philippines - Distilled Spirits*, the AB was satisfied in finding two products to be like even if competition did not take place in the whole market, but was instead limited to a segment of it. The AB observed that Art. III of the GATT 'does not protect just some instances or *most* instances, but rather, it protects *all* instances of direct competition'.⁸⁷ Such a finding was considered by the AB to be relevant also under Art. III:4 GATT and 2.1 TBT, but it clarified that 'the notion that actual competition does not need to take place in the whole market, but may be limited to a segment of the market, is separate from the question of the degree of competition that is required to satisfy the standards of "directly competitive or substitutable products" and "like products"'.⁸⁸

The AB therefore avoided answering the question of how large the segment of consumers willing to substitute between the two products at issue must be for a finding of likeness, but it seems that a relatively small subset with a strong degree of substitutability will suffice,⁸⁹ all the more if in combination with all other criteria indicating likeness. As a final outcome, a finding of likeness is relatively likely in the presence of products which do not show any differences with respect to the traditional criteria, and

⁸⁵ Under such a scenario it could be assumed that, for example, domestic products qualify for the sustainability feature at issue, whereas the foreign products do not, and this generates detrimental impact in the form of loss of competitive opportunities. This example would identify a national treatment violation. A possible MFN violation claim could be raised where most of the products from foreign Country A qualify for the sustainable feature at issue, and most of the products of Country B do not. The likeness assessment would therefore involve these two product groups.

⁸⁶ Van den Bossche, P., Zdouc, W. (2013) *The law and policy of the World Trade Organisation*. Cambridge: Cambridge University Press, 393.

⁸⁷ Appellate Body Report, *Philippines - Taxes on Distilled Spirits (Philippines - Distilled Spirits)*, WT/DS403/AB/R, 21 December 2011, paras. 220-221. See also Iacovides, M.C. (2014) Marginal consumers, marginalised economics: Whose tastes and habits should the WTO Panels and Appellate Body consider when assessing 'likeness'? *Journal of World Trade* 48(2), 323-350.

⁸⁸ *US - Clove Cigarettes*, WT/DS406/AB/R, para. 143.

⁸⁹ For instance, In *US - Clove Cigarettes* the Appellate Body considered that the degree of competition and substitutability between menthol cigarettes and clove cigarettes that the Panel found for the subgroup of young and potential young smokers - which is considerably smaller than the overall consumer group of smokers - was sufficiently high to support a finding of likeness under Article 2.1 TBT. See *US - Clove Cigarettes*, WT/DS406/AB/R, para. 145.

where the tastes and habits of at least some consumers correspond.⁹⁰ It is therefore fairly predictable to conclude that the sustainable products covered by VSS schemes, and 'conventional' products, would be considered as like under the TBT/GATT standard of likeness. In the end, a similar outcome was reached in *US - Tuna II*, where at issue was a certification system for 'dolphin-friendly' tuna, and where the parties to the dispute agreed that the product to be considered was simply tuna.

A related issue for the treatment of likeness which arises for standard-setters with a transnational dimension and therefore not connected with any Member's territory, is whether the identification of a group of domestic products when standards are drafted by transnational standard-setters is possible. There are simply no 'like domestic products', unless the VSS at issue is attributable to a Member, or clearly established in a specific territory and drafting standards for products in that territory only. NT breaches cannot therefore arise, whereas MFN breaches can still occur, and the likeness assessment is performed on the basis of two (or more) third-country like products.

3.1.2 Treatment no less favourable

The concept of 'treatment no less favourable' under the TBT Agreement contains both a national treatment (NT) obligation and a most-favoured nation (MFN) obligation.⁹¹ It covers, exactly like the GATT, both *de jure* and *de facto* discrimination and must be similarly interpreted as imposing 'effective equality of opportunities for imported products'.⁹² A difference in formal treatment is thus neither necessary nor sufficient for a finding of violation,⁹³ nor is the mere fact that some foreign producers are negatively affected by the measure.⁹⁴ What is dispositive of a treatment less favourable, both under the GATT and the TBT, is the modification of 'the conditions of competition in the marketplace to the detriment of the group of imported products *vis-à-vis* the group of domestic like products'.⁹⁵ The circumstances under which a MFN and a NT breach can occur under the GATT provisions will be briefly discussed in Sections 3.1.2.1 and 3.1.2.2; subsequently, the analysis will focus on the features of the treatment no less favourable test under Art. 2.1 TBT.

⁹⁰ It should not be forgotten, however, that other elements may weigh against a finding of likeness between 'sustainable' and 'regular' products, which is the factor of price. As VSS-certified products are more expensive than conventional products, price differential may matter, as noted by the AB in Appellate Body Report, *Philippines - Taxes on Distilled Spirits (Philippines - Distilled Spirits)*, WT/DS403/AB/R, 21 December 2011, para. 215.

⁹¹ *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, para. 267. Note that the three TBT disputes discussed below have only addressed the national treatment component of the obligation.

⁹² Panel Report, *US - Section 337 of the Tariff Act of 1930 (US - Section 337)*, L/6439 - 36S/345, adopted on 7 November 1989, para. 5.10.

⁹³ Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea - Beef)*, WT/DS161/AB/R, adopted 11 December 2000, para. 136; *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, para. 277.

⁹⁴ Flett, J. (2013) WTO space for national regulation: Requiem for a diagonal vector test. *Journal of International Economic Law* 16(1), 37-90.

⁹⁵ *US - Clove Cigarettes*, WT/DS406/AB/R, para. 180.

3.1.2.1 MFN in Article I:1 of the GATT

Article I:1 of the GATT contains the most-favoured nation obligation, the first cornerstone of the GATT system, which addresses discrimination between and among like products of different foreign origins. It prohibits measures modifying 'the conditions of competition between like imported products to the detriment of the third-country imported products at issue'.⁹⁶ Article I:1 applies to both *de jure* and *de facto* discrimination,⁹⁷ and covers, *inter alia*, the same internal measures at issue under Art. III:4.⁹⁸ Notwithstanding some textual difference, the AB noted that the spirit of the provision does not differ from Art. III:4, in that it is similarly concerned with a prohibition of discriminatory measures which alter the equality of competitive opportunities of like products from all WTO Members.⁹⁹ For measures falling under Art. III:4, an MFN breach entails a measure conferring an 'advantage, favour, privilege or immunity' on a product originating from any country; and that such advantage is not accorded immediately and unconditionally to like products from all other Members.¹⁰⁰

Previous case-law required that an 'advantage' must be granted *without conditions* to all other WTO Members.¹⁰¹ The AB clarified that conditions may indeed be attached in order to receive an 'advantage'. However, conditions that have a detrimental impact on the competition opportunities are prohibited, as Art. I:1 'permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member'.¹⁰² Criteria that are product-related may, or may not, *de facto* generate a detrimental impact.¹⁰³ In such a scenario, it can be inferred from *EC - Seals* that inquiries over protectionist or regulatory purposes are not required under the MFN obligation.¹⁰⁴ Conversely, in light of the spirit of the provision, origin-based regulatory distinctions would give rise to a rebuttable presumption of inconsistency with Art. I:1

⁹⁶ *EC - Seals*, WT/DS401/AB/R, para. 5.90.

⁹⁷ Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry (Canada - Autos)*, WT/DS139/AB/R, 31 May 2000, para. 78.

⁹⁸ Panel Reports, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R 22 May 1997, para. 7.176; Panel Report, *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (US)*, WT/DS290/R, adopted 15 March 2005, para. 7.713.

⁹⁹ *EC - Seals*, WT/DS401/AB/R, para. 5.82.

¹⁰⁰ *EC - Seals*, WT/DS401/AB/R, para. 5.86.

¹⁰¹ The interpretation of 'unconditionally' as 'no conditions are possible' appeared, in a statement not related to the Enabling Clause in Panel Report, *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries (EC - Tariff - Preferences)*, WT/DS246/R, adopted 1 December 2003, para. 7.59. The Appellate Body clarified that, with respect to the Enabling Clause, additional preferential treatment can be granted under certain conditions to similarly situated developing countries. Appellate Body Report *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries (EC - Tariff - Preferences)*, WT/DS246/AB/R, adopted 20 April 2004, para. 173.

¹⁰² *EC - Seals*, WT/DS401/AB/R, para. 5.88.

¹⁰³ *Indonesia - Autos*, WT/DS54/R, para. 14.143.

¹⁰⁴ *EC - Seals*, WT/DS401/AB/R, para. 5.90.

GATT,¹⁰⁵ as they are likely to create more favourable competitive opportunities for some WTO Members.¹⁰⁶

3.1.2.2 National treatment in Article III:4 of the GATT

The national treatment obligation for internal regulatory measures provided for in Art. III:4 GATT constitutes the second cornerstone of the GATT system. Also Art. III:4 covers cases of both *de jure* and *de facto* discrimination.¹⁰⁷ The extent of 'treatment no less favourable' in the meaning of Art. III:4 had remained somewhat unclear until the recent *EC - Seals* case, because of the uncertainty surrounding inquiries into protectionist purposes, or regulatory rationales, for the finding of a breach. In *EC - Seals*, the AB clarified that treatment no less favourable in GATT Art. III:4, like in Art. 2.1 TBT, requires effective equality of competitive conditions between the groups of imported and like domestic products.¹⁰⁸ By no means is identical treatment required.¹⁰⁹ The AB had previously rejected¹¹⁰ a rather popular interpretation of *Dominican Republic - Cigarettes* as requiring a separate inquiry into whether the detrimental impact of a measure on imports is unrelated to the foreign origin of a product.¹¹¹

The detrimental impact must however be connected by means of a 'genuine relationship' with the contested measure.¹¹² Having already rejected in the past all inquiries into the presence of protectionist purposes,¹¹³ in *EC - Seals* the AB adhered to textualism - in particular the presence in the GATT of exceptions accommodating the right to

¹⁰⁵ *Canada - Autos*, WT/DS139/AB/R, para. 10.29.

¹⁰⁶ Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas, complaint by Mexico*, WT/DS27/R/MEX, adopted 25 September 1997, para. 7.239.

¹⁰⁷ *US - Section 337*, L/6439 - 36S/345, para. 5.11; *Korea - Beef*, WT/DS161/AB/R, para. 135.

¹⁰⁸ *EC - Seals*, WT/DS401/AB/R, para. 5.101; See also *US - Clove Cigarettes*, WT/DS406/AB/R, para. 176; 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. 305 and 136; Appellate Body Report, *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines (Thailand - Cigarettes (Philippines))*, WT/DS371/AB/R, adopted 17 June 2011, para. 126; *Korea - Beef*, WT/DS161/AB/R, paras. 135; *Japan Alcoholic Beverages II*, WT/DS08/AB/R, p. 16; GATT Panel Report, *US - Section 337*, L/6439 - 36S/345, para. 5.10.

¹⁰⁹ *US - Section 337*, L/6439 - 36S/345, para. 5.11; AB in *Korea - Beef*, WT/DS161/AB/R, para. 627.

¹¹⁰ *US - Clove Cigarettes*, WT/DS406/AB/R, fn 372 to para. 179.

¹¹¹ Appellate Body Report, *Dominican Republic Measures Affecting the Importation and Internal Sale of Cigarettes (Dominican Republic - Cigarettes)*, WT/DS302/AB/R, adopted 25 April 2005, para. 96.

¹¹² *Thailand - Cigarettes (Philippines)*, WT/DS371/AB/R, para. 128; *Dominican Republic - Cigarettes*, WT/DS302/AB/R, para. 96, in which, it is submitted, the Appellate Body elaborated, somewhat clumsily, a casualty test between the contested measure and the detrimental effect; *US - Tuna II*, WT/DS381/AB/R, para. 214; AB in *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, para. 270.

¹¹³ *EC-Bananas III*, WT/DS27/AB/R, para. 216. There the Appellate Body seemed to also imply that Art. III:1 does not inform Art. III:4. The Appellate Body then partially backtracked in *EC - Asbestos*, where it held that the general prohibition on protectionism in Art. III:1 informs Art. III:4 as well, in the sense that a group comparison is required between imported and domestic products. A group comparison implies that whenever detrimental impact is found for the group of imported products, conversely, protection is afforded to the group of like domestic products, and therefore 'gives meaning' to the general principle expressed in Art. III:1. *EC - Asbestos*, WT/DS135/AB/R, para. 100. See also Ehring, L. (2002) *De facto discrimination in World Trade Law. National and most-favoured-nation treatment - or equal treatment?* *Journal of World Trade* 36(5), 921-977.

regulate¹¹⁴ - and thus rejected all inquiries into regulatory purpose as well. GATT Art. III:4 was therefore aligned not just to TBT Art. 2.1 (minus the even-handedness inquiry, as it will be seen in the following Sections), but also to the first sentence of GATT Art. III:2, where legitimate aims of a measure cannot excuse less favourable treatment.¹¹⁵ A finding of disparate impact concludes therefore the analysis under Art. III:4, and moves on to the exceptions under Art. XX, according to a 'clear division of labour' between the substantive and the exception provisions.¹¹⁶

3.1.2.3 Treatment to less favourable under Art. 2.1 TBT

Under the TBT Agreement, after a finding of detrimental impact, which could consist either of a MFN or a NT breach, an additional inquiry must be performed over whether the detrimental treatment stems exclusively from a legitimate regulatory distinction or whether - conversely - it reflects discrimination against the group of imported products. By definition, technical regulations and standards are measures which draw distinctions between products or their related processes and production methods. The AB noted that, for this reason, Art. 2.1 TBT 'should not be read to mean that any distinction, in particular those that are based *exclusively* on particular product characteristics or their related processes and production methods, would *per se* accord less favourable treatment within the meaning of Article 2.1'.¹¹⁷

This finding is supported by the text of Art. 2.2 TBT, providing that obstacles to international trade may be permitted as long as they are found to be necessary for the fulfilment of a legitimate objective.¹¹⁸ Furthermore, the sixth recital of the preamble of the TBT Agreement affirms Members' right to regulate by means of *inter alia* technical regulations, 'subject to the requirement that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade'. Since the TBT Agreement attempts to mediate between the right to regulate and trade liberalisation, the AB concluded in *US - Clove Cigarettes* that 'Article 2.1 should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinction'.¹¹⁹ A legitimate regulatory distinction underpins a

¹¹⁴ *EC- Seals*, WT/DS401/AB/R, para. 5.125.

¹¹⁵ *Japan Alcoholic Beverages II*, WT/DS08/AB/R, para. 115.

¹¹⁶ Du, M.M. (2015) 'Treatment not less favourable' and the future of national treatment obligation in GATT Article III:4 after *EC - Seal Products*. *World Trade Review* 14(1), 25.

¹¹⁷ *US - Clove Cigarettes*, WT/DS406/AB/R, para. 169.

¹¹⁸ It shall be kept in mind that Art. 2.1 is concerned with discrimination, and Art. 2.2 with trade-restrictiveness, which may occur in the absence of any discriminatory elements.

¹¹⁹ *US - Clove Cigarettes*, WT/DS406/AB/R, para. 174.

measure which has the effect of differentiating between products, while pursuing a reasonable and justifiable objective in a fair and justifiable manner.¹²⁰

This analysis must be made by looking at the circumstances of the case, such as the design, architecture, revealing structure and operation of the technical regulation, and in particular at whether the technical regulation at issue, including its application, is 'even-handed'.¹²¹ It appears that the AB considers the lack of even-handedness as broadly overlapping with the concept of discrimination as understood in the Chapeau of Art. XX GATT, as it expressly stated that the assessment focuses on whether detrimental impacts on competitive opportunities for the imported products reflect discrimination.¹²² It shall be noted that the AB has hinted that the additional inquiry over the existence of detrimental impact stemming exclusively from a legitimate regulatory distinction is to be performed only for technical regulations that do not *de jure* discriminate against imports.¹²³ *De jure* discriminatory technical regulations, as long as they generate detrimental impact, do not seem to be justifiable under the TBT Agreement as the latter does not provide for exceptions.¹²⁴

Concerning which policy objectives are considered as legitimate, WTO adjudicatory bodies have shown deference towards regulating WTO Members. If the policy objective is among those listed in Art. 2.2, panels are bound to accept it as legitimate. In case it is

¹²⁰ Houston-McMillan, J. (2016) The legitimate regulatory distinction test: Incomplete and inadequate for the particular purposes of the TBT Agreement. *World Trade Review* 15(4), 554.

¹²¹ *US - Clove Cigarettes*, WT/DS406/AB/R, para. 182.

¹²² *US - Clove Cigarettes*, WT/DS406/AB/R, para. 224.

¹²³ *US - Clove Cigarettes*, WT/DS406/AB/R, para. 215.

¹²⁴ Albeit the problem may be in practice limited (as *de jure* discriminatory technical regulations are rare, and can almost always being construed by legislators in a *de facto* discriminatory form), it remains true that there may be good reasons for a Member to *de jure* discriminate in its technical regulations on the ground of a legitimate objective. A sensible explanation is that technical regulations are considerably trade-restrictive measures which, by definition, must draw distinctions between products on the basis of a legitimate policy objective. The regulatory distinction must be drawn only on a basis *related* to a legitimate policy objective. In other words, the function of the 'exception' is fulfilled by the 'legitimate' aspect of the objective pursued; a regulatory distinction based on origin is unconnected to any of such legitimate policy objectives. Given the technical nature of technical regulations, it can arguably even be seen as strong evidence of protectionist purpose, which would justify a stricter approach. Further, drafting technical regulations employing origin-neutral distinctions instead of origin-based distinctions is a more efficient solution for a regulating Member in the pursuit of its policy objective. Assuming that a specific risk of contamination is present among product X from country A, an importing country could, of course, draft a technical regulation prohibiting all products from containing product X from country A, in order to protect public health. However, imposing that all products shall not be contaminated could be a more efficient way of pursuing the protection of human health at the same time minimising the possible discriminatory elements, especially if it cannot be excluded that there may be products from county A which are not contaminated and would therefore be excluded. This is not more burdensome in terms of enforcement, as the regulating State can still enforce stricter compliance with the regulatory requirements by products originating from contaminated areas without discriminating with respect of conformity assessment procedures. Products originating in contaminated countries are allegedly not *in a comparable situation* to that of products of national origin or from other countries, in the meaning of Art. 5.1.1 TBT Agreement. Economic efficiency is, therefore, irrelevant under distinctions based on origin. As the third recital of the TBT Agreement explicitly refers to the efficiency-enhancing role played by international standards and conformity assessment procedures, it seems thus reasonable to disallow origin-based regulatory distinctions also in technical regulations.

not mentioned in the open list of Art. 2.2, then the presence of that objective in other provisions of the WTO Agreements may guide panels to consider such objective as legitimate.¹²⁵ Panels, however, are to determine the objective of the contested measure without deferring to the characterisation offered by the respondent.¹²⁶ As will be seen in Section 3.2, the determination of a legitimate policy objective for private actors may differ from that for WTO Members.

3.1.2.4 *Even-handedness of the regulatory distinction*

The determination of whether the detrimental impact of a technical regulation stems exclusively from a legitimate regulatory distinction is the crucial element under Art. 2.1 TBT in order to discern WTO-compliant measures from those in breach of the TBT Agreement. Such an inquiry ‘probes the legitimacy of regulatory distinctions through careful scrutiny of whether they are designed and applied in an even-handed manner such that they may be considered “legitimate”’.¹²⁷ Different than under the Chapeau of Art. XX GATT, the rationale behind a regulatory distinction does not have to be connected with the purpose of the measure, thereby rendering Art. 2.1 TBT a suitable venue for justifying multi-purpose measures.¹²⁸ For a determination of even-handed regulatory design and application, it must be assessed whether the regulatory distinction at issue does not reflect discrimination. The focus of the analysis must be on the regulatory distinctions accounting for detrimental impacts; other elements of the contested technical regulation are however relevant for the purpose of that assessment, to the extent they can contribute to the analysis by situating the regulatory distinction accounting for detrimental impact ‘within the overall design and application of the technical regulation at issue’.¹²⁹

At a very minimum, even-handedness requires consistency in the determination and application of the contested regulatory distinction, in light of the policy objective pursued. This requires that like products shall be treated equally in the policy perspective at issue.¹³⁰ If two like products are regulated differently while they pose a similar threat

¹²⁵ *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, para. 372.

¹²⁶ *US - Tuna II*, WT/DS381/AB/R, para. 314.

¹²⁷ Appellate Body Report, *United States - Certain Country of Origin Labelling (COOL) Requirements. Recourse to Art. 21.5 of the DSU by Canada and Mexico (US - COOL 21.5 (Canada and Mexico) (Canada and Mexico))* WT/DS384/AB/RW and WT/DS386/AB/RW, adopted 18 May 2015, para. 5.92.

¹²⁸ Marín Durán, G. (2016) Measures with multiple competing purposes after *EC-Seal Products*: Avoiding a conflict between GATT Article XX-Chapeau and Article 2.1 TBT Agreement. *Journal of International Economic Law* 19(2), 484-485.

¹²⁹ *US - COOL 21.5 (Canada and Mexico) (Canada and Mexico)*, WT/DS384/AB/RW and WT/DS386/AB/RW, para. 5.94, where also regulatory distinctions not generating any detrimental impact were taken into account. In the case at issue those were the three exceptions to the COOL measure.

¹³⁰ Jia, H.H. (2013) Entangled relationship between Article 2.1 of the TBT Agreement and certain other WTO provisions. *Chinese Journal of International Law* 12(4), 755. In *US - Clove Cigarettes*, the AB came to the conclusion that the US acted in breach of Art. 2.1 TBT, as the US measure banned clove cigarettes, virtually all of which are imported from Indonesia, but not menthol cigarettes, which posed equivalent threat in the light of the policy objective at issue and were mostly domestically produced. As observed by the AB, a ‘particular characteristic is present in both clove and

(or risk) on the basis of the objective at issue, a finding of a lack of even-handedness is likely. The approach elaborated by the AB to appraise discrimination shows little deference to the regulating State, as under Art. III:4 GATT. In *Clove - Cigarettes*, the rejections of all arguments based on 'regulatory feasibility' was clear,¹³¹ and the focus of the AB's analysis was on the basis of scientific evidence only, which showed equivalent risk levels from menthol and 'regular' cigarettes.

The imposition of different requirements for a group of like products, in the absence of different levels of risk or threat, can also result in a finding of a lack of even-handedness,¹³² under an assessment of whether the measure is 'calibrated' to the risk difference. In *US - Tuna II*, the certification requirements for dolphin-safe tuna established by the US were based on different and more stringent requirements¹³³ for tuna gathered in the East Tropical Pacific (ETP) than for tuna gathered outside the ETP. However, the risk for dolphins to be killed outside the ETP was comparable to that within the ETP, in spite of the fact that the association between tuna and dolphins was less evident than in the ETP. As a matter of fact, the different requirements made it possible that non-ETP tuna was granted dolphin-safe certification even if harm to dolphins had occurred.¹³⁴ In that case, the US failed to prove that the specific difference in labelling conditions represented a legitimate regulatory distinction, and hence that the detrimental impact stems exclusively from the above mentioned distinction rather than reflecting discrimination.¹³⁵

The assessment of even-handedness in *US - Tuna II* was performed on the basis of an appraisal of a large amount of scientific evidence concerning the regulated subject matter. The AB extensively looked at the level of risk or threat on both sides of the regulatory distinction, i.e. the risk for dolphin in the ETP and outside the ETP.¹³⁶ At this stage of the inquiry, the chosen level of protection does not matter for a finding of a breach.¹³⁷ The US identified one of the objectives of the measure as 'generally to reduce

menthol cigarettes, menthol cigarettes have the same product characteristic that, from the perspective of the stated objective of [the contested measure], justified the prohibition of clove cigarettes'. The AB referred to the Panel Report conclusions on the fact that the both menthol and clove cigarettes possess a flavour capable of hiding the harshness of tobacco and thus appeal to young smokers. See *US - Clove Cigarettes*, WT/DS406/AB/R, para. 225.

¹³¹ I.e. the arguments submitted by the US that the cost for enacting a ban on menthol cigarettes as well would be unbearable for the health system - as there would be millions of treatments for withdrawal symptoms - and that a ban would result in the development of a black market.

¹³² Resulting in a MFN breach or a national treatment breach in case the product subgroup subject to the more lenient requirements originates in a specific Member or is that of domestic origin respectively.

¹³³ Such requirements were generating detrimental impact as 'Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a "dolphin-safe" label, whereas most tuna products from the United States and other countries that are sold in the US market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a "dolphin-safe" label'. *US - Tuna II*, WT/DS381/AB/R, para. 284.

¹³⁴ *US - Tuna II*, WT/DS381/AB/R, para. 248.

¹³⁵ *US - Tuna II*, WT/DS381/AB/R, para. 297.

¹³⁶ Crowley, M., Howse, R. (2014) *Supra* at 30, 330.

¹³⁷ It should be noted that the AB, in its even-handedness inquiry, relied on the Panel's finding made in the context of an Art. 2.2 TBT infringement, but not applying the correct test. In the course of an assessment under 2.2 TBT, the chosen

the adverse effects of setting on dolphins to catch tuna by ensuring that the US market is not used to encourage setting on dolphins to catch tuna.¹³⁸ Indeed the ETP requirements did contribute to a large extent to address dolphin mortality, but it was not sufficient to avoid a finding of a lack of even-handedness as it could not be explained why similar risks, in spite of a different likelihood to occur, were treated differently.

To a large extent, the AB also in *US - COOL* engaged in a similar calibration exercise, but alleged elements of necessity were brought into the even-handedness test.¹³⁹ A closer look at *US - COOL* reveals that the case is broadly in line with previous TBT case-law. The country of origin labelling (COOL) measure enforced by the US aimed at defining - by means of four different mandatory labels - the origin of beef and pork cuts as a function of the countries in which certain steps of the production process, such as birth, raising and slaughtering, take place. The regulatory distinctions drawn by the COOL measure were considered to be the distinctions based on the three production steps mentioned above, as well as the four different types of labels.¹⁴⁰ The AB held that the record keeping and verification requirements that producers and processors were required to generate under each of the four labels were disproportionate as compared to the level of information actually provided to consumers, and to the broad exemptions provided by the measure.¹⁴¹

If, on the one hand, it would be problematic to hold a measure not to be even-handed only because some of its requirements are burdensome or unnecessary, on the other hand, both the panel and the AB took particular issue with a specific requirement which was found to be particularly discriminatory. A verification requirement *de facto* necessitated segregation of livestock on the basis of its origin, therefore creating a strong economic incentive for business operators to process exclusively domestic livestock.¹⁴² Such a requirement of the COOL measure was found to generate considerable detrimental impacts, which could not be explained by the policy objective pursued, i.e. the need to communicate information to consumers.¹⁴³ Therefore, the detrimental impact was found not to stem exclusively from a legitimate regulatory distinction, but was instead indicative of discrimination.¹⁴⁴ Although the term 'calibration' was not employed in the report, it seems the AB has performed the same analysis as in *US - Tuna II*,

level of protection, and the contribution to the objective are taken in consideration. As a matter of fact, the measure was found by the AB to be necessary.

¹³⁸ 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. 7.485.

¹³⁹ 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(1), 12-13.

¹⁴⁰ *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, para. 341.

¹⁴¹ *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, paras. 343-346

¹⁴² Panel Report, *United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/DS386/R, adopted 18 November 2011, para. 7.372.

¹⁴³ The reasoning becomes more explicit in the 21.5 DSU Appellate Body report. *US - COOL 21.5 (Canada and Mexico) (Canada and Mexico)* WT/DS384/AB/RW and WT/DS386/AB/RW, para. 5.36.

¹⁴⁴ *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, para. 349.

inquiring into the motives for the presence of a regulatory distinction, the underlying requirements, and whether those requirements bear a rational connection with the policy objective pursued.

However, and perhaps unavoidably, the calibration test has turned out to possess undeniable features of necessity. In other words, by requiring that the stringency of the regulatory requirements bears rational connection to the level of risk or threat, the assessment has turned into an analysis of whether the stringency of the requirement is necessary.¹⁴⁵ The test, however, applies both ways and, similarly, has the effect of assessing whether the *lack* of a requirement is 'necessary' or can be explained, in the light of the objective pursued. For example if, on the one hand, in *US - COOL* the presence of strict book-keeping requirements were considered unnecessary, in *US - Tuna II*, on the other hand, the lack of stringent dolphin-safety standards outside the ETP was considered as unjustifiable, or inexplicable, in the presence of the same level of threat.

Different from the necessity test under the subparagraphs of Art. XX GATT, whenever a requirement is too stringent for the level of risk, the assessment does not contemplate a quest for a less trade restrictive alternative (or less discriminatory, as under the Chapeau) but, simply, of a better calibrated - and not necessarily less detrimental - regulatory requirement. The importation of elements from the necessity test into Art. 2.1 results in the requirement of even-handedness being broader than the concept of 'arbitrary or unjustifiable discrimination, or disguised restriction on international trade' in Art. XX GATT.¹⁴⁶ As under the GATT, it also makes a breach of the non-discrimination obligation in Art. 2.1 TBT possible in cases where there is a detrimental impact in the absence of protectionist intent or purpose.¹⁴⁷ Certain requirements generating a detrimental impact may not necessarily have been designed 'so as to afford protection' to domestic producers.

It can therefore be concluded that even-handedness, and in particular the requirement of calibration between stringency of the regulatory distinction and the extent of risk and concern, imposes an obligation to enforce somewhat *efficient* technical regulations. Intuitively, efficiency - in the non-economic meaning of an effective correspondence

¹⁴⁵ As Section 4.1 will discuss, Art. 2.2 TBT assesses the necessity of the trade restrictiveness of the contested technical regulation, and the subparagraphs of Art. XX assess the necessity of the measure as a whole. Including some sort of a necessity inquiry in Art. 2.1 TBT does not therefore necessarily duplicate the analysis that is to be performed under Art. 2.2 TBT, nor in the subparagraphs of Art. XX GATT.

¹⁴⁶ Panel Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products. Recourse to Article 21.5 of the DSU by Mexico*, WTO/DS381/RW, adopted 14 April 2015, paras. 7.96 and 7.557. On a different opinion, and suggesting that the AB should bring even-handedness in line with Art. XX GATT to avoid conflict see Marín Durán, G. (2016) *Supra* at 128, 467-495.

¹⁴⁷ In the sense that the AB never stated that prohibited (i.e. protectionist) purpose lies at the basis of an Art. 2.1 breach, but only that a legitimate regulatory objective can prevent the finding of a violation. See Regan, D.H. (2013) 'Regulatory purpose in GATT Article III, TBT Article 2.1, the Subsidies Agreement, and elsewhere: *Hic et ubique*' in Van Calster, G., Prévost, D. (Eds.) *Research handbook on environment, health and the WTO*. Cheltenham: Edward Elgar, 41. *EC - Seals* has then explicitly transposed that finding to the domain of the GATT.

between means and outcomes of regulation - can be seen as evidence of *bona fide* regulatory intention. Indeed, as the TBT Agreement elaborates on Art. III GATT,¹⁴⁸ such a request for regulatory efficiency cannot be equated to the *maximisation* of regulatory efficiency, since the GATT and the WTO Agreements simply protect the trade concessions made by their signatories from protectionist tendencies.¹⁴⁹ This means that the TBT Agreement, by means of the even-handedness prong of the less favourable treatment inquiry, addresses measures which are inefficient in a peculiar 'WTO meaning' of the term, which include measures which over-regulate (mostly foreign products) or under-regulate (mostly national products),¹⁵⁰ in the lack of a rational connection to scientific evidence.¹⁵¹

The allocation of the burden of proof to demonstrate that the measure is calibrated is very important, because of its implications for the stringency of the standard of review employed. The AB in *US - Tuna II* held that, according to the traditional allocation of the burden of proof in WTO law, it is the responsibility of the complainant to make a *prima facie* case of an Art. 2.1 TBT breach. In partial exception to this principle, it is up to the respondent to demonstrate that the requirements of the contested technical regulation are calibrated to the level of risk.¹⁵² This is in line with the standard of proof under the Chapeau of Art. XX GATT¹⁵³ which, in turn, shows that the right to regulate provided in the TBT Agreement is not treated as an autonomous right but, instead, in the same manner as an exception.¹⁵⁴

3.1.2.5 Even-handedness and the Chapeau of Art. XX GATT

Assuming an extent of correspondence between even-handedness and the Chapeau analysis, the TBT cases have shown its features with a level of detail unseen in the GATT Chapeau cases. Nonetheless, as the 21.5 *Tuna II* panel found that even-handedness was broader than the Chapeau of Art. XX, a brief disquisition over the scope of the latter provision is required, which is helpful in understanding the scope of the concept of

¹⁴⁸ Rigod, B. (2015) *Optimal regulation and the law of international trade. The interface between the right to regulate and WTO law*. Cambridge: Cambridge University Press, 98-101.

¹⁴⁹ I.e. the so-called 'market access preservation' argument. See Antràs, P., Staiger, R.W. (2012) Trade agreements and the nature of price determination. *American Economic Review* 102(3), 470-476. In addition, in the framework of an Art. 2.2 inquiry, the AB has held that by no means are there obligations on Members to draft measures which are 100% effective in the pursuit of their objective. See *US - Tuna II*, WT/DS381/AB/R, para. 311.

¹⁵⁰ Some commentators have referred to these measures as to 'dumb' measures, in the sense that they are non protectionist *per se*, but still have a detrimental impact on imported products. For an interesting blog discussion on this issue, see <http://worldtradelaw.typepad.com/ielpblog/2016/01/talking-tuna.html>.

¹⁵¹ This does not mean that the assessment must be based on science. In practice, panels have shown little willingness to invoke external expertise under the TBT. See, for example the panel in *US - Tuna II*, relying entirely on the conflicting evidence submitted by the parties. *US - Tuna II*, WT/DS381/R, paras. 7.517-7.543.

¹⁵² *US - Tuna II*, WT/DS381/AB/R, para. 283.

¹⁵³ Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline (US - Gasoline)*, WT/DSO2/AB/R, adopted 29 April 1996, p. 22.

¹⁵⁴ Condon, B.J. (2014) Treaty structure and public interest regulation in international economic law. *Journal of International Economic Law* 17(2), 345. On a different opinion: Du, M.M. (2007) *Supra* at 69, 280.

arbitrary or unjustifiable discrimination, a key determinant of the even-handedness inquiry.

The purpose of the Chapeau of Art. XX GATT is to prevent the abuse of the exceptions under Art. XX, and therefore constitutes expression of the *bona fides* of the party invoking the exception.¹⁵⁵ The AB had purportedly limited the examination under the Chapeau to the application of the measure and not to the contested measure, nor to its specific content.¹⁵⁶ In *Brazil - Retreaded Tyres*, it was held that the Chapeau requires an examination of the manner in which the measure 'is implemented in practice, including any elements extraneous to the measure itself that could affect its ability to perform its functions'.¹⁵⁷ This has been understood as limiting the scope of the Chapeau appraisal only to the manner the measure is applied - therefore looking only at its implementation and administration - whereas the content of the measure itself was to be addressed exclusively under the subparagraphs, in the course of the necessity appraisal.¹⁵⁸ The logical consequence of this approach was that, as noted already in *US - Gasoline*, the analysis of discrimination under the Chapeau could not be the same as the analysis of discrimination under a substantive GATT provision.¹⁵⁹ The practice of the AB has however differed as it has considered - already in *US - Gasoline* - the substance of the measure under a Chapeau appraisal.¹⁶⁰

In *EC - Seals*, the AB also expressly considered the content of the measure in the Chapeau assessment. It was held that the case-law on the Chapeau stemming from *US - Gasoline* should not be interpreted as meaning 'that the circumstances that bring about the discrimination that is to be examined under the Chapeau cannot be the same as those that led to the finding of a violation of a substantive provision of the GATT 1994.'¹⁶¹ In *EC - Seals*, the AB undertook an inquiry aiming at assessing whether 'different

¹⁵⁵ *US - Gasoline*, WT/DS02/AB/R, p. 22.

¹⁵⁶ *US - Gasoline*, WT/DS02/AB/R, p. 22; Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products (US - Shrimp)*, WT/DS58/AB/R, adopted 12 October 1998, para. 119 - 120.

¹⁵⁷ Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres (Brazil - Retreaded Tyres)*, WT/DS332/AB/R, adopted 3 December 2007, para. 7.107.

¹⁵⁸ See for example Panel Report, *Brazil - Retreaded Tyres*, WT/DS332/R, para 7.237.

¹⁵⁹ See *infra* for further discussion.

¹⁶⁰ *US - Gasoline*, WT/DS02/AB/R, p. 27-28; see also, for a similar outcome, Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 22 October 2001, para. 79. Also the Panel in *EC - Tariff Preferences*, in a finding not appealed by the parties, applied the Chapeau test to the specific design of the EC drug arrangement as unjustifiably excluding some countries while accepting others. *EC - Tariff - Preferences*, WT/DS246/R, para. 7.228. Bartels suggests that the difference between 'application' and 'content' of a measure translates into a question of evidence. If there is little evidence of discrimination in the actual content of the measure, then the Appellate Body, under the Chapeau, would look at the actual or expected application, based on its 'design, architecture and revealing structure'. Bartels, L. (2015) The Chapeau of the General Exception in the WTO GATT and GATS Agreements: A reconstruction. *American Journal of International Law* 109(1), 100-101.

¹⁶¹ *EC - Seals*, WT/DS401/AB/R, para. 5.298 and its application in para. 5.318. The Appellate Body also noticed that 'a measure can be found to be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination under the Chapeau on grounds that are not necessarily the same in their "nature and quality" as the

regulatory treatment [...] constitutes "arbitrary or unjustifiable discrimination"¹⁶² and, specifically, whether the 'criteria of the IC exception [i.e. the specific elements of the measure generating detrimental impact, resulting from the MFN breach under Art. I:1] are designed and applied in a manner that would render arbitrary or unjustifiable the different regulatory treatment'.¹⁶³ In other words, the AB performed an inquiry of the reasons behind discrimination after a finding that a substantive GATT provision had been breached, which showed similarities with the scope of the appraisal performed under the even-handedness test.

With respect to the prohibition of arbitrary or unjustifiable discrimination, the analysis requires one to prove that i) the measure results in discrimination; ii) such discrimination is arbitrary or unjustifiable; and iii) discrimination occurs between countries where the same conditions prevail.¹⁶⁴ Concerning i), it has been noted above that the statement from *US – Gasoline*, that the discrimination at issue in the Chapeau is not the same as in the substantive GATT provisions, has been explicitly overruled by the AB in *EC - Seals*. The type of discrimination addressed in the Chapeau can therefore arise both in the application and in the actual design of the measure.

With respect to the arbitrariness, or unjustifiable character, of such discrimination, the Chapeau has become the *locus* for inquiries over the motives behind discrimination. The AB has found several instances of arbitrary or unjustifiable discrimination in its case-law. In *US - Shrimp*, *de facto* imposing a trade embargo to force third countries to comply with the same regulatory requirements applied by the respondent (i.e imposing 'single, rigid and unbending requirements') was held to constitute arbitrary discrimination in the meaning of the Chapeau.¹⁶⁵ Discrimination was deemed to exist 'not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries'.¹⁶⁶ In *EC - Tariff Preferences*, arbitrariness was similarly deemed to arise where comparably situated countries were excluded from a preferential tariff scheme.¹⁶⁷ In *US - Shrimp*, elements specific to the application of the measure were also considered to be unjustifiably discriminatory, such as the lack of transparency and predictability in the certification process.¹⁶⁸ Concerning the conditions that must be considered to 'prevail' in the countries under inquiry, only conditions which are relevant for the purpose of establishing

discrimination which was found to be inconsistent with the non-discrimination obligations of the GATT 1994, such as Articles I and III.' *EC- Seals*, WT/DS401/AB/R, para. 5.312. See also on this point. Bartels, L. (2015) *Supra* at 160, 117.

¹⁶² *EC- Seals*, WT/DS401/AB/R, para. 5.316.

¹⁶³ *EC- Seals*, WT/DS401/AB/R, para. 5.321, italic added.

¹⁶⁴ *US - Shrimp*, WT/DS58/AB/R, para. 150.

¹⁶⁵ *US - Shrimp*, WT/DS58/AB/R, para. 177.

¹⁶⁶ *US - Shrimp*, WT/DS58/AB/R, paras. 164-165.

¹⁶⁷ *EC - Tariff - Preferences*, WT/DS246/R, paras. 7.229-7.230.

¹⁶⁸ *US - Shrimp*, WT/DS58/AB/R, para. 180-181.

arbitrary or unjustifiable discrimination in light of the character of the measure and the circumstances of the case are to be considered.¹⁶⁹

In order to find discrimination as 'justifiable', and to exclude any arbitrary character, a panel must focus on the causes behind such discrimination, which must bear a rational connection to an objective falling within one of the subparagraphs.¹⁷⁰ Discrimination is therefore excluded under the Chapeau if, for example, its cause is connected to the protection of the environment. This statement, however, was problematic with respect to measures that pursue other objectives by means of exceptions, which themselves may give rise to detrimental impacts. In *Brazil - Retreaded Tyres*, the presence of an exception to the import ban of remoulded tyres enforced to implement a MERCOSUR tribunal ruling was held not to bear any relation to the objective of environmental protection pursued by the contested measure as, in fact, it went against the policy objective at issue, even if just to a very small extent.¹⁷¹

In *EC - Seals* the problem was somehow resolved by concluding that the analysis should look at whether the discrimination can be *reconciled* with the policy objective pursued.¹⁷² There, the objective pursued by the so-called IC exception to protect the economic and social interests of Inuit communities was *prima facie* accepted albeit not mentioned in Art. XX, but it was then found that the EU did not reconcile such an objective with the main policy objective of the measure, i.e. to address the EU moral concerns regarding seal welfare. The AB suggested that the EU should have taken further action to ensure that hunts by the indigenous communities were also respectful of seal welfare.¹⁷³ Such an approach has been described as taking the form of a 'double necessity' test, where the measure has to be the least discriminatory to pursue the secondary objective, while at the same time should be the least inconsistent with respect to the primary objective.¹⁷⁴

It is still open to discussion how far the AB is willing to go with this approach and in particular if it is willing to accept all policy objectives other than those in the subparagraphs and if it is open to accept as justifiable under other policy objectives discrimination which does not arise from the exceptions contained in the measure at issue. Such approaches may, however, be necessary in order to avoid that the outcome of a combined application of GATT and TBT rules would not result in a divergent outcome because of the different justificatory grounds between the two Agreements. In such a way, the scope of the Chapeau of Art XX would entirely be equated to that of the even-handedness test of Art. 2.1. It shall, however, be kept in mind that the AB does not believe that, in spite of certain similarities, the legal tests under even-handedness and

¹⁶⁹ *EC - Seals*, WT/DS401/AB/R, para. 5.299. See also *US - Shrimp*, WT/DS58/AB/R, para. 120.

¹⁷⁰ *Brazil - Retreaded Tyres*, WT/DS332/AB/R, para. 226.

¹⁷¹ *Brazil - Retreaded Tyres*, WT/DS332/AB/R, para. 228.

¹⁷² *EC - Seals*, WT/DS401/AB/R, para. 5.306.

¹⁷³ *EC - Seals*, WT/DS401/AB/R, para. 5.320.

¹⁷⁴ Bartels, L. (2015) *Supra* at 160, 119-120.

under the Chapeau are the same in their application, to the extent that a finding under either of the tests could be automatically transposed to the other.¹⁷⁵

3.2 Towards a non-discrimination test for standards and its application to VSS

Section 3.1 discussed the test under Art. 2.1 TBT which, from a literal standpoint, appears very close to that in Annex 3.D for standards. Literal interpretative arguments against its transposition seem therefore excluded. If this view is supported, standards should not treat less favourably products which are 'like'. However, *factual* discrimination would be permitted as long as it stems exclusively from a legitimate regulatory distinction provided for in the standard itself. In order to appraise whether a distinction is legitimate, it must be probed whether the objective pursued by the standard is legitimate, and whether the regulatory distinction is even-handed, i.e. it does not reflect discrimination. The requirement of even-handedness mandates that similar risks or concerns are treated similarly and different risks or concerns are treated differently, with a difference in requirements which is calibrated or corresponding to such a difference in risk or concern. As likeness has been discussed in Section 3.1.1, and it does not seem to possess any problematic feature preventing its transposition to Annex 3.D, the remainder of this Section will focus on the concept of treatment no less favourable. It will reflect on the application of the same test to private standards and to VSS in particular, mindful of the specific features of these instruments. It will then offer two possible avenues for review, one more deferential towards private standards, and the other more intrusive and closely based on the test for technical regulations.

A related problem with a test along the lines of Art. 2.1 TBT is that it requires active involvement of the respondent to function given the breach/justification structure imported from the GATT. This is problematic with respect to private bodies, which are not parties to the DSU. Therefore, panels would have to second-guess the objective, for example of an allegedly discriminatory scheme against which a Member has not taken any measure to ensure its compliance with the TBT Code. This Section should not be understood as suggesting that a private standard may, or should, be directly subject to dispute settlement. Instead, it provides legal tools to appraise under which circumstances a VSS could be considered as discriminatory in the meaning of WTO law.

3.2.1 *Legitimate objectives pursued by VSS*

As an argument also generally supporting the transposition of the test under Art. 2.1 TBT to standards, it shall be kept in mind that standardising bodies also include governmental standardising bodies, which can be governmental agencies - as long as they draft by

¹⁷⁵ EC - Seals, WT/DS401/AB/R, para. 5.311-5.312.

consensus non-mandatory provisions for common and repeated use addressing product characteristics and their related process and production methods. As seen in Section 4.2.2 of Chapter 5, governmental bodies are subject to the provisions of the TBT Code by virtue of Art. 4 TBT. As the measures drafted by such bodies would not be subject to a different treatment under the GATT merely because of their voluntary character,¹⁷⁶ it is hard to think of a reason why the non-discrimination test for governmental standards, either at a central or local level, would differ from Art. 2.1 TBT.¹⁷⁷ *De jure* discriminatory governmental standards, similarly as technical regulations, are therefore considered in breach of the TBT Agreement, no further analysis being required. For *de facto* discriminatory governmental standards, a detrimental impact is to be permitted in the presence of a legitimate regulatory objective.

Nevertheless, the legitimate objectives pursued by standards, including public ones, may differ from those pursued by technical regulations. This affects the final outcome of a legal analysis, regardless of whether the standard is drafted by a governmental or a non-governmental body. Recalling that a similar argument was made above for technical regulations,¹⁷⁸ some standards as well have a markedly technical component. Technical regulations are an expression of the Members right to regulate, i.e they are measures through which a legitimate policy objective is pursued by prescribing certain technical features of products. Standards have a strong double technical/regulatory nature as well, even more so than technical regulations, for example in the case of technical standards addressing product interoperability.

These standards pursue objectives that cannot be considered as legitimate for public bodies to regulate mandatorily under Articles 2.1 and 2.2 TBT. The rationale behind technical standard-setting is grounded on efficiency-related arguments such as interoperability between products, increased efficiency and increased profitability. These can hardly be considered as legitimate objectives that a WTO Member can pursue by means of its technical regulations. As held by the AB, the presence of an objective in other provisions of the WTO Agreements may guide panels in considering such an objective as legitimate.¹⁷⁹ The TBT Agreement indeed addresses the concept of economic efficiency in its preamble, but with limited reference to international standards and conformity assessment procedures. If Members want to pursue efficiency-related objectives, international standards shall be used. Deviations can take place but only under considerations *other* than efficiency, such as a different level of protection,

¹⁷⁶ As long as they generate an advantage for the entity with which it is in compliance. It is here assumed that at least VSS confer an advantage upon compliance.

¹⁷⁷ Flexibility in ensuring that the burden of the obligation imposed on Members is not unreasonable is already provided by the lower level of state responsibility for local governmental bodies and non-governmental bodies.

¹⁷⁸ See Section 2.1.1.

¹⁷⁹ *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, para. 372.

fundamentally different conditions, or a different objective.¹⁸⁰ It follows that Members cannot impose mandatory technical regulations which are not based on international standards with the only purpose of increasing efficiency, unless such technical regulations can be justified under another policy objective more easily reconcilable with the TBT Agreement, for example the protection of consumers, or health and safety grounds. Efficiencies-related objectives are arguably more legitimately pursued by means of voluntary measures, possibly drafted and enforced by private bodies at the transnational stage, and permitting at least an extent of harmonisation.

The objectives which can be considered as legitimate should therefore differ according to the mandatory or voluntary character of a measure, and whether it is emanation of public or private authority. Panels should therefore accept as legitimate economic efficiency-related objectives such as interoperability between products, increased efficiency and increased profitability, both for governmental and especially non-governmental standards since the pursuit of efficiency is inherent in the activities of profit-driven private economic operators. A reference to economic efficiency can be found in the preambles of both the GATT and the TBT, providing therefore a possible textual basis on which to accept such objectives as legitimate.

Certain non-governmental standardising bodies such as VSS may legitimately pursue other objectives not just limited to the efficiency-related objectives discussed above but are, instead, aligned to those normally pursued by governments. Concerning the policy objectives that can be considered as legitimate, under Art. 2.1 and 2.2 of the TBT Agreement, a certain deference has been employed in the acceptance of several different objectives. Such a deference can arguably be extended to private parties in the exercise of their autonomy under an Agreement which recognises the contribution of private actors to the pursuit of efficiency and regulatory goals. Also an argument of private autonomy would permit private actors to give their contribution to the public interest.

Measures aiming at protecting the rights or improving the living conditions of workers located in foreign jurisdictions can be construed or represented as pursuing objectives linked to the public morals of the citizens in the WTO Member concerned, i.e. where the effects of the standards are felt, thereby connecting the objective pursued to a policy objective expressly permitted by the WTO Agreements. However, the evidentiary threshold required to succeed is rather high. It must be noted that the test for public morals is relatively strict, at least under Art. XX(a) GATT,¹⁸¹ although it allows for public

¹⁸⁰ This also makes perfect economic sense, since increasingly high global efficiency gains generated by the single regulatory regime resulting from an international standard cannot be achieved by multiple, diverging technical regulations each pursuing its own understanding of efficiency.

¹⁸¹ It is debatable whether the mere presence of a concern among consumers, which can be assessed by means of public opinion polls, would suffice for the determination of a concern as of a 'moral' nature. Indeed, the risk would be to confuse certain consumer preferences with actual moral concerns in a given society. In order to assess whether a moral

moral concerns to vary from Member to Member.¹⁸² In *US - Tuna II*, the US, albeit in the presence of a strong case proving that consumers bear moral concerns towards fishing practices harmful to dolphins,¹⁸³ it carefully avoided construing the policy objective pursued by the measure at issue as referring to public morals. Instead, the objective pursued was phrased so as to avoid a Member's market being used to encourage economic activities that are opposed by the citizens of the regulating state. The panel accepted it as legitimate without much discussion.¹⁸⁴ In a similar manner, measures with a conservationist or other environmental purpose such as limiting polluting emissions can be easily brought under the legitimate objective of environmental protection.¹⁸⁵

Another approach can however be employed, which is to ignore the objective pursued by the scheme (i.e. environmental protection, or ensuring acceptable labour practices), and consider the objective as the provision of information to consumers concerning certain social or environmental features of the product at issue, whenever the standard takes the form of a labelling scheme. The prevention of deceptive practices is an objective explicitly mentioned under Art. 2.2 TBT and thus arguably permitted under Annex 3.D as well. Categorising the policy objective of VSS as providing information to consumers is none the less legitimate but it may affect the necessity analysis, as the risk of non-fulfilment may be considered as less severe in the weighting and balancing assessment, if performed in the same manner as under Art. 2.2 TBT.

Other objectives pursued by private standards may be more complex to situate within the WTO approach to 'legitimate objectives'. Certain standards, including VSS, pursue - or can be constructed as pursuing - product quality and the identification of products with special features with the objective to differentiate them from 'regular' products, which can still be sold as such on the market. This holds true even if the standard pursues an additional legitimate regulatory objective, such as environmental protection. Quality standards, as seen in Section 2.3.2 of Chapter 3, can be legitimately set by private actors at a very stringent level, resulting therefore in a limited number of products which are capable of qualifying. As discussed in Section 2.4.2.2 of Chapter 4, EU competition law

concern is present in a given society, higher threshold evidence has been given a certain weight such as previous legislation, administrative and constitutional practices. See Panel Report in *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R and WT/DS401/R, adopted 25 November 2013, para. 7.404.

¹⁸² Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 7 April 2005, para. 299; Panel Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, adopted 12 August 2009, para. 7.763.

¹⁸³ As the preference by American consumers for 'dolphin-friendly' tuna was so strong that all major American retailers had decided to no longer sell tuna caught by fishing methods which 'set on dolphins'. *US - Tuna*, WT/DS381/R, para. 7.352.

¹⁸⁴ '...the Panel considers that regulating the information that appears on a label to ensure that consumers may safely exercise their preference is a legitimate mechanism to ensure this purpose.' *US - Tuna*, WT/DS381/R, para. 7.440.

¹⁸⁵ It should not be forgotten that, under the TBT Agreement, pursuing the policy objective of environmental protection does not appear to be subordinated to the additional requirement of Art. XX(g) GATT, namely that the measure is made effective in conjunction with restrictions on domestic production or consumption.

does not perceive this to be a problem; quite the opposite, it considers quality standards to generate positive efficiencies for consumers which are capable of more than offsetting a host of restrictions to competition. In the end, as will be seen, the necessity obligation in Annex 3.E appears to forgo a correlation between stringency and the objective pursued, thereby allowing a margin for a deferential approach towards quality standards. It can therefore be held that product quality should be acknowledged as a legitimate objective pursued by private parties, which would then allow for a deferential approach to restrictions. Indeed, the pursuit of product quality itself could be brought back under the objective of increasing profitability, another objective intimately connected with typical private party goals and private autonomy.

This Section has shown three types of objectives which can be legitimately pursued by private standards: efficiency-based goals; policy goals such as public morals, environmental protection and consumer protection/information; and product quality goals. Efficiency and quality goals as they are more closely connected to private autonomy should lead to a more deferential approach in the discrimination analysis, in particular in its even-handedness step. Public policy goals may instead either be tackled with the same deference, or under a closer scrutiny.

3.2.2 VSS and treatment no less favourable

Failing to qualify is part of the intended functioning of many VSS and quality standards in general. These standards inevitably modify the conditions of competition in a manner which results in treatment no less favourable for the products which do not qualify, whose intensity varies according to the consequences of non-compliance.¹⁸⁶ Other types of standards, such as interoperability standards and other technical standards, have a specific harmonisation rationale in view to increase efficiency.¹⁸⁷ The larger the group of producers which employ the standards, the higher the efficiency generated. Such a harmonising aim cannot be found for certain quality standards, as complete harmonisation would hamper the very functioning of a standard whose goal is product differentiation.¹⁸⁸ For these measures, the application of the same test as in Art. 2.1 TBT -

¹⁸⁶ Lopez-Hurtado, C. (2002) Social labelling and WTO law. *Journal of International Economic Law* 5(3), 719-746; 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), 855-880; Green, A. (2005) Climate change, regulatory policy and the WTO. *Journal of International Economic Law* 8(1), 143-189; Cheyne, I. (2009) Proportionality, proximity and environmental labelling in WTO law. *Journal of International Economic Law* 12(4), 927-952; Szwebo P. (2013) Water footprint and the law of WTO. *Journal of World Trade* 47(6), 1280; Mavroidis, P.C., Wolfe, R. (2016) *Supra* at 59, 2.

¹⁸⁷ Dragusanu, R., Giovannucci, D., Nunn, N. (2014) The economics of Fair Trade, *Journal of Economic Perspectives* 28(3), 226-227.

¹⁸⁸ Indeed, this does not hold true for all VSS. As seen in Chapter 2, the reasons for uptake of certain multi-stakeholder schemes do not include exclusively expected profitability, but encompass moral considerations about the inherent value to follow stricter rules. Empirical evidence shows that in certain markets the VSS share of the market for a product is larger than the market share of non-certified products. This seems to suggest that broad uptake, for certain schemes, does not diminish the perceived advantage resulting from certification. The actual functioning of some schemes

which equates detrimental conditions on the group of imported product with a *prima facie* breach which can be saved by demonstrating that it all stems from an even-handed regulatory distinction - may even compromise their purpose. The crucial element of the analysis becomes how to assess whether the conditions of competition are modified to the detriment of imported products.

With respect to a formally voluntary measure that was nevertheless considered as a technical regulation, the AB in *US - Tuna II* criticised the panel remark that all detrimental impacts arising from the contested measure were, in fact, due to the behaviour of private economic operators, which were not prevented from complying with the measure by simply adapting their fishing techniques and production methods.¹⁸⁹ The AB noted that the measure at issue nevertheless modified the conditions of competition to the detriment of imported products. Although possessing particular features, the US labelling scheme for dolphin-safe tuna could, if to an extent only, be construed as a quality standard, in spite of being found - for other reasons - to be a technical regulation. Granted, tuna which was not dolphin-safe certified, i.e. 'regular' tuna, was hard to find on the US market, given the very high value attached to the certification by US consumers.¹⁹⁰

Also for quality standards it seems thus that the old adage applies that WTO rules protect competitive opportunities and not trade flows,¹⁹¹ irrespective of the voluntary or mandatory nature of the measure, and regardless of whether the inherent functioning of the measure is to separate products according to their compliance with certain features. If competition is distorted to the detriment of imports, a finding of a breach is likely. If a quality standard modifies the conditions of competition to the detriment of the *group* of imported products, a finding of breach is likely to occur. Some scope for measures which *do not* negatively affect the *whole group* of imports worse than like domestic products appears to be ensured. Less favourable treatment however arises if the cost of compliance is higher for the group of imported products as a whole, which seems a natural outcome for many VSS under review, in spite of whether their objective is framed as a policy objective or a quality objective.

The test for private standards requires further reflections about the legitimacy and actual feasibility of a WTO inquiry into *de facto* discrimination committed by non-governmental bodies. It is assessed on the basis of the effects of the standard only, without taking into account possible discriminatory or exclusionary intent by the standardising body under a test comparable to the 'so as to afford protection' standard. An effect-only test as applied under Art. 2.1 TBT Agreement has the outcome of turning many VSS into *prima*

appears thus to go against the concept of entry-dissipating rent as discussed by Dragusanu, R., Giovannucci, D., Nunn, N. (2014) *Supra* at 187.

¹⁸⁹ *US - Tuna II*, WT/DS381/AB/R, para. 221.

¹⁹⁰ *US - Tuna*, WT/DS381/R, para. 7.352.

¹⁹¹ Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas. Article 21.5 DSU Recourse (Ecuador II)*, WT/DS27/AB/RW2/ECU, adopted 26 November 2008, para. 469.

facie de facto breaches of the non-discrimination principle. For *de jure* discrimination, the problem is less evident as standards generally and VSS specifically, infrequently distinguish on the basis of origin. Whenever they do so, it is to give due account to country specificities, and therefore cannot be considered as discriminatory because of a predictable lack of detrimental impact.

A transposition of the 'so as to afford protection' test would permit the identification of a reasonable and more readily enforceable obligation for WTO Members, which would only have to remedy instances of private regulatory protectionism, and at the same time would protect private authority from the influence of legal principles whose ultimate goal is 'just' the preservation of multilaterally agreed upon trade concessions. The test would also permit the appraisal of the even-handedness only in the event of a protectionist application or design of a standard, thereby ensuring much more private regulatory space than an effect test. It is however unlikely that such a test would be employed in the lack of a textual basis, in the presence of a similarly worded obligation which has been interpreted otherwise, and given its current operationalisation by means of the group comparison.

3.2.3 *Even-handedness inquiry for VSS*

As for technical regulations, the assessment of the legitimacy of a standard's regulatory distinction(s), and in particular its even-handed design and application, becomes crucial for a finding of infringement as it can 'heal' all the detrimental impact it generates. This is all the more important for the almost structural detrimental impact that VSS generate. As for technical regulations, the bulk of the substantive analysis for the even-handedness test for standards consists of a potentially intrusive quest into the appropriateness of the regulatory distinction at issue. In general, to escape a finding of a lack of even-handed design, a standard's requirements must be designed with attention to possible local specificities, in order to ensure that similar situations are dealt with by requirements with a stringency calibrated to the risk at hand. As the WTO does not question the level of protection chosen in State measures, it is all the more expected that the same would occur for private measures. However, at least a connection between the level of the risk or the level of protection and the stringency of the requirements must exist, which must be reflected also in their effectiveness. Very stringent requirements must be appropriate for the objective pursued, and must contribute at least partially to it. Conversely, requirements that apply in several countries irrespective of local differences, and that may even be simply inapplicable in a given context, are more prone to result in arbitrary discrimination and therefore lacking of even-handedness. The same would occur for requirements which are stringent but ineffective, or lacking a rational connection with the objective of the scheme.

As hinted at in Section 3.2.1, the objective of a standard may be used to determine a

different approach to the assessment of its WTO-compliance which is operationalised in the even-handedness inquiry. Standards addressing efficiency-based objectives such as products interoperability, profitability or differentiation, and product quality objectives could be addressed more leniently. It is easier to prove at least an extent of contribution to those objectives, possibly even without the employment of any scientific evidence. If two products are different, the objective of product differentiation has been achieved. If two different products can now operate together, the objective of product interoperability has been achieved. If several more stringent requirements are complied with, higher product quality can be expected. This hands-off approach could apply to standards reflecting private actors' economic goals. It would also ensure deference insofar as the requirements of the standard can very easily meet the even-handedness test identified above. Conversely, if a standard is considered as pursuing policy goals, the appraisal could be either more deferential and highlighting the gap-filling role of VSS, or less deferential and requiring an extent of scientific evidence.

A more deferential approach connects VSS to international instruments. WTO Members have the right to unilaterally define their policies, which can also include social and environmental policies provided that they comply with WTO provisions¹⁹² and, particularly, if they are not a disguise for protectionism.¹⁹³ The framework of international agreements entered into by WTO Membership is crucial in providing justification for unilateral measures, especially in the social and environmental domain where extraterritorial effects are frequent. The powerful statement that WTO law is not in 'clinical isolation' with the rest of international law,¹⁹⁴ and the reference to 'sustainable development' in the Preamble of the WTO Agreements, have permitted the AB to take an evolutionary interpretative approach to accommodate certain policy goals, in particular environmental protection.¹⁹⁵ The Chapeau and its requirement of 'unjustifiable discrimination' pose limits to unilateral actions, and would not be triggered in case the measure is in line with a multilaterally negotiated agreement on the issue in question. Trans-boundary issues should be dealt with as much as possible via cooperation and consensus.¹⁹⁶ The AB therefore uses international law as a baseline to determine whether, under the circumstances of a specific case, discrimination is justifiable.¹⁹⁷ In this way, the AB aims at striking a balance between WTO Membership's international obligations and

¹⁹² *US - Shrimp*, WT/DS58/AB/R, para. 121. See also Horn, H., Mavroidis, C. (2008) The permissible reach of national environmental policies. *Journal of World Trade* 42(6), 1116.

¹⁹³ Howse, R., Trebilcock, M.J. (1996) The fair trade-free trade debate: Trade, labour, and the environment. *International Review of Law and Economics* 16(1), 61-79.

¹⁹⁴ *US - Gasoline*, WT/DS02/AB/R, p. 17.

¹⁹⁵ *US - Shrimp*, WT/DS58/AB/R, paras. 128-132.

¹⁹⁶ *US - Shrimp*, WT/DS58/AB/R, paras. 168-169.

¹⁹⁷ Howse, R. (2002) The Appellate Body rulings in the *Shrimp/Turtle* case: A new legal baseline for the trade and environment debate. *Columbia Journal of Environmental Law* 27(2), 506.

'a consistent and harmonious approach to the interpretation of WTO law among all WTO members'.¹⁹⁸

Multilateral trade agreements play a crucial role in determining the consistency with WTO law of environmental measures under Art. XX.¹⁹⁹ Trade measures authorised by customary international law or under an agreement concerning human rights are also permitted under Art. XX.²⁰⁰ Trade sanctions approved by the UN Security Council can be complied with, without violating WTO law.²⁰¹ Indeed some human rights are contested, both in their existence and identification of a proper standard.²⁰² Specific regimes like the labour regime under the ILO are however expressly recognised as relevant by the WTO itself,²⁰³ and States are arguably permitted to lawfully take trade measures affecting *producers* in the breach of international labour obligations.²⁰⁴ It is therefore submitted that the more a VSS is aligned with the text of an international instrument, or constitutes a form of implementation thereof, the less problematic its negative trade effects should be. It should therefore be considered as even-handed, so that its detrimental impact would be excused, also in this case without an in-depth appraisal of its substance.

Setting standards at a level mandated by international agreements, or referring directly to it, would not result in problems of WTO-consistency regardless of the agreement's qualification as international standard.²⁰⁵ Social VSS which closely refer to ILO Conventions should therefore raise the least amount of concern. In the end, they apply to producers, thereby minimising the risk of arbitrary discrimination. Nuances are nonetheless possible, and may even be desirable, for environmental VSS. They regulate a more diverse set of issues which may be difficult to connect to a multilateral agreement or the level of protection it pursues. For example, MSC standards bear a close connection to principles of the UN-FAO Code of Conduct, which may be characterised as an international standard for sustainable fishery exploitation. MSC standards should thus be considered as even-handed. On the opposite side of the spectrum, VSS in the area of biofuel sustainability address the controversial issue of indirect land-use change (ILUC),

¹⁹⁸ Appellate Body Report, *European Communities - Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, para. 845.

¹⁹⁹ Biermann, F. (2001) The rising tide of green unilateralism in World Trade law. Options for reconciling the emerging North-South conflict. *Journal of World Trade* 35(3), 425; Condon, B.J. (2009) Climate change and unresolved issues in WTO law. *Journal of International Economic Law* 12(4), 926.

²⁰⁰ Conversely, simple counter measures as reaction of another party's violation of its obligations are not possible. Bartels, L. (2002) *Supra* at 46, 393-394. See also Marceau, G. (2002) WTO dispute settlement and human rights. *European Journal of International Law* 13(4), 753-814.

²⁰¹ Because the prevalence of the UN Charter over other treaties. See Art. 103 UN Charter, and Articles XXI(c) of the GATT.

²⁰² Andersen, H. (2015) Protection of non-trade values in WTO Appellate Body jurisprudence: Exceptions, economic arguments, and eluding questions. *Journal of International Economic Law* 18(2), 391.

²⁰³ Singapore WTO Ministerial 1996: Ministerial Declaration. WT/MIN(96)/DEC, 18 December 1996.

²⁰⁴ Baradaran, S., Barclay, S. (2011) Fair trade and child labour *Columbia Human Rights Law Review* 43(1), 21. See also Andersen, H. (2015) *Supra* at 202.

²⁰⁵ Marceau, G. (2009) 'Trade and labour'. In Bethlehem, D., McRae, D., Neufeld, R., Van Damme, I. (Eds.) *The Oxford Handbook of international trade law*. Oxford: Oxford University Press, 543.

which is not just a contested environmental issue, but also its calculation and implementation is based on controversial methodologies.²⁰⁶

This approach would avoid looking intrusively into the regulatory distinction to assess its even-handedness. Conversely, a less deferential approach to the even-handedness inquiry is also possible, which requires a closer scrutiny of the substance of the scheme and follows more closely the analytical approach for technical regulations. VSS certifying producers rather than products, and therefore requiring certification over a number of production processes which do not bear any connection with the final product such as system standards, are theoretically more exposed to a challenge of discrimination.²⁰⁷ Certain demanding and costly management system requirements are particularly problematic, as they may be considered as too stringent for the objective pursued, in particular if the scheme's objective is to inform consumers and it intends to communicate only a more limited amount of information to consumers about the product at issue.²⁰⁸

Setting a higher bar requires, in principle, a rational connection between the level of threat and the objective pursued. International agreements and, of course, scientific studies, are evidentiary grounds on which the relation between stringency and risk is explained.²⁰⁹ The lack of any available international instrument or scientific evidence which at least partially supports the stringency of the requirements, would make it difficult to hold that a standard is even-handed. One may argue that private parties are not bound by the same stringent obligation as WTO Members, and a deferential approach to the scientific justification of their measures under, but not different from that employed for technical regulations, would be appropriate to avoid undue hindrance to private autonomy.²¹⁰

The problematic relation between the handling of scientific evidence and stringency of the regulatory requirements in the calibration assessment is not improved for certain VSS whose requirements are mostly descriptive and do not possess a strictly technical character. As a matter of fact, also for standards addressing animal welfare and organic agriculture, scientific evidence is a relevant tool to assess whether a requirement can ensure, if to an extent only, that living conditions of animals are appropriate and certain requirements in agricultural production effectively minimise the use and presence of

²⁰⁶ See generally, for issue of WTO compliance, Lydgate, E.B. (2013) The EU, the WTO and indirect land-use change. *Journal of World Trade* 47(1), 159-186.

²⁰⁷ Provided that the presence of a label brings them under the scope of the TBT Agreement.

²⁰⁸ This risk would be exacerbated by the presence of detrimental effects in third countries away from the place of consumption, of which the consumer would not have knowledge and would find it harder to incorporate in his purchase decision. Cheyne, I. (2009) *Supra* at 186, 941.

²⁰⁹ *US - Shrimp*, WT/DS58/AB/R, 132; *US - Tuna*, WT/DS381/R, para. 7.518-7.531.

²¹⁰ Indeed, under the TBT Agreement, the standard of review employed does not correspond to a *de novo* review. WTO panels are therefore expected to exercise a certain deference towards the methodology chosen and, in general, towards the employment of scientific evidence in the support of the regulatory distinctions. See generally, Du, M.M. (2013) 'Standard of review in TBT cases'. In Epps, T., Trebilcock, M.J. (Eds.) *Supra* at 69, 164-203.

pesticides and other chemicals in the final products. The situation differs for standards addressing CO₂ emissions, where science plays a major role. There are several different methodologies for environmental life cycle assessments and the appraisal of CO₂ emissions, the choice of which can even lead to diverging outcomes.²¹¹ Scientific evidence has therefore a profound influence over whether products manage to qualify under the scheme at issue, and whether requirements can be considered as even-handed.

Ultimately, for all VSS, the assessment of even-handedness is highly dependent on the presence of evidence that could challenge the calibration of the regulatory distinction, such as the existence of a comparable risk or threat among those falling under the objective pursued which is not regulated with the same stringency and which could have contributed to a different outcome *vis-à-vis* discrimination, or unnecessarily strict and burdensome requirements. The more precise the requirements are under the scheme, the higher the chances that some may fail the calibration inquiry. On the other hand, general requirements which allow a margin of manoeuvre and a certain discretion in their implementation are less problematic, as they are less likely to generate a detrimental impact.

In case of the discriminatory *application* of a standard, a finding of a lack of even-handedness is more straightforward as it is less likely to require the appraisal of any scientific evidence. Discriminatory access to a standard, such as an unjustifiable denial to apply to a scheme, or conditions which are imposed on certain products or producers in order to prevent them from acceding to the VSS, are arguably considered as forms of discriminatory application of a standards, always in breach of Annex 3.D of the TBT Code of Good Practice.

4 Annex 3.E of the TBT Code of Good Practice - Necessity

Annex 3.E of the TBT Code of Good Practice contains a necessity obligation for standards; it provides - exactly like that for technical regulations under Art. 2.2 TBT - that standards must not be prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. However, the mirror obligation for technical regulations continues by providing that 'for this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective'. It seems that standards do not have to fulfil the requirements of i) pursuing an objective which is legitimate, and ii) being the least trade-restrictive alternative for the pursuit of that

²¹¹ Franklin Associates (2004). An analysis of the methods used to address the carbon cycle in wood and paper products. National Council for Air and Stream Improvement. cit. in Sathre, R., O'Connor, J. (2010) A synthesis of research on wood products and greenhouse gas impact. 2nd Edition. Vancouver, B.C. FP Innovations (Technical report TR-19R).

means. Such difference in scope is reasonable if account is given to the specific purpose a major group of standards covered by the Agreement fulfil which, as seen, is interoperability between products, increased efficiency and increased profitability. It was argued in Section 3.2.1 that such purposes cannot be considered as legitimate policy objectives in the meaning of Articles 2.1 and 2.2 TBT. The lack of a reference to a legitimate objective in Annex 3.E can be seen as a literal basis supporting the argument above that the list of legitimate objectives for standards and in particular private standards must differ from, and be broader than, those at applicable to technical regulations.

Furthermore, and concerning least-trade restrictiveness, Section 3.2.2 has shown that certain standards are legitimately set at a more stringent level than other alternatives in order to fulfil their purpose. For example, labelling schemes such as VSS, and all quality standards, are more stringent than the rules that would otherwise be applicable because their purpose is to identify products which are of a certain high quality. It seems therefore appropriate for the necessity obligation under Annex 3.E to be more relaxed than that under Art. 2.2 TBT, as a literal approach to interpretation suggests. For governmental standards and technical regulations, a different test between Annex 3.E and Art. 2.2 is a remarkable difference with respect to the GATT, where voluntary measures conferring an advantage are not treated more deferentially because of their non-binding nature.

This Section tries to identify how a necessity obligation for standards could be structured. It builds on the guidance offered by Art. 2.2 TBT, assessing the necessity of the trade-restrictiveness of a technical regulation, and the necessity test contained in certain subparagraphs of Art. XX GATT, which assesses the necessity of the measure as a whole.

4.1 Guidance offered by Art. 2.2 TBT

Art. 2.2 TBT provides that 'Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create'. At first sight, a literal approach to Art. 2.2 of the TBT Agreement, and in particular the requirement to take into account the risks non-fulfilment would create, seems to provide a strong textual basis for a *stricto sensu* proportionality appraisal which weighs trade-restrictiveness of the measure, importance of the policy objective, and risk generated by non-compliance. The extent to which a *stricto sensu* proportionality has been made part of Art. 2.2 TBT by means of the AB's interpretation is, however, much less evident. Importantly, and differently from the necessity test in Art. XX GATT, Art. 2.2 TBT can be triggered independently and in the lack of any detrimental impact. Further, necessity in Art. XX refers to the necessity of the *measure as a whole*,

whereas the test at issue under Art. 2.2 SPS assesses the necessity of the *trade restrictiveness* of the measure.²¹²

The test for Art. 2.2 TBT was elaborated by the AB in *US - Tuna II*. As a preliminary point, a 'legitimate objective' must be ascertained; as discussed in Section 3.1.2.3, WTO adjudicatory bodies are bound to accept policy objectives not mentioned in the open list of Art. 2.2, if that objective can be found in, or is connected to, other provisions of the WTO Agreements.²¹³ Panels are to determine the objective of the contested measure without deferring to the characterisation offered by the respondent.²¹⁴ It is uncontested that, as under the GATT, Members can achieve their legitimate objectives at a level they consider appropriate.²¹⁵ Under Art. 2.2 TBT, a Member also has the undisputed right to adjust the level of protection in case of variable risks associated with non-fulfilment.²¹⁶

Four steps are subsequently required from panels to be applied, the order of which may vary according to the circumstances of the case at issue.²¹⁷ As a first step, a panel must ascertain the degree to which, if at all, the contested technical regulation contributes to the legitimate objective pursued - which is revealed, either implicitly or explicitly, by the design, the structure, the operation and the application of the measure.²¹⁸ By no means does the contribution have to correspond to a complete effectiveness of the technical regulation.²¹⁹ As a second step, the trade restrictiveness of the technical regulation must be identified. The third step requires the identification of the nature of the risk at issue and, as a related fourth step, the gravity of the consequences of non-fulfilment of the legitimate objective.²²⁰ None of these factors needs to be demonstrated quantitatively by complainants in order to make a *prima facie* case nor do panels have to go beyond a qualitative determination that a measure, for example, produces certain limiting effects on competitive opportunities.²²¹

The AB defined the necessity analysis under Art. 2.2 TBT as an inquiry into the trade-restrictiveness of the measure at issue. Trade-restrictiveness is not *per se* prohibited. The appraisal involves 'a relational analysis of the trade-restrictiveness of the technical

²¹² *US - Gasoline*, WT/DS02/AB/R, p. 16, most recently reaffirmed by the AB in *EC- Seals*, WT/DS401/AB/R, para. 5.184.

²¹³ *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, para. 372.

²¹⁴ *US - Tuna II*, WT/DS381/AB/R, para. 314.

²¹⁵ *US - Tuna II*, WT/DS381/AB/R, para. 316, and sixth recital of the Preamble to the TBT Agreement.

²¹⁶ Lowe, E.R. (2014) Technical regulations to prevent deceptive practices: Can WTO Members protect consumers from [un] Fair-Trade coffee and [less-than] free-range chicken? *Journal of World Trade* 48(3), 615 referring to the *US - Tuna II* case. Failing to adjust the level of protection in relation to a different level of risk may result in a breach of Art. 2.2, and most likely also of Art. 2.1 TBT in case the technical regulation generates detrimental impact for the group of imported domestic products, as the requirements would not be calibrated.

²¹⁷ *US - COOL 21.5 (Canada and Mexico) (Canada and Mexico)*, WT/DS384/AB/RW and WT/DS386/AB/RW, para. 5.205.

²¹⁸ *US - Tuna II*, WT/DS381/AB/R, para. 317.

²¹⁹ *US - Tuna II*, WT/DS381/AB/R, para. 311.

²²⁰ *US - Tuna II*, WT/DS381/AB/R, para. 322.

²²¹ *US - COOL 21.5 (Canada and Mexico) (Canada and Mexico)* WT/DS384/AB/RW and WT/DS386/AB/RW, para. 5.208-5.209.

regulation, the degree of contribution that it makes to the achievement of a legitimate objective, and the risks non-fulfilment would create'.²²² The approach requires a 'holistic weighing and balancing' of all factors.²²³ According to the AB, and strongly reminiscent of the necessity test under Art. XX GATT,²²⁴ the analysis allows in most cases²²⁵ for the 'comparison of the trade-restrictiveness and the degree of achievement of the measure, with that of possible alternative measures that may be reasonably available *and* less trade restrictive than the challenged measure, taking account of the risks non-fulfilment would create'.²²⁶ The AB stressed the comparative character of such an assessment, which requires the establishment of the existence of unnecessary obstacles by means of a comparative appraisal.²²⁷

The alternative measure has to make a degree of contribution to the legitimate objective which does not need to be *identical*, but rather *equivalent* to the contested technical regulation. Such a margin of appreciation may vary from case to case, informed, for example, by the risk non-fulfilment may create.²²⁸ The AB acknowledged that the text of Art. 2.2 specifically mandates panels to take into account the relational analysis the risks non-fulfilment would create; for this purpose, consideration must be given to all available evidence. Quantitative methods must be employed if possible in the assessment of such risk. As not all types of risk can be quantified exactly under common risk assessment methodologies, in some cases a conjunctive analysis is required, which assesses risk in qualitative terms.²²⁹ In assessing the risk generated by non-fulfilment, a panel is however not required to take into account the relative importance of interests or values protected by a measure.²³⁰ In theory, thus, an alternative measure achieving a lower degree of protection, but which applies to a broader range of products, may be found to constitute a suitable less trade-restrictive alternative.²³¹

4.2 Necessity in the subparagraphs of Art. XX GATT

Under the GATT, the necessity test assessing the necessity of the measure is triggered only after a finding of a substantive breach and, provided that an exception is invoked, after having ascertained that the contested measure falls within the scope of application of one of the subparagraphs of Art. XX. The second step of the subparagraph analysis

²²² *US - Tuna II*, WT/DS381/AB/R, para. 318.

²²³ *US - COOL 21.5 (Canada and Mexico) (Canada and Mexico)*, WT/DS384/AB/RW and WT/DS386/AB/RW, para. 5.207.

²²⁴ As elaborated under Art. XX(d) in *Korea - Beef*, WT/DS161/AB/R, para. 166.

²²⁵ As suggested by the Appellate Body, two situations in which no alternative needs to be suggested arise whenever a measure is not trade restrictive at all, and whenever a trade-restrictive measure makes no contribution at all. *US - Tuna II*, WT/DS381/AB/R, fn 647 to para. 322.

²²⁶ *US - Tuna II*, WT/DS381/AB/R, para. 320.

²²⁷ *US - COOL 21.5 (Canada and Mexico)*, WT/DS384/AB/RW and WT/DS386/AB/RW, para. 5.212.

²²⁸ *US - COOL 21.5 (Canada and Mexico)*, WT/DS384/AB/RW and WT/DS386/AB/RW, paras. 5.215 and 5.254.

²²⁹ *US - COOL 21.5 (Canada and Mexico)*, WT/DS384/AB/RW and WT/DS386/AB/RW, para. 5.218.

²³⁰ *US - COOL 21.5 (Canada and Mexico)*, WT/DS384/AB/RW and WT/DS386/AB/RW, para. 5.279.

²³¹ *US - COOL 21.5 (Canada and Mexico)*, WT/DS384/AB/RW and WT/DS386/AB/RW, para. 5.270.

then requires panels to inquire into the necessity of the measure at issue for the pursuit of the objectives under subparagraphs (a), (b) and (d). Subparagraph (g), conversely, requires the measure merely to *relate* to the protection of the environment. This Section will focus only on the former.

The assessment of necessity in the subparagraphs of Art. XX has long been associated with a debate over the presence and the features of the principle of proportionality in WTO law. Proportionality can be divided into three elements: suitability, necessity, and *stricto sensu* proportionality. Suitability looks at whether the measure is appropriate for the achievement of the objective pursued - and such an appraisal is performed in the first step of the subparagraphs assessment. Necessity is linked to the presence of reasonably available alternative measures which can achieve the same objective while being less trade-restrictive; and *stricto sensu* proportionality, which consists of an analysis of whether the (trade) restrictive effects of a measure are disproportionate in relation to the (other) policy objective pursued.²³² The necessity appraisal performed by panels under subparagraphs (a), (b) and (d) consists of the first two elements mentioned above - i.e. suitability and necessity - with the third element of *stricto sensu* proportionality somehow read into necessity, but by no means consisting of a fully-fledged balancing between constitutional values.²³³

Early case-law on Art. XX(b) elaborated a two-step analysis of whether the measure is designed for the stated purpose (suitability), and whether the measure is necessary for fulfilling said purpose (necessity).²³⁴ Whereas the first element is rather uncontroversial, the second is more complex, and has witnessed a certain evolution in case law. In *Korea - Beef*, it was held that the concept of necessity falls on a continuum stretching from 'indispensable/of absolute necessity' to 'making a contribution to'. Proceeding with its analysis, the AB held that the assessment 'involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the [...] measure to [the policy objective at issue], the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports'.²³⁵ Such weighing and balancing is however not performed independently, but is 'comprehended in the determination of whether a[n] alternative measure which [...] "could reasonably be expected to employ" is available, or

²³² Jans, J. (2000) Proportionality revisited. *Legal Issues of Economic Integration* 27(3), 240-241. See also Trimadis, T. (2006) *The general principles of EU law*. Oxford: Oxford University Press.

²³³ Neumann, J., Türk, E. (2003) Necessity revisited: Proportionality the World Trade Organisation law after *Korea - Beef*, *EC - Asbestos* and *EC - Sardines*. *Journal of World Trade* 37(1), 199-223. Van den Bossche, P. (2008) Looking for proportionality in WTO law. *Legal Issues of Economic Integration* 35(3), 289; Fontanelli, F. (2012) Necessity killed the GATT - Art. XX GATT and the misleading rhetoric about 'weighing and balancing'. *European Journal of Legal Studies* 5(2), 36-56.

²³⁴ Panel Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 29 January 1996, para. 6.20. The same two-step appraisal was confirmed by in *Korea - Beef*, WT/DS161/AB/R, para. 157.

²³⁵ *Korea - Beef*, WT/DS161/AB/R, paras 161-162 and 164. See also *Brazil - Retreaded Tyres*, WT/DS332/AB/R, para. 178.

whether a less WTO-inconsistent measure is “reasonably available”.²³⁶ Such a less trade restrictive measure must however permit the regulating State to achieve the same level of protection chosen.²³⁷

Therefore as under Art. 2.2 TBT, a less trade restrictive measure must be identified and used as a comparator in the assessment of necessity. Such measure must be ‘reasonably available’, which entails a reasonable burden on the regulating State for its implementation.²³⁸ To support the absence of a *sensu strictu* proportionality appraisal in the GATT, the AB has stressed that setting a level of protection which is deemed appropriate is an undisputed right of any WTO Member and, as such, is not open to challenge.²³⁹ The objective pursued does play a role in the analysis, as it might influence the acceptance of a measure as necessary, since ‘the more vital or important the common interests or values pursued, the easier it would be to accept as “necessary” measures designed to achieve those ends.’²⁴⁰ Interests such as public morals²⁴¹ and public health²⁴² have been explicitly considered as ‘very important’ by WTO adjudicatory bodies.

Complainants can thus only argue that the measure is not necessary to achieve the chosen level of protection, which results in a more deferential probe into the existence of a less trade restrictive alternative. As a partial qualifier of the WTO ‘mantra’ that the chosen level of protection cannot be challenged, the AB in *Brazil - Retreaded Tyres* held that in order to be necessary a measure must *materially* contribute to the achievement of the objective, and not just *marginally* or *insignificantly*, especially if the degree of trade restrictiveness is very high as in the case of an import ban.²⁴³ Conversely, less trade restrictive measures are more likely to be found as necessary.²⁴⁴ As under Art. 2.2 TBT, under Art. XX GATT, the AB has left freedom to panels to choose either qualitative or quantitative methods in appraising to contribution of the measure to the achievement of the objective.²⁴⁵

²³⁶ *Korea - Beef*, WT/DS161/AB/R, para. 166. In other cases, however, the alternative measure was required not to be ‘less WTO-inconsistent’, but rather less trade restrictive. See, for example, *EC - Asbestos*, WT/DS135/AB/R, para. 172.

²³⁷ *EC - Asbestos*, WT/DS135/AB/R, para. 174.

²³⁸ *EC - Asbestos*, WT/DS135/AB/R, para. 169.

²³⁹ *EC - Asbestos*, WT/DS135/AB/R, para. 168 and 174. As Mavroidis eloquently noted, WTO dispute settlement bodies can extend their judicial review ‘only with respect to the means used to achieve the ends: ends are not justiciable, means are.’ Mavroidis, P. C. (2005) *The General Agreement on Tariffs and Trade: A commentary*. Oxford: Oxford University Press, 191. In the context of the SPS Agreement see Appellate Body Report, *Canada - Continued Suspension of Obligations in the EC - Hormones Dispute*, WT/DS321/AB/R, adopted 16 October 2008, para. 690.

²⁴⁰ AB in *EC - Asbestos*, WT/DS135/AB/R, para. 172. See also Appellate Body Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 7 April 2005, para. 307.

²⁴¹ Panel Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, adopted 12 August 2009, para. 7.817.

²⁴² *Brazil - Retreaded Tyres*, WT/DS332/AB/R, para. 182.

²⁴³ *Brazil - Retreaded Tyres*, WT/DS332/AB/R, para. 210.

²⁴⁴ *China - Audiovisuals*, WT/DS363/AB/R, para. 310.

²⁴⁵ *Brazil - Retreaded Tyres*, WT/DS332/AB/R, para. 146.

4.3 Towards a necessity test for standards and its application to VSS

General rules of treaty interpretation seem to suggest that, in order to give full meaning to the textual difference between Annex 3.E - providing only that standard setting bodies must avoid preparing, adopting or applying standards with a view to or with the effect of 'creating unnecessary obstacles to international trade' - and Art. 2.2 - holding that 'creating unnecessary obstacles to international trade' means that technical regulations must not be 'more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create' - the test in Annex 3.E should be more relaxed.

There are good policy arguments supporting this view, such as the fact that standards may be legitimately set very stringently in order to ensure and communicate, for example, a superior product quality, and that private parties must be given a sufficient margin of manoeuvre to self-regulate their activities. Therefore, the request of a less trade restrictive alternative would hardly ensure a reasonable outcome. Several elements of the test under Art. 2.2 TBT can be in conflict with the purpose of a VSS, as it will be shown in Section 4.3.1. The lack of an obligation to pursue a legitimate objective is indicative of the fact that standards may be lawfully set at a very high level generating substantial trade-restrictiveness. Such stringency does not need to be justified on the basis of a legitimate objective and taking into account the risk generated by non-fulfilment. Section 4.3.2 will therefore argue that the necessity test for standards should, in fact, be structured along the lines of a suitability test.

4.3.1 *The problem with a 2.2-like necessity test for VSS*

An analysis of necessity for standards structured along the lines of Art. 2.2 TBT would begin with the appraisal of the pursuit of a legitimate policy objective, against which to appraise the contribution of the measure and the risks non-fulfilment would generate. As held above, private standards pursue objectives such as efficiency, quality, and public policy. Assessing whether a measure in fact contributes to efficiency and quality objectives and whether it is necessary for that purpose, would require an unreasonable amount of economic and scientific evidence which would result an unacceptable intrusion with private parties' self-regulatory prerogatives. In addition, it would also be impossible to appraise, even just qualitatively, the risk of non-fulfilment of an efficiency standard. The unfeasibility of a necessity test for efficiency and quality objectives shows the need for a hands-off approach to necessity. Nonetheless, similar problems arise under a 2.2 TBT test also for public policy objectives.

A case-by-case analysis may demonstrate that some VSS do not contribute much to their policy objective, albeit this occurs only in rather exceptional cases. In the framework of

the EU competition law analysis,²⁴⁶ it has been shown that for certain policy objectives the evidence concerning actual contribution of certain environmental VSS is controversial. Recent studies addressing social VSS have similarly shown little evidence of transformational change and pro-poor development.²⁴⁷ Generally, however, a minimum extent of contribution can be expected unless the scheme has clear protectionist goals. Under an Art. 2.2 TBT test, a qualitative assessment is sufficient for the scope of the analysis, and the appraisal is to be performed by looking at design, structure and application of the VSS at hand. This assessment may not be easy to perform in abstract terms, but it is likely that a VSS at least makes some contribution to the policy objective pursued. There is no minimum threshold to be met,²⁴⁸ for schemes whose objective is the provision of information to consumers, the provision of just some information to consumers has not been considered as problematic and is accepted by the AB.²⁴⁹ Inaccurate or incomplete schemes as discussed in Section 2.4.3 of Chapter 4 would arguably be considered as contributing to their objective, if to some extent only, unless their claims are entirely misleading.

The second factor requires the identification of the level of trade-restrictiveness of the standards, which is relatively easily discernible from the stringency of its requirements and from the consequences of failing to meet such requirements. A high level of trade-restrictiveness is closely connected to the market popularity of the scheme, and its indispensability for acceding to a market. In general, competitive opportunities for imported products, and the extent to which they are affected in the event compliance with the scheme does not occur, are relevant factors to incorporate in the appraisal.

The third and fourth elements require a quantitative identification of the risks the policy objective previously accepted as legitimate aims to protect and an evaluation of the consequences and risks resulting from non-fulfilment. In a finding not contested by the AB, the panel in *US - COOL* noted that, for the labelling scheme at issue there and on the basis of the evidence on the record, it appeared that US consumers were not ready to pay a premium for information on the origin of beef cuts, and it concluded that obtaining such information was not a high priority for consumers. Hence, the consequences of non-fulfilment would not be very severe.²⁵⁰ Extending such a methodology to other schemes, it can be noted that the stronger the consumer preference for a certain objective, the more serious the risks of non-fulfilment would be, with moral and human health concerns arguably ranking the highest. This outcome is

²⁴⁶ Section 2.3.3 of Chapter 4.

²⁴⁷ Hoffmann, U., Grothaus, F (2015) Assuring coherence between the market-access and livelihood impact of private sustainability standards. UNFSS Discussion Papers No.6, May 2015, 8.

²⁴⁸ *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, para. 461.

²⁴⁹ *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, para. 466.

²⁵⁰ Panel Report, *United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, adopted 18 November 2011, para. 7.354; *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, para. 478. Conversely, risks deriving from non-fulfilment can be deemed to be more severe in the presence of a clear consumer willingness to pay for certain additional characteristic or information.

however subordinated to whether the objective of a VSS is considered to be the protection of the environment or the provision to consumers of information about environmental features of the products. Otherwise, the risk of not fulfilling the objective of providing information to consumers is likely to be considerably lower.

To summarise, under a 2.2 TBT test, VSS are likely to be considered as contributing to some extent to the policy objective at issue; to be rather trade restrictive under strong consumer preference; to protect from varying, but in general relatively high levels of risk, which generates variable, but on occasion relatively severe consequences of non-fulfilment. With respect to the less trade restrictive alternative against which the four factors above must be assessed, voluntary labelling has oftentimes been suggested by complainants with little success.²⁵¹ Several factors, however, render voluntary labelling an alternative which is not always reasonably available. The proliferation of labelling schemes, conflicting evidence supporting their effectiveness, and unpredictable and varying patterns of consumer behaviour, seem to suggest that voluntary labelling's contribution to a policy objective is normally at lower level than that of a mandatory measure.²⁵²

It is however difficult to operationalise the comparison of the trade-restrictiveness of a private measure like a VSS against that of an alternative measure. Firstly, as seen above, the very concept of a less trade restrictive alternative is difficult to reconcile with quality standards, which can legitimately be set at a very stringent level, and which thus generate substantial trade-restrictive effects. Secondly, it is conceptually impossible to identify a less trade restrictive measure than a private voluntary standard, which seems to be the least trade restrictive alternative *par excellence*, regardless of the objective it pursues. Thirdly, it would be particularly intrusive to require private parties to identify a less trade restrictive measure for their self-regulatory activities. Private authorities do not have access to the same range of regulatory options of public authorities. Requiring that their regulatory choices must always be the least trade restrictive would be rather problematic in light of private autonomy.

4.3.2 Identifying a necessity test for standards and its application to VSS

Clearly, the necessity obligation in Annex 3.E must be given some meaning. For instance, it could apply to standards whose severe stringency, possibly coupled with frivolous or

²⁵¹ In *US - COOL*, Canada and Mexico suggested a voluntary COOL scheme as a less trade restrictive alternative to a mandatory COOL scheme. See *US - COOL*, WT/DS384/AB/R and WT/DS386/AB/R, respectively at paras. 135 and 156. In *US - Tuna II*, Mexico suggested the coexistence of the US scheme with the voluntary AIDCP certification and labelling regime. See *US - Tuna II*, WT/DS381/AB/R, para. 57. In *EC - Seals*, Norway suggested certification according to animal welfare standards and labelling as an alternative to the EU ban on certain seal products. See the AB analysis in *EC - Seals*, WT/DS401/AB/R paras. 5.262 and following.

²⁵² Emslie, J.J. (2005) Labelling programs as a reasonably available least restrictive trade measure under Article XX's nexus requirement. *Brooklyn Journal of International Law* 30(2), 485-545.

unintelligible purposes that can be arguably connected with a concealed protectionist purpose, leads to a distortion of international trade. The test would take the form of a suitability test, which simply looks at whether the measure is suitable for the pursuit of its purported objective. The suitability test, at least as applied in certain subparagraphs of Art. XX GATT, is far from being strict. With respect to a measure under Art. XX(d), the AB held that a measure can be considered as suitable for its objective even if it cannot be guaranteed to achieve its result with absolute certainty.²⁵³ A standard which may not fulfil its objective is therefore not necessarily an 'unsuitable' standard.

There are clearly not many standards that would qualify for an infringement of Annex 3.E. Standards that should be struck down are the most egregious cases of regulatory capture, possibly in the form of the attempt of an uncompetitive (national) industry or a coalition of industries to seek protection from foreign competition by setting requirements that are technically impossible to meet by other producers.²⁵⁴ Standards which are ineffective in the pursuit of their objective, but are nevertheless trade-restrictive and strictly enforced can arguably also fall in such a category. Most likely, such standards would also be in breach of Annex 3.D, as its requirements would not be even-handed and calibrated to the level of threat or risk.

It is rather unlikely that VSS would be considered in breach of this provision, at least those that are strongly based on consumer preferences, as it is expected that reasonably informed consumers direct their purchase preferences towards VSS that are at least partially effective. As demonstrated in Chapter 4, VSS at least partially contribute to their environmental and social objectives. If the objective of a scheme is framed to be the provision of information to consumers, or ensuring product quality, it can be assumed that almost always VSS are effective in delivering such outcomes. Their suitability for the objective pursued can therefore be hardly disputed.

Conversely, standards that do not necessitate consumer involvement, such as business to business standards and certain sectoral standards which do not entail any label, may present a higher chance to raise issues under the necessity provision of the TBT Code of Good Practices. Only extreme cases of regulatory capture shall result in a breach of Annex 3.E, which may normally give rise to serious concerns as well under competition law. It should be noted that not all possible forms of competition law breaches discussed in Chapter 4 would result in a breach of Annex 3.E as well, since such VSS may still be considered as suitable for the pursue of their objective under the TBT Code. Arguably,

²⁵³ Appellate Body Report, *Mexico - Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 6 March 2005, para. 75.

²⁵⁴ An example of regulatory capture of this type would be that of the standards for skis developed in the mid Eighties by the Japanese Consumer Product Safety Association at the request of the nascent Japanese ski industry. The standard imposed minimum thickness and width requirements with which foreign ski producers could not comply, because their technologically superior products could achieve flex and stability without making skis as thick and heavy as the Japanese producers. The justification offered for the ski standard was that snow in Japan is different from snow in other countries. See Büthe, T., Mattli, W. (2012) *Supra* at 65, 135.

the most egregious types of object breaches under EU competition law could involve a standard which is not suitable for its any purpose apart from protectionism.

5 Annex 3.F of the TBT Code - Obligation to use international standards

Art. 2.4 and Annex 3.F of the TBT Agreement contain an obligation applying, respectively, to Members drafting technical regulations and to public and private standard-setters to base their technical regulations and standards on the relevant international standard, whenever present or close to completion. Members and standard-setters are relieved from the obligation in the event the international standard could not achieve the same level of protection sought, or where it would be inappropriate because of different climatic, geographic and technological factors. It is the responsibility of the complainant to prove that a relevant international standard has not been used as a basis for a contested measure.²⁵⁵ Different than for technical regulations, a standard based on international standards is not expressly conferred a presumption of WTO-compliance.²⁵⁶

5.1 Guidance offered by Art. 2.4 TBT

Under Art. 2.4 TBT, the analysis consists of three elements i) the existence of an international standard; ii) whether the international standard has been 'used as a basis' and; iii) whether the international standards is ineffective or inappropriate for the legitimate objective pursued.²⁵⁷ The three-step test has been elaborated in the context of Art. 2.4 TBT, but given the close literal basis of Annex 3.F, it is here presumed it applies to standards as well. In this Section reference will however be made to technical regulations.

Concerning the first step of the analysis, Section 4.2.3 of Chapter 5 discussed the criteria an international standardising body must possess. An international standard can be said to constitute the basis for a technical regulation 'when it is used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation'.²⁵⁸ This requires a very strong and close relation between the international standard and the technical regulation in order to affirm that the latter is based on the former, which is stricter than a 'rational relationship'. At a minimum, there should not be a contradiction.²⁵⁹ In the context of the SPS Agreement,²⁶⁰ the panel noted that a measure can, under certain particular circumstances, achieve a higher level of protection and

²⁵⁵ *EC - Sardines*, WT/DS231/AB/R, paras. 274-275.

²⁵⁶ *Lopez-Hurtado*, C. (2002) *Supra* at 186, 734; *Szwedo*, P. (2013) *Supra* at 186, 1280.

²⁵⁷ *US - Tuna II*, WT/DS381/R, para. 7.627.

²⁵⁸ *EC - Sardines*, WT/DS231/AB/R, para. 240.

²⁵⁹ *EC - Sardines*, WT/DS231/AB/R, paras. 245, 247-249

²⁶⁰ Where a similar obligation to base SPS measures on international standards is provided in Art. 3.3.

being stricter than the relevant international standard, though still 'based' on it. The crucial issue to determine whether a technical regulation is based on the relevant international standard is the assessment of the outcome of compliance with the latter. If a product complying with the international standard is not in compliance with the contested measure, it cannot be said that the contested technical regulation is based on the relevant international standard.²⁶¹

Concerning the third step, WTO law establishes an undisputed right for WTO Members to establish the level of protection they deem fit, and to set their measures at a level of stringency which are not questioned.²⁶² This means that, after an objective has been deemed as legitimate, it will have to be assessed whether the international standards are ineffective or inappropriate for that purpose. As far as the difference between effectiveness and appropriateness is concerned, the former bears upon the results of the means employed, whereas the latter relates to the nature of the means employed.²⁶³ It seems therefore that an ineffective international standard cannot meet the results aimed in the contested measure, whereas an inappropriate international standard does not constitute a suitable means to that purpose.²⁶⁴

To conclude, it seems that as long as the level of protection pursued by the contested measure is higher than that which can be ensured by means of the relevant international standard, a technical regulation would be excluded from a claim under Art. 2.4 TBT.²⁶⁵ This seems to be supported by the fact that international standards are normally drafted for the purpose of establishing a minimum level of protection, whereas the TBT Agreement aims to employ them as a 'ceiling' for public regulation.²⁶⁶ Deviations should therefore be permissible given an expected difference in stringency between the objectives pursued by standards and the measures at hand. Conversely, it would arguably be more burdensome for a respondent to prove that the international standard

²⁶¹ Panel Report, *United States - Measures affecting the importation of animals, meat and other animal products from Argentina*, WT/DS447/R, adopted 24 July 2015, paras. 7.238-7.241.

²⁶² This principle is reaffirmed in the fifth recital of the TBT Agreement, which provides that 'no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement'. (Italic added).

²⁶³ Panel Report, *European Communities - Trade Description of Sardines*, WT/DS2321/R, adopted 29 May 2002, para. 7.116.

²⁶⁴ *EC - Sardines*, WT/DS231/AB/R, para. 288. For an application of this approach, the panel in *US - COOL* concluded that Codex Stan 1-1986 was ineffective and inappropriate for the legitimate objective of providing information to consumers about the countries where an animal was born, raised and slaughtered. The international standard was able to only determine origin about the country of origin and of 'substantial transformation' (i.e. processing). See *US - COOL*, WT/DS384/R and WT/DS386/R, para. 7.735.

²⁶⁵ Similarly supporting the presence of considerable regulatory space for WTO Members vis-à-vis international standards: Wijkström, E., McDaniels, D. (2013) *Supra* at 72, 1017; Wagner, M. (2013) 'International standards'. In Epps, T., Trebilcock, M.J. (Eds.) *Supra* at 69, 268.

²⁶⁶ 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.

is ineffective or inappropriate with respect to a measure which is in breach of Art. 2.2 TBT. In some cases, the international standards could constitute a less trade restrictive alternative in the meaning of Art. 2.2 TBT.

5.2 Application to VSS of the Art. 2.4 test

As seen in the previous Chapter, several VSS which subscribed to and are certified as in compliance with the ISEAL Code of Good Practice have a good chance of being considered as international standardising bodies which draft international standards for the purpose of the TBT Agreement. Compliance with the ISEAL Code gives rise to a presumption of compliance with the TBT Code of Good Practice and the TBT Committee Decision as well. As the obligation to employ international standards also addresses private standard-setters in Annex 3.F, it is of fundamental importance to assess the outcome of the obligation to base VSS on international standards, in particular because multiple schemes are present which cover the same issue, for example sustainable forestry products or sustainable coffee production.

If a VSS scheme aims at the same level of protection of another VSS, which may be considered as the relevant international standard, then the former shall be based on the latter. The major controversy here concerns the assessment of the level of protection, which has to be done by analysing and comparing all diverging criteria of both schemes, in order to determine whether the level of protection sought is in fact the same between the two schemes. It is to be expected, and indeed it happens that, in the presence of a fully-fledged market for VSS, schemes accentuate their differences, either in terms of objectives pursued or stringency of their requirements.

Generally, the assessment of whether a VSS is based on the relevant international standard is relatively straightforward to perform; if products cannot be certified under the VSS at issue, but are in compliance with the relevant international standard, it can be concluded that the VSS is not based on the international standard. Given the frequent reports concerning the difficulty for producers to achieve double certification for VSS covering the same issue because of diverging criteria,²⁶⁷ assuming that at least some VSS can be considered as relevant international standards and that levels of protection are equivalent, the obligation in Art. 2.4 and Annex 3.F is rather frequently breached. Such a breach would be more likely from VSS which are not ISEAL-certified, and are active in a regulatory domain already occupied by an ISEAL standard-setter.

²⁶⁷ Abbott, K.W, Snidal D. (2009) Strengthening international regulation through Transnational New Governance: Overcoming the orchestration deficit. *Vanderbilt Journal of Transnational Law* 42, 551; see also Potts, T., Haward, M. (2007) International trade, eco-labelling, and sustainable fisheries. Recent issues, concept and practices. *Environment, Development and Sustainability* 9(1), 91-106.

The desirability of a strict application of the obligation to base *all* private standards on international standards is worthy of further discussion; a formalistic application of this test hinders private autonomy, as it basically prohibits regulatory diversity. Indeed it is reasonable to subject such an obligation to technical standardising bodies whose objective is the pursuit of network gains and product interoperability; given that efficiency gains is the objective of technical standards, deviation from international standards should be discouraged. Also health and safety standards do not need to be duplicated unless their aim is a higher level of protection. However, for many types of private standards, product differentiation is a good enough reason to draft different standards to base different products on, without the need to justify such a deviation on the basis of a higher level of protection sought by the standardising body, or the presence of different factors which render inapplicable the international standard. This would surely be the case for VSS whose objective is product quality. Also for VSS in the pursuit of public policy goals it is expected that the pursuit of slightly different legitimate objectives²⁶⁸ would suffice to immunise VSS from a breach of Annex 3.F - given the lack of a relevant international standard for a very specific and narrow objective. In the end, this would not be a different approach from that which WTO Members have to abide with *vis-à-vis* their technical regulations.

6 VSS as attributable measures under the SPS Agreement

It has been seen in Chapter 5 that the SPS Agreement, in its Art. 13, mandates Members to take reasonable measures to ensure that private SPS measures are in compliance with the SPS Agreement. Different from the TBT Agreement, such an obligation is limited to private SPS measures that are attributable to a WTO Member under the WTO rules for attribution. Concerning the scope *rationae materiae*, it will be seen that the objectives pursued by some VSS under inquiry here, such as those covering GMOs or organic agricultural rules, are difficult to situate without controversy within the scope of application of the SPS Agreement. It shall however not be forgotten that in case such schemes were not to be covered by the SPS Agreement, the rules of the TBT Agreement would anyway be applicable.²⁶⁹ The remainder of this Chapter discusses the relevant SPS discipline which can apply to VSS, beginning with the substantive scope of the SPS Agreement.

²⁶⁸ Within the domain of sustainable coffee production, for example, certifying 'bird-friendly' coffee, or the conservation of forest through the production of coffee under the shade of forest canopy.

²⁶⁹ According to Art. 1.5 of the TBT Agreement. See also Prévost, D. (2008) Private sector food-safety standards under the SPS Agreement: Challenges and possibilities. *South African Yearbook of International Law* 33, 27.

6.1 The substantive scope of 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,²⁷⁰ which directly or indirectly affect international trade.²⁷¹ It is undisputed that measures addressing food safety issues fall within its scope of application. It is, however, more controversial to assess the application of the SPS Agreement to a number of measures which cover issues that do not, intuitively, qualify as SPS measures covered by the scope of the Agreement, such as regulatory schemes addressing genetically modified organisms (GMOs), or the permissible maximum level of residues of certain products, as well as generic organic product rules at issue in several VSS. Annex A.1 of the SPS Agreement, if interpreted broadly, can theoretically accommodate a broad range of measures. The expansive interpretation provided by the panel report in *EC - Biotech* has construed subparagraph (a) of Annex A.1 as to include the life and health of microorganisms which are part of an ecosystem which is affected by GMOs, thereby allowing measures addressing GMOs to be covered by the SPS Agreement.²⁷² Similarly, subparagraph (b) has been interpreted as to cover anything that in principle can be eaten, therefore including also GMOs crops.²⁷³ GMOs themselves have been considered under certain circumstances as pests, the spread of which can be constrained under subparagraph (c).²⁷⁴ In a similar fashion, the same panel has interpreted subparagraph (d) as to prevent any damage to the environment, in a manner that expands the scope of the SPS Agreement as to cover also measures that aim at environmental protection.²⁷⁵ The panel also appeared to suggest the scope of the SPS Agreement is not just limited to situations where there is a 'direct and immediate' causal link between the product at issue and potential harm to health associated with pest and diseases.²⁷⁶

Such an expansive approach has been condemned by commentators as disregarding the context and purpose of the SPS Agreement, its very specific scope, and unduly

²⁷⁰ 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.

²⁷¹ Such a requirement has been interpreted broadly, and it is not required to demonstrate actual effects on trade. *EC - Biotech*, WT/DS291/R, paras. 7.434 - 7.435.

²⁷² *EC - Biotech*, WT/DS291/R, paras. 7.219 and 7.220.

²⁷³ *EC - Biotech*, WT/DS291/R, paras. 7.292-7.313.

²⁷⁴ *EC - Biotech*, WT/DS291/R, para. 7.245.

²⁷⁵ *EC - Biotech*, WT/DS291/R, para. 7.373.

²⁷⁶ Peel, J. (2007) A GMO by any other name... might be an SPS risk!: Implications of expanding the scope of the WTO Sanitary and Phytosanitary Measures Agreement. *European Journal of International Law* 17(5), 1022.

overlapping with the scope of application of the TBT Agreement.²⁷⁷ It also challenges the conventional view of the SPS Agreement as the one with the narrowest scope among the WTO Agreements, as basically a 'carve-out' from the TBT Agreement.²⁷⁸ If accepted, this approach would result in many precautionary environmental measures being challenged under the strict SPS rules concerning scientific justification, with a strong likelihood of a breach. It shall therefore be concluded that it is still open for debate whether the SPS Agreement applies to, for example, measures regulating the presence of GMOs, or defining rules for organic products. SPS measures are designed to protect specific values from risks or threats arising under the specific circumstances enunciated under Annex A.1. The major problem concerning the coverage under the SPS Agreement of measures limiting the employment of GMOs or provisions addressing organic agriculture is that the nature of the potential risk, the manner in which it may materialise and the endangered objects and values, are all undefined.²⁷⁹

6.2 Relevant provisions of the SPS Agreement

The SPS Agreement aims at mediating between market access for imported food and agricultural products and the right of WTO Members to take measures whose objective is the protection of public health.²⁸⁰ WTO Members have a right to take SPS measures.²⁸¹ As a consequence, it is presumed that SPS measures taken by Members are SPS-consistent, unless prima facie proven otherwise by a complainant.²⁸² Respondents, however, are required to make their case as well and produce relevant evidence to this purpose.²⁸³ SPS discipline is not concerned *per se* with substantive SPS rules, but aims at three main principles: international harmonisation, scientific justification and non-discrimination in the imposition of SPS measures.

The SPS Agreement provides that SPS measures affecting international trade must be based on,²⁸⁴ or conform to,²⁸⁵ the relevant international standard. 'Conforming to' an

²⁷⁷ Scott, J. (2007) *The WTO Agreement on Sanitary and Phytosanitary measures. A commentary*. Oxford: Oxford University Press, 14-16; Prévost, D. (2009) *Balancing trade and health in the SPS Agreement: The development dimension*. Nijmegen: Wolf Legal Publisher, 522-523. For a critical commentary on selected crucial issues in the panel report, see also Prévost, D. (2007) Opening Pandora's box: The panel's findings in the *EC - Biotech Products* dispute. *Legal Issues of Economic Integration* 34(1), 67-101.

²⁷⁸ Motaal, D. (2004) The 'multilateral scientific consensus' and the World Trade Organisation'. *Journal of World Trade* 38(4), 856.

²⁷⁹ Conrad, C.R. (2006) PPMs, the *EC - Biotech* dispute and applicability of the SPS Agreement: Are the panel's findings built on shaky ground? The Hebrew University of Jerusalem Research Paper No. 8-06,16.

²⁸⁰ Van den Bossche, P., Zdouc, W. (2013) *Supra* at 86, 896.

²⁸¹ Art. 2.1 SPS Agreement.

²⁸² Appellate Body Report, *European Communities - Measures Concerning Meat and Meat Products (EC - Hormones)* WT/DS26/AB/R, adopted 16 January 1998, para. 98.

²⁸³ Appellate Body Report, *Japan - Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 26 November 2003, para. 154.

²⁸⁴ Art. 3.1 SPS Agreement.

²⁸⁵ Art. 3.2 SPS Agreement.

international standard confers a presumption of conformity with the Agreement as well.²⁸⁶ The SPS Agreement, different from the TBT Agreement, expressly mentions three international standard-setters: the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organisations operating within the framework of the International Plant Protection Convention.²⁸⁷ With respect to the difference between 'based on' and 'conforming to' an international standard at issue, respectively, in Articles 3.1 and 3.2, the former standard is more relaxed than the latter, which arguably entails cases where the international standard is transposed as it is in the SPS measure at issue.²⁸⁸

In all cases (i.e. in cases there is a scientific justification for not employing an international standard, or a Member decides to set a higher level of protection, or in cases there is no international standard) SPS measures must be based on a risk assessment, which is an evaluation of the likelihood of risk and its economic consequences,²⁸⁹ to be performed according to the requirements provided for in Art. 5.²⁹⁰ SPS measures must therefore be in compliance with a *sui generis* necessity obligation which establishes a strong link between the contested measure and scientific principles and evidence supporting the need for its existence.²⁹¹ In addition,²⁹² SPS measures shall not be more trade restrictive than necessary to achieve a Member's appropriate level of SPS protection.²⁹³

With respect to the scientific justification of an SPS measure, the scientific evidence must bear a rational relation to the measure, which demonstrates the existence²⁹⁴ and extent of risk from which the measure is aiming to protect by means of an appropriate level of protection, and it must be of the kind necessary for a risk assessment.²⁹⁵ The fact that Members may take SPS measures on the basis of a precautionary approach to risk, permitted by Art. 5.7 of the SPS Agreement, must be taken into account in the appraisal of the scientific basis underlying an SPS measure.²⁹⁶ Art. 5.7 operates as a qualified exemption from the obligation to base SPS measures on scientific evidence, allowing Members to adopt provisional SPS measures where scientific evidence is insufficient or

²⁸⁶ Art. 3.2 SPS Agreement.

²⁸⁷ Art. 3.4 SPS Agreement.

²⁸⁸ EC - *Hormones*, WT/DS26/AB/R, paras. 163-164.

²⁸⁹ Annex A.4 SPS Agreement.

²⁹⁰ Art. 3.3 SPS Agreement.

²⁹¹ Art. 2.2 and Art. 5.1 SPS Agreement.

²⁹² Although the two requirements may be, on occasions, overlapping, it must be kept in mind that they are two separate obligations. See Panel Report, *Japan - Measures Affecting the Importation of Apples*, WR/DS245/R, adopted 15 July 2003, para. 8.78.

²⁹³ Art. 5.6 SPS Agreement.

²⁹⁴ Panel Report, *Japan - Measures Affecting the Importation of Apples. Article 21.5 DSU Recourse (United States)*, WT/DS245/RW, adopted 15 July 2003, para. 8.45.

²⁹⁵ Panel Report, *United States - Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 29 September 2010, para. 7.200.

²⁹⁶ EC - *Hormones*, WT/DS26/AB/R, para. 124.

inconclusive.²⁹⁷ The SPS Agreement therefore turns science into the yardstick against which measures aiming at protecting public health must be evaluated and, ultimately, taken.

SPS measures must also respect the principle of non discrimination,²⁹⁸ which requires a three-step inquiry into whether i) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member; ii) the discrimination is arbitrary or unjustifiable; and iii) identical or similar conditions prevail in the territory of the Members compared.²⁹⁹ As Art. 5.5 provides, in its relevant part, that ‘each Member shall avoid arbitrary or unjustifiable distinctions in the levels [of protection] it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade’, a violation of Art. 2.3 can occur also when discrimination happens with respect to products that are not ‘similar’, or ‘like’.³⁰⁰

6.3 Issues in the application of the SPS Agreement to VSS

Private SPS standards in general and, specifically, VSS that are covered by the scope of the SPS Agreement result in a number of problems under its discipline, of which the most notable is the troubled relation between the substantive standards of certain VSS and their scientific justification. VSS pursuing the objective of food safety, such as GLOBALG.A.P., are normally drafted as a business-to-business tool mostly to avoid liability through higher product quality. GLOBALG.A.P. standards are generally stricter than both relevant public standards and international standards.³⁰¹ It is hard to claim that such a deviation is due to different conditions, or that the higher level of protection sought is in fact based on scientific grounds.

VSS addressing the presence of GMOs and/or certifying organic agricultural products are based on consumer demand for GMOs-free and organic produce, and respond to the sometimes irrational consumer perception of certain types of products being ‘better’ or even ‘safer’ and ‘healthier’ than traditional products, which is not supported by actual

²⁹⁷ Appellate Body Report, *Japan - Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 22 February 1999, para. 80. It should be noted that the panel in *EC - Biotech* disagreed with the characterisation of Art. 5.7 as an exception to Art. 2.2, but rather considered it as an autonomous right of the regulating Member. See panel in *EC - Biotech*, WT/DS291/R, paras. 7.2968-7.2969.

²⁹⁸ Art. 2.3 and Art. 5.5 SPS Agreement.

²⁹⁹ Panel Report, *Australia - Measures Affecting Importation of Salmon. Recourse to Art. 21.5 of the DSU by Canada*, (*Australia - Salmon 21.5 (Canada)*) WT/DS18/RW, adopted 18 February 2000, para. 7.111.

³⁰⁰ *Australia - Salmon 21.5 (Canada)* WT/DS18/RW, para. 7.112. A different level of protection which can be characterised as arbitrary or unjustifiable is an element of proof that a Member is applying an SPS measure in a manner which either discriminates between countries where the same conditions prevail, or that it constitutes a disguised restriction on international trade as prohibited by Art. 2.3. See *EC - Hormones* WT/DS26/AB/R, para. 240.

³⁰¹ Swinnen, J., Maertens, M., Colen, L. (2015) ‘The role of food standards in trade and development’. In Hammoudi, A., Grazia, C., Surry, Y., Traversac, J.B. (Eds.) *Food safety, market organisation, trade and development*. London: Springer, 135.

scientific grounds. It is therefore difficult to hold that they are drafted on the basis of solid scientific evidence supporting the deviation from the relevant international standard, where present, as well as their necessity and stringency. The SPS Agreement allows measures to be taken on the basis of precaution, and Members are permitted to take SPS measures where a full-blown risk assessment cannot be performed, for example, because of insufficient scientific evidence. This does not mean, however, that the lack of evidence supporting the existence of risk would allow precautionary measures to be taken on the basis of Art. 5.7 SPS.

Selectivity in the objective pursued, and application to a narrow product group is a feature of several VSS. For those addressing SPS issues which are covered by the SPS Agreement, a breach of the obligation to ensure that similar levels of threat or risk for different products are treated equally is conceivable, if the opposite would result in discrimination or a disguised restriction of international trade. As only VSS which are attributed to a Member are subject to this obligation, it can be concluded that private autonomy to regulate is not affected by the provisions of the SPS Agreement.

7 Conclusion

This Chapter has analysed important substantive issues concerning the application of the TBT Code of Good Practice to standards, and especially to voluntary sustainability standards, to determine the extent of substantive coordination WTO law can exercise over the substance of VSS. Lacking interpretative guidance from the Appellate Body over the substantive provisions of the TBT Code, it has elaborated normative tests for the application of the fundamental concept of non-discrimination, unnecessary trade-restrictiveness, and the obligation to base standards on international standards. Clarifying the scope of the substantive meta-rules of the TBT Code is essential to understand under which conditions a private standard can be said to be discriminatory or unnecessary, and to define the boundaries of the harmonisation requirement. To build up a clear conceptual and legal framework surrounding the TBT Code of Good Practice is a necessary prerequisite to its effective application and implementation by private standardising bodies. Clarity over the substantive provisions is also essential in the broader debate over private standards to determine which standards are actually discriminatory in the meaning of international trade law, and are not merely sorting disparate impacts among different groups of producers. Granted, to apply international trade law principles to private standards requires careful consideration and profound awareness of the peculiarities of the different types of standards.

As a preliminary matter to the analysis of the provisions of the TBT Code, this Chapter has shown another instance of the AB's expansive approach towards issues of the scope of the TBT Agreement. Labelling schemes are covered as an outcome of the expansive interpretation of the second sentence in the definition of technical regulations and

standards, which covers *all* types of requirements regulating access to a label. This results in the potential application of the TBT Agreement even to those standards which do not directly regulate any product characteristics or process and production methods, such as management standards, as long as a label is employed. For standards (and technical regulations) which do not entail a label, it appears that the intention of the drafters was to limit the PPM scope of the TBT Agreement to *related* PPM. For the purpose of our inquiry over the WTO treatment of VSS, it seems that a great majority of the schemes are covered, with the possible exclusion of initiatives which do not entail a label and cover npr-PPMs, which constitute a minor group. To reconcile the obligation to ensure compliance with the TBT Code, which encompasses all standardising bodies, with a narrower definition of standards, it has been suggested that Members are to be held responsible only for the standards caught by the definition in Annex 1 of the TBT Agreement.

The TBT Code applies to many different standardising bodies as discussed in Chapter 5, and many VSS may therefore generate State responsibility in case reasonable measures are not taken to remedy their deviations from the provisions of the TBT Code. Many multi-stakeholder VSS bodies claim to be in compliance with the TBT Code via the provisions of the ISEAL Code of Good Practice, which incorporate WTO meta-rules for standardising bodies. The fact that the TBT Code appeared to be designed with technical standardising bodies and technical standards in mind does not seem to raise particular issues concerning its application to different types of standards. The procedural obligations of the TBT Code focus on *ex post* and *ex ante* procedural transparency with the objective to avoid protectionist motivated standards. The substantive obligations are equally important, albeit never addressed in dispute settlement. Particular attention is therefore required in the elaboration of normative substantive tests for standards.

To begin, it seems that many VSS *prima facie* modify the condition of competition to the detriment of the group of imported products. Such detrimental impact has thus to be justified. The structure of the test under Art. 2.1 TBT, which operationalises the non-discrimination obligation under the TBT Agreement in combination with the exceptions, requires all *de facto* detrimental treatment to stem from a legitimate regulatory distinction. In order to appraise the legitimacy of a distinction, an objective pursued must be legitimate and, very importantly, the regulatory distinction must be even-handed, i.e. it must not reflect discrimination. Even-handedness requires that similar risks or concerns are treated similarly by the measure, and different risks or concerns are treated differently, with a difference in requirements which is calibrated, i.e. bearing a rational connection to, such a difference in risk or concern. Even-handedness, and in particular the requirement of calibration between stringency of the regulatory distinction and the extent of risk or concern, imposes an obligation to enforce somewhat efficient measures. A measure which is not efficient, in the peculiar WTO understanding of the term, either

over-regulates - most likely foreign products - or under-regulates - most likely national products - absent a rational connection to scientific evidence.

The analysis of standards against such a test begins with an appraisal of the objective pursued. Standards may pursue efficiency-related objectives such as product interoperability, increased efficiency or profitability; they may aim at defining product quality; they may pursue objectives traditionally associated to the State, such as policy goals like the protection of public morals, environmental concerns, or consumer protection and information. These three types of objectives shall be considered as legitimate at least for non-governmental bodies. Whether all these objectives sort regulatory effects, efficiency and quality goals are more traditionally associated with private actors than public policy goals. Granted, it may be difficult to fit each standard into a single objective. VSS, for example, can be seen as having product quality as an objective, but also public policy goals. A determination of which objective is pursued by a standard must take into account the regulatory purpose of the body which establishes it. For VSS, a broad correspondence can arguably be found between multi-stakeholder, sectoral, and company VSS and, respectively, public policy, quality, and efficiency-based rationales of the standards drafted by these bodies.

Regardless of whether their objective is considered to be efficiency, product quality or a public policy objective, VSS are likely to modify the competitive conditions to the detriment of the group of imported products. Being impossible to accommodate private regulatory autonomy by means of a 'so as to afford protection' test, even-handedness becomes the crucial criterion in the legal analysis where to situate a deferential approach. More 'private' legitimate objectives such as efficiency and product quality, also due to the nature of the requirements, by means of which they are pursued, should be given more leeway. Product interoperability can be considered as achieved as long as two products can finally operate together; higher quality is presumed to follow from compliance with a host of more stringent requirements. It should therefore be rather unproblematic to show a relation between the legitimate objective and the requirements and to conclude that the regulatory distinction is even-handed. Standards drafted to pursue public policy goals under a regulatory stance sharing features with that of public authorities can be addressed under a different, and varying, standard of review.

A deferential approach should be employed for standards which are in line with multilaterally agreed upon instruments, both in terms of their substance, their policy area of application, and their level of protection. Social schemes, for example, would benefit from this hands-off approach as long as their provisions are more or less closely aligned to ILO Conventions. A scheme which confers a market advantage to a producer by signalling its compliance with ILO standards cannot be considered as discriminatory in the meaning of the TBT Agreement. The approach towards environmental schemes should be more nuanced, given the broader range of issues they cover. Schemes which

apply to environmental domains which are more contested, or are based on controversial methodologies, should be scrutinised more closely under an approach which more closely resembles the test under Art. 2.1 TBT. In that event, the lack of scientific evidence supporting the presence of stringent requirements (i.e. their calibration with the level of risk or threat) is the crucial element to determine WTO-compliance of a private standard. Theoretically, as the level of protection is not challenged, a light-touch analysis could also accept requirements which are very strict (i.e. generating considerable detrimental impact) and aim at identify quality products, as long as effective to a certain extent. It is crucial that VSS do not discriminate between similar risks or threats within their objective, and at least a relationship exists between the stringency of the requirements and the level of protection chosen. Attention for local specificities and for requirements that may be particularly detrimental under certain circumstances must be ensured.

The necessity obligation in Annex 3.E complements the non-discrimination obligation of Annex 3.D. It was submitted that it should take the form of a suitability test to reflect a difference in textual meaning, to ensure private regulatory autonomy, and because the traditional necessity test would simply be impossible to transpose to private standards. Suitability simply requires that a measure is appropriate for the objective it pursues; it does not entail that the measure must be actually effective in accomplishing its purpose. Standards which are completely ineffective, and nevertheless very trade-restrictive, are arguably put into force for no reasons other than protectionism. A necessity obligation structured as a suitability test is thus able to address regulatory capture also for standards which pursue efficiency and product quality, and which would be assessed very deferentially under the non-discrimination obligation.

The third substantive requirement of the TBT Code requires compliance with international standards whenever possible. Indeed, there is a pressing need to harmonise private standards, at least in certain domains. The requirement to employ international standards is however rather 'soft', and non-governmental standardising bodies are given a considerable leeway to avoid its application. Firstly, the objective pursued by the relevant international standard and the standard in question must be identical. A standard pursuing a narrow objective is likely to operate outside the scope of application of any relevant international standards. Secondly, a different level of protection pursued would suffice to render the international standard ineffective for the objective pursued by the private standard in question. Considering the private actors enjoy a right to regulate and self-regulate at a level they deem fit which is beyond that of public rules, deviations from the objective of the relevant international standard are expected to be frequent and permissible.

Also SPS provisions may apply to VSS, but limitedly to schemes attributable to a Member and whose substantive scope is food safety. Certain crucial elements of the SPS Agreement are inherently difficult to reconcile with the functioning and purpose of VSS

which are designed as a liability tool, and therefore enforce rather stringent requirements to minimise risk or respond to sometimes irrational, non-scientifically based consumer preferences for specific types of products. It is debatable whether certain VSS are actually based on scientific evidence in the manner required by the SPS Agreement. Another problematic feature VSS possess with respect to the SPS rules is the selective approach in the choice of the risk protection which is sought, which is more evident for schemes with a narrow objective. Also their deviation from international standards would be difficult to justify in the presence of evidence signalling particular risks or different conditions.

The analysis in this Chapter shows that it is possible to transpose the provisions of international trade law to private standards and interpret the meta-rules of the TBT Code of Good Practice in a manner which ensures private autonomy, protects experimentation in regulatory approaches, and at the same time identifies discriminatory and unnecessary standards WTO Members must address and rectify. The normative approach to the non-discrimination provisions is consistent with the normative frame elucidated in Section 3 of Chapter 2, as it provides a degree of autonomy which increases from multi-stakeholder VSS to company schemes. The non-discrimination provision in Annex 3.D, following the interpretation suggested is triggered by VSS which are active in the absence of multilateral agreement over a specific issue, in an arguably particularly contested issue area. Multi-stakeholder and sectoral standards whose stringency bears no connection with available scientific evidence face a higher risk of resulting in discrimination. The necessity obligation in Annex 3.E is structured to cover standards which are very trade restrictive, completely ineffective and, possibly, just protectionist. It can be expected that not many VSS would be in breach of such an obligation, as it has been observed that many schemes at least partially contribute to their goal. The combination of these two provisions is arguably capable of encompassing the most trade restrictive and discriminatory VSS. Finally, the harmonisation provision in Annex 3.F is rather soft, and it is likely to contribute only marginally to alleviate consumer confusion generated by VSS. On the positive side, it would not have the effect of hampering diversity in regulatory approaches.

VSS schemes should base their understanding of the concepts of non-discrimination, necessity, and harmonisation on the normative interpretation illustrated above. Scheme holders can be confident that their schemes would not be discriminatory in the meaning of WTO law if a VSS comes close to taking the form of an implementing measure of international provisions. The closer VSS follow multilaterally agreed upon norms, the less the need to show a relation between the stringency of their standards and science. Unfortunately, this does not automatically result in a guarantee of effectiveness, as the assessment does not verify whether the international agreement in question represents an effective mechanism to address the social-environmental externality at hand, nor whether its effects are positive. VSS scheme-holders should not be very concerned about the pressure generated by the TBT Code's requirement to base standards on

international standards. Given the trade restrictive effects of diverging regulatory regimes, they should nonetheless explore all venues for mutual recognition and benchmark, if possible.

It can be expected the negative effects generated from a VSS in breach of the substantive provisions of the TBT Code must reach a certain level before the obligation to take reasonable measures for compliance is triggered. Even so, the extent of the actual interference over private autonomy is in fact determined not by WTO law itself but, less problematically for WTO legitimacy, by Members' reasonably available measures. However, this leaves the enforcement of the TBT Code's obligations on standardising bodies entirely in the hands of WTO Members. Particularly important is their capacity to appraise which standards are in breach of TBT Code provisions, and their willingness to take reasonably available measures to remedy those breaches. Such measures, if taken, and regardless of their actual effectiveness, exhaust responsibility for the Member at issue. Indeed, provided that no coercion is imposed on the standard-setting body, they ensure an additional level of degree to private regulatory autonomy. It is however impossible to determine in abstract terms a level of breach which would require Members' intervention, and of which type.