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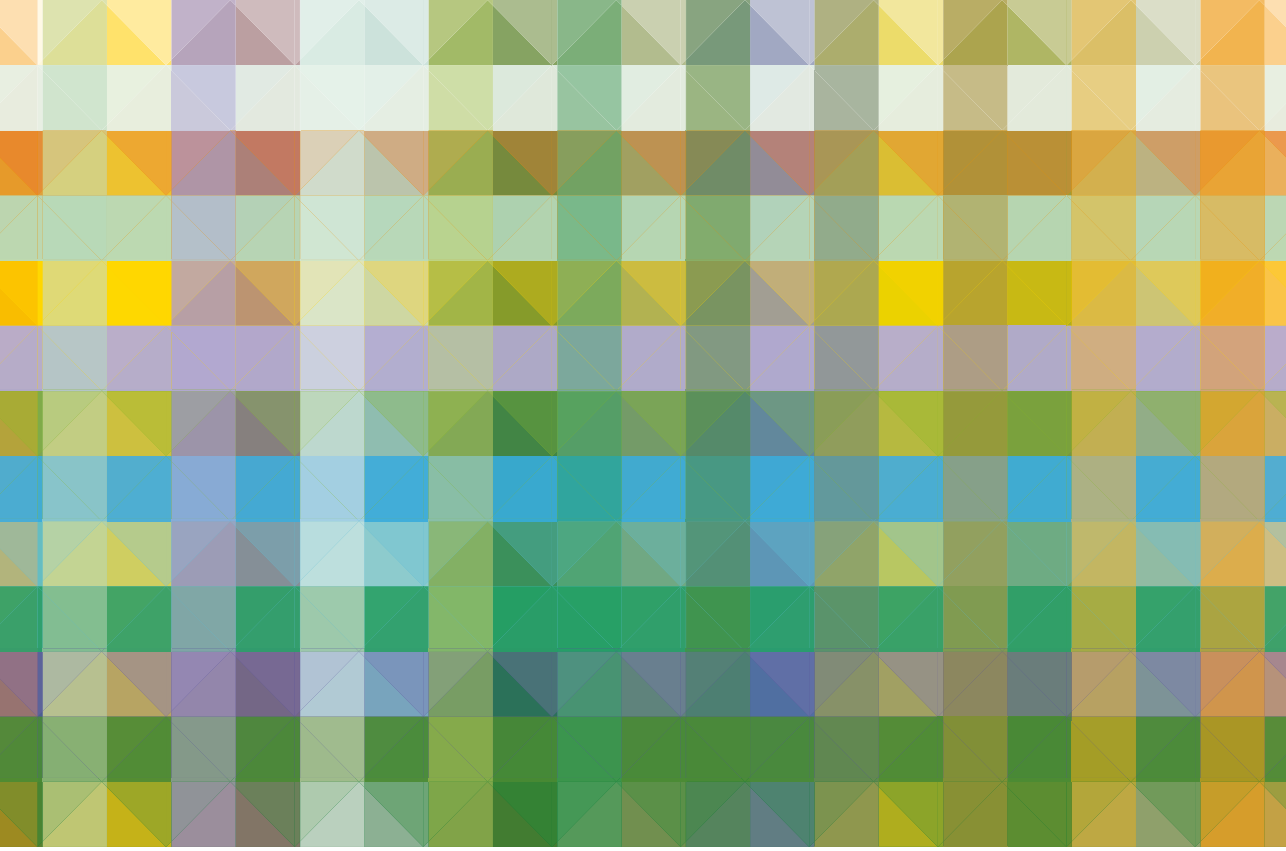

PUBLIC PLAY UPON **PRIVATE STANDARDS**

How European and International Economic Law Enter into Voluntary Regimes for Sustainability

Enrico Partiti

PUBLIC PLAY UPON PRIVATE STANDARDS

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

Enrico Partiti

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

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Promotores:

dhr. prof. dr. P.J. Kuijper	Universiteit van Amsterdam
mw. prof. dr. A.A.M. Schrauwen	Universiteit van Amsterdam

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Chapter 1
Introduction and methodology

1 The rise of voluntary sustainability standards

The ever-growing role of private parties in regulation at the transnational stage, including social and environmental issues, has been the focus of a broad corpus of scholarly research in the past decades. As a consequence of the inadequacy of the jurisdiction-based reach of State rules to address effectively trans-boundaries phenomena, private actors including companies and NGOs have stepped into the transnational domain to play a crucial regulatory role in global governance.[1] This leading role of private actors is particularly noticeable in the areas of global market governance where globalisation resulted in market failures, such as the troublesome mediation between economic and non-economic concerns, like trade on the one hand, and environmental and social protection on the other. Private actors created voluntary rules - either complementing or competing with public ones[2]- addressing a variety of phenomena ranging from the sustainable exploitation of forestry and fishery resources, to the provision of working conditions which are perceived as acceptable, to the reduction of polluting emissions in the production of goods. Certain transnational issue areas thus experienced increased legalisation, with clear rules, rights, duties, and allocation of responsibilities.[3]

Different from other areas,[4] the partial shift in authority from the public to the private and from the national to the transnational level, which is observable in the social and

[1] See, among the many and from different perspectives: Gereffi, G., Garcia-Johnson, R., Sasser, E. (2001) The NGO-industrial complex. *Foreign Policy* 125, 56-65; Scott, C. (2002) Private regulation of the public sector: A neglected facet of contemporary governance. *Journal of Law and Society* 29(1), 56-76; Cutler, A.C. (2003) *Private power and global authority: Transnational merchant law in the global political economy*. Cambridge: Cambridge University Press; Kingsbury, B. (2003) 'The international legal order'. In Cane, P., Tashkent, M. (Eds.) *The Oxford Handbook of legal studies*. Oxford: Oxford University Press, 283-284; Gereffi, G., Humphrey, J., Sturgeon, T. (2005) The governance of global value chains. *Review of International Political Economy* 12(1), 78–104; Levi Faur, D. (2005) The global diffusion of regulatory capitalism. *The Annals of the American Academy of Political and Social Science* 598(1), 12-32; Kingsbury, B., Krisch, N., Stewart, R.B. (2005) The emergence of Global Administrative Law. *Law and Contemporary Problems* 68(3), 15-62; Meidinger, E. (2006) The administrative law of global private-public regulation: The case of forestry. *European Journal of International Law* 17(1), 47-87; Vogel, D. (2008) Private global business regulation. *Annual Review of Political Science* 11, 261–282; Abbott, K.W., Snidal, D. (2009) Strengthening international regulation through transnational new governance: Overcoming the orchestration deficit. *Vanderbilt Journal of Transnational Law* 42(2), 501-578; Abbott K.W., Snidal, D. (2009) 'The governance triangle: Regulatory standards institutions and the shadow of the State'. In Mattli W., Woods, N. (Eds.) *The politics of global regulation*. Princeton: Princeton University Press, 50; Callies, G.P, Zumbansen, P. (2010) *Rough consensus and running code: A theory of transnational private law* Oxford: Hart Publishing; Cafaggi, F. (2011) New foundations of transnational private regulation. *Journal of Law and Society* 38(1), 20-49. Although not covering purely private forms of regulation, see also Pauwelyn, J., Wessel, R., Wouters, J. (Eds.) (2012) *Informal international lawmaking*. Oxford: Oxford University Press.

[2] Abbott K.W., Snidal, D. (2009) 'The governance triangle: Regulatory standards institutions and the shadow of the State'. In Mattli W., Woods, N. (Eds.), *Supra at 1*, 66.

[3] Meidinger, E. (2007) 'Beyond Westphalia. Competitive legalisation in emerging transnational regulatory systems'. In Brutsch, C., Lehmkuhl, D. (Eds.) *Law and legalisation in transnational relations*. Oxford and New York: Routledge, 121-143.

[4] For example the domain of technical product standards and financial services standards. See, generally, Büthe, T., Mattli, W. (2012) *The new global rulers: The privatisation of regulation in the world economy*. Princeton:

environmental regulatory domain, is not a consequence of delegation of public regulatory powers on the basis of better expertise and efficiency of private regulatory actors.[5] The perception of constraints from international trade law in the regulation of processes,[6] and the difficulty to find a multilateral agreement over crucial global problems[7] contributed to the creation of regulatory gaps at the global level.[8] Transnational private systems of regulation have therefore been created,[9] where private actors have undertaken a dual 'gap-filling' role in the social and environmental domain and, at the same time, contributed to its fragmentation.[10] Also in the European Union (EU) private regulation either is triggered with the purpose of overcoming competence constraints,[11] or driven by explicit institutional preference.[12]

Indeed, the concept of self-regulation is useful to understand partially this phenomenon.[13] However, in certain cases, the creation of regulatory regimes consisting of permanent institutions for deliberative interest mediation, rule setting and enforcement, and redress mechanisms transcends the traditional understanding

Princeton University Press. See also Büthe, T., Mattli, W. (2005) Global private governance: Lessons from a national model of setting standards in accounting. *Law and Contemporary Problems* 68(3), in particular at 229-232.

5 Klabbers, J. (2013) 'Of round pegs and squared holes: International law and the private sector'. In Jurčys, P., Kjaer, P.F., Yatsunami, R. (Eds.) *Regulatory hybridisation in the transnational sphere*. Leiden and Boston: Martinus Nijhoff, 38.

6 Among the many see 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.

7 Krisch, N. (2014) The decay of consent: International law in an age of global public goods. *American Journal of International Law* 108(1), 38. See also Bodansky, D., Lawrence, J.C. (2009) 'Trade and environment'. In Bethlehem, D., McRae, D., Neufeld, R., Van Damme, I. (Eds.) *The Oxford Handbook of international trade law*. Oxford: Oxford University Press, 507.

8 Wouters, J., Marx, A., N. Hachez (2012) 'Private standards, global governance and international trade - The case of global food safety governance'. In Marx, A., Maertens, M., Swinnen, J., Wouters, J. (Eds.) *Private standards and global governance. Economic, legal and political perspectives*. Cheltenham and Northampton: Edward Elgar, 255-292; Levi, M., Adolph, C., Berliner, D., Erlich, A., Greenleaf, A., Lake, M., Noveck, J. (2012) Aligning rights and interests: Why, when and how to uphold labor standards. Background Paper for the World Development Report 2013.

9 Bartley, T. (2007) Institutional emergence in an era of globalisation: The rise of transnational private regulation of labor and environmental conditions. *The American Journal of Sociology* 113(2), 297–351; Dingwerth, K., Pattberg, P. (2009) World politics and organisational fields: The case of transnational sustainability governance. *European Journal of International Relations* 15(4), 707-743; Loconto, A., Fouilleux, E. (2014) Politics of private regulation: ISEAL and the shaping of transnational sustainability governance'. *Regulation and Governance* 8(1), 166.

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

11 Eberlein, B., Grande, E. (2005) Beyond delegation: Transnational regulatory regimes and the EU regulatory state. *Journal of European Public Policy* 12(1), 89-112.

12 Cafaggi, F. (2010) Private law-making and European integration: Where do they meet, when do they conflict? In Oliver, D., Prosser, T., Rawlings, R. (Eds.) *The regulatory State*. Oxford: Oxford University Press, 201-228.

13 Ayers, I., Braithwaite, J. (1992) *Responsive regulation: transcending the deregulation debate*. Oxford: Oxford University Press; Ogus, A. (1995) Rethinking self-regulation. *Oxford Journal of Legal Studies* 15 (1), 97-108; Black, J. (1996) Constitutionalising self-regulation. *Modern Law Review* 59(1), 24-55.

of industry's self-regulation of its activities. Transnational private regulatory regimes may take the form of a transnational, rule-oriented system made up of competing, and mutually adjusting, organisations and institutions.[14] They operate in the context of regulatory pluralism, where multiple and overlapping norms and legal regimes are put into place and compete for acceptance, trust, and utilization.[15]

Altruistic considerations about the 'right' behaviour are only a partial explanation for the creation of such transnational private regulation.[16] Equally strong forces behind the creation and enforcement of common rules are profit and efficiency-based rationales such as economic strategies, the need to differentiate products to meet consumer demand, and protection from liability.[17] Many private regulatory regimes are a response to externalities and collective action problems suffered by private actors.[18] Private environmental standards, for example, offer a practical solution to the free riding problem in environmental protection, as they link the higher cost incurred in the production of environmentally friendly goods to the promise of a competitive advantage.[19]

Among the many regimes in the domain of social and environmental protection, or sustainability,[20] voluntary sustainability standards (VSS) play an important role and

[14] Meidinger, E. (2006) *Supra at 1*, 67; Bernstein, S., Cashore, B. (2007) Can non-state global governance be legitimate? An analytical framework. *Regulation and Governance* 1(2), 348; Cafaggi, F. (2011) *Supra at 1*, 21; Bomhoff, J., Meuwese, A. (2011) The meta-regulation of transnational private regulation. *Journal of Law and Society* 38(1), 161.

[15] Teubner, G. (1997) Global Bukowina: Global pluralism in the World society. In Teubner, G. (Ed.) *Global law without a State*. Brookfield: Dartmouth, 3-28. More specifically with reference to transnational private regulation: Cafaggi, F. (2006) 'Rethinking private regulation'. In Cafaggi, F. (Ed.) *Reframing self-regulation in European private law*. Alphen aan den Rijn: Kluwer Law International, 36-38; Zumbansen, P. (2011) Neither 'public' nor 'private', 'national, nor 'international': Transnational corporate governance from a legal pluralist perspective. *Journal of Law and Society* 38(1), 50-75.

[16] Cashore, B. (2002) Legitimacy and the privatisation of governmental governance: How non-state market-driven (NSMD) governance systems gain rule-making authority. *Governance: An International Journal of Policy, Administration and Institution* 15(4), 522; Marx, A, Bécault, E., Wouters, D. (2012) 'Private standards in forestry: Assessing the legitimacy and effectiveness of the Forestry Stewardship Council'. In Marx, A., Maertens, M., Swinnen, J., Wouters, J. (Eds.) *Supra at 8*, 60-97.

[17] For example, in the domain of corporate codes and standards addressing social and environmental externalities see: Jenkins H., Yakovleva N. (2006) Corporate social responsibility in the mining industry: Exploring trends in social and environmental disclosure. *Journal of Cleaner Production* 14(3-4), 271-284; Marx, A. (2008) Limits to non-state market regulation: A qualitative comparative analysis of the international sport footwear industry and the Fair Labour Association. *Regulation and Governance* 2(2), 253-273; McClusky, J., Winfree, J.A. (2009) Pre-empting public regulation with private food quality standards. *European Review of Agricultural Economics* 36(4), 525-539 Cohen Maryanov, D. (2010) Sweatshop liability: Corporate codes of conduct and the governance of labour standards in the international supply chain. *Lewis and Clark Law Review* 14(1), 400.

[18] Abbott, K.W., Snidal, D. (2001) International 'standards' and international governance. *Journal of European Public Policy* 8(3), 345-370.

[19] Fransen, L. (2011) Why do private governance organisations not converge? A political-institutional analysis of transnational labour standards regulation. *Governance: An International Journal of Policy, Administration and Institutions* 24(2), 359-360.

[20] The boundaries of 'sustainability' for the purpose of this research will be clarified in Section 2.2 of Chapter 2.

have been given considerable attention by political scientists.[21] VSS are here defined as voluntary (in some cases market-based) regulatory schemes designed by private bodies with the purpose of addressing, directly or indirectly, and by means of third-party certification of products and processes, the social and environmental impact resulting from the production of goods. VSS, as Chapter 2 will further illustrate, take forms as diverse as certification schemes, codes of conduct, and companies' contracting practices. Although a common feature of these instruments is a complete lack of public authority,[22] their impact and effects nevertheless can in certain cases be comparable to those of public regimes.

The regulatory dimension of VSS is not driven by forces connected to formal State authority; in fact, little connection with public bodies can be found. Rather, its causes must be found in forces which, on the market, are capable of generating effects comparable to public authority, such as market power of certain economic actors, consumer preference, strategic and efficiency-based considerations of the regime members, and risk avoidance strategies.[23] None of these drivers requires any form of public delegation, apart from a tacit State acquiescence. Some VSS boast a high degree of perceived legitimacy of their rules among the actors subject to them;[24] more often, others possess a strong *de facto* mandatory character because of the market share of the actors which support them and require their acceptance.[25] The relation between the VSS scheme-holder and the entity seeking certification is

[21] Cashore, B. (2002) *Supra at 16,* 503-529; Kirton, J.J., Trebilcock, M.J. (Eds.) (2004) *Hard choices, soft law: Voluntary standards in global trade, environment and social governance.* Farnham: Ashgate Publishing; Campins Eritja, M. (Ed.) (2004) *Sustainability labelling and certification.* Madrid-Barcelona: Marcial Pons; Meidinger, E. (2006) *Supra at 1;* Cashore, B., Gale, F., Meidinger, E. and Newsom, D. (Eds) (2006) *Confronting sustainability: Forest certification in developing and transitioning countries.* New Haven: Yale Forestry School. Conroy, M.E. (2007) *Branded! How the 'certification revolution' is transforming global corporations.* Gabriola Island, BC, Canada: New Society. Marx, A. (2011) 'Global governance and the certification revolution: Types, trends and challenges'. In Levi-Faur, D. (Ed.) *Handbook on the politics of regulation.* Cheltenham: Edward-Elgar, 712-726; Overdevest, C., Zeitlin, J. (2012) Assembling an experimentalist regime: Transnational governance interactions in the forest sector. *Regulation and Governance* 8(1), 22–48; Marx, A., Maertens, M., Swinner, J., Wouters, J. (Eds.) *Supra at 8*; Marx, A. (2013) Varieties of legitimacy: A configurational institutional design analysis of eco-labels. *Innovation: European Journal for Social Science Research* 26(3), 268-287; Palekhov, D. (Ed.) (2015) *Voluntary standards systems. A contribution to sustainable development.* Berlin and Heidelberg: Springer; Marx, A., Sharma, A., Bécault, E. (2015) Voluntary Sustainability Standards. An overview. Acropolis Report - Klimos. Available at https://ees.kuleuven.be/klimos/papers/marx_2015_voluntary _sustainability_ standards. pdf, 6.

[22] Vogel, D. (2008) *Supra at 1*, 262; Muchlinski, P. (2003) Human rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organisations. *Non-State Actors and International Law* 3, 127.

[23] Meidinger, E. (2007) *Supra at 3,* 121–143.

[24] Cashore, B. (2007) *Supra at 14*, 349-350. To understand legitimacy of transnational private regulatory actors along the same lines of democratic legitimacy is counterproductive and of limited assistance to understand the acceptance of certain regimes. It is suggested that legitimacy instead focuses on whether different actors affected by a private institution accept its authority and interact with its broader institutionalised norms in a given issues areas. Certain rules are therefore legitimate insofar as a community to which the rules apply cognitively accept and justify shared rules. Bernstein, S. (2011) Legitimacy in intergovernmental and non-state global governance. *Review of International Political Economy* 18(1), 17-51. See also Section 3 of Chapter 2.

[25] Wouters, J., Geraets, D. (2012) Private food standards and the World Trade Organisation: Some legal considerations. *World Trade Review* 11(3), 479-489.

frequently a hierarchical one.[26] In addition, certified companies are subject to sophisticated quasi-judicial monitoring and enforcement mechanisms ensuring the effectiveness of the regime,[27] of which one of the underlying rationales may even be the avoidance of State regulation.[28] Loss of competitiveness and market opportunities[29] and, from the perspective of international trade law and trade-barrier effects,[30] are threats which spur actors towards compliance. In spite of their private and voluntary nature, therefore, VSS deeply affect the freedom of individuals and economic operators.[31]

At the same time, other interests' representation, especially of weaker and vulnerable constituencies, remains often inadequate in transnational regulation.[32] Also because of this reason transnational private rules, certain VSS included, may generate direct effects on individuals and market participants other than the rule-drafters or regime-members. These are the actors which have not given their explicit consent to the rules they are subject to and, at the same time, are not *de facto* free to choose whether to join, or to leave, a regime.[33] This situation evokes an informal exercise of public authority. Both by acting under implicit or tacit delegation[34] and by

[26] Cafaggi, F., Iamicelli, P. (2015) 'Private regulation and industrial organisation: Contractual governance and the network approach. In Grundmann, S., Moslein, F., Riesenhuber, K. (Eds.) *Contract governance: Dimensions in law and interdisciplinary research*. Oxford: Oxford University Press, 346-347.

[27] Meidinger, E. (2007) *Supra at 3,* 124; Cafaggi, F. (2012) 'Enforcing transnational private regulation: Models and patterns'. In Cafaggi F. (Ed.) *Enforcement of transnational regulation. Ensuring compliance in a global world*. Cheltenham and Northampton: Edward Elgar, 77.

[28] Diller, J. (1999) A social conscience in the global marketplace? Labour dimensions of codes of conduct, social labelling and investor initiatives. *International Labour Review* 138(2), 101.

[29] Henson, S., Humphrey, J. (2009) The impact of private food safety standards on the food chain and on public standard-setting processes. Paper Prepared for FAO/WHO Codex Alimentarius Commission; International Trade Center (2012) When do private standards work? Literature Review Series on the Impact of Private Standards - Part IV. Geneva: ITC.

[30] Chang, S.W. (1997) GATTing a green trade barrier. Eco-labelling and the WTO Agreement on Technical Barriers to Trade. *Journal of World Trade* 31(1), 137–159; Lopez-Hurtado, C. (2002) Social labelling and WTO law. *Journal of International Trade Law* 5(3), 719–746; Joshi, M. (2004) Are eco-labels consistent with World Trade Organisation *Agreements? Journal of World Trade* 38(1), 69–92 (2004); Bonsi, R., Hammet A.L., Smith, B. (2008) Eco-labels and international trade: Problems and solutions. *Journal of World Trade* 42(2), 407–432.

[31] Cafaggi, F. (2011) *Supra at 1*, 21. See also, generally, Cafaggi, F., Renda, A., Schmidt, R. (2013) Transnational private regulation. OECD - International regulatory cooperation: Rules for a global World Vol. 1; Fuchs, D., Kalfagianni, A., Havinga, T. (2011) Actors in private food governance: The legitimacy of retail standards and multi-stakeholder initiatives with civil society participation. *Agriculture and Human Values* 28(3), 353-367.

[32] Stewart, R.B. (2014) Remedying disregard in global regulatory governance: Accountability, participation, and responsiveness. *American Journal of International law* 108(2), 211-270.

[33] Cafaggi, F. (2011) *Supra at 1*, 22.

[34] It has been claimed that the involvement of broad constituencies in transnational regulation operates under implicit delegation to regulate on behalf of disperse communities. Delegation would 'take place' where the subject matter to be regulated makes it difficult or impossible to identify a specific regulatory power 'wielder'. See Cafaggi, F. (2012) Transnational private regulation and the production of global public goods and private 'bads'. *European Journal of International Law* 23(3), 697-698. See also for a discussion of delegation to agents in the lack of principals: Cohen. J., Sabel, C. (2006) Global Democracy? *New York University Journal of International Law and Politics* 37(2), 763. It shall not be forgotten that governments can also delegate by omission by leaving regulatory space to be filled in by private parties. This act of omission shall be considered as a policy decision, for which States are accountable in the competent fora. See Mavroidis, P.C., Wolfe, R. (2016) Private standards and the WTO: Reclusive no more. EUI Working Paper RSCAS 2016/17, 8.

performing public functions broadly defined, transnational regulatory regimes end up affecting individual rights as protected by international treaties, constitutions, regulatory and administrative norms.[35]

Also from the perspective of the State such changes in global governance have been profound to the point of turning public bodies and administrative agencies into rule-takers in domains where public policy-making is affected by rules drafted by non-public actors.[36] More relevant for our purposes, recent research has instead highlighted reciprocal influence between private regimes and, especially, between public and private regimes.[37] Through a variety of means, public bodies attempt to steer, influence and coordinate a variety of actors at the transnational stage included private regimes, by means of substantive and procedural requirements of good administration.[38] This book concerns the role played by legal provisions, particularly those of international and European economic law, in the influence and regulation of VSS, with the aim to eliminate trade barrier effects and consumer confusion often generated by transnational private regulation in the field of sustainability.

1.1 The regulatory effects of VSS

Private regulatory activity at the transnational stage in the social and environmental domain is intimately linked to the employment of regulatory instruments taking the form of product standards.[39] Also legal research has, somehow belatedly, addressed the different facets of standardisation, including its peculiar features, the actors involved, the different types of outcome, and the legitimacy and accountability

[35] Benvenisti, E., Downs, G.W. (2012) 'National courts and transnational private regulation'. In Cafaggi, F. (Ed.) *Supra at 27*, 136. See also Kingsbury, B., Krisch, N., Stewart, R.B. (2005) *Supra at 1*, 23-24; Bernstein, S. (2011) *Supra at 24*, 27.

[36] Braithwaite, J., Drahos, P. (2000) *Global business regulation*. Cambridge: Cambridge University Press, 421; Vandembergh, M.P. (2005) The private life of public law. *Columbia Law Review* 105(7), 2029-2096; Cafaggi, F. (2009) Private Regulation in European Private Law. EUI Working Papers 2009/31

[37] This is generally the approach of the regulatory governance perspective. See generally Scott, C. (2010) 'Regulatory governance and the challenge of constitutionalism'. In Oliver, D., Prosser, T., Rawlings, R. (Eds.) *The regulatory State: Constitutional implications*. Oxford: Oxford University Press. More specifically see Cafaggi, F. (2011) *Supra at 1*, 42. From a legal sociology perspective: Bartley, T. (2011) Transnational governance as the layering of rules: Intersections of public and private standards. *Theoretical Inquiries in Law* 12(2), 517-542. Political scientists and regulation scholars have recently focused on a very broad array of tools, and not limited to legal instruments, by means of which private-private and public-private interactions take place. See Eberlein, B., Abbott, K.W., Black, J., Meidinger, E., Wood, S. (2014) Transnational business governance interactions: Conceptualisation and framework for analysis. *Regulation and Governance* 8(1), 1-21; Bartley, T. (2014) Transnational governance and the re-centred state: Sustainability or legality. *Regulation and Governance* 8(1), 93-109; Wood, S., Abbott, K.W., Black, J., Eberlein, B., Meidinger, E. (2015) The interactive dynamics of transnational business governance: A challenge for transnational legal theory. *Transnational Legal Theory* 6(2), 333-369.

[38] Kingsbury, B., Krisch, N., Stewart, R.B. (2005) *Supra at 1*.

[39] See generally, Abbott, K.W., Snidal, D. (2001) *Supra at 18*.

issues.[40] More recently, particular attention has been devoted to international standardisation.[41] Standards are trade catalysts, insofar as they reduce transactional costs by providing information about products, bringing efficiency and an optimal degree of order in their domain of application.[42] Technical standards drafted within the International Organisation for Standardisation (ISO) system define technical features of products. This type of standardisation is the textbook example of private regulation justified by technocratic legitimacy.[43] Other standards drafted outside the ISO regime such as VSS possess a much more normative character.[44] Owing both to its technical features and its voluntary character, standardisation has largely escaped public scrutiny.[45] Generally, standardisation epitomises an increased uneasiness in defining the boundaries of what is 'law': standard setters operate between public and private, between norm and regulation.[46]

A closer look at VSS exposes the typical features and objectives of standardisation, altogether with an undeniable and somehow 'public', regulatory flavour - at least for some of them. However, it is not only regimes that are transparent and open on non-discriminatory basis for accession from new members that exercise regulatory functions. Also corporate governance and bilateral contracting practices of companies reveal an important public dimension.[47] Within this framework, VSS do not just respond to a logic of self-interest, however 'enlightened', but provide a

[40] See Joerges, C., Schepel, H., Vos, E. (1999) The law's problem with the involvement of non-governmental actors in Europe's legislative process: The case of standardisation under the 'New Approach'. EUI Working Paper LAW No. 99/9; Vos, E. (1999) *Institutional frameworks of community health and safety regulations Committees, agencies and private bodies.* Oxford: Hart Publishing; Morth, U. (2004) *Soft law in governance and regulation. An interdisciplinary analysis.* Cheltenham: Edward Elgar; Schepel, H. (2005) *The Constitution of private governance. Product standards in the regulation of integrating markets.* Oxford: Hart Publishing; Peters, A., Koechlin, L., Forster, T., Zinkernagel, G.F. (Eds.) (2009) *Non-state actors as standard-setters.* Cambridge: Cambridge University Press; Higgins, V., Larner, W. (2010) *Calculating the social. Standards and the reconfiguration of governing.* Basingstoke: Palgrave McMillan; van Gestel, B., Micklitz, H.W. (2013) European integration through standardisation: How judicial review is breaking down the club house of private standardisation bodies. *Common Market Law Review* 50(1), 145–181; Berliner, D., Prakash, A. (2013) Signalling environmental stewardship in the shadow of weak governance: The global diffusion of ISO 14001. *Law and Society Review* 47(2), 345-372; Mataija, M. (2016) *Private regulation and the Internal Market. Sports, legal services and standard setting in EU economic law.* Oxford: Oxford University Press.

[41] Pauwelyn, J., Wessel, R., Wouters, J. (Eds.) (2012) *Supra at 1*; Trebilcock, M.J., Epps, T. (Eds.) (2013) Research Handbook on the WTO and Technical Barriers to Trade. Cheltenham: Edward Elgar; Delimatsis, P. (Ed.) (2015) *The law, economics and politics of international standardisation.* Cambridge: Cambridge University Press;

[42] See, generally, Link, A.N. (1985) Market structure and voluntary product standards. *Applied Economics* 15(3), 393-401.

[43] Cabral, L., Kretschmer, T. (2007) 'Standards battles and public policy'. In Greenstein, S., Stango, V. (Eds.) *Standards and Public Policy.* Cambridge: Cambridge University Press, 329-344.

[44] Abbott, K.W., Snidal, D. (2001) *Supra at 18* , in particular at 351-354; Cafaggi, F. (2011) *Supra at 1*, 29.

[45] Abbott, K.W., Snidal, D. (2000) Hard and soft law in international governance. *International Organization* 54(3), 441.

[46] Delimatsis, P. (2015) 'Continuity and change in international standardisation.' In Delimatsis, P. (Ed.), *Supra at 41*, 4. See also Vogel, D. (2008) *Supra at 1*, 261.

[47] Vandenbergh, M.P. (2007) The new Wal-Mart effect: The role of private contracting in global governance. *UCLA Law Review* 54(4), 913-970; See also Scott, C., Cafaggi, F., Senden, L. (2011) The conceptual and constitutional challenge of transnational private regulation. *Journal of Law and Society* 38(1), 10.

practical bottom-up response to the long-lasting quest for mediation between market and non-market concerns.[48] In addition, VSS directly contribute to achieving two - very public - regulatory objectives intimately connected to their form of standards. The first goal is the elimination of externalities resulting from production or consumption processes that include pollution, health and safety risks, and a host of 'moral externalities'. However difficult to quantify, the latter are suffered by certain concerned consumers, and include moral considerations deriving, for example, from inadequate animal welfare and poor working conditions.

The second objective is the elimination of information asymmetries between producers and consumers concerning hidden product features. Without accurate and trustworthy information, a market for environmentally-friendly goods could not operate. If it is impossible for consumers to differentiate between 'green' and 'brown' products, the producers of non-environmentally-friendly goods would outcompete the producers of green products, and possibly even drive the latter out of the market.[49] VSS which employ a label[50] pursue the objective to correct information asymmetries, very often in combination with the other objective of externality abatement.

For example, the Forestry Stewardship Council (FSC) aims at eliminating externalities resulting from unsound environmental, social and economical forestry management by promoting 'environmentally appropriate, socially beneficial, and economically viable management of the world's forests'.[51] The FSC scheme employs labelling on products derived from wood from certified forests, with the purpose of ensuring that consumers receive accurate information. It thereby allows a market for sustainable forestry products to function properly. Other schemes certify that a company's labour practices and workplace conditions are decent, in line with international instruments, and a plan is in force for continuous improvement.[52] VSS employing a label constitute a specific, and privately created, form of market-based instruments of regulation. Such regulatory tools direct market forces towards the correction of specific market externalities, and can take many forms. Market-based friction-reduction instruments, such as certification and labelling schemes, communicate to consumers information about certain non-visible product features.[53]

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48 Kingsbury, B., Krisch, N., Stewart, R.B. (2005) *Supra at 1*, 52.

49 Akerlof, G.A. (1970) The Market for 'lemons': quality uncertainty and the market mechanism. *Quarterly Journal of Economics*, 84(8), 488-500.

50 Indeed, also VSS which do not utilize labels, and are instead employed in business-to-business relations, can be seen as correcting information asymmetries between the producer and the purchaser of goods, which can have incomplete information about certain product features.

51 Forestry Stewardship Council. Principles and criteria. Available at https://us.fsc.org/en-us/what-we-do/mission-and-vision

52 Social Accountability 8000. International Standard. Available at http://sa intl.org/_data/n_0001/ resources/ live/SA8000% 20Standard%202014.pdf

53 Hockenstein, J.B., Stavins, R.N., Whitehead, B.W. (1997) Crafting the next generation of market-based environmental tools. *Environment: Science and Policy for Sustainable Development* 39(4), 12-33; Keohane, N.O.,

Alternatively, and from a perspective closer to international law than that of regulation, VSS can be portrayed as *sui generis* implementing instruments of international legal obligations. In an era of challenge to the traditional understanding of international law and institutions,[54] private regimes have the effect of 'hardening' soft-law obligations or complementing treaty rules,[55] which are both much-needed devices - particularly in the trade domain.[56] This perspective emphasises VSS' potential to turn broad international environmental and social rules into readily applicable provisions. At times ratification and implementation of multilateral treaties are lagging behind; these agreements would then not be directly applicable to individuals, and impossible to comply with in the absence of further specifications. Social standards are a fitting example, as they transpose ILO Conventions' requirements into an easily enforceable, effectively monitored, and directly applicable form for private economic operators. The traditional role of public authorities in giving effect to international law provisions is thereby bypassed. Another example is the international environmental law regime, based on a relatively small core of very generic international instruments, which are subsequently made operative by different groups of actors by means of a network of other instruments and institutions that include private actors and private rules.[57] For example, the Marine Stewardship Council (MSC) standards are based on the UN-FAO Code of Conduct of Responsible Fisheries - a framework instrument for sustainable fishing activities.[58] Other private regimes were instead explicitly established as a gap-filling response to the failure of treaty-based solutions.[59]

This implementing capacity of VSS should not be surprising. Many regulatory instruments taking the form of standards play such an implementing role, especially

Reeves, R.L., Stavins, R.N. (1998) The choice of regulatory instrument in environmental policy. *Harvard Environmental Law Review* 22(2), 313-367; Rademaekers, K., van der Laan, J., Smith, M., van Bruegel, C., Pollitt, H. (2011) The role of market-based instruments in achieving a resource efficient economy. Brussels: European Commission - DG Environment.

54 Slaughter, A.M. (2004) *A new World order*. Princeton: Princeton University Press.

55 Affolder, N.A (2009) The private life of environmental treaties. *American Journal of International Law* 103(3), 510-525; Affolder, N.A. (2010) The market for treaties. *Chicago Journal of International Law* 11(1), 159-195.

56 Pauwelyn, J. (2014) Rule-Based Trade 2.0? The rise of informal rules and international standards and how they may outcompete WTO Treaties. *Journal of International Economic Law*, 17(5), 749. See also Delimatsis, P. (2011) The fragmentation of international trade law. *Journal of World Trade* 45(1), 87-116. On private actors' unconventional 'implementation' of international agreement, see Cafaggi, F. (2012) *Supra at 34*, 711, where it is argued that the empirical reality, especially concerning agreement in the environmental sphere, suggests that private actors regulatory activities are functionally linked with public international regimes, and transcending traditional public-private divides.

57 See generally: Abbott, K.W. (2011) The transnational regime complex for climate change. *Environment and Planning C: Government and Policy* 30(4), 571-590. For the European Union case, see De Cendra de Larràgan, J. (2009) 'Regulatory dilemmas in EC environmental law: The ongoing conflicts between competitiveness and the environment'. In Cafaggi, F., Muir Watt, H. (Eds.) *The regulatory function of European private law*. Cheltenham: Edward Elgar, in particular at 118-128.

58 Gulbrandsen, L.H. (2014) Dynamic governance interactions: Evolutionary effects of state responses to non-state certification programs. *Regulation and Governance* 8(1), 84. See also https://www.msc.org/about-us/standards/fisheries-standard.

59 This is the case regarding several private regimes in the forestry domain. See Meidinger, E. (2006) *Supra at 1*.

when they operate in tandem with public authority. This is the case of technical standards, which transform general and broad requirements into detailed and readily applicable rules. This is the very principle of the New Approach to standardisation in the EU. The EU legislator only sets general mandatory requirements for product safety. The implementation is then left to European Standardisation Bodies (ESBs) which, under a mandate from the Commission, draft European standards voluntarily employed by producers. As European standards give rise to a presumption of conformity with the Directives' requirements, they have quickly become the most utilized means for producers to prove compliance with the latter.[60]

1.2 VSS and problems on the market

Transnational private regulation may generate negative effects typical of public regulation, especially where it takes the form of product standards such as VSS. This is particularly evident when market consequences are taken into account. The quick growth and increased popularity of VSS brought to the fore problems typical of non-tariff barriers and regulatory instruments relying on consumer preference. Two broad groups of problems deserve analytical and, possibly, regulatory attention: market access difficulty for producers, and consumer confusion. The severity of these problems is commensurate to the perceived mandatory character of the standards, and the proliferation of schemes addressing similar externalities.

In the first place, the trade barrier effect of additional, sometimes divergent, regulatory regimes cannot be underestimated. Standards defining product characteristics and production processes are particularly prone to generate this concern. As tariffs are at their lowest since the inception of the multilateral trading regime, and are even being eliminated altogether in combination with all quantitative restrictions in a trading block such as the EU, the largest obstacle to trade is the difference in regulatory regimes, consisting of both public and private rules.[61] One third of the global trade in goods is affected by divergent regulatory standards across different jurisdictions, whose complete harmonisation would result in a seven percent reduction in tariffs.[62] Global standardisation, also in the sustainability domain, should therefore be welcomed - and indeed it is mandated by international economic law. Art, 2.4 of the TBT Agreement requires that WTO Members base their national regulation on international standards, provided that they exist and are appropriate for the fulfilment of a legitimate policy objective pursued. On a level of positive integration, EU law has explicitly delegated private

[60] Joerges, C., Schepel, H., Vos, E. (1999) *Supra at 40.*

[61] Commission Communication COM(2012) 22 final, on trade, growth and development. Tailoring trade and investment policy for those countries most in need.

[62] Büthe, T., Mattli, W. (2012) *Supra at 4*, 8.

entities the task of drafting standards,[63] albeit not so extensively in the social and environmental domain.

Generally, and at any domain, standardisation is rarely about reaching a compromise among different approaches to regulation. It is instead a highly politicised battle for the pre-eminence of one regulatory approach, or technical solution, over another.[64] All standards create 'winners' and 'losers'. Often, certain economic operators manage to take advantage of the newly created regulatory regime, either because they are better suited for compliance, or because the agreed-upon standard closely resembles the practice they already employ. This happens either because of a successful regulatory capture, or by exploiting a stronger market position. [65] Conversely, other producers risk incurring higher costs which may undermine their economic performance. The outcome of standardisation may not be beneficial to society as a whole. A suboptimal outcome may prevail, which brings about higher costs for producers which exceed the overall gains for consumers, or by society at large in case the standard's objective is externality abatement.[66] A standard may also result in considerable gains for producers without contributing to similar gains for consumers which, for example, occurs when standards restrict competition.[67]

Standards provided for in certification schemes and codes of conduct addressing social and environmental aspects of the production of goods are prone to being set without due regard to all local specificities. VSS scheme-holders sometimes proudly state that their standards are applicable globally, with a single set of standards for all producers, as this ensures uniformity in products and outcomes.[68] Such standards, however, may by unfit for application to another country, region, or even producer. The effects can be very detrimental for producers. This occurs frequently for many agricultural producers in developing countries. Their main concern is not just entering a specific market, as tariffs are generally low and their products price-competitive, but fulfilling a host of complex requirements to enter a supply chain.[69]

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[63] Schepel, H. (2005) *Supra at 40.*

[64] Marquez, P. (2007) Standardisation and capture: The rise of standardisation in international industrial regulation and Global Administrative Law. *Global Jurist* 7(3); Staiger, R., Sykes, A. (2011) International trade, national treatment and domestic regulation. *Journal of Legal Studies,* 40(1), 149; Büthe, T., Mattli, W. (2012) *Supra at 4*, 11; Swinnen, J., Vandemoortele, T. (2012) Trade and the political economy of standards. *World Trade Review* 11(3), 390.

[65] Olson, M. (1965) *The logic of collective action*. Cambridge: Harvard University Press, 49. Godfrey, J.M. (2005) Regulatory capture in the globalisation of accounting standards. *Environment and Planning* 37, 1975-1993.

[66] Beghin, J., Disdier, A.C., Marette, S., van Tongeren, F. (2012) Welfare costs and benefits of non-tariff measures in trade: A conceptual framework and application. *World Trade Review* 11(3), 356-375.

[67] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 264.

[68] This is for example the case of Tesco with its Nurture program for fruit and vegetables certification. http://www.tesco.com/nurture/?page=nurturescheme

[69] Henson, S. (2008) The role of public and private standards in regulating international food markets. *Journal of International Agricultural Trade and Development* 4(1), 76.

In such a scenario, allegations of disguised protectionism are justified.[70] VSS challenge the very basis of the central tenet on which the multilateral international trade regime is built, which holds that different regulatory regimes are part and parcel of a country's comparative advantage.[71]

The costs of certification and auditing verifying compliance are high, but even more expensive are the required changes in production processes, internal management and organisational procedures required to ensure conformity to the standard. The lack of infrastructure and human and technical expertise in developing countries increases the perceived cost of compliance. Nonetheless, the cost of non-compliance, if they are excluded from a crucial market for their products, is much higher.[72] Further, multiple, overlapping regimes regulating the same phenomenon increase firms' transactional, implementation, and operational costs, and create the possibility for opportunistic forum shopping.[73] Suppliers in sectors vulnerable to consumer pressure are also exposed to requests from downstream companies to comply with, for example, a retailer code, a sectoral code, as well as one or more NGO schemes. Unfortunately, the obligations of similar regimes may not be perfectly aligned, and in some cases, even conflict with each other.[74] Finally, for certain schemes, the producers voluntarily applying for certification are often those which will have to face lower compliance costs, or which already possess higher skills and the resources to fulfil all the requirements of the standard.[75] Thus, the cost of compliance is a major challenge, and the overall net societal impact of some schemes is questionable, as many of the producers whose practices would have to be improved substantially, more often opt out.

The actual 'voluntary' character of standardisation is also exposed as fictional, for some standards more than others.[76] This is particularly the case when powerful retailers establish codes of conduct and certification schemes, compliance with which is, in certain markets, essential for entering into a distribution contact with a large

[70] Bhagwati, J. (2001) 'After Seattle: Free trade and the WTO'. In Porter, R.B. (Ed.) *Efficiency, equity, and legitimacy: The multilateral trading system at the Millennium*. Washington: Brooking Institution Press, 60-61; Gandhi, S.R. (2005) Regulating the use of voluntary environmental standards within the World Trade Organisation level regime: Making a case for developing countries. *Journal of World Trade* 39(5), 855-880.

[71] For a modern application of the classic Ricardo's propositions see Krugman, P., Obstfeld, M. (2008) *International economics: Theory and policy*. New York: Prentice Hall, 27–36.

[72] Maertens, M., Swinner, J.F.M. (2008) Standards as barriers and catalyst for trade, growth and poverty reduction. *Journal of International Agricultural Trade and Development* 4(1), 50-51.

[73] Abbott, K.W., Snidal, D. (2009) *'The governance triangle: Regulatory standards institutions and the shadow of the State'*. In Mattli W., Woods, N. (Eds.) *Supra at 1,* 44-88.

[74] Abbott, K.W., Snidal, D. (2009) Strengthening international regulation through Transnational New Governance: Overcoming the orchestration deficit. *Vanderbilt Journal of Transnational Law* 42, 551.

[75] International Trade Centre (2012) When do private standards work? Literature Review Series on the Impact of Private Standards - Part IV. Geneva: ITC.

[76] Also the Court of Justice of the European Union (CJEU) acknowledged that technical standards can become *de facto* mandatory for the purpose of market access. See C-171/11 *Fra.bo v DVGW* [2012], ECR I-0000, paras 29-30, and Section 2.2.3 of Chapter 3 for further discussion.

retailer holding *de facto* gate-keeper power for market access. In such a scenario, the decision to comply with a standard or a retailers' code, under unfavourable and possibly even unfair terms, is to a large extent influenced by external conditions like the market power of the retailer.[77] Suppliers in developing countries are usually passive players, and are normally merely given a code of conduct when a supply contract is signed, told to comply with it and then informed that they will undergo periodic audits.[78] Furthermore, the voluntary nature of VSS is fundamentally challenged at its basis by national regulations providing incentives to companies which behave in a socially responsible manner,[79] as well as by a policy preference for market-based instruments to address, in particular, environmental issues.[80] Consumer preference also renders acceptance of a scheme less of a really voluntary choice, especially if producers want to enter the profitable 'quality' market for certified products.[81] For example, certification in sectors like forestry and fisheries is increasingly essential to market a product at all, as markets for 'regular' products are shrinking.[82]

As VSS increase in popularity and initiatives proliferate,[83] consumers, the real movers behind the diffusion of VSS, can suffer negative consequences which could threaten

[77] Diller, J. (1999) *Supra at 28*, 100-101.

[78] Jiang, B. (2009) Implementing supplier codes of conduct in global supply chains: Process explanations from theoretic and empirical perspectives. *Journal of Business Ethics* 85(1), 78.

[79] Sobczak, A. (2006) Are codes of conduct in global supply chains really voluntary? From soft law regulation of labour relations to consumer law. *Business Ethics Quarterly* 16(2), 168; Cafaggi, F. (2011) *Supra at 1*, 22.

[80] For example, in the EU see Commission Communication COM(2011) 681 final on a renewed EU strategy 2011-14 for Corporate Social Responsibility.

[81] In 2014, Dutch consumers alone spent more than € 2.6 billion in 'sustainable food', a 20% increase from the previous year. See Logatcheva, K. (2015) Monitor duurzaam voedsel 2014. Consumentenbestedingen. LEI Wageningen UR. Available at http://edepot.wur.nl/361052. A recent estimate of the global market for low-carbon goods and services sets it at € 4.2 trillion, the EU accounting for a fifth of it. Department for Business, Innovation & Skills (2013) Low carbon environmental goods and services. Report for 2011/11. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224068/bis-13-p143-low-carbon-and-environmental-goods-and-services-report-2011-12 .pdf.

[82] In 2014, 75% of the timber sold on the Dutch market was certified as 'sustainable'. Similarly, the market share of sustainably-certified paper and paperboard has increased from 32% to 47% between 2011 and 2013. Such market shares do not identify anymore a situation where certified product are a niche in which producers may want to tap, but rather show that certification is less and less of a choice if entrance on the market for *general* timber products is sought. See Oldenburger, J., de Groot, C., Winterink, A., van Benthem, M. (2015) Almost 75% of timber on the Dutch market sustainably produced. Bosberichten 2015-3. Available at https://www.unece.org/fileadmin/DAM/timber/Forest_ Information _Billboard/BB_2015_03_English.pdf. It is foreseeable that a similar situation would occur in the near future on the market for sustainable seafood, at least with respect to certain fisheries. In 2015, 14% of the global production of seafood was certified. From 2003 to 2015, sustainable seafood growth at a rate of 35% a year, which is ten times faster than the growth of the global seafood industry. Potts, J., Wilkings, A., Lynch, M., McFatridge, S. (2016) State of sustainability initiatives review: Standards and the blue economy. International Institute for Sustainable Development. Available at http://www.iisd.org/ sites/default/files/publications/ssi-blue-economy-2016.pdf.

[83] For a comprehensive overview: Marx, A., Wouters, J. (2014) Competition and cooperation in the market of voluntary sustainability standards. United Nations Forum on Sustainability Standards Discussion Paper Series No. 3. Available at https://unfss.files.wordpress.com/2013/02/unfss-dp-no-3-final-version-15april_full.pdf.

the very functioning of these schemes.[84] Consumers are often confused by the proliferation of standards resulting from the rapid increase in popularity of labels and codes of conduct, and it is difficult to differentiate and to compare apparently similar regulatory regimes that may be characterised by completely different standards, stringency, and efficacy.[85] The impact of VSS on the objective pursued varies considerably. Some schemes merely 'hold the bar', by only ensuring compliance with the applicable legal obligations, for example by providing that certified products must comply with all relevant law and regulations. This type of scheme is on the rise, as some initiatives that were previously aiming at pursuing ambitious sustainability goals are transforming into schemes for the verification of legality of the certified products.[86] Other VSS 'raise the bar', by going beyond the applicable regulatory regime. Because of their stringency, such VSS have in theory a more profound impact and are drivers of change, but are also potentially more trade-restrictive.[87] The stringency of a scheme is in many cases difficult to identify because of the presence of standards whose operationalisation is left to the entity seeking certification.[88] As shown in the forestry certification sector, large differences persist among labelling schemes applying to the same issue, not only in terms of stringency of standards, but also of legitimacy and accountability practices within the organisation, connection with the industry and its agenda, and even the strictness and independence of the audit and certification process.[89] End-consumers are normally not aware of all these issues, nor are they well-positioned to evaluate the claims made by different scheme-holders.

Adding to consumer confusion, some standards employ a selective approach in the inclusion of internationally recognised fundamental principles or rights, in particular in the area of labour rights protection.[90] This does not just go against the universality of labour rights,[91] but also shows that firms enforce their codes according to concerns that are industry or sector-specific. Certain labour rights such as the prohibition of child labour are frequently included in the standards, arguably because their infringement leads to negative publicity. Conversely, other rights such

[84] Abbott K.W., Snidal D. (2009) 'The governance triangle: Regulatory standards institutions and the shadow of the State'. In Mattli W., Woods, N. (Eds.) *Supra at 1*, 44-88.

[85] For examples in the field of ethical coffee certification, see Ponte, S. (2005) Standards and sustainability in the coffee sector. A global value chain approach. United Nations Conference on Trade and Development and the International Institute for Sustainable Development; Raynolds, L.T., Murray, D., Heller, A. (2007) Regulating sustainability in the coffee sector: A comparative analysis of third-party environmental and social certification initiatives. *Agriculture and Human Values* 24(2), 147-163.

[86] Bartley, T. (2014) *Supra at 37*.

[87] Raynolds, L.T., Murray, D., Heller, A. (2007) *Supra* at 85, 148.

[88] See Section 5.4 of Chapter 2 for further discussion.

[89] Cadman, T. (2011) *Quality and legitimacy of global governance. Case lessons from forestry*. Basingstoke: Palgrave Macmillan.

[90] Bartley, T. (2011) *Supra at 37*, in particular at 534-541.

[91] The universality of labour rights remains, however, a debated concept that developing countries in particular tend to reject. See for example Bhagwati, J. (1995) Trade liberalisation and 'fair trade' demands: Addressing the environmental and labour standards issues. *The World Economy* 18(6), 759.

as freedom of association are rather excluded because their enforcement would be particularly costly for the company.[92]

Consumers are not in the position to assess the truthfulness of a claim about a product's quality or production methods but, at the same time, the proper functioning of labelling schemes and codes is based to a large extent on their trust.[93] A debate on the trustfulness, and consequently on the effectiveness of sustainability standards as well as their perception by consumers has sprouted also among non-specialist audiences.[94] Companies also are reacting to allegations of deceptive practices in the certification process, and withdraw from schemes that, for different reasons, are reported not to achieve their objective or are not independent.[95] Surveys indicate that consumers can be skeptical about the sustainability claims of retailers, companies and even public governments.[96] This skepticism is partially due to a prolonged exposition to 'greenwashing' practices, a phenomenon that has proliferated during the Nineties, and which uses public relations tools to make corporations appear to be sensitive to the environment while, in fact, they are not.[97] Although the trend is changing, the lack of independent monitoring, and the lax - if not absent - certification practices of some codes, still raise doubts on whether they are drafted as a genuine attempt to pursue sustainable practices and improve workers conditions, or simply aimed at modifying stakeholders' perceptions.[98] Indeed some initiatives are described as little more than 'empty, corporate-sponsored public relations rhetoric'.[99]

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92 Diller, J. (1999) *Supra at 28*, 112-113; Boiral, O. (2003) The certification of corporate conduct: Issues and prospects. *International Labour Law Review* 142(3), 333.

93 Chon, M. (2009) Marks of rectitude. *Fordham Law Review* 77(5), 2319.

94 Eilperin, J. (2012, April 23) Some question whether sustainable seafood delivers on its promise. *Washington Post*, available at http://www.washingtonpost.com/national/health-science/some-question-whether-sustainable-seafood-delivers-on-its-promise/2012/04/22/gIQAauyZaT_story.html?wpisrc=emailtoafriend retrieved online on June, 12th 2013.

95 This is, for example, the case of a number of companies, including five from the Fortune 500 list, withdrawing from the Sustainable Forestry Initiative (SFI), a certification program for sustainable managed forests, after a report exposed several false claims by SFI, and in particular its close connection with large timber companies which undermined its independence. See http://forestethics.org/fortune-500-companies-drop-misleading-eco-label.

96 A report of the Dutch competition authority shows that Dutch consumers are considerably confused about quality labelling, including social and environmental labelling, and some schemes are simply seen as marketing strategies. Almost 50% of Dutch consumers believe that there are too many labels, and around 40% believe that the presence of a label is a mere excuse to increase prices. See Autoriteit Consument & Markt (2016) ACM over keurmerken. Available at https://www.acm.nl/nl/publicaties/publicatie/15163/ACM-over-keurmerken/ See also Horne, R. (2009) Limits to labels: The role of eco-labels in the assessment of product sustainability and routes to sustainable consumption. *International Journal of Consumer Studies* 33(2), 181; Lamb, H. (2008) Fairtrade: Working to make markets fair. In International Trade Centre. What If? New Challenges in Export Development: Consumers, Ethics and Environment, 59.

97 Muchlinski, P. (2007) *Multinational enterprises and the law*. Oxford: Oxford University Press, 550.

98 Entine, J. (2013) Ecolabels - The Wild West of labelling. Ethical Corporation. Available at: http://www.ethicalcorp.com /environment/ecolabels-wild-west-labelling.

99 Bartley, T. (2003) Certifying forests and factories. States, social movements, and the rise of private regulation in the apparel and forest products fields. *Politics and Society* 31(3), 435.

Finally, consumers do not always understand the claims associated with certain VSS, or misunderstand what claims entail. A relatively common misunderstanding, for example, concerns the alleged 'better' health and safeness features, and richness in nutritive values, of organic products versus non-organic. Scientific studies point towards the lack of any difference between organic and non-organic products, except that non-organic products may present traces of pesticide residues.[100] Similar consumer misunderstandings have arisen with respect to food-miles and, generally, locally sourced products. While consumers certainly enjoy a sacred prerogative to decide what to purchase, 'local' should not be equated with 'greener', or 'more efficient'. It has been demonstrated that the non-mechanised and non-intensive agricultural practices in certain developing countries more than offset the carbon emission in transportation, and thus caused less polluting emission per unit than agricultural products gathered in the vicinity of the place of consumption, for example, in Europe.[101]

As will be seen in Section 3 of Chapter 3, many elements of consumer confusion are difficult to address by means of traditional instruments of consumer protection. It is nevertheless essential that consumers understand clearly the claims of a scheme, and that their trust towards VSS is not hindered. Regulators have adopted measures to ensure that certain private schemes adhere to a publicly determined standard of trustworthiness.[102] More substantive public intervention may be necessary in the future to address proliferation though. Mechanisms of mutual recognition and equivalence are hardly in the interest of private schemes competing on a standardisation market which, as any market, values diversity of its products.

2 Methodology

In light of the above, it is not surprising that the nature of VSS is controversial and, as seen in some cases, explicitly contested. If these rules were drafted by public authorities, they would be particularly contentious under both EU and WTO law. In part this explains why private actors are responsible for their creation. Under EU law, provided that the field is not harmonised by EU legislation, State measures restricting market access risk being struck down by the Court of Justice of the European Union (CJEU). State measures may aim at protecting the environment, or consumers, but the outcome of the Court analysis, which balances between

[100] See the report from the Italian consumer association Altroconsumo (2015) Non crediamo in Bio. Available at http://www.altroconsumo.it/alimentazione/prodotti-alimentari/news/prodotti-bio.

[101] Weber, C.L., Matthews, H.S. (2008) Food-miles and the relative climate impacts of food choices in the United States. *Environmental Science and Technology* 42(10), 3508–3513.

[102] For example, the EU intervened in setting baseline requirements for organic certification that all schemes in that domain must comply with. See Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products. L 189/1. This issue will be further discussed in Chapter 2 and in Section 3.2.1.1 of Chapter 3.

economic and non-economic concerns, has on occasion shown to privilege the former. WTO law considers discrimination sufficient to trigger a *prima facie* breach; this may occur systematically for costly environmental measures which negatively affect producers from countries with a lower level of environmental protection. A *prima facie* breach can be justifiable, but WTO dispute settlement bodies have performed extensive inquiries over the overall even-handedness and necessity of the regime in a fashion that curtails public autonomy and requires a careful crafting of regulatory measures.

The private, transnational and formally voluntary character of VSS makes them particularly elusive to the reach of regulators. The international trade regime applies directly only to public measures.[103] The negative effects of VSS are felt in countries that can neither affect the scope of such regimes, nor the preferences of the actors that support them. The traditional enforcement tools of private regulation available at the national level for national courts are of limited effectiveness with respect to transnational private regulatory regimes.[104] Even in the mostly Western countries where such schemes are established, voluntary private measures in certain areas may be considered as belonging to the protected domain of private autonomy, thereby limiting their review.[105]

This book is generally concerned with the alternatives available to public authorities to exercise control, coordination and review over transnational private regulation, and specifically over VSS. A need arguably exists to bring public authority back into transnational regulation to unlock its full potential.[106] Therefore, an appraisal is necessary of the extent to which transnational private regulatory instruments can be supervised and influenced by public authorities in order to maximise their effectiveness and lessen their negative effects. A novel and promising conceptual framework and theoretical approach to assess the interplay between public and private authority will be employed, which takes a broad look at the types of private regulatory regimes mechanisms over which influence and control can be exercised by public actors.[107] Following the Transnational Business-Governance Interaction (TBGI) framework of analysis, the different forms of interaction between public and private authority must therefore be carefully studied to understand the multi-faceted and possibly subtle influence exerted by public regimes over private ones.

[103] The WTO rules of attribution and the scope of measures covered by the WTO Agreements are discussed in Chapter 5.

[104] Benvenisti, E., Downs, G.W. (2012) 'National courts and transnational private regulation'. In Cafaggi, F. (Ed.) *Supra at 35*, 140-141.

[105] Cafaggi, F. (2012) 'Enforcing transnational private regulation: models and patterns'. In Cafaggi, F. (Ed.) *Supra at 27*, 91.

[106] Abbott, K.W., Snidal, D. (2009) *Supra at 1*, 577.

[107] Eberlein, B., Abbott, K.W., Black, J., Meidinger, E., Wood, S. (2014) *Supra at 37*; Wood, S., Abbott, K.W., Black, J., Eberlein, B., Meidinger, E. (2015) *Supra at 37*.

Legal literature acknowledges that coordination, meta-rules, and procedural requirements can be suitable tools to that purpose, as they improve both the quality and legitimacy of transnational regulatory regimes, including those established by private actors.[108] By meta-regulation and meta-rules, we mean a set of 'light' normative requirements on the basis of which private actors are required to institutionalise the process and the substance of their regulatory efforts.[109] In addition to coordination, meta-rules, and procedural requirements, legal review of certain privately designed regimes should not be excluded *a priori*.[110] This is not to say that private rules, especially those which may become essential to market a product, should always be legally challengeable, for example because they are in obstruction of the freedom of movement under EU law. Courts are ill-positioned to review the complex technical features often possessed by private standards, and may generate chilling effects over private regulation.

However, as in the same manner domestic courts have attempted to establish jurisdiction over the actions of international institutions,[111] it is neither unconceivable, nor *per se* undesirable, that national courts may attempt to establish (albeit limited) jurisdiction over the activities of some transnational private regulators, especially in the presence of rules that apply almost mandatorily to private actors and bring about distributional effects.[112] This already occurs under EU law for professional self-regulation and certain sport rules, which can be reviewed under the Treaty freedoms

[108] Black, J. (1996) Constitutionalising self-regulation. *Modern Law Review* 59(1), 24; Freeman J. (2000) The private role in public governance. *New York University Law Review* 75(3), 543-675; Schepel, H. (2005) *Supra at 40*, 247; Kingsbury, B., Krisch, N., Stewart, R.B. (2005) *Supra at 1*; Pauwelyn, J., Wessel, R.A., Wouters, J. (2012) 'Informal international lawmaking: An assessment and template'. In Pauwelyn, J., Wessel, R.A., Wouters, J. (Eds.) *Supra at 1*, 528-529. It has been noted that the proliferation of private regimes, at least at the national level, has not created a situation where independent regimes operate, but stronger coordination is made necessary by the actual interdependence of private regimes with public rules. Cafaggi, F. (2010) Private law-making and European integration: Where do they meet, when do they conflict? In Oliver, D., Prosser, T., Rawlings, R. (Eds.) *The regulatory State*. Oxford: Oxford University Press, 204.

[109] Jordana, J., Levi-Faur, D. (2004) *The politics of regulation: Institutions and regulatory reforms for the age of governance*. Cheltenham: Edward Elgar, 6-7.

[110] Cafaggi, F. (2012) 'Enforcing transnational private regulation: models and patterns'. In Cafaggi, F. (Ed.) *Supra at 27*, 128.

[111] See, for example, the Bosnian Constitutional Court's review of the activity of the UNHR, or the outcome of the *Kadi* saga under EU law.

[112] Kingsbury, B., Krisch, N., Stewart, R.B. (2005) *Supra at 1*, 31-32. On a similar position also the International Public Authority perspective. It recognises that certain private activities may be as much in the public interest as public activities. Certain private regulatory activities can be seen as functionally equivalent to activities undertaken on a public legal basis. Private activity which directly affects public goods, or which is carried out where colliding fundamental interests of different social groups are at stake would be covered. Such activities should thus be subject to the same legal requirement applicable to functionally equivalent exercises of public authority by public actors, in the sense they unilaterally determine others and reduce their freedom. See von Bogdandy, A., Dann, P., Goldmann, M. (2010) 'Developing the publicness of public international law: Towards a legal framework for global governance activities'. In von Bogdandy. A., Wolfrum, R., von Bernstorff, J., Dann, P., Goldmann, M. (Eds.) *The exercise of public authority by international institutions. Advancing international institutional law*. Haidelberg: Springer, in particular at 14-15. The 'unilateral determination' in question, is arguably understood as implying a formally mandatory character of the rules at hand, thereby excluding rules which, under various means, become *de facto* mandatory.

and/or competition law.[113] Such scrutiny also addresses institutional and procedural features of the regulating body, such as its composition, the presence of appeal mechanisms and the proportionality of sanctions.[114]

The application of certain legal principles - among which proportionality, non-discrimination and less trade-restrictiveness, typical of international and EU economic law - constitutes a form of control, or a legal accountability mechanism with the potential to increase the legitimacy and effectiveness of private regulatory activity.[115] More fundamentally, legal review and legal principles will insure that the mediation between trade and societal concerns offered by certain private regimes is performed under at least a degree of scrutiny from the democratic institutions which are traditionally legitimised to undertake such a goal. Legal review, however episodic, which finds a transnational regulatory body in breach of certain provisions, has the potential to greatly improve the practice of many other private regulators, even in different domains.[116]

2.1 Research questions

Among the several possible forms of transnational private regulation, the focus here is on VSS. VSS possess many features common to transnational private regulation, including some particularly problematic ones. VSS take the form of product standards; they have a markedly transnational component and application; they mediate between values which can be conflicting and located among different constituencies; they generate distributional concerns; they have a practical impact on everyone's life by determining and affecting consumer purchase patterns. Some VSS appear to be at least relatively successful in pursuing their stated objective.[117] They have therefore become an important and rather emulated instrument of global governance in the area of trade and sustainability, which is potentially in line with the goals pursued by public authorities as well.

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[113] C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653; C-36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR I-1406; C-415/93 *Union Royale Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921; Joined Cases C-51/96, C-191/97, *Deliège v Ligue francophone de judo et disciplines associées ASBL and Others* [2000] ECR I-2549.

[114] Mataija, M. (2016) *Supra at 40*, 261.

[115] Mattli, W., Büthe, T. (2005) Global private governance: Lessons from a national model of standard setting in accounting. *Law and Contemporary Problems* 68(3), 226; Kingsbury, B., Krisch, N., Stewart, R.B. (2005) *Supra at 1*, 37-41, Cassese, S. (2005) Administrative law without the State? The challenge of global regulation. *New York University Journal of International Law and Policy* 37(4), 669; Esty, D.C. (2006) Good governance at the supranational level: Globalising administrative law. *Yale Law Journal* 115(7), 1527-1536; Harlow, C. (2006) Global administrative law: The quest for principles and values. *European Journal of International Law* 17(1), 189-207.

[116] Stewart, R.B. (2014) *Supra at 32*, 250.

[117] See for a recent review of the effects of certification initiatives in the paper products, agrifood, apparel and electronic supply chains: Bartley, T., Setrini, G., Summers, N., Koos, S., Samel, H. (2015) *Looking behind the label: Global industry and the conscientious consumer*. Bloomington: Indiana University Press.

Among the possible legal tools for supervision and influence, those offered by European and international economic law are here selected because they are *prima facie* particularly suitable for the task at hand. Certain economic law provisions, for example EU competition law, expressly apply to private agreements in the presence of economic operators like VSS. Its effect-based jurisdiction[118] is particularly effective to catch phenomena at the transnational stage. Other rules, such as EU freedom of movement, have instead the potential to apply to private rules as well which hinder fundamental economic rights. While VSS have been devoted almost no academic attention under EU law, under WTO law a debate has flourished over private standards. WTO law is particularly well-positioned to deal with private instruments taking the form of standards, as the TBT Agreement provides for meta-rules of governance and, particularly important for our purpose, of substance, applicable to certain private standardising bodies and their standards.

Certain provisions of economic law consider and affect both the effects and substance of a measure; they constitute therefore rather sophisticated tools for discerning lawful measures from unlawful ones. Among all effects generated by the schemes in question, here the focus is on the effects which are the most relevant under international and EU economic law provisions, which are generally trade-barrier effects. Although EU competition law is predominantly concerned with the welfare of consumers, trade-barrier effects are also important as, to a certain point, they determine the extent of competition in a market. In addition, consumer confusion is taken into account as a means by which to include both the effects generated on consumers by the schemes and their proliferation, and also to attempt to include considerations about their effectiveness. The contribution of VSS towards the objectives they pursue, as will be seen, matters less under Art. 34 TFEU and WTO law, but has more relevance under EU competition provisions.

The overarching question this dissertation attempts to answer is the extent to, and the conditions under which, EU and WTO economic law regimes can control and review, and also coordinate and influence VSS, with the purpose of remedying their trade barrier effects and consumer confusion. This book can be seen as a case study over a relatively uniform subset of transnational private regulation generating specific regulatory concerns, and which investigates the possible reach of a set of legal provisions as a possible solution. As further explained in Section 4 of Chapter 2, the conceptual framework of analysis offered by the Transnational Business Governance Interactions (TBGI) approach is employed for this purpose. The legal rules considered, i.e. the tools by means of which such interactions between public and

[118] *United States v Aluminium Co. of America* 148 F.2d 416 (1945), 443; In the EU see the similar approach which focuses on the implementation of an agreement between undertakings in the EU territory. See 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.

private authority take place, are a host of diverse economic law provisions applicable, or potentially applicable, to private standards - some of which constitute somewhat of a grey legal area, both at the EU and the WTO level.

Art. 34 TFEU is among such rules. It provides that measures having equivalent effects to quantitative restrictions in the internal market are prohibited. Albeit applying in principle to public measures, its application to private rules is not to be excluded, as the practice of the Court seems to confirm in particular with respect to product standards. As VSS may qualify as agreements between undertakings, and the restrictions to market access generated may have an impact on consumer welfare and on market parameters, the EU competition regime, in particular under Articles 101 and 102 TFEU, is obviously relevant. Finally, the WTO Agreements - especially the TBT Agreement - include provisions indirectly affecting private parties' trade-restricting activities in the regulatory domain, by prohibiting discrimination and unnecessary trade-restrictiveness of their standards. The form of these obligations can be described as meta-rules but, by being imposed on WTO Members, at least theoretically can be enforced against Members in WTO dispute settlements. Such requirements set a uniform approach for national public regulators' oversight over private standards, and establish minimum requirements on which private standards must be based.

This book is also concerned with other legal provisions. Particularly important are rules which result in forms of interaction between private bodies and EU regulators in the exercise of their market regulatory functions. These interactions, either directly or indirectly, influence the substance of VSS and thereby affect, and possibly reduce, market access and consumer confusion by establishing regulatory arrangements. They therefore fall squarely within the remit of the research question. These rules take different forms such as harmonisation measures and meta-rules. They deserve attention also from the perspective of international trade law since, by establishing a link between private and public authority, they may have the effect of resulting in attribution and State responsibility for private measures under WTO law. In that event, WTO provisions may be applicable to the substance of a VSS as it was a public measure.

The aim of the analysis here undertaken is three-fold. The first objective is to understand the extent of the possible reach of EU and international economic law as it stands, and certain regulatory measures, over a specific subset of private regulatory regimes. Our goal is to offer tangible legal solutions to problems VSS might cause to market participants. Since legal areas considered here are underdeveloped, as a second related objective this book suggests normative approaches to certain legal tests in order to extend public control and influence over VSS to address the specific problems here discussed, both under Art. 34 TFEU and

under the TBT Agreement, and also under the relevant competition law tests under Art. 101 TFEU. Such normative tests are embedded in the overall teleological structure of the legal norms considered, and mediate between private autonomy, market access obligations, and fundamental public policy objectives. As a third objective, this book aims at empowering VSS standard-setting bodies to design instruments in full compliance with applicable EU and international economic law rules. It also aims at informing all relevant stakeholders of the consequences certain legal provisions already generate on VSS, or may generate in the future under certain conditions.

2.2 Structure of this book

This Chapter has framed the emergence of VSS within the broader trend of transnational private regulation, and discussed some of the problems engendered by private schemes. Chapter 2 complements Chapter 1 by discussing at length the main features of VSS, beginning with an accurate definition of the subject matter. Chapter 2 illustrates the boundaries of the broad domain of 'sustainability', and the role of third-party certification both in ensuring effectiveness and amplifying trade-barrier effects. VSS are defined broadly, not just in terms of their area of coverage, but also *vis-à-vis* their institutional set-up. It is therefore possible to appraise the possibilities for public influence with respect to an entire domain of global governance pursuing sustainability by means of product standards. Subsequently, with the assistance of political science literature, three ideal-typical categories of VSS are designed, in order to facilitate and fine-tune the legal analysis, and to identify which should be the role of public authority *vis-à-vis* each of these groups. Such categories identify transnational private rules as public, club or private goods, all of which contribute to different extent to the production of global public goods.

Literature on global public goods also offers a normative frame for public intervention. In order to stimulate the creation of global public goods, as well as a desirable output, public authority should put facilitations into place to support and encourage the aggregate effort of the actors involved. Closer intervention is however required where global public goods result in distributional concerns. The role of public authority should therefore be a controlling and coordinating role, which could be exercised by means of legal review, for example under Art. 34 TFEU and competition law, through meta-rules such as those contained in the TBT Agreement, and by means of several forms of interaction with private regulatory authority aiming at influencing its procedures and substance.

With respect to this issue, the Chapter lays down a framework for classifying forms of interaction between public and private authority grounded on the transnational business-governance interactions (TBGI) literature. The framework indeed

encompasses the broad interactions between public authorities and VSS and is exercised by means of legal provisions such as Art. 34 TFEU, the EU competition law regime, and the TBT Code of Good Practice. The TBGI approach is also used more specifically to identify a host of EU regulatory initiatives affecting at different degrees VSS and their substance, on which we will return in Chapter 3 and Chapter 5. Finally, several features of VSS are discussed in preparation for the legal analysis. These include formal features such as the forms of the standards, the presence of a label, and the stringency of the scheme. Importantly, relevant differences between VSS and technical standards are highlighted and explained.

Having clarified the conceptual and normative background, Chapter 3 begins the legal analysis with an assessment of VSS under Art. 34 TFEU, and under other EU secondary rules which become directly applicable on, or indirectly affect, VSS as a consequence of EU market regulation. The possibility of applying Art. 34 TFEU to private rules requires an analysis of its scope, including the substantive coverage of the obligation. The Chapter clarifies the concept of restriction to market access, with specific reference to private regulatory instruments based on standards. Subsequently, the scope *ratione personae* of Art. 34 TFEU is analysed, by connecting Art. 34 case-law with that under the freedom of circulation of persons (Articles 45, 49 and 56 TFEU). Although the Court has repeatedly stated that Art. 34 TFEU applies to public measures only, to understand case law within a framework that considers Art. 34 as prohibiting third-party interference in intra-EU contracts shows that private rules can be covered too. Further, the case-law's recent evolution resulted in the application of Art. 34 to a private standard-setter in the presence of elements of connection with a Member State. The practice of the Court of Justice of the European Union to elevate the principle of non-discrimination to a fundamental right is discussed as a possible avenue to subject private rules to the Treaties' provisions. On the basis of this normative framework, Art. 34 TFEU is applied to VSS. In order to conciliate private autonomy and market access, the analysis includes the design of a substantive test applying to the specificities of private quality standards, and discusses specific elements required in the justification of private rules.

Finally, the Chapter addresses cases of interactions between private authority and EU regulators. Three situations are discussed, altogether with their consequences on the market impact of VSS: the direct employment of VSS in EU legislation as it occurs under the Renewable Energy Directive; forms of indirect influence on VSS exercised by EU legislation; and employment of VSS by EU Member States. These interactions may result in a number of potential consequences such as coordination of regulatory effects whereby the implementing role of VSS is brought to the fore; influence on the procedures and the substance of the schemes which are recognised; control by public bodies of whether certain requirements are complied with; and even Court review of the VSS body's compliance with good administration principles. For each

instance of interaction the likely consequences on trade restrictive effects and consumer confusion will be discussed.

Chapter 4 addresses the other side of an increasingly untenable divide between public and private rules, and discusses VSS under the EU competition regime. It shows that multi-stakeholder and sectoral VSS can be seen as horizontal agreements between undertakings, to which applies the prohibition of entering into agreements which have the object or effect of restricting competition. The Chapter preliminarily discusses the possibility to exclude VSS from competition scrutiny, insofar as they may be considered as exercising forms of public authority. Subsequently, by employing empirical research on the market impact of standards and VSS, as well as economic literature, it illustrates object and effect restrictions to competition generated by VSS. Similarly, pro-competitive effects of VSS are explained. It is demonstrated that, differently from technical standards, certain pro-competitive effects normally associated with standardisation agreements do not occur.

The implications of this finding are assessed within the framework for balancing pro- and anti-competitive effects of an agreement as interpreted and applied by the Commission. The Chapter also discusses the practice of national competition authorities, and suggests a normative approach under Art. 101 TFEU to address market access and consumer confusion concerns. Chapter 4 also discusses the residual situation under which company VSS constitute vertical agreements between undertakings, and a more relevant scenario under which a scheme can be seen as a dominant undertaking operating on the market for sustainable standardisation. The Chapter also appraises whether recognition of a VSS instrument suffices to exclude the application of competition rules as it normally occurs with respect to State measures.

Chapter 5 changes perspective and moves to the domain of public international law and, mostly, international trade law. The aim of the Chapter is to investigate i) the possibility of attributing VSS to a WTO Member, ii) under which circumstances, and iii) to understand the resulting obligation imposed on the State, in particular under the TBT Agreement. At first, the relevant rules for attribution of private conduct are elucidated, as provided for in the Articles on State Responsibility for Internationally Wrongful Acts. Subsequently, WTO case law where private party activity was at hand is discussed, with the objective of appraising the extent of consonance of the WTO/GATT tests for attribution and the rules of public international law, and to identify the relevant standard under which private conduct is attributable under the GATT. After having comprehensively outlined the WTO framework for attribution under the GATT, the analysis turns to the appraisal of VSS against such framework. The specific categories for interaction identified in Chapter 2 and discussed in Chapter 3 are employed again to assess whether VSS employment in legislation will

give rise to attribution, and under which conditions attribution can arise for other, less structured, interactions.

The Chapter then addresses the TBT Agreement, which can be depicted as a regime containing special rules for attribution for standardising bodies. The establishment of a standardising body in a Member's territory imposes an obligation on the Member not to encourage deviations from the provisions contained in the TBT Code of Good Practice for the Preparation, Adoption and Application of Standards (the 'TBT Code of Good Practice', or the 'TBT Code'), and to take reasonable measures which may be available to ensure its compliance. The remained of the Chapter discusses whether VSS bodies - and, if so, which types - are considered as standardising bodies in the meaning of the TBT Agreement. It sheds light over the extent of the obligation imposed on WTO Members, and which measures must be taken to ensure compliance. It also investigates whether some VSS can be considered as relevant international standards over which Members must base their measures. Finally, the Chapter briefly addresses the SPS Agreement, and whether a possibility exists that VSS are considered as measures subject to its scope.

Chapter 6 clarifies the substantive provisions of the meta-rules of the TBT Code of Good Practice. As the Appellate Body (AB) has never provided interpretive guidance over these provisions, the extent of these obligations is unknown. It is therefore unclear which types of breaches by standardising bodies WTO Members have an obligation to remedy by taking reasonably available measures. Is non-discrimination for private standards to be assessed against the same test for non-discrimination as for public mandatory technical regulations? The aim of Chapter 6 is to identify the meaning of three crucial provisions of the TBT Code of Good Practice by suggesting normative tests for certain substantive obligation.

Firstly, the Chapter assesses whether the definition of standards provided in Annex 1 of the TBT Agreement covers VSS. It then appraises the implications of the expansive interpretation provided by the AB over certain definitional elements. Secondly, the Chapter discusses substantive and procedural provisions of the TBT Code of Good Practice. The analysis focuses on the former. This is not to deny that procedural obligations concerning transparency in the standard-setting are crucial; quite the opposite, their importance is acknowledged and taken into utmost account. Nonetheless, this study focuses on obligations whose content is particularly elusive and in need of clarification, and capable of having an effect on the substance of the scheme. These obligations are that standards do not discriminate, do not create unnecessary barriers to trade, and are based on the relevant international standards.

The AB's interpretation of similar provisions of the TBT Agreement concerning technical regulations offers valuable guidance in structuring the obligations for

standards. The peculiar nature of private standards, and in particular quality standards such as VSS, must be acknowledged. Crucial elements that must accommodate the specificities of quality standards such as VSS include i) the objectives pursued which are to be accepted as legitimate, ii) the implications stemming from the application of the treatment-no-less-favourable standard to measures structurally resulting in the distortion of competitive opportunities, and iii) whether the detrimental impact generated from a standard stems exclusively from a legitimate regulatory objective, also known as the even-handedness test. Also the concept of 'necessity' of a standard, as will be seen, is rather different from 'necessity' used elsewhere in the WTO Agreements. Finally, for analytical completeness, Chapter 6 addresses the main provisions of the SPS Agreement which are more problematic for VSS which may be covered by its scope of application.

Chapter 7, finally, draws some conclusions concerning the possible means offered by certain provisions of economic law to influence the outcomes of private regulatory instruments in the form of VSS, both positively and normatively. It shows the possibility to interpret certain EU and international economic law provisions with the effect of applying to VSS and addressing the issues on the market level discussed here. It shows the presence of links between the different regulatory levels and identifies features with respect to which economic law still demonstrates a certain uneasiness.

2.3 Relevance and novelty

VSS have been extensively studied by political scientists but not comprehensively yet under EU and international economic law, in spite of their potential contribution to the mediation between free trade and sustainability and their possible problematic consequences. By linking political science literature with legal literature and legal analysis, this dissertation fills a gap in scholarly research by exposing the potential of the economic law regime, and of specific rules thereof, to substantively influence a subset of transnational private regulation, and how this process unfolds in practice. This study appraises how certain provisions of economic law can be used and interpreted not just to review, but also to influence and coordinate, transnational private regulatory regimes to allocate regulatory competences and effects in the regulatory governance process. This dissertation therefore provides a practical solution to expand the reach of public authority over a crucial subset of private regulation, and aims at elaborating a ready-to-use legal toolbox to serve for that purpose.

More specifically, transnational private regulation has been studied by several perspectives, but it has hardly been approached comprehensively from the angle of economic law. This is regretful. Certain private regulatory regimes such as VSS are

either expressly under the scope of its provisions (as under competition rules, or the explicit WTO approach towards private standards), or the private regulatory instruments feature striking similarities with public ones, which are normally under the scrutiny of these legal regimes. This dissertation constitutes the first attempt to analyse a sub-group of transnational private regulatory instruments such as VSS under EU law, and both under EU and WTO provisions. Recent interpretive developments under the TBT Agreement make this contribution particularly timely. Finally, this book attempts to identify a normative legal framework applicable to product standards that is not just technical, but instead generates structural distributional concerns.

By directly connecting to the TBGI framework of analysis, this book aims to contribute to the debate over interactive mechanisms between different forms of regulatory authority located at different regulatory levels. This is also the first study that comprehensively identifies and illustrates the economic law provisions and principles applying or potentially applying to VSS, with which scheme-holders should be familiar and in compliance.

Chapter 2
Classifying VSS

1 Introduction

The field of private standards for sustainability issues is comprised of schemes and initiatives which deeply differ. A full-fledged market for certification exists,[1] where more than 450 different sustainability labels compete with each other.[2] Within this group, inclusive multi-stakeholder organisations have set up labelling schemes which are well-established and recognisable by market actors.[3] A growing number of sectoral standards address, for example, labour practices, and even food health and safety schemes contain provisions addressing environmental protection.[4] Many sectoral organisations and individual firms set standards containing specific social and environmental requirements, which are then imposed upstream on their suppliers by means of codes of conduct.[5] Firms even design sustainable product lines on the basis of such requirements.[6] Several reporting and benchmarking initiatives assess, compare and make public suppliers' performance.[7] It is therefore important to limit the field of research to a workable amount of relatively comparable VSS, and then describe their features which are more relevant for legal analysis.

This Chapter aims at providing definitional clarity, at first, by defining in Section 2 the concept of voluntary sustainability standards (VSS). It does so by identifying the boundaries of the concept of sustainability, and by employing a clear-cut criterion such as the presence of third-party certification differentiating hortatory from enforceable initiatives. This study, therefore, does not cover self-certificatory schemes. Subsequently, Section 3 identifies three types of VSS, on the basis of their institutional setting and the output of the standardisation process. To a large extent, such a division consists of ideal-types; in the real world, VSS might possess different features. The aim of this Chapter is rather modest; it does not aim at describing all VSS

[1] Reinecke, J., Manning, S., von Hagen, O. (2012) The emergence of a standards market: Multiplicity of sustainability standards in the global coffee industry. *Organisation Studies* 33(3), 791.

[2] Marx, A., Sharma, A., Bécault, E. (2015) Voluntary Sustainability Standards. An overview. Acropolis Report - Klimos. Available at https://ees.kuleuven.be/klimos/papers/marx_2015_voluntary_sustainability_standards.pdf, 6.

[3] Around 97% of those 450 initiatives draft standards by consensus. However, only around half of these labels contemplate third party certification. See Marx, A. (2013) Varieties of legitimacy: A configurational institutional design analysis of eco-labels. *Innovation: European Journal for Social Science Research* 26(3), 274-275.

[4] Henson, S., Reardon, T. (2005) Private agri-food standards: Implication for food policy and the agri-food system. *Food Policy* 30(3), 241-253.

[5] Vandenbergh, M.P. (2007) The new Wal-Mart effect: The role of private contracting in global governance. *UCLA Law Review* 54(4), 913–970.

[6] See for examples the initiatives of Carrefour and Tesco. http://www.carrefour.com/cdc/commerce-responsable/securite-et-qualite-des-produits/; http://www.tesco.com/nurture/.

[7] The most popular of which is probably the United Nations' Global Compact, which engages the business world to cooperate with the UN in partnership with other NGOs, to promote good corporate practices based on ten universal social, labour, environmental and anti-corruption principles. The objective of the Global Compact is 'to stimulate change and to promote good corporate citizenship and encourage innovative solutions and partnerships'. Criticism of the Global Compact - that can indeed be extended to many similarly designed instruments - has focused on its lack of a legal binding nature, explicit performance criteria and independent monitoring and compliance mechanisms. The Global Compact is instead understood as a 'learning forum'. http://www.unglobalcompact.org/AbouttheGC/ TheTENPrinciples/index.

characteristics, but only those relevant for an analysis under certain EU and WTO economic law rules.

The division between multi-stakeholder, sectoral and company VSS, which is suggested in Sections 3.1.1, 3.1.2 and 3.1.3, however, is firmly based on literature from different disciplines, and supported by a thorough empirical review of around thirty VSS schemes of different kinds. Regulatory and political science literature suggests that such a classification does not simply highlight different constituencies in the standard-setting, but also reveals a considerably different degree of consent and legitimacy which, in turn, identifies (or not) certain forms of collective governing. Similarly, the outputs of these three types of institutions also differ. As Section 3.1 and 3.2 explain, the standards drafted by multi-stakeholder, sectoral and company VSS result in a varying degrees of exclusion of the actors which want - or have to - accept them, thereby allowing us to frame the standards as the public, club, or private goods.

This perspective allows us to draw a close connection with private autonomy, a feature which is more closely connected to private goods than to public goods. The tripartition retains important considerations about the institutional set-up of the standard-setting organisation. As the following Chapter demonstrates, the application of certain legal provisions is a feature of a standard-setting body. The categorisation also allows us to normatively identify the role public authorities should play *vis-à-vis* such transnational rules in the form of global public goods, or producing global public goods. The State should be a coordinator and facilitator, and possibly ensure supervision in cases where distributional concerns are at hand. Section 4 discusses different types of interplay between public authorities and private authorities with respect to VSS with the objective of clarifying how public authorities coordinate or facilitate private actors' standard-setting. Three specific forms of interactions will also be identified - and employed in the analysis under EU law and WTO law - where public regulators, to different degrees, make use of VSS in their regulations or, directly and indirectly, allow them to affect their substance.

Section 5 of this Chapter analyses important formal features of VSS which will be relevant in the legal analysis. At first, Section 5.1 discusses certain formal features of standards which are relevant under WTO provisions. Subsequently, the differences between VSS and technical standards is explained in Section 5.2.; at several junctures in this book a comparison will be drawn between these two private instruments. Sections 5.3, 5.4 and 5.5 address, respectively, the different dynamics of schemes which entail a label, the varying stringency of the standards, and a host of features affecting market access and consumer confusion, such as local adaptation, recognition and overlap of the standards. Finally, Section 6 concludes.

2 The boundaries of the subject matter

VSS are voluntary (in some cases market-based) regulatory schemes designed by private bodies with the purpose of addressing, directly or indirectly, and by means of third-party certification of products and processes, the social and environmental impact resulting from the production of goods.[8] Such schemes take the form of standards, an elusive concept with several meanings ranging from 'a guide for behaviour and for judging behaviour',[9] or 'a voluntary best-practice rule'.[10] For our purposes, a standard can be seen as a provision proscribing the characteristics of certain features concerning a product and/or a process that brought it into being. The ISO (International Organisation for Standardisation), the global authority in the domain of technical standardisation, defines a standard as a document which 'provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context.'[11]

Standards are drafted by a host of different actors, with different purposes. A very general classification of standard-setters identifies four main groups.[12] International or intergovernmental organisations, such as OECD and ILO perform standard-setting functions in their respective domains. National or supranational regulators arguably play the most prominent role in standardisation. These bodies can be either public, such as the Codex Alimentarius Commission, or private, such as standard-setting bodies like ISO. Finally, a diverse group of actors such as companies, NGOs, industry associations, research institutions and multi-stakeholder coalitions, operates in competition on the market for standards. The actors drafting and enforcing VSS are located within this broad group.[13]

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[8] For comparison, the definition of VSS given by the United Nation Forum on Sustainability Standards reads: 'standards specifying requirements that producers, traders, manufacturers, retailers or service providers may be asked to meet, relating to a wide range of sustainability metrics, including respect for basic human rights, worker health and safety, the environmental impacts of production, community relations, land use planning and others'. See UNFSS (2013) Voluntary sustainability standards. Today's landscape of issues and initiatives to achieve public policy objectives. United Nations Forum on Sustainability Standards. Available at https://unfss.files.wordpress.com/2013/02/unfss_vssflagshipreport part1-issues-draft1.pdf. Different from the UNFSS's, our definition highlights the private character of VSS, restricts their application to the domain of goods, and adds the requirement of third-party certification.

[9] Abbott, K.W., Snidal, D. (2001) International 'standards' and international governance. *Journal of European Public Policy* 8(3), 345.

[10] Kerwer, D. (2005) Rules that many use: Standards and global regulation. *Governance: An International Journal of Policy, Administration, and Institutions* 18(4), 611.

[11] ISO Guide 2:2004, Art. 3.2. This definition is broader than the definition of standard for the purposes of the TBT Agreement. See Section 4 of Chapter 5 and Section 2.1 of Chapter 6 for in-depth discussion.

[12] Büthe, T., Mattli, M. (2012) *The new global rulers. The privatisation of regulation in the world economy*. Princeton: Princeton University Press, 25-29.

[13] It should be noted that ISO drafts standards such as the ISO 14000 series and the ISO 26000 addressing, respectively, environmental and social performance of certified entities, which could qualify as VSS. Given the peculiar role of ISO, its very structured relations with certain public regulators, its special role conferred upon it by

2.1 Standards and certification

A fundamental feature of standards is, by definition, their voluntary character. This element is also acknowledged by the definition of standard in the relevant international agreement, the TBT Agreement,[14] and constitutes the differentiating element with mandatory technical regulations, which are normally set by public bodies.[15] Such a voluntary character is, however, always understood formally, and not factually. This is to say that the definition of standards ignores that certain standards are *de facto* mandatory in order to market a certain product or to enter a certain supply chain or distribution system.[16] As discussed in Section 1.2 of Chapter 1, a great deal of the detrimental impact generated by VSS is due to their actual or increasingly mandatory character. This is all the more evident for codes of conduct with which upstream suppliers have to comply in order to do business with a powerful retailer or company.[17] Certain schemes, such as those addressing agricultural practices in agri-food production, have become a *de facto* requirement for the marketing of certain products in Western countries, and the requirements are particularly stringent for and difficult to comply with by developing countries.[18] Consumer preferences play a profound role as well, and VSS certification can be the only means to enter a specific product market.

Both the trade-restrictive and *de facto* mandatory character of VSS are exacerbated by the presence of strict verification and enforcement mechanisms ensuring that products and production methods are in compliance with the standards. A growing number of schemes contemplate third-party certification. Third-party certification is a form of enforcement under which an accredited third-party certifier verifies compliance with the standards provided for in the VSS. Certification is a non-judicial enforcement mechanism, which combines the traditional public law functions of administrative inspection and adjudication.[19] Certification is capable of generating real market access problems if compliance cannot be achieved, as producers cannot 'cheat' and claim they are compliant when, in fact, they are not. Moreover, legal consequences might

the TBT Agreement, and the presence, among the national committees drafting standards at the central level, of *public* national standardising bodies, ISO's standards are not covered by the scope of this research.

14 See Annex I of the TBT Agreement.

15 See Section 4.2.1 of Chapter 5 for discussion on whether also public bodies can set, enforce and implement technical regulations.

16 In WTO dispute settlement, complaining parties have advanced with no success the argument that the concept of 'mandatory', describing the compulsory character of technical regulation, relates to whether compliance with a measure is mandatory to enter a market. This issue is elucidated in Section 4.1 of Chapter 5.

17 Jiang, B. (2009) Implementing supplier codes of conduct in global supply chains: Process explanations from theoretic and empirical perspective. *Journal of Business Ethics* 85(1), 78.

18 Henson, S. (2008) The role of public and private standards in regulating international food markets. *Journal of International Agricultural Trade and Development* 4(1), 76.

19 Meidinger, E. (2007) 'Beyond Westphalia. Competitive legalisation in emerging transnational regulatory systems'. In Brutsch, C., Lehmkuhl, D (Eds.) *Law and legalisation in transnational relations*. Oxford and New York: Routledge, 124.

arise as well, especially in the event that the auditing of management system schemes such as the ISO 14001, a common requirement of many VSS, brings to light previously unnoticed breaches of environmental regulations. In these cases liability may arise and auditors may be even mandated to disclose violations under certain legal regimes.[20] Similar concerns arise when the auditing is coupled with a disclosure requirement.[21] Conversely, other initiatives which are hortatory or difficult to enforce generate fewer problems in terms of market access.[22] Third-party certification is therefore chosen as an additional element defining a VSS, because it allows us to differentiate hortatory schemes and enforceable ones, and identifies schemes which really are trade-restrictive.[23]

The effectiveness of regulatory schemes in achieving its objectives is increasingly ascribed to their link to third-party certification.[24] Since third-party certification brings about impartiality, independence and a certain amount of fair process procedures, it also contributes to the elevation of the legitimacy of the regulatory regimes to which it applies.[25] Certification therefore strengthens schemes that arguably make a *prima facie* valid claim at regulating a certain social and environmental domain in an

[20] Orts, E.W., Murray, P.C. (1997) Environmental disclosure and evidentiary privilege. *University of Illinois Law Review* 3(1), 1-69; Delmas, M.A. (2002) The diffusion of environmental management system standards in Europe and in the United States: An institutional perspective. *Policy Science* 35(1), 96-97.

[21] See, for example, the MSC. Both the draft report from the auditors and the final report have to be made public according to Articles 27.15 and 27,17 of MSC Certification Requirements. See at http://www.msc.org/documents /scheme-documents/msc-scheme-requirements/msc-certification-require ments /view.

[22] Arthurs, H. (2004) 'Private ordering and workers' rights in the global economy: Corporate codes of conduct as a regime of labour market regulation'. In Conaghan, J., Fischl, R.M., Klare, K. (Eds.) *Labour law in an era of globalisation. Transformative practices and possibilities.* Oxford: Oxford University Press, 479.

[23] It should be noted that, from an empirical assessment, many multi-stakeholder VSS employ third-party certification to verify compliance. Conversely, many company VSS, and also a few sectoral VSS, foresee different (and weaker) forms of enforcement, such as self-declarations and second-party certification. This would exclude them from the scope of this research project.

[24] Kalfagianni, A., Pattberg, P. (2013) Participation and inclusiveness in private rule-setting organisation: Does it matter for effectiveness? *Innovation: The European Journal of Social Science Research* 26(1), 8-9. See generally on certification: Conroy, M.E. (2007) *Branded! How the 'certification revolution' is transforming global corporations.* Gabriola Island, BC, Canada: New Society. Effectiveness generated by certification may however differ between sectors, and between schemes. There seems to be agreement that forestry certification brings about positive change (See generally Cashore, B., Gale, F., Meidinger, E., Newsom, D. (Eds.) (2006) *Confronting sustainability: Forest certification in developing and transitioning countries.* New Haven: Yale Forestry School). On the other hand, evidence is mixed for organic agriculture (Marshall, R.S. and Standifird, S.S. (2005) Organisational resource bundles and institutional change in the U.S. organic food and agricultural certification sector. *Organis*ation *and Environment* 18(3), 265–286), apparel (Elliott, K., Freeman, R. (2003) Can labor standards improve under globalisation? Washington: Institute for International Economics), and mining (Mining Certification Evaluation Project Final Report. Online, available at: www.minerals.csiro.au/sd/Certification/MCEP_Final _Report_Jan2006.pdf). Generally, on the effects of VSS, see for exhaustive literature review: International Trade Center (2012) When do private standards work? Literature Review Series on the Impact of Private Standards - Part IV. Geneva: ITC.

[25] See with respect to the domain of sustainability standards: Guldbradnsen, L.H. (2010) *Transnational environmental governance: The emergence and effects of the certification of forests and fisheries.* Cheltenham: Edward Elgar. From a more legal perspective: Cafaggi, F. (2012) 'Enforcing transnational private regulation: Models and patterns'. In Cafaggi F. (Ed.) *Enforcement of transnational regulation. Ensuring compliance in a global world.* Cheltenham and Northampton: Edward Elgar, 77.

effective manner - or, at least, do not just pursue the self-serving economic interest of the certified entity. Schemes which do not employ third-party certification can be defined as self-declarations,[26] and are excluded from the scope of this research.

2.2 Areas of 'sustainability'

The group of VSS covered by this book encompasses different types of standards. Two major groups can be found addressing 'sustainability' - which is understood broadly as including all environmental and social issues described in this Section. The first group of VSS aims at directly regulating a domain in the area of sustainability, by directly setting requirements with which products in that domain must be in compliance. To some extent, such VSS can be seen as 'quality' standards insofar they identify products which possess special social and environmental features which distinguish them from 'regular' products. Included within this group are all initiatives contributing to a different extent to better resource management, the preservation of ecosystems and biodiversity, and to ensure animal welfare. Good agricultural practices standards (GAP)[27] also can to a certain extent be accommodated in the group above. Albeit responding to logics of product health and safety,[28] they reflect social and environmental considerations as well, or at the very least inform the context in which safety standards are drafted,[29] as a direct consequence of the acknowledgement of the role agricultural production can play in the achievement of sustainable development.[30] Organic agriculture schemes can also be considered as included in this group as they regulate pesticide and genetically-modified organisms (GMOs) use.

Social standards also belong in the category of quality standards. Social issues covered by VSS differ considerably and include, for example, standards covering the subject matter of the seven core ILO Core Conventions;[31] non-Core Conventions such

[26] This is the European Commission's approach for certification schemes applying to agricultural products and foodstuff. See Commission Communication - EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuff. 2010/C 341/04.

[27] See, generally, Henson, S., Reardon, T. (2005) *Supra at 4*, 242; Liu, P. (2009) Private standards in international trade: Issues and opportunities. Paper presented at the WTO's Workshop on environmental-related private standards, certification and labelling requirements, Geneva, 9 July 2009; Henson, S., Humphrey, J. (2009) The impact of private food safety standards on the food chain and on public standard-setting process. Paper prepared for the Joint FAO/WHO Food Standards Programme.

[28] FAO (2007) Private standards in the United States and European Union markets for fruit and vegetables. Implication for developing countries. Rome: FAO Commodity Studies Series, 46.

[29] See for example the strong emphasis put by FAO on economic and social sustainability of farming practices. Food and Agriculture Organisation of the United Nations. (2003) Development of a framework for good agricultural practices. COAG/2003/6.

[30] See in particular Agenda 21 Chapter 14 on Promoting Sustainable Agriculture and Rural Development Johannesburg Declaration on Sustainable Development (4 September 2002) A/CONF.199/20. Social requirements however constitute separate standards that remain optional for producers seeking certification. See the Risk Assessment Module on Social Practices of GLOBALG.A.P., at http://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-00001/GRASP/.

[31] ILO Convention C29 on forced labor (1930); ILO Convention C87 on freedom of association and protection of the right to organise (1948); ILO Convention C98 on the right to organise and collective bargaining (1949); ILO

as the Convention on Indigenous and tribal Peoples;[32] the issue-area covered by the International Covenant on Economic, Social and Cultural Rights;[33] and also provisions and instruments addressing issues outside multilaterally agreed upon instruments, such as adequate remuneration and stable contractual relations between suppliers and producers. Also included in this group are FairTrade, and broadly defined 'ethical' claims ensuring appropriate remuneration, stable contractual relations, and direct business relations with producers.

Some of the concerns addressed by social and environmental schemes can be considered as moral ones, to the extent that they pertain to the standard of right and wrong conduct maintained by a community.[34] Animal welfare and organic agriculture, which often also have an impact on the environment, are examples of that. The same can be said for all social standards, which hinge on consumers' representations of what the appropriate level of social protection, remuneration and workplace conditions should be.[35] For clarity, standards addressing other moral concerns, which do not have such a close impact on environmental or social practices, are not considered as VSS. For example, there are certification schemes identifying halal or kosher products, which are similarly set transnationally, mostly by private actors.[36]

VSS do not just regulate the areas above in a direct manner, but can also regulate indirectly by offering tools that aid consumers in making their purchase decisions. VSS can simply provide information to consumers concerning, for example, the amount of CO2 emissions from products. In such cases, the standards do not provide for substantive requirements, or specific thresholds to be met, but consist of complex methodologies for data collection and assessment, as will be discussed in Section 5.1. Eco-labels identifying and/or classifying products on the basis of their environmental performance, emission, and energy consumptions can also be seen as standards indirectly addressing environmental issues.[37] Well recognised public schemes have

Convention C100 on equal remuneration (1951); ILO Convention C105 on the abolition of forced labor (1957); ILO Convention C111 on employment and occupational discrimination (1958); ILO Convention C138 on minimum age (1973); ILO Convention C182 on the worst forms of child labor (1999).

32 ILO Convention C169 on Indigenous and Tribal People (1989).

33 International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

34 This is the definition of public morals given within the frame of WTO dispute settlement, where a justificatory ground exists under Art. XX(a) to save measure otherwise inconsistent with the GATT on the basis of public morals. See Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* WT/DS285/R, adopted 10 November 2004, para. 6.465.

35 Also animal welfare standards can fall under this rationale. However, the term 'social' is here limited to practices affecting workers and producers, not animals.

36 Havinga, T. (2011) 'On the borderline between state law and religious law. Regulatory arrangements connected to kosher and halal foods in the Netherlands and the United States'. In van der Meulen, B. (Ed.) *Private food law: Governing food chains through contract law, self-regulation, private standards, audit and certification schemes.* Wageningen: Wageningen Academic Publishers, 265-288.

37 An eco-label is a label 'which identifies overall environmental preference of a product (i.e., good or service) within a product category based on life cycle considerations', according to the definition provided by the Global Eco-Labeling Network and quoted in Bonsi, R., Hammet, A.L., Smith, B. (2008) Eco-labels and international trade:

been established in the past to identify the better-performing products in a given product group, such as the EU Eco-Label,[38] the German Blue Angel scheme,[39] and the Scandinavian Nordic Swan.[40] Nevertheless, private schemes are also on the rise.[41]

VSS thus constitute a broad group of initiatives which aims at protecting the public interest, and not just interests directly involved in the supply chain.[42] Sophisticated multi-stakeholder global governance platforms are included, such as the Forestry Stewardship Council (FSC),[43] the Marine Stewardship Council (MSC),[44] FairTrade,[45] or Social Accountability International [46] aiming, respectively, at the sustainable management of forests, at the sustainable exploitation of marine resources, at tackling poverty and empowering producers in the Global South, and at promoting workers' rights. Also sectoral initiatives involving predominantly economic actors are covered. Prime examples are the Program for the Endorsement of Forestry Certification (PEFC), [47] a FSC competitor in the area of forest resource management,

Problems and solutions. *Journal of World Trade* 42(3), 409. Eco-labels such as the German Blue Swan, the Scandinavian Nordic Swan or the EU Ecolabel all assess the environmental impact of a good throughout its product-cycle by means of a life-cycle assessment (LCA). Product categories are created which group together products with the same end-use; only those with a particularly efficient environmental performance are entitled to use the label.

38 Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, L 27/1.

39 The German Blue Angel is also the oldest voluntary labelling scheme ever established addressing environmental concerns, as it dates back to 1977. See Gertz, R. (2004) Access to environmental information and the German Blue Angel - Lessons to be learned? *European Environmental Law Review* 13(10), 268-275.

40 See http://www.nordic-ecolabel.org

41 In the EU alone, there are 80 different methodologies for calculating and reporting greenhouse gas emissions, and around 60 methodologies for carbon footprints. See Communication from the Commission COM/2013/0196 final. Building the Single Market for green products. Facilitating better information on the environmental performance of products and organisations. However, not all of these methodologies can be seen as VSS since they may not require certification. Indeed, some of them result in full-fledged private schemes which allow companies to make effective and quantifiable claims over the environmental impact of their products and operations.

42 For an exhaustive mapping exercise from the relevant United Nation agency on VSS, see United Nations Forum on Sustainability Standards (UNFSS) (2013) Voluntary Sustainability Standards - Today's Landscape of Issues and Initiatives to Achieve Public Policy Objectives – Part 2: Initiatives. Available at https://unfss.files.wordpress.com/2012/05/unfss-report-initiatives-2_draft_lores.pdf.). See also Marx, A., Sharma, A., Bécault, E. (2015) *Supra at 2*. Our definition may, however, be broader as is it includes standards drafted by many different types of bodies, and narrower at the same time, as it excludes standards for services.

43 https://ic.fsc.org/en. On FSC structure and functioning see Taylor, P.L. (2005) In the market but not of it: Fair Trade coffee and Forest Stewardship Council certification as market-based social change. *World Development* 33(1), 129-147.

44 https://www.msc.org. On MSC see generally, Cummings, A. (2004) The Marine Stewardship Council: A multi-stakeholder approach to sustainable fishing. *Corporate Social Responsibility and Environmental Management* 11(2), 85–94; Ponte, S. (2012) The Marine Stewardship Council (MSC) and the Making of a Market for 'Sustainable Fish'. *Journal of Agrarian Change* 12(2-3), 300-315.

45 http://www.fairtrade.net. On the Fair Trade movement and certification see Jaffee, D. (2014) *Brewing justice. Fair Trade coffee, sustainability, and survival.* Oakland: University of California Press.

46 http://www.sa-intl.org. On SA8000, Social Accountability International's main standard, see: Gilbert, U., Rasche, A. (2007) Discourse ethics and social accountability. The ethics of SA8000. *Business Ethics Quarterly* 17(2), 187-216.

47 http://www.pefc.org. On PEFC, in particular in relation to FSC see Auld, G., Gulbrandsen, L.H., McDermott, C.L. (2008) Certification schemes and the impact on forests and forestry. *Annual Review of Environment and Resources* 33, 198; Overdevest, C. (2010) Comparing forest certification schemes: the case of ratcheting standards in the forest sector. *Socio-Economic Review* 8(1), 47-76.

GLOBALG.A.P.[48] for farm assurance and good agricultural practices, and a myriad of sectoral supply chain codes addressing mostly labour issues, such as the International Council of Toy Industries' Code and CARE Process,[49] and the Electronic Industry Citizenship Coalition's Code.[50]

Other sectoral initiatives can address environmental issues, such as schemes in the biofuel domain like the Biomass Biofuels Sustainability Voluntary Initiative (2BSvs),[51] which certifies 'sustainable' biofuels in the meaning of EU Directive 2009/28/EC on Renewable Energy.[52] The definition also includes sourcing requirements set forth by single retailers to provide consumers with 'sustainable' or 'responsible' products such as those implemented by Carrefour[53] and Tesco,[54] or requirements by single companies to preserve acceptable working conditions in the supply chain, such as those implemented by Starbucks[55] or Nike,[56] provided that enforcement by means of third-party certification is employed.

It is evident that VSS constitute a broad group of diverse instruments, underpinned by different logics, interests and organisations.[57] The next Section attempts to bring order and identifies three categories of VSS, and discusses the main features associated with each of these ideal-typical groups. In spite of a broad definition of VSS, similar effects, in particular on trade, are generated by the three types of VSS discussed below. However, as the following EU and WTO Chapters will illustrate, for the purpose of the legal rules here considered, the treatment of these three types of standards may - and should - differ.

[48] http://www.globalgap.org/uk_en/. Hachez, N., Wouters, J. (2011) A glimpse at the democratic legitimacy of private standards. Assessing the public accountability of GLOBALG.A.P. *Journal of International Economic Law* 14(3), 677-710.

[49] http://www.toy-icti.org. For a comparative analysis of certain businesses' codes, including ICTI see: Kock, A., van Tulder, R. (2002) Child labor and multinational conduct: A comparison of international business and stakeholder codes. *Journal of Business Ethics* 36(3), 291–301.

[50] http://www.eiccoalition.org. For an account of the industry's code in the broader interactive frame with public regulation see: Locke, R.M., Rissing, B.A., Pal, T. (2013) Complements or substitutes? Private codes, State regulation and the enforcement of labour standards in global supply chains. *British Journal of Industrial Relations* 51(3), 519-552.

[51] http://en.2bsvs.org.

[52] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L-140.

[53] http://www.carrefour.com/sites/default/files/CHARTESOCIALE_ENv2.pdf.

[54] http://www.tesco.com/nurture/.

[55] http://www.starbucks.com/responsibility/sourcing/coffee.

[56] http://about.nike.com/pages/resources-faq.

[57] See also Marx, A. (2013) *Supra at 3*, 268-287; Marx, A., Sharma, A., Bécault, E. (2015) *Supra at 2*, 14.

3. Institutional arrangement of VSS bodies and their output

VSS constitute a varied group of different instruments with diverse constituencies, institutional settings, procedural fairness in the standard-setting, and areas of coverage. This Section introduces a classification between multi-stakeholder schemes, sectoral schemes and company schemes. The classification has been developed based on the institutional features connected to the participants to the rule-setting and the participants to the regulatory regime. It allows the location of the regulatory claim made by the scheme to be placed on a continuum spanning from a regulatory stance resembling that of public authorities, to the domain of private autonomy. At the same time, it allows us to determine normatively what the role of the State should be *vis-à-vis* these instruments, and to fine tune both the positive and normative application of the legal provisions with the different reality of the schemes.

3.1 VSS and global public goods

Differences in the institutional structure, procedural fairness in standard-setting, and areas of coverage affect the effectiveness and legitimacy of the resulting regulatory regime, not just its trade-restrictiveness.[58] The definition here employed is of cognitive acceptance and justification of shared rules by the community to which the rules apply, which is different from the legitimacy applied to the State and its activities.[59] Several factors contribute to determine such acceptance, including procedural elements ensuring fair and effective participation of all actors involved, procedural fairness in the standard-setting and governance of the VSS body,[60] and also output considerations about the effectiveness and efficiency of the regime in pursuing its objectives.[61]

IR and legal literature alike have noted the similarities between a specific subgroup of transnational private regimes and state-based regulatory and legal systems. In the domain of sustainability, an innovative institutional approach combining elements of

[58] Cafaggi, F. (2011) New foundations of transnational private regulation. *Journal of Law and Society* 38(1), 38.

[59] 'Legitimacy requires institutionalised authority (whether concentrated or diffuse) with power resources to exercise rule as well as shared norms among the community. Norms of legitimacy provide justifications and a shared understanding of what an acceptable or appropriate institution should look like and bounds what it can and should do.' Bernstein, S., Cashore, B. (2007) Can non-State global governance be legitimate? A theoretical framework. *Regulation and Governance* 1(4), 351. See also Bernstein, S. (2005) Legitimacy in global environmental governance. *Journal of International Law and International Relations* 1(1-2), 142.

[60] Casey, D., Scott, C. (2011) The crystallisation of regulatory norm. *Journal of Law and Society* 38(1), 87.

[61] Cashore, B. (2002) Legitimacy and the privatisation of governmental governance: How non-state market-driven (NSMD) governance systems gain rule-making authority. *Governance: An International Journal of Policy, Administration and Institution* 15(4), 505. Risse, T. (2004) 'Transnational governance and legitimacy'. In Benz, A., Papadopoulos, Y. (Eds.) *Governance and democracy. Comparing national, European and international experiences.* London and New York: Routledge, 180.

expert-driven technocracy with elements of deliberative democracy is that of 'non-state market-driven' (NSMD) instruments.[62] By means of market forces, and through the involvement of different stakeholders and broader civil society, these regimes aim to be authoritative through the creation of rules with a sufficient pull toward compliance. Most importantly, such regimes present crucial features of 'traditional' public legal forms such as: the definition of rights and duties through rules; implementation and enforcement by specialised officials; a participatory, transparent and proceduralized rule-making process; and a normative justification of the rules.[63]

On the one hand, all VSS under inquiry here, by definition, prescribe rules and duties by means of their standards, and are implemented and enforced by specialised officials through third-party certification. On the other hand, variations in participation in the rule-setting, procedures, and normative justifications identify different groups, as Sections 3.1.1, 3.1.2 and 3.1.3 clarify. International legal scholarship agrees with NSMD scholars that certain private transnational regulatory regimes can be based on a normatively much stronger procedural backdrop, grounded firmly on 'thick stakeholder consensus', rather than public international law, whose logic responds to a 'thin state consent'.[64] Certain VSS regimes, from a position of strength due to a combination of high input and output legitimacy, are able to promote and market their own standards as appropriate and legitimate for the an entire economic sector, and thus to reorient the norms of acceptable market behaviour. Governance and enforcement rules have been described as resembling more the dynamics of state regulation than those of voluntary bodies' standards, once actors opt into the regime.[65]

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[62] Cashore, B. (2002) *Supra at 61*. Similar and recurring structures and governance processes among multi-stakeholder organisations in the domain of sustainability have been broadly observed also by, *inter alia*, Meidinger, E. (2007) 'Beyond Westphalia: Competitive legalisation in emerging transnational regulatory systems'. In Brütsch, C., Lehmkuhl, D. (Eds.) *Supra at 19*, 121-43; Bernstein, S., Hannah, E. (2008) Non-state global standard setting and the WTO: Legitimacy and the need for regulatory space. *Journal of International Economic Law*, 11(3), 575-608; Dingwerth, K., Pattberg, P. (2009) World politics and organisational fields: The case of transnational sustainability governance. *European Journal of International Relations* 15(4), 713-715.

[63] Meidinger, E. (2007) 'Beyond Westphalia: Competitive legalisation in emerging transnational regulatory systems'. In Brütsch, C., Lehmkuhl, D. (Eds.) *Supra at 19*, 139; see also Matten, D. Crane, A. (2005) Corporate citizenship: towards an extended theoretical conceptualisation. *Academy of Management Review* 30, 166–79.

[64] Pauwelyn, J., Wessel, R.A., Wouters, J. (2012) 'Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable'. In Pauwelyn, J., Wessel, R.A., Wouters, J. (Eds.) *Informal international lawmaking*. Oxford: Oxford University Press, 505-506. For an application of the concept to the domain of international trade law and the domain of international standardisation, see Pauwelyn, J. (2014) Rule-based trade 2.0? The rise of informal rules and international standards and how they may out compete WTO Treaties. *Journal of International Economic Law* 17(4), 739–751.

[65] Bernstein, S., Hannah, E. (2008) *Supra at 62*, 575-579. This is particularly evident if the reference point employed is ISO, whose procedural requirements in the standard-setting ensure much less openness, transparency and inclusiveness if compared to the requirements into play for certain VSS bodies. On ISO's procedural requirements see most recently Delimatsis, P. (2014) Into the abyss of standard-setting: An analysis of procedural and substantive guarantees within ISO. TILEC Discussion Paper 2014-042.

A crucial feature of some VSS is that they are not just open for acceptance to all market actors willing to join (and, of course, to undergo certification), but also that the very standard-setting process can be influenced by many different types of actors and constituencies - an element which highlights their 'collective governing' function.[66] Other VSS are not, however, open for acceptance to all actors. They are either limited to certain actors in a specific sector or selected sub-entities in the supply chain, or the standards are drafted by a narrower constituency of interests. A collective governing and regulatory role is intimately connected with an approach which frames certain transnational rules taking the form of standards as global public goods, or as rules which contribute to the production of global public goods. Global public goods are goods whose non-rival consumption generates non-excludable benefits, and which are supplied at a universal level. Their supply requires multi-actor, multi-sector, and multi-level cooperation to be provided, which is different from national public goods.[67] Public goods are normally undersupplied, as individual actors are tempted to free-ride.[68]

Transnational regulatory regimes are both global public goods in themselves, and contribute to the creation of global public goods such as transnational environmental and social protection. Importantly, such regimes can also be supplied by private economic actors and civil society.[69] Standardisation, for example, has long been considered as a (global) public good in economics literature.[70] More recently, international standards have been considered also by legal scholars as a global public good, as they are available to all, and no actor can monopolise their use.[71] The nature of a standard as a global public good is not affected by a requirement of certification

[66] Wolf, K. (2006) 'Private actors and the legitimacy of governance beyond the State: Conceptual outlines and empirical explorations'. In Benz, A., Papadopoulos, Y. (Eds.) *Governance and democracy.* London and New York: Routledge, 220.

[67] Kaul, I. (2012) Global public goods: Explaining their under provision. *Journal of International Economic Law* 15(3), 731-732 and 736.

[68] Kaul, I., Conceicao, P., Le Goulven, K., Mendoza, R. (2003) 'How to improve the provision of global public goods?' In Kaul, I., Conceicao, P., Le Goulven, K., Mendoza, R. (Eds.) *Providing global public goods: Managing globalisation,* New York and Oxford: Oxford University Press, 21.

[69] Demsetz, H. (1970) The private production of public goods. *The Journal of Law and Economics* 13(2), 293-306. More recently and closer to our subject matter: Cafaggi, F. (2012) Transnational private regulation and the production of global public goods and private 'bads'. *European Journal of International Law* 23(3), 696. For the same conclusion from the perspective of management and economics see Scherer, A.G., Palazzo, G. (2011) The new political role of business in a globalised world: A review of a new perspective on CSR and its implications for the firm, governance, and democracy. *Journal of Management Study* 48(1), 899-931.

[70] Standardisation was described as a public good for the first time by Kindleberger, C.P. (1983) Standards as public, collective and private goods. *Kyklos* 36(3), 377-396. However, the author's claim was that *everybody,* and not just *all economic actors* could benefit from standardisation. His contribution also focused on the standardisation of system of measurement, and not standards developed by international standardising organisation as in subsequent, more recent, literature. For this approach, see Wieland, J. (2014) *Governance ethics: Global value creation, economic organisation and normativity.* Heidelberg-New York-Dordrecht-London: Springer, 61-72.

[71] From a more markedly international legal perspective: Du, M., Deng, F. (2016) International standards as global public goods in the world trading system. *Legal Issues of Economic Integration* 43(2), 120.

and, at times, accessibility upon the payment of a fee.[72] For a standard to be a global public good, non-rivalry and non-excludability must apply to its outcome and effects (i.e. environmental benefits, which are always non-rival and non-excludable), and also must also apply to its 'production process' by means of standardisation and the procedures to which it is subject.[73]

On this last point, standards and VSS schemes are highly varied. Thus, not all of them can be said to constitute global public goods. Certain VSS, however, are available for every economic operator in the same manner as global public goods and no actor can monopolise or restrict their consumption or acceptance - not even the actors which did not contribute to their creation. Further, no actor can be excluded in their production, nor can participation by one specific actor reduce the possibility of another to participate. Finally, increased use generates larger benefits, which actors cannot be prevented from enjoying. This latter feature can be framed from the perspective of environmental or social objectives pursued by the scheme - whose improvements benefit everyone - but also from the perspective of the economic benefits accrued to the actors concerned, i.e. the arguable increase in competitiveness and efficiency for the firms accepting the VSS.[74]

3.1.1 Multi-stakeholder VSS

Not all VSS possess all the characteristics described above. The features and effects of NSMD regimes, an open and 'collective governing' function, and the production of standards in the form of public goods, are shared by a specific (and to some extent ideal) group of VSS. By reference to one of its institutional elements, this group can be defined as a 'multi-stakeholder' VSS. The name highlights a specific feature in the standards-setting and governance of the organisation responsible for the standards, which is the presence of interests and representatives, rather than just the industry. At different degrees, social and environmental NGOs, consumer organisations, trade unions, local producers, and smallholders are also included, and they draft standards by consensus.[75]

Multi-stakeholder VSS are set by a body within a permanent organisation; the latter also serves as a forum for interest representation and a platform for revision and amendment of the standards. Multi-stakeholder schemes possess a strong

[72] Cafaggi, F. (2012) *Supra at 69*, 702. For a different position holding that certification-based regime are instead club goods see, albeit from a different perspective, Potoski, M., Prakash, A. (2005) Covenants with weak swords: ISO 14001 and facilities environmental performance. *Journal of Policy Analysis Management* 24(4), 745–769.

[73] Cafaggi, F. (2012) *Supra at 69*, 701.

[74] Some caveats are here required and refer to the fact that, different from technical standardisation, which is normally the subject of the disquisitions linking standards to public goods, VSS do not generate some of the positive externalities technical standards do. This issue will be discussed more in detail in Section 2.4.2.4 of Chapter 4.

[75] Marx, A. (2013) *Supra at 3*, 274.

transnational character, bringing together disparate constituencies and addressing global phenomena. They are open for acceptance by all interested actors. Furthermore, all interest groups affected by the standards are included in standard-setting and, at times, governance of the organisation. VSS membership provides an opportunity to contribute to the rule-setting, and is open to all interested individual, economic, non-governmental and at times even public actors. At least one body represents all different interests in the management of the organisation, from steering functions to advisory ones.[76] Therefore, there is only a certain extent of overlap between regulators and the regulated entities, which differentiate multi-stakeholder schemes from initiatives possessing stronger self-regulatory features, such as sectoral and company schemes.

Such a governance structure is not always ideal and it doesn't automatically ensure the 'perfect' functioning of the scheme, for example by preventing the generation of trade-barrier effects. Allowing different interests to be represented in the organisation does not mean that *all* relevant affected groups are actually involved. As a matter of fact, severe underrepresentation of developing countries' interests persists, which can be partially responsible for the trade-barrier effects generated by private schemes.[77] The lack of broad representation of global South's interests even in the most inclusive regimes provides a strong argument for claims that environmental protection and sustainability in general are in the interests of developed countries only.[78] A notable exception is the FSC, whose governance structure consists of three chambers, respectively representing social, environmental and economic interests. Each chamber is divided into an equally represented 'North' and 'South' sub-chamber system, which allows for effective equal representation of developed and developing countries' constituencies.[79]

The procedures employed in the standard-setting by multi-stakeholder VSS present a high level of participatory fairness, procedural transparency, openness and inclusiveness. Multi-stakeholder VSS are usually members of the ISEAL Alliance, a meta-regulatory organisation [80] of private standard-setters in the domain of sustainability, whose aim is to contribute to the creation of social and environmental certifications which are effective, legitimate and credible.[81] ISEAL drafts procedural standards in the form of Codes of Good Practice, which are used as a reference for

[76] Dingwerth, K., Pattberg, P. (2009) *Supra at 62,* 713.

[77] Scott, C. (2012) 'Non-judicial enforcement of transnational private regulation'. In Cafaggi, F. (Ed.) *Supra at 25,*145.

[78] Kapoor, A. (2011) Product and process methods (PPMs): 'A losing battle for developing countries'. *International Trade Law and Regulation* 17(4), 131-142.

[79] See, generally on FSC structure and governance Tollefson, C., Gale, F., Haley, D. (2008) *Setting the standard. Certification, governance and the Forestry Stewardship Council*. Vancouver and Toronto: UBC Press.

[80] Derks, B. (2014) Meta governancee in the realm of voluntary sustainability standards: Early experiences and their implications. UNFSS Discussion Papers No. 1, 9-12.

[81] ISEAL Alliance (2011) Scaling up strategy. A strategy for scaling up the impact of voluntary standards, online at http://community.isealalliance.org/sites/default/files/Scaling_Up_Strategy_Final_June2011_0. pdf.

drafting, updating and enforcing substantive sustainability standards normally in the form of labelling schemes. Compliance with the ISEAL Code ensures, *inter alia*, that VSS standard-setting bodies are operating in conformity with all procedural requirements of the relevant international instruments addressing private standard-setting, such as the Code of Good Practice contained in the WTO Technical Barriers to Trade (TBT) Agreement,[82] and the ISO/IEC Guide 59 addressing good practices for standardisation.[83] Arguably, this ensures the clarity and effectiveness of the resulting set of standards.[84]

The ISEAL Code, however, goes much further than the requirements contained in those two instruments. For example, it provides for more detailed rules about draft standards, offers several possibilities for the submission of comments by stakeholders at several stages of the standard-setting and posits additional requirements ensuring increased participation, such as, for example, broad and pro-active stakeholder representation and involvement.[85] ISEAL also provides a standardised methodology for impact assessment to demonstrate that standards have a positive impact.[86] However, one should not believe that ISEAL meta-standards were drafted spontaneously by enlightened civic constituencies. They were drafted to respond to the need to ensure compliance with good administration principles provided for in international instruments, to ensure procedural legitimacy to the whole sustainability standards movement[87] and its institutionalisation,[88] and also to respond to the demands by public authorities and courts.[89]

The open and non-excludable character, not just of the access to the final 'good' - the standard - but also of its 'production' process - the standard-setting - allows us to frame multi-stakeholder VSS as public goods. From the perspective of legitimacy, more than ten years ago a study on NSMD schemes concluded that schemes which ensure broad interest representation and which are perceived as independent from

[82] The main provisions of the TBT Code of Good Practice provide that standards shall not discriminate; shall not be more trade restrictive than necessary; shall be based on international standards; and shall be drafted by specifying performance characteristics, if feasible. Standard-setters are required to participate to international standard-setting activities, and avoid overlap and duplication with other standards. A host of procedural requirements addresses transparency in the standard-setting, the provision of information about draft standards, the availability of periods for commenting on draft standards, the presence of a redress procedure. For an account of the substantive and procedural requirements of the TBT Code of Good Practice, see Section 2.2 of Chapter 6.

[83] ISO/IEC (1994) ISO/IEC Guide 59: 1994. Code of Good Practice for Standardisation.

[84] ISEAL Alliance (2014) Setting social and environmental standards. ISEAL Code of Good Practice v. 6.0, online at http://issuu.com/isealalliance/docs/iseal_standard_setting_code_v6_dec_.

[85] *Ibid*.

[86] ISEAL Alliance (2014) Assessing the impact of social and environmental standards. ISEAL Code of Good Practice (Impacts Code) v. 2.0, available at http://www.isealalliance.org/our-work/defining-credibility/codes-of-good-practice/impacts-code.

[87] Reinecke, J., Manning, S., von Hagen, O. (2012) *Supra at 1*, 804.

[88] Loconto, A., Fouilleux, E. (2014) Politics of private regulation: ISEAL and the shaping of transnational sustainability governance. *Regulation and Governance* 8(2), 178.

[89] Bartley, T. (2011) Transnational governance as the layering of rules: Intersections of public and private standards. *Theoretical Inquiries in Law* 12(2), 517.

the industry - such as, for example, the FSC - possess increasingly visible elements of moral legitimacy. Moral legitimacy presupposes that actors do not just follow certain rules on the basis of narrow self-interests, but are also increasingly guided by a value judgment that following such rules is the 'right thing' to do.[90] The adoption of multi-stakeholder schemes, arguably, is not just based on the possibility of increased economic returns and market opportunities, but also on the perception from companies that the resulting regulatory regime has some intrinsic value justifying its adoption. A tension with more economic logics, however, still permeates multi-stakeholder schemes. Ultimately, the regime has to be embraced by economic actors, which in turn requires overall economic feasibility to be successfully implemented.[91]

3.1.2 Company VSS

VSS drafted by a single company radically differ from multi-stakeholder VSS on several grounds. The purpose of VSS drafted by a single company is comparable to that of multi-stakeholder VSS. Both types of instruments define and identify sustainable product and process features, with the aim of correcting externalities or to remedy information asymmetries - in this case between supplier and producer(s). However, a review of the dynamics underpinning company VSS, which are then included in a supply contract, reveals a remarkably asymmetrical relation between the firm imposing the standard and the supplier which has to adhere to or enforce it.

Firstly, entrance in the regime is not open to all interested parties, just the retailer or the scheme-holder intending to enter in a contractual relation with another business entity, which is normally a supplier or producer. The regulatory regime can take the form of a one-off set of standards or, more often, a default set of standards applicable to all upstream business entities. Secondly, company VSS are, generally, neither drafted nor managed within a permanent organisation.[92] Thirdly, suppliers and producers are rarely in the position of influencing the substance of the standards, which can also be a simple reference to a third-party standard.[93] Nevertheless, compliance with the VSS can be an essential condition if entrance is sought in a given

[90] Cashore, B. (2002) *Supra at 61*, 522. Similar findings, albeit with some caveats concerning developing countries participation, were made also by Marx, A, Bécault, E., Wouters, D. (2012) 'Private standards in forestry: Assessing the legitimacy and effectiveness of the Forestry Stewardship Council'. In Marx, A., Maertens, M., Swinnen, J., Wouters, J. (Eds.) *Private standards and global governance. Economic, legal and political perspectives.* Cheltenham-Northampton: Edward Elgar, 60-97.

[91] Potoski, M., Prakash, A. (2009) 'A club theory approach to voluntary programs'. In Potoski, M., Prakash, A. (Eds.) *Voluntary programs: A club theory perspective*. Cambridge: MIT Press, 17-40.

[92] Vandenbergh, M.P. (2007) *Supra at 5*, 924-925.

[93] Cafaggi, F., Iamicelli, P. (2015) 'Private regulation and industrial organisation: Contractual governance and the network approach'. In Grundmann, S., Moslein, F., Riesenhuber, K. (Eds.) *Contract governance: Dimensions in law and interdisciplinary research*. Oxford: Oxford University Press, 346-347.

supply chain, especially in the presence of downstream entities with strong market shares and market power.[94]

Such an asymmetrical relation bears consequences on economic outcomes as well. There are notable differences concerning the impact of the standard between upstream and downstream economic actors in a supply chain. It has been demonstrated that upstream actors - suppliers and producers - bear most of the costs of voluntary schemes in the agri-food sector, the major sector of application of company VSS. Conversely, downstream economic actors such as retailers tend to reap most of the economic benefits.[95] This is not to deny any positive impact of company VSS on the welfare of suppliers or, in the case of developing countries' suppliers, on economic development at large. Empirical evidence is however mixed.[96] In the end, company VSS are standards defining sourcing requirements, and are intimately connected to the right to conduct economic activities recognised in many jurisdictions.

It is safe to hold that company VSS, generally, do not possess standard-setting procedures which are as inclusive and aiming at ensuring due process as those of multi-stakeholder VSS. This is due to the mostly 'unilateral' character of company VSS.[97] It cannot be concluded, however, that this type of standard-setting, adoption, and enforcement is unlawful. Private contractual relations often take place against a backdrop of power inequality, the extent of which very rarely deserves the attention of the legislator or the judiciary. Company VSS are a widespread supply-chain management tool and make perfect economic sense.[98] For the purpose of the distinction made here, company VSS can produce global public goods, if to an extent only. However, as they do not constitute an open regulatory system, they themselves are not global public goods. Company VSS are private goods, as access to the

[94] Diller, J. (1999) A social conscience in the global marketplace? Labour dimensions of codes of conduct, social labelling and investor initiatives. *International Labour Review* 138(2), 100-101; Jiang, B. (2009) *Supra at 17*, 78. Henson, S., Humphrey, J. (2012) 'Private standards in global agri-food chains'. In Marx, A., Maertens, M., Swinnen, J., Wouters, J. (Eds.) *Supra at 90*, 98-113.

[95] See for example Clapp, J., Fuchs, D. (2009) 'Agrifood corporations, global governance and sustainability: A framework for analysis'. In Clapp, J., Fuchs, D. (Eds.) *Corporate power in global agrifood governance.* Cambridge MA: The MIT Press, 6-7.

[96] For a comprehensive literature review on the effects of private standards (including many company standards) on developing countries see: International Trade Centre (2011) The impacts of private standards on producers in developing countries. Literature review series on the impact of private standards. Part I and Part II available at http://www.intracen.org/itc/publications/publications-catalogue; Maertens, M., Swinnen, J. (2012) 'Private standards, global food supply chain and the implications for developing countries'. In In Marx, A., Maertens, M., Swinnen, J., Wouters, J. (Eds.) *Supra at 90*, 153-171.

[97] It has been observed that increasingly also private firms are adopting governance mechanisms that imitate the multi-stakeholder mode of governance and consist of forums where different interests can be voiced. It has also been observed that an equal voice in decision-making and standard-setting is still often times denied. See Fransen, L. (2012) Multi-stakeholder governance and voluntary programme interactions: Legitimation politics in the institutional design of Corporate Social Responsibility. *Socio-Economic Review* 10(1), 164-165, 188.

[98] Gereffi, G., Humphrey, J., Sturgeon, T. (2005) The governance of global value chains. *Review of International Political Economy* 12(1), 78-104.

standard is not open, and certain actors are excluded from benefiting from it.[99] Furthermore, it is arguable that their perceived legitimacy can be expected to flow substantially from logics connected to the economic self-interest of the parties directly involved. Nevertheless, this form of private contracting is considered as an important transnational governance tool because of its extensive consequences and implications on the supply chain.[100]

3.1.3 Sectoral VSS

Sectoral VSS are schemes and codes of conduct drafted by (normally sectoral) associations of enterprises for their application in a given sector. Generally, such standards are open for acceptance to all actors in a supply chain. Sectoral VSS display features which are a combination of those reviewed above for multi-stakeholder and companies schemes. Sectoral VSS are located somewhere 'in between' multi-stakeholder and company VSS. Downstream business actors are the actors which have the final word over the content of the standard, although exceptions are possible.[101] The standard-setting is not highly proceduralized, as sectoral codes are often a response to a specific economic need, or a one-off response to or prevention against negative events.[102] It is also rare that interests other than economic ones are included in the standard-setting and in the governance of the organisation, if any. The application of the standards is, however, broader than the bilateral economic relation between suppliers and retailers at issue for company VSS. Sectoral standards may apply to all actors in a given sector, often as a precondition to business relations.[103]

Sectoral schemes include industry codes and standards that are traditionally understood as a typical form of business self-regulation, whose enforceability varies according to the instrument and the legal system considered.[104] This type of instrument has made its appearance before courts and possesses certain specific features concerning its enforcement.[105] Codes and standards drafted by sectoral associations or with the involvement of a stakeholder base may, under certain

[99] Kindleberger, C.P. (1983) *Supra at 70*, 381.

[100] Vandenbergh, M.P. (2007) *Supra at 5*, 917.

[101] Hachez, N., Wouters, J. (2011) *Supra at 48*, 677-710.

[102] Cohen Maryanov, D. (2010) Sweatshop liability: Corporate codes of conduct and the governance of labour standards in the international supply chain. *Lewis and Clark Law Review* 14(1), 400; Jenkins H., Yakovleva N. (2006) Corporate social responsibility in the mining industry: Exploring trends in social and environmental disclosure. *Journal of Cleaner Production* 14, 271-284.

[103] Henson, S., Humphrey, J. (2009) The impact of private food safety standards on the food chain and on public standard-setting processes. Paper Prepared for FAO/WHO Codex Alimentarius Commission.

[104] As here we are concerned with sectoral schemes enforced by means of third-party certifiers, the actual level of enforceability is rather high - if by enforceability it means the possibility to ensure that a standard is properly complied with. See Wymeersch, E. (2006) The enforcement of corporate governance codes. *Journal of Corporate Law Studies* 6(1), 117.

[105] Delimatsis, P. (2010) 'Thou shall not… (dis)trust': Codes of conduct and harmonisation of professional standards in the EU. *Common Market Law Review* 47(4), 1049-1087.

circumstances, be interpreted and enforced as legally binding contracts.[106] Codes may affect litigation even if not transposed into binding contracts. Codes of conduct are routinely resorted to by judges as yardstick in the interpretation of general normative standards, such as 'reasonableness' or 'due diligence' in corporate practices.[107] When a code is sufficiently precise and addressed to the broad public, as in the case of highly-promoted labour codes, judges may enforce it under the law for consumer protection against deceptive practices.[108] Sectoral codes drafted by specific bodies, especially those regulating the practice of a profession, may also be subject to the application of certain public law rules,[109] competition law,[110] and even constitutional norms. For example, professional bodies must comply with ECHR, and in particular with the fair process obligation contained therein.[111] However, no delegation can be observed for sectoral VSS, which is different from certain types of self-regulation.[112]

By constituting a form of industry self-regulation, sectoral VSS aim at collectively governing the activity of the entities to which they apply. The justification of self-regulatory activities stems from freedom of contract and self-organisation considerations aiming at ensuring the proper practice of a profession or a sector.[113] However, the rules of sectoral VSS do not just apply to the actors that drafted them, but also to third parties, which is different from a narrow understanding of the term self-regulation. These are different actors in the supply chain which are not involved in the standard-setting, possibly even their subcontractors. Given the mismatch between

[106] Arthurs, H. (2004) 'Private ordering and workers' rights in the global economy: Corporate codes of conduct as a regime of labour market regulation'. In Conaghan, J., Fischl, R.M., Klare, K. (Eds.) *Labour law in an era of globalisation: Transformative practices and possibilities.* Oxford: Oxford University Press, 484.

[107] Wymeersch, E. (2006) *Supra at 104*, 119. In the EU, however, a sectoral code does not grant a presumption of conformity with the standard of fairness of the Unfair Commercial Practices Directive, but only strong evidence of compliance. See Pavillon, C.M.D.S. (2012), The interplay between the Unfair Commercial Practices Directive and codes of conduct. *Erasmus Law Review* 5(4), 260. The employment of corporate codes to assess, for example, due diligence can be defined as an indirect form of judicial review, and is tantamount to an indirect scrutiny of legitimacy of the code at hand. This 'recognition' of sort by a Court of private standards expands their legitimacy and authority to regulate a given domain. See Cafaggi, F. (2012) 'Enforcing transnational private regulation: models and patterns'. In Cafaggi, F. (Ed.) *Supra at 25*, 93.

[108] Sobczak, A. (2006) Are codes of conduct in global supply chains really voluntary? From soft law regulation of labour relations to consumer law. *Business Ethics Quarterly* 16(2), 168; see also Muchlinski, P. (2003) Human rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organisations. *Non-State Actors and International Law* 3(1), 129.

[109] Under EU freedom of movement see, for example, C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653. Furthermore, the Commission is instructed to ensure that the use of self-regulation is consistent with EU law, and meets the criteria of transparency and representativeness. See European Parliament/Council/Commission, Interinstitutional agreement on better law-making [2003] C 321/1, para. 17.

[110] Under EU competition law, see most recently, C-1/12 *Ordem dos Técnicos Oficiais de Contas* [2013] ECR I-000; C-136/12 *Consiglio Nazionale dei Geologi v. Autorità Garante della Concorrenza e del Mercato* [2013], ECR I-000.

[111] See, generally, Vitkauskas, D., Dikov, G. (2012) Protecting the right to a fair trial under the European Convention on Human Rights. Council of Europe human rights handbooks.

[112] Büthe, T., Mattli, W. (2005) Global private governance: Lessons from a national model of setting standards in accounting. *Law and Contemporary Problems* 68(3), 229-231.

[113] Under EU law see C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, para. 123.

regulators and regulated entities, 'private regulation' has been advanced as a better fitting definition.[114] However, the prevailing logic in the elaboration and adoption of sectoral codes remains rooted in economic and business considerations of liability limitation and risk avoidance.[115] The limited and asymmetrical participation in the setting of sectoral standards, as well as their restricted application - which is circumscribed to specific actors in the supply chain - is not consistent with the approach described above which frames certain standards as global public goods. At best, sectoral VSS can be considered as non-purely private goods, or 'club goods'. Their consumption is non-rival, but excludable, if only to a certain extent.[116] Self-regulation as a club good produces and protects private benefits, i.e. those of the regime members; it creates barriers to exclude others from acceding to or producing the same good.[117]

3.2 Institutional desirability?

Section 3.1 has built three categories of VSS on the basis of their institutional arrangement and other features. Multi-stakeholder, sectoral, and company VSS differ insofar as standards are created by and apply to, respectively: i) by any interested actor and to any interested actor; ii) by actors in the supply chain and to actors in the supply chain; and iii) by a company and to a limited group of suppliers. It is thus suggested that multi-stakeholder, sectoral, and company VSS represent, respectively: i) global public goods; ii) club goods; and iii) private goods. It will be shown that, in line with an approach that equates international standards with global public goods, multi-stakeholder VSS have a very high chance of being considered as 'relevant international standards' in the meaning of Art. 2.4 of the TBT Agreement.[118]

Regardless of whether they constitute themselves as a global public good, these three types of standards contribute to the production of global public goods, albeit to different extents. The objectives pursued by the schemes, i.e. the establishment of regulatory regimes correcting social and environmental externalities, are global public goods. Some regimes, however, give more weight to the accomplishment of private benefits over the achievement of global public goods. As seen, this is determined by

[114] Cafaggi, F. (2006) 'Rethinking private regulation. In Cafaggi, F. (Ed.) *Reframing self-regulation in European private law*. Alphen aan den Rijn: Kluwer Law International, 17-19.

[115] Marx, A. (2008) Limits to non-state market regulation: A qualitative comparative analysis of the international sport footwear industry and the Fair Labour Association. *Regulation and Governance* 2(2), 253-273; McClusky, J., Winfree, J.A. (2009) Pre-empting public regulation with private food quality standards. *European Review of Agricultural Economics* 36(4), 525-539; Cohen Maryanov, D. (2010) *Supra at 102*, 400.

[116] Bernstein, L. (1992) Opting out the legal system: Extralegal contractual relations in the diamond industry. *The Journal of Legal Studies* 21(1), 1145-157. On a similar position, although not expressly employing the concept of club good, see van Gestel, B., Micklitz, H.W. (2013) European integration through standardisation: How judicial review is breaking down the club house of private standardisation bodies. *Common Market Law Review* 50(1), 145–182.

[117] Cafaggi, F. (2012) *Supra at 69,* 700.

[118] See Section 4.2 of Chapter 5.

the governance and institutional arrangements,[119] and it arguably is the case for company and, albeit to a lesser extent, sectoral VSS. Nevertheless, as all these regimes pursue at different degrees also non-economic objectives, which benefit everybody in a non-rival and non-excludable manner, they contribute at least to a certain extent to the creation of global public goods.

The contribution of private actors to the creation of public goods such as environmental protection is controversial. Similarly, the very provision of certain global public goods should not be considered as inherently desirable, as there are different needs from different types of global public goods among different global constituencies.[120] For this reason, especially when global public goods result in distributional implications, public control and supervision over their provision should be exercised.[121] This approach normatively favours multi-stakeholder VSS for the purpose of the production of global public goods, because of their inclusive, open, and deliberative procedural requirements - which are also found to generate more stringent standards.[122] The effects of the regime must be comprehensively taken into account as well before concluding that multi-stakeholder VSS can be considered as global public goods.[123] This requires that multi-stakeholder VSS' outcomes should be satisfactory not just by achieving the scheme's objective, but also by avoiding generation of negative externalities in their application, which may include trade barrier effects and consumer confusion hindering their optimal functioning.[124]

To link standards with global public goods has additional consequences for the role the State and public institutions should play *vis-à-vis* transnational private rules, apart from a supervisory role where distributional effects are at stake. Standards as global public goods are the outcome of the aggregate effort of different types of actors. In order to stimulate their creation and, importantly, an output which is desirable, the State should put facilitations into place to support and encourage the aggregate effort of the actors involved.[125] These facilitations may take the form of interactions between private and public authority, as described in the next Section with respect to VSS. Public-private interactions contribute to supporting the private regulatory scheme by fostering its acceptance, ensuring its trustworthiness, and limiting adverse market effects. At the same time, in some instances, public authorities provide constraints or

[119] Cafaggi, F. (2012) *Supra at 69*, 699.
[120] Kaul, I. (2012) *Supra at 67*, 733.
[121] Cafaggi, F. (2012) *Supra at 69*, 696.
[122] Kalfagianni, A., Pattberg, P. (2013) *Supra at 24*, 15.
[123] Cafaggi, F. (2012) *Supra at 69*, 698.
[124] Literature on international standards similarly acknowledges the importance to equally meeting high thresholds of procedural accountability and also of substantive quality. See Wijkström, E., McDaniels, D. (2013) Improving regulatory governance: International standards and the WTO TBT Agreement. *Journal of World Trade* 47(5), 1013-1046.
[125] Krisch, N. (2014) The decay of consent: International law in an age of global public goods. *American Journal of International Law* 108(1), 4; Du, M., Deng, F. (2016) *Supra at 71*,119.

conditions with which the scheme must comply as a form of control on procedures and, at times, outcomes.

Public authorities can also exercise their supervising and coordinating roles by means of interactions such as court review under, for example, freedom of movement provisions and competition law in the EU. This interaction brings legal accountability by means of substantive and procedural review of VSS' features.[126] The reach of meta-regulatory tools such as the TBT Code of Good Practices is also of fundamental importance and potentially far-reaching. These means of review and influence will be discussed, respectively, in Chapter 3, 4 and 6. Arguably, court review may ensure a rather thorough control over private regulatory activities, which may though generate 'chilling' effects for private regulation. In light of the frame above, a more extensive degree of control appears reasonable for VSS, as they structurally generate distributional concerns since they mediate between trade and non-trade values, affect producers' competitiveness, and consumers' tastes and consumption patterns. Distributional concerns are less visible for technical standards, thereby suggesting that the State's approach towards them should be more limited,[127] and possibly only encompassing facilitation, and not necessarily requiring review and closer forms of supervision.

Public coordination and supervision over private regimes may raise concerns for private autonomy of the actors establishing the regime. To frame VSS as global, club, or private goods defuses such an argument, and identifies normatively which regimes should be treated more deferentially by public authorities. Public control over private and club goods such as company and sectoral VSS should be less intrusive, arguably less so for private goods. Conversely, the control of global public goods such as multi-stakeholder VSS is less controversial, as discussed above. This is also demonstrated empirically, as most of the interaction described in the next Section and in Chapter 3 already addresses multi-stakeholder schemes. Finally, as will be seen, concerns about private autonomy are also limited under an argument that passing the test of public scrutiny is in the interest of scheme holders in order to enhance their legitimacy and acceptance.

[126] Stewart, R.B. (2014) Remedying disregard in global regulatory governance: Accountability, participation, and responsiveness. *American Journal of International law* 108(2), 249.

[127] Stewart, R.B. (2014) *Supra at 126* , 226.

4. Public role and specific forms of interaction with VSS

As discussed above, legal scholarship framing certain forms of transnational private regulation as global public goods, in line with political science scholarship,[128] identifies a directing and controlling role of the State. Recommendations have been made that public actors should intervene in private regulation. In spite of the private character of VSS schemes, it can be empirically discerned that they do not operate in a vacuum devoid of public influence.[129] The relation between States and VSS is, however, a complex one, if not because it takes forms and venues which are at times indirect and, thus, not easily identifiable. In general, different forms of interactions are observable.[130] The concept of interaction is much more flexible to describe the interplay between private and public authority than the concepts of delegation and agency - which are increasingly inadequate in describing the complexity of reality, especially at the transnational stage.[131] 'Interactions', in the meaning of the Transnational Business-Governance Interaction (TBGI) approach, identify several possible ways in which governance actors and institutions engage with and react to one another in the regulation of business conduct.[132] Interactions affect the design of the regulatory institutions, the nature and the content of their rules, and the overall behaviour of the regulated entities.[133]

The TBGI framework aims at observing the effects of interactions on several components of the regulatory governance process.[134] Particularly relevant for our purpose are the formulation and implementation steps, as they determine the substance of the standards and have a direct bearing on the negative effects of VSS.

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[128] In particular the claim that states possess the incentives and have the interest to employ and promote 'transnational new governance'. Abbott, K.W., Snidal, D. (2009) Strengthening international regulation through transnational new governance: Overcoming the orchestration deficit. *Vanderbilt Journal of Transnational Law* 42(2), 510.

[129] See the excellent work from Bartley, and in particular Bartley, T. (2011) *Supra at 89*; Bartley, T. (2014) Transnational governance and the re-centred state: Sustainability or legality. *Regulation and Governance* 8(1), 93-109.

[130] In this book, the focus will be on EU regulators and VSS. Also the interplay between the meta-rules of the TBT Code of Good Conduct and VSS can be considered as a form of interaction.

[131] Lindseth, P.L. (2006) 'Agents without principals? Delegation in an age of diffuse and fragmented governance' In Cafaggi, F. (Ed.) *Supra at 114,* 108-109. See also Sabel, C.F., Zeitlin, J. (2012) 'Experimentalist governance'. In Levi-Faur, D. (Ed.) *The Oxford Handbook of Governance*. Oxford: Oxford University Press, 174-175; Green, J.F. (2013) *Rethinking private authority: Agents and entrepreneurs in global environmental governance*. Princeton: Princeton University Press, in particular at 14-19.

[132] Eberlein, B., Abbott, K.W., Black, J., Meidinger, E., Wood, S. (2014) Transnational business governance interactions: Conceptualisation and framework for analysis. *Regulation and Governance* 8(1), 2.

[133] Wood, S., Abbott, K.W., Black, J., Eberlein, B., Meidinger, E. (2015) The interactive dynamics of transnational business governance: A challenge for transnational legal theory. *Transnational Legal Theory* 6(2), 355.

[134] Such steps are: i) framing the regulatory agenda and setting objectives; (ii) formulating rules or norms; (iii) implementing rules within targets; (iv) gathering information and monitoring behaviour; (v) responding to non-compliance via sanctions and other forms of enforcement; and (vi) evaluating policy and providing feedback, including review of rules. Eberlein, B., Abbott, K.W., Black, J., Meidinger, E., Wood, S. (2014) *Supra at 132,* 6.

Most of the interactions considered here occur at a meso-level and at the macro-level,[135] in the sense they take place between VSS (either singularly or collectively) on the one hand, and regulators and regimes at the EU and WTO level on the other. Section 3 of Chapter 3, however, also discusses interactions occurring at the micro-level, i.e. between individual regulatory actors such as EU regulators and a specific VSS. The objective is to assess the likely effects of all these interactions on the substance of the schemes.

The study of such interactions allows us to understand, explain and predict their impact on VSS, by means of the expected variation of the proxies of outputs and outcomes.[136] The interactions considered here are between VSS and the internal market discipline under Art. 34 TFEU and under the EU competition law regime, and between interactions with the WTO law regime and its meta-regulatory provisions. Although political scientists understand the concept of public-private interactions in an expansive manner, and at several different stages of the standard-setting,[137] the focus here will also be on interactions based on specific legal instruments. Such interactions at the micro and meso-level take place where EU regulators attempt to influence at several degrees the substance and procedures of VSS. Based on empirical review, such interaction between governments in the exercise of their market regulation prerogatives and VSS - often multi-stakeholder - can take three forms.[138] Governments can be *users* of VSS, *facilitators,* or *supporters.* All three forms of interactions describe situations in which public and private authorities engage in forms of coordination and/or cooptation.[139]

Specifically, these interactions, at different degrees, may result in coordination between the regulatory actors, i.e. an allocation of regulatory tasks which highlights the implementing effects of VSS. Other effects of such interactions are of particular concern here, as they may also influence procedural and substantive requirements. Some interactions, under certain circumstances, have the effect of co-opting the VSS in question by imposing legal obligations on the schemes. It may also occur that more structured forms of interaction result in supervision and review over VSS. For example,

[135] Eberlein, B., Abbott, K.W., Black, J., Meidinger, E., Wood, S. (2014) *Supra at 132,* 8.

[136] Wood, S., Abbott, K.W., Black, J., Eberlein, B., Meidinger, E. (2015) *Supra at 133,* 356.

[137] Abbott K.W., Snidal, D. (2009) 'The governance triangle: Regulatory standards institutions and the shadow of the State'. In Mattli W., Woods, N. (Eds.) *The Politics of Global Regulation.* Princeton: Princeton University Press, 44–88.

[138] The classification is based on an early empirical work identifying examples of public use, at different extents, of VSS schemes by Carey, C., Guttenstein, E. (2008) Government use of voluntary standards: Innovation in sustainable governance. ISEAL Alliance R079, 18-21. See also, for a similar empirical categorisation, Cragg, W. (2005) *Three questions about corporate codes: Problematisation, authorisation, and public/private divide.* Cheltenham: Edward Elgar, cit. in von Hagen, O., Alvarez, G. (2011) The interplay of public and private standards. Literature Review Series on the impact of private standards - Part III. Geneva: International Trade Centre, 16.

[139] Other possible forms of interaction may instead generate competition between regimes, or chaos. Eberlein, B., Abbott, K.W., Black, J., Meidinger, E., Wood, S. (2014) *Supra at 132,* 11-12. For a similar approach to the effects of interactions between public and private authority see also Cafaggi, F. (2011) *Supra at 58,* 44-45.

these forms of interactions under EU law may result in an amount of indirect legal scrutiny of VSS, either because of the presence of legal acts, because of certain requirements imposed by the legislators, or because recognition leads altogether to the application of the freedom of movement provisions. Chapter 3 will discuss these situations into detail. Chapter 5 then discusses the extent to which these forms of interaction may give rise to attribution under WTO law.

It is assumed here that VSS, some more than others, have an interest in forming at least some types of structured relations with States and rule-makers. Apart from the obvious benefit that direct incentives and facilitation for uptake can generate, forms of recognition and possibly even employment in legislation greatly increases the legitimacy of VSS. This is particularly important for schemes competing on a market for sustainability standardisation. It is especially relevant for multi-stakeholder initiatives in need of communicating to the broader public the differences with similar schemes, but where a stronger role played by the industry may have the effect of 'watering down' the substance of the standards. Stronger forms of interaction can thus have positive impacts on uptake as they profoundly affect the perceived legitimacy of the scheme.[140] These interactions have also been considered as capable of enhancing the legitimacy of public rules, for example where they further and contribute to public goals.[141]

4.1 Public authorities as users of VSS

Where a close and formal arrangement between governments and a VSS is present, possibly by means of legal acts, public bodies can be seen as *users*, i.e. they have a direct relation with a VSS. This happens when public authorities specifically require the employment of a sustainability scheme, for example to sort out which producers or products can be entitled to a benefit, or as a means to demonstrate compliance with legislative requirements. A regulation can either explicitly indicate a scheme to be employed or provide for a general requirement to use one. A connection with a legislative instrument is necessary to give rise to this type of relation. This interaction influences VSS by several means. The employment in legislation is prerogative of instruments whose objectives and procedures are in line with those spelled out by public authority. A VSS which wants to be 'used' has to abide by substantive and procedural requirements determined by the regulator.

[140] Meidinger, E. (2006) The administrative law of global private-public regulation: The case of forestry. *European Journal of International Law* 17(1), 59; Black, J. (2008) Constructing and contesting legitimacy and accountability in polycentric regulatory regimes. *Regulation and Governance* 2(1), 157; Bernstein, S., Hannah, E. (2008) *Supra at 62*, 584; Overdevest, C., Zeitlin, J. (2014) Assembling an experimentalist regime: Transnational governance interaction in the forest sector. *Regulation and Governance* 8(1), 44.

[141] Cafaggi, F. (2010) Private law-making and European integration: Where do they meet, when do they conflict? In Oliver, D., Prosser, T., Rawlings, R. (Eds.) *The regulatory State*. Oxford: Oxford University Press, 223.

When public bodies are users of VSS, a more or less clear division of labour can be observed, in particular whenever compliance with VSS gives rise to a presumption of compliance. In this sense, endorsement or recognition leads to regulatory complementarity between private and public institutions. [142] Complementarity highlights the implementing role of VSS, and it is a particularly noticeable phenomenon in the EU approach to biofuel sustainability within the frame of the Renewable Energy Directive discussed in Section 3.1 of Chapter 3. Recognition, or forms of support to VSS schemes, may come with strings attached. In addition, recognition may also bring the application of certain provisions or legal principles either directly on the VSS body, or indirectly, as a form of control exercised by judiciary bodies to validate the act of recognition. This legal spill over of sorts can, to this extent, be seen as a cooptation device to influence either the substance of the standards or certain procedures of the VSS body concerned. This argument is also discussed in Section 3.1 of Chapter 3.

A government can also be a user of a VSS in the strict sense of the term when certification of governmental products or properties is undertaken, as in the case of FSC certification of publicly owned forestal land. However, in this case, the VSS scheme does not seem to be subject to any legal rules, which is different from the other cases of governmental use. This scenario will therefore not be taken into account.

4.2 Public authorities as facilitators of VSS

Public bodies can be seen as *facilitators* when they provide a legal environment which is directly or indirectly favourable to the development or uptake of VSS. This is the most frequent interaction, and a variety of approaches are possible. This type of interaction, therefore, includes a host of means by which public authorities coordinate and support transitional private regulatory activities. Some means, such as harmonisation initiatives aimed at ensuring a minimum extent of trustworthiness and meta-regulation efforts, either directly or indirectly, result in certain requirements being imposed on the scheme. By meta-regulation and meta-rules we mean a set of 'light' normative requirements on the basis of which private actors are required to institutionalise the process and the substance of their regulatory efforts.[143] In other cases, facilitation simply fosters VSS' acceptance. An example of facilitation which directly impacts on VSS is the Organic Food Regulation, which sets baseline requirements with which private organic agriculture certification initiatives must comply. An example of facilitation which, instead, indirectly impacts VSS is the public procurement Directive. It permits contracting authorities to employ private schemes as

[142] Cafaggi, F. (2011) *Supra at 58*, 41.

[143] Jordana, J., Levi-Faur, D. (2004) *The politics of regulation: Institutions and regulatory reforms for the age of governance*. Cheltenham: Edward Elgar, 6-7.

a tendering specification. Requirements are imposed about the procedures of the VSS which can be employed, and which contracting authorities have to verify. By this means, public authorities can exercise indirect control over procedural features of VSS. An example of such interaction which does not result in direct or indirect effects on a scheme, apart from arguably increasing its uptake, is the EU Forest Law Enforcement, Governance and Trade (FLEGT) scheme. The initiative aims at combating the practice of illegal logging outside the EU by establishing procedures retailers must have in place to assess that the timber which is sold in the EU has been gathered in accordance with the requirements of the countries of origin. Among the documents that retailers may request to prove compliance with local legal requirements, third party forestry certification schemes are allowed to be employed.[144] Other forms of facilitation will be described and discussed in Section 3.2 of Chapter 3.

4.3 Public authorities as supporters of VSS

Finally, public bodies can be seen as *supporters* of a specific VSS, because of the extent of affiliation, practical assistance, or endorsement. The most straightforward form of support is the allocation of resources in favour of VSS. The EU, for example, allocates funds in partnership with NGOs to FairTrade initiatives.[145] Support can also take the form of expressed endorsement which, differently from *use* of VSS, does not occur by means of legal instruments. Some European competition authorities, in the exercise of their competition advocacy tasks, have been suggested to recommend to market actors the acceptance of market-based instruments in the domain of sustainability. [146] Public authorities can offer incentives to firms to undertake certification, such as technical assistance. Endorsement can also take place when governments themselves are member of a voluntary sustainability initiative.

States may also participate directly in the standard-setting, provided that the VSS allows it. Multi-stakeholder VSS do not normally restrict participation in the standard-setting to private actors only, but effectively permit *any* interested stakeholder to participate, which is different from sectoral and company schemes.[147] It is however difficult to evaluate whether and to what extent public actors, arguably specialised governmental agencies, effectively take the opportunity to participate in the standard-

[144] Regulation (EU) 995/2010 of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market. L 296/23. See in particular Art. 6.

[145] Commission Communication COM(2009) 215 final. Contributing to Sustainable Development: The role of Fair Trade and non- governmental trade-related sustainability assurance schemes.

[146] Report from the Nordic Competition Authorities (2010) Competition policy and green growth, Interactions and challenges, 35. Available at http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/competition-policy-and-green-growth.pdf.

[147] This is the case, for example, of FairTrade and FSC. Fairtrade International, *Standard Operating Procedure Development of Fairtrade Standards*, Art. 2.3, http://www.fairtrade.net/fileadmin/user_upload/content/2009/standards/documents/2012-02-07_SOP_Development_Fairtrade_Standards.pdf; Cadman, T. (2011) *Quality and legitimacy of global governance. Case lessons from forestry*. Basingstoke: Palsgrave Macmillan, 53, 61.

setting. Support also occurs whenever states provide an environment which is supportive of CSR practices and specific self-regulatory activities. EU examples of support of VSS include, for example, the establishment of the Retailer Forum, which has the objective of facilitating the private sector's exchange of best practices among retailers to foster demand and consumption of sustainable products.[148]

5. Formal features of VSS

Sections 3 and 4 provided an institutional categorisation of VSS bodies and standards, and described the possible avenues for their control and supervision from public authorities by means of interactions between regulators and private standard-setters. Our attention now turns to the output of standard-setting to clarify concepts to which we will return in the course of the legal analysis. Section 5.1 begins by describing certain formal features of standards. The aim is to discuss elements which are relevant in particular under WTO law. This Section adopts a descriptive perspective to reveal how specific elements in the form of the set of standards related to trade-barrier effects may determine the applicability of certain legal provisions, and present a higher chance of being in potential conflict with EU and WTO law rules as discussed in the following Chapters. The elements addressed here include the form of the standards in Section 5.1, the presence of a label in Section 5.3, the stringency of a scheme in Section 5.4, and adaptation, recognition and overlap between standards in Section 5.5. Section 5.2 illustrates the differences between VSS and the type of instruments normally evoked by the concept of standard, i.e. technical standards. As the legal treatment of technical standards in legal areas such as competition law is relatively well-defined, their differences with VSS must be understood. Here the focus is on the rationales behind their creation and acceptance. Differences and similarities concerning the economic effects of VSS and technical standards will be addressed in detail in Chapter 4.

5.1 Form of the standards

The prescriptive element of a VSS, like all standards, can take several forms, according to the classification of possible modalities of a standard spelled out by the ISO.[149] As a first relevant distinction, a VSS can address features of either a product or the process(es) performed to bring a product into existence. A standard addressing features of a product is a standard which specifies one or more requirements with

[148] Commission Communication COM(2008) 397 final on the Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan.

[149] ISO/IEC (2004) ISO/IEC Guide 2: 2004. Standardisation and related activities / General vocabulary. The relevance of ISO Guide is not incidental, as the TBT Agreement provides that the terms contained in the TBT Agreement shall be given the same meaning as in ISO/IEC Guide 2, which represents the ISO official document concerning terminology employed in standardisation.

which a product must be in compliance. It can address its physical features, but also other aspects concerning terminology, sampling, testing, and labelling.[150] Product standards are therefore technical specifications of design and performance characteristics of manufactured goods.[151]

A standard can also address the processes employed in bringing a product into existence. Although the ISO/IEC Guide 2:2004 does not provide for a definition of process, a product is defined as the result of a process in other ISO documents.[152] It is therefore safe to hold that a process encompasses specific actions and steps required in the production of a product. A recurring classification of processes can be found in international trade law and differentiates between processes that leave an observable trace in the final product and processes which do not. The first situation identifies incorporated, or product-related, processes and production methods (PPMs), whereas the second identifies unincorporated, or non-product related PPMs. The academic example of the former include a standard defining the use of pesticides or other chemicals in agriculture, which may result in hazardous residues; classic examples of the latter are standards addressing the amount of polluting emissions in the production of a good, or the working conditions of labourer, which make indiscernible a 'green' good from a 'brown' good, or a child-labour free carpet from a sweatshop carpet. This distinction between incorporated and unincorporated PPMs arose in the legal literature as a way of dealing with States' uneasiness with the regulation of processes of production taking place abroad. Given its 'academic' origins, it may even be irrelevant within the context of the TBT Agreement.[153] The distinction has, however, deeply influenced many debates, including that about the possible reach of WTO law over the regulation of environmental measures. However, here it will be used primarily to highlight conceptual differences in the substance of VSS.

Many VSS address intangible features of the production process such as labour standards, and environmental and social externalities of processes. Following the distinction between incorporated and unincorporated PPMs, they thus fall in the latter category. However, the line dividing incorporated from unincorporated PPMs, and process from product standards, is not always obvious, or even possible to draw. For example, the widespread employment of process standards, especially in private regulation, has generated standards in some domains - such as, for example, organic food production - addressing simultaneously product and process. By establishing process requirements regulating the use of pesticides, they directly impact those

[150] ISO/IEC (2004) ISO/IEC Guide 2: 2004. Standardisation and related activities / General vocabulary. Art. 5.1 to 5.8.
[151] Büthe, T., Mattli, M. (2012) *Supra at 12*, 5.
[152] ISO/IEC (2004) ISO/IEC International Standard 17000. Conformity assessment - Vocabulary and general principles. Art. 3.3. For the definition of process provided by the Appellate Body within the framework of the TBT Agreement, see Section 2.1.2 of Chapter 6.
[153] Both issues will be discussed exhaustively from the perspective of WTO law in Chapter 5 and 6.

product features which are directly sought after by consumers. For goods such as recycled products, standards addressing processes also constitute product standards.

The standards of a VSS scheme - defining either a product, or the two types of process discussed above - can be descriptive standards, performance standards, or management system standards. A product or a process can be defined in descriptive manner, for example by describing certain tangible physical features, or by describing process that shall or shall not be used, like child labour, or environmentally sound fishing methods which do not harm other species. In the alternative, VSS can also define features of products and processes in a performance-based manner. Performance standards do not describe certain characteristics, but instead specify their attributes in terms of output. Performance-based requirements define the energy efficiency of products like house appliances, or set a maximum level of polluting emissions in the production process. Performance-based standards are normatively preferable because, by focusing on the outcomes and allowing different means to accomplish them, they are less trade-restrictive than descriptive standards.[154]

A third form of standard is also possible, which presents different features from descriptive and performance requirements. A substantial part, if not the majority, of the requirements provided for in VSS takes the form of management system standards.[155] A management system standard defines processes and procedures[156] to be established and implemented in the administration and management of the producing company, which do not necessarily result in a specific outcome. These standards can be seen as guidelines on how to design and manage complex organisations.[157] A management system standard is a set of deeply varying elements including organisational structures, procedures concerning the planning of specific activities, and the allocation of responsibilities, which a company's management employs to establish specific objectives - such as a specific environmental policy - and to then achieve them.[158] These requirements are typical of a reflexive approach to regulation and law, which aims at designing self-regulating regimes by means of

[154] See Annex 3.I of the TBT Agreement.

[155] For example, FSC standards require the presence of a management system which promotes 'the development and adoption of environmentally friendly non-chemical methods of pest management and strive to avoid the use of chemical pesticides'. (Principle 6.6). Further, and more generally, 'a management plan - appropriate to the scale and intensity of the operations - shall be written, implemented, and kept up to date' (Principle 7). See 'FSC Principles and Criteria for Forest Stewardship'. Available at https://ic.fsc.org/principles-and-criteria.34.htm. Management systems are also required for schemes focusing on social aspects only, such as SA8000. See 'Social Accountability 8000 - International standard' Art. 9. Available at http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937. All PEFC standards directly refer to management requirements and management plans. See Sustainable Forest Management. Available at http://www.pefc.org/standards/technical-documentation/pefc-international-standards-2010/676-sustainable-forest-management-pefc-st-10032010.

[156] To this extent a system standard addresses only processes and not products.

[157] Furusten, S. (2000) 'The knowledge base of standards'. In Brunsson, N. and Jacobsson, B. (Eds.) *A World of standards*. Oxford: Oxford University Press, 71.

[158] ISO (2004) ISO International Standard 14001. Environmental management systems - Requirements with guidance for use. Art. 3.8; Delmas, M.A. (2002) *Supra at 20*, 93.

organisational and procedural norms. Control occurs on an indirect level, since the only task of a reflexive system is to determine the organisational and procedural background constraining future action.[159] A reflexive law instrument, differently from 'command and control' regulatory instruments, creates a system of incentives and procedures stimulating actors to reflect about which behaviour they should take and foster continuous improvement. They constitute a common feature of 'experimentalist' governance regimes.[160]

The peculiarity of this type of 'reflexive' standards is that the processes in question are neither incorporated nor unincorporated in the final product; it can, in fact, be said that they bear no direct relation *at all* with the product or any of its characteristics.[161] Depending on the environmental goals and policy plans companies are required to independently develop, and against which they will be audited, entities operating in the same sector or managing the same type of environmental risk might end up having different levels of stringency in their approach to environmental protection.[162] This is also explicitly acknowledged by ISO itself in the text of the ISO 14001 standard, the most widely employed management system standard for environmental performance,[163] and which is often referred to in other standards, VSS included.

VSS normally include a combination of the three types of standards here described, with a certain preference for management system standards which reflect a policy preference for governing principles in achieving sustainable resource management.[164] Management system standards are pervasive and often require extensive changes in the internal organisation of a firm and its established management practices.[165] In general, descriptive and performance-based requirements can be found as well, addressing incorporated and, especially, unincorporated PPMs. The employment of certain types of standards depends, to some extent, on the objective pursued by the scheme. For example, schemes which use labels to inform consumers about energy-efficiency features of products predominantly employ descriptive and performance

[159] Teubner, G. (1983) Substantive and reflexive elements in modern law. *Law and Society Review* 17(2), 239-252.

[160] Overdevest, C., Zeitlin, J. (2014) *Supra at 140*, 7.

[161] Braun, B. (2005) 'Building global institutions: The diffusion of management standards in the world economy - An institutional perspective'. In Alvstam, C.G., Schamp, E.W. (Eds.) *Linking industries across the World*. London: Ashgate, 3-27.

[162] On ISO 14001 see Clapp, J. (1998) The privatisation of global environmental governance: ISO 14000 and the developing world. *Global Governance* 4(3), 309.

[163] ISO/IEC (2004) International Standard ISO 14001. Environmental management systems. Requirements with guidance for use, vi.

[164] Over the effectiveness of which, actually, the evidence is conflicting. See, for example Rondinelli, D., Vastag, G. (2000) Panacea, common sense or just a label? The Value of ISO 14001 environmental management system. *European Management Journal* 18(5), 499-510.

[165] This is illustrated by the fact that 95% of the corrective action requirements issued by auditors (i.e. the remedies firms have to undertake in order to be fully compliant with the standards) in the forestry certification sector concern improvements to be made in the implementation of management plans. See Auld, G., Gulbrandsen, L.H., McDermott, C.L. (2008) Certification schemes and the impact on forests and forestry. *Annual Review of Environment and Resources* 33, 198.

standards. The subject matter of social VSS necessarily requires standards addressing unincorporated PPMs, often by means of descriptive standards.

A special situation which cannot be fitted into any of the three types of standards described above is that of VSS whose standards provide for a methodology to be employed in the calculation of features such as polluting emission. This feature is typical of VSS indirectly regulating a certain (normally environmental) issue. Life-cycle assessment standards, or standards addressing the calculation of certain types of emission such as food miles, are a prime example. Such standards prescribe which elements are to be taken into account in the calculation of certain emissions throughout product life, or a subset of it. Several methodologies coexist, which may or may not include certain steps in the product cycle, or give different weights to the emissions produced in different steps of the production or consumption phase, to the detriment of clarity and increase the costs for companies that want to market their 'green' products in different countries.[166] The choice of a methodology for assessment of a process would indeed fit in the ISO definition of standard, albeit it does not determine any product or process.

Product / Process									Methodology
Descriptive (Design)			Performance			Management system			
pr. char.	pr-PPM	npr-PPM	pr. char.	pr-PPM	npr-PPM	pr. char.	pr-PPM	npr-PPM	
size, dimension, color, material	prohibition to use chemicals	minimum salary provision	appliance efficiency (kW per use)	maximum level of chemical residues	limit to polluting emissions during production/ no child labour	n/a	health and safety, quality, risk assessment systems	social and environmental systems	

Table 1. Possible types of standards addressing product or process, or methodology

[166] The EU Commission has identified 80 methodologies and initiatives for calculating and reporting greenhouse gas emissions, elaborated both by private and public bodies, and around 60 methodologies for carbon footprint calculation. The effects on the EU internal market are that companies wanting to market their product in different Member States have to undergo certification and reporting under different systems and methodologies, with consequent cost increases. The Commission has therefore developed two methodologies for appraising the environmental footprint of products and organisation, which are suggested as a common methodology to be employed in the EU by Member States, companies and private organisations. See Communication from the Commission COM/2013/0196 final. Building the Single Market for Green Products Facilitating better information on the environmental performance of products and organisations.

5.2 VSS and technical standards

At several junctures throughout this book, a comparison will be made between VSS and technical standards. The difference between technical standards and other standards has been identified by political scientists by looking at the reasons behind their elaboration. Technical standards are a coordination response to solve a network externality. Interconnectivity between different products and the related need to ensure physical uniformity of products generate such externalities. Conversely, VSS are drafted to address a prisoner's dilemma type of externality. These include physical externalities generated by an actor's behaviour which affects another's behaviour - such as pollution - and also policy externalities. For example, a regulatory regime in one country may detrimentally affect producers in another country.[167] VSS address these problems by aiming at correcting the physical externality - pollution *and* the policy externality - the comparative advantage enjoyed by producers which comply with more relaxed environmental regulations.

At the cost of oversimplification, technical standards are understood as the outcome of standardisation at the ISO level, the relevant national bodies within the ISO system, and from European Standardisation Bodies.[168] Such instruments possess strong technical features in the form of descriptive and performance standards, but are very rarely in the form of management system standards. Their specific objectives are interoperability between products and, in some cases, health and safety goals pursued by means of prescribing product requirements. Such standards, different from standards like VSS, have an inherently harmonisation objective, to the extent that greater (mostly efficiency-based) gains are generated by an increase in compliance.[169] It will be seen that most of the competition law debate about standards has involved technical standards. Granted, the dividing line between technical standards and VSS may be blurred, such as for eco-labels addressing emissions and environmental impact, which can contain highly technical standards. Nonetheless, such standards are normally not drafted by standardising bodies within the ISO system. In any event, VSS can also be seen as quality standards.[170] Quality standards allow complying and non-complying products to be ranked according to their performance *vis-à-vis* a specific feature. For example, MSC-certified fish is 'more sustainable' than non-certified fish.

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[167] Abbott, K.W., Snidal, D. (2009) *Supra at 128*, 507. Abbott, K.W., Snidal, D. (2001) *Supra at 9*, 347-348.

[168] See Section 2.1.1 of Chapter 4.

[169] Katz, L.M., Shapiro, C. (1985) Network externalities, competition, and compatibility. *The American Economic Review* 75(3), 424-440.

[170] A similar distinction can be found in economic literature concerning standards which contribute to vertical and horizontal product differentiation. In the first group belong standards which allow the classification of products as one being 'better' or 'safer' than another. In the second group, the standard identifies characteristics for differentiation between products, but the outcome cannot be ranked. See WTO (2005) World Trade Report 2005. Exploring the links between trade, standards and the WTO, 32.

5.3 Employment of a label

An important element of VSS is the presence or the absence of a label providing information to consumers about the product's compliance with the scheme at hand. Although a logo to be applied to product may not seem worthy of much attention, it does in fact reveal fundamentally different rationales in the establishment and functioning of the schemes, and it is capable of affecting the legal analysis both under EU competition law and under WTO law, as will be discussed in Section 2.4.2.1 of Chapter 4 and Section 2.1 of Chapter 6. The presence of a label highlights consumer preferences as the tool ensuring the functioning of a market for that specific sustainable product. Labels are almost the norm for multi-stakeholder schemes, which rely on consumer awareness as a vehicle for change. Sectoral and, in particular, company VSS employ labels much less frequently. This is due to the business-to-business purpose of such schemes, which is particularly evident for company VSS. The aim of those schemes is to address governance in the supply chain and they do not require direct involvement of consumers to be established and function. Nevertheless, if a company VSS is established with the purpose of creating a 'sustainable' product line, such as those of food retailers like Tesco and Carrefour, the recognisable product logo serves the same function as a label in providing information to consumers. As Section 1.2 of Chapter 1 elucidates, consumer confusion arises only for VSS which utilize a label. Other schemes do not necessitate consumer involvement to pursue their objectives.

The lack of a label is also connected to another rationale. Certain VSS certify products, and in some cases a label is affixed to goods; conversely, other VSS certify the whole company. For example, eco-labels addressing environmental features apply to products. Normally, VSS which employ a label require the certification of individual products and not of the whole entity. Other schemes instead require the entire company to be certified. This is the case of management system schemes certifying the social or environmental performance of an entity, such as SAI8000, but also of certain company VSS and GAP schemes.[171] This means that not just a specific product line has to be 'upgraded' to meet the requirement of the VSS, but the whole company requires reorganisation in order to meet the standards.

5.4 Stringency of the standards

The stringency of the requirements of a VSS is a crucial element determining adverse trade effects. A scheme's stringency can be appraised in abstract terms by comparison to the provisions that would normally be applicable for the producers absent such a

[171] Nike, for example, requires their suppliers to be certified, and not just their products. For Nike' Code of Conduct, the reasons lies in the fact that the Code aims at ensuring acceptable labour conditions among suppliers. GlobalG.A.P. is a prime example of a GAP scheme certifying producers and not products.

private regime. Stringency is, however, not always easy to quantify. In the easiest scenario, the VSS requires the entities seeking certification to be in compliance with the existing regulatory regime. The VSS can therefore be said to 'hold the bar'.[172] For the purpose of compliance, this situation theoretically corresponds to a low level of trade-restrictiveness. Also standards addressing methodologies, for example for the calculation of polluting emissions, can be seen as 'holding the bar'. The standard itself does not require producers to comply with any specific substantive rule, but just to follow the indicated procedures to measure and report about certain product features connected to polluting emissions.

In other cases, the provisions contained in a VSS appear more stringent than the rules that would otherwise be applicable; the VSS can thus be described as 'raising the bar'. This scenario includes the obvious situation of more stringent requirements,[173] but also of VSS whose standards consist of new rules in an area where no other rules are present, [174] and the requirement of management system standards that would otherwise not be implemented by the entity seeking certification.[175] In those cases, a higher incidence of trade-barrier effects can be expected, which are linked to the difficulty in meeting and/or implementing the standards. For certain producers it may be impossible to modify products and process features without irremediably compromising their competitiveness.

Notwithstanding the above, in practice, it is not always easy to pinpoint whether a standard actually raises or holds the bar. The lack of rules which would otherwise be applicable is particularly evident for VSS and have the effect of implementing broad international law obligations referring, at large, to sustainable use of exhaustible resources. At the national level, in the case of implementing instruments, the actor implementing the general rules acts within the framework established by the delegating actors. Even in the presence of formal delegation and mechanisms of control, it has been observed that implementing actors may have in practice a wide margin to determine, for example, the level of protection which should have been set by their principals.[176] VSS clearly operate unconstrained by formal rules of delegation

[172] Even schemes that in fact 'raise the bar' require, as a 'baseline', compliance with all applicable laws and regulations.

[173] For example, the FSC prescribes that natural water courses in the forest under certification must be protected and restored. See FSC International Standard. FSC Principles and Criteria for forestry stewardship, FSC-STD-01-001 (V5-2), Art. 6.8 Available at https://ic.fsc.org/en/certification/principles-and-criteria.

[174] For example, the Program for Endorsement of Forestry Certification (PEFC) provides that the use of pesticides shall be minimised, and appropriate silvicultural alternatives and biological measures shall instead be preferred. See PEFC International Standard: Requirements for certification schemes. PEFC ST 1003:2010, Art. 5.2.8. Available at http://www.pefc.org/images/documents/PEFC_ST_1003_2010_ SFM__ Requirements_2010_11_26.pdf.

[175] The requirement to introduce a management system, as discussed above, is a common feature of a sizeable majority of the schemes, and in particular of environmental ones.

[176] See Joerges, C., Schepel, H., Vos, E. (1999) The law's problem with the involvement of non-governmental actors in Europe's legislative process: The case of standardisation under the 'New Approach'. EUI Working Paper LAW No. 99/9; Vos, E. (1999) *Institutional frameworks of community health and safety regulations Committees, Agencies &*

and related supervising mechanisms, and the approach to 'implementation' taken by certain schemes is very wide. It seems to transcend the original subject matter to incorporate holistically a host of other issues connected to the regulated area.[177] In such cases, it is therefore complicated to determine whether a scheme holds the bar, i.e. it has the effect of implementing internationally agreed upon rules, or it raises the bar by itself establishing new, more stringent, requirements.

Different rationales may lie behind the stringency of a standard. In some cases, the explanation is arguably connected with the nature of the risk or concern addressed by the scheme, and in particular whether it responds to specific problems in the supply chain or consumer perceptions. This is particularly the case for sectoral and company schemes. Assuming that the problem in a supply chain is to ensure that products are not made in breach of certain national and international provisions, a scheme aims at certifying products against the requirements that should be applicable in the country of production, but which end up being breached because of enforcement problems. This is the case of sectoral and company social VSS addressing labour conditions which, in most instances, simply verify that the producer is in compliance with the applicable labour standards.[178] Consumer perception about specific issues in a supply chain may determine the substance and the stringency of other schemes which can be seen as raising the bar. For example, consumers are becoming concerned about several issues in the palm oil supply chain,[179] such as deforestation and land-grabbing, which has led to the creation of the Roundtable on Sustainable Palm Oil initiative and standards.[180]

This is not to say that no trade-barrier effects are to be expected for bar-holding schemes. It is possible that trade barriers arise because of consumer preferences. For example, assuming that a CO2 label reporting the amount of polluting emission in a product's production process has a relatively small cost, which simply includes the appraisal of emissions at several stages, trade barrier effects can arise because of

Private Bodies. Oxford: Hart Publishing, 252; Egan, M. (2001) *Constructing a European Market. Standards, regulation and governance*. Oxford, Oxford University Press; Schepel, H. (2005) *The constitution of private governance. Product standards in the regulation of integrating markets*. Oxford and Portland: Hart Publishing, 255-256.

[177] A holistic approach is arguably the most effective way to ensure 'sustainability'. Such a holistic approach is particularly evident in standards certifying sustainable forestry management. For example, the FSC standard covers areas as diverse as workers' rights and employment conditions, indigenous people's rights, relations with the affected communities, altogether with actual environmental requirements concerning more closely the ecological impact of forestry practices.

[178] For example the Nike's Code of Conduct, which applies to all its suppliers, requires compliance with ILO standards and applicable environmental laws and regulations. Available at http://about.nike.com/pages/resources-faq. A similar approach is also that of a sectoral organisation in the toy sector, the International Council of Toy Industries, and its Code of good practices. Available at http://www.icti-care.org/e/content/cat_page.asp?cat_id=294.

[179] See, for example, the recent allegations directed towards Ferrero, the producer of Nutella, about the sustainability of the palm oil it uses in many of its products. https://www.theguardian.com/ environment/2015/jun/19/ferrero-accused-nutella-youre-really-spoiling-us.

[180] See http://www.rspo.org/certification.

consumer choice, and possibly because other products are better performing, and are thus chosen by consumers. A VSS implementing labour law obligations can do so in a discriminatory manner or in an unnecessarily burdensome manner. However, it is doubtful that the trade-barrier effect would be in all cases, including those above, the proper categorisation of the situation. If a company, which has always produced under sweatshop-like conditions, cannot accede to a market any longer because compliance with widely accepted international labour standards detrimentally affects its competitiveness, it is probably inappropriate to worry about the existence of a trade barrier.

Stringency should not be equated with effectiveness. In other words, a stringent or burdensome standard should not be considered to be an improved outcome and a more effective tool towards change. The nature of management system standards and the form of standards often employed to pursue the scheme's objective makes it very difficult to quantify the actual effects and impact of specific VSS. Management system standards, as described above, result in different outcomes depending on the entity implementing them. System management standards in the environmental domain, for example, do not determine goals or targets to be achieved - such as the reduction of pollution. Rather, they set requirements defining the operational systems to be complied with within companies for activities which have an environmental impact. Management system standards provide a systematic framework within which to incorporate environmental concerns into a company's day-to-day operations.[181] Indeed, the system is supposed to be effective and deliver tangible outcomes.[182] However, their quantification is determined by the system's implementation at a company level and widely differs between entities.[183] It is therefore quite difficult to evaluate, and especially quantify exactly, the impact on the environment of a VSS including its management system standards without assessing the performance of each certified entity.

5.5 Local adaptation, recognition, overlap

There are other elements contributing to the erection of trade-barriers in addition to the stringency of the VSS. A feature of VSS which arguably facilitates standard acceptance is the adaptation of the set of standards to the local specificities. Some

[181] Delmas, M. (2001) Stakeholders and competitive advantage: the case of ISO 14001. *Production and Operations Management* 10(3), 343-358.

[182] On the effectiveness and the positive effects of ISO 14000 see, generally, Bansal, P., Bogner, W. (2002) Deciding on ISO 14001: Economics, institutions, and context. *Long Range Planning* 35(3), 269–290.

[183] Jang, W., Lin, C. (2008) An integrated framework for ISO 9000 motivation, depth of ISO implementation and firm performance. The case of Taiwan. *Journal of Manufacturing Technology Management*, 19(1), 194– 216. For exhaustive literature review on this point, see Heras-Saizarbitoria, I Boiral, O. (2013) ISO 9001 and ISO 14001: Towards a research agenda on management system standards. *International Journal of Management Reviews* 15(1), in particular at 55.

VSS consist of a single set of standards applying to all countries.[184] For some VSS, a single set of standards is a consequence of the fact that no adaptation is really necessary. Provisions concerning labour standards can be applied in different contexts without further implementation being required. Some VSS, on the other hand, may arguably benefit from adaptation to reduce trade barrier effects or, simply, to be applicable. Standards applied with the same stringency do level the playing field and ensure uniformity, but do not address the fact that pursuing an objective at a certain level may not be reasonable in one context but will be in other contexts. In addition, a specific element of the standard addressing a particular issue may not be relevant in a given context and it may be more appropriate to address other issues, which are not covered, in order to achieve the objective of the scheme.

Conversely, other VSS consist of a broad set of principles, which is then turned into appropriate requirements for the local specificities through national standards. Certain provisions may not be applicable and others may require further clarification, or implementation, in order to be applied to a given context.[185] A similar type of adaptation can be observed for VSS in the form of eco-labels, which 'rank' products on the basis of certain environmental features, or award a label to particularly performing products. Such schemes prescribe specific standards for any category of products to which the scheme applies.[186]

A frequently reported problem generated by VSS is the presence of multiple initiatives addressing the same or very similar phenomenon. For example, in the domain of coffee certification, Utz Kapeh standards focus on trade relations and a series of good agricultural practices also cover food safety; Fair Trade is centred on a different approach to conventional trade, but without addressing directly environmental and food safety. So-called 'shade-grown coffee' initiatives such as the Smithsonian Migratory Bird Centre for 'bird friendly' coffee and the Rainforest Alliance certification schemes focus on the conservation of forest through the production of coffee under the shade of forest canopy, but they do not cover social issues at all. A producer may have to comply with several of those initiatives at the same time and also with the sourcing requirements of a retailer in the form of a company VSS.[187] The cost of certification does not just add up, but it may also be that conflicting standards among the different schemes prevent acceptance of more than just one of them.

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[184] For example SA8000, the most popular multi-stakeholder scheme for the appraisal of a company's social performance. See Social Accountability 8000 - International Standard' http://www.sa-intl.org/_data/n_0001/resources/live/ 2008StdEnglishFinal.pdf. An example of company VSS which does not contemplate adaptation is Tesco's Nurture program for environmental and responsible fruits and vegetable. http://www.tesco.com/nurture/.

[185] An example is the Marine Stewardship Council, whose broad requirements mandate, basically, nothing more than that fisheries shall be sustainably exploited. A technical committee appraises on a case by case basis the permissible amount of catch to prevent over-depletion when a fishery applies for MSC certification.

[186] Gertz, R. (2005) Eco-labeling - A case for deregulation? *Law, Probability and Risk* 4(3), 132-133.

[187] Abbott, K.W, Snidal D. (2009) *Supra at 128*, 551.

Proliferation differs from sector to sector. The factors contributing to proliferation and regulatory fragmentation in the domain of sustainability are a low level of business concentration combined with greater civil society involvement in governance and stringent standards set by the first-moving regulator. On the contrary, business concentration, a more business-driven from of governance and more lenient standards of the first-moving regulator are likely to result in a more cohesive regulatory domain, and thus in less proliferation.[188]

The consequences of competition between different VSS on the quality and the substance of standards are currently unclear. One study concerning halal certification - which, in spite of the similarities, cannot be considered as a VSS - shows that certain newly introduced schemes were particularly relaxed in their standards and conformity assessment in order to easily acquire market share.[189] To avoid all the problems above, some VSS allow for recognition of equivalent schemes or recognise parts of similar schemes.[190] Although *suggested* by the ISEAL Code,[191] multi-stakeholder VSS - and other types of schemes as well - only very rarely allow for recognition of similar schemes. [192] It is actually doubtful whether recognition, equivalence and even benchmarking are in the economic interest of schemes competing on a market for standardisation which, as in any market, cannot but value diversity.[193]

6 Conclusion

This Chapter brings some clarity to the multifaceted nature of VSS and their features. It starts from the definition of VSS in order to identify the boundaries of the subject matter of this book. VSS are voluntary (in some cases market-based) regulatory schemes designed by private bodies with the purpose of addressing directly or indirectly, and by means of third-party certification of products and processes, the social and environmental impacts resulting from the production of goods. VSS consist

[188] Fransen, L., Conzelmann, T. (2015) Fragmented or cohesive transnational private regulation of sustainability standards? A comparative study. *Regulation and Governance* 9(3), 259-275.

[189] Van Waarden, F. and van Dalen, R. (2013) 'Halal and the moral construction of quality. How religious norms turn a mass product into a singularity'. In Beckert, J., Musselin, C. (Eds.) *Constructing quality. The classification of goods in the economy*. Oxford: Oxford University Press, 197-222.

[190] This is the case, for example, of the 2BSvs scheme for biofuel certification, which provides the opportunity to recognise other schemes in the same domain which have been recognised by the Commission as well. See http://en.2bsvs.org/news/single/article/reconnaissance-par-2bsvs-des-autres-schemas-volontaires.html. GlobalGAP offers a system of benchmarking aiming at identifying 'equivalent' or 'resembling' schemes. See http://www.globalgap.org/uk_en/what-we-do/the-gg-system/ benchmarking/.

[191] ISEAL Code of Good Practice. Setting Social and Environmental Standards. Version 6.0 - December 2014, Clause 4.2.3. The requirement of exploring unilateral or mutual recognition is optional.

[192] Marx, A., Wouters, J. (2014) Competition and cooperation in the market of voluntary sustainability standards. United Nations Forum on Sustainability Standards Discussion Paper Series No. 3, 16-17. Available at https://unfss.files.wordpress.com/2013/02/unfss-dp-no-3-final-version-15april_full.pdf.

[193] See also Bomhoff, J., Meuwese, A. (2011) The meta-regulation of transnational private regulation. *Journal of Law and Society* 38(1), 161 and the literature discussed therein.

of certifiable product standards addressing sustainability, i.e. a host of practices connected to environmental and social issues ranging from emission reduction to working conditions, and from organic agriculture to animal welfare.

Different typologies of VSS operate on what can be defined as a market for sustainable standards. This Chapter provides a classification of VSS bodies which identifies forms of collective governing as opposed to forms of (semi)private governing, and which is underpinned by different normative justifications of the regime's rules. All VSS, at least to a certain extent, contribute to the much-needed creation of global public goods such as regulation at the transnational stage, as well as social and environmental protection. However, some schemes more than others give a stronger weight to the pursuit of private benefits in addition to public benefits.

Multi-stakeholder VSS ensure a high degree of participation for a very large group of interests. They are able to gather considerable support and market success, also because of an increased perception by market actors and public bodies of their effectiveness and legitimacy. Such standards are open for acceptance by any interested actor in a given economic area. Sectoral VSS are more closely associated to self-regulation, although they apply to a broader range of actors than just those which drafted them. Normally they are drafted by a sectoral association to be applied in all contractual relations within a supply chain. Company VSS are standards set by a retailer to apply in contractual relations with its suppliers. At different degrees, sectoral and company VSS result, in addition to the abatement of an externality, also in private benefits within a supply chain, as a specific response to a crisis event or reputational damage, or stemming from product differentiation. Their openness, both in the standard-setting and acceptance is limited. Sectoral and company standards can be seen, respectively, as club and private goods, whereas multi-stakeholder standards are public goods.

This Chapter gives considerable relevance to institutional features of VSS, as they are particularly important in the normative identification of the proper public behaviour *vis-à-vis* VSS. Coordination and support is expected from the State with respect to bodies contributing to the production of global public goods. Forms of control over the substance shall, in addition, be exercised where distributional concerns are at hand. The institutional features of VSS also allow us to determine normatively certain legal tests, such as a normative approach to Art. 34 TFEU to be applicable to private measures in a manner which is respectful of private autonomy. Public interference over private goods and club goods should occur at a lesser extent than over public goods. The institutional structure of a VSS bears consequences for the application of EU competition rules as well; as Chapter 4 elucidates, they become more relevant for multi-stakeholders and sectoral schemes.

We concluded that the aggregate effort of private actors towards the creation of global public goods should be supported and coordinated by public authorities. This Chapter then presents a host of different 'interactions' between private and public authority that can contribute, directly and indirectly, to that goal. By means of such interactions public authorities coordinate, influence and may even exercise the degree of control required over private instruments which generate distributional concerns, aim at mediating between different sets of values, and prescribe normative behaviours. The interaction between Art. 34 TFEU and EU competition law provisions on the one hand, and VSS on the other can be considered as some of the means by which public authorities can exercise review over private regulatory behaviour. Another similar interaction takes place by means of the TBT Code of Good Practice, albeit at a less direct level.

More specific and narrower forms of interaction are also considered where EU regulators engage in market regulation influencing procedures and, particularly important for our purposes, the substance of VSS. EU public bodies can use VSS in their regulation, which occurs in the presence of requirements for recognition, and may on occasions even result in court review over the scheme in question. EU public bodies, more frequently, facilitate acceptance of VSS, by providing a policy or legal environment which is favourable to the development and acceptance of standards. Some of these interactions aim at ensuring, directly or indirectly, the trustworthiness of the regime and correct certain negative consequences from the schemes; other interactions simply foster the acceptance of standards. Public authorities can also support a specific scheme by providing financing, or by suggesting its uptake by softer means.

It is in VSS' interest to establish connections with public authorities. A closer link to public authority, for example by means of interactions, enhances the scheme's legitimacy which, in turn, generates a competitive advantage on the market for standards. Also court review can fulfil such a goal, but it should be exercised with moderation so as not to hinder creativity and experimentation of private rule-makers, and to avoid suffering the political cost of 'patrolling' sustainability.

The Chapter concludes by discussing formal features of VSS, which are of central importance in our legal analysis. Certain formal features are not just linked to trade-restrictiveness and the presence of consumer confusion, but also determine whether or not certain WTO law provisions are relevant for the standards here considered. As it will be seen, this is the case of the form of the standards, and specifically whether a scheme employs a label. The Chapter also clarifies a profound difference in purpose between VSS and technical standards. Such difference supports a diverse approach by public authorities towards the two groups of standards, which for technical standards should thus be limited to forms of coordination.

On the basis of such a framework, it is now appropriate to begin the analysis of the legal provisions through which public authorities can exercise support and control over VSS. EU rules of the internal market will be discussed first. Chapter 3 addresses freedom of movement, specifically Art. 34 TFEU, and a host of EU measures in the domain of market regulation. The objective is to study the extent to which Art. 34 TFEU, in its current application, can address market barrier and consumer confusion. It will also develop a normative test which is better suited to our purposes. From a more descriptive stance, the Chapter also addresses the seldom noticeable implications on VSS of several EU regulatory instruments which establish relations of coordination, influence and control between public and private authority.

Chapter 3
VSS in the internal market
Art. 34 TFEU and specific forms of interaction in the domain of market regulation

1. Introduction

Free movement provisions and EU competition law play a crucial role in the potential review of VSS. This Chapter, in combination with the next one, aims at assessing the treatment of VSS under both legal areas. Chapter 3 focuses on Art. 34 TFEU and on other EU rules in the domain of market regulation. Relevant EU provisions in the domain of the internal market encompass a host of secondary legislation which applies, directly or indirectly, to VSS. As a whole, this group of diverse legal instruments also determines an extent of coordination and even review of VSS, as well as influences their substantive and procedural features. Art. 34 TFEU and the enforcement of competition law represent a more evident, and somewhat 'harder', tool for review. The measures discussed in Section 3 of this Chapter constitute instead softer mechanisms for influencing and nudging, albeit forms of review are also possible.

The regulatory effects of VSS are felt both in the internal market and outside of it. Since they are standards defining product features,[1] they share several similarities with technical product standards. As such, VSS are potentially under the scope of Art. 34 TFEU insofar as they affect trade between Member States. Section 2 of this Chapter addresses VSS mostly under such a perspective. The objectives pursued by certain schemes, especially those in the domain of environmental and social protection, can be considered as aligned to those of the EU as enshrined in the Treaties. Section 3 therefore also reviews measures which can be seen as possible synergies between public and private regulatory instruments to pursue shared objectives. Measures such as the Renewable Energy Directive and the Public Procurement Directives highlight the implementing and enforcement potential of VSS, a potential which may also have repercussions for VSS' application in the external domain.[2]

Art. 34 TFEU may seem an unlikely candidate among the available legal tools to review private regulatory activity at the transnational stage. A long-standing argument in EU law holds that free movement provisions, in particular Art. 34 TFUE, are applicable only to public measures, or to measures which can be brought under the

[1] EU law does not treat process requirements any different from product rules, however their connection with a product is. See, among the many cases, C-6/81 BV *Industrie Diensten Groep v J.A. Beele Handelmaatschappij BV* [1982] ECR I-707; C-379/89 *Preussen Elektra AG v Shleswag* [2001] ECR I-2099; C-5/94 *The Queen v Minister of Agriculture, Fisheries and Food ex parte Hedley Lomas* [1996] ECR I-2553.

[2] Certain VSS are consistent and aligned with the EU objective to support both the internal and the external dimension of the 'greening' of trade and its social dimension. Commission Communication COM(2010) 612 final on trade, growth and world affairs. Trade policy as a core component of the EU's 2020 strategy. Provided that VSS' employment in internal market measures is desirable, a horizontal coherence argument could support their employment also in certain instruments of external commercial policy. On external regulatory policy see Cremona, M. (2013) Expanding the internal market: An external regulatory policy for the EU? In Van Vooren, B., Blockmans, S., Wouters, J. (Eds.) *The EU's role in global governance*. Oxford: Oxford University Press, 162-177. On the principle of coherence *vis-à-vis* the EU's external competences see Gauttier, P. (2004) Horizontal coherence and the external competences of the European Union. *European Law Journal* 10(1), 23-41.

umbrella of public authority. The argument is, however, being challenged both theoretically and by the practice of the CJEU. From a theoretical perspective, a rigid divide between public and private does not just fail to describe reality, but it is also counterproductive for a rigorous legal approach investigating the EU law treatment of transnational private regulation. VSS well epitomise the collapse of the dichotomy between public and private interests, and between regulatory and market behaviour.[3] Still, private regulation can affect the process of integration, both by simulating it, but also by contributing to further fragmentation if conflicting or diverging regimes are established. VSS do not necessarily result in furthering harmonisation and may instead represent barriers to market access. However, through the lense of fundamental rights, by implementing the freedom to conduct a business or freedom of contract, certain VSS may even be considered as independent from and outside the scope of internal market goals.[4]

A catching-up process of the Court *vis-à-vis* the expansion of private regulatory activities is clearly noticeable in the domain of freedom of circulation of persons. Treaty freedoms have been applied to self-regulation and to private regulation, i.e. those private regimes which, different from self-regulation, are binding on actors other than those who drafted the rules. In this way, the Court has contributed to the elevation of the regulatory legitimacy of private regimes, and offered mechanisms of review in light of the explicit institutional support of private regulations which became apparent from the early 2000s.[5] It also certified a transition from the safeguard of private autonomy to the safeguard of regulatory autonomy, also by means of elaboration of specific justificatory grounds for private rules.[6] Different from other freedoms, the application of Art. 34 TFEU to private rules has been less visible, and generally limited to instances of more or less explicit delegation of regulatory powers to private bodies. On occasions the CJEU has incidentally noted that this Article only applies to public measures. Nonetheless, this Chapter shows that a throughout reassessment of case law in light of a different conceptualisation seems to point towards a possible horizontal application also of Art. 34 TFEU. This Chapter investigates whether this normative position is desirable for ensuring review of VSS, how it should be operationalised in order not to hinder private autonomy, and what

[3] Azoulai, L. (2008) The Court of Justice and the social market economy: The emergence of an idea and the conditions for its realisation. *Common Market Law Review* 45(5), 1345; Semmelmann, C. (2010) The European Union's economic constitution under the Lisbon Treaty: Soul-searching shifts the focus to procedure. *European Law Review* 35(4), 529. See also Poiares Maduro, M. (2010) The chameleon State. EU law and the blurring of the private/public distinction in the market. In Rainer, N. (Ed.) *Conflict of laws and laws of conflict in Europe and beyond: Patterns of supranational and transnational juridification*. Antwerp, Oxford and Portland: Intersentia, 279-292.

[4] Cafaggi, F. (2010) Private law-making and European integration: Where do they meet, when do they conflict? In Oliver, D., Prosser, T., Rawlings, R. (Eds.) *The regulatory State*. Oxford: Oxford University Press, 226.

[5] Commission Communication COM(2001)428 final. A white paper on European governance. C 287.

[6] Mataija, M. (2016) *Private regulation and the internal market. Sport, legal services, and standard setting in EU economic law*. Oxford: Oxford University Press, 260.

specific consequences it would entail for multi-stakeholder, sectoral, and company VSS.

The analysis of the scope *ratione personae* of Art. 34 TFEU must begin with its substantive scope which is, unfortunately, almost as debated as its personal application. The concept of non-discriminatory restrictions to market access is particularly complex to pin down in practice, as Section 2.1 discusses. Section 2.1.1 casts some light over the concept of market access, and Section 2.1.2 tries to identify its boundaries. Subsequently, Section 2.2 assesses the scope *ratione personae* of Art. 34 TFEU. Section 2.2.1 digresses into the analysis of the other freedoms. Section 2.2.2 looks at the private bodies which have been subject to Art. 34 TFEU, which include bodies that could be connected to public authorities. Section 2.2.3 describes the first CJEU case where also a body not so clearly connected to a Member State was subject to Art. 34 TFEU. Section 2.2.4 introduces a useful heuristic framework for predicting which private bodies could be cover by Art. 34 TFEU, and applies it to VSS. Similarly, Section 2.2.5 describes a normative framework which could result in the horizontal application of Art. 34 TFEU by means of the extension of the principle of non-discrimination to horizontal relations, and by means of a functional approach to public authority. Finally, Section 2.3 applies the normative frameworks identified in Sections 2.2.4 and 2.2.5 to VSS. Section 2.3.1 summarises the finding concerning the personal scope of Art. 34 *vis-à-vis* multi-stakeholder, sectoral and company VSS. Section 2.3.2 discusses the substantive application of a market access test to VSS, describing the main challenges and the conceptual problems of an unfettered transposition of the test employed for public measures. Finally, Section 2.3.3 discusses the justification regime and the proportionality appraisal for private actors and, specifically, for VSS.

Having discussed Art. 34 TFEU as a venue for review of VSS, Section 3 addresses the possible means for review, coordination and allocation of regulatory effects, and the influence over procedures and substance of VSS which take place through EU legislation in the domain of market regulation. The aim is to assess how legal instruments which EU authorities already employ can have a positive impact on trade barriers and consumer confusion. Generally, the Section shows the means available to policy makers and legislators to influence transnational private regulatory activity in the domain of sustainability, both by means of instruments specifically targeting a VSS, and also by means of more 'general' regulatory regimes. By applying the framework elucidated in Section 4 of Chapter 2 concerning the interactions between public and private authorities, the conclusive part of this Chapter addresses cases of EU use, facilitation and support of VSS. Section 3.1 studies a case of EU use of VSS within the frame of the Renewable Energy Directive (RED). It shows the extent of coordination between the general stipulations set by EU legislators and the implementation determined by the recognised VSS schemes. It also shows how requirements are imposed on the standards, and the overall possible extent of court review. Section 3.2

analyses the consequences for coordination, influence and effects of a host of regulatory instruments which are conductive to VSS' activities, and which can be sub-divided into harmonisation efforts, and meta-rules. Section 3.3 briefly discusses cases of EU support of VSS. Section 3.4 addresses the consequences for the application of EU law in case of use of VSS by a Member State. Section 4 concludes the Chapter.

2. Direct application of freedom of movement provisions to VSS

Art. 34 TFEU provides for the elimination of all quantitative restrictions and measures having equivalent effect (MEEs) on the import of goods. The text of the Article, altogether with that of the other freedoms, is neutral concerning the possibility of being applicable only to State measures. Its application to rules established by private actors, such as VSS, deserve a careful discussion because of a continuously expansive approach of the CJEU towards Treaty freedoms, both concerning their substance and their scope *ratione personae*. Further, the link between the personal scope of the Treaty freedoms is becoming increasingly entangled with their substantive scope.[7] It is impossible to discuss the personal application of the market freedoms without addressing their substantive scope as well. Under all Treaty freedoms, Art. 34 TFEU included, the Court employs a 'market access' approach which considers State measures to be unlawful even in the lack of discriminatory elements. The concept of market access is discussed in Section 2.1.1. As many measures can theoretically be seen as restricting market access, the uncertainty of such a test has been extensively criticised in literature.[8] A market access approach is, nevertheless, not unfettered: Section 2.1.2 addresses its limits.

Concerning the personal scope of the Treaty freedoms, earlier case law of the CJEU has been understood by scholars as denying direct horizontal effect to the Treaty freedoms. Cases where the Treaty provisions were applied to private parties were traditionally explained by the presence of connections with Member States, or with

[7] In other words, as it will be seen, the personal scope of certain Treaty freedom comes close as being identified with, and equated to, the capacity to restrict access to the market. See Prechal, S., De Vries, S. (2009) Seamless web of judicial protection in the internal market? *European Law Review* 34(1), 7-8; Schepel, H. (2012) Constitutionalising the market, marketising the Constitution and to tell the difference: On the horizontal application of the free movement provisions in EU law. *European Law Journal* 18(2), in particular at 184-190.

[8] Spaventa, E. (2004) From *Gebhard* to *Carpenter*: Towards a (non)-economic European Constitution. *Common Market Law Review*, 41(3), 743-773; Oliver, P., Enchelmaier, S. (2007) Free movement of goods: Recent development in the case law. *Common Market Law Review* 44(3), 649-674; Snell, J. (2010) The notion of market access: A concept or a slogan? *Common Market Law Review* 47(2); Oliver, P. (2011) Of trailers and jet skis: Is the case law on Art. 34 TFEU hurtling in a new direction? *Fordham International Law Journal* 33(5), 1423-147; Khan, A. (2015) Corporate mobility, market access and the internal market. *European Law Review* 40(3), 371-390. See also, from a comparative perspective Reid, E. (2010) Regulatory autonomy in the EU and WTO: Defining and defending its limits. *Journal of World Trade* 44(4), 877-901.

the tasks conventionally associated to States.[9] The evolution of case law of the CJEU, at times unclear, has rendered this position increasingly difficult to hold,[10] as Section 2.2 shows.

2.1 The substantive scope of Art. 34 TFEU

A disquisition over the substantive scope of Art. 34 TFEU for regulatory measures is linked to the approach to economic integration which is taken into account, insofar as the latter informs the meaning and scope of the substantive test designed by the Court. Clarifying which approach is chosen is particularly important not so much for (relatively uncontroversial) direct and indirect discriminatory measures, but especially for non-discriminatory restrictions to market access. These latter cases push EU freedom of circulation law into delicate domains, where even measures with an indirect or minimal impact on trade could be challenged as in breach of the free movement provisions.

This difficulty is exacerbated by measures like the ones at issue here, which have the purpose of identifying and differentiating quality products for goods which are, in most cases, perfectly marketable and can also originate from a EU country. 'Sweatshop', 'unsustainable', or 'polluting' goods - often originating from outside the EU - under normal circumstances cannot be prevented from entering the EU market and being conferred the custom status of Community goods.[11] This simply means that such goods are in free circulation within the EU, but not necessarily are in compliance with marketing requirements in place at the EU or Member State level and, therefore, marketable.[12] Still, Member States, exactly under Art. 34 TFEU for goods from other EU Members, can restrict sales of imported products originating from outside the EU on the basis of a number of grounds such as public morality, public policy, and the protection of health and life of humans, animals or plants.[13] In the absence of harmonisation, Members may also establish requirements with which products must comply in order to be marketed. Under the scenarios described below for the application of freedom of movement rules to VSS, products are marketable as they are since, in the end, without certification they would still be 'regular' products in compliance with EU harmonising measures. This also includes, for example, sweatshop goods which enter the EU because of ineffective enforcement in the country of origin, or illegally harvested products.

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[9] Barnard, C. (2016) *The substantive law of the EU. The four Freedoms*. Oxford: Oxford University Press, 232-234.

[10] Schepel, H. (2012) *Supra at 7*, 179.

[11] As 'release for free circulation shall confer on non-Community goods the customs status of Community goods. It shall entail application of commercial policy measures, completion of the other formalities laid down in respect of the importation of goods and the charging of any duties legally due'. See Council Regulation 2913/92 of 12 October 1992 establishing the Community Customs Code L-302/1.

[12] C-296/00 *Prefetto Provincia di Cuneo v Silvano Carbone* [2002] ECR I-4670, para. 31. See also C-51/75 *EMI Records Limited v Cbs United Kingdom Limited* [1976] ECR I-811.

[13] Art. 24 of Council Regulation (EC) No 260/2009 of 26 February 2009 on the common rules for imports. L 84/2.

VSS constitute obstacles to market access to a Member State in the absence of linking factors to any Member State as, empirically, VSS regulating authority is disconnected from public delegation. Their treatment would be rather different if they were to be found to constitute public measures. Limiting the analysis to a public-equivalent measure to a VSS contemplating a label, generally, labelling requirements are not excluded from Art. 34 TFEU under the *Keck* case-law.[14] Voluntary labels of quality and origin enacted by Member States are caught by the scope of Art. 34 TFEU, as they determine a disadvantage for products which fail to qualify,[15] and they encourage consumers to purchase products bearing the label to the disadvantage of imported products.[16] Pure quality labels enacted by public bodies have not yet appeared before the Court. Even assuming a lack of discrimination, publicly established quality - or sustainability - labels may be considered as *prima facie* hindering market access because they may favour certain products over others.

2.1.1 The notion of market access

Art. 34 TFEU and fundamental economic freedoms do not confer on traders a general right to trade, nor an unfettered right to pursue unhindered one's economic activity in a market without rules.[17] The Treaties - in particular the rules on the internal market and competition - confer on market participants a *qualified* right to trade, which is the right to compete on equal terms in the internal market, in a framework of ever-increasing integration between Member States.[18] The idea that the Treaties formed a neoliberal charter of economic freedom was swept away already with *Keck,*[19] where relatively clear limits were drawn concerning the possibility for traders to challenge all rules affecting trade. The Court has however struggled to translate the approach above into legal tests determining with acceptable legal clarity which regulatory measures constitute measures having equivalent effect to quantitative restrictions.

The CJEU has famously addressed under Art. 34 TFEU discriminatory measures and measures which discriminate indirectly albeit being facially neutral.[20] Initially, it has

[14] C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505, para. 31; C-33/97 *Colim NV v Bigg's Continent Noord NV* [1999] ECR I-3175, para. 37.

[15] C-13/78 *Eggers v Die Frie Hansestadt Bremen* [1978] ECR I-1936, para. 26.

[16] C-325/00 *Commission v Germany (Labels of Origin and Quality)* [2002] ECR I-9977, paras. 24-25.

[17] Opinion of Advocate General Tesauro in C-292/92 *Hunermund v Landesapothekerkammer Baden-Wurttemberg* [1993] ECR I-6787, para. 25-26; Opinion of Advocate General Poiares Maduro in Joined Cases C-158-59/04 *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [2006] ECR I-8135, para. 37, 41. A similar statement can be found *vis-à-vis* Art. 49 TFEU in Opinion of Advocate General Tizzano in C-442/02 *Caixa Bank France v Ministère de l'Economie, del Finances et de l'Industrie* [2004] ECR I-8961, para. 63.

[18] Opinion of Advocate General Poiares Maduro in C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP (Viking Line)* [2007] ECR I-10806, para. 33.

[19] Reich, N. (1994) The November revolution of the European Court of Justice. *Keck, Meng* and *Audi* revisited. *Common Market Law Review* 31(3), 459.

[20] Indirectly discriminatory measures are themselves defined broadly as either measures that 'affect essentially' foreign products or persons, or measures that 'can be more easily satisfied' by national goods and persons rather

done so by means of a test whose far-reaching breadth[21] became a source of concern when traders began to file cases where the impact of the regulatory measures on Union trade was tenuous at best.[22] The CJEU therefore defined a class of measures whose impact on market access is not *de jure* nor *de facto* any different for domestic and imported product, that of certain selling arrangements (CSAs),[23] defining the conditions under which products are sold[24] - to be excluded from the scope of Art. 34 TFEU. By referring to the concept of market access, the Court paved the way for a third class of measures (in addition to directly and indirectly discriminatory measures, and product rules) covered by Art. 34 TFEU, those which substantially hinder market access of products from other Member States, and which do not seem to imply any extent of discrimination.[25]

Defining the substance and especially the limits of the concept of market access is therefore crucial. Almost any measure in the domain of market regulation may have the direct or indirect effect of remotely affecting the possibility to enter the market. The reach of Art. 34 TFEU would be unsustainably broad and indistinguishable from the very *Dassonville* formula the Court tried to narrow down.[26] It is thus essential to identify a threshold separating measures which, generally, affect trade from those which affect market access, and to clarify whether discrimination must still be at hand to trigger Court review. Addressing the meaning of market access is crucial in understanding the overall scope of Art. 34 TFEU. All measures covered by Art. 34 TFEU - including directly and indirectly discriminatory measures - can be seen as more or less severe hindrances to market access.[27] Further, an approach based on market access aligns Art. 34 TFEU[28] with the other freedoms where a two-step assessment is employed (1: is there an hindrance?; 2: is it justifiable?).[29]

than foreign goods or persons, or where 'there is a risk that they may operative to the particular detriment' of foreign goods and persons. See C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-02617, paras. 18-19.

21 C- 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR I-837, para. 5.

22 See, for example, C-145/88 *Torfaen Borough Council v B & Q plc.* [1989] ECR I-03851.

23 Joined Cases C-267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6126, para. 16.

24 Or when, where and how certain products can be sold. Case C-71/02 *Herbert Karner* [2004] ECR I-3025, para. 38. See also Mortelmans, K. (1991) Article 30 of the EEC Treaty and legislation relating to market circumstances: Time to consider a new definition. *Common Market Law Review* 28(1), 115. Barnard, C. (2016) *Supra at 9,* 128.

25 C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519, para. 37.

26 Oliver, P. (2011) *Supra at 8,* 1423-1471.

27 Even product rules are capable of being conceptualised as measures hindering market access, as Advocate General Tesauro already pointed out in his Opinion in *Familiapress*, where a single market access test was suggested for the first time. Opinion of Advocate General Tesauro in C-368/95 *Vereinigte Familiapress GmbH v H. Bauer Verlag* [1997] ECR I-3689, para. 10. See also Opinion of Advocate General Bot in C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519, para. 109.

28 Already visible in C-250/97 *Monsees v Unabhangiger Verwaltungssenat fur Karnten* [1999] ECR I-2921, para. 23.

29 C-76/90 *Sager v Dennemeyer & Co LTD.* [1991] ECR I-4221; C-415/93 *Union Royale Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921, para. 103; C-384/93 *Alpine Investment BV v Minister van Financien* [1995] ECR I-1141; C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165. See also Khan, A. (2015) *Supra at 8.*

Market access is a flexible concept. It allows the Court to employ a margin of manoeuvre to assess whether measures restricting trade or sales are in fact in breach of Art. 34 TFEU.[30] This flexibility must be retained because, in spite of the broad scope of Art. 34 TFEU, the Court has traditionally denied a *de minimis* rule,[31] and sensibly so. A *de minimis* rule would require the production of economic data which applicants cannot summon, which is often misunderstood by Courts and which, most importantly, leads to uncertainty and possibly diverging application of EU law depending on the facts of the case.[32] Nonetheless, in *Peralta* and *Krantz*, respectively a reverse discrimination and a restriction case, the Court held that the scope of Art. 34 TFEU excludes Member States' measures which are too indirect or uncertain to actually have an effect on trade.[33] A certain causality, which shall not be too remote, seems thus a requirement. Some scholars see this as a *de minimis*.[34] As an 'official' alternative to *de minimis,* however, the Court has traditionally preferred to design categories of measures. Some present discriminatory elements, such as product rules, and are therefore always covered by Art. 34. Some other measures do not discriminate, are not problematic for the freedom of circulation - such as the CSAs as defined in *Keck* - and thus excluded.[35] Less clear is the position of a third group of measures on restriction on use, bans, and any other measure which hinders market access in the apparent lack of discrimination.[36]

2.1.2 The limits of a market access approach

Economic literature is not just helpful for the purpose of clarifying the limits of the concept of market access and Art. 34 TFEU, but also for generally understanding the concept of trade barriers enacted by public bodies. The approach below indeed informed the debate over the meaning of market access under EU law.[37] Within the study of barriers to entry into a market under US antitrust law, economists have defined the concept in several manners. A useful definition is that of Stigler, who

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30 Snell, J. (2010) *Supra at 8*.

31 Joined Cases C-177/82 and 178/82 *Criminal Proceeding against Jan van de Haar and KAVEKA de Meern BV* [1984] ECR I-1798, para. 13; Case C-67/97 *Criminal proceedings against Ditlev Bluhme* [1998] ECR I-08033.

32 Davies, G. (2012) The Court's jurisprudence on free movement of goods: Pragmatic presumptions, not philosophical principles. *European Journal of Consumer Law* 2012(2), 31.

33 C-379/92 *Criminal proceedings against Matteo Peralta* [1994] ECR I-3453, para. 24; C-69/88 H. *Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Netherlands State*, [1990] ECR I-583, para. 11. See also, in the domain of freedom of movement of workers, C-190/98 *Volker Graf v Filzmoser Maschinenbau GmbH* [2000] ECR I-513, para. 25.

34 Jansson, M.S., Kalimo, H. (2014) *De minimis* meets 'market access': Transformations in the substance - and the syntax - of EU free movement law? *Common Marker Law Review* 51(2), 531.

35 Horsley, T. (2012) Unearthing buried treasure: Art. 34 TFEU and the exclusionary rules. *European Law Review* 37(6), 734-757.

36 C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519; C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-04273; C-456/10 *Asociacion Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administracion del Estado* [2012] ECR I-000.

37 Davies, G. (2010) Understanding market access: Exploring the economic rationality of different conceptions of free movement law. *German Law Journal* 11(8), 682; se also Snell, J. (2010) *Supra at 8*.

suggests that the concept should be addressed in relative terms. If a newcomer has to incur higher costs than those incurred by the market incumbent(s), a market barrier can be deemed to exist.[38]

Nonetheless, such costs shall be understood narrowly, and thus separated by other factors such as features of the market, or better efficiency of certain firms in complying with requirements that thus have a positive impact on the cost an entity has to bear to enter a market. Costs are possibly limited to regulatory burdens which are not affecting in the same factual manner different economic operators.[39] Even excluding the fact that regulations such as product rules always put foreign producers at a disadvantage because of a 'double' obligation, also in an internal situation to adapt products to be in conformity with such measures, albeit resulting in costs, confers an advantage over those companies which have not done so. To this extent, product rules have the effect of constituting a barrier to market access.[40] Although this definition concerns access to a market by domestic actors, it can be transposed to markets whose entrance is sought by economic operators from other Member States as well.

Davies has convincingly based on the grounds above his explanation of CJEU's case-law on market access restrictions under Art. 34 TFEU - and also other freedoms. The restrictions considered by the Court all contained *selective* elements, often times discriminatory on the basis of nationality, singling out certain economic operators. Such elements result in a distortion of the competitive relation between market operators and generally in inequality between them.[41] The approach requires looking at the effects on the importers and on the market, once it is properly identified. Within this framework, measures imposing an additional equal cost on *all* market actors are not challengeable, as they do not alter competitive relations.[42] The limits of the market access test thus exclude measures restricting market access which effectively impact in the same manner on *all* EU producers. Different costs borne by different producers which can be explained under efficiency-based considerations cannot be the basis for a finding of a breach.

Also 'difficult' cases such as cases concerning severe restrictions on use and bans can be explained within this framework as having a selective impact: producers of goods in competition with those producing banned, or restricted, goods are conferred a

[38] Stigler, G.J. (1968) *The organisation of industry*. Homewood, IL: Richard D. Irwin Inc., 67–70.

[39] Bork, R.H. (1993) *The antitrust paradox*. New York: Maxwell Macmillan, 310–311, 328–329; Snell, J. (2010) *Supra at 8* 439.

[40] Harbord, D., Hoehn, T. (1994) Barriers to entry and exit in European competition policy. *International Review of Law and Economics* 14(4), 411.

[41] Davies, G. (2010) *Supra at 37*, 683 and 695.

[42] See, for an example of such measures in the domain of services: Joined Cases C-544/03 and C-545/03 *Mobistar SA v Commune de Fléron, and Belgacom Mobile SA v Commune de Schaerbeek* [2005] ECR I-07723, para. 35.

competitive advantage.[43] The selectivity factor potentially goes further than nationality-based discrimination although, in practice, overlap is to be expected in most cases. It is hard to conceive that the Italian government had entirely banned motorcycle trailers or that Sweden had almost completely restricted the use of jet-skis, in the presence of national producers.[44] It should not be forgotten that the concept of market access as elucidated by the Court seems to contain a reference to the magnitude of the effects of the measure. It must have *considerable* influence on the behaviour of consumers,[45] or must *greatly* restrict the use of a product.[46] In *Trailers* and *Mickelsson*, the 'considerable' impact of the measures on market access is evident, especially if it is taken into account that such products were in the first place lawfully manufactured and marketable in other Member States,[47] and the measure was curtailing the inherent purpose for which the products were designed.[48] Measures which merely limit freedom of actions should not constitute a basis for a breach.[49]

The framework elucidated above makes perfect sense if it is kept in mind that the Treaty rules are still about anti-protectionism, however with far-reaching implications.[50] Integrating the economies of 28 Member States requires the abolition of all measures which discriminate or that factually and unequally limit access to the market of a Member States - which almost always end up favouring domestic or incumbent economic actors. The very concept of a quantitative restriction (and measures having equivalent effects) implies the replacement of supply by domestic products. A measure which merely limits the entrance on a market, or imposes additional costs to all actors, and which is factually equally directed towards all producers, cannot be

43 Davies, G. (2010) *Supra at 37*, 696.

44 C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519; C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-04273.

45 C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519, para. 56.

46 See C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-04273, para. 28.

47 See Opinion of Advocate General Trstenjak in C-265/06 *Commission v Portugal (tinted glass car windows)* [2008] ECR I-2245, para. 38.

48 Eijstbouts, W.T., Jans, J.H., Prechal, A., Senden, L.A.J. (Eds.) (2012) *Europees Recht. Algemeen Deel.* Groeningen: Europa Law Publishing, 96.

49 Opinion of Advocate General Kokott in C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2006] ECR-I782, para. 48. This concept is however not always clearly reflected in case-law. For example, in *Blanco Pérez*, the CJEU considered zoning rules concerning planning criteria for the licensing of pharmacies as (justifiable) restrictions hindering the exercise by pharmacists from other Member States of their activity on the Spanish territory. The rule in question merely established that a pharmacy has to serve at least 2000 inhabitants and be at a minimum distance of 250 meters from another pharmacy. Joined Cases C-570/07 and C-571/07 *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios and Principado de Asturias* [2010] ECR I-4629, para. 59. That case is also in contrast with cases where similar rules concerning goods were not considered as restrictions under the *Keck* doctrine. See C-391/92 *Commission v Greece* [1995] ECR I-1621.

50 The free movement rights are understood by the Court as 'instruments to opening up markets' as held in Opinion by Advocate General Trstenjak in C-81/09 *Idryma Typou AE v Ypourgos Typou kai Meson Mazikis Enimerosis* [2010] ECR I-10161, para. 75. On the same same position, Advocate General Maduro held that Art. 34 TFEU aims 'to guarantee the opening-up of national markets, offering producers and consumers the possibility of fully enjoying the benefits of an internal market, and not to encourage a general deregulation of national economies.' Opinion of Advocate General Poiares Maduro in Joined Cases C-158-59/04 *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [2006] ECR I-8135, para. 37.

challenged - unless it is agreed that Art. 34 TFEU is construed as an anything-goes deregulatory provision.

2.2 Scope *ratione personae* of Art. 34 TFEU *vis-à-vis* private parties

The application of the Treaty freedoms to private parties, also known as direct horizontal effect, has been a divisive issue in doctrine, fuelled by the unclear practice of the Court. Those denying direct horizontal effect explain cases of application of Treaty provisions to private individuals by the presence of connections with Member States or the tasks traditionally associated to the State. An analysis of the practice of the Court shows that the situation may differ. As a starting point, it must be stressed that the evolution of the personal scope of the four freedoms *vis-à-vis* the activities of private parties has not proceeded in parallel for all of them. Freedom of circulation of goods stands out as a limited exception since, until today and in spite of a certain lack of clarity in some instances, the Court has shown more reticence in applying Art. 34 TFEU to the activities of private actors than under other freedoms. Before addressing the question of the personal scope of Art. 34 TFEU in Sections 2.2.2 and 2.2.3, it is therefore necessary to briefly appraise in Section 2.2.1 the situation under Articles 45, 49 and 56 TFEU - generally referred to as free movement of persons - mindful of the general trend of convergence among Treaty freedoms.[51] Finally, Sections 2.2.4 and 2.2.5 discuss normative frameworks which contemplate the horizontal effect of Art. 34 TFEU.

2.2.1 Personal scope of the free movement of persons

Under Art. 45, and possibly also Articles 49 and 56 TFEU, the prohibition of discrimination has been applied by the CJEU to all measures by private bodies regulating collectively a certain sector and employment conditions. In addition, free movement provisions have also been applied to private bodies unilaterally regulating employment conditions within the framework of national labour legislation. This expansive approach of the Court dates back to the 1974 *Walrave and Koch* case. There, the Court, by employing a combination of functionalism and *effet utile* reasoning, found that the Union Cycliste Internationale, whose rules deemed the nationality of a pacemaker and a stayer to be the same, was subject to the scope of application of the Treaty provisions prohibiting nationality-based discrimination.[52]

The prohibition of restrictions and obstacles to the enjoyment of freedoms appears to cover cases in which the contested private measure is of a collective nature, i.e. it

[51] Poiares Maduro, M. (1998) *We the Court. The European Court of Justice and the European economic constitution.* Oxford: Hart Publishing, 101.

[52] C-36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR I-1406, paras. 16-17.

applies mandatorily on a number of private actors.[53] In *Bosman,* the freedom provisions were considered as applicable to all rules regulating employment which are not discriminatory but that, nevertheless, constitute restrictions to the freedom of circulation of workers - irrespective of their public or private nature.[54] In *Wouters,* where Art. 49 TFEU was at issue, the CJEU held that compliance with the freedom to provide services and freedom of establishment is required also in cases where rules are not public, but regulate collectively self-employment and the provision of services, such as those of the Dutch bar.[55] Also in *Deliège* the outcome was alike, as the CJEU held that rules enforced by a judo organisation, which had the effect of restricting freedom to provide services, were contrary to Art. 56 TFEU.[56]

In another series of cases, the CJEU expanded its understanding of the types of private bodies whose discriminatory measures are caught, at least, by Art. 45 TFEU. In *Angonese*[57] and *Raccanelli*,[58] private bodies regulating the condition for employment in accordance with national labour law (specifically, an Italian private bank and a German research institution) were caught by the prohibition of indirect discrimination resulting from a combined reading of Articles 18, 45, and 157 TFEU. However, both cases could be explained on the basis of some connection with Member States, such as the legal framework of Italian law in *Angonese,* and the extensive public funding of the research institute at hand in *Raccanelli.*[59] In *Ferlini,* another discrimination case, the Court extended the application of Art. 18 TFEU to all cases 'where a group or organisation such as [the one in the main proceeding] exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty.'[60] The body in *Ferlini* was a consortium of health-care providers, accounting for almost the entirety of the market, arguably in the exercise of typically public powers.[61] The application of the prohibition of discrimination applies not only to measures that aim at regulating collectively, but also to the 'unilateral' measures[62] (i.e.: not collective) at issue in

[53] Karayigit, M.T. (2011) The horizontal effect of the free movement provisions. *Maastricht Journal of European and Comparative Law* 18(3), 314.

[54] C-415/93 *Union Royale Belge des Sociétés de Football Association v Bosman* [1995] ECR I-4921, para. 98-99. The measure at issue concerned the imposition of a fee to be paid at a football club at the moment one of its players, having concluded its contract was about to be transferred to another football club.

[55] C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, para. 120.

[56] Joined Cases C-51/96, C-191/97 *Deliège v Ligue francophone de judo et disciplines associées ASBL and Others* [2000] ECR I-2549, para. 60.

[57] C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139.

[58] C-94/07 *Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV.* [2008] ECR I-05939.

[59] Mataija, M. (2016) *Supra at 6*, 37.

[60] C-411/98 *Ferlini v Centre Hospitalier de Luxembourg* [2000] ECR I-8126, para. 50.

[61] Davies, G. (2012) Freedom of movement, horizontal effect, and freedom of contract. *European Review of Private Law* 3(4), 815.

[62] Even contractual provisions between private parties have been caught by the prohibition of discrimination under Art. 45 and 56 TFEU. In the earlier *Haug-Adrion,* a German private car insurance provider was offering less favourable insurance premiums to clients purchasing cars with custom plates, which is normally done by customers with foreign residences. The Court found that there was no reason, in principle, to exclude contractual provisions

Angonese and *Raccanelli*. It may seem far reaching, but indirectly discriminating against individuals on the basis of nationality constitutes a violation of a fundamental principle such as that contained in Art. 18 TFEU.

The Treaty provisions here considered have been fully applied where a non-public entity has the capacity of imposing discriminatory and restricting rules that hinder the fundamental freedoms. Such capacity stems from 'State-like' authority, or even 'State-like' *power* arising from the exercise of regulatory power.[63] The Union Cyclist Internationale, the Belgian Football Federation, the Dutch Bar and the French Judo Association at issue in, respectively, *Walrave, Bosman, Wouters* and *Deliège* have in common a non-public nature, as well as the capacity to autonomously regulate a certain field across the board. The regulatory capacity of these bodies resembles closely that of the State, in spite of the complete lack elements of State control or delegation - with the limited exception of *Wouters*, as Dutch legislation recognises self-regulatory activities of professional associations.

The power relations at issue in the collective regulation cases, and even in the employment cases (*Angonese, Raccanelli* and to some extent also in *Ferlini*) are strongly asymmetrical in favour of the employer. In *Walrave*, the very specific profession of the two applicants contributed to their subordinate position *vis-à-vis* the rule-setter determining the conditions for their employment. For the applicants in the cases mentioned above, also due to the very narrow segment of the market at issue, there was no escape but to comply with those private rules; their relation *vis-à-vis* the rule setter was not dissimilar to that *vis-à-vis a*a Member State. The powers of the private bodies in question are quasi-legislative, and possessing elements of public authority as they entail typical regulatory tasks resulting in compulsory unilateral and universally applicable regulation.[64]

Regardless of its private or public composition, any body which undertakes activities that are normally considered to fall within the domain of, or with a similar effect as, public regulatory power seems to be subject to a prohibition of discrimination *and* restriction to market access under Articles 45, 49 and 56 TFEU. This approach has been described as a functional understanding of collective regulation, under which what matters is the mere presence of regulatory power, irrespective of whether it derives from a formal source.[65] Given the ever-expanding role of private law-making

such as the one at issue from the scope of Art. 45 TFEU. In any case, a finding of discrimination was not made. Also in this case, however, the fact that the insurance contract was officially approved under German legislation could established a 'link' between the private action and the German government. See C-251/83 *Haug-Adrion v Frankfurter Versicherungs AG* [1984] ECR I-4278, paras. 14-18.

63 Sauter, W., Schepel, H. (2009) *State and market in European Union law. The public and private spheres of the Internal Market before the EU Courts*. Cambridge: Cambridge University Press, 102.

64 Karayigit, M.T. (2011) *Supra at 53*, 311.

65 Schepel, H. (2012) *Supra at 7*, 185-187; Sauter, W., Schepel, H. (2009) *Supra at 63*, 97-103. From a similar conclusion from the perspective of the interplay between Art. 16 of the Charter of Fundamental Rights and the

and governance in the EU and elsewhere, coping mechanisms by judicial authorities are unavoidable in order to mitigate its impact on the freedoms of circulation.[66] Accordingly, the Court has shown its willingness to apply the Treaty provisions also to private bodies which exercise regulatory authority that is functionally equivalent to that of the State.

The Court's functional understanding of power and authority in the context of the four freedoms is consistent with the functional interpretation of public power or authority in competition law cases. Different from the situation in *Diego Calì*,[67] where a company was entrusted with a public task by a public body in an explicit fashion, in most of the cases discussed above, no form of public delegation can be found. International or national associations assumed regulatory power on the basis of different justifications and without explicit public delegation. Many cases of self-regulation are therefore covered by the Treaty rules under the freedom of circulation of people both for discriminatory and restrictive behaviour and, in spite of whether a link can be established, to a Member State.

Functional equivalence is understood broadly as the ability to exercise regulatory power over the others. In practice, however, it corresponds to the capacity to obstruct free movement.[68] For this reason, also private bodies not strictly in the exercise of collective regulatory functions such as trade unions have been subject to the Treaty rules.[69] Functionally equivalent forms of public authority can thus also be exercised by means not requiring the presence of delegation[70] or forms of collective regulation, and which may in theory also encompass market power.

Treaty freedoms see: Babayev, R. (2016) Private autonomy at the Union level: On Article 16 CFREU and free movement rights. *Common Market Law Review* 53(4), 1004.

66 See, among the many, Chalmers, D. (2006) Private power and public authority in European Union law. In Bell, J., Kilpatrick, C. (Eds.) *The Cambridge Yearbook of European Legal Studies 2005-2006*. Oxford: Hart Publishing, 59-94.

67 C-343/95 *Diego Calì & Figli Srl v Servizi Ecologici Porto di Genova SpA* [1997] ECR I-1580, para. 23.

68 Schepel, H. (2012) *Supra at 7*, 185-186; Davies, G. (2012) *Supra at 61*, 824.

69 It seems that the Court acknowledged the collective regulatory functions of trade unions too, albeit the restrictions in question were not stemming from it. 'In exercising their autonomous power, pursuant to their trade union rights, to negotiate with employers or professional organisations the conditions of employment and pay of workers, trade unions participate in the drawing up of agreements *seeking to regulate paid work collectively*' (italics added). See C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP (Viking Line)* [2007] ECR I-10806, para. 65; C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet (Laval)* [2007] ECR I-11767.

70 The lack of explicit delegation does not preclude the application of EU law provisions, as explicitly held by the Court in C-171/05P *Laurent Piau v Commission* [2006] ECR I-0037, paras. 76-78.

2.2.2 Case-law on private bodies covered by Art. 34 TFEU

The traditional view over the personal scope of Art. 34 TFEU is that the CJEU differentiates between the freedom of circulation of goods and persons.[71] Although the CJEU has (only) once incidentally ruled that 'it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods',[72] more often the Court has remarked that it considers Art. 34 TFEU applicable only to national measures and not to the conduct of undertakings.[73] The focus of the Court on measure enacted by Member States dates back to *Dassonville* and the definition of MEE.[74] According to this view, contracts between private parties such as company VSS and, sometimes, sectoral VSS which contravene the free movement of goods would be covered by the Treaties only insofar as competition provisions are triggered.[75] This view is based on a traditional understanding of the 'division of labor' between freedom of movement and competition law addressing, respectively, public and private measures.[76] It however fails to describe correctly the situation for services - private rules affecting their provision have been subject to both sets of rules - and it ignores the blurring of the public-private divide.

A number of similarities can be observed between Art. 34 TFEU and the other freedoms. It is thus appropriate to begin with those before addressing cases of collective regulation and contractual relations which are relevant for VSS. The major similarity concerning the personal scope of Art. 34 TFEU with the other freedoms is the inclusion of bodies exercising forms of collective regulation under a more or less 'classic' delegation of power and thus an extended vertical effect framework. In assessing whether a private body could be brought within the domain of the State, the Court has employed a rather broad functionalist approach. The Court has declared private bodies' activities to be covered by the scope of Art. 34 TFEU whenever a link

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[71] Lohse, E.J. (2007) Fundamental freedoms and private actors - Towards an 'indirect horizontal effect'. *European Public Law* 13(1), 167.

[72] C- 58/80 *Dansk Supermarked v Imerco* [1981] ECR I-181, para. 17. It must be noticed that the 'agreement between individuals' in breach of Art. 34 at issue in that case was relied upon by the claimant on the basis of a Danish law on unfair commercial practice. In other words, the Danish provision was giving a special value to that agreement in order to qualify the commercial practices of the defendant as unfair. The CJEU in fact concluded that the Danish law did not pose any problem, but the agreement in breach of Art. 34 could not be relied upon in order to classify the marketing of certain goods as unfair commercial practice. The case was anyway not followed by the Court, also as the situation could/should have been solved with reference to competition law.

[73] Joined Cases C-46 and 48/93 *Brasserie du Pêcheur SA v Germany and the Queen v Secratary for State and Transport ex parte: Factortame Ltd and Other*s [1996] ECR I-1131, para. 54; C-311/85 *Vereniging van Vlaamse Reisbureaus v VZW Sociale Dienst* [1987] ECR I-3821, para. 30; Opinion of Advocate General Warner in Cases 55 and 57/80 *Musik Vertrieb v GEMA* [1980] ECR I-167, para. 174.

[74] C- 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR I-837, para. 5.

[75] Hartkamp, A. (2010) The effect of the EU Treaty in private law: On direct and indirect horizontal effect of primary Community law. *European Review of Private Law* 3(3), 539.

[76] Joined Cases C-177/82 and 178/82 *Criminal Proceeding against Jan van de Haar and KAVEKA de Meern BV* [1984] ECR I-1798, para. 14.

with the Member State could be established. In its case-law, the CJEU has looked at several elements demonstrating governmental involvement, such as: the establishment of a body by means of a governmental act;[77] the presence of a formal legislative recognition combined with the power of imposing sanctions;[78] State control exercised by means of binding instructions;[79] the presence of financial aid, 'moral support' and the appointment of members.[80] Functions, statutory basis, management and funding are therefore the elements that the CJEU will take into account.[81]

In some of the cases decided under Art. 34 TFEU, for example in *Apple and Pear Development Council,* a finding of explicit delegation of State functions made unproblematic the connection of the private-law body's standard-setting and certification activities with the Member State. In other cases, the test for attribution of private conduct seems much less demanding than that under public international law both for a finding of delegation of public authority and effective control.[82] A body like the Irish Goods Council at issue in *Buy Irish,* was deemed to be covered by Art. 34 TFEU in spite of being explicitly considered as *not* in the exercise of public authority. It was hard to prove that the Member State could exercise 'effective control' in the meaning of effectively and strictly controlling and directing the actions of the body.[83] Granted, links between VSS Member States cannot be found. VSS are not established by governmental acts; if financial aid and forms of 'moral' support can be found, these cannot be seen as even remotely reaching the extent of support put by the Irish government into the Buy Irish campaign.[84]

The private-law bodies that were caught by the scope of Art. 34 TFEU, such as the Apple and Pear Development Council and the British Royal Pharmaceutical Society, share the same regulatory capacity possessed by the bodies in the case law under Art. 45, 49 and 56 TFEU. However, these bodies were entrusted by the State with rule-making and enforcement powers, and they thus engaged in mandatory collective regulation of an economic activity. The role of the British Pharmaceutical Society is, to this extent, completely comparable to that of the Dutch Bar in *Wouters,* and so are their relations with their respective governments. This approach therefore shows similarities with the case-law under other freedoms. Art. 34 TFEU has been applied to

77 C-222/82 *Apple and Pear Development Council v K.J. Lewis LTD and Other* [1983] ECR I-4083, para. 17.

78 C-266/87 *The Queen v Royal Pharmaceutical Society of Great Britain* [1989] ECR I-1321, para. 14.

79 C-302/88 *Hennen Olie* [1990] ECR I-4625.

80 C-249/81 *Commission v Ireland (Buy Irish)* [1982] ECR I-4005, para. 15; C-325/00 *Commission v Germany (Labels of Origin and Quality)* [2002] ECR I-9977, para. 17.

81 Opinion of Advocate General Jacobs in C-325/00 *Commission v Germany (Labels of Origin and Quality)* [2002] ECR I-9977, para. 13.

82 See Section 2.3 of Chapter 5 for further discussion over the relevant public international test for attribution of private conduct.

83 Hojnik, J. (2012) Free movement of goods in a labyrinth: Can *Buy Irish* survive the crises? *Common Market Law Review* 49(2), 302.

84 The situation may differ for legislative recognition by a Member State, a scenario addressed in Section 3.4 of this Chapter.

bodies regulating collectively both in cases of discrimination (*Royal Pharmaceutical Society*) and restriction (*Fra.bo*, discussed below in Section 2.2.3), exactly like Art. 45 TFEU.

2.2.3 Art. 34 TFEU and measures in the lack of a connection with Member States

A peculiar group of cases under Art. 34 is represented by instances where the Court found that private action unconnected to the State is capable of restricting free movement, and thus the State was to be indirectly held responsible for not having taken measures to remedy the situation.[85] In *Spanish Strawberries,* the CJEU held that Member States shall not refrain from adopting measures required in order to deal with obstacles to the free movement which are not caused by the State. State inaction with respect to private activity representing an obstacle to the freedom of circulation of goods was considered as falling under Art. 34 TFEU in a comparable way as State positive action infringing the freedom of circulation.[86] While this statement, read out of context, seems to imply that Members have an obligation to police private restrictions to an extent that would render them responsible, for example, also for the trade restricting activities of VSS, the reality is that France was basically failing to enforce the most basic fundamental rules of law and order.[87] Art. 34 TFEU contains therefore a good faith positive obligation on Member States to prevent private impediments on the free movement.[88] It seems, however, that it is limited to the most egregious cases of State inaction, and the CJEU recognised a margin of discretion for Member States to decide which private actions must be tackled.[89]

Besides this somewhat special group of cases identifying a duty to eliminate the most severe restriction to trade, it must be stressed that, different from freedom of movement of persons, Art. 34 TFEU has not been applied yet to bodies that regulate collectively *without* at least a degree of State delegation. In other words, there is no equivalent case for Art. 34 TFEU of what *Bosman* and the other sport cases represent for Art. 45 TFEU. To this extent, the functional understanding of collective regulation described above cannot be said to apply to private-law bodies under Art. 34 TFEU.

In *Fra.bo,* where a restriction was at hand, the CJEU nevertheless applied Art. 34 TFEU to the technical standardisation and certification activities of a standard-setter established under private law, whose standards gave rise to a presumption of

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[85] C-265/95 *Commission v France (Spanish Strawberries)* [1997] ECR I-6959; C-112/00 *Schmidberger Internationale Transporte v Austria* [2003] ECR I-5659.

[86] C-265/95 *Commission v France (Spanish Strawberries)* [1997] ECR I-6959 paras. 30-31.

[87] France had been continuously ignoring for several years the physical destruction at the border by enraged French farmers of imported products lawfully entitled to enter the French market.

[88] Baquero Cruz, J. (1999) Free movement and private autonomy. *European Law Review* 24(6), 610.

[89] C-265/95 *Commission v France (Spanish Strawberries)* [1997] ECR I-6959 para. 33.

conformity with German law. The character of the private standard-setter at issue in *Fra.bo* lies very close to the explicit delegation side of the spectrum, as it can be considered as entrusted of special regulatory and market-access powers by the German legislation conferring a presumption of conformity to the products certified under its standards. The CJEU, as a matter of fact, determined whether the activities of the body at issue were restrictive of the freedom of movement 'in the light of inter alia the legislative and regulatory context in which it operates'.[90] The CJEU however did not rule on the legality of German legislation - which, probably, was itself in breach of Art. 34.[91] In case it had not been deemed compatible with Art. 34, *any* activity of a body receiving this type of empowerment from unlawful legislation, would have been considered in breach of EU law. Still, 'the legislative and regulatory context' referred to by the Court is broad enough to arguably include situations where a private body enjoys a *de facto* regulatory power under the tacit consent of a Member State.

It may simply be that no suitable case has yet reached the Court: obviously also in the domain of goods, certain entirely private associations whose membership is mandatory can *substantially* restrict trade and enforce discriminatory and even protectionist measures.[92] Membership - or acceptance - of certain VSS can become an essential condition to enter a market, but this is determined by factors such as consumer preferences and, generally, market features unconnected to the State. In *Fra.bo,* it is noteworthy that the CJEU acknowledged that certain standards may become *de facto* mandatory requirements to enter the market because of, among several factors, consumer preferences.[93] Under such circumstances, a private body would possess a *de facto* market gate-keeping power that would trigger the application of Art. 34 TFEU. It is, however, far from clear whether such an approach can be extended to standard-setting bodies also in the absence of connecting elements with the State, such as the formal entrustment of specific regulatory tasks.[94]

Another difference between goods and the other freedoms is that, different from *Angonese* and *Raccanelli*, the obligation to respect Art. 34 TFEU has not been imposed on private bodies in cases of unilateral conduct discriminating on the basis of

[90] C-171/11 *Fra.bo v DVGW* [2012] ECR I-0000, para. 26.

[91] See also Schepel, H. (2013) Case C-171/11 Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches. *European Review of Contract Law* 9(2), 190.

[92] Baquero Cruz, J. (1999) *Supra at 88*, 616.

[93] See C-171/11 *Fra.bo v DVGW* [2012] ECR I-0000, paras 29-30.

[94] The outcome of *Fra.bo* may be problematic in light of that fact that many technical standard setters, including the European Standardising Organisations, operate within similar frameworks connecting them to a Member State. The possibility of unfettered Court review of technical standards is undesirable because it would render unworkable a system which was arguably created to operate efficiently outside the normal procedures applicable for legislative instruments. In addition, Courts hardly possess the expertise to appraise the highly technical character of a technical standard. A narrow reading of *Fra.bo* is also possible, as simply standing for the imposition on standardising bodies within the EU to embrace mutual recognition of certificates of conformity released by third-party bodies. See C-171/11 *Fra.bo v DVGW* [2012] ECR I-0000, para. 10.

origin. This type of discrimination affects the very core of a person's integrity and, accordingly, the Court interpreted the principle of discrimination on the ground of nationality from a means to pursue market integration to a means to protect human dignity.[95] The alleged lack of direct horizontal effect of Art. 34 TFEU can thus be explained by reference to the obvious differences between goods and people.[96] Nonetheless, under Art. 34 TFEU, no case law has appeared before the Court where it had to address private unilateral discriminatory measures. The Court has however dealt with cases of restrictions arising by private contractual relations. In *Sapod-Audic*, the Court discussed the application of Art. 34 TFEU to a contractual obligation between a food processor and a company providing systems for waste disposal concerning the payment of a fee to the waste disposal company, which in return allowed affixing a 'green dot' recycling logo on product packaging. The CJEU held that obligations arising out of contractual provisions between private parties cannot be regarded as a barrier to trade in the meaning of Art. 34 TFEU, since they are not imposed by a Member State but agreed upon between individuals.[97]

2.2.4 A normative venue for review I: interfering with third-party contractual preferences

Sapod-Audic is often considered as an expression of the Court's intention to deny direct horizontal effect to Art. 34 TFEU. However, it has been pointed out that freedom of movement can be understood as protecting economic actors from third-party interference in their (interstate) contractual preferences. Within this framework, that case is also in line with a view that holds that a party to a contract cannot employ EU law to escape voluntarily agreed upon contractual obligations.[98] The personal scope of Art. 34 TFEU - and other freedoms as well - acquire more precise boundaries which assist us in determining whether multi-stakeholder, business and company VSS bodies are caught by the Treaty obligations. Measures by private bodies to which freedom of circulation of persons has applied can all be seen as emanating from a

[95] Prechal, S., De Vries, S. (2009) *Supra at 7*, 18.

[96] In the sense that Art. 34 TFEU has much of a weaker connection with Art. 18 TFEU (prohibiting discrimination on the basis of nationality), Art. 20 TFEU (establishing the citizenship of the Union), and Art. 21 TFEU (establishing the right of movement for EU citizens) than the other freedoms, and in the robust link between the freedom of movement of workers and the provisions contained in the Charter of Fundamental Rights. Krenn, C. (2012) A missing piece in the horizontal effect 'jigsaw': Horizontal direct effect and the free movement of goods. *Common Market Law Review* 49(2), 185, 188. It has to be kept in mind, however, that not all of the provisions of the Charter themselves appear to have direct horizontal effect. Opinion of Advocate General Trstenjak in C-282/10 *Dominguez v Centre Informatique du Centre Ouest Atlantique* [2012] ECR I-0000, paras. 80-83. Art. 27 of the Charter on workers' right to information and consultation within the undertaking surely does not have horizontal effect as 'it must be given specific expression in European Law or national law'. See C-176/12 *Association de Médiation Sociale v Union locale des syndicats CGT* [2014], para. 44. Other Articles of the Charter, such as Art. 16 have conversely been given effect in dispute between private actors. See C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL* [2011] ECR I-11959. See also Section 2.3.3 for further discussion.

[97] C-159/00 *Sapod-Audic v Eco-Emballages SA* [2002] ECR I-5057, para. 74.

[98] Davies, G. (2012) *Supra at 61*, 808 and 814.

body capable of limiting the freedom of two other parties to contract. This does not mean that the Treaties confers a right on a given company that consumers and other business entities must enter into a contractual relation with it. Consumer preferences and ordinary purchase practices would therefore be excluded, as third party intervention is a different concept than the exercise of one's preference.[99] Thus, and in line with *Sapod-Audic*, a simple private contractual preference with no regulatory effects outside the relation between the two parties would not be caught by the scope of Art. 34 TFEU.[100]

Without much controversy, this approach would exclude company VSS from the scope of Art. 34 TFEU. An agreement like a company VSS, whose terms are negotiated by both its parties, regardless of disparities of power, is covered neither by Art. 34, nor by other free movement provisions. Conversely, sectoral rules which have been drafted by retailers, which then apply them in their contractual relations with suppliers, can be seen as representing a third party intervention into the freedom to contract between suppliers and each of the retailers. This would be the case of sectoral VSS, and all rules emanated by sectoral associations which apply *de facto* mandatorily in all contractual relations between its members and third-parties, or even as a precondition for membership. Conceptually, there is little difference between those bodies and, for example, that at issue in *Wouters* apart from the fictionally voluntary character of sectoral VSS' provisions. The only missing step in the practice of the CJEU is the severance of the acknowledgement from the *Fra.bo* case that certain requirements may become *de facto* mandatory from the presence of a connecting link to a Member State.

It is clear that also multi-stakeholder VSS can interfere with two other parties' contracting preferences. As for sectoral VSS, this happens whenever certification cannot be granted - normally because the conditions are not met - and therefore preventing the entity seeking certification from contracting with consumers and suppliers willing to purchase. It is, however, debatable whether it really constitutes interference of the same type as, for example, that exercised by the rules of the Belgian football federation concerning contractual relations between players and football clubs. To some extent, the interference exercised by the VSS can be described as an expression itself of the preference of one of the two parties, the one which intends to purchase or supply VSS-certified products. Indeed the scheme-holder is a third party *vis-à-vis* two other entities wishing to enter into a contract and can, under this framework, interfere with two other parties' contracting preferences. Still, what matters is the perceived mandatory character of certification, as no interference

[99] Davies, G. (2012) *Supra at 61*, 813.

[100] Under this approach, the different application of Art. 45 TFEU to private contractual relations in the sphere of employment (*Angonese* and *Raccanelli*) is explicable by the explicit reference under Art. 45(2) TFEU to the elimination of all discrimination concerning employment, which would limit substantially employers' capacity to contract.

can be said to occur if certification is *de jure* and *de facto* entirely voluntary. Only in the opposite case would multi-stakeholder VSS fall under Art. 34 TFEU. Preferences from consumers and retailers, to the extent that affect the perceived voluntariness of the scheme for producers, would therefore be crucial for subjecting multi-stakeholder VSS to Art. 34 TFEU.

2.2.5 A normative venue for review II: a 'fundamental freedom' approach to Art. 34 TFEU

A means by which private rules may be brought under the scrutiny of Art. 34 TFEU is through the practice of the Court to elevate the norm against discrimination, which is often referred to as a 'fundamental freedom',[101] as a general principle of law and a fundamental right[102] rendering it applicable also in private relations.[103] On these grounds, direct horizontal application of the freedom provisions would be triggered whenever discriminatory impediments from private parties stand in the way of market access. In *Viking Line,* the Court kept this possibility open by holding explicitly that direct horizontal effect of the Treaty freedoms is not limited to bodies exercising quasi-regulatory and quasi-public functions.[104]

Two situations must be considered separately. Where *discrimination* arises from private behaviour, it is the applicability of fundamental rights in private relations which ensures that the private equivalent of public discriminatory measures are caught by Art. 34 TFEU. Conversely, cases of non-discriminatory *restrictions* arising from private parties' regulatory activities can be brought under Art. 34 TFEU by means of the functional approach to collective regulation employed under other freedoms, and described in Section 2.2.1. Case law has not yet clarified whether formally non-mandatory private regulatory regimes are also covered by the Treaty freedoms. As in the framework above, the only missing step in the practice of the CJEU is the severance of the acknowledgement that certain requirements may become *de facto* mandatory, from the presence of a connecting link to a Member State. The presence of regulatory authority restricting freedom of circulation would therefore trigger the application of Art. 34 TFEU even in the absence of any connection with national and Union legislators. The fact that a restriction to free movement arises in the exercise of another fundamental freedom, such as the freedom to conduct an economic activity

[101] See, generally: Morijn, J. (2006) Balancing fundamental rights and comm market freedoms in Union law: *Schmidberger* and *Omega* in the light of the European Constitution. *European Law Review* 12(1), 15-40; de Vries, S.A. (2013) Balancing fundamental rights with economic freedoms according to the European Court of Justice. *Utrecht Law Review* 9(1), 169-192.

[102] C- 240/83 *ABDHU* [1985] ECR I-531, para. 9.

[103] Schepel, H. (2012) *Supra at 7*, 190. See also Tushnet, M. (2003) The issue of state action/horizontal effect in comparative constitutional law. *International Journal of Constitutional Law* 1(1), 79-98.

[104] C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP (Viking Line)* [2007] ECR I-10806, para. 64.

or the freedom of contract, would not render the freedom provision inapplicable as neither fundamental rights nor freedom provisions are absolute.[105]

In his *Viking Line* Opinion, Advocate General Maduro narrowed down this approach in line with common sense, the *Ferlini* formula, and coherently with a functional understanding of public authority. Under the obvious undesirability of subjecting all private behaviour to the Treaty rules,[106] only private action which is capable of effectively restricting others from exercising their rights of free movement would be caught by the scope of the freedom provisions.[107] Freedom provisions are thus to be applied to private parties only under limited circumstances, where the influence wielded is large enough to prevent others from enjoying their right of free movement, and a certain flexibility would be retained between freedoms.[108]

This approach would apply for all freedoms and would likely catch cases of discrimination and restrictive practices by private actors with an economic power such as to prevent the entry of products into a national market. The test overlaps to a large extent with the market access test determining the substantive scope of the obligation, confirming a 'collapse of the substantive scope into the personal scope' of Art. 34 TFEU and of the other freedoms.[109] Be that as it may, the restriction has to originate from a body that does not act like a 'regular' market participant, but instead has State-like characteristics.[110] Arguably the test requires at the very least a situation of dominance that would also trigger Art. 102 TFEU.[111] A powerful retailers' choice to store only domestic goods is, under this approach, probably covered by Art. 34 TFEU, whereas single consumers' preferences or local food vendors' purchase patterns would not be subject to the Treaty provisions.[112]

This normative approach does not go against previous case-law[113] and witnesses a certain acceptance in scholarly literature.[114] Both for cases of discrimination and

[105] Opinion of Advocate General Poiares Maduro in C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP (Viking Line)* [2007] ECR I-10806, para. 23. This statement is supported by the stance of the Court in its case law under which it was required to mediate between fundamental rights and freedom of circulation, such as *Omega* and *Schmidberger*. The issue will be further discussed in Section 2.3.3.

[106] Opinion of Advocate General Poiares Maduro in *Viking Line*, para. 43.

[107] Opinion of Advocate General Poiares Maduro in *Viking Line*, para. 49.

[108] Opinion of Advocate General Poiares Maduro in *Viking Line*, paras 33-34, 42, 45-48.

[109] Prechal, S., De Vries, S. (2009) *Supra at 7*, 7-8; Schepel, H. (2012) *Supra at 7*, in particular at 184-190.

[110] Lohse, E.J. (2007) *Supra at 71*, 179.

[111] Arguably, the concept of 'market power' in competition law is not sufficient to describe such as situation, as market power simply describes the capacity of an undertaking not to be immediately affected by variation in demand and price. The concept of dominant position is therefore more helpful in determining when an actor has power, in practice, to hinder market access.

[112] Davies, G. (2012) *Supra at 61*, 813; Schepel, H. (2012) *Supra at 7*, 192.

[113] For example, the restriction at issue in *Sapod Audic* would most likely fall below the substantive threshold for market access given its limited impact to restrict access to the market.

[114] Schepel, H. (2013) Freedom of contract in free movement law: Balancing rights and principles in European public and private law. *European Review of Private Law* 21(5-6), 1211-1229.

restrictions, what matters is the capacity to restrict market access in practice and above a certain threshold. The identification of that threshold is crucial for the application of Art. 34 TFEU to VSS, but exposes to the threats of identifying *de minimis* as discussed above. The capacity to hinder access to the market can be equated to the transition between a breach of economic interest to a breach of economic right. The analysis requires an assessment of whether VSS, in particular in light of their regulatory role which is more evident for multi-stakeholder VSS, can fall within the provisions of the Treaty under the functional understanding of collective regulation described in the sections above.

The trigger for the application of the free movement rules would not be the compulsory membership of the private body, nor its monopolistic character (where present). The test would involve an assessment of whether the individual *vis-à-vis* the private body and its standards is in a position similar to that *vis-à-vis* the State.[115] An empirical assessment is required, in particular for cases of restrictions, which can be operationalised by looking at market datas and behaviours. For bodies exercising quasi-collectively regulatory functions such as multi-stakeholder VSS, to appraise their capacity to hinder market access would require an investigation looking at whether failure to achieve certification results in the impossibility of entering a market. This depends on empirical factors such as a very strong intensity of consumer or retailer preference for a specific type of VSS. The presence of a narrow product market would also accentuate the risk. This would be, for example, the case where a VSS identifies one very important feature for consumers (referring to sustainability, animal welfare, labor conditions) for a single product.

Conversely, sectoral schemes and company schemes possess a stronger self-regulatory and economic rationale defining their nature as a club or private goods, which, in turn, results in a more or less strong contractual tool expressing business preferences. Such instruments respond to market needs such as structuring commercial relations with suppliers within a framework of contractual freedom and under a fundamental right to pursue an economic activity. After *Wouters*, [116] competition law applies to self-regulation in addition to freedom of movement. Different from *Wouters*, where the rules at issue were drafted by the Dutch bar to be employed by its members for sectoral VSS, and exactly like in *Fra.bo*, the rules are drafted by a sectoral associationfor potential application by a group *broader* than the association itself. Sectoral and company VSS are schemes designed by economic entities and are employed by the same actors that designed them, often to their direct economic advantage. As Section 2.3.3 discusses, freedom of contract and freedom to run a business are fundamental rights which shall not be unduly encroached upon. However, also certain firms and especially retailers consortia can prevent market

[115] Baquero Cruz, J. (1999) *Supra at 88*, 618.
[116] C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653.

access to such an extent that they erode other economic operators' fundamental economic rights as defined by the CJEU. The threshold is certainly high, and rightly so. There is probably not any company in the EU which can currently exert such a power to prevent market access. Arguably, some retailer organisations may reach the threshold in particular circumstances, which would occur when producers are not able to market *at all* in a given Member State.

The assessment of whether producers are actually prevented from marketing is not as intuitive as it may seem for measures such as VSS, and standards in general. Products and production methods can almost always be modified to meet the criteria provided by private rules. In the end, under normal market circumstances requirements can be imposed on the supply chain to meet certain sustainability preferences, and companies may legitimately want to differentiate their products from those of the competitors. These arguments should be acknowledged and accommodated in order not to hinder private autonomy. The circumstances which may trigger Court review could include the unfeasibility for a producer to alter its products to meet the criteria of the standard, and the appearance of clear exclusionary market effects.

Very difficult to appraise, but nonetheless crucial, is the quantitative definition of how many producers must be excluded from the market before a private body can be said to hinder market access. Transposing the finding from case-law concerning public measures - i.e. a very small subset of affected producers suffices - seems rather problematic as it may trigger litigation whenever even just one producer fails to qualify for private requirements. This occurs basically for all private standards. While this raises no problems for sectoral and company VSS, which are less likely to be covered by the scope of Art. 34 TFEU, the issue is of paramount importance for multi-stakeholder VSS and their viability. We shall return on this point in Section 2.3.2.

2.3 Application of Art. 34 TFEU to VSS

Courts like the CJEU can be well placed to impose checks on private regulation, especially when its exclusionary effects cannot be addressed by market forces and by means of the political process.[117] In the lack of any scrutiny, private regulation may be biased in favour of the actors setting or enforcing the rules. Market discipline may fail to remedy these problems in the presence of small individual stakes for consumers compared to the larger stakes for producers. Even open participatory rules such as those of multi-stakeholder VSS offer more incentives for participation to industry actors with higher interests, financial availability and returns from successful capture.[118]

[117] Mataija, M. (2016) *Supra at 6*, 50-51.

[118] Olson, M. (1965) *The logic of collective action*. Cambridge: Harvard University Press, 49. See also, generally, Domhoff, G.W. (2009) *Who rules America? Challenges to corporate and class dominance*, New York: McGraw Hill Higher Education.

Limited resources, costs, difficulties in dealing with technical matters, and a possible 'chilling effect' over desirable forms of private regulation, however, are factors and risks suggesting that Courts should generally approach private rules with care and moderation.[119] The case-law of the CJEU seems to reflect these concerns. So far, few cases have resulted in the imposition of obligations over private actors and these were limited to case of compulsory and collective forms of private regulation - certainly not market transactions. The CJEU employed different rationales to subject private measures under Treaty scrutiny, such as functionalism, *effet utile*, expansive attribution tests, a reference to the universal nature of non-discrimination. It is possible to expect a future frame in which the Court does not investigate whether a measure is public or private, but simply whether free movement can be hindered.[120] 'Hindrance' is no easy concept either and, as seen above, the CJEU has set flexible boundaries to it.

Sections 2.1 and 2.2 have elucidated fundamental questions of personal and substantive scope of Art. 34 TFEU. It is now appropriate to apply the normative framework identified above to VSS. Section 2.3.1 begins by briefly summarising the conclusions in Section 2.2 concerning the personal scope of Art. 34 TFEU *vis-à-vis* VSS under the two normative approaches. Section 2.3.2 reflects upon the circumstances under which private measures capable of conferring a market advantage, but also of constituting a barrier, should be considered in breach of the market access test. Finally, Section 2.3.3 discusses the possibility to justify the restriction, in particular on the basis of the fundamental right to conduct a business, as well as a possible approach of the Court towards the proportionality assessment.

2.3.1 Personal application

Under the approach in Section 2.2.4, which frames current case-law as preventing third-party interference in contractual relations, the following can be concluded for VSS:

i) company VSS are excluded by Art. 34 TFEU
ii) sectoral VSS are covered by Art. 34 TFEU if *de facto* non-voluntary
iii) multi-stakeholder VSS are covered by Art. 34 TFEU if *de facto* non-voluntary.

Under the normative framework in Section 2.2.5, grounded on a functional approach to collective regulation and the horizontal application of the non-discrimination

[119] Benvenisti, E., Downs, G.W. (2012) 'National courts and transnational private regulation'. In Cafaggi, F. (Ed.) *Enforcement of transnational regulation. Ensuring compliance in a global world*. Cheltenham, Northampton: Edward Elgar, in particular at 140-146. See also Cafaggi, F. (2012) 'Enforcing transnational private regulation: Models and patterns'. In Cafaggi, F. (Ed.) *Enforcement of transnational regulation. Ensuring compliance in a global world*. Cheltenham, Northampton: Edward Elgar, 92.

[120] Verbruggen, P. (2014) The impact of primary EU law on private law relationships: Horizontal direct effect under the free movement of goods and services. *European Review of Private Law* 22(2), 215.

principle, what matters is an appraisal of whether the individual *vis-à-vis* the private body at hand is in a similar condition to that *vis-à-vis* the State. Therefore, with respect to private standards:

i) company VSS are covered by Art. 34 TFEU if the standard constitutes an essential condition to accede to a market
ii) sectoral VSS are covered by Art. 34 TFEU if the standard constitutes an essential condition to accede to a market
iii) multi-stakeholder VSS are covered by Art. 34 TFEU if the standard constitutes an essential condition to accede to a market.

The two frameworks overlap to a great extent. A *de facto* mandatory scheme is likely to be so because it constitutes an essential condition to enter a market. Further, it is very unlikely that, under the second normative framework, a single company could exert such power to become a market-gate keeping entity in the lack of links with a Member State. By providing a considerable degree of autonomy to company schemes, the personal framework of application here described is in line with the normative approach to public, club and private goods outlined in Section 3.2 of Chapter 2.

2.3.2 Substance thresholds for market access breach

Section 2.1 shows that, according to the classic approach to market access, a rule is considered in breach of Art. 34 TFEU, and thus needs to be justified, as long as it hinders access to a market for some producers. In principle, for public measures, this applies irrespective of whether a measure has a trade-enhancing and pro-market access effect for other producers, even if it includes the majority of them. Transposing this test to private measures and standards such as VSS ignores the fact that all standards have effects which both facilitate and impede market access. These effects indeed matter within the Treaties framework since EU-wide standards - including those addressing sustainability - contribute to integrating the economies of EU Members.[121] Different, some of the private sectoral rules addressed by the CJEU stemmed from nation-wide private bodies and contributed to the fragmentation of the regulatory landscape. Yet, a market access approach would consider many, if not all, VSS covered by the scope of Art. 34 as *prima facie* breaches.

The main conceptual problem concerning the application of a normative market access test for VSS becomes the assessment of the market barrier effect of VSS in comparison to the positive effects on market entrance that VSS generate as well. While cases of direct and indirect discrimination would be covered at all times, non-

[121] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 263.

discriminatory restrictions arising from failure to qualify with a VSS are more complex to appraise. Products and production methods can almost always be modified to meet the criteria of the standard at hand. Further, under normal market circumstances, requirements can be imposed on the supply chain to meet certain sustainability preferences, and companies may legitimately want to differentiate their products from those of the competitors by means of quality standards.

Section 2.1 explained that a measure imposing an equal factual 'cost' on *all* actors cannot be considered as a restriction to market access. The impact on market access due to cost increases engendered by participation in a VSS scheme might have different effects depending on the producers considered. For some, it may be almost negligible. For others, on the contrary, compliance may be very difficult, as adjusting products and production processes to meet the VSS requirements can result in severe loss of competitiveness or can be physically impossible. The extreme case scenario occurs when certain producers cannot enter the market anymore because of a loss of competitiveness. The question becomes how large the subset of excluded producers must be to give rise to a finding of infringement.

The CJEU ruled on this point with respect to a State measure in the domain of the freedom of circulation of services, although the finding was made in the context of a discriminatory measure. It does not matter whether discrimination has effects even on a very small group; the fundamental nature of the obligation does not permit even a very limited group of traders from being *completely prevented* from entering the market.[122] This finding under the freedom of movement of services is in line with the above mentioned rejection of a *de minimis* threshold. However, if a producer is excluded from entering into a contractual relation with a powerful retailer, this does not mean that the retailer may be subject to the scope of Art. 34 TFEU. The application of Art. 34 TFEU for discrimination contained in VSS would occur only when (even just a few) producers are *completely prevented from* market access,[123] which involves an assessment of external factors such as, *inter alia,* market structure and alternative channels for distribution. Indirect discrimination can be structurally at issue for certain environmental labelling or certificatory schemes, in particular those addressing the carbon emissions in bringing the product to the market, or the freight emissions measuring the environmental impact of goods transportation. Schemes covering these aspects have the indirect effect of favouring products made in the vicinity of the place of consumption or sale, which normally are national goods.

[122] C-212/06 *Government of the French Community and Walloon Government* v *Flemish Government* [2008] ECR I-1683, para. 52. See also Jansson, M.S., Kalimo, H. (2014) *Supra at 34,* 533.

[123] It shall be recalled that, in its case-law, the Court has referred to measures hindering market access as measures having a *considerable* influence on the behaviour of consumers, or *greatly* restricting the use of a product. See C-110/05 *Commission v Italy (Trailers)* [2009] ECR I-519, para. 56; C-142/05 *Åklagaren v Percy Mickelsson and Joakim Roos* [2009] ECR I-04273, para. 28.

Also for non-discriminatory VSS it may occur that just a few producers are entirely prevented from accessing the market. It may also happen that for some producers access to a market only occurs in the presence of costs higher than those borne by other competitors. It is debatable whether both situations would correspond to a *prima face* breach of Art. 34 TFEU. Firstly, it should be noted that whether the VSS 'holds' or 'raises' the bar has little relevance in itself. As long as a restriction to market access is generated by a VSS, the substantive scope of Art. 34 TFEU would cover it. Secondly, all standards defining 'quality' products have the very purpose of preventing access to the 'quality product' market to products of a lower quality, which are obviously marketable as 'regular' products. Conversely, the standard can be seen as *creating* a market and therefore increasing market opportunities for complying products. A 'quality' standard can be legitimately set extremely high so that only very few producers can comply. A means to appraise these two dynamics against each others is crucial, but does not pertain to the market access test as applied by the Court so far. Thirdly, a fundamental point concerns the costs borne by producers to adjust their products in line with the 'quality' standard. To incur lower costs does not mean anything except that the entity in question has been particularly efficient in adapting, a fact to be commended rather than to be deplored. Indeed, the entity may have incurred lower costs because the standard in question was closely based on the features of its products, perhaps because of regulatory capture in the standard-setting process. Or it may be that an entire national sector has set standards in a manner which would be very costly or impossible for other companies to comply with - a typical protectionist strategy.

Although competition law is a more suitable venue to address market restrictions in these terms,[124] what matters, it is here argued, is the combined *welfare effect* for producers determined by the VSS. An appraisal of combined welfare of producers affected by the VSS could be employed to evaluate the actual market restriction generated by the scheme on the group of producers as a whole. In the presence of a net decrease in producer welfare, it can be concluded that the scheme generates negative effects for producers that would likely be transmitted to the level of market access, in the most straightforward case, because the loss of producers whose products cannot enter the market is higher than the profits incurred by producers whose products qualify with the standard. Such a situation is rather suspect, and the Court may want to take a closer look at why a standard destructs more trade than it creates. Looking at producer welfare also permits the identification of intermediate situations where the standard adds up to producers costs without being matched by an increase in demand or market opportunities. Under such a scenario, it is reasonable to assume that compliance with the standard has occurred not on the basis of an

[124] Nevertheless, EU competition law does not focus on producer welfare unless it has repercussions on market parameters which, in turn, affect the welfare of consumer - the only yardstick against which anti-competitive agreements are to be assessed. See Chapter 4 for an in-depth discussion.

economically rational decision since no firm would increase its costs without the promise of increased returns, but because of the presence of external pressures - be that of a successful regulatory scheme established because of strong consumer preference in a narrow market segment, or economically powerful retailers which impose their requirements upstream.

A focus on producer welfare is grounded on the arguable purpose of Art. 34 TFEU.[125] It is, however, impossible to determine a legal test which is able to assess the situation above without employing a substantial amount of market data, and at the same time ensuring predictability and uniform application of the law. Restricting the personal scope of Art. 34 TFEU so as to avoid dealing with this type of questions is therefore to be welcomed. Another possibility, which results in the same outcome of avoiding economic analysis, is to consider the restriction arising from a VSS as a *prima facie* breach of a fundamental freedom, and then to balance it against party autonomy as protected by fundamental right to pursue an economic activity, as discussed in the next Section. Both means are 'blunt' devices which only limitedly take into account the specific economic and factual reality - and therefore grant a larger margin of manoeuvre for VSS.

2.3.3 Justification and proportionality

A market access test has the effect of transforming many private measures, VSS included, into *prima facie* breaches. This effect is however limited by the arguable presence of a built-in substantive *de minimis* from the test in *Trailers,* which only catches considerable impediments to market access, or a personal *de minimis* under the fundamental freedom avenue which only covers bodies possessing a *de facto* gate-keeping power. Art. 36 TFEU, the mandatory requirements and the assessment of proportionality are, in any event, of fundamental importance. The CJEU ruled that,

[125] EU freedom of circulation law can be framed as being concerned with the welfare of producers and their gains resulting from market access and, at least within Art. 34 TFEU, with interferences on the welfare of producers deriving from State action. (See Poiares Maduro, M. (1998) *Supra at 51*). A test appraising the welfare of producers is thus consistent with this logic. The approach is a consequence of the almost constitutional role played by the principle of mutual recognition, and became more visible with the market-access approach to Art. 34 TFEU. In *Cassis de Dijon* the Court highlighted the 'double burden' borne by producers which have to comply with more than one set of rules, thereby switching the focus of the analysis to the supply side of the market. The second step is the subordination of consumer preferences - determining consumer welfare - to the internal market values and the welfare of consumer, as it can be concluded from the approach of the Court with respect to consumer preferences. The CJEU held that 'legislation of a Member State must not "crystallise" given consumer habits so as to consolidate an advantage acquired my national industries concerned to comply with them' (C-178/84 *Commission v Germany (Beer purity requirement)* [1987] ECR I-0037, para. 31). The transition towards a market access test accentuates the focus on producer welfare, as Art. 34 TFEU goes much further than the negative integration objective pursued by WTO non-discrimination and necessity provisions. The market access test, in tandem with harmonisation and mutual recognition, results in the actual removal of barriers to trade, including non-discriminatory ones to the *immediate advantage* of producers. Indeed, a welfare increase may be transmitted to society at large by an increase of product choice and efficiency, but the appearance and extent of such effects cannot be presumed *ex ante*.

in principle, many of the expressed grounds for justification contained in Art. 36 TFEU and the overriding reasons of public interest can also be invoked by private parties.[126]

The Court applied justifications and the principle of proportionality to private parties, for example, in *Angonese*, where it was held that private actors as well can rely on objective factors unrelated to nationality, provided that proportionality is respected.[127] Private parties, most of the time, do not pursue the public good by acting in their self-interest. But this should not always preclude access to justificatory grounds such as public policy or public health, as it may occur that private interest is aligned with the public interest. The Court acknowledges that private action can generate similar effects to public action, a finding which holds true especially for the similar regulatory effects of certain private and public measures.

From a pragmatic and functionalist perspective, the application of justificatory grounds normally invokable by a Member State - both those in Art. 36 TFEU and the mandatory requirements - would be permissible when private actors undertake clear State-like regulatory tasks. Chapter 2 shows that this claim holds particularly true for multi-stakeholder VSS, which mediate between values and diverse constituency by means of a deliberative process. In those situations, the restriction could possibly be justified on environmental, or consumer protection grounds and other mandatory requirements of public interest. Private bodies have been granted *ad hoc* structural and organisational justifications such as the need to organise and set sports rules.[128] The possibility of resorting to public goals and not just 'private' justifications recognises that the regulatory authority of private parties legitimately extends to domains other than self-regulation, with a consequent impact on the margin of manoeuvre permitted.

A fundamental problem concerning the application of justificatory grounds to private parties, and to sectoral and company VSS in particular, is that previous rulings of the Court have disallowed the employment of economic and profitability-related grounds to justify infringements to the four freedoms.[129] Extending this prohibition to private bodies would be in contrast with the previous case-law of the CJEU where the Court

[126] Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921, para. 11. In *Laval,* however, the Court seems to have limited the possibility for private actors to make use of the Treaty derogations, but not of the mandatory requirements. C-341/05 *Laval* [2007] ECR I-11767, para. 84. Generally, on mandatory requirements and the rule of reason, see: Schrauwen, A.A.M. (Ed.) (2005) *Rule of reason. Rethinking another classic of European legal doctrine.* Groningen: Europa Law Publishing.

[127] C-281/98 *Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4161, para. 42. For an explicit statement from the Court concerning the possibility for private actors to make use of mandatory requirements for justifying restrictions: C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP (Viking Line)* [2007] ECR I-10806, para. 90.

[128] Joined Cases C-51/96, C-191/97 *Deliège v Ligue francophone de judo et disciplines associées ASBL and Others* [2000] ECR I-2549, para. 67.

[129] C-120/95 *Decker v Caisse de Maladie del Employés Privés* [1998] ECR I-1831, para. 39; C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* [2000] ECR I-4113, para. 48.

accepted the possibility that the exercise of a fundamental right of the infringer could be invoked to justify a restriction.[130] Private autonomy and the freedom of contract, which can encompass many economic grounds, constitute a possible iteration of the fundamental right to conduct a business under Art. 16 of the EU Charter of Fundamental Rights,[131] and a cornerstone of the liberal economic model.

More specifically, and particularly relevant for the possibility to subordinate contracting to specific sustainability requirements of products, the CJEU ruled that the freedom to choose whom to do business with constitutes a 'specific expression' of the freedom to conduct an economic activity, which forms part of the general principles of EU law.[132] Within this frame, sectoral and company VSS would constitute an articulation of such freedom.[133] In *Wouters,* although not explicitly connected with fundamental freedoms, the Court accepted without much discussion that self-regulation can legitimately have the objective of guaranteeing the proper practice of a profession.[134] Sectoral VSS which can be connected to the need to ensure the 'proper functioning' of a sector could arguably benefit from this line of justification. Possibly, such a ground could also encompass quality requirements for products, including those addressing social and environmental features. Private autonomy can therefore be used to determine the boundaries of the horizontal application of the Treaty freedoms.[135]

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[130] C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP (Viking Line)* [2007] ECR I-10806, para. 75; C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning, Byggettan and Svenska Elektrikerförbundet (Laval)* [2007] ECR I-11767, para. 102. For cases of indirect horizontal effect see C-112/00 *Schmidberger Internationale Transporte v Austria* [2003] ECR I-5659, para. 69. For cases involving state measures see C-36/02 *Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609. See also Lohse, E.J. (2007) *Supra at 71*, 164; Krenn, C. (2012) *Supra at 96*, 212-213.

[131] C-426/11 *Alemo-Herron & others v Parkwood Leisure LTD* [2013] ECR I-0000, para. 32-33.

[132] Joined Cases C-90/90 and 91/90 *Jean Neu and Others v Secrétaire d'Etat à l'Agriculture et à la Viticulture* [1991] ECR I-3633, para. 13. For a more recent application under the Charter see C-281/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECR I-0000, para. 43.

[133] Generally, private regulation grounds its basis either on the constitutional principles of freedom of association or on freedom of contract. In these cases, law-making powers are almost intrinsic to the exercise of such freedoms. Cafaggi, F. (2010) Private law-making and European integration: Where do they meet, when do they conflict? In Oliver, D., Prosser, T., Rawlings, R. (Eds.) *Supra at 4,* 213.

[134] C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, para. 123.

[135] This is also due to a considerable overlap between the scope of the Treaty freedoms and Art. 16 of the Charter, insofar as they are both concerned with the freedom of the individual to organise her economic life and to consequently engage in legal relations of her choice. The Treaty freedoms, under this framework, represent a specific and narrower iteration of Art. 16 of the Charter limited to the freedom of market access. See Verbruggen, P. (2014) *Supra at 120,* in particular at 202. See also C-367/12 *Sokoll-Seebacher* [2014] ECR I-0000, para. 20. A least Art. 34 TFEU possesses an instrumental character which is connected to its use by the Court to pursue market integration. See de Cecco, F. (2014) Fundamental freedoms, fundamental rights and the scope of free movement law. *German Law Review* 15(3), 385. Differently, a fundamental right of individual autonomy is to be protected as an end in itself. See Babayev, R. (2016) *Supra at 65*, 989.

Under a fundamental right scenario a balancing exercise is required, under which freedom of doing business can restrict market access up to a certain point only. This would be more the case for business actors capable of wielding 'State-like' economic power. The outcome of balancing a fundamental freedom against a fundamental right is inherently unpredictable.[136] There have been cases in which the fundamental right had to yield to the fundamental freedom (*Viking Line* and *Laval*), and cases in which the opposite occurred (*Schmidberger*). Equally unpredictable is the balance between freedom of contract as a fundamental right, and other objectives. The invocation of freedom of contract was not successful to justify the breach of passenger rights and generally consumer protection *acquis*,[137] but on another occasion it has been used aggressively to successfully justify the abrogation of employees rights.[138] It is unfeasible to design a clear hierarchy, but it seems that freedom of contract may be limited in the presence of common rules 'imposing specific restrictions in that regard'.[139] In the end, freedom of contract - like any other fundamental right - is not absolute and must be viewed in relation to its social function.[140]

The justification of a measure in breach of Art. 34 TFEU also includes the oft-decisive assessment of proportionality. Under a market access test, proportionality becomes the main criterion to weed out lawful measures from unlawful ones.[141] Proportionality requires that a measure must be suitable and, most important, necessary for the objective pursued. Specifically, a measure must not go beyond what is necessary for the attainment of its objective. The Court has operationalised this requirement by looking at the presence of an alternative measure capable of achieving the objective to the same extent, but in a less burdensome way, or which limits to a lesser extent the right or the obligation at hand.[142] The CJEU has traditionally been generous towards Member States in recognising justificatory grounds in the form of overriding reasons of public interests; this has been counterbalanced with a certain strictness in the proportionality assessment.[143] The general approach to proportionality is that it is much stricter in the presence of State measures, whereas it is more lenient for Union measures and simply looking at manifest inadequacy.[144]

If we accept a State-like regulatory role for multi-stakeholder VSS, it seems then logical to expect the same stringent approach to proportionality as in vertical

[136] Schepel, H. (2013) *Supra at 114*, 1228-1229.
[137] Case C-12/11 *McDonagh v Ryanair* [2013] ECR I-0000.
[138] C-426/11 *Alemo-Herron & others v Parkwood Leisure LTD* [2013] ECR I-0000. See also Prassl, J. (2013) Freedom of contract as a general principle of EU law? Transfers of undertakings and the protection of employer rights in EU labour law. *Industrial Law Journal* 42(4), 434-446.
[139] Case C-240/97 *Spain v Commission* [1999] ECR I-6571, para. 99.
[140] C-281/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECR I-0000, para. 45.
[141] Trimadis, T. (2006) *The general principles of EU law*. Oxford: Oxford University Press, 196.
[142] Harbo, T.I. (2010) The function of the proportionality principle in EU law. *European Law Journal* 16(2), 172.
[143] Schepel, H. (2013) *Supra at 114*, 1221.
[144] Trimadis, T. (2006) *Supra at 141*; Harbo, T.I. (2010) *Supra at 142*, 172.

relations. In such a case, for multi-stakeholder VSS freedom of contract would not play a role, as their regulatory function is more evident. The impossibility to balance between fundamental rights would be compensated by the possibility to revert to a rather broad pool of public policy grounds, which could cover all objectives pursued by VSS - among which are environmental protection, the protection of exhaustible resources, moral concerns arising from certain practices, consumer protection.

The approach to proportionality would logically differ for sectoral and company VSS. Their more prominent economic rationale is more closely associated to the exercise of a fundamental right. Where fundamental freedoms and fundamental rights enter into conflicts, Advocate General Trstenjak has suggested, and extended to private actors as well, a 'double proportionality test'. A balance between a fundamental right and a fundamental freedom is to be attained when 'the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom'.[145] In other words, neither the substance of the former nor of the latter must be impaired.[146] This type of assessment shows close resemblance with the *stricto sensu* concept of proportionality.[147]

Practical problems may arise during the assessment of the proportionality of the restriction to market access caused by the substance of the VSS scheme and the objectives pursued. For all VSS, it is difficult to imagine a standard of review when the substance of the scheme is taken into account, unless a mandatory requirement of 'determining quality requirements' is accepted. For VSS that raises the bar, indeed the case for almost all multi-stakeholder VSS, the requirements included go well beyond and are much stricter than the rules with which products would normally be in compliance. How would the CJEU, for example, assess proportionality of an environmental standard for sustainable forest management, or an eco-label awarded to products with a limited environmental impact? Unless an implementing role is acknowledged for certain VSS, which would render applicable provisions not yet applicable, products certified under those VSS are already safe and not harmful for the environment, at least according to the law. Other VSS are less problematic. For example, private rules defining organic agricultural standards are drafted within a EU legal framework which expressly permits private operators to draft rules in that domain, provided that harmonised EU baseline requirements are followed.[148]

[145] Opinion of Advocate General Trstenjak in C-271/08 *Commission v Germany* [2010] ECR I-7091, para. 190.
[146] Harbo, T.I (2010) *Supra at 142,* 175.
[147] de Vries, S.A. (2013) *Supra at 101*, 191.
[148] Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products. L 189/1, Art. 23.

As VSS certification is conferred to products that perform particularly well in a certain domain under criteria designed by the VSS body, the question becomes the choice of the level of protection as well as the objective pursued. Is the standard too stringent in order to achieve, say, generally, environmental protection? Though this is not the type of question a Court might be well equipped to tackle, it must be noted that the choice of the level of protection is seldom disputed by the CJEU for public measures. This standard of review could be extended to multi-stakeholder VSS. *A fortiori*, this would apply also to private sectoral bodies exercising self-regulatory functions, as a sufficient degree of deference is necessary to take into account and protect private autonomy. In addition to allow private parties to employ a broad set of justificatory grounds, therefore, the CJEU has the additional tools for ensuring a sufficient margin of autonomy to private parties, either by a light-touch analysis focusing on procedures, or by exercising deference towards the level of protection chosen.

Generally, it has been suggested that, when addressing private technical standard-setters, the Court should exercise a light review limited to the appraisal of good governance and compliance with principles of good administration.[149] Such requirements could be operationalised on the basis, for example, of the safe-harbour requirements for standardisation agreements under competition law.[150] The CJEU may lack the knowledge to delve into the substance of highly technical questions. Additionally, it may be desirable to safeguard regulatory diversity, experimentation, and the capacity of standardising bodies to set varying levels of protection, and pursue them by different means. This argument may not be relevant in its entirety to all VSS, as some of them do not present very technical features. In any event, case-law shows that the CJEU is willing to look into highly technical matters. In a pending case at the time of writing, the Advocate General supported the Court's jurisdiction to provide interpretation over the technical standards drafted by ESBs.[151]

3. Interactions, recognition, and indirect forms of influence at the EU and at the Member State level

Section 2 discussed the interaction between VSS and freedom of movement by means of the application of Art. 34 TFEU to VSS under an assumption that no connecting link with a Member State could be found. Section 3 now turns to the forms of specific interaction addressed in Section 4 of Chapter 2. Albeit these interactions do not necessarily establish such a connecting link, they identify more or less structured

[149] Mataija, M. (2016) *Supra at 6*, 248.

[150] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 280. For in-depth discussion, see Section 2.3.4 of Chapter 4.

[151] Opinion of Advocate General Campos Sanchez-Bordona in C-613/14 *James Elliott Construction Limited v Irish Asphalt Limited* [2016] ECR I-0000, paras. 42-63.

mechanisms for review, coordination and allocation of regulatory effects, and procedural and substantive influence between public authorities and VSS. Public bodies and governments, it should be recalled, can either be users, facilitators, or supporters of VSS. This occurs where public authorities, respectively: i) employ VSS in legislation, often for the specific purpose of demonstrating compliance with regulatory requirements; ii) create a legal and policy environment which is favourable to the development and acceptance of VSS; iii) support financially or demonstrate an extent of affiliation and endorsement with a VSS. The objective of this Section is to study how certain EU measures in the broad domain of market regulation[152] apply to VSS within the interactions spelled out above and, generally, to investigate their direct and indirect effects over VSS bodies and their standards.

EU use of VSS is described in Section 3.1. At least in the form it takes within the framework of the Renewable Energy Directive (RED), it results in coordination between public and private authorities, and therefore in an allocation of regulatory effects which brings to the fore the implementing role of VSS. In addition, the procedures and substance of the schemes are influenced by the requirements spelled out by EU legislators. The framework also allows for an extent of review over the recognised VSS. EU facilitation of VSS is described in Section 3.2 as taking two possible forms: harmonisation efforts, and meta-rules. Depending on the legal arrangement at hand, harmonisation and meta-rules result in a varying degree of influence on the substance and procedures of VSS. Coordination may also be established but, different from governmental use of VSS, it takes a softer form which neither entails formal recognition of schemes nor results in legal review of the scheme by EU Courts. Finally, forms of support described in Section 3.3 are likely to result in the least amount of influence on the schemes.

This Section addresses mostly cases of interaction between the EU and VSS, and it focuses on the most evident forms of interaction, i.e. those stemming from legal instruments and policy documents directly referring to VSS. Other types of less direct subtle interactions are indeed possible, but are not considered here. At the Member State level, only the case where Member States are users of VSS is addressed in Section 3.4, given the potential application of EU law which may be triggered as a consequence. The interactions between EU legislators and VSS will be addressed once more in Chapter 5 under WTO provision to the extent that, by establishing a 'link' with private measures, they may result in attribution to the Member of the private rules in question.

[152] The measures here described are, for simplicity, considered to be taken in the domain of market regulation. However, they are not just legally based on Art. 114 TFEU. For example, the organic products Regulation was exclusively taken on the basis of Art. 43 TFEU concerning the implementation of the common agricultural policy, and the Renewable Energy Directive was also taken on the basis of Art. 192 TFEU which implements the EU shared competence in the environmental domain.

3.1 EU use of VSS and its legal consequences

The EU, quite distinctively among global regulators, is itself a user of VSS in one but nonetheless remarkable domain - that of biofuels sustainability. This situation offers a unique opportunity to investigate the extent of the application of legal provisions to VSS with the aim to exercise forms of coordination and control over their activities. This arrangement identifies a situation of co-regulation, where a private regulatory instrument is employed to implement a public policy.[153]

The framework of the Renewable Energy Directive (RED)[154] imposes greenhouse gas (GHG) emissions and other sustainability requirements[155] on biofuel producers in order to account for the calculation of Member States' renewable energy obligations and to be eligible for financial support.[156] Member States are under the obligation to require biofuel producers to demonstrate compliance with the GHG emissions and sustainability requirements.[157] Among possible means, the Commission is given the possibility to recognise voluntary national or international private or public schemes setting standards for the purpose of measuring GHG emissions and ensuring compliance with the sustainability criteria.[158] Such schemes are clearly VSS. The Commission has recognised around twenty schemes which include, among others, multi-stakeholder initiatives such as the Round Table for Responsible Soy,[159] the

[153] Gaebler, M. (2014) 'Recognition of private sustainability certification systems for public regulation (co-regulation): Lessons learned from the EU Renewable Energy Directive'. In Schmitz-Hoffmann, C., Schmidt, M., Hansmnn, B., Palekhov, D. (Eds.) *Voluntary standard systems. A contribution to sustainable development*. Verlag, Berlin and Heidelberg: Springer, 100.

[154] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140.

[155] Specifically, a reduction in emission of GHG of at least 60% for biofuels produced in installations starting operation after 5 October 2015 (Art. 17.2). The sustainability requirements ensure that biofuels are not made from material obtained from lands with a high biodiversity value or with a high carbon stock or from peatland, as defined respectively in Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Articles 17.3 to 17.5.

[156] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Art. 17.1.

[157] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Art. 18.1.

[158] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Art. 18.4.

[159] Commission Implementing Decision 2011/440/EU of 19 July 2011 on the recognition of the 'Round Table on Responsible Soy EU RED' scheme for demonstrating compliance with the sustainability criteria under Directives 2009/28/EC and 2009/30/EC of the European Parliament and of the Council. L 190/83.

International Sustainability and Carbon Certification System,[160] and also sectoral associations' schemes such as 2BSvs.[161]

A coordination relationship between the EU and VSS is thus established, which highlights the implementing role of the recognised VSS. VSS have the objective of specifying the processes to achieve GHG reduction and to ensure sustainability within the framework of the general requirements laid down by the RED. At the same time, by providing a methodology for calculation and assessment of such requirements, they permit identification of biofuels in compliance with the general requirements. By decentralising the operationalisation of the requirements, the EU legislators also allow private actors to employ the scheme that is better suited for their needs. Importantly, as the biofuel requirements apply also to biofuels produced outside the EU, VSS become an essential tool to monitor extraterritorially the sustainability of biofuels, where the EU does not have the formal authority nor the practical capacity to do so.

The RED also contemplates mechanisms for influencing VSS' procedural and substantive requirements with which VSS must be in compliance to benefit from Commission recognition. Requirements are included in Art. 18.5 of the Directive and also clarified by a Commission Communication.[162] Such requirements can be seen as an indirect form of influence on VSS wishing to be recognised. This argument is based on the presumption that recognition is a sought-after status by scheme holders, as it enhances their legitimacy and predictably ensures an increased acceptance. Some requirements concern the substance of the scheme, which must be aligned to certain methodological standards and must contribute to the objective of the RED. The procedural requirements are, however, rather broad and unspecified. A scheme applying for recognition must meet 'adequate standards of reliability, transparency and independent auditing'. For schemes determining areas of high biodiversity values, the RED establishes additional requirements of objectivity, coherence with internationally recognised standards and the presence of an appeal procedure. Such requirements do not seem very articulated, but they are made more detailed by the presence of delegation to the Commission to adopt implementing acts specifying the standards for independent auditing which voluntary schemes must then respect.[163]

[160] Commission Implementing Decision 2011/438/EU of 19 July 2011 on the recognition of the 'International Sustainability and Carbon Certification' scheme for demonstrating compliance with the sustainability criteria under Directives 2009/28/EC and 2009/30/EC of the European Parliament and of the Council. L 190/79.

[161] Commission Implementing Decision 2011/437/EU of 19 July 2011 on the recognition of the 'Biomass Biofuels Sustainability voluntary scheme' for demonstrating compliance with the sustainability criteria under Directives 2009/28/EC and 2009/30/EC of the European Parliament and of the Council. L 190/77.

[162] Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability schemes [2010] C 160/01.

[163] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Art. 18.5.

The Commission Communication attempts to give more bite to the broad requirements of reliability, transparency and independent auditing spelled forth in the RED by listing more specific assessment and recognition requirements. The Communication, however, only enumerates a number of conditions for auditors to be considered as competent and independent[164] but, remarkably, does not elaborate any further on transparency. The Implementing Decisions recognising the schemes bear no evidence of the actual type of assessment performed by the Commission, which seems to exercise broadly its discretion. Furthermore, a reflexive process of sorts is initiated by the RED. Recognised VSS have to report to the Commission on a number of issues such as independence of audits and certificatory bodies, strategies to deal with non-compliance, transparency in the accessibility and availability of information, level of stakeholder involvement. Parliament and Council are then to analyse these reports and elaborate on a list of best practices.[165]

The RED has caused VSS addressing biofuel sustainability to proliferate, an objective that the Directive itself considers to be in the interest of the EU.[166] The reality is that the schemes recognised differ considerably. Differences are broad to that extent that the standards of some recognised VSS may actually fail to discern cases of non-compliance with the RED requirements. Further, noticeable differences in terms of stringency are observed between broader and pre-existing (normally multi-stakeholder) bar-raising VSS schemes for biofuel sustainability and those created with the specific purpose of establishing and demonstrating RED-compliance. [167] Proliferation is not, in this case, particularly problematic from the perspective of consumer confusion, as these schemes are for business use only. Different from a situation where VSS operate without any level of public involvement, proliferation under this specific scenario is arguably less detrimental for market access, since producers can pick and choose the VSS better crafted for their needs. This means that producers can also strategically opt for the less stringent, or the weakest in assessing compliance. While this impacts favourably on the trade barrier effect, it risks being detrimental to the important environmental objectives pursued by the RED.

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[164] Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability schemes [2010] C 160/01, Art. 2.2.2.

[165] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Art. 18.6.

[166] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, as amended by Directive (EU) 2015/1513 of the European Parliament and of the Council of 9 September 2015. L 140, Recital 79.

[167] International Union for the Conservation of Nature - National Committee of The Netherlands (2013) Betting on best quality: A comparison of the quality and level of assurance of sustainability standards for biomass, soy and palm-oil, 35. Available at http://cmsdata.iucn.org.iucn.vm.iway.ch/downloads /betting_on_best_quality.pdf; Schlamann, I. (2013) Searching for sustainability: Comparative analysis of certification schemes for biomass used for the production of biofuels. World Wildlife Fund Deutschland. Gaebler, M. (2014) 'Recognition of private sustainability certification systems for public regulation (co-regulation): Lessons learned from the EU Renewable Energy Directive'. In Schmitz-Hoffmann, C., Schmidt, M., Hansmnn, B., Palekhov, D. (Eds.) *Supra at 153*, 109.

Commission recognition is formally different from delegation of regulatory powers as it occurs, for example, in the domain of technical standardisation.[168] By there not being delegation, but only *ex post* recognition, there is no need for the recognised bodies and the act of recognition to be in compliance with the *Meroni* criteria for delegation of regulatory powers.[169] Recognition does not confer a lawful exercise of *ex novo* regulatory power to another entity, but it deals with a pre-existing entity already in the exercise of regulatory functions, albeit on the basis of private authority. Still, an extent of Court review is possible and determined by the presence of a legal act for recognition. Formal recognition of VSS instruments takes place by means of a Commission Decision;[170] The Court's review of such an act is allowed under Art. 263 TFEU under action by Member States, other EU institutions, or an individual who is 'directly concerned'.[171] But to what extent does the CJEU assesses the substance of the standard and the procedural requirements with which the body should be in compliance according to the RED?

In *Artegodan*, a case concerning a Commission's authorisation for marketing certain drugs, which was based on a scientific assessment by the Committee for Proprietary Medicinal Products (CPMP), the Court of First Instance ruled that 'although the CPMP's opinion does not bind the Commission, it is none the less extremely important so that any unlawfulness of that opinion must be regarded as a breach of essential procedural requirements rendering the Commission's decision unlawful'.[172] In that case, where the Commission was dealing with technical matters and was not

[168] The extensive amount of 'legalisation' brought in the EU standardisation regime by means of Regulation 1025/2012 has dispelled the remaining doubts concerning the presence of delegation in the EU standardisation regime. See Schepel, H. (2013) The new approach to the New Approach: The juridification of harmonised standards in EU law. *Maastricht Journal of European and Comparative Law* 12(4), 521-533.

[169] Case C-9/56 *Meroni v High Authority* [1958] ECR I-0135. See also Lenaerts, K. (1993) Regulating the regulatory process: 'Delegation of powers' in the European Community. *European Law Review* 18(1), 41; Donnely, C.M. (2007) Delegation of governmental power to private parties: A comparative perspective. Oxford: Oxford University Press; Griller, S., Orator, A. (2010) Everything under control? The 'way forward' for European agencies in the footsteps of the Meroni Doctrine. *European Law Review* 35(1). The *Meroni* doctrine provides that delegation cannot confer powers different from those the delegating institution is conferred by the Treaty. This means that the exercise of the delegated powers must be subject to the same conditions it would have been subject in the absence of a delegation. Delegation also has to be explicit, and must be ratified by the institution delegating powers. Finally, delegation must not alter the balance of powers established by the Treaty. Delegation shall thus not empower the delegated institution with such a wide margin of discretion that its decisions cannot be evaluated on the basis of objective criteria; in other words, delegation must be limited to strictly executive powers.

[170] For the RED see Communication from the Commission on voluntary schemes and default values in the EU biofuels and bioliquids sustainability schemes [2010] C 160/01, Art. 21.

[171] As implementing decisions are regulatory acts, for which the Treaty of Lisbon requires 'direct concern', i.e. 'the measure at issue must directly affect the legal situation of that individual and there must be no discretion left to the addressees of that measure who are responsible for its implementation, that implementation being purely automatic and resulting from Community rules alone without the application of other intermediate rules'. Joined Cases 41/70 to 44/70 *International Fruit Company and Others v Commission* [1971] ECR I-411, paras 23 to 29. For a detailed account of the 'Lisbon test' for regulatory act see Albors-Llorens, A. (2014) 'Judicial protection before the Court of Justice of the European Union'. In Barnard, C., Peers, S. (Eds.) *European Union Law*. Oxford: Oxford University Press, 276-278. Potential directly concerned parties thus include producers, including foreign producers.

[172] Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others v Commission* [2002] ECR II-4945, para. 197.

capable of conducting a scientific or technical evaluation on its own, the CJEU showed its willingness to review the formal procedural legality of the opinion, as well as the exercise of the Commission's discretion. Previously, the Court also held that following without reservation the opinion of technical experts does not *per se* run counter to EU law. However, the quality of the experts that have been consulted and their capacity to conduct an assessment on the subject at hand will be the object of careful scrutiny by the CJEU.[173]

In order to extend those findings to the recognition of VSS within the framework of the RED, the similarity of the situation with that in *Artegodan* must be stressed. Also in the domain of biofuels, the Commission relies i) on external expertise, ii) to conduct an assessment, iii) which it is not capable of undertaking on its own, which is the appraisal of the environmental impact of biofuel production, particularly in foreign jurisdictions. It has been argued that the CJEU might look at the private body in charge of the assessment, but in its analysis the Court will mostly limit itself to whether the VSS body's procedural requirements have been complied with, whether reasons have been stated, and whether the level of technical expertise is satisfactory.[174] In other words, it verifies compliance with basic principles of goods administration. It must be noted that, by addressing the Commission Decision, no requirements are directly imposed on the VSS body. It can nevertheless occur that the Commission Decision is annulled and, thus, the scheme cannot be employed anymore for demonstrating compliance. It is difficult to assess whether recognised VSS scheme-holders are actually aware of this possibility of indirect review.

The CJEU's review of acts of the institutions where discretion in policy choice is retained is normally rather 'light', in particular in the assessment of proportionality[175] The Court usually verifies whether the decision is 'not vitiated by a manifest error or a misuse of powers and that the competent authority did not clearly exceed the bounds of its discretion'.[176] Although the RED in Art. 18.5 provides that the Commission shall ensure that schemes meet adequate standards of reliability, transparency and independent auditing, the Commission Communication that sets forth the requirements for recognition, does not operationalise such standards any further, nor does the Commission seem to look at such standards when assessing VSS schemes for the purpose of recognition. It is doubtful whether this type of 'light' review might be a remedy for the equally light control exercised by the Commission. In any event, also

[173] Case C-269/90 *Technische Universiteit Munchen v Hauptzollamt Munchen* [1991] ECR I-5469, para. 22.

[174] Hofmann, H.C.H., Rowe, G.C., Turk, A.H. (2011) *Administrative law and policy of the European Union*. Oxford: Oxford University Press, 604.

[175] Craig, P. (2012) *EU administrative law*. Oxford: Oxford University Press, 592-593; Harbo, T.I. (2010) *Supra at 142*, 172.

[176] Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others v Commission* [2002] ECR II-4945, para. 201.

EU institutions are bound by Art. 34 TFEU.[177] The presence of discriminatory elements in a recognised VSS would lead, in case of a legal challenge, to an arguably less deferential scrutiny of the Commission's discretion. In any case, it can be observed that the presence of a co-regulatory arrangement elevates private rules at the same level of administrative rules, to be treated with the same level of judicial deference.[178]

It can be concluded that in case the EU legislators use a VSS under the legal and institutional dynamics of the RED, regulatory effects are clearly allocated. The extent of indirect influence EU legislators can exert and which is able to affect trade-barriers effects and confusion is theoretically rather high. However, it does not determine direct legal review on the VSS being recognised. There is, however, a strong dependence on the extent of control that the Commission is willing to exert on the schemes it aims at recognising, and the specific legal arrangement. The requirements for recognition, however broadly defined in the Directive, can be made more precise by Commission's practice. Future implementation of the transparency requirements could give an indication of whether the Commission intends to tighten its control, which does not seem very stringent at the moment. The legal arrangement at hand in the framework of the RED contributes to the determination of legal review, albeit limited. The presence of administrative discretion limits the extent of legal review on recognised VSS to major procedural breaches of good administration principles by the VSS body. Arguably, the situation may differ in the presence of discrimination - which would be the only instance in which Art. 34 TFEU can be fully brought into the equation.

3.2 EU facilitation as indirect form of influence

Use of a VSS requires the presence of legal acts recognising VSS or, as Chapter 5 will discuss, 'acknowledging and adopting' private rules. Conversely, facilitation does not require legal acts specifically targeting a VSS, but it rather entails a less direct contact between private and public authority. The forms of interaction considered in this Section describing EU facilitation of VSS transcend the characteristics of self-regulation and co-regulation as identified by the EU institutions.[179] EU legislators anyway engage in forms of supervision and control over VSS. This is coherent with the Commission role to verify and exercise control over self-regulation.[180] Many of the interactions observed between the EU and VSS mostly fall within the group of facilitation. The

[177] C-15/83 *Denkavit Nederland* [1984] ECR I-2171, para. 15; Joined Cases C-154/04, 155/04 *Alliance for Natural Health* [2005] ECR I-6451, para. 47.

[178] Cafaggi, F. (2009) Private regulation in European private law. EUI Working Papers RSCAS 2009/31, 4.

[179] At least as defined in the White Paper on EU Governance and the subsequent Intern-institutional agreement. See Commission Communication COM(2001)428 final. A white paper on European governance. C 287; European Parliament/Council/Commission, Inter-institutional agreement on better law-making [2003] C 321/1.

[180] European Parliament/Council/Commission, Inter-institutional agreement on better law-making [2003] C 321/1, para. 17.

review performed here is not exhaustive, as there may be forms of more indirect facilitation provided, for example, by the strong EU policy preference for CSR.[181]

The instances of facilitation here discussed include all those bearing a discernible impact on VSS which could be identified at the time of writing. They present considerable variations concerning the amount of direct or indirect legal review exercised on the VSS, which is clearly dependent on the legal arrangement at hand. For example, harmonisation efforts such as the organic products Regulation are basically an attempt to directly regulate the substance of VSS in the organic agriculture domain without necessarily imposing a single public scheme. Conversely, the harmonising effort in the framework of the 'internal market for green products' initiative is based on entirely voluntary compliance by VSS. The substance of legislation in question also affects the actual amount of influence that is exercised on the procedures and substance of VSS. The incentive offered by public procurement could have a major impact in extending procedural requirements over VSS bodies but the narrow substantive scope of the Directive has the effect of limiting the range of VSS contracting authorities may employ. The presence of a 'facilitation' interaction does not however result, in all cases, in forms of direct or indirect control. Facilitation arrangements can also entail a limited influence exercised by public authorities, such as under the FLEGT schemes, where only marginal requirements are imposed on VSS.

3.2.1 Harmonisation efforts

Harmonisation of a private regulatory domain can occur mandatorily by means of Regulation like the organic product Regulation, or by softer forms such as the single market for green product initiative launched by the Commission. Both instances harmonise the substance of VSS within a certain domain (i.e. organic agriculture), or their methodology (i.e. for the appraisal of polluting emission).

3.2.1.1 The organic products Regulation

The organic products Regulation is a form of facilitation interaction between EU and VSS which takes the form of harmonisation. The organic products Regulation mandates that all products making claims relating to organic agriculture must be in compliance with the EU standards laid down in the Regulation.[182] Private (and also public) organic standards are still permitted to coexist in the EU market, and products can bear private organic labels, but this can occur only to the extent that they comply

[181] See, generally, Commission Communication COM(2011) 681 final on a renewed EU strategy 2011-14 for Corporate Social Responsibility.

[182] Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products. L 189/1, Art. 23.

with the Regulation.[183] This means that organic agriculture VSS can only be more stringent than the Regulation. Existing schemes not in compliance with the Regulation are not *per se* prohibited, but are not permitted to make claims associated with the organic nature of products. Clearly, this considerably reduces their appeal. The presence of common rules for organic agriculture thus has the effect of ratcheting up all private standards in that domain at least to the level of the Regulation. Granted, the EU standards are themselves based on a private initiative,[184] but the presence of common rules prevent newer initiative from diluting the content of the standards.[185]

The Regulation offers an interesting example of how to ratchet up the substance of VSS by means of less voluntary dynamics, and how the creation of common rules can have the effect of leveling, if to a certain extent only, the playing field. To regulate a labelling domain by setting common rules applicable by default and allowing coexistence of other schemes has also the effect of increasing the level of protection. This increases consumer confidence and arguably also lowers trade-barrier effects resulting from divergent approaches to organic agriculture. As the rules of the Regulation can be seen as rather exhaustive and thereby limiting the presence of more stringent VSS, intra-EU trade barriers effects - and arguably consumer confusion as well - are diminished in the presence of at least an extent of harmonisation.

3.2.1.2 The single market for green products initiative

A similar regulatory effort - however more 'soft' - to ensure uniform substance of the scheme, to improve consumer confidence and take down private trade barriers appears underway in the domain of what the Commission has defined as the single market for green products initiative. The Commission has been undertaking a *sui generis* harmonisation exercise, whereby it has defined one robustly science-based single methodology for appraising the environmental impact of products and organisation. The Commission strongly suggests that these two methodologies be used in the EU by national and private standards for reporting greenhouse gas emissions.

[183] Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products. L 189/1, Art. 25.2.

[184] I.e. the IFOAM standards for organic agriculture, drafted in 1980 by the International Federation of Organic Agriculture Movements, an NGO, and used as input for the Codex Alimentarius Commission Guidelines for the production, processing, labelling and marketing of organically produced food. The Codex Guidelines and IFOAM standards were subsequently used as basis for the previous Organic Food Regulation, EU Regulation 2092/91, which uniforms the regulation of organic agriculture in EU Member States. See Van Der Grijp, N., Brander, L. (2004) 'Multi-sector and sector-specific schemes' In Campins Eritja, M. (Ed.) *Sustainability labelling and certification*. Madrid-Barcelona: Marcial Pons, 80.

[185] On this point, and the dual enabling and constraining character of public and private interaction in the organic agriculture domain see Arcuri, A. (2015) The transformation of organic regulation: The ambiguous effects of publicisation. *Regulation and Governance* 9(1), 144-159.

The single methodology would replace some 80 different methodologies for calculating and reporting greenhouse gas emissions, and around 60 methodologies for carbon footprints, which cannot be tackled by the application of the principle of mutual recognition.[186] Private and public schemes are not mandated to employ the Commission methodology, which therefore may constitute a voluntary standard in the meaning of the TBT Agreement.[187] Nonetheless, the Commission is willing to do so to promote its methodology by including it in the Eco-Management and Audit Scheme (EMAS)[188] - EU's environmental management plan, and in the EU Ecolabel.[189] Also this interaction can be categorised as facilitation, since it explicitly aims at the improved operation of different schemes by influencing their substance. It suggests voluntary tools for lowering trade barrier effects which can theoretically also have a positive impact on consumer perception of the schemes.

3.2.2 Meta-rules

Meta-rules are broad requirements public authorities demand from VSS schemes, which are left a margin of manoeuvre for their operationalisation and implementation. Such requirements, deriving from public measures such as the public procurement Directive, apply voluntarily but there is an incentive as compliance entitles a scheme to be employed for a specific purpose by public authority - such as to certify 'green' product features in governmental procurement. Meta-rules can therefore be seen as requirements with which VSS must comply if they want to fulfil a specific role. Other meta-rules are entirely voluntary and their uptake is left to the freewill of the scheme-holders.

3.2.2.1 The public procurement Directive

Public procurement is generally a powerful tool for public authorities to indirectly regulate and enforce private conduct.[190] EU public procurement rules also offer an effective incentive mechanism not just for the entities contracting their products, but also for VSS by means of the imposition of certain procedural requirements for their employment. The new public procurement Directive[191] can be seen as an example of facilitation to VSS' activities. To solve the problem for contracting authorities to verify

[186] Commission Communication COM/2013/0196 final. Building the Single Market for Green Products Facilitating better information on the environmental performance of products and organisations.

[187] See Section 4.1 of Chapter 5 for further discussion.

[188] Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS). L 342/1.

[189] Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel. L 27/1.

[190] Baldwin, R., Cave, M., Lodge, M. (2012) *Understanding regulation: Theory, strategy, and practice*. Oxford: Oxford University Press, 116-117.

[191] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. L 94/65.

process standards and general corporate behaviour, the Directive permits them to employ social and environmental criteria or contract performance conditions in their public contracts, with respect to any stage of products life-cycle.[192] The Directive therefore improves the schemes' popularity among contracting authorities. In addition, the Directive sets requirements that schemes must respect if they want to qualify to be included in public procurements. According to the Directive, private labelling requirements such as those contained in certain VSS can be employed to demonstrate compliance with the requirements of the contracting authorities. Contracting authorities can even *require* a label altogether but, in line with the mutual recognition principles under freedom of movement, they cannot do so without recognising equivalent schemes and should accept alternative means of proof.[193] Also this form of interaction, therefore, results in an allocation of regulatory effects between public and private authority, where the label is used to enforce (and on occasions possibly even implement) the requirements set forth by contracting authorities.

The Directive contributes to a legal environment which positively influences the uptake of VSS by expressly permitting contracting authorities to require the presence of a label as a requirement in public procurements.[194] Labels acquire quite a substantial role; a contracting authority can prescribe the use of a label, without specifying any further product characteristics or technical specifications. A great deal of trust is put in the VSS to certify and identify products which actually conform to the expectations of the contracting authority. For this reason, those schemes that contracting authorities are permitted to employ are expected to respect good governance principles. At the same time, the rule-making authority of the schemes chosen is enhanced.[195] The label requirements shall be based on objectively verifiable[196] and non-discriminatory criteria; standard-setting occurs by means of an open and transparent procedure which is inclusive of all relevant stakeholders; labels are accessible without discrimination to all interested parties; and the standards are set by a third body, over which the economic actor applying for certification does not exercise decisive influence.[197] Such requirements are mostly procedural, and seem to

[192] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. L 94/65, Art. 42 and Annex VII.

[193] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. L 94/65, Art. 43 - which seems to explicitly overrule previous case law such as C-360/10 *Commission v Netherlands* [2012] ECR I-0000, para. 112, where it was held that the contracting authorities were free to chose to refer in the procurements to the requirements of an eco-label, but not to refer to the eco-label as such.

[194] Caranta, R. (2016) 'Labels as enablers of sustainable public procurement'. In Sjåfjell, B., Wiesbrock, A. (Eds.) *Sustainable public procurement under EU law. New perspective on the State as stakeholder*. Cambridge: Cambridge University Press, 109.

[195] Gulbrandsen, L.H. (2014) Dynamic governance interactions: Evolutionary effects of state responses to non-state certification programs. *Regulation and Governance* 8(1), 82.

[196] The 'objectively verifiable' criteria takes into account the finding of the CJEU in *Concordia Bus*. See C-513/99 *Concordia Bus Finland Oy Ab Helsingin kaupunki, HKL-Bussiliikenne* [1999] ECR I-7213, para. 66.

[197] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. L 94/65. Art. 43.

highlight a correlation between input and output legitimacy which does not necessarily hold true in reality.

The Directive, however, limits the capacity of the contacting authorities to promote sustainability practices in the form of company CSRs. Among the possible social and environmental requirements that contacting authorities can impose, the employment of a general corporate policy is explicitly prohibited.[198] The Directive then must prevent such CSR requirements from entering 'through the backdoor' by means of the labels that contracting authorities may require, and through which many - as discussed - address broader CSR practices within the entity certified by means of management standards. It is thus provided that labels whose requirements do not exclusively refer to the permissible form of technical specifications, but also address, for example, corporate CSR practices, cannot be employed in public procurements. Contracting authorities can still define the specifications by reference to those of the label, but cannot require the label as such, as certification would necessarily impose on the entity compliance with CSR standards.[199] Therefore, the Directive permits a contracting authority to directly employ only a restricted group of VSS, which excludes schemes containing management standards, constituting a sizeable share of VSS.

The reach of basic procedural requirements could seem limited in practice. Nonetheless, they played an important role in improving PEFC's governance structure, which was skewed in favour of business actors. After a scheme was not approved by the Central Point of Expertise on Timber, the body in charge of assessing certification schemes and advising the UK government on timber procurement, PEFC revised and improved its standard-setting procedures to be more inclusive and transparent. It has been observed that, in sectors where VSS compete, public procurement requirements put considerable pressure on the poorly performing programs.[200] Also the effects on certification uptake are notable, especially in certain sectors such as timber products. Evidence shows that, in order to simplify and standardise supply chains, timber suppliers switched to certified products for all customers, and not just the public-sector ones.[201]

[198] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. L 94/65, Recital 104. This is in line with the Opinion of the Advocate General Kokott in C-360/10 *Commission v Netherlands* [2012] ECR I-0000, para. 88.

[199] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. L 94/65, Art. 43.

[200] Gulbrandsen, L.H. (2014) *Supra at 195*, 83 and 86.

[201] Brack D. (2010) Controlling illegal logging: Consumer-country measures. Chatham House Briefing Paper EERG IL BP 2010/01, 10, 11. Available at https://www.chathamhouse.org/sites/f iles/chathamhouse/public/Research/Energy%2C%20Environment%20and%20Development/bp0110brack.pdf. This, generally, confirms the idea that companies operating globally prefer a single regulatory regime, even if it is rather stringent, than laxer but divergent ones. See Bhagwati, J. (2004) *In defence of globalisation*. Oxford: Oxford University Press, 150.

Public procurements can therefore be considered as an effective form of facilitation with multi-faceted effects. The Directive provides a favourable regulatory frame for VSS to be employed by contracting authorities, thereby stimulating their operations. It further sets meta-rules that schemes must comply with in order to be employed by public authority. As no formal review is performed by contracting authorities, nor are such meta-rules imposed in a binding fashion, the influence exercised on VSS is only indirect. Evidence has shown that this dynamic has been effective in starting a 'race to the top' among competing VSS regimes to meet the requirements. Strengthening procedural requirements and, arguably, also substantive outcomes has the expected effect of positively impacting on consumer trust. Private regimes may still diverge and pursue different objectives, without lowering barrier effects.

3.2.2.2 The Commission Communication on best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs

The 2010 Commission Communication on best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs[202] also constitutes a form of facilitation consisting of meta-rules. This form of interaction is, however, 'softer' than the public procurement Directive. The Communication acknowledges the contribution of private standards in the functioning of certain agricultural markets, but also suggests a number of best practices for voluntary certification schemes for agricultural products and foodstuff, which represent a considerable group in the domain of VSS. The Communication is therefore a rather explicit means to influence the procedures of VSS bodies, however in a 'soft' manner. Scheme holders can voluntary adopt the Commission guidelines, which have no legal value nor do they certify the validity and effectiveness of the schemes in compliance.

The requirements are quite detailed and include transparency and non-discrimination in the standard-setting and management; involvement of all stakeholders especially those from where the scheme applies; sound scientific bases, where required; continuous development; and stability in the standards in order to avoid adaptation costs. Transparency requirements are much more detailed than under the RED, with precise indications concerning the objective of the schemes and the claims associated thereto; information available to the broader public inclusive of translations; the publication of scientific evidence backing the scheme's claims; a clear explanation of the extent to which the scheme goes beyond the relevant legal requirements. The Communication concludes by recommending impartiality in auditing and certification as well as partial or complete mutual recognition or acceptance.

[202] Commission Communication (2010) EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs C 341/04.

The Communication, it should be stressed again, is entirely voluntary. It merely constitutes the view of the Commission following a public consultation to improve the functioning of the schemes, in the acknowledgment that legislative action was not needed at that stage to correct the shortcomings of certification schemes. If followed and implemented by schemes holders it can have a positive effect on consumer perception of the schemes. Nevertheless, it is surprising that less detailed and less stringent requirements are spelled out for recognised VSS for the purpose of biofuel certification, which seems to be falling as well under the scope of the 2010 Communication on best practice guidelines.

3.2.2.3 The forest law enforcement, governance and trade (FLEGT) scheme

The forest law enforcement, governance and trade (FLEGT) scheme creates an environment which is favourable to VSS operations, by establishing a 'soft' mechanism for coordination in the presence of minimal meta-rules. The regime established by the EU actively fights illegal logging by ensuring that only lawful timber enters the EU. The FLEGT Regulation[203] establishes detailed procedures for the verification of whether timber imported in the EU complies with all legislative requirements of the country of origin, and puts the burden on traders bringing timber on the EU market to prove that timber is lawfully harvested. The Regulation permits traders to employ third-party private certificatory schemes to demonstrate compliance to the extent that, among their standards, they certify that timber products are in accordance with all applicable legislation of their country of origin. FSC and PEFC schemes would fall in that group. No additional requisites for VSS are mentioned, apart from descriptive criteria about the features of the schemes which can be employed, such as to be publicly available, to employ third-party certification, to employ a chain-of-custody approach, and to identify timber gathered in breach of applicable legislation.[204] No reference is made to the substance or the procedures of the scheme.

3.2.2.4 The Directive on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings

The Directive on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings also contains provisions on non-financial reporting. Large undertakings with more than 500 employees are required to report every year that they adhere to all rules applicable to the undertaking's development, performance, position and impact of its activity, relating to

[203] Regulation (EU) No 995/2010 of the European Parliament and the Council of 11 May 2009 laying down the obligations of operators who place timber and timber products on the market. L 295/13.

[204] Commission implementing regulation (EU) No 607/2012 of 6 July 2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations as provided for in Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market. L 177/16, Art. 4.

environmental, social and employee issues, respect for human rights, anti-corruption and bribery. In implementing the Directive, Member States must provide that companies may rely on national, EU-wide or international frameworks.[205] Among such tools, VSS are a possible means through which companies can report about their impact on sustainability matters.

The Directive expressly mentions as possible options the EU Eco-Management and Audit Scheme (EMAS), a EU management standard which builds on ISO 14000,[206] reporting initiatives such as the Global Compact,[207] and even ISO 26000, ISO's highly criticised[208] foray in the domain of sustainability standards. By making non-financial reporting mandatory for many companies, the Directive arguably generates increased demand for VSS and reporting instruments in order to communicate to consumers about a company's performance. However, it does not provide for any specific requirement concerning the schemes with which companies can resort. The instruments listed by means of example in the Directive are actually rather diverse.

3.2.2.5 The unfair commercial practices Directive

Among the forms of interaction which generate only indirect effects on VSS, the requirements imposed by EU discipline of unfair commercial practices are worthy of discussion. Although the unfair commercial practices Directive[209] does not make any specific reference to social and environmental product claims, two Commission's Guidance documents have elaborated on the concept of environmental claims in a manner which may have an indirect impact on the substance of at least environmental VSS. The general features of environmental claims, based on Articles 6, 7 and 12 of the Directive, are that they have to be clear, accurate, unambiguous, and must be capable of being substantiated by traders. This means that they should truthfully and accurately represent the scale of the environmental benefit.[210]

[205] Directive 2013/34/EU of the European Parliament and the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings. L 182/13, Art. 19a, as amended by Directive 2014/95/EU of the European Parliament and the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

[206] Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS). L 342 09.

[207] See https://www.unglobalcompact.org-

[208] Bijlmakers, S., van Calster, G. (2015) 'You'd be surprised how much it costs to look this cheap! A case study of ISO 26000 on social responsibility.' In Delimatsis, P. (Ed.) *The law, economics and politics of international standardisation*. Cambridge, Cambridge University Press, 275-309.

[209] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market. L 149/22.

[210] European Commission staff woking document of 25 May 2016 on guidance on the implementation/application of Directive 2005/29 EC on unfair commercial practices SWD(2016)163 final, 107.

Generally, the current guidance openly favours third-party certification over self-declarations as a means to make environmental claims. However, no additional conditions are laid down to identify which third party schemes are trustworthy and effective for that purpose, although it seems that public schemes are considered as reputable.[211] In a previous version of the Guidance document, issue was taken with certification schemes giving the impression of environmental benefits, whereas such a scheme in fact only verifies compliance with regulatory requirements.[212] Schemes that 'hold the bar' are therefore considered as problematic from the perspective of consumer protection. Such schemes may give the false impression to consumers that products possess specific features, whereas they are merely in compliance with baseline requirements. Generally, by imposing responsibility on traders, the Directive may indirectly have an impact on the acceptance of certain VSS. However, this would occur only in the event that an allegation of unfair commercial practices is made as a result of the employment of a scheme which is ineffective, or whose effects cannot be substantiated. The 'threat' of consumer protection litigation may nonetheless spur producers to opt out from schemes which are ineffective or whose effects are particularly difficult to assess.

3.3 EU support of VSS

Cases of support of VSS identify instances where a public authority expresses an extent of affiliation with a scheme. The domain of 'fair trade' has been worthy of two Commission Communications highlighting its important contribution to sustainable development.[213] The latest Communication highlights the criteria normally employed by fair trade schemes, but takes an explicit hands-off approach by claiming EU institutions should not play a role in regulating or even ranking private fair trade schemes. It however describes that, ideally, criteria such as non-discrimination, independent monitoring and offering consumers objective information about the impact on producers' livelihoods of fair trade schemes can have a positive effect on schemes' operation. The Communication can be seen as a form of support, as the Commission commits to provide financing to Fair Trade and other fair trade VSS, through development cooperation instruments and NGO's co-financing. Explicit financial support to fair trade VSS is peculiar, as no other VSS receive EU fundings. Coherently with the hands-off Commission approach, no conditions are imposed on

[211] European Commission staff working document of 25 May 2016 on guidance on the implementation/application of Directive 2005/29 EC on unfair commercial practices SWD(2016)163 final, 109-111; See also the non legally binding advice of the Multi-stakeholder Group on Environmental Claims available at http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3327, especially at 37.

[212] European Commission staff working document of 3 December 2009 on guidance on the implementation/application of Directive 2005/29 EC on unfair commercial practices SEC(2009) 1666, 42.

[213] Commission Communication COM(2009)215 final. Contributing to sustainable development: The role of Fair Trade and non-governmental trade-related sustainability assurance schemes; Commission Communication COM(1999) 619 final on 'fair trade'.

VSS which benefit from EU funding. Support to VSS by means of the provisions of funding, at least in the case of fair trade, does not therefore result in any form of coordination, influence or review.

3.4 Use of VSS by Member States

The possible use of VSS by Member States is straightjacketed by competences constraints deriving from the Treaties. The Treaties give a large margin of manoeuvre for Member States to take measures in the domain of working conditions to protect workers' health and safety and environmental protection.[214] However, this margin of action is diminished by the broad scope of Art. 114 TFEU as a legal basis - which would arguably interfere with Member State measures involving the labelling of products, such as many VSS, and/or specifying process and production methods of goods. Also in the presence of harmonising measures, Member States can still adopt or maintain national measures if justifiable under the grounds in Art. 36 TFEU and in an area not covered by harmonisation. Member States can also take measures in a harmonised area in order to protect the environment or the working environment. However, an additional requirement of producing new scientific evidence to support their measures, and the requisite that the situation must be specific to a Member State, complicate the justification for introducing or maintaining different and more stringent national rules. As a consequence, Member State's use of a VSS as a means to demonstrate compliance with legal requirements (in the guise of the RED Directive) can only take place if the purpose is to demonstrate compliance with EU requirements (i.e. in the presence of harmonising measures under Art. 114 TFEU), or national requirements in domains not harmonised by EU rules.

It is useful to draw a parallel with technical standards, which also can be employed to demonstrate compliance with EU and national requirements. As a starting point, in the presence of harmonised rules for products already in compliance with EU standards, Member States cannot require additional compliance with other private standards in the same domain.[215] Further, the conferral of a presumption of conformity only to products certified by a national standardising body has the effect of dissuading producers from marketing a product in a Member State and therefore constitutes a breach of Art. 34 TFEU. The Court held that to simply *encourage* economic operators to obtain marks of conformity for products lawfully marketable in another Member State contravenes Art. 34 TFEU.[216] Even just to recommend the uptake of a specific VSS in a harmonised domain would therefore be rather problematic under this line of cases.

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[214] Art. 153 TFEU confers on the EU only supporting, or residual, competence in the area of workers health and safety; Art. 193 TFEU allows Members to take environmental measures more stringent than those agreed upon under Art. 192 TFEU.

[215] C-100/13 *Commission v Germany (Ü Mark)* [2014] ECR I-0000, para. 63.

[216] C-227/06 *Commission v Belgium* [2008] ECR I-46, para. 69. See also Schepel, H. (2013) *Supra at 91*, 187.

In light of this previous Court's finding, and as discussed in Section 2.2.3, it is likely that the CJEU in *Fra.Bo* understood the contested German legislation to be itself in breach of Art. 34 TFEU as it provided legal compliance upon certification under a national standard. The possibility to employ VSS to assess compliance with legislation are also rather limited for Member States. The employment of private standards and VSS to verify compliance with regulatory requirements is circumscribed for cases where products would not be lawfully marketable in the lack of an assessment - for example in the presence of a hypothetical national or EU requirement that the marketing of coffee is limited to coffee sold by producers who have been paid a fair price.

Under this - admittedly rather exceptional - scenario, the VSS would be *directly* covered by Art. 34 TFEU if the body holds a *de facto* gate-keeping power to the market of the Member State. The turning point in *Fra.bo* was the presumption of conformity given by German legislation to products in compliance with DVGW standards, coupled with a practical lack of alternative. This seems to suggest that whenever a Member State confers upon compliance with a VSS - for example FairTrade - a presumption of conformity with a 'fair coffee' requirement, the Court will look at the effective voluntariness of VSS uptake. If alternative means for compliance effectively exist, i.e. other VSS, such as for example UTZ can be employed or other procedures such as a self-declaration by traders, then the risk is lower that a VSS body would hold such a *de facto* market access gate-keeping power.

Conversely, in circumstances under which compliance with one recognised VSS is the only way to meet the legislative requirements, *de jure* or *de facto* - because intense consumer preference for products certified by a specific scheme, such as FairTrade - then review under Art. 34 would be triggered along the lines of the *Fra.bo* case. In this case, the situation would not differ from that under product rules, as the requirement of paying a fair price becomes itself a product rule. A body required to assess compliance could also be directly mandated to apply the principle of mutual recognition, i.e. to consider substantially comparable forms of certification as equivalent of the certification it provides.

To sum up, use of VSS by a Member State is limited by competence constraints of EU law. VSS can be used only if products are not lawfully marketable in the absence of a certification process. This situation may occur if EU or national legislation in a non-harmonised domain provide for certain specific sustainability requirements with which products must comply. A *de facto* gate-keeping power possessed by a VSS body entrusted with certification is likely to result in the application of Art. 34 TFEU and the principle of mutual recognition. A VSS may be required to justify restrictions to market access and, possibly, indirect forms of discrimination in its standards. Conversely, to allow for different schemes to certify products would be less problematic under Art. 34

TFEU. Arguably, the trade-barrier effects are lower when producers can choose which scheme to employ. Indeed, also in this hypothetical scenario, requirements can be imposed by the Member State on the VSS employed, with the objective to ratchet up their procedural and substantive standards and to ensure only trustworthy schemes are employed.

Also at the Member State level, use of VSS results in an extent of legal review of private standards. Different from cases of EU use of VSS, here Art. 34 TFEU is always applicable on the VSS itself, but arguably only in cases where the national legislator requires compliance with one VSS in order to market products on its territory, and which ends up having a gate-keeping power on the Member State's market. However exceptional this situation may be, it would anyway result in a great deal of substantive review over a private body. Which standards of review would the Court employ is a question left open from *Fra.bo*, where the Court simply held that the activity of a private standard-setters hinder market access, and did not proceed in its analysis. As suggested in Section 2.3.3, also in this case, a light-touch review may be appropriate.

4. Conclusion

A catching-up process with private regulation and VSS is very noticeable under EU law. At the general level, the practice of the CJEU expands the application of certain fundamental freedoms to private bodies and subjects them to the principles of non-discrimination and proportionality and the prohibition of restricting market access. More specifically, a host of EU regulatory instruments have the effect of coordinating and influencing VSS and harness their potential for the extraterritorial regulation of certain phenomena, or as a means to demonstrate regulatory compliance. Both instances well illustrate how public authorities claim, if partially, their influence over transnational private regulation and exercise supervision over the provision of global public goods in the form of transnational regulation. Both instances also offer, at varying extents, solutions to address and remedy market barrier effects and consumer confusion generated by VSS. This Chapter shows that the current underdevelopment of case-law under Art. 34 TFEU seems to point towards a lack of direct horizontal effects which would exclude its application to VSS. From a more normative vantage point, however, Art. 34 TFEU could offer a (limited) margin of manoeuvre to be applicable to VSS. Conversely, certain EU regulatory instruments are already capable of coordinating and influencing, albeit at varying extents, VSS' activities. The above suggests that scheme holders should ensure compliance with the mostly procedural requirements laid down therein, in order to take advantage from such interactions with EU authorities.

Section 2 attempts to answer the vexed question of the horizontal application of the Treaties' freedoms and of Art. 34 TFEU in particular. A superficial review of case-law

seems to indicate that VSS are excluded from the scope of Art. 34 TFEU as they cannot be considered as public measures - not even under the expansive tests the CJEU has at times made use of. The employment of Art. 34 TFEU as a tool to address VSS appears therefore precluded. A deeper and more systemic approach reveals, instead, that the outcome may not be so clear-cut. A framework which explains the Treaty freedoms as protecting from third-party interference in contractual preferences shows that sectoral VSS and multi-stakeholder VSS which are *de facto* non voluntary are possibly covered by Art. 34 TFEU. In line with this approach, a more normative framework hinging on whether private bodies can obstruct market access in a manner similar to Member States shows that company, sectoral and multi-stakeholder VSS are possibly covered by Art. 34 TFEU - provided that they constitute essential condition to enter a market. The two frameworks, one originating in literature, the other in the doctrinal reasoning of Advocate General Maduro, overlap to a great extent, as a VSS which is *de facto* mandatory is likely to be an essential condition for market access. It is further unlikely that company VSS can acquire a market gate-keeping role in the absence of Member State's empowerment or delegation.

The application of Art. 34 TFEU to private standards, especially quality standards which design rules more stringent than those applicable, is harbinger of thorny issues. This Chapter therefore puts forward a normative substantive test and a framework for justification to be employed by VSS. A transposition of the market access test as it is, is likely to result in VSS being *prima facie* in breach of Art. 34 TFEU. This Chapter submits that a different substantive test looking at variations in producer welfare would better gauge the pro-trade and pro-integration effects on the one hand, and the anti-trade and anti-integration effects of private standards on the other. The same would also hold true for VSS. An economic test would be a more suitable device to weed out restrictive, coercively imposed or even protectionist VSS from legitimate ones. Courts, and the CJEU is no exception, are however not well positioned to delve too deeply into economic analysis. Following a 'traditional' approach to market access, VSS which fall under the scope of Art. 34 TFEU are therefore *prima facie* in breach if even just a producer is *de facto* completely prevented from marketing in a given territory. Admittedly, this is a rather extreme scenario. It could be determined for multi-stakeholder schemes by very strong consumer preference, for sectoral schemes by mandatory compliance with a set of standards within an organisation's self-regulation prerogatives and for company schemes by the presence of monopolist-like market shares.

If private autonomy is to be ensured, a margin of manoeuvre must be granted to VSS covered by the Treaty provisions. If flexibility cannot be granted at the stage of the substantive application of Art. 34, as case-law seems to suggest, then it has to be accommodated at the justification stage. However this generates legal uncertainty and unpredictability. Multi-stakeholder schemes in the possession of a collective governing

role functionally aligned with that of public authorities should be permitted to resort to public policy justificatory grounds. They should also be excluded from a mutual recognition obligation as it is applied to public measures not to hamper experimentation in regulatory approaches. For sectoral and company schemes displaying a prominent economic objective, the fundamental right to conduct a business would be applicable. Sectoral VSS showing notable similarities with self-regulation may be justifiable under the imperative requirement to ensure the proper functioning of a sector, which could arguably include also the need to set certain quality requirements for products. The assessment of proportionality would then appraise a restriction to market access against either a public policy ground, or a 'private' justificatory ground in the form of the fundamental right to conduct a business. In both cases, the assessment is unpredictable and further complicated by the fact that VSS go beyond the requirements which would normally be applicable. One may even conceive of a very light-touch review which simply considers the procedural requirements under which the body at hand operates.

This normative scenario results in limited consequences for VSS. The application of Art. 34 TFEU to private parties is likely to imply several thresholds: a personal threshold (i.e. a *de facto* mandatory character, or the indispensability of compliance of a VSS to market), a substantive threshold (i.e. the impossibility to market a product), and a justification threshold (which appraises the restriction against the objective of the scheme or a fundamental right). These three thresholds considerably restrict the number of VSS which are covered by the personal scope, the substantive scope and which, finally, cannot be saved by derogations. After all these steps, which types of VSS would be considered as in breach of Art. 34 TFEU? Not many.

Arguably, direct discrimination cannot be tolerated for multi-stakeholder VSS which are popular and sought-after by consumers. To include also indirect discrimination may seem logical, but the important caveat is that this would have the effect of turning into a *prima facie* breach of internal market rules environmental schemes addressing emissions which account also for transportation emissions - provided, of course, that the personal threshold has been met. This may not necessarily be a bad outcome, given the often misleading character of those claims. To cover also cases of non-discriminatory restrictions to market access would go against the very concept of quality standards. Since a fundamental freedom cannot consist of a separated non-discrimination right and market access right, then restrictions arising from a multi-stakeholder VSS are *prima facie* infringements, but justifiable. However, a restriction would be deemed to occur only when a producer cannot market *at all* its products in a given Member State. For sectoral and company schemes, the crucial threshold is the personal one. It is rather unlikely that, under the current market structure in the EU, any company possesses an economic power such as to prevent access to the market in the same manner as the State does. It may be more likely to occur for sectoral

schemes. Also in such case, direct and indirect discrimination are less likely to be condoned, whereas restrictions should be justifiable under contractual freedom.

The above describes a situation under which very few VSS can result in breach of Art. 34 TFEU, which possibly include only schemes essential to enter a market with a more or less explicit protectionist effect. To link Court review to the indispensability of a scheme seems reasonable and appropriate to ensure private autonomy. Nevertheless, these high thresholds would have the effect that the majority of VSS would still operate entirely below the radar of Court review. Even a normative test designed to turn Art. 34 TFEU into a horizontally applicable provisions cannot tackle successfully trade barrier effects and consumer confusion generated by VSS by means of legal review. It would, at best, address discrimination by private schemes which are indispensable for market access.

Section 3 studies a host of EU secondary rules which influence VSS and the extent of coordination, influence and review that such measures exercise on the schemes. The specificities of the measure in question determine the actual extent of coordination, influence and/or review of VSS. Certain closer forms of interaction, such as EU use of VSS, result both in: coordination of regulatory effects; influence on the procedures and the substance of the schemes which are recognised; control by the Commission of whether requirements are complied with; and even Court review of the VSS body's compliance with good administration principles. Less structured interactions which do not involve recognition of a VSS can also generate several consequences for the standards at hand. Facilitation arrangements can coordinate regulatory effects when schemes are used, for example, to demonstrate compliance with contracting authorities' specifications under the public procurement Directives, or to verify compliance with the rules applicable in the country of origin of timber products under the FLEGT scheme. Facilitations can either affect substance, such as harmonisation resulting from the organic products Regulation, or procedures, such as the meta-rules of the public procurement Directive. Review and control is limited to the selection of a VSS as a possible tool to fulfil the objective of the measure at issue. This occurs in the public procurement Directive, where the onus of selecting schemes which can be employed falls on contracting authorities.

It seems that at least in some specific domains EU public authorities have already recognised the desirability of the employment of VSS. The legal structures of the specific interactions here considered also seem to provide an opportunity to ratchet up procedures and substance of the schemes, and ultimately improving their effectiveness while minimising their negative consequences. This means that EU regulators may find it desirable to extend some of the features of such interactions to other schemes and other domains. It should nonetheless be done properly. Firstly and very importantly, EU regulators should lay down detailed requirements for recognition,

on which they should then exercise real and accurate control. This would protect the regime from legal challenges, and ensure that the schemes recognised are actually suitable for the purpose of their employment.

The requirements imposed should be closely aligned to international law provisions, in particular the TBT Code of Good Conduct for private standards which will be addressed in Chapter 5 and 6. None of the legal instruments here reviewed provide that the schemes recognised must be no less trade restrictive than necessary; the RED does not even provide that the schemes recognised must not be discriminatory. Both discrimination and unnecessary trade-restrictiveness, as it will be seen, are the cornerstone of the TBT Code, the compliance with which by private standards must be ensured by WTO Members. Regretfully, certain EU regulatory measures fail altogether to specify requirements for VSS. This is the case of the non-financial reporting Directive. Given the diversity of the schemes which companies can employ, credible reporting requires credible means employed for that purpose. Further, the obligations deriving from WTO law may require a closer control on private standards with which legally structured relations are established.

Harmonisation, especially by setting baseline requirements, can in theory be a powerful tool to diminish consumer confusion and trade barrier effects of VSS. It may however come at the cost of hindering experimentation of regulatory approaches. Regulators should in any case consider whether areas other than organic products and 'green' product claims are worthy of harmonisation. The Commission has recently done so in the domain of sustainable fishery standards.[217] Public procurements are a powerful tool to increase the employment of VSS and to successfully influence their requirements, as demonstrated by the case of forestry certification. It appears desirable that contracting authorities are offered the possibility to employ a larger number of VSS, including also those addressing management practices in the domain of sustainability which are, as of now, precluded from being employed. Generally, the employment of VSS in more legal instruments and the resulting allocation of regulatory effects could be fruitful. Schemes along the lines of FLEGT could be extended to different supply chains exposed to the risk of illegal gathering and harvesting, so that other ranges of private schemes could be employed to demonstrate compliance. Possibly, EU legislators could even consider forms of employment of VSS in its trade agreements to verify compliance with their social and environmental chapters.

At the Member State level, use of VSS is confronted with the competence constraints of EU law. Therefore, VSS can only be employed in the limited case of demonstrating compliance with products which would not be marketable without certification under

[217] Commission Report COM(2016)263 final on options for an EU eco-label scheme for fishery and aquaculture products.

EU or Member States' requirements in an area not subject to harmonisation. The situation is, however, theoretical, as no such cases of Member State use of a VSS could be found. Coordination would arise as a consequence of the scheme's employment as a means to verify compliance. Influence would be possible if the Member State sets requirements for recognition of the standards. Notably, review by the CJEU could be rather intrusive - arguably comparable to that which would be exercised towards the measure of a Member State - in case one single scheme is selected and it therefore ends up exercising market gate-keeping prerogatives.

From the perspective of VSS, the regulatory instruments described in Section 3 show the importance of certain procedural requirements in the standard-setting if the scheme is to benefit from the interaction with public authorities. Each measure may lay down specific substantive requirements for schemes; nevertheless, there is a common preference for procedural features of good administration, however generally framed. In the first place, the auditing should be performed by an independent third-party. Transparency in the standard-settingand its openness to a host of different interest are of paramount importance. There are, however, different stages of the standard-setting which should be open and over which transparent access to information should be ensured from the very early stages of agenda-setting to the implementation of the scheme. For the operationalisation of this principle, standard-setters could comply with meta-rules such as the ISEAL Code. At any stage, standard-setting should not be discriminatory, nor open to regulatory capture by vested interests. A common thread to many regulatory instruments is the need to ensure that the schemes employed are reliable and trustworthy. It requires that the claims made by VSS are objectively verifiable, and should not give the impression to bring about certain effects whereas, in fact, they do not.

All in all, this Chapter shows that VSS do not operate in a legal vacuum under certain provisions of EU law. Certain regulatory measures, under specific conditions, can be suitable and effective to 'regulate' VSS. Conversely, the application of Art. 34 is undermined by structural problems. These include the role of fundamental rights in affecting its scope, and a market access test which focuses on the existence of a trade barrier as the only effect to trigger a *prima facie* breach, and does not permit an appraisal of other effects until the justification stage. Even at that stage, positive effects, for example environmental benefits, are accounted for rather loosely through an arguably deferential proportionality test. Further, Art. 34 TFEU does not allow overall pro-trade effects from being considered at all at any stage of the legal analysis. Although it has the advantage of being more easily enforceable by private applicants than competition rules, Art. 34 TFEU thus constitutes a rather blunt device which prevents a comprehensive evaluation of the effects of a scheme. The next Chapter turns to the analysis of whether EU competition law's legal tool box could be more suitable in assessing the combination of different effects of a scheme, which include

pro-trade and anti-trade consequences, as well as a scheme's contribution to its objective.

Chapter 4
VSS in the internal market
Competition law rules

1 Introduction

While the freedom of movement provisions discussed in Section 2 of the previous Chapter have an effect of preventing fragmentation of regulatory regimes, EU competition rules can be conceived as pushing towards decentralisation of (private) regulatory approaches and even regulatory competition in the interests of consumers.[1] Cartels represent an important tool of transnational regulation which transcend the market-based jurisdictional reach of public regulation.[2] In spite of such transnational features, EU competition law nonetheless applies by virtue of an effect-type doctrine whereby the implementation of an agreement in the EU suffices to trigger competition scrutiny.[3]

A common element between the three types of VSS is a minimal, if absent, role of the State and the presence of business operators or undertakings in the standard-setting. The resulting standard can thus be construed as an agreement between undertakings in the meaning of EU competition law. The regulatory rationale behind VSS schemes, however, differs considerably. As shown in Chapter 2, in spite of the common presence of an extent of contribution to public goals, VSS' rationale can be construed on a continuum between regulatory and economic goals. It ranges from encompassing markedly regulatory intentions for multi-stakeholder VSS, to self-regulatory goals for sectoral VSS and to mostly economic objectives for company VSS. All these three situations do not exclude *per se* the application of competition provisions, albeit different considerations may be relevant whenever an agreement pursues also non-economic objectives.

It is very important to investigate the potential application of competition law to VSS. Such schemes directly affect market parameters which are routinely under the scrutiny of competition authorities, competition itself, but also product quality - for example in the form of social and environmental product features - and, of course, prices. The implementation of a scheme may or may not generate certain efficiencies on a EU market both for producers and - most importantly - for consumers. By providing products that conform to consumers' tastes, VSS directly enhance consumer welfare. Cartels can also correct externalities and market failures. By providing information by means of labels about hidden product features, VSS empower consumers to make

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1 Marenco, G. (1987) Competition between national economics and competition between business - A response to Judge Pescatore. *Fordham International Law Journal* 10(3), 420-443.

2 Maher, I. (2011) Competition law and transnational private regulatory regimes: Marking the cartel boundary. *Journal of Law and Society* 38(1), 119-137.

3 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. See also Geradin, D., Reysen, M., Henry, D. (2011) 'Extraterritoriality, comity, and cooperation in EU competition law'. In Guzman A.T. (Ed.) *Cooperation, comity, and competition policy*. Oxford: Oxford University Press, 22-54; Wagner-von Papp, F. (2012) 'Competition law and extraterritoriality'. In Ezrachi, A. (Ed.) *Research Handbook on international competition law*. Cheltenham: Edward Elgar, 21-60.

informed purchase decisions, and allow a market for sustainable products to function. Effective, non-discriminatory and proportional VSS also pursue fundamental policy objectives which are aligned to the public interest and at the same time may have a positive impact on market parameters and on the welfare of consumers, such as environmental, social and consumer protection. Under certain conditions, restrictive agreements between undertakings can either be excluded altogether by competition rules if in the pursuit of national or EU public interest goals or, more relevant for our case, be justifiable because they generate net positive efficiencies.

VSS can however also impact negatively on competition in many ways. As a starting point, trade barrier effects and consumer confusion may have repercussions on market parameters, especially on competition, and on consumer welfare. In the most straightforward scenario, a scheme is established with the purpose of excluding certain competing, possibly foreign, products from the market. Such a protectionist standard, arguably, often generates considerable inefficiencies to result in breach of competition provisions. Alternatively, a scheme may discriminate against specific producers with a similar negative outcome in terms of efficiencies.

Unfortunately, the situation is not always clear-cut. The case of food-miles labels offer interesting grounds for discussion. Studies have found that producers in developing countries will not qualify for the label in EU markets, or will be severely penalised by it as clearly the transport carbon emission per unit is much higher than for local products. However, the overall carbon emission during production and transport combined is much lower than that of EU products, due to the more extensive and less mechanised production methods.[4] Another example is private food standards concerning health and safety, and environmental and social impact required by sectoral associations of retailers on food producers. The stringency of the standards is questionable and not always associated with clearly defined risks or sound risk assessment procedures. Their effect is therefore the prevention of market access to producers that are otherwise price and quality-competitive. Consumer confusion is a closely connected phenomenon, which arises because of the appearance of several schemes making the same claim. Even more confusion is created by the proliferation of several initiatives making *slightly different* claims, which could counter the possible efficiencies these instruments generate.[5]

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[4] See generally Smith, A., Watkiss, P., Tweddle, G., McKinnon, A., Browne, M., Hunt, A., Treleven, C., Nash, C., Cross, S. (2005) The validity of food miles as an indicator of sustainable development. Final report produced for the Department of Environment, Food, and Rural Affairs. Available at http://webarchive.nationalarchives.gov.uk/20130131093910/http://www.defra.gov.uk/statistics/files/defra-stats-foodfarm-food-transport-foodmiles-050715.pdf.

[5] Eilperin, J. (2012, April 23) Some question whether sustainable seafood delivers on its promise. *Washington Post* Available at http://www.washingtonpost.com/national/health-science/some-question-whether-sustainable-seafood-delivers-on-its-promise/2012/04/22/gIQAauyZaT_story.html?wpisrc=emailtoafriend. For a recent instance on the Dutch press see 'Nederlander weg kwijt in woud duurzaamheidskeurmerken' online at http://nos.nl/artikel/2006000-nederlander-weg-kwijt-in-woud-duurzaamheidskeurmerken.htmlRecent.

Understanding how the interplay between VSS and competition rules unfolds is crucial not just for the purpose of this research. Competition authorities are striving to elaborate satisfactory and coherent approaches to deal with agreements between undertakings which also pursue public goals, and whose choice may have potentially inhibiting consequences for private regulation. Two main approaches are possible, which have spurred a considerable debate in scholarly literature. An economic perspective either limits the analysis to a strict neoclassical economic approach[6] or, more broadly and more popularly, takes a wider understanding of accountable efficiency.[7] Another view holds that agreements necessary for pursuing public goals can be excluded altogether by competition scrutiny.[8] Social, and especially, environmental agreements have elicited discussion both among academics and practitioners about the proper competition approach towards them.[9]

This Chapter aims at investigating the extent of review which can be exercised on VSS by means of EU competition law enforcement. It starts from the assumption, grounded on solid empirical evidence, that some VSS may have widespread negative effects on market parameters, structurally affect competitive conditions on the market and generate distributional concerns. It therefore does not further elaborate normatively on whether undertakings are legitimised to restrict competition to pursue public goals, and to what extent. Nonetheless, a margin for economic operators to pursue goals other than economic ones must be permitted and should be operationalised by means of a broad economic approach to accountable efficiencies. The aim of the Chapter is limited to showing under which conditions infringements of EU competition law may occur and to understand the extent to which competition enforcement could contribute to lessen market access concerns and consumer confusion generated by VSS. The Chapter also suggests a normative approach to ensure that market access

Eurobarometer surveys report that 48% of consumers claims that environmental standards are not clear and a mere 6% of EU citizens trust producers' claims regarding environmental attributes of their products. See http://ec.europa.eu/environment/eussd/smgp/ facts_and_figures_en.htm.

6 Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01; Kjølbye, L. (2004) The new Commission Guidelines on the application of Article 81(3): An economic approach to Article 81. *European Competition Law Review* 25(9), 566-577; Odudu, O. (2006) *The boundaries of EC competition law. The scope of Article 81*. Oxford: Oxford University Press.

7 Townley, C. (2009) *Article 81 EC and publicKing policy*. Oxford: Hart Publishing; Casey, D.K. (2009) Disintegration: Environmental protection and Article 81 EC. *European Law Journal* 15(3), 362-381; Kingston, S. (2012) *Greening EU competition law and policy*. Cambridge: Cambridge University Press.

8 Mortelmans, K. (2001) Towards convergence in the application of the rules on free movement and competition? *Common Market Law Review* 38(3), 613-649; Monti, G. (2002) Article 81 EC and public policy. *Common Market Law Review* 39(5), 1057-1099.

9 Townley, C. (2009) *Supra at 7*; Casey, D.K. (2009) *Supra at 7*; Lavrijssen, S. (2010) What role for national competition authorities in protecting non-competition interests after Lisbon? *European Law Review* 35(5), 636-659; Kingston, S. (2012) *Supra at 7;* Report from the Nordic Competition Authorities (2010) Competition policy and green growth, Interactions and challenges. Available at http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pmyhteisraportit/ competition-policy-and-green-growth.pdf; Autoriteit Consument & Markt (2014) Vision document. Competition and sustainability, 8-9. Available at https://www.acm.nl/en/publications/ publication/13077/Vision-document-on-Competition-and-Sustainability/.

and consumer confusion can be properly caught by the legal tests under EU competition rules, without undermining the contribution to public goals made by VSS. It will also illustrate the means by which EU competition law may exercise an extent of influence on the procedures employed by VSS bodies, as the Commission grants EU competition immunity to voluntary standards drafted by means of a transparent and unrestricted standard-setting procedure.

The main focus of this Chapter is on Art. 101 TFEU and follows the approach and standard of review outlined by the European Commission, mindful that the enforcement of competition rules by national competition authorities (NCAs) may differ. Throughout this Chapter it will be seen that especially for certain types of instruments, the lack of positive efficiency generated by informing consumers may on occasions have the effect of complicating the justification of their restrictive effects on competition. This holds particularly true if a narrow approach to accountable positive efficiency is adopted, as supported by the Commission. Enforcement of EU competition law against certain VSS could therefore be a tool to review schemes that, among other negative effects, unduly hinder market access. Also confusion generated by the proliferation of several schemes, and the mismatch between claims made and consumer perceptions, is a matter that could be tackled through competition law's approach to efficiencies. Labelling schemes generate positive efficiency insofar as they provide information to consumers, ensure that products whose features correspond to consumer taste are brought to the market and, by permitting producers to set the correct price, contribute to market functioning. In case of a discrepancy between the claim made by a scheme and its impact considered in terms of efficiencies, competition law could be a possible legal tool to overturn certain VSS to the advantage of more effective ones.

This Chapter starts from the assumption that potentially all VSS are under the scrutiny of competition law. Section 2 discusses the application of Art. 101 TFEU to VSS. It begins by demonstrating the applicability of competition rules to the schemes in Sections 2.1. Standard-setting bodies can be considered associations of undertakings, and the resulting standard can be considered as a decision; in the alternative, the standard can be seen as an agreement between undertakings. Specifically, multi-stakeholders and sectoral VSS are horizontal agreements, whereas company VSS are to be assessed separately as vertical agreements entered into between a retailer and a supplier. Standardisation in the domain of sustainability constitutes an economic activity to which competition rules apply. Section 2.2 discusses the possibility to exempt agreements in the public interest from the scrutiny of competition law. Section 2.3 then discusses restrictions to competition generated by VSS within the framework of the Commission Guidelines on horizontal agreement, which also identifies safe harbour requirements for standardisation agreements. Restrictions to competition which may be generated by horizontal VSS schemes are discussed with the assistance

of economic literature over the effects on competition and market parameters of different types of schemes. Section 2.4 discusses positive efficiencies generated by VSS according to the approach to efficiencies and public policy objectives followed by the Commission. Finally, it concludes by attempting to balance positive and negative effects on competition in order to show which VSS are more problematic under Art. 101 TFEU. Section 2.5 discusses briefly company VSS as vertical agreements. Section 3.1 and 3.2 respectively address exploitative and exclusionary abuses for VSS under Art. 102 TFEU, under the assumption that a VSS body may be considered as an undertaking on its own. Section 4 investigates the possibility of exempting from competition law scrutiny a Member State's legislation recognising a VSS scheme for legislative and regulatory purposes, i.e. a case of public use of VSS. Section 5 concludes the Chapter.

2 VSS under Art. 101 TFEU

Art. 101 TFEU prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Such agreements are considered to be automatically void. Agreements which contribute to efficiencies, technical or economic progress, and at the same time provide consumers with a fair share of the resulting benefit, are exempted by the prohibition provided that the restrictions to competition are indispensable to achieve those objectives and competition is not eliminated in respect of a substantial part of the products in question.

This Section follows the logical analytical structure determined by the letter of Art. 101 TFEU. However, the analysis of VSS within a competition law framework also requires addressing a number of disputed issues, which are touched upon at several junctures within Section 2. Firstly, certain agreements between undertakings, by virtue of their objectives, can either be excluded altogether by competition review or can be considered as not restricting competition. These two related topics will be addressed respectively in Sections 2.1.1 and 2.2. Secondly, the role which concerns other than competition and public policy objectives can play in the justification of a restrictive agreement is addressed in Section 2.4.1. Also the relation between standard-setting and EU competition law bears a close connection to the subject matter of this dissertation. The competition law treatment of European Standardising Bodies (ESBs) is addressed in Section 2.1.1 and in Sections 2.3.3 and 2.3.4. The related requirements for competition immunity of other standard-setters determined by the Commission are discussed in Section 2.3.4.

2.1 VSS and economic activity

The first step in the assessment under Art. 101 TFEU concerns the presence of an agreement between undertakings or a decision of an association of undertakings. For the moment, company VSS will be set aside and will be addressed in Section 2.5. Sectoral and multi-stakeholder schemes are drafted by undertakings. Both types of standards are set and approved by specific bodies within an organisation, whose composition could vary from case to case and may not exclusively consist of business representatives. Standards may thus be drafted and approved by bodies which, in spite of the presence of undertakings, do not always clearly exercise economic functions. While it is rather uncontroversial to consider company VSS as grounded on economic motivations, Section 3 of Chapter 2 highlighted explicit regulatory and self-regulatory objectives, respectively for multi-stakeholder and sectoral VSS. Indeed, the fact that in many cases standards are sold on what arguably constitutes a market for sustainability standards, it at least mitigates the unfettered regulatory claim made by certain schemes, and brings to the fore the presence of economic activity by the VSS body at hand. On the other hand, the objectives pursued by VSS are often in consonance with the public interest. Generally, private regulation and standard-setting could be considered as activities in the public interest, provided that certain conditions are met. Is it possible to conclude that all VSS are covered by the scope of Art. 101 TFEU and also, provided that they exercise a dominant position, of Art. 102 TFEU?

2.1.1 Standard setting as an economic activity

Similarly as under the four freedoms,[10] in order to determine whether EU competition rules are applicable, a functional approach is employed. This looks at the activity rather than at the private or public character of the body carrying out that activity. Under a functional approach, competition rules apply to all activities concerning market participation, whereas freedom of movement rules apply to activities involving market regulation.[11] The latter activities include functions connected with the exercise of the powers of a public authority.[12] As at least certain VSS have been framed in Chapter 2 as possessing strong regulatory features, it is relevant to discuss whether, under certain conditions and circumstances, multi-stakeholder VSS may be excluded

[10] See discussion in Section 2.2.1 of Chapter 3. The choice of a functional approach is a consequence of the presence of public/private divide in the Treaties - whereby Treaty freedoms apply to State measures and competition law to the conduct of private parties - which is not reflected in a similarly clear divide in the real world.

[11] Sauter, W., Schepel, H. (2009) *State and Market in European Union law: The public and private spheres of the Internal Market before the EU Courts*. Cambridge: Cambridge University Press, 79; Odudu, O. (2010) The public/private distinction in EU internal market law. *Revue Trimestrelle de droit Européen* 46(4), 831-834.

[12] C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, para. 57.

from competition purview as they may be considered as exercising functionally equivalent forms of public authority.

Can certain tasks like standard-setting constitute economic activity even if regulation is involved or if they are perceived as possessing a strong regulatory rationale? The companies participating in the management of the schemes and setting the standards constitute undertakings.[13] For sectoral and multi-stakeholder VSS in particular, however, while contemplating the presence of undertakings in the standard-setting at varying degrees, the resulting standard may not be drafted and approved exclusively by business representatives. If the agreement is concluded by a body whose composition does not only include business representatives, the composition of the body is not determinative for its qualification as association of undertakings for the purpose of EU competition law.[14] An association of undertakings may however also perform non-economic activities which are not subject to Art. 101 TFEU.[15] It is therefore necessary to separate between possible economic and non-economic activity undertaken by such a body[16] and assess whether standard-setting itself could constitute an economic activity.

A task in the public interest or generally activities in the exercise of powers typical of those of a public authority are not considered by the Court to fall within the domain of economic activity and are therefore excluded by the application of competition law.[17] It is thus important to appraise whether social and environmental standard-setting taking place in highly proceduralised and 'democratic' fora could be considered as an activity typical of public authority, which would exclude VSS from the scope of EU

[13] The definition of undertaking, which has the same meaning under Art. 101 TFEU and Art. 102 TFEU, revolves around the fundamental element of economic activity. C-41/90 *Hofner and Elser v Macroton GmbH* [1991] ECR I-1979, para 21. In *Pavlov*, the Court clarified that any activity consisting of the offer of goods or services on a given market constitutes economic activity. See Joined Cases C-180/98, 181/98, 182/98, 183/98 and 184/98 *Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, para 75. The assessment of whether an activity possesses economic character, looks at whether, *in principle*, it could be carried out by a private undertaking with the view to make profits. (Opinion of AG Jacobs in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband and Others* [2003] ECR I-02493, para. 28). The activity does not necessarily have to be performed in return for an economic contribution; it suffices that it could theoretically be performed under a system of competition. The lack of profit-seeking or economic purpose in a specific case does not mean that the activity is not economic.

[14] See Joined cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 *API - Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti and Ministero dello Sviluppo Economico* [2014] ECR I-0000, para. 113. Arguably, the outcome would differ in case the majority of the members of the association with the power to take decisions would include public officials, and a Member State would specify public interest criteria. In the presence of economic activity it is however irrelevant whether the composition of a VSS body includes even a majority of public (or, generally, non-business) officials. This seldom happens, as industry is present virtually in all VSS bodies. If a VSS body does not foresee industry participation at all, the resulting standard cannot be qualified as a horizontal agreement between undertakings. The extent of competition review would be limited to Art. 102, provided that the VSS body has a dominant position on the market for sustainable standards.

[15] C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, paras. 50-71; C-1/12 *Ordem dos Técnicos Oficiais de Contas* [2013] ECR I-000, paras. 39-59.

[16] C-49/07 *MOTOE v Elliniko Dimosio* [2008] ECR I-4863, para 25.

[17] C-343/95 *Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA* [1997] ECR I-1580 paras. 22-24.

competition law.[18] The performance of a public task or a task in the public interest is required to exclude a private body from Art. 101 TFEU.

A public task constitutes part of the essential functions of the State.[19] Such functions have not been listed by the Court, but seem to include tasks intimately associated to the State such as fiscal administration, justice, and security and also more expansively, goals such as supervision and control of the air space[20] and the protection of the environment.[21] The assessment of the CJEU is however not limited to the nature of the activity, but also includes aims and the rules to which it is subject, and in particular if the undertakings operate in compliance with rules laid down by public authorities.[22] The Court's treatment of Eurocontrol in *SAT* is illustrative of the rules to which a body shall be subject. In his Opinion, AG Tesauro discussed the control activities of Member States over Eurocontrol's tasks, specifically concerning its ability to independently dispose of the capital in its possession. It was found that Eurocontrol had no financial independence in the absence of agreements from the States which established it. Therefore, also the rules to which Eurocontrol was subject were connected to the exercise of public authority.[23] This approach was confirmed by the Court.[24]

Different types of standards can be found on the market, of which EU technical standards represent a particular group which defines product characteristics and health and safety requirements under a Commission mandate and give rise to a presumption of conformity with EU product Directives. Before the major overhaul of the system introduced by Regulation 1025/2012, it was held that, in spite of the official character bestowed on European Standard-Setting Bodies (ESBs) by EU legislators, technical standard-setting carried out by ESBs could not benefit from an exemption on the ground that they exercise tasks typical of those of public authorities.[25] The Commission does believe that EU technical standard-setters such as CEN are entrusted with a task in the public interest. Nonetheless, to the extent that the technical committees responsible for standards development are composed of industry representatives, competition law becomes applicable.[26] Procedures also

[18] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 258.

[19] *Ibid*.

[20] Opinion of AG Tesauro in Case C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1993] ECR I-45, para. 27

[21] C-343/95 *Diego Calì & Figli Srl v Servizi Ecologici Porto di Genova SpA* [1997] ECR I-1580 para. 23.

[22] Opinion of Advocate General Cosmas in C-343/95 *Diego Calì & Figli Srl v Servizi Ecologici Porto di Genova SpA* [1996] ECR I-1549, para. 42.

[23] Opinion of Advocate General Tesauro in C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1993] ECR I-45, para 12.

[24] C-364/92 *SAT Fluggesellschaft v Eurocontrol* [1993] ECR I-43 paras. 28-31. The criteria of nature, aims, and rules are quite undefined, and it has been observed that they may offer a certain margin of manoeuvre for undertakings aiming to be exempted from competition rules by claiming to be acting in the public interest. See Sauter, W., Schepel, H. (2009) *Supra at 11*, 85.

[25] Schepel, H. (2005) *The constitution of private governance. Product standards in the regulation of integrating markets*. Oxford and Portland: Hart Publishing, 315.

[26] The Commission makes that explicit in Commission Decision COMP/F-2/38.401 *EMC/European Cement Producers* [2005] D/205249, paras. 73-74.

matter. The regime pre-Regulation 1025/2012 was rather problematic *vis-à-vis* its criteria for delegation of powers and executive control; according to some scholars it even constituted an illicit form of delegation.[27] Limited procedural control from public authority would not suffice for ESBs to be considered as carrying out tasks typical of public authority.[28]

The Commission in its 2010 Guidelines on Art. 101, takes the explicit position that technical standard-setters recognised under Directive 98/34/EC are subject to competition law to the extent that the standard-setting body is an undertaking or an association of undertakings within the meaning of Art. 101 and 102 TFEU.[29] This is in spite of the fact that ESBs' standards are a peculiar group of standards with a particularity close connection to the EU rule-making process. The practice of the Commission has addressed a number of technical standards drafted by sectoral organisations, consortia, and private entities outside the EU system of standardisation without excluding the standards in question by means of a public authority argument.[30] Private standard-setting has been addressed also by the Court, for the first time in *SELEX*. There, the standard-setting activities of the body in question - Eurocontrol, an international organisation - were found by the General Court not to constitute economic activities.[31] Such a finding must however be put in the right perspective considering the specificity of the case. The General Court concluded that standard-setting activities of Eurocontrol in that specific case did not constitute economic activity, not because the body was in the exercise of public authority, but

[27] Joerges, C., Schepel, H., Vos, E. (1999) The law's problems with the involvement of non-governmental actors in Europe's legislative processes: The case of standardisation under the 'New Approach'. EUI Working Paper LAW No.99/9, 26 and the literature referred to therein.

[28] An argument could be made that the extent of legalisation brought into the regime by Regulation 1025/2012, with the presence of legal acts at several critical junctures of the standard-setting such as the definition of the mandate - which now appears to take the form of a full-fledged delegation of regulatory powers - and the objection procedure, as well as the explicit Commission pre-emptive control over the publication of the standards in the Official Journal, aim to subject ESBs to the same rules public authorities are subject to, thereby excluding them from competition purview. It is therefore possible that technical standards drafted by ESBs could, in the future, be excluded altogether from competition rules. This outcome is a result of Regulation 1025/12 which appears to be turning technical standards into acts of the Union. In his Opinion in *James Elliot Construction*, Advocate General Campos Sánchez-Bordona held that standards drafted by ESBs are the result of 'controlled legislative delegation in favour of a private standardisation body', because of Commission's significant control over the procedures of drafting standards, their close connection to EU Directives, their adoption upon Commission's mandate, and their publication in the Official Journal from which stems a presumption of conformity with EU law for products in compliance with the standards. Further, adoption of the standards is financed and governed by EU law. See Opinion of Advocate General Campos Sanchez-Bordona in C-613/14 *James Elliott Construction Limited v Irish Asphalt Limited* [2016] ECR I-0000, paras. 42-63.

[29] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para 258.

[30] Commission Decision IV/31.458 *X/Open Group* [1987] L 35/36; Commission Decision IV/35.691 *Pre-insulated pipe cartel* [1998] L 24/1; see also Commission Decision COMP/F-2/38.401 *EMC/European Cement Producers* [2005] D/205249 for a determination of the circumstances under which standard-setting does not normally give rise to competition concerns, as Section 2.3.4 discusses. Under Art. 102, more recently, see Commission Decision AT.39939 *Samsung - Enforcement of UMTS standard essential patents* [2014] C(2014) 2891 final; Commission Decision AT.39985 *Motorola - Enforcement of GPRS standard essential patents* [2014] C(2014) 2892 final.

[31] Case T-155/04 *SELEX Sistemi Integrati v. Commission* [2006] ECR II-4803, para. 69.

because of the lack of a market for technical standardisation services in the sector of air traffic monitoring equipment.[32]

In general, for all cases of standard-setting, a market for standardisation is found, or the presence of undertakings in the standard-setting which do not operate under procedures typical of public authority (or, indeed often, both) is found. With respect to ESBs, as seen, it is the presence of undertakings that triggers the application of EU competition rules.[33] In such a case, the standard-setting body itself could be considered as an undertaking as well, to be subject to Art. 102 provided that its position is of dominance. For multi-stakeholder VSS, a market for sustainability standards exists, at least within certain domains.[34] Several schemes compete to attract new participants to the regime, which normally pay a fee to partake in the scheme and lawfully employ the scheme logo and the sustainability claim it includes. It is not relevant that the body adopting the standard, i.e. the VSS body itself, may not be the body that drafts the standard, which may be a committee of experts, a committee at a decentralised level, or a multi-chamber committee. *Adoption* of standards suffices to link a standard-setting body with economic activity. Conversely, if approval takes place by a body in the exercise of public authority, competition law will not be applicable even if standards are set by undertakings.[35]

Even conceding that goals pursued by certain VSS can be generally considered as aligned to the public interest and to the tasks performed by public authority - and assuming the lack of a market for standards - VSS would still not pass the EU competition test identifying whether a body is in the exercise of public authority. VSS' rules and procedures may, if particularly inclusive, present some resemblance to those of public authority. However, forms of state control are missing altogether. By definition VSS are entirely private, in the sense that, as seen in Section 4 of Chapter 2 and Section 3 of Chapter 3, the weak forms of contact with public authorities, where present, do not even remotely meet the test for delegation of powers under EU law.[36] It is therefore reasonable to consider also sectoral and multi-stakeholder VSS bodies

[32] Case T-155/04 *SELEX Sistemi Integrati v. Commission* [2006] ECR II-4803, para. 61. This is not surprising, as air-traffic control is the classic public good which can only be supplied in a situation of natural monopoly. It is essential that air-traffic control systems in different states are integrated and standardised, but at the same time it is not feasible that more than one air traffic control entity operates in a single territory. This prevents the creation of a market.

[33] As technical standards are sold by ESBs and national standardisation bodies, at least theoretically, also the claim that a market for technical standards exists could be made. See Koenig, C., Spiekermann, K. (2010) EC competition law issues of standard setting by officially-entrusted versus private organisations. *European Competition Law Review* 31(11), 451. The US system of standardisation shows that competition between technical standardising bodies is well possible. See Maher, M (1998) An analysis of internet standardisation. *Virginia Journal of Law and Technology* 3(5), 1522-1687.

[34] Reinecke, J., Manning, S., Von Hagen, O. (2012) The emergence of a standards market: Multiplicity of sustainability standards in the global coffee industry. *Organisation Studies* 33(3), 791.

[35] See Case T-155/04 *SELEX Sistemi Integrati v. Commission* [2006] ECR II-4803, para. 59.

[36] The situation may nonetheless differ for instances of interactions such as recognition, as Section 4 will elucidate.

to be in the exercise of economic activity. The same applies for sectoral standards which present a more markedly economic purpose. Since standard-setting in the domain of sustainability is likely to constitute economic activity, it does not matter whether the VSS is qualified as an agreement between undertakings or a decision of an association of undertakings.

2.1.2 Multi-stakeholder and sectoral VSS as horizontal agreements between undertakings or decisions of an association of undertakings affecting trade between Member States

Concerning the second requirement of scope in the application of Art. 101 TFEU, it is necessary that undertakings enter into an agreement or that an association of undertakings issues a decision. Very likely, a VSS would be considered as an agreement. Standards and the outcomes of standardisation process are considered as under the scope of the Guidelines on horizontal cooperation agreements.[37] In the case of VSS, where certification is employed to verify compliance and contractual arrangements between the scheme-holder and the entity seeking certification, the situation does not differ, since legal contracts qualify as agreements.[38] A VSS would also easily qualify as a decision of an association of undertakings. The non-binding character of VSS does not prevent the applicability of competition rules, as even non-binding recommendations are considered to be covered by the scope of Art. 101(1) TFEU, subject to the condition that it is common practice to follow them.[39]

As agreements with a limited impact do not fall by Art. 101(1) TFEU, an assessment of a potential *de minimis* character of VSS shall also be made. As a rule, for horizontal agreements which do not involve hardcore restrictions, if the aggregate market share held by the undertakings participating in the agreements is less then 10% of the relevant markets, then the agreement does not appreciably restrict competition.[40] The assessment must obviously be performed on a case-by-case basis. For sectoral VSS, where a majority, if not the totality, of undertakings in a given economic sector participates, it is rather unproblematic to consider the 10% threshold as met. For multi-stakeholder VSS, a greater degree of variation as far as industry participation can be observed. The popularity of the scheme is, in this case, strictly connected with the

[37] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 257.

[38] For a recent application see T-419/03 *Alstoff Recycling Austria v Commission* [2011] ECR II-0000, para 9.

[39] For example, a recommendation by an association of water-supply undertakings to its members suggesting that they do not connect to the water system dish-washers which were not bearing a certificate of conformity by the relevant certification body, was considered to be caught by the scope of Art. 101(1) TFEU. C-96/82 *IAZ International Belgium NV v Commission* [1983] ECR I-3369. Albeit VSS could also qualify as a decision of an association of undertakings, throughout this Chapter, the term agreement will anyway be employed to encompass also decisions of associations of undertakings.

[40] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*). [2001] C 368/07, para. 7.

possibility of finding that the agreement falls within the scope of Art. 101(1). Furthermore, if the relevant market is defined narrowly[41] and encompassing, for example, the market of a sustainable product, it is more likely that the agreement would fall outside the scope of the *de minimis.*

2.2 Exclusion from Art. 101(1) TFEU

Certain agreements between undertakings under the definition in Art. 101(1) TFEU can nevertheless be excluded from the application of EU competition law, by virtue of their special objective. This was the case in *Albany* and in the similar judgements of *Brentjens* and *Drijvende Bokken*.[42] Collective agreements in the social sphere aiming at improving working conditions are altogether excluded from the application of competition provisions, since the social policy objectives pursued by those agreements would be undermined by the application of Art. 101(1) TFEU.[43] The reasoning of the CJEU was based on the acknowledgement that the EU does not only have a policy to ensure undistorted competition, but also constitutionally pursues the harmonious development of economic activities and a high level of social protection in the EU territory.[44] A broad reading of the judgment is also possible to justify all agreements in the social sphere.[45] Nonetheless, the Court has been quite strict in the assessment of whether the nature and the purpose of the agreement justify the application of the exemption.[46]

This strictness can be seen as a sign of the constitutional nature of the *Albany* exception, i.e. based on a holistic interpretation of the Treaties, rather than on competition law.[47] In spite of its strictness, which does not allow its application outside the domain of collective agreements in the social sphere aiming at improving working conditions, a number of other policy objectives which are part of and included in a collective agreement might benefit from the exemption as well. Collective agreements addressing environmental concerns directly related to working conditions may also

41 See Section 2.3.2 for further discussion.

42 See C-67/96 *Albany International BV v Stichting Bedrijfpensioenenfonds Textielindustrie* [1999] ECR I-5751; Joined Cases C-115/97, C-116/97, C-117/97 *Brentjens' Handelsonderneming v. Stichting Bedrijfpensioenfonds voor de Handel in Beouwmaterialen* [1999] ECR I-6025; *Drijvende Bokken v Stichting Pensioenfonds voor de Vervoer-en Havenbedrijven* [1999] ECR I-6121.

43 C-67/96 *Albany International BV v Stichting Bedrijfpensioenenfonds Textielindustrie* [1999] ECR I-5751, para. 59.

44 C-67/96 *Albany International BV v Stichting Bedrijfpensioenenfonds Textielindustrie* [1999] ECR I-5751, paras. 53-55.

45 Monti, G. (2007) *EC competition law.* Cambridge: Cambridge University Press, 98.

46 To the extent that the slight difference between the sectoral pension fund in *Albany* and the occupational pension fund at issue in *Pavlov* was sufficient to deny the application of the *Albany* exception in the latter case. What mattered was the fact that an occupational pension fund is not concluded within the framework of collective bargaining. See Joined Cases C-180/98, 181/98, 182/98, 183/98 and 184/98 *Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451.

47 Vedder, H.H.B. (2003) *Competition law and environmental protection in Europe. Towards sustainability?* Groningen: Europa Law Publishing, 129; Sauter, W., Schepel, H. (2009) *Supra at 11*, 90-91.

benefit from the exemption.[48] This exemption would be of relevance for VSS only in the event social and/or environmental standards are inserted in collective agreements. Granted, VSS addressing social and labour practices may be drafted by representatives of both industries and trade unions which aim at improving working conditions. Normally, however, the aim of such an agreement would be the protection of workers *outside* the EU. The agreement would thus fail to qualify for the *Albany* exemption based on Articles 154 and 155 TFEU, arguably unless protection of workers outside the EU could be construed as a policy objective under Art. 3(5) TEU.[49]

More relevant for our subject matter, the CJEU has also exempted an agreement between undertakings from the scope of Art. 101(1) TFEU because the objective of the decision was aimed at protecting a public interest, albeit one not recognised in EU legal sources. The Court, most famously in *Wouters*, applied a so-called 'EU-style rule of reason'.[50] A decision of the Dutch Bar prohibiting lawyers from entering into registered partnership with accountants was found to be restrictive of competition - and also of the freedom of establishment. It was however conceded that a restrictive measure should be assessed in the light of its objectives under Art. 101(1) TFEU, in particular whether its restrictive effects are inherent in the pursuit of those objectives.[51] The decision was eventually found to be 'reasonably necessary' to ensure the proper practice of the legal profession, did not appear to go beyond what is necessary to fulfil that objective, and was therefore not considered as a restriction of competition.[52]

The reasoning of the CJEU shows similarities with the 'rule of reason', or 'mandatory requirement'type of justification in freedom of movement. The application of a rule of reason in the domain of EU competition law in the same guise as under US antitrust law has been outrightly discarded by the Court of First Instance in *Métropole*.[53] The 'rule of reason' employed in *Wouters* does not concern any form of economic assessment of pro- and anti-competitive effects, which would otherwise render Art. 101(3) TFEU nugatory. It rather looks at whether the contested agreement effectively pursues a public policy goal, and whether the restriction to competition is necessary in

[48] Vedder, H.H.B. (2003) *Supra at 47*, 130-131. It is nonetheless difficult to fathom why only agreements in the area covered by Articles 154 - 155 TFEU, i.e. in the context of collective negotiations, can be exempted from Art. 101(1) TFEU, and not in other areas of Union policies.

[49] To the extent that compliance with international labour right obligations pursued by an agreement can be considered as international law, the respect of which the EU must uphold in its 'relations with the wider world' under Art. 3(5) TEU.

[50] Monti, G. (2002) *Supra at 8*, 1086.

[51] C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, para. 97.

[52] C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1653, paras. 107 and 109.

[53] T-112/99 *Métropole Télévision v Commission* [2001] ECR II-2459, para 72-77. The rule of reason, at least in its understanding from US antitrust law, would require that an assessment of the pro- and anti-competitive elements of an agreement is to be performed during the analysis of whether the agreement results in restrictions in competition by object or effect. According to the Court, this assessment, to be performed in Art. 101(1), would render useless Art. 101(3) if it addressed also pro- and anti- competitive elements.

order to exclude the application of Art. 101 TFEU. To this assessment of necessity, the requirement of proportionality was then added in *Meca-Medina*.[54] Conversely, in the *Albany* line of cases, no appraisal of necessity was performed, and the agreement was excluded without any further assessment. There, two EU polices were balanced against each other, whereas in *Wouters* competition was balanced against an allegedly national interest, i.e. safeguarding the proper practice of the legal profession.

Importantly, such a national interest had already been accepted as legitimate by the Court in the context of freedom of movement rules.[55] This element should not be disregarded; the body at hand was in the exercise of regulatory powers functionally equivalent to those of public authority, and therefore covered by Article 49 TFEU.[56] Although the Court assessed the compatibility with competition rules before addressing freedom of movement rules, it was necessary to justify the agreement also under Art. 101 TFEU, and to ensure the same outcome under both sets of rules avoiding a complex economic analysis. The Court thus, in this instance,[57] dispelled the concerns concerning different standards of legality between the two sets of legal provisions, and the claim that EU institutions should be neutral *vis-à-vis* the regulatory or legislative techniques chosen by Member States to pursue their policies.[58]

The type of balancing performed in *Wouters* results therefore in an increased convergence between competition and freedom of movement rules.[59] The EU-style rule of reason has so far been applied only where private actors undertake compulsory and collective regulatory functions in the exercise of functionally equivalent forms of public authority, which however fail to qualify for the exclusion for activities in the exercise of public authority under competition law.[60] The Court has applied the EU-

[54] C-519/04P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-7006, paras. 42-45.

[55] Monti, G. (2007) *supra at 45*, 111-112. See C-3/95 *Reiseburo Broede v Gerd Sandker* [1996] ECR I-6511, para. 37.

[56] As discussed in Section 2.2.1 of Chapter 3.

[57] In other areas, the Court has taken a different approach under the Treaty freedoms than under competition law. For example, there are different standards for economic activity, and a substantially different approach to *de minimis*. See Mataija, M. (2016) *Private regulation and the internal market. Sport, legal services, and standard setting in EU economic law*. Oxford: Oxford University Press, 124-128.

[58] Member States may enforce legislation, to be subject to the scrutiny of the freedoms of movement rues, whereas other Member States may prefer de-regulatory or market-based instruments enforced by private parties, to be caught by EU competition law. Different standards of legality between the two sets of legal norms may unduly straightjacket the policy choices of national legislators This is the so-called 'seamless web' approach between internal market and competition rules, which prescribes the same standard of legality between the two sets of norms. See Gyselen, L. (1994) 'The emerging interface between competition policy and environmental policy in the EC'. In Cameron, J., Demaret, P., Geradin, D. (Eds.) *Trade and environment: The search for balance*. London: Cameron May, 245. See also Pescatore, P. (1986) Public and private aspects of European Community competition law. *Fordham International Law Journal* 10(3), 373-419.

[59] Mortelmans, K. (2001) *Supra at 8*.

[60] In addition to *Wouters*, see C-519/04P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-7006; C-1/12 *Ordem dos Técnicos Oficiais de Contas* [2013] ECR I-000; C-136/12 *Consiglio Nazionale dei Geologi v Autorità Garante della Concorrenza e del Mercato* [2013], ECR I-000; Joined cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 *API - Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti*

style rule of reason not only to cases where forms of delegation of regulatory functions could be found, such as in *Wouters*[61] and in other cases of professional self-regulation,[62] but also in cases where no delegation whatsoever was present and outside the domain of professional rules. *Meca Medina* was a sport case where the sport federation at issue operated in the absence of explicit state delegation but nevertheless the restriction was not considered as unjustified under 101 TFEU because it was necessary and proportionate to pursue a legitimate regulatory goal.[63]

The scope of application of the *Wouters* exemption has been interpreted as standing for the possibility to justify *any* restriction of competition which is necessary to achieve a national public interest.[64] Narrow interpretations of *Wouters* are also possible, among which the 'regulatory ancillarity' approach. Under such a perspective, *Wouters* represents the extension of the doctrine of the Court to exonerate restrictions that are inherent in the pursuit of a legitimate *economic goal*[65] - if necessary and proportionate to that objective[66]- to legitimate *regulatory activity* of associations of undertakings.[67] The extent to which the *Wouters* exemption can be applied outside the domain of professional mandatory self-regulation and the conceptually not dissimilar sport domain is still open to debate. Would it be possible to invoke the exemption if private parties engage in regulatory activity, for example in the environmental field or in the domain of consumer protection, and in the lack of delegation or other connecting elements to a Member?

It has been suggested that legitimate regulatory activity should not be limited to professional mandatory self-regulation, but should also cover any public task in the public interest carried out by undertakings. This is where such activity might be

and Ministero dello Sviluppo economico [2014] ECR I-000. T-90/11 *Ordre national des pharmaciens (ONP) and Others v European Commission* [2014] ECR II-0000 was the first case, upheld by the General Court, where the Commission imposed a fine on a trade association.

61 In *Wouters,* Dutch legislation in force recognised the self-regulatory activities of professional associations and bodies.

62 C-1/12 *Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência* [2013] ECR I-0000 and in C-136/12 *Consiglio Nazionale dei Geologi v Autorità Garante della Concorrenza e del Mercato* [2013] ECR I-0000.

63 C-519/04P *David Meca-Medina and Igor Majcen v Commission* [2006] ECR I-7006, paras. 42-45.

64 Monti, G. (2007) *Supra at 45,* 112.

65 As far as the application of economic or commercial ancillarity to VSS, it should be noted that the approach applies to contractual clauses restrictive or conduct, which are ancillary and objectively necessary to a legitimate agreement. For VSS, the restrictions arise from the whole agreement itself and not from clauses connected to its implementation or enforcement. See C-250/92 *Gøttrup-Klim e.a. Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA* [1994] ECR I-5641, paras. 35-45.

66 C-250/92 *Gøttrup-Klim Grovvareforeninger v Dansk Landsbrugs Grovvareselskab AmbA* [1994] E.C.R. I-564, para. 42.

67 Whish, R., Bailey, D. (2015) *Competition Law.* Oxford: Oxford University Press, 140. See also Sauter, W. (2014) Proportionality in EU competition law. *European Competition Law Review* 35(7), 328-329; Schmid, C.U. (2000) Diagonal competence conflicts between European competition law and national regulation - A conflict of laws reconstruction of the dispute on book price fixing. *European Review of Private Law* 8(1), 166-167. For an even narrower interpretation of *Wouters* as limited to a strictly defined 'deontological ancillarity', see Loozen, E. (2006) Professional ethics and restraints to competition. *European Law Review* 31(1), 28-47.

carried out by the State and to the extent that restrictions to competition are necessary to the pursuit of the agreement itself.[68] Conversely, as Art. 101(1) TFEU is merely concerned with the *existence* of agreements that restrict competition, some commentators and the Commission seem to agree that public policy concerns resulting from policy linking clauses must be addressed under Art. 101(3) TFEU, since they do not have a bearing on the notion of *restriction* to competition.[69] Nonetheless, the practice of the Commission concerning environmental agreements has been described as too unclear to claim unequivocally whether the Commission has effectively excluded altogether the agreements in question by the scope of Art. 101(1) or after an assessment under Art. 101(3).[70]

The problem with accepting that any public policy objective pursued by private parties could exempt restrictions, which are inherent for its achievement, is that it requires considerable faith in the capacity of private actors to pursue the public interest and forgoes entirely any other consideration.[71] In the domain of professional self-regulation, the private interest of ensuring the proper practice of a profession by means of rules on professional behaviour arguably coincides considerably with the public interest. The same occurs for sport rules, for example, concerning doping, which bear a direct connection to the credibility of the sporting activity at hand. In other domains, however, such an overlap between private and public interests is not unambiguous and at best it can be described as an alignment.

Firstly, a broad approach to ancillary regulatory restraints requires the identification of the main objective of an agreement, against which the necessity of the restrictions is to be assessed. Needless to say, this requires a value judgement. Secondly, there is no guarantee that private actors act completely and exclusively in the public interest. Multi-stakeholder VSS permit a mediation of different interests but it cannot be ensured that, for example, the goal of environmental protection does not result in distortion of market parameters under the pursuit of the economic self-interest of business operators. The procedural requirements for interests other than business' are much more limited for sectoral and company VSS. In other words, the risk that private self-interest is pursued under the cloak of public interest is too high to entirely renounce the appraisal of efficiency and the welfare considerations at issue under Art. 101(3), and simply deal with it through a proportionality test. This would not be in

[68] Kingston, S. (2012) *Supra at 7*, 237-238. See also Mataija, M. (2016) *Supra at 57*, 98. It is evident that the among the two conditions raised above, the fact that a regulatory activity would be carried out by the state in order to benefit from the *Wouters* exemption is rather difficult to reconcile with VSS, as public authorities face considerable legal and political barriers to the extraterritorial regulation of processes.

[69] Faull, J., Nikpay, A. (Eds.) (2014) *The EU law of competition*. Oxford: Oxford University Press, 186. See also Townley, C. (2009) *Supra at 7*.

[70] Townley, C. (2009) *Supra at 7*, 128.

[71] Schweitzer, H. (2009) 'Competition law and public policy: Reconsidering an uneasy relationship - the example of Article 81'. In Drexl J., Idot, L., Monger, J. (Eds.) *Economic theory and competition law*. Cheltenham: Edward Elgar, 138.

contradiction with the emphasis on self-regulation and co-regulatory arrangements of EU institutions,[72] as long as the efficiencies that can be employed to offset anti-competitive effects are not interpreted narrowly. Quite the opposite, and thirdly, it may even be reasonable for public authorities to at least retain the possibility of excercising forms of control on private regulators. The effect-based reach of competition law could be one of the few tools for control, in particular *vis-à-vis* transnational private regulators operating outside the traditional national borders which draw the limits of public enforcement.

All in all, the possible boundaries of the *Wouters* exemption remain difficult to define. In spite of the perspective adopted regarding its breadth, two major problems remain for the application of the *Wouters* exemption to VSS - albeit its application may still be more plausible than the exclusion of VSS from competition purview by means of a public authority argument. Firstly, VSS pursue policy objectives such as environmental protection, consumer protection, and animal welfare, which are covered by policy linking clauses,[73] and not necessarily in a national interest. Granted, a national sectoral VSS containing quality requirements could be framed as necessary to ensure the 'proper functioning' of a sector, as discussed in Section 2.3.3 of Chapter 3. By not falling under any of the expressed Treaty goals, it could be considered as a national interest like that in *Wouters*. Also for these objectives, however, Art. 101(3) TFEU seems the best place for an appraisal.

Secondly, VSS possess a *de jure* voluntary character, whereas the exemption has so far covered only mandatory private rules applying to members of a profession of a sport federation. It is possible to frame the exemption as also to cover the competition law side of private measures that fall under the freedom of movement under the functional approach to collective regulation discussed in Section 2.2.1 of Chapter 3. However, the CJEU has not applied yet the Treaty freedoms to private *voluntary* rules, and not even to *de facto* mandatory ones in the lack of connecting elements with the State. As Section 2.3.1 of Chapter 3 shows, only if the CJEU is willing to expand the reach of Art. 34 TFEU to bodies drafting *de facto* compulsory standards, may it then be expected that under specific circumstances certain multi-stakeholder and sectoral VSS could benefit from an exemption from Art. 101(1) TFEU.

It should not be forgotten that the Commission always looks at the effects of standardisation agreements, in spite of whether the agreement pursues explicit public goals. In *CECED,* a standardisation agreement concerning washing machine efficiency was considered by the Commission as generating sufficient efficiencies to be justified,

[72] Commission Communication COM(2001)428 final. A white paper on European governance. C 287; European Parliament/Council/Commission. Inter-institutional agreement on better law-making [2003] C 321/1.

[73] Respectively Articles 11, 12 and 13 TFEU.

but only after an assessment of efficiency.[74] In a case where arguably a standardisation agreement was at hand, the CJEU refused to apply a proportionality test to conclude that the agreement did not generate restrictions. In *IAZ*, the fact that a certification scheme for washing machines also pursued the goal of public health did not play a role in the conclusion that the agreement restricted competition by object.[75]

2.3 Restrictions of competition generated by multi-stakeholder and sectoral VSS

Having argued that, likely, VSS can be considered as agreements between undertakings which fall under Art. 101(1) TFEU, the following two Sections now discuss the second and the third step in the assessment under Art. 101 TFEU. Section 2.3 addresses the presence of restrictions to competition generated by VSS, and Section 2.4 whether such restrictive effects can be more than offset by the efficiencies generated by the agreement under Art. 101(3). Section 2.3 and 2.4, taken together, illustrate certain differences between VSS and technical standards, which are the standards which the Commission arguably refers to in the Guidelines on horizontal restraints. As a consequence, the assessment of VSS under Art. 101 may differ from that of standards, especially because of different efficiencies generated.

It is submitted that the different effects of the two types of standards should affect also the Commission's approach towards the safe harbour requirements. VSS should be approached less deferentially, possibly by not being considered as pro-competitive merely if in compliance with procedural requirements, but only after including in the assessment their effects as well. Section 2.3.1 briefly elucidates the notions of object and effect restrictions to competition. Section 2.3.2 illustrates the test for market definition. Subsequently, Section 2.3.3 introduces the Commission Guidelines on horizontal agreements and focuses on the treatment of VSS under the guidance for standardisation agreements. Section 2.3.4 discusses in detail the procedural requirement of the Guidelines and the possibility for VSS to qualify. Section 2.3.5 discusses restrictive effects of VSS; restrictions and efficiencies resulting from the schemes are analysed by reference to empirical studies assessing the impact of standards on market parameters.

2.3.1 Object and effects restrictions

The prohibition contained in Art. 101(1) TFEU refers to all agreements that have as their object or effect the restriction, prevention or distortion of competition.[76] For

[74] Commission Decision IV/36.718 *CECED* [2000] L 187/47.

[75] Joined cases 96-102, 104, 105, 108 and 110/82 *NV IAZ International Belgium and others v Commission* [1983] ECR I-3369, para. 25.

[76] Hereinafter the term 'restriction' will be employed to include also prevention and distortion of competition.

certain agreements that restrict competition, their anti-competitiveness can be inferred from their object, i.e. by the meaning and purpose of the agreement.[77] Those agreements will always be considered as infringing Art. 101(1) TFEU without being necessary to demonstrate appreciable adverse *effects* on competition,[78] or on consumers.[79] Agreements restricting competition by object can still be saved by Art. 101(3) TFEU, but it is up to the undertakings to prove that their agreement generates efficiency-enhancing effects and fulfils the four criteria of Art. 101(3) TFEU.[80] Price-fixing, market-sharing and output control including, but not limited to, the grounds mentioned in Art. 101(1) TFEU itself, are the typical forms of restriction of competition by object.[81] The intention of the parties does not matter in order to determine a restriction of competition by object, nor does the aim of the agreement, however laudable.[82]

In other cases, it is necessary to prove that the agreement brings about restrictive effects on competition to lead to an infringement of Art. 101(1) TFEU. For an agreement to be restrictive by effects, 'it must affect actual or potential competition to such an extent that on the relevant market negative effects on prices, output, innovation or the variety or quality of goods and services can be expected with a reasonable degree of probability. Such negative effects must be appreciable. [...] It is not sufficient in itself that the agreement restricts the freedom of actions of one or more parties.'[83] A restriction of conduct is therefore not necessarily a restriction of competition unless it affects market parameters such as prices, output, product quality, product variety, or innovation.[84] The dividing line between the two groups of agreements is blurred: the Commission has on several occasions characterised an agreement as restrictive by effect, where it could have instead been considered as restrictive by object.[85] The CJEU has not contributed much to bring clarity on the distinction between restrictions by object or effect.[86] In fact, it has been argued that the choice to classify a restriction of competition by object or by effect is a decision of

[77] C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, para. 58.

[78] Opinion of AG Kokott in C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paras. 43-44.

[79] C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paras. 62-64.

[80] C-209/07 *Competition Authority v Beef Industry Development* [2008] ECR I-8637, para. 21.

[81] Opinion of AG Trstenjak in C-209/07 *Competition Authority v Beef Industry Development* [2008] ECR I-08637 para. 48.

[82] C-96/82 *IAZ International Belgium NV v Commission* [1983] ECR I-3369, para. 25, where an agreement contributing to the protection of public health and the reduction of conformity inspections cost was considered to appreciably restrict competition within the internal market, and in spite of the fact that it was not the intention of the parties.

[83] Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 24.

[84] Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 25.

[85] Whish, R., Bailey, D. (2015) *Supra at 67*, 123.

[86] C-32/11 *Allianz Hungària Biztosító and Others* [2013] ECR I-0000, para. 48. For a more recent restrictive approach to object restrictions see C-67/13P *Groupement des cartes bancaires (CB) v European Commission* [2014] ECR I-000.

policy for the EU institutions.[87] Given the inherent uncertainty in classifying a restriction, in Section 2.3.5 the two types of restrictions are discussed together.

2.3.2 Market definition

Restrictions of competition are to be assessed on a specific product market or more markets if that is the case. The Commission reckons that technical standardisation agreements produce effects on four possible markets: the market for the standardised product; the market for the technology - in case the standard requires the employment of a certain technology; the market for standard-setting; and the market for testing and certification.[88] Given the lack of empirical data concerning the effects on the last two markets and the absence of a market for technology, we will focus here only on the first market, that for VSS-certified products. In spite of the frequent absence of physical differences between VSS-certified and non-certified products, it is common practice for the Commission to consider *all* features that matter to consumers, also those that are immeasurable in objective terms, to delimitate the boundaries of a relevant market. Non-economic parameters may render the assessment more complex.[89] Product substitutability is the main factor to be considered in the definition of a market, which basically requires the identification of an alternative source of supply for the customers of the undertaking.[90] This necessitates an assessment of whether certain products are perceived as substitutable by consumers, normally by means of a speculative test investigating the reaction of consumers after a small relative price change between two products.[91]

The presence of higher prices for certified products could, in itself, be indicative of the presence of separate markets for certified and non-certified products.[92] After the application of a price test, if the market definition was broader and included both certified and non-certified products, the likelihood of a finding of restriction would diminish considerably.[93] The boundaries of a market shall not just define which

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87 Faull, J., Nikpay, A. (Eds.) (2014) *Supra at 69*, 237.

88 Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 261.

89 OECD (2013) The role and measurement of quality in competition analysis. OECD Competition Committee, 78-79.

90 Commission Notice on the definition of relevant market for the purpose of Community competition law [1997] C 372/5, para. 13.

91 Commission Notice on the definition of relevant market for the purpose of Community competition law [1997] C 372/5, para. 15.

92 T-427/08 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission* [2010] ECR II- 5865, para. 74.

93 It is interesting to note a possible conceptual similarity between the test for market definition under EU competition law and the WTO test for likeness discussed in Section 3.1.1 of Chapter 6. As will be seen, it is likely that 'sustainable' products and 'regular' products are considered as like under WTO law. Differently, under competition law, the products will be considered on two separate markets. The reason arguably is to be found on the focus on consumer preference of the competition test, whereas the WTO test looks more comprehensively also at different factors. Curiously, the outcome is the same, i.e. it is more difficult for the measures considered not to

products are included, but also its geographical delimitation. For the purpose of our analysis it is assumed that the relevant market has an EU-wide dimension or, in the presence of locally successful schemes, that the relevant market encompasses the market of several EU Member States.

2.3.3 Standardisation agreements and VSS under the Commission Guidelines

Standardisation agreements are defined in the Commission's guidance on horizontal agreements as agreements whose objective is 'the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply'.[94] Also covered by the definition are terms of access to a particular quality mark and standards-setting agreements concerning environmental performance.[95] Both sectoral and multi-stakeholder VSS appear to fall under the guidance offered by the Commission concerning standardisation agreements, at least environmental VSS and all schemes which can be construed as quality standards.

It seems that the guidance offered in the 2001 Guidelines could be generally considered as valid nowadays,[96] in particular because the category of environmental agreements discussed there at length is not addressed in such detail in the 2011 Guidelines. For the purpose of our analysis concerning VSS, however, only the latest version of the Commission's Guidance is taken into account. The reason is that VSS represent a smaller and somewhat peculiar group of environmental agreements which can be more fittingly brought under the heading of standardisation agreements as discussed in the 2011 Guidelines. Environmental standardisation is explicitly mentioned as an example of a standardisation agreement covered by the latest version of the Guidelines.[97] The scope of environmental agreements is much broader and includes also agreements not involving standardisation and covering, for example, packaging and waste collection and disposal, and direct emission reduction. In any event, under the 2001 Guidelines, VSS would be considered as 'agreements that may fall under Art. [101(3)]', insofar as they 'appreciably restrict the parties' ability to devise the characteristics of their products or the way in which they produce them'.[98] The analytical approach to restrictions would thus not differ, but it would not be possible

be in breach of the relevant provisions. Restrictions to competition are easier to be found on a small market and it is more likely that detrimental treatment occurs for certain products if the group of products considered is large.

94 Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 257.

95 *Ibid.*

96 Kingston, S. (2012) *Supra at 7*, 243.

97 Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 329.

98 See Commission Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements [2001] C 3/02, para. 189.

for environmental agreements under the old Guidelines to make use of the safe harbour provisions.

The Commission acknowledges that generally, standardisation agreements produce significant positive effects.[99] However, restrictions to price competition, control or limitation of production, markets, innovation and technical development may materialise as well.[100] Standards may have the object of restricting competition, for example, where pressure is put in order not to market products not in compliance with the standards.[101] Standards may also have the effect of restricting competition in the presence of market power.[102] Restrictive effects are unlikely where there is effective competition between a number of voluntary standards.[103] Generally, restrictive effects do not materialise if participation to the standard-setting is unrestricted and transparent, compliance with the standards occurs voluntarily, and access to the standard takes place on fair, reasonable and non-discriminatory terms.[104]

2.3.4 Safe-harbour requirements

With a faith in procedural requirements not shared by other enforcement authorities,[105] the Commission, in the 2010 Guidelines on Horizontal Agreements, acknowledged that certain procedures in the standard-setting process are normally sufficient to ensure that the standard will not result in a restriction of competition. Different from safe-harbours in the form of market share, four procedural requirements are spelled out in the Guidelines: unrestricted participation to the standard-setting; procedural transparency for adoption; no obligation to comply with the standard; access to the standard technology on fair, reasonable and non-discriminatory (FRAND)

[99] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 263.

[100] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 264.

[101] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 273.

[102] Market power describes an objective position of economic strength by an undertaking, which allows it to raise prices above the competitive level without losing sales so rapidly as to not profit from the price increase. Most undertakings in non-perfectly competitive markets enjoy some form of market power. As perfect competition can hardly be found outside micro-economics textbooks, the presence of market power is diffuse, and competition issues materialise only when market power is significant. Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, paras. 39-47.

[103] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 277.

[104] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 280.

[105] US antitrust law does not allow 'good' procedures to immunise technical standard setting between companies from antitrust scrutiny, although 'bad' procedures have always been considered as evidence of anti-competitive behaviour. See Anton, J.J., Yao, D.A. (1994) Standard-setting consortia, antitrust, and high-technology industries. *Antitrust Law Journal* 6, in particular at 256-257.

terms.[106] Compliance with these requirements does not grant undertakings a public interest exclusion from competition rules, but is instead very likely to result in immunity for private bodies operating on the basis of certain procedural guarantees of public interest.[107] The requirements can thus be seen as a form of influence over general standardisation procedures, including those of VSS.

The belief that these four requirements are sufficient to guarantee that the outcome of a standard is at least aligned to the public interest and that they are sufficient to mediate between a multitude of private and public interests seems to disregard the unavoidable power imbalance within many private standard-setters,[108] and the findings of public-choice literature showing that even the fairest procedural requirements can be manipulated to the advantage of some parties.[109] The importance of such requirements in competition enforcement should however not by underestimated. The Commission, in its assessment of standardisation agreements, begins its assessment by looking at the procedural aspects of standardisation and does not continue its analysis if the requirements are met.[110]

As hinted above, technical product standard-setting may have been the main objective of the Guidelines and the safe-harbour exemption, as the presence of a detailed FRAND obligation seems to suggest.[111] Technical standards include standards drafted by ESBs, national standard-setters and other private standard-setters to solve network externalities such as interconnectivity between products and product uniformity. The Guidelines explicitly cover[112] standard-settings by bodies operating within the EU standardisation system as resulting from the 'new approach to standardisation'.[113] The Guidelines also cover technical standards with the objective of

[106] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 280.

[107] Schepel, H. (2005) *Supra at 25,* 320, who argues that the requirements are imported from the *effet utile* doctrine for anti-competitive state legislation.

[108] Büthe, T., Mattli, W. (2012) *The new global rulers: The privatisation of regulation in the world economy.* Princeton: Princeton University Press.

[109] Anton, J.J., Yao, D.A. (1994) *Supra at 105,* 256.

[110] Mataija, M. (2016) *Supra at 57,* 240.

[111] Also most of the literature discussing standard-setting from a competition perspective seems to have a focus on technical standards and on standards incorporating patented technology. See for example Shapiro, C. (2000) 'Setting compatibility standards: Cooperation or collusion'. In Dreyfuss, R.C., Zimmermann, D.L., First, H. (Eds.) *Expanding the boundaries of intellectual property.* Oxford: Oxford University Press; Geradin, D., Rato, M. (2007) Can standard-setting lead to exploitative abuse? A dissonant view on patent hold-up, royalty stacking and the meaning of FRAND. *European Competition Journal* 3(2), 101-162; Koenig, C., Spiekermann, K. (2010) *Supra at 33*, 449-459; Layne-Farrar, A. (2010) Non discriminatory pricing: Is standard-setting different? *Journal of Competition Law and Economics* 6(4), 811-838; Mariniello, M. (2011) Fair, reasonable and non-discriminatory (FRAND) terms: A challenge for competition authorities. *Journal of Competition Law and Economics* 7(3), 523-542.

[112] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 258.

[113] Council Resolution on a New Approach to technical harmonisation and standards [1985] C 136/01. As seen above in Section 2.1.1 it is open for discussion whether this still holds true.

environmental protection and apparently also other public objectives.[114] Technical standards generate increased market integration and penetration, interoperability between products and encourage the development of new, improved products and foster innovation[115] They may contain patented technology, or may even consist exclusively of a patented technology. It was noted already prior to the introduction of safe harbour requirements that the Commission was particularly generous in offering procedural grounds for competition law immunity to technical standard-setting, arguably in order to accommodate Member States' different standard-setting systems and to offer the EU regime a shield from competition litigation.[116]

It should not be taken for granted that different types of standards generating different effects should benefit from the same safe harbour requirements. Standards like VSS aim at correcting physical and political externalities. Indeed, they result in positive gains from externality abatement. But, by levelling the playing field, VSS inherently bring about modification in the conditions of competition. Generally, as Section 2.4.2.4 shows, VSS also generate different positive gains, and do not generate some of the efficiencies normally associated with technical standards. It is therefore here submitted that, for agreements concerning objectives other than efficiency (interoperability standards) and health and safety (the 'new approach' standards - which are already treated more deferentially, as it will be discussed below), qualifying for the safe harbour requirements should not let enforcement authority necessarily conclude that a standard is pro-competitive. A throughout case-by-case assessment of the effects of the standard would be a more suitable approach. Or, at the very least, a very strict appraisal should be made of a standard-setting body's procedural requirements.

The remainder of this Section discusses the four requirements of the Guidelines *vis-à-vis* VSS. Obviously, an assessment of VSS' compliance with safe-harbour requirements must be performed on a case by case basis. It has been shown in literature that private technical standard-setters operating in a regime of competition between standards do not always ensure the same procedural safeguards that officially-entrusted bodies comply with.[117] The same can be said for VSS. Generally, compliance with the ISEAL Code ensures a good deal of compliance with the procedural requirements provided for in the Guidelines. However, a body's compliance *only* with the TBT Code of Good Practice for the Preparation, Adoption and Application of Standards (hereinafter: the

[114] See the examples in Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, paras. 329-330.

[115] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, paras. 263 and 321. For an account of the features of technical standardisation see Swamm, P. (2000) The economics of standardisation. Final report for standards and technical regulations Directorate Department of Trade an Industry, study for the United Kingdom Department of Trade an Industry, 16-17.

[116] Schepel, H. (2005) *Supra at 25*, 312-313.

[117] Koenig, C., Spiekermann, K. (2010) *Supra at 33*, 458.

'TBT Code of Good Practice', or the 'TBT Code'), does not automatically lead it to qualify for the safe-harbour requirements under the Commission Guidelines. The TBT Code does not require unrestricted participation to standard-setting activities.[118] The safe-harbour requirements seem to constitute more codification of previous case law than to be based on the TBT Code's provisions. Non-compliance does not automatically imply that Art. 101 TFEU is infringed, but requires the parties to self-assess whether the standard is likely to produce negative effects on competition.[119]

Interestingly, failure to comply with certain procedural requirements such as the voluntary character of a standard and non-discrimination has the effect of considerably increasing the chances of a finding of an effective restriction to competition, or even to constitute an object restriction in itself. This shows the thin line along which standard-setters walk when they establish procedures for participation, the importance of good administration principles in standard-setting and, more specifically, the negative consequences on market parameters that are presumed to stem from the lack of an effective voluntary character.

2.3.4.1 Unrestricted and non-discriminatory participation

Generally, associations with market power, and from which exclusion would generate restrictive effects, do not enjoy unfettered discretion in setting up their procedural rules.[120] The requirement of unrestricted participation aims at guaranteeing that all competitors affected by the standard can participate in the standard-setting. It also requires non-discriminatory voting procedures and objective criteria for allocating voting rights.[121] Participation must give the possibility to influence the result of standard-setting and allow participants to acquire know-how on the standard, which is essential in the decision of whether to follow it.[122] The Commission has considered the use of environmental quality labels as restrictive of competition where exclusive sale and purchase networks are established on the basis of the label, with the effects of excluding competitors from joining the scheme.[123]

For multi-stakeholder VSS, in particular those in compliance with the ISEAL Code of Good Practice for standard-setting, inclusive procedures are put into place that aim at ensuring broad participation, also in the governance of the standard-setting body and

[118] See Section 2.2 of Chapter 6 for discussion over the provisions of the TBT Code of Good Practice.

[119] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 279.

[120] Joined Cases T-528/93, T-543/93, T-546/93 *Métropole and Others v Commission* [1996] ECR II-649, para. 95.

[121] Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 281.

[122] Commission Decision IV/31.458 *X/Open Group* [1987] L 35/36. There, the Commission recognised that publicness of a standard would still not permit the undertakings excluded from the standard-setting to influence the content of the standard.

[123] Commission Decision IV/32.202 *APB* [1990] L 18/35.

the broader organisation, when present. For other schemes, a less positive account can be found in literature.[124] If the requirement is intended to mean that all competitors affected by the standards must effectively participate in the standard-setting, then not many schemes could be exempted. It seems, however, that the Commission is flexible with respect to such a requirement and does not consider problematic situations of limited participation if in view of achieving an agreement on the standard at hand.[125]

Intentional exclusion of certain competitors from joining the standard could occur during the standard-setting phase, whenever a standard is set with the outcome that certain actual or potential competitors will never be able to comply. This may occur, for example, by designing product categories for environmental schemes which are very narrow, and thus exclude or disadvantage certain competitors. Similar outcomes can occur where the standard directly or indirectly discriminates against competitors, or where the stringency of the standard is set above the level that well-informed consumers will choose, in order to raise the entry barriers to the market for sustainable products.[126] These situations are tantamount to an object restriction to competition.[127] As will be seen in Section 3.2.2, exclusion can also be addressed under Art. 102 TFEU, provided that the standard-setting organisation exercises a dominant position.

2.3.4.2 Transparency

Procedural transparency requires mechanisms in place to allow stakeholders to be informed about present and future standard-setting activities. It mandates active engagement with a group broader than just the competitors, also encompassing all interested stakeholders.[128] ISEAL Membership ensures access to a great deal of information surrounding the standard at several stages in the adoption process; the same cannot be said for all other standard-setting bodies. A body's compliance with the transparency provisions of the TBT Code of Good Practice could also ensure compliance with the transparency obligation of the Guidelines.

Transparency in standard-setting is fundamental as it permits companies to make informed decisions about whether or not to embrace the standard. Arguably, the

[124] See generally Ozinga, S. (2001) *Behind the logo. An environmental and social assessment of forest certification schemes*. Moreton-in-Marsh: Fern; Cadman, T. (2011) *Quality and legitimacy of global governance. Case lessons from forestry*. Basingstoke: Palgrave Macmillan.

[125] Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 295.

[126] Report from the Nordic Competition Authorities (2010) Competition policy and green growth, Interactions and challenges, 62. Available at http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/competition-policy-and-green-growth.pdf

[127] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 273.

[128] Faull, J., Nikpay, A. (Eds.) (2014) *Supra at 69*, 1013.

inclusion of a transparency requirement in the Guidelines is a consequence of an investigation conducted by the Commission where a patent-holder did not disclose in due time the existence of patented technology essential for a standard, which was about to be approved. In the *Rambus* case, the undertaking at hand revealed the patent in its possession only after the sector was locked into the technology in question and was thus enjoying considerable gains from royalties.[129] Given the lack of patented technology in VSS, such cases of 'patent ambush' would not occur.

2.3.4.3 Voluntary nature of the standards

The requirement that standard acceptance must be voluntary and that producers must retain the possibility to develop alternative standards or products that are not in compliance with the VSS deserves detailed treatment. It does not only refer to standard-setting *per se* but, more generally, to the consequences stemming from non-adoption. If requirements are not met, the prospect of restrictive effects to competition is likely to increase and in some cases even constitute an object restriction to competition.[130] The voluntary nature of a standard is thus a crucial factor for a finding of restriction.[131] The requirement can be considered as fulfilled as long as certification is limited to certain products or supply chains and producers are then effectively free to decide whether or not to comply with the standard and to produce non-certified products.[132] Potentially problematic for VSS is the requirement of producer certification, which curtails the possibility to manufacture non-compliant products. More generally, however, it is important to investigate the treatment of the factual mandatory character of an agreement under EU competition law.

In line with the non-formalistic approach employed by the CJEU in analysing *de facto* mandatory measures under Art. 34 TFEU,[133] it is acknowledged under competition rules that compliance with a private standard, however voluntary, may become a *sine qua non* for acceding to a certain market.[134] Certain factors discussed by the Court under the Treaty freedoms[135] seem to be playing a role also under competition rules. For example, if producers wish to remain in the supply-chain, would strong retailers' choice (which is a reflection of consumer preferences) for VSS-certified products reduce the effective voluntary character of compliance? The *Ship Classification* shows

[129] Commission Commitment Decision COMP/C-3/38.636 *Rambus* [2009]. A press release with the commitment on the side of Rambus can be found at http://ec.europa.eu/competition/antitrust/ cases/dec_docs/38636/ 38636_1003_5.pdf

[130] Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 293.

[131] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, paras. 277, 293, 317.

[132] The requirement concerning the possibility to produce non-compliant products stems from the *Philips/VCR* case. See Commission Decision IV/29.151 *Philips/VCR* [1978] L 47/42.

[133] Section 2.2.3 of Chapter 3.

[134] Faull, J., Nikpay, A. (Eds.) (2014) *Supra at 69,* 1006.

[135] C-171/11 *Fra.bo v DVGW* [2012] ECR I-0000, paras. 29-30.

the Commission's partial acknowledgement of this problem. Classification Societies (CSs) set and verify safety and environmental requirement for commercial vessels. Certification of a CS by the International Association for Classification Society (IACS), the relevant international standard-setter for maritime safety and regulation, is essential to be able to purse certain verification tasks. The Commission acknowledged that restrictive effects to competition could be generated if access to IACS certification was unduly impeded. This was because of States' strong preference for CSs which are members of the IACS to perform statutory survey.[136] The Decision shows that preference for certain certified services can generate and enhance restrictive effects in case certification can not be achieved, although it was not the only factor which brought the Commission to apply competition rules on the IACS. The reasoning could be extended to certified products. EU competition law therefore acknowledges and gives a certain weight to the fact that strong consumer or supplier preference for VSS-certified products would reduce the effective voluntary character of standards.

In another case where the standard at hand was an ESB standard, conversely, a very high market share of a standardised product was not considered as affecting the voluntary nature of the standard, as long as non standard-compliant products were in theory permitted on the market. The Commission was not impressed by the argument that it was very difficult and costly to employ other methods to demonstrate compliance with the standard requirements.[137] In the domain of the freedom of circulation of goods, it shall be recalled that the CJEU has been receptive to this type of argument and has more easily accepted the possibility that standards can become *de facto* mandatory because the alternatives are unfeasible.[138] The Commission's stricter approach with respect to the voluntary character of the standard may be due to the fact it was drafted by an ESB. It has been submitted that the Commission treats ESBs more deferentially, for example by presuming that the procedural requirements are complied with unless demonstrated otherwise.[139]

It is difficult to elaborate an approach on how to weight and take into account elements affecting the voluntary character of standard which are outside the control of the standard-setters - such as consumer preferences. The Commission seems more likely to accept that a standard may be not as voluntary as it is professed to be for standards outside the EU system of standardisation. Actions which can be attributed to the standard-setter and which negatively affect the voluntary character of a VSS are covered. Pressure put to bear by the standard-setters on third parties not to market products which fail to comply with the standards also matter in assessing whether a standard is indeed voluntary. Putting pressure may also be considered as a restriction

[136] See Commission Decision COMP/39.416 *Ship Classification* [2009] C(2009)7796 final, para 12-13.
[137] Commission Decision COMP/F-2/38.401 *EMC/European Cement Producers* [2005] D/205249, paras. 80-90.
[138] See C-171/11 *Fra.bo v DVGW* [2012] ECR I-0000, paras 29-30.
[139] Mataija, M. (2016) *Supra at 57*, 241.

by object, especially when standards are set by a sectoral association of manufacturers with large market share.[140] Indeed VSS bodies promote their standards and encourage their acceptance from producers and retailers. Such activities may raise concerns under competition law, especially for sectoral schemes where all members of a sector feel compelled to employ a standard. To this extent, different factual elements can influence the formally voluntary character of a standard.

2.3.4.4 FRAND terms

The fourth safe-harbour requirement concerns the presence of IP-rights and access to the standard. For technical standards, the crucial issue is access to the standard itself as it may necessitate the acquisition of relevant intellectual property (IP) rights to have access to a certain technology. Restrictions to competition arise when access to IP rights is not made available by the right-holder or is not made available under fair, reasonable and non discriminatory terms, or the presence of patented technology is not disclosed at the moment of the standard-setting. Recent investigations in the area of technical standard-setting by the Commission have focused on such problems, within the framework of Art. 102 TFEU.[141]

The occurrence of such IP rights-related concerns, to which considerable attention is devoted in the Guidelines on horizontal restraints,[142] is not present for VSS as no pre-determined technology is mandated in the standard to achieve the desired outcome. This is obvious for standards addressing labour conditions, where technology does not play a role at all. Standards addressing environmental aspects related to the production of goods are normally performance-based and simply prescribe a certain result to be met. The producer retains full autonomy in implementation by means of any necessary technology. Given that many schemes contain management standards, the lack of IP-related concerns is all the more evident and should be considered as a factor that limits a finding of restriction.

2.3.5 Assessment of restrictions to competition generated by VSS

The Guidelines acknowledge that standardisation, under circumstances of market power, may have the effect of restricting competition.[143] Certain VSS may contribute to

[140] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para 273.

[141] The situations described refer respectively to the *IPCom*, *Qualcomm*, and *Rambus* investigations by the EU Commission. See the Commission's press releases for *IPCOM:* http://europa.eu/rapid/press-release_MEMO-09-549_en.htm*;* for *Qualcomm:* http://europa.eu/rapid/press-release_IP-15-6271 _en.htm; and for *Rambus:* http://europa.eu/rapid/press-release_IP-09-1897_en.htm.

[142] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, paras. 267-269; 280; 284-291; 298-299.

[143] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01 para. 277.

the creation of market power for certified undertakings and have a positive effects on their market shares. By 'rewarding' certain producers, labelling schemes awarded to quality products establish a situation of monopolistic competition.[144] Restrictions may also occur in the event compliance with certain safe-harbour requirements is not ensured. The Commission considers restrictive effects without delving into the substance of the standards, at least for ESB standards. For example, it does matter whether restrictive effects are due to the presence of prescriptive requirements which could have been avoided with the employment of performance requirements. In other words, the fact that a ESB standard does not permit an operator to qualify would not be automatically dispositive of a restriction to competition.[145] Nonetheless, the very purpose of VSS which ensure compliance with legal requirements may be also be problematic in itself. The Court explicitly held that ensuring compliance with statutory requirements is a prerogative for public authorities and not private undertakings, as it 'may call for complex assessments which are not within the area of responsibility of those private undertakings'.[146]

2.3.5.1 Exclusion and negative effects on competition

Exclusion from a standard may occur when certain companies are prevented effective access to it.[147] Exclusion due to the impossibility of complying with the standard is a relevant factor in a finding of anti-competitive effects. Although multi-stakeholder and sectoral VSS are normally open for other undertakings to join, exclusion of third parties could result from *de facto* impossible, or excessively costly, compliance with the standard. Whether or not this type of exclusion is intrinsic for instruments that aim at certifying 'quality' products, it does however matter for the purpose of finding a restriction of competition.[148] A finding of restriction is linked to the presence of detrimental effects on market parameters in the event of failure to achieve certification, and in particular to negative consequences for competition on the relevant market.[149]

[144] Markandya, A. (1997) 'Eco-labelling: An introduction and review'. In Zarrilli, S., Veena, J., Vossenaar, R. (Eds.) *Eco-labelling and international trade*. Basingstoke: Palgrave Macmillan, 18.

[145] Commission Decision COMP/F-2/38.401 *EMC/European Cement Producers* [2005] D/205249, para. 107.

[146] C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporitel (Akcenta)* [2013] ECR I-0000, paras. 19-20. The facts in *Akcenta* should be kept in mind. Three banks decided not to enter into business with *Akcenta,* a financial institution and a competitor of the three banks on the market for foreign exchange operations, on the alleged ground it lacked a necessary licence to operate on the market. Standards certifying legal compliance may be treated more leniently, especially as they can also be seen as certifications for fitness of purpose. Nonetheless, a certain condemnation of unilateral market policing remains from the case in question.

[147] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01 para. 264.

[148] Anton, J.J., Yao, D.A. (1994) *Supra at 105*, 265.

[149] Anton, J.J., Yao, D.A. (1994) *Supra at 105*, 260.

Empirical evidence of exclusion from VSS is abundant in particular for small producers, which is in turn reflected in market access impediment.[150] This is particularly the case for agri-food producers in developing countries.[151] The small size of the producers is related to the likelihood of a negative impact of the cost of compliance with a scheme, as the per-unit cost is higher. Small firms also find it more difficult to generate economies of scale. A negative impact on producers is not taken into account in a competition law analysis, as producer welfare is not considered by the Commission. However, generally, a negative impact on producers may translate into negative effects on market parameters and competition. As the cost of compliance can be very high,[152] certain VSS have been observed to bring about higher prices, normally as a pass-on of the cost increase for producers. There is moderate evidence that, in certain markets and under certain circumstances, the price increase accrues to producer or retailer profits.[153]

The impact of VSS on competition in the market for sustainable products differs in the short and in the long term. Assuming demand for certified products, the creation of a standard confers a first mover advantage to the producers that immediately opt in. This contributes to a situation of market power for undertakings operating in the new market for VSS-certified products, which may enjoy oligopoly gains in the short period with a consequent reduction in allocative efficiency. Unless the scheme is not designed in a way to exclude actual or potential competitors, in the long term, the presence of gains should attract other firms in the market willing to undertake the necessary investments to comply with the scheme, thereby increasing competition and allocative efficiency. The demand for certified products is however limited, as certain consumers simply look at price, and sustainable features of products do not affect their purchase decisions. Unless prices for certified products decrease or even equate non-certified products, the theoretical growth in supply will no longer be matched by corresponding demand. As a result, a situation of oligopoly and market power could persist. Where no barriers to certification exist, a growth in popularity of the scheme

[150] Among the many from different perspective and addressing different types of instruments: Chang, S.W. (1997) GATTing a green trade barrier. Eco-labelling and the WTO Agreement on Technical Barriers to Trade. *Journal of World Trade* 31(1), 137-159; Dolan, C. and Humphrey, J. (2000) Governance and trade in fresh vegetables: The impact of UK supermarkets on the African horticulture industry, *Journal of Development Studies* 37(2), 147-76; Graffham, A., Karehu, E., Macgregor, J. (2007) Impact of EurepG.A.P. on small-scale vegetable growers in Kenya. International Institute for Environment and Development: Fresh Insights 6; Henson, S. (2008) The role of public and private standards in regulating international food markets. *Journal of International Agricultural Trade and Development* 4(1); Maertens, M., Swinner, J.F.M. (2008) Standards as barriers and catalyst for trade, growth and poverty reduction. *Journal of International Agricultural Trade and Development* 4(1); Bonsi, R., Hammet, A.L., Smith, B. (2008) Eco-Labels and international trade: Problems and solutions. *Journal of World Trade* 42(3), 407-432.

[151] Since such effects do not materialise on the EU market, they cannot be taken into account for the purpose of a competition law assessment.

[152] Henson, S., Humphrey, J. (2009) The impact of private food safety standards on the food chain and on public standard-setting processes. Paper Prepared for FAO/WHO Codex Alimentarius Commission, 29.

[153] Mendoza, R., Bastiaensen (2003) Fair trade and the coffee crisis in the Nicaraguan Segovias. *Small Enterprise Development* 14(2).

among producers could even affect detrimentally the entities holding certification, if the market for certified products does not grow.[154]

VSS' levelling-the-playing-field rationale can have a varying impact on production costs. For some companies, the cost of compliance may be lower and therefore they are placed at a cost advantage *vis-à-vis* their competitors, which may last in the long term.[155] However, if compliance with the standards is an entirely voluntary decision, it can be assumed that the long-term gains will more than offset the initial loss of compliance, as no company would increase its costs without expecting increased returns in the future. The impact on competition, also taking into account potential competitors in the non-certified market, is therefore complex to assess and several factors must be considered. It seems, however, that most restrictions to competition could be limited to the short run.

2.3.5.2 Negative effects on other market parameters

As a certain feature is chosen over others, by definition, the social cost of technical standardisation is the decline in product variety and innovation.[156] Standard-setting can be used with the object of unduly restricting the freedom of the members to the standard-setting organisation to differentiate their products.[157] Technical development and innovation may be inhibited by the presence of rigid and pre-determined requirements addressing certain aspects of a product, and additional foreclosure on the markets for alternative features or technologies can occur.[158] Such issues are relevant for all standardisation agreements, including VSS.

The possibility for producers to develop and resort to alternative standards for products is crucial to avoid the creation of such negative effects.[159] VSS do not impose specific requirements nor do they prohibit producers from producing 'regular' products as well, although it may be more expensive under certain circumstances to have a product line for sustainable products and another for 'regular' products. In areas like organic agriculture or where chain of custody certification is required, this

[154] In economics, this situation has been defined as 'entry-dissipating rent', and has been studied with specific respect to declining market advantages generated by Fairtrade certification. In the lack of a corresponding market growth, the more producers are FairTrade certified, the more their individual market share and sales shrink. See Dragusanu, R., Giovannucci, D., Nunn, N. (2014) The economics of Fair Trade. *Journal of Economic Perspectives* 28(3), 226-227. The presence of entry dissipating rents partially challenges the non-rivalry character of the uptake of certain VSS constituting global public good.

[155] Frontier Economic (2008) The competition impact of environmental product standards. Office of Fair Trading, 64.

[156] Casella, A. (2001) Product standards and international trade. Harmonisation through private coalitions? *Kyklos* 54, 245; Dolmans, M. (2002) Standards for standards. *Fordham International Law Journal* 26(1), 174-175. Conversely, in certain situations, innovation can only take place in the presence of at least a degree of standardisation.

[157] Commission Decision IV/31.371 *Roofing felt (Belasco)* [1986] L 232/15.

[158] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 264-266.

[159] Commission Decision IV/29.151 *Philips/VCR* [1978] L47/42, para. 23.

may be particularly complicated and expensive to implement. For social standards, it is expected that the whole production site or even an entire supply chain complies with certain labour requirements. In these two scenarios, the possibility to employ alternative requirements is considerably diminished.

For other VSS, such decline in product variety cannot be always easily demonstrated, as they do not prescribe specific technologies or methods of production, but normally allow the firm seeking certification to implement the requirements in a flexible manner by simply setting a target to achieve through management system standards. A certain decline in variety is demonstrable, as products that become VSS-compliant share certain common features. Specifically, 'sustainable' characteristics are now the same for all VSS-certified products. Other product features still differ and products are still competing with respect to those features.

A finding of restrictive effects is more likely if the standard covers a large part of the end product.[160] Since sustainability claims are important for some consumers, it is possible that this is deemed to have occured. In order to comply with certain schemes, particularly those addressing environmental protection, a complete re-design of the product may be required, although producers are often given freedom over implementation by means of performance requirements. This may lessen negative impacts on competition as generally findings of restrictions are connected to the autonomy of the parties to attain the objective of the agreement. In the previous version of the Guidelines on horizontal agreements, the Commission while discussing environmental agreements considered the presence of loosely-defined commitments and the possibility of implementing agreements without having to resorting to pre-determined technical solutions to limit the likelihood of a finding of restriction.[161] The frequent employment of management system requirements which do not bear directly on product features may lower the chance of a finding of negative effects on product variety.

VSS can also restrict competition by object if the standard has the object of limiting output or increasing prices. Initiatives such as the MSC, for example, provide for a yearly maximum fish catch for each certified fishery, which clearly constitutes a restriction in quantity for MSC-certified fish. Similar considerations apply for sustainable timber certification programs. For standards such as Fairtrade certifications, the underlying rationale of the scheme itself is to pay a product premium in order to increase producers' profit. Fair trade standards can thus be seen as restricting competition by object. Furthermore, as for any other horizontal agreement,

[160] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 293.

[161] Commission Notice C3/02 on Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (2001), para. 177. See also Townley, C. (2009) *Supra at 7*, 125.

there is a generalised risk that the parties to the scheme coordinate their behaviour in a collusive way through information exchanges. If the standard-setting process is used to engage in discussions or exchange information for this purpose, a reduction in competition could occur.[162] Risks of collusion could be exacerbated by the permanent structure of certain standard-setting bodies since participants regularly meet even after the standards have been drafted.

2.4 Assessment of pro-competitive effects under Art. 101(3) TFEU

After a finding of restriction of competition under Art. 101(1), the restrictive effects on the market will then be balanced against the pro-competitive effects under Art. 101(3) TFEU.[163] The assessment under Art. 101(3) TFEU also requires an analysis of economic efficiencies; a requirements of a pass-on to consumers of the resulting benefits; an inquiry on whether the agreement is proportionate; and whether it does not eliminate competition with respect to a substantial part of the market for the products in question. This Section addresses the positive efficiencies generated by VSS and attempts to balance them with the anti-competitive effects described in Section 2.3.5. A preliminary discussion is required in Section 2.4.1 to elucidate which types of efficiency can be taken into account, and the extent to which an agreement's objective pursuing public goals can account for its justification under Art. 101(3) TFEU. Section 2.4.2 discusses then the positive efficiencies generated by VSS, which include market creation by means of provision of information to consumers, the abatement of externalities, and a number of other positive efficiencies on market parameters. The Section also analyses the extent of pass-on to consumers of such efficiencies, whether the restrictions are proportionate and whether competition is not eliminated. Section 2.4.2.4 devotes particular attention to the different efficiencies generated by VSS *vis-à-vis* technical standards.

2.4.1 Accountable efficiencies after the modernisation of EU competition law

In the Commission's practice before the modernisation of the competition regime initiated by Regulation 1/2003, public policy goals - i.e. goals other than economic efficiencies and competition - have played a variable role, ranging from less-than-supportive to almost-decisive, in the justification of agreements that otherwise restrict competition.[164] Competition rules were interpreted by the Court in light of broader EU

[162] In the *Pre-insulated pipes* decision, the Commission dealt with a standard-setting organisation created by a cartel, whose main goal was to use standards to delay technological innovation which would have generated price reduction. See Commission Decision IV/35.691 *Pre-insulated pipe cartel* [1998] L 24/1.

[163] Joined Cases T-374/94; T-375/94; T-384/94; T-388/94 *European Night Services v Commission* [1998] ECR II-3141, para. 136.

[164] 26/76 *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1977] ECR 1875, para 20; Joined Cases T-528/93, T-543/93, T-546/93 *Métropole & Others v Commission* [1996] ECR II-649, para. 118. See also Wesseling, R. (2000)

goals.[165] In assessing the restraints to competition against a public policy objective, in practice, the Commission and the Court engaged in a balancing exercise featuring elements of proportionality, and in the lack of strict economic terms.[166] Either the first condition of Art. 101(3) TFEU - requiring improvement of production or the promotion of progress - was interpreted expansively, or the literal meaning of Art. 101(3) was set aside and policy goals were brought into the analysis. This would also be permitted by the presence of policy linking clauses in the Treaty.[167]

In several Decisions, the protection of the environment was one of the public goals which played a role in the justification of an otherwise anti-competitive agreement. In early cases, environmental concerns played a supportive role in the justification.[168] In *DSD*, the fact that an agreement gave direct practical effect to the environmental objectives of EU legislation[169] was regarded as a decisive factor in granting an exemption.[170] The approach is remarkable as the Commission equated the contribution to the implementation of the Community's objectives to a direct gain in economic efficiency. The productive efficiencies actually generated by the agreement, however, played only a marginal role in granting the exemption.[171] The subsequent *CECED* decision showed that the environmental objective of an agreement can be a major ground on which to offset a cost increase, a reduction of consumer choice and even a competitive disadvantage that the agreement was imposing on certain producers.[172] The Commission adopted a very broad approach to welfare by insisting that the collective benefits generated by the agreement were of such a magnitude that they allowed consumers to enjoy a fair share of the benefits even in the absence of individual benefits accrued to individual purchasers.[173] Concepts typical of

The modernisation of EC antitrust law. Oxford and Portland: Hart Publishing, 49. Monti, G. (2002) *Supra at 8*, 1057-1099; Parret, L. (2010) Shouldn't we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy. *European Competition Journal* 6(2), 346-350.

165 6/72 *Europemballage Corporation and Continental Can Company v Commission* [1973] ECR I-215, paras. 22-27.

166 Faull, J., Nikpay, A. (Eds.) (2014) *Supra at 69*, 186. Townley, C. (2009) *Supra at 7*, 6-7, and 64 and following. For discussion of proportionality and its variation according to the public policy objective considered see Lavrijssen, S. (2010) *Supra at 9*, 636-659.

167 Townley, C. (2009) *Supra at 7*, 65-66. Policy-linking clauses were introduced with the Treaty of Maastricht and require that certain policy be taken into account at all timse during the pursuit of all other EU policies. It should be noted that public policies were taken into account even prior to the introduction in the Treaties of policy-linking clauses, whose constitutional standing and the resulting 'hierarchy' with other EU polices (including competition) are still debated. Policy-linking clauses are however not merely programmatic, but instead impose legal obligations. See Opinion of Advocate General Jacobs in C-379/98 *PreussenElektra AG v Schhleswag AG* [2001] ECR I-2099, para. 231.

168 Commission Decision IV/33.640 *Exxon-Shell* [1994] L 144/2, para. 67-69, and Commission Decision IV/34.252 *Philips-Osram* [1994] L 378/37, paras. 25-26.

169 The relevant piece of legislation was Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, which aims at preventing or reducing the environmental impact of goods packaging.

170 Commission Decision IV/34.493 *DSD* [2001] L 365/5, paras. 143-146.

171 Casey, D. (2009), *Supra at 7*, 372.

172 Commission Decision IV/36.718 *CECED* [2000] L 187/47, paras. 30-34.

173 Commission Decision IV/36.718 *CECED* [2000] L 187/47, para. 56. See also Townley, C. (2009) *Supra at 7*, 150.

environmental economics such as 'marginal environmental damage' were employed, possibly because to some extent they can be translated into economic values. The Commission was also lenient in its analysis of proportionality,[174] in a way which is reminiscent of the necessity test under the four freedoms.[175]

A broad approach to policy goals other than competition was criticised as hindering predictability and legal unity.[176] The modernisation of the EU competition regime which culminated with Regulation 1/2003 reduces dramatically the role public policy goals can play in the justification of an agreement. This stems from the need to ensure uniform application by national competition authorities (NCAs) resulting from direct applicability, and also to reduce the political complexity of the issues they address.[177] Public policy goals can only be taken into account if subsumed in economic terms into one of the four conditions of Art. 101(3).[178] The Commission also requires undertakings to provide precise substantiation of all alleged efficiencies in order to demonstrate that they effectively constitute objective economic benefits.[179] Certain public policy goals, such as environmental protection, can indeed be transposed into economic terms. Some environmental gains take the form of qualitative efficiencies, which constitute a type of efficiency that together with cost efficiencies, the Commission has recognised as a relevant element for an assessment under Art. 101(3) TFEU.[180] The Guidelines are not binding, however, and national enforcement practices may differ.

The modernisation process was accompanied by a sharp focus on consumer welfare, a controversial concept in itself, which has been described as 'the ultimate objective of the Commission intervention in the area of antitrust'.[181] Departing from previous practice, the Commission equates consumer welfare with economic efficiency, even though the two concepts can at times be in conflict.[182] The CJEU explicitly held that the objectives of EU competition law also include the protection of the structure of the market and competition as such.[183] This means that a *prima facie* violation of Art.

[174] Lavrijssen, S. (2010) *Supra at 9*, 647.

[175] de Vries, S.A. (2006) *Tensions within the Internal Market. The functioning of the Internal Market and the development of horizontal and flanking policies*. Groningen: Europa Law Publishing, 208.

[176] See for example Odudu, O. (2006) *Supra at 6*, 163-173. Specifically Odudu's approach rejects all goals pursued that cannot be ascribed to efficiency-based considerations.

[177] Amato, G. (1997) *Antitrust and the bounds of power: The dilemma of liberal democracy in the history of the market*. Oxford: Hart Publishing, 118-122.

[178] Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 42.

[179] Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 57.

[180] Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 59.

[181] Lowe, P. (2008) The design of competition policy institutions for the 21st century - The experience of the European Commission and DG Comp, *Competition Policy Newsletter* 3, 1.

[182] Cseres, K. (2007) The controversies of the consumer welfare standard. *The Competition Law Review* 3(2); Lovdahl Gormsen, L. (2007) The conflict between economic freedom and consume welfare in the modernisation of Article 82 EC. *European Competition Journal* 3(2), 329-344. Parret, L. (2010) *Supra at 164*, 250. Economists in particular highlight an inherent arbitrariness in the concept of consumer welfare, which favours one social group over another and impede the maximisation of efficiency and economic growth.

[183] C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para. 38. Joined Cases C-501/06 P, C-

101(1) TFEU can be made merely in the presence of an agreement restricting economic freedoms without demonstrating negative implications for consumers.The protection of the competitive process can, at times, go against the interests of consumers.[184] Consumer welfare is identified with the maximisation of consumer surplus, which is realised by direct and explicit economic outcomes such as better quality or lower prices.[185] The increase or decline in *total* surplus is not relevant.[186] Direct and indirect users of the products covered by the agreement are to be considered as relevant consumers,[187] which also generates problematic situations, especially under Art. 102, as *customer* welfare is unrelated to *consumer* welfare.[188] The approach is broader than under other areas of law, such as consumer protection, where the consumer who is protected is limited to the final consumer, whereas in competition law all intermediate customers are also considered as consumers.[189] It should be noted that CJEU seems to support a broader view towards efficiencies whereby EU competition law is enforced to the benefit of the whole EU, and not just consumers.[190]

Further, only gains accruing to the relevant product market can be taken into account.[191] This means that if an agreement benefits society as a whole, it would still be considered as anti-competitive if it does not generate enough positive efficiency for the purchasers.[192] The approach is basically the opposite of the Commission's expansive reasoning in *CECED* described above. This strict approach to consumer welfare is also reflected in its temporal application. If the gain for consumers will take place in the future, then it has to be greater in order to compensate for the present loss since consumers value a present gain more than a future gain.[193] Also this condition is rather strict, in particular for the justification of agreements that generate their efficiencies over a larger temporal span, such as environmental agreements.

The fundamental problem with the post-modernisation stance of the Commission is that it disregards the constitutional structure of EU competition law in general and of Art. 101 TFEU in particular. Art. 101 TFEU is not structured to permit a defence based

513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-09291, para. 63.

184 Cseres, K., Mendes, J. (2014) Consumers' access to EU competition law procedures: Outer and inner limits. *Common Market Law Review* 51(2), 489.

185 Brodley. J.F. (1987) The economic goals of antitrust: Efficiency, consumer welfare, and technological progress. *New York University Law Review* 62, 1033. It should be kept in mind that the concept of welfare, at least intuitively, encompasses more than just surpluses accruing from price and quality, and could be construed around the economic concept of utility.

186 Cseres, K. (2007) *Supra at 182,* 149.

187 Guidelines on the application of Art. 81(3) or the Treaty, [2004] C 101/08, para. 84.

188 Akman, P. (2010) 'Consumer' versus ' customer': The devil in the detail. *Journal of Law and Society* 37(2), 315-344.

189 Cseres, K. (2007) *Supra at 182,*132-133.

190 See C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR I-0000, para. 22.

191 Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 43.

192 Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 85.

193 Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 88.

exclusively on proving that a restrictive agreement has pro-competitive effects, but instead contains a built-in public interest defence (i.e. the agreement would result in economic progress which benefits consumers), delimited by a proportionality test. Public policy considerations must therefore be allowed to play a role as long as they fall under the first positive condition of Art. 101(3), regardless of whether or not such benefits possess strictly pro-competitive effects.[194] The presence in the Treaties of policy linking clauses and the principle of coherence enshrined therein shall not be disregarded. Agreements which can enjoy justification, *inter alia*, on the basis of public policy objectives, should not be in direct conflict with competition to the extent that they challenge the policy choice in favour of a policy other than competition. In other words, no value judgement should be required to justify an agreement which is directly opposed to competition policy's rationales.[195] Also the Court acknowledges that non-competition objectives alone will not suffice to save an otherwise restrictive agreement.[196]

With this in mind, it is now appropriate to turn to the positive efficiencies generated by VSS which can be taken into account under Art. 101(3).

2.4.2 Positive efficiencies generated by VSS

Standardisation agreements in all domains have the potential to generate significantly positive economic effects. In the Guidelines on horizontal agreements, the Commission notes that, in general, technical standards engender efficiencies in the form of increased market integration and penetration, interoperability between products and encourage the development of new, improved products and foster innovation. All these efficiencies can be passed on to consumers.[197] Generally, the Commission considers standards facilitating competition between new or already existing products as benefitting consumers as well.[198] Standards facilitate market penetration by lowering barriers to entrance, with the result of increasing efficiency-

[194] Schweitzer, H. (2009) *Supra at 71*, 144; See also Wesseling, R. (1999) The Commission White Paper on modernisation of EC antitrust law: Unspoken consequences and incomplete treatment of alternative options. *European Competition Law Review* 20(8), 423; Townley, C. (2009) *Supra at 7*, in particular at 80-81; Van Rompuy, B. (2012) *Economic efficiency: The sole concern of modern antitrust policy? Non-efficiency considerations under Art. 101 TFEU*. Alphen aan de Rijn: Wolters Kluwer, especially at 391-393 and 400-401. For an analysis of industry agreements in the area of social responsibility against US antitrust law, and the specific problems generated by the US Courts approach to *per se* restrictions see Scott, I. (2016) Antitrust and socially responsible collaboration: A chilling combination? *American Business Law Journal* 53(1), 97-144.

[195] Schweitzer, H. (2009), *Supra at 71*, 149.

[196] Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-595, para. 139.

[197] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 263 and 321. Generally, for a very comprehensive account of the features of technical standardisation see Swamm, P. (2000) The economics of standardisation. Final report for standards and technical regulations Directorate Department of Trade an Industry, study for the United Kingdom Department of Trade an Industry, 16-17.

[198] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 321.

enhancing price-competition.[199] Section 2.4.2.1 analyses the efficiencies for consumers generated by the schemes in term of provision of information. Such efficiencies may have important positive effects on innovation and on the creation of new markets. Section 2.4.2.2 discusses general positive effects on market parameters. Section 2.4.2.3 assesses the efficiencies in terms of abatement of externalities, which can only partially be accounted for if a strict approach to efficiency is employed. Section 2.4.2.4 assesses the efficiencies which the Commission discusses generally for standardisation, but that are not generated by VSS. Section 2.4.2.5 addresses the last two conditions of Art. 101(3) TFEU, i.e. indispensability of the restriction and elimination of competition.

2.4.2.1 Market creation by means of provision of information

VSS, as all standards, reduce consumer uncertainty by lowering transaction and search costs.[200] The most important positive effect brought about by VSS lies in the form of allocative efficiency and facilitates consumer choice by providing information.[201] In particular, schemes which contemplate a label to be applied to products provide information to consumers about specific product features, and thus generate considerable efficiencies.[202] This is all the more true for credence goods such as sustainable products.[203] Since a sought-after characteristic may be unobservable to consumers even after consumption, information gaps can be exploited by suppliers, which can manufacture sub-optimal goods with respect to the sustainable quality in question or charge higher prices than value of the actual good's social or environmental quality. If consumers are aware of this possibility, they may even refrain from purchasing such products, either because the price is too high, or to avoid the moral taint of indirectly contributing to an adverse practice. The resulting outcome could be the failure of the market for sustainable products as a result of adverse selection.[204] VSS therefore increase, or even create, competition for standardised

[199] Koenig, C., Spiekermann, K. (2010) *Supra at 33,* 449.

[200] Blois, K.J. (1990) Transaction costs and network. *Strategic Management Journal* 11(3), 493-496. With specific reference to the organic food market: McCluskey, J. J. (2000) A game theoretic approach to organic foods: An analysis of asymmetric information and policy. *Agricultural and Resource Economics Review* 29(1), 1-9.

[201] As it is acknowledged for all standards. See Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 310.

[202] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, paras. 263, 308. See also Office of Fair Trading (2008) The competition impact of environmental product standards, Report prepared by Frontier Economics for the Office of Fair Trading, 52-54. Available at http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/OFTwork/research/economic-research/completed-research#named7.

[203] Darby, M., Karni, E. (1973) Free competition and the optimal amount of fraud. *Journal of Law and Economics* 16(1), 68-69.

[204] Akerlof, G. (1970) The market for lemons: Quality uncertainty and the market mechanism. *The Quarterly Journal of Economics* 84(3), 488-500; Darby, M., Karni, E. (1973), *supra at 203*, 67.

products.[205] Labelling instruments can also insure that correct prices are set for sustainable products, which offer the proper incentive for innovation.

The provision of information by means of logos and brands signalling and reassuring about certain features thus contributes to the proper functioning of the market. However, the efficiency generated from informing consumers can diminish in the presence of multiple claims from multiple initiatives, as consumers may have to spend additional time and resources to determine which claims are accurate and trustworthy.[206] The proliferation of VSS in the form of labelling schemes for certain products thereby limits the possible gains in allocative efficiency and reductions in transaction costs.[207] Proliferation is not a 'fault' of a specific standardisation agreement insofar it depends on factors outside the control of a scheme.[208] An additional scheme on the market however generates lower gains. Certain NCAs have explicitly taken issue with the high number of overlapping technical standards, and recommended increased oversight and a stronger steering role from relevant national standardising bodies.[209]

Gains accruing from the provision of information should generally be put in the right perspective, in particular for certain schemes whose impact and efficacy is contested. With respect to Fair Trade products, and arguably also organic products, it has been noted that due to consumers' uncertainty about the ability of the products to contribute to their goal (i.e. greater equity and fairness in trade relations), Fair Trade products should be considered as 'indeterminate goods'. The main feature of an indeterminate good is that 'information about the characteristics of these goods/services is not available, taking into account the actual knowledge at the time, and is not possessed by any agent'.[210] A market for indeterminate goods could collapse, if doubts about the effectiveness of product characteristics persist, and the certifications in place to achieve the objectives sought by consumers are not effective.[211] For indeterminate goods, gains accruing from the provision of information

[205] Link, A.N. (1985) Market structure and voluntary product standards. *Applied Economics* 15, 394.

[206] 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), 625.

[207] This is also recognised by national competition authorities. See Conseil de la Concurrence. Avis relatif à l'examen, au regard des règles de concurrence, des modalités de fonctionnement de la filière du commerce équitable en France. N° 06-A-07 du 22 mars 2006, para. 78.

[208] Notwithstanding this, it shall not be forgotten that avoidance of overlapping standards is one of the requirements that the TBT Code of Good Practice imposes on standardising bodies. See Section 2.2 of Chapter 6 for further discussion.

[209] Conseil de la Concurrence. Avis portant sur l'examen, au regard des règles de concurrence, des activités de normalisation et de certification. N° 15-A-16 du 16 novembre 2015, paras. 20-21.

[210] Lupton, S. (2005) Shared quality uncertainty and the introduction of indeterminate goods. *Cambridge Journal of Economics* 29(3), 413.

[211] Balineau, G., Dufeu, I. (2010) Are Fair Trade goods credence goods? A new proposal, with French illustrations. *Journal of Business Ethics* 92(2), 342.

are to be considered very carefully, and the lack of knowledge about the scheme's actual impact may affect detrimentally the information gains generated by the label.

2.4.2.2 Positive effects on other market parameters

As all standards have a positive impact on product quality,[212] it is uncontroversial to hold the same for VSS. Higher product quality is a crucial outcome which can compensate for the increased cost faced by consumers.[213] Certified products could be more efficient and more environmental-friendly; both are characteristics that can be translated into economic terms and therefore capable of being balanced under Art. 101(3) TFEU. For standards addressing working conditions, certified products embody the non-physical quality sought after by 'responsible' consumers.

The effect on other market parameters, as discussed in the previous section, is moderately negative, at least for prices, since increases are likely in certain cases. Depending on the circumstances and the nature of the scheme, VSS may generate positive effects as well on market parameters, including prices. Some schemes have engendered positive externalities for producers, such as less waste, more efficient energy and resource use, all of which can - at least theoretically - bring about lower prices. For output restrictions, which in the section above were observed to arise for some schemes, other VSS may generate positive effects on output, which increases as a result of more efficient production methods.[214] Since sectoral VSS can be considered as devices for supply-chain coordination, it is expected that they generate productive efficiencies. They may be passed on to consumers in the form of lower prices.

2.4.2.3 Externality abatement

Other positive effects are to be taken into account as well, to the extent they can be subsumed into economic terms, even if they are ascribed to public policy considerations.[215] Among the different goals pursued by VSS that can broadly fall under the heading of 'sustainability', environmental effects are very important, and have been considered by the Commission as relevant in balancing anti-competitive effects.[216] Evidence of VSS' effects on the environment is normally positive, although not always easy to appraise.[217] One often quoted study challenging the effectiveness of labelling schemes has shown, however, that eco-labels do increase the

[212] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 308.

[213] C-382/12P *MasterCard v Commission* [2014] ECR I-2201, para. 234.

[214] Van Hagel, O., Alvarez, G. (2011) The impact of private standards on producers in developing countries. International Trade Center Literature Review Series on the Impact of Private Standards, 14.

[215] Guidelines on the application of Art. 81(3) or the Treaty [2004] C 101/08, para. 42.

[216] *Ibid.*

[217] Blackman, A., Rivera, J. (2010) The evidence base for environmental and socio-economic impacts of 'sustainable' certification. Washington DC, Resources for the Future Discussion Paper Series.

consumption of certified goods, but also of non-certified goods, with the potential total outcome of a net negative impact on the environment.[218] Most positive effects generated by some VSS, however, are more qualitative issues such as diversity preservation, soil erosion, resource management. not the reduction of polluting emissions, which are more promptly quantifiable and comparable.

Not all of the environmental gains above can be transposed into economic terms that can be accounted for, if the strict approach of the Commission is followed. The situation for social gains is even more unfavourable. Social gains such as a positive impact on the livelihood of indigenous communities or improvements of the working condition of workers *outside* the EU can hardly be transposed in economic terms, and are in any case generated on markets which are difficult to be taken into account unless a very expansive approach to social welfare is adopted. The positive social and environmental impact resulting from the abatement of externality would therefore be included in the assessment of pro- and anti-competitive effects only in certain cases, and limited to measurable - mostly environmental - effects. It should however be considered that products incorporating social values, such as acceptable working conditions, are considered by economists to be 'mixed product bundles'.[219] Such products incorporate characteristics equivalent to the purchase of a product and the performance of an additional action, such as, for example, the expression of consumers' social dedication by means of a donation to a charity improving working conditions.[220] Mixed product bundles contribute to the maximisation of consumer utility and, at the same time, increase chances of ethical behaviour by eliminating the additional transaction costs to consumers - in the example above resulting from the donation - which is an economically measurable feature.

2.4.2.4 Efficiencies not generated by VSS

Some of the gains normally generated from standardisation agreements and discussed in the 2010 Guidelines are not always demonstrable for VSS. Gains in the form of product interoperability are normally limited. Such gains are given considerable weight by the Commission, as they avoid lock-in with a specific supplier, and they are presumed to generate efficiency.[221] Different from technical standards, VSS do not directly contribute to product interoperability and compatibility. Granted, an extent of uniformity with respect to intangible features is provided but, also due to the fact that actual product characteristics may vary because of the frequent presence of

[218] Mattoo, A., Singh, H.V. (1994) Eco-Labeling: Policy considerations. *Kyklos* 47(1) 53-65.

[219] See, generally, Chao, Y., Derdenger, T. (2013) Mixed bundling in two-sided markets in the presence of installed base effects. *Management Science* 59(8), 1904-1926.

[220] Steinrucken, T., Jaenichen, S. (2007) The Fair Trade idea: Towards an economics of social labels. *Journal of Consumer Policy* 30, 205-206.

[221] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 311.

performance standards, such gains are limited or absent. Similarly, positive network externalities originating from standardisation, which refer to the increase in consumer utility from a given good that derives from the number of other goods or users who are in the same 'network'[222] cannot be observed either. There is no increase in utility accruing to consumers resulting from an additional firm or product in compliance with a scheme, only more choice.[223] Network gains from sustainability in general and environmental VSS specifically, however, correspond to the arguably lower cost in developing environmentally-friendly solutions when more companies are involved. These network gains however do not directly accrue to consumer welfare. For social standards, network gains are even more difficult to observe.

Different from technical standards in the EU, for VSS a regime of competition between schemes is normally observable,[224] which could possibly result in a detrimental effect on complete integration on the internal market. A certain extent of harmonisation is occurring depending on the standard considered and, therefore, some gains from market integration are still observable. VSS applying to food products represents an exception, as the rationale for the creation of private food standards is to favour integration and coordination between supply chain actors.[225] Competition between standards is, nevertheless, explicitly considered as a factor that lowers the risk of a restriction to competition.[226]

To conclude, as gains resulting from interoperability, network externality, market penetration and integration are limited, the major pro-competitive and consumer-welfare enhancing effect of VSS is market creation by means of the provision of information to consumers. Importantly, this fundamental type of efficiency is presumed to be always generated by labelling schemes, provided that the claims are truthfu, and excessive proliferation is not present. An analysis of market effects also finds other

[222] Katz, L.M., Shapiro, C. (1985) Network externalities, competition, and compatibility. *The American Economic Review* 75(3), 424-440.

[223] For technical standards, the market can be construed as a two-sided market where the technical standard at issue constitutes the economic platform allowing the two sides of the market to interact and reap network benefits (for example a standardised technology such an operative system enables end-users and developers to directly interact). VSS cannot be considered as economic platforms allowing two sides of the market, i.e. producers and consumers/retailers to interact. An increase in usage of VSS by consumers, which corresponds to their intention to purchase VSS-certified products, increases the value to and participation of producers, which decide to comply with the VSS because of new marketing opportunities. Consumers in return benefit from the positive feedback loop that generated the increase in supply. However, the opposite process cannot be observed, i.e. that more producers deciding to comply with the VSS will result in an increase of usage (consumption) and increase value by producers/retailers. The promise of purchase VSS to a large extent pushes producers to employ the standard. On two-sided markets see, generally, Rochet, J.C., Tirole, J. (2003) Platform competition in two-sided markets. *Journal of the European Economic Association* 1(4), 990-1029.

[224] There are for example four main schemes for the certification of sustainable forestry products, and around five main programs for sustainable coffee, however with different claims.

[225] Gereffi, G. Humphrey, J., Sturgeon, T. (2005) The governance of global value chains. *Review of International Political Economy* 12(1), 78-104.

[226] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 277.

important positive effects such as increased product quality and productive efficiencies which may be partially passed on to consumers. If the purpose of the scheme is the abatement of an externality, such as rectifying environmental damages or addressing the social practices incorporated in a product, at least some environmental and social gains are generated, unless the scheme is completely unsuccessful. Nonetheless, only some of the efficiencies resulting from externality abatement can be taken into account under the strict approach followed by the Commission, and these are mostly limited to certain environmental gains.

2.4.2.5 Indispensability of the restriction and substantial elimination of competition

The criterion of indispensability of the restriction looks at whether certain restrictions go beyond what is necessary to achieve its intended efficiency gains.[227] Generally, an agreement should not cover more than is necessary to achieve its aims, including for standardisation agreements defining product quality such as VSS.[228] It can thus be presumed that as long as the objective of a standard it to set a high level of quality, the indispensability criterion is likely not to raise problems. If a standard aims at high product quality, which is demanded by consumers, even extensive restrictions resulting from product re-design are likely to be accepted as necessary. A voluntary standardisation agreement, different from agreements which apply mandatorily to a whole industry, for example to level the playing field in the environmental domain, is likely to be much less problematic under this perspective. Other examples of non-indispensable restrictions in the Guidelines overlap with certain safe harbour requirements. Closed access to the standard-setting is normally not indispensable, unless the parties demonstrate significant inefficiencies from unfettered participation.[229] Also making a standard formally binding and obligatory for an industry is normally non indispensable.[230]

The fourth criteria of Art. 101(3) concerns the elimination of competition on the relevant market. The Commission looks at the competitive constraint imposed on the parties and the impact of the agreement. In practice, this is done by taking market shares into account.[231] As discussed in Section 2.3.5, a VSS may lower competition in a market for sustainable products, especially in the short term, which on occasions can be considered as a substantial elimination of competition.

[227] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 314.

[228] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 317.

[229] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 315.

[230] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 318.

[231] Commission Communication Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] C 11/01, para. 324.

2.4.3 Balancing pro- and anti-competitive effects of VSS

The balancing of pro- and anti-competitive effects of VSS is necessarily a complex exercise, which obviously depends on the specific factual situation. If the balancing assessment is performed within the economic efficiency test, following the Commission's standard in the aftermath of modernisation, fewer elements are allowed to be taken into account to find positive efficiency arising from the agreement. As seen in Section 2.4.1, only efficiencies that can be transposed into economic terms are taken into account. Undoubtedly, for VSS which provide information to consumers, market creation effects are given a great weight in the Guidelines. These are, therefore, presumed to offset restrictive effects on market parameters - as long as blatant exclusionary effects do not arise as a consequence of discrimination or unnecessarily strict standards, and at least partially contribute to their objective.

The above is based on the assumption that the claims made by the label are truthful. Also the inclusiveness of the claim is important and should not be disregarded by competition authorities, as well as its understanding by consumers.[232] For example, if the label focuses on a certain pro-environmental feature, but disregards other anti-environmental, or less positive features possessed by the product, it still does generate a partial increase in allocative efficiency and consumer welfare. However, consumer welfare could be increased more if the label provided more complete information that would permit consumers to make even better informed purchases and, importantly, would not penalise producers which do not qualify for the label. Even if producer welfare is not taken into account in competition analysis, the impact of a label on competition must be taken into account. It is therefore here advocated that the allocative efficiency effects of a label be carefully scrutinised, in particular those relating to the completeness of the information it provides, and that it is not quickly concluded that the presence of a label always generates positive effects capable of offsetting anti-competitive ones.[233]

In other cases, i.e. in the absence of a label, as VSS do not possess several of the positive efficiencies normally arising from standards, a careful in-depth assessment of

[232] Ogus, A. (2004) *Regulation: Legal form and economic theory*. Oxford: Hart Publishing, 41. See also Cheyne, I. (2009) Proportionality, proximity and environmental labelling in WTO law. *Journal of International Economic Law* 12(4), 935.

[233] For an example of a labelling scheme which provides only partial information, see the recent debate at the European Parliament on nutrient profile labelling, also known at 'traffic-light' labels (Regulation (EC) No 1924/2006 on nutrition and health claims made on foods [2006] L 404/9). The scheme mechanically rates products on the basis of the amount of nutrients contained in it; for example, a product with a high content of fats will receive a red label. To the eyes of consumers, the system classifies products as 'healthy' and 'unhealthy' on the basis of its content, but in fact it disregards that the impact of a product's nutrients is strictly correlated to its consumption. Certain products high in fats, but for which a very moderate consumption is the norm, would be severely penalised. The European Parliament eventually voted in favour of rejecting the system, as it distorts the competition and was not based on sound scientific methodology. European Parliament Resolution of 12 April 2016 on Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook (2014/2150(INI)), para. 47.

all pro- and anti-competitive effects is required. If the impact on market parameters is negative, such effects shall be compared against consumer welfare gains and the possible, but limited, environmental gains that can be transposed into economic terms. The final assessment is in theory open to a finding either of net restriction or net efficiency, but a scheme may fail to generate significant efficiencies to offset possible restrictions to competition resulting from the agreement.

However, even within an economic balancing, defined by Townley as market balancing, a margin of manoeuvre is still permissible to indirectly accommodate, or give more weight to, public policy-related efficiencies - as the concept of economic efficiency is in itself value-laden.[234] One avenue is to give more weight to productive and dynamic efficiencies.[235] In this manner, also future investments and the long-term need for innovation can be included, and environmental arguments can play a role in the justification of the agreement. Agreements with an environmental objective normally result in additional research and development and innovation, and generate positive environmental spillovers, which are typical factors accruing productive and dynamic efficiencies.[236] The outcome is thus a balance in economic terms between a public policy goal, such as environmental protection, and the restriction in competition. In this way, greater weight is given to long-term consumer interests and overall societal welfare at the expense of short-term consumer interests. This would be allowed only if the agreement enhances social welfare by introducing innovation efficiency, if it is necessary, reasonable and proportionate, and if it does not permanently impair competition.[237]

In any event, a narrow approach to public policy goals has the potential to straightjacket the possibility to employ self-regulation and market-based instruments to pursue CSR-related objectives. This is not just in contrast with the legal status of policy linking clauses and the trend of convergence between freedom of movement and competition,[238] but also goes against the EU and Member State's expressed

[234] Townley, C. (2009) *Supra at 7,* in particular 177-195.

[235] Productive efficiency describes the optimal distribution between inputs that permits the maximisation of production given certain resources. In perfect competition, productive efficiency is maximised where the cost of a product is equal to its marginal cost. This corresponds to a situation in which producer welfare is at its minimum and consumer welfare is maximised. A high level of competition is consistent with a consumer welfare standard, but only to the extent it does not squeeze producer margins to the point that new investment does not occur because it cannot be recouped anymore. In this scenario, allocative efficiency in the long term - which measures the capacity of producers to offer goods and services that are most desirable in a society and the allocation of scarce resources in the areas where they are most valued - cannot be maximised. Maximising allocative efficiency is particularly important in competition law, since it corresponds to a maximisation of consumer welfare in the long term. This is however not always possible, because it might come at the expense of productive efficiency and dynamic efficiency (i.e. productive efficiency of a firm over time).

[236] de Vries, F.P., Nentjes, A., Odam, N. (2012) Voluntary environmental agreements: Lessons on effectiveness, efficiency and spillover potential. *International Review of Environmental and Resource Economics* 6(2).

[237] Cseres, K. (2007), *Supra at 182,* 126.

[238] Kingston, S. (2010) Integrating environmental protection and EU competition law: Why competition isn't special. *European Law Journal* 16(6), 780-805.

preference for private sector-driven regulatory initiatives, especially in the domain of sustainability.[239] A broader approach than the Commission's hard line is however supported by the Treaty and, to a certain extent, even the CJEU's practice. The bottom line is that public policy goals alone cannot justify anti-competitive effects. This does not seem the case for VSS, as most schemes to some extent generate at least some positive efficiencies, even excluding allocative efficiencies deriving from the provision of information. To include more types of positive efficiencies, including those not strictly quantifiable in economic terms, would allow enforcement authorities to possess enough evidence to justify all VSS which do not have clear exclusionary intention or effects, and are not too strict in the pursuit of their objective. In particular, the fact that VSS pursue public objectives mentioned in the Treaties and even in policy linking clauses is likely to play a role, especially in the lack of specific EU rules in the area.

Some NCAs seem to share a more relaxed stance towards public policy goals, noticeably so in the domain of sustainability, and offer interesting suggestions on how to accommodate public policy considerations in the balancing exercise. The Dutch Competition Authority (ACM) considers that if a sustainability initiative benefits a certain interest which is deemed valuable by consumers and society, and no key competition parameters are restricted, even market-wide arrangements may be reconcilable with Art. 101 TFEU. Even if this may not sound surprising, especially in light of the positive impact of standardisation discussed by the Commission in the Guidelines, the ACM continues by noting that Art. 101(3) offers enough margin also to justify agreements which deeply affect prices or qualities, as long as 'regular' products can still be purchased on the market and there is evidence of consumer's willingness to pay a premium for socially and environmentally responsible products. Only in the presence of a market-wide agreement affecting prices and quality is an appraisal of the benefits for consumers to be made.[240]

The ACM therefore assesses whether consumers are willing to pay for a certain sustainable feature of a product.[241] On the basis of such an approach, an agreement between producers and retailers aimed at replacing regularly-raised chicken products

[239] Commission Communication COM(2011) 681 final on a renewed EU strategy 2011-14 for Corporate Social Responsibility.

[240] Autoriteit Consument & Markt (2014) Vision document. Competition and sustainability, 8-9. Available at https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability/ See also Report from the Nordic Competition Authorities (2010) Competition policy and green growth, Interactions and challenges. Available at http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/competition-policy-and-green-growth.pdf. Generally, on the Dutch competition authority's initiatives in the sustainability domain see Smits, R. (2014) 'Sustainable competition law enforcement: Animal rights. An essay on integrating other sentient beings' interests in the work of a competition authority'. In Arts, D., Devroe, W., Foqué, R., Marchand, K., Verougstraete, I. (Eds.) *Liber Amicorum Jacques Steenbergen, Mundi et Europae Civis*, Brussels: Larcier, 533-542.

[241] It shall be noted that the Dutch NCA seems open to accept a broad list of public policy goals, as long as they constitute a societal concern, and arguably without resorting to a national legal basis. Autoriteit Consument & Markt (2014) Vision document. Competition and sustainability, 6.

sold in supermarkets with chicken raised under improved animal welfare conditions was found to be restrictive of competition. The so-called 'Chicken of Tomorrow' agreement would have marginally increased animal welfare conditions from the baseline standards provided for in legislation; it would have restricted competition as 'regular' chicken would not be sold anymore in supermarkets, and it would have resulted in a price increase higher than what consumers were willing to pay for the animal welfare improvement. The agreement was therefore found not to generate benefits for consumers as its costs exceeded its benefits.[242]

To quantify in economic terms the value to consumers of a public policy goal and to compare it with the costs generated by the agreement is thus one possible approach. The French NCA seems to have applied a different method, which requires an objective evaluation of the actual effects of the initiative at hand on the public policy objective it aims to pursue,[243] something which cannot be measured by means of a willingness-to-pay test.[244] This approach is rather broad in considering accountable efficiencies, as it does not require strict economic quantification, but simply that the effects must not be subjective. Consumer benefits are still obviously required. Improvement taking place outside the EU - such as social improvements experienced by Fairtrade producers in developing countries - must at least bear a connection with national consumers and their possibility to enjoy some indirect benefit. For example, clearly and objectively defined Fairtrade standards may improve downstream competition and increase efficiency.[245]

The latter approach seems more suitable for the purpose of weeding out ineffective VSS, as it takes into account the efficacy of the agreement. In addition, it also does not require that consumers actually fully understand the claims underpinning the scheme. Consumer preferences may be influenced by a suboptimal understanding of the consequences of a scheme, in addition to the complex consequences on the market parameters which may be unknown to consumers, and which may have affected their choice. Let us assume a situation with an agreement between market participants concerning organic agriculture standards, in a context where all consumers very much value organic agriculture because they believe it is healthier and especially more sustainable than conventional agriculture. The agreement surely is pro-competitive if

[242] Autoriteit Consument & Markt (2015) ACM's analysis of the sustainability arrangements concerning the 'Chicken of Tomorrow'. Available at https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow/.

[243] In the case of Fairtrade, the French NCA aims at measuring the social impact on foreign producers, which is the public policy pursued by the standards. See Conseil de la Concurrence. Avis relatif à l'examen, au regard des règles de concurrence, des modalités de fonctionnement de la filière du commerce équitable en France. N° 06-A-07 du 22 mars 2006, para. 97.

[244] In particular because the willingness-to-pay analysis appraises how much consumers are willing to pay for the effects on a public policy objective pursued by an agreement, regardless of whether the agreement in fact sorts those effects (which in any case may not be manifested yet on the market for agreements not yet implemented).

[245] Conseil de la Concurrence. Avis relatif à l'examen, au regard des règles de concurrence, des modalités de fonctionnement de la filière du commerce équitable en France. N° 06-A-07 du 22 mars 2006, paras. 101-103.

prices do not increase more than what consumers are willing to pay. However, a willingness to pay test does not cover other inefficiencies that may be generated. For example, the actual sustainability of organic agriculture on a massive scale is profoundly questioned, as its yields are lower than normal production and would thus require larger amounts of arable land.[246] These effects surely deserve consideration in an economic balancing. An approach which measures efficiencies - understood broadly - is thus preferable to a willingness-to-pay test, as it allows a holistic evaluation of all effects generated by a VSS, and not just the fact that it pleases consumers who may misunderstand its claims and actual outcomes.[247]

All in all, if enforcement authorities agree that private regulation in the domain of sustainability in the form of VSS is generally desirable, it will often be possible to find evidence of efficiencies which offset anti-competitive effects. In the simplest way (and the one most in line with the Commission's approach), it can be done by giving great weight to allocative efficiency generated by provision of information and market creation. An expansive approach to the accountable efficiencies can also be employed, to the extent that the objective of a scheme is the abatement of an externality, and the VSS is at least partially effective in doing so. Conversely, the same margin of manoeuvre offered by Art. 101(3) can be employed to address schemes which discriminate, are unnecessarily strict or burdensome, or ineffective in the pursuit of their professed objective. In such cases all effects must be carefully investigated. Discriminatory and protectionist objectives, if implemented successfully by the scheme-holders, are likely to also bring about negative effects on competition, which will be more evident in the lack of labelling. This occurs more often for those sectoral schemes with a business-to-business component. Competition law enforcement could therefore offer a solution to address market access and consumer confusion.

2.5 Company VSS as vertical agreements under Art. 101 TFEU

Under Art. 101 TFEU, the second scenario to be addressed concerns the possibility for company VSS to qualify as vertical agreements. Company VSS are normally implemented between retailers and suppliers concerning the supply of products in conformity with certain sustainability requirements specified by them, or may require compliance with one or more VSS. In either case, this is done by means of contractual arrangements regulating features of the products. Company VSS therefore qualify as

[246] Seufert, V., Ramankutty, N., Foley, J.A. (2012) Comparing the yields of organic and conventional agriculture. *Nature* 458(7397), 229-232.

[247] It shall be kept in mind that sociologists have extensively questioned the motives behind 'conscientious consumerism' and have stressed its frequent shallowness, which detracts from more efficient pathways of social change, and is instead an expression of parochial and self-serving, lifestyle-related, values which may even legitimise overconsumption. See Szasz, A. (2007) *Shopping our way to safety: How we changed from protecting the environment to protecting ourselves.* Minneapolis: University of Minnesota Press; Maniates, M., Meyer. M.J. (2010) *The environmental politics of sacrifice.* Cambridge MA: MIT Press.

vertical agreements. A vertical agreement is defined as an agreement entered into between two or more undertakings operating at a different level of the production or distribution chain and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.[248]

Contractual constraints to competition may serve a host of legitimate economic purposes, such as a reduction of transactional costs.[249] Vertical restraints to competition are thus generally considered less detrimental to competition and consumer welfare than horizontal ones.[250] Several positive externalities are generated by vertical agreements, the most relevant of which for our purpose are standardisation gains deriving from product uniformity and quality.[251] VSS ensure access to 'premium' retailers that only stock quality products and, especially, ensure a certain measure of uniformity and quality standardisation in order to appeal to specific consumer tastes.[252] Given the assumption that vertical agreements generate efficiencies in most cases, the coverage of the block exemptions is rather broad.

To the extent that such agreements are bilateral, i.e. they are entered into by one supplier and one retailer at the time, it is likely that they will qualify under the block exemption, as the market share of retailer and especially that of supplier may fall below the threshold. The market shares are rather lenient. Below a 30% market share on the purchasing market and 30% on the supply market, the agreement is considered non-restricting, and often even pro-competitive.[253] It also appears that the content of the agreement, mostly specifying product features, would not have as a direct or indirect object one of the hardcore restrictions or excluded restrictions at issue under Articles 4 and 5 of the Block Exemption Regulation. Even in the unlikely situation the company VSS would take the form of a network of contracts entered into collectively by the retailers and several suppliers, the applicability of the *de minimis* is likely. Vertical agreements entered into by non-competing undertakings whose *individual* market share on the relevant markets does not exceed 15% are normally considered as falling outside the scope of Art. 101(1) TFEU.[254] Only in the event of a parallel network of contracts covering more than 50% of a relevent market can the

[248] Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] L 102/1, Art. 1.1.

[249] Commission Guidance on vertical restraints [2010] C 130/1, para. 106.

[250] C- 32/11 *Allianz Hungaria Biztosìtò Zrt* [2013] ECR I-160, para. 43. Guidance on vertical restraints, C 130/1, para. 98.

[251] Whish, R., Bailey, D. (2015) *Supra at 67*, 647.

[252] Commission Guidance on vertical restraints [2010] C 130/1, para 107(c) and 107(i).

[253] Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] L 102/1, Articles 4 and 5.

[254] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) [2001] C 368/07, para. 7.

Commission declare the block exemption Regulation inapplicable.[255] Also in this scenario it is rather likely that company VSS would still fall under the block exemption.

3 VSS under Art. 102 TFEU

The analysis of VSS under competition law must include also an assessment of Art. 102 TFEU prohibiting the abuse of dominant position. Art. 102 addresses the unilateral conduct of undertakings.[256] With respect to VSS, Art. 102 is obviously applicable to company VSS, provided that the company is dominant and in a scenario whereby the superior bargaining power of a dominant retailer translates into exploitative or exclusionary conduct. Art. 102 is also applicable to multi-stakeholder and sectoral VSS, provided that standard-setting bodies can be considered as undertakings. This would be the case if the standard is offered for acceptance to other entities on a narrowly defined market for sustainability standardisation.

Exploitation could occur whenever unfair contractual obligations are imposed by a dominant retailer over suppliers in a situation of different bargaining power, whereby the retailer could reap most of the benefits - because of the possibility of charging higher prices - and the suppliers most of the costs - because of the costly compliance with strict social-environmental product requirements. A joint abuse of dominance by more undertakings, i.e. an abuse of a collective dominant position could occur when a group of undertakings or retailers, as a sector or in a part of it, formulates certain VSS and imposes them downstream on their suppliers.[257] Exclusionary conduct could occur as well whenever a dominant supplier, by means of its contracting practice, has the effect of creating foreclosure on the upstream market.[258] Exclusionary conduct from a dominant multi-stakeholder or sectoral VSS may arise if the VSS body excludes certain customers - i.e. the companies seeking uptake - from the market for sustainable products.

The first step of an assessment under Art. 102 TFEU concerns the market shares an undertaking must possess to be considered as dominant. Dominance confers a position of economic strength so as to enable an undertaking to prevent effective

[255] Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] L 102/1, Art. 6.

[256] Wijckmans, F., Tuytschaever, F. (2011) *Vertical agreements in EU competition law.* Oxford: Oxford University Press, 13.

[257] A dominant position can be held collectively by undertakings that, taken singularly, do not meet the market share threshold for dominance. See Joined Cases T-24/93 *Compagnie Maritime Belge v. Commission* [1996] ECR II-1207.

[258] It should be noted that some commentators suggest that in order to modernise the approach to Art. 102, to ensure predictability and to dispel the critique that Art. 102 'protects competitors and not competition', the component of abuse should be exploitation *and* exclusion, matched with no increase in efficiency. For our purpose, exploitative and exclusionary abuses will be discussed separately. See Akmann, P. (2012) *The concept of abuse in EU competition law. Law and economic approaches.* Oxford and Portland: Hart Publishing, in particular at 300-325.

competition in the relevant market, and to afford the possibility of acting independently from its competitors and consumers.[259] Dominance is normally presumed to occur with a market share of 50% or more of the relevant market.[260] The Commission does not allow for a 'safe harbour' threshold below which there is no dominance, but it considers that dominance is 'not likely' below a 40% market share. There could be cases below that threshold that nevertheless deserve the attention of enforcement authorities.[261] European retailers, such as supermarkets and food retailers which normally enforce company VSS, normally do not possess such a considerable market share. However, as the Commission seems open to at least consider situations below that threshold, it is here presumed that the 40% market share can be at risk in some cases. Conversely, it is rather likely that the market shares on the market for sustainable standards for multi-stakeholder and sectoral VSS are close to, or above, such threshold. In spite of the above mentioned proliferation of VSS initiatives, for each product there are normally one or two major standard-setters. For example, the market share in the Netherlands of PEFC is around 66% of certified forestry products.[262] MSC basically holds a position of monopoly in the standard-setting of sustainable fisheries requirements.[263]

3.1 Exploitative abuses

Exploitative practices are made possible by the dominant undertaking's market power and directly harm customers. These include charging high prices or imposing unfair trading conditions, specifically those that are above or more onerous than those that would be applied in a competitive market.[264] These types of abuses are controversial in literature as enforcement authorities are required to make judgments on a dominant undertaking's price and output decisions, a role which is closer to market regulation than to that of market supervision which competition authorities are normally expected to play.[265] Nonetheless, it has been noted that the spirit of Art. 102 TFEU as drafted in the Treaty of Rome was actually to protect from this type of abuse.[266] A few cases concerning excessive prices were pursued successfully, but under limited

[259] C- 22/76 *United Brands Company and United Brands Continental BV v Commission* [1977], ECR I-207, para. 65.

[260] C- 62/86 *AKZO v Commission* [1991] ECR I-3359, para. 60.

[261] Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, para. 14.

[262] http://www.pefc.org/news-a-media/general-sfm-news/1249-pefc-the-preferred-choice-for-certified-timber-in-the-netherlands

[263] van Oorschot, M., Kok, M., Brons, J., van der Esch, S., Janse, J., Rood, T., Vixseboxse, E., Wilting, H., Vermeulen, W. (2014) Sustainability of international Dutch supply chains. Progress, effects and perspectives, PBL Netherlands Environmental Assessment Agency, 53. Available at http://www.pbl.nl/sites/default/files/cms/PBL_2014_Sustainability%20of%20international%20Dutch%20supply%20chains_1289.pdf.

[264] Faull, J. Nikpay, A. (Eds.) (2014) *Supra at 69,* 387.

[265] Schweitzer, H. (2007) 'The history, interpretation and underlying principles of Section 2 Sherman Act and Article 82 EC'. In Ehlermann, C.D., Marquis, M. (Eds.) *European competition law annual 2007: A reformed approach to article 82 EC*, 119-163.

[266] Akman, P. (2009) Searching for the long-lost soul of Article 82 EC. *Oxford Journal of Legal Studies* 29(2), 271.

circumstances where the dominant undertaking either enjoyed a *de facto* monopoly, or where its actions were creating serious impediments to the internal market by erecting artificial barriers to parallel trade.[267]

Exploitative abuses can occur in the presence of substantive buyer power, sometimes referred to as monopsony power, which is typical of vertically structured industries where the downstream market is much less concentrated than the upstream market.[268] Large supermarket chains often possess such buyer power. Undertakings with substantive buyer power can 'exploit' their suppliers, for example by offering abnormally low prices. For the purpose of our analysis, it could be hypothesised that to enter into contractual obligations with suppliers on terms allegedly more favourable to the retailer could constitute an unfair trading condition in the meaning of Art. 102(a) TFEU. Art. 102 can be applied to an agreement contrary to Art. 101 where one of the parties is dominant and imposes unfair contractual terms on the other.[269]

Whereas this practice may have an impact on welfare distribution between undertakings, specifically redistributing welfare from producers to retailers, it does not necessarily affect consumer welfare. Consumers, for example, can benefit from increased quality.[270] A careful examination of the effects on efficiency and consumers is therefore essential.[271] The extent to which the effects of company VSS translate into negative effects on market parameters and competition may be limited to the short term. In the medium run, it is likely that suppliers adapt and improve their production methods in order to comply in a cost-effective manner with retailers' requirements. In such a case, since the competitive structure of the market is not impaired, no abuse of dominant position can be said to occur. Further, the presence of profits due to a dominant position attracts other players in the market, with the effect of reducing the profits made by the dominant undertakings from the alleged exploitation of suppliers.

Case-law so far has only considered unfair trading conditions with respect to customers and not with respect to suppliers. In *BRT v SABAM* and in *GEMA*, the Commission argued that a contractual clause, in order not to be unfair, must be indispensable for the purpose of the contract and equitable - which means that it shall not limit the freedom of one of the parties more than necessary.[272] In subsequent

[267] Case 26-75 *General Motors Continental NV v Commission* [1975] ECR I-1367; Case C-226/84 *British Leyland Public Limited Company v Commission* [1986] ECR I-9297. See also Motta, M., de Streel, A. (2006) 'Excessive pricing and price squeeze under EU law'. In Ehlermann, C.D., Atanasiu, I. (Eds.) *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?*, 107.

[268] O'Donoghue, R., Padilla, A.G. (2013) *The law and economics of Art. 102 TFEU*. Oxford and Portland: Hart Publishing, 840-841.

[269] C-66/86 *Ahmed Saeed* [1989] ECR I-803, paras. 37-38.

[270] O'Donoghue, R., Padilla, A.G. (2013) *Supra at 268*, 841.

[271] Akmann, P. (2009) 'Exploitative abuse in Article 82 EC: Back to basics?' in Barnard, C., Odudu, O. (Eds.) *Cambridge Yearbook of European Legal Studies 11*, Oxford: Hart Publishing, 165.

[272] C-127/73 *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR I-313. para 15; Commission Decision IV/26.760 *GEMA* [1982] L 94/12, paras. 36 and 46.

cases, the second condition has been elaborated on and interpreted in a very similar fashion to the classic proportionality test.[273] The Commission therefore looks at: whether the contested clause pursues a legitimate objective rather than just exploitation; whether it is effective for the achievement of the goal; whether it is necessary, i.e. there are no alternatives that are equivalently effective in achieving the same goal with a lesser degree of restrictive or exploitative effect; and whether it is proportionate, i.e. the exploitative effect does not outweigh the legitimate goal.[274] It could be suggested that a clause would be unfair if it would not be proposed and accepted in a regime of competitive conditions. In both contract law and competition law the concept of 'unfairness' describes a situation of significant imbalance between the rights and obligations of the parties to the contract. In competition law, the concept is associated with the concepts of transparency, objectivity, certainty and limited discretion. [275] Arbitrariness,[276] oppressiveness and a one-sided contract[277] have contributed to a finding of unfairness.

The imposition of VSS in the form of stringent requirements, with which products must be in compliance, has been observed to produce a disparate impact when the producers bear most of the costs and the retailer reaps most of the benefits. Such practices do not appear unfair *per se* as VSS are clearly spelled out in contracts in clear terms, and are transparent to the extent the content of a VSS is made public, reasonably well-known, and even used for promotional activities concerning the characteristics of products. The inclusion of VSS in supply contracts appears also in compliance with the proportionality test designed by the Commission, unless the stringency of the standards is deemed unnecessary. VSS clearly pursue a legitimate objective, which is the supply of products with certain socio-environmental characteristics that appeal to a group of consumers. This can be framed as an economic objective normally pursued by companies. VSS are at least partially effective in the pursuit of the objective since normally certification is mandated to prove compliance. Finally, it is hard to imagine a less restrictive alternative, in particular when it is permissible to employ alternative means for compliance such as equivalent forms of certification. Concerning *stricto sensu* proportionality, the objective pursued of ensuring a certain sought-after product characteristic for the purpose of competition law clearly outweighs the exploitative effects if a consumer welfare standard is employed.[278]

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[273] In particular in Commission Decision IV/34.493 *DSD* [2001] L 365/5, para. 111.

[274] O'Donoghue, R., Padilla, A.G. (2013) *Supra at 268*, 856.

[275] Cseres, K. (2011) 'Competition law and contract law' In Hartkamp, A., Hesselink, M., Hondius, E., Mak, C., du Perron, E. (Eds.) *Towards a European civil code,* Nijmegen: Wolters Kluver, 221.

[276] Case C-26/76 *United Brands Company and United Brands Continental BV v Commission* [1977] ECR I-207, para. 190.

[277] C-247/86 *Alsatel v SA Novasem* [1988] ECR I-5987, para. 10.

[278] It might be difficult in general to disentangle distributional effects from efficiencies, but in the case at hand it seems uncontroversial to claim that consumers directly benefit from an increase in quality and new product choice and the distributional effects are circumscribed to retailers and suppliers.

Exploitative abuses in the form of unfair trading conditions for company VSS are therefore unlikely to arise. Even assuming that certain food retailers or supermarkets are in a position of dominance, most anti-competitive effects of those practices are likely to be limited to the short term. Furthermore, in light of the proportionality test devised by the Commission to assess whether a contractual clause is fair, i.e. it is indispensable for the purpose of the contract and equitable, it is doubtful that a VSS would not be justifiable.

3.2 Exclusionary abuses

Exclusionary abuses cover practices from a dominant undertaking aiming to exclude a competitor from the market or from the entrance thereof, which have a detrimental effect on competition and thus, on consumer welfare.[279] The Commission has made this type of behaviour as one of its enforcement priorities.[280] Competition law and Art. 102 also protect the competitive process as such. This cannot be done without protecting individual competitors from illegal practices which exclude them from market participation.[281] Foreclosure on the upstream market occurs for certain VSS which are implemented upstream between retailers and producers, in particular in certain domains. For example, there is moderate evidence of a reduction in competition by means of consolidation and concentration in the supply chain.[282] This is more evident for VSS addressing food standards, which at times facilitate and even require vertical integration within the global sourcing network.[283]

Not only company VSS, but also multi-stakeholder and sectoral VSS may be in breach of Art. 102, provided that they are in a position of dominance. A multi-stakeholder or sectoral VSS organisation can be framed as an undertaking operating on the market for sustainability standards, if producers and business entities operating on a product market are allowed to employ its standard - regardless of whether they pay for it or not. Exclusionary practices may affect entities seeking access to certain standards, if access is being denied by the standard-setter, and not by the third-party certifier which assesses conformity with the standard.

It should be noted from the outset that EU law does not require that the dominant undertaking must be competing with the companies which suffer the abuse, or are

[279] See Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] C 45/02, para. 5.

[280] Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] C 45/02, para 7.

[281] Schweitzer, H. (2007) 'The history, interpretation and underlying principles of Section 2 Sherman Act and Article 82 EC'. in Ehlermann, C.D., Marquis, M. (Eds.) *Supra at 265,* 119-163.

[282] Henson, S., Humphrey, J. (2009) *Supra at 152,* 31.

[283] Van Hagel, O., Alvarez, G. (2011) *Supra at 214,* ix; Lee, J., Gereffi, G., Beauvais, J. (2012) Global value chains and agrifood standards: Challenges and possibilities for small-holders in developing countries. *Proceedings of the National Academy of Sciences* 109(31), 12326-12331.

active on the same market where the abuse is felt.[284] It suffices that a link between the two markets is established. In *Aéroports de Paris* the Court established that, where an undertaking in receipt of a service operates on a separate market from that in which the undertaking supplying the service is present, the conditions for the applicability of Art. 102 are satisfied provided that 'owing to the dominant position occupied by the supplier, the recipient is in a situation of economic dependence *vis-à-vis* the supplier, without them necessarily having to be present on the same market. It is sufficient if the service offered by the supplier is necessary to the exercise by the recipient of its own activity.'[285] In the case of VSS, a link would clearly exist between the market for standardisation services for a certain product and the market of the product in question.

In the event that a VSS is essential to enter a product market, a dependence relation might exist. Therefore, even if the VSS body is not operating on the same market as the companies being foreclosed on, practices excluding undertakings from seeking access to the standards can be considered as abusive under Art. 102 TFEU. A VSS body whose standards are essential to market a certain product - mostly because of intense consumer preference - can undoubtedly be said to hold market power, as it is allowed to behave independently of its customers, i.e. the producers seeking access, especially if the latter cannot resort to any other standard in order to market their products.

To refuse an entity access to the standards constitutes therefore a refusal to supply.[286] Alternatively, a dominant undertaking's decision to refuse to supply non-certified products can fall under the definition. Under EU competition law, the conditions under which refusal to supply may give rise to a breach under Art. 102 TFEU are very narrow. This is especially true under the 'essential facility' doctrine, which involves the denial to a facility which is necessary to compete in a downstream market. The approach is not limited to a physical facility or service,[287] but can include a standard, as long as it constitutes the essential condition to accede to a sustainable market. In *Bronner*, the CJEU ruled that i) access to the facility (in our case, the standard itself or the supply chain and the distribution network controlled by a retailer) must be indispensable, i.e. there must not be any actual or potential substitute; ii) duplication of the facility must be impossible; iii) refusal to deal must result in the elimination from competition of the undertaking being denied access; iv) refusal to deal occurred in the lack of any objective justification.[288] The Commission's Guidance partially deviates from these

[284] Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] C 45/02, para. 76.
[285] T-128/98 *Aéroports de Paris v Commission of the European Communities* [2000] ECR II-03929, paras. 164-165.
[286] Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] C 45/02, para. 78.
[287] Faull, J. Nikpay, A. (Eds.) (2014) *Supra at 69,* 465 and 473.
[288] C- 7/97 *Oscar Bronner GmbH & Co. v Mediaprint* [1998] ECR I-7791, paras. 37-41.

requirements and instead requires that the refusal relates to a product or service which is objectively necessary for the competition on a downstream market; the refusal is likely to eliminate effective competition in the downstream market; and the refusal is likely to lead to consumer harm.[289]

The refusal by a dominant undertaking to source certain products, all the more in the presence of at least a degree of consumer preference, would hardly fulfil these criteria. A narrow approach to exclusion is based on economic freedom and the right to choose trading partners,[290] which as discussed in Section 2.3.3 of Chapter 3 is even considered as a fundamental right under EU law. Such strictness seems justified as an 'open access' obligation may undermine undertakings' incentive to innovate, thereby harming consumers.[291] It is therefore to be excluded that, for company VSS, a preference for products with certain features can be considered as in breach of the 'refusal to deal' doctrine.

For multi-stakeholder and sectoral VSS, a finding of a breach depends on a number of factors. For several products, an alternative for VSS may be available on the market. The duplication by a producer of the standard he is being denied access to is very complicated, for the reason that the establishment of a scheme on the market is a function of consumer trust and consumer preferences, which hardly are under the control of a single company. As per the third requirement in *Bronner*, the undertaking being denied access faces a complete restriction of competition on the market for sustainable products, which may be theoretically offset by the possibility to market its products as regular products. Finally, the last criterion requiring that denial occurred in the lack of objective justification allows the identification of which type of exclusionary behaviour can be sanctioned under Art. 102. Clearly, the mere fact that a producer does not qualify for the standard cannot be the basis for a breach. On the contrary, to discriminatorily refuse to allow certain producers to apply the standards or to set standards which visibly discriminate against certain producers may be considered as lacking an objective justification.

At least in theory, therefore, discriminatory practices concerning access to the standard, or during the standard-setting aiming at preventing producers to employ the VSS, can be seen as exclusionary abuses under Art. 102 TFEU. This would more easily occur for multi-stakeholder and sectoral initiatives enjoying a position of dominance on the market for sustainability standardisation, and in the lack of

[289] Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] C 45/02, paras. 81-85.

[290] Opinion of Advocate General Jacobs in C-7/97 *Oscar Bronner GmbH & Co. v. Mediaprint* [1998] ECR I-7794, para. 56. See also T-41/96 *Bayer v Commission* [2000] ECR II-3383, para. 180.

[291] Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] C 45/02, para. 75.

alternative schemes producers can resort to in order to market their products as sustainable.

4 Member States use of VSS and application of competition rules to State measures

A final situation deserving attention under EU competition law is the possibility to apply competition rules to legislation delegating market regulation to private parties, whose actions can result in restrictions to competition. For VSS, this could occur where States delegate the regulation of certain social and environmental aspects of the production of goods to private bodies. It has been seen in Chapter 2 that delegation *tout court* cannot be observed for VSS, but *ex post* public recognition for different purposes may occur, among which the conferral of a presumption of conformity with regulatory requirements. These situations correspond to Member State use of VSS as discussed in Section 3.4 of Chapter 3. Would Member State's legislation recognising a VSS be subject to the application of competition rules?

Competition rules do not apply to legislation, regardless of its impact on competition. The Court has however set limits to this exemption when the requirements for the application of Art. 101 are met, i.e. when undertakings are involved.[292] In a particularly unfortunate formulation, the CJEU held that Member States must not introduce or maintain in force measures, including those of a legislative nature, which may render ineffective the competition rules applicable to undertakings. That would be the case 'where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to [Art. 101] or reinforces their effects or deprives its own legislation of its official character by delegating to private traders responsibility for taking economic decisions affecting the economic sphere.'[293]

From the first condition it can be inferred that competition law would still be applicable if Member State recognise an anti-competitive VSS for the purpose, for example, of demonstrating regulatory compliance. The second condition clearly cannot be interpreted as a condemnation of delegation in every instance, including where no anti-competitive behaviour has been committed by the undertakings. The Court instead has looked at whether the final responsibility for the measure established by the private parties lies on public authority and, most importantly, whether procedural obligations ensure that the undertakings operate in the public interest.[294] Public interest is therefore not defined in substantive or institutional terms,

[292] C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall- Berufsgenossenschaft* [2009] ECR I-1513, para. 70.
[293] C-267/86 *Van Eycke v ASPA* [1988] ECR 4769, para. 16.
[294] C-185/91 *Reiff* [1993] ECR I-580, para. 22; C-96/94 *Centro Servizi Spediporto Srl v. Spedizioni Marittima del Golfo* [1998] ECR I-2883, para. 25 ; C-38/97 *Librandi* [1998] ECR I-5955, para. 34.

but is instead defined procedurally.[295] The delegation of decision making and regulatory tasks to private bodies which could not be overruled by private authorities, nor subject to any degree of procedural control, would thus result in the application of competition law.[296]

This approach is clearly noticeable in *Arduino* and *Cipolla,* where procedural requirements were somehow disregarded and the focus was on State approval. The formal adoption by the Italian government of minimum fees for legal services drafted by the Italian Bar (which were not binding before adoption) was considered sufficient evidence of residual control exercised by the Italian State, which had not engaged in unlawful delegation.[297] This finding was made in spite of the lack of special procedures to ensure that the Italian Bar acted in the public interest in its price-setting tasks.[298] The price-fixing scheme therefore escaped competition scrutiny, but could still be challenged under freedom of movement.[299] Conversely, in *API,* minimum prices for road-haulage were established by an association of undertakings which was operating in the lack of procedural constraints aiming at incorporating broader public interest considerations, the lack of control and approval by the State. The rules were found to be emanations of undertakings and therefore covered by EU competition law.[300]

It should be noticed from the outset that the extent of control exercised by Member States in recognising VSS could vary from case to case. Recognition as such can be seen as the acknowledgement by public authorities that the substance of a pre-existing scheme is aligned with, or contributes to, the public interest.[301] Public authorities cannot however modify the content of a VSS nor can they normally influence the substance of the standards, but they ultimately make the decision of whether or not to recognise it. This could be seen as evidence of the Member State retaining final responsibility for the measure not engaging in illegal delegation. Freedom of movement rules would however be applicable to the recognised VSS.

Nevertheless, the procedures under which the VSS has been drafted, however sophisticated and inclusive they may be, are not aligned to those of public bodies and

[295] Schepel, H. (2002) Delegation of regulatory powers to private parties under EC competition law: Towards a procedural public interest test. *Common Market Law Review* 39(1), 48.

[296] Sauter, W. (2015) Containing corporatism: EU competition law and private interest government. *European Competition Law Review* 36(5), 188.

[297] C-35/99 *Criminal proceedings against Michele Arduino* [2002] ECR I-1529 paras. 41-42; C-94-04 *Federico Cipolla v Rosaria Fazari* [2006] ECR I-11455, paras. 52-53.

[298] C-35/99 *Criminal proceedings against Michele Arduino* [2002] ECR I-1529, para. 39; C-94-04 *Federico Cipolla v Rosaria Fazari* [2006] ECR I-11455, para. 49.

[299] C-94-04 *Federico Cipolla v Rosaria Fazari* [2006] ECR I-11455, paras. 58-61.

[300] Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13 *API - Anonima Petroli Italiana SpA v Ministero delle Infrastrutture e dei Trasporti and Ministero dello Sviluppo economico* [2014] ECR I-0000, para. 41.

[301] The adoption by the Italian government of a Decree approving the tariffs set by the National Council of Customs Agents was considered to be in breach of a combined reading of Art. 101 TFEU with Art. 4(3) TEU. See C-35/96 *Commission v Italy* [1998] ECR I-3851, para. 59.

therefore do not ensure that the standard-setting body acts exclusively in the public interest.[302] Firstly, Member States recognise VSS only *ex post,* i.e. after the standard has been created, which limits considerably their influence on procedures. Granted, public authorities may decide not to recognise standards which are unsatisfactory from the perspective of input legitimacy but, even so, it is impossible to ensure that the private body operates in the public interest. Secondly, the presence of undertakings in the standard-setting process does not take place in the dispossession of their formally private capacity. As such, it is not just concerned with public interest, but also with economic feasibility, profitability, credibility, and the necessity to ensure broad market uptake of the resulting standard.

The act of recognition of a VSS could however suffice to immunise from competition scrutiny Member State legislation recognising possibly restrictive private standards. If, on the one hand, recognition can be seen as the retention of the possibility for public authorities to exercise control of the standards, on the other hand, standard-setting procedures employed by VSS bodies are unlikely to ensure that the VSS is drafted with the exclusive objective of pursuing the public interest. It is also reasonable to assume that VSS bodies could not invoke the state action doctrine as a defence for their anti-competitive conduct. In order to qualify for the defence, anti-competitive behaviour must be required by national legislation, or legislation must create a legal framework eliminating the possibility of competitive activity.[303] For VSS, the strictest means of pressure from public authority on undertakings to enter into standardisation agreements, where present, takes the form of encouragement, and clearly does not meet the threshold provided from the state action doctrine.[304] This would mean that other forms of interaction at a Member State level would also not result in competition law exclusion under state action.

5 Conclusion

This Chapter has assessed multi-stakeholder, sectoral and company VSS against EU competition law provisions to evaluate the extent of review which can be exercised on VSS generating negative effects on the market. The reformed EU competition law system - at least according to the Commission's post-modernisation view - results in an inherent unfriendliness towards business self-regulation when it pursues objectives

[302] It should not be forgotten that the regulatory authority of VSS is formally disconnected from public authority. There is simply no delegation. Procedural requirements could immunise private agreements which do not need State approval to become binding, but are nevertheless the outcome of a delegation process. Nonetheless, VSS operating without any connection to the State are not generally exempted from the application of EU competition law unless recognised by Member States. This holds true irrespectively of the inclusiveness of the standard-setting process, and possible claims from the standard-setting body of acting in the public interest.

[303] Joined Cases C-359/95P and 379/95P, *Commission and France v Ladbroke Racing* [1997] ECR I-6265, para. 33. See generally Blomme, E. (2007) State action as defence against 81 and 82 EC. *World Competition* 30(2), 243.

[304] Kingston, S. (2012) *Supra at 7*, 344.

other than competition and efficiency, which derives from the limited grounds which are allowed to justify the anti-competitive effects of an agreement. In spite of that, it does not seem that self-regulatory initiatives pursuing non-efficiency goals have so far been hindered as testified by the proliferation of VSS on the EU market. The possibility is therefore open for the Commission to use such inherent 'unfriendliness' of competition law towards self-regulation to 'regulate' self-regulation and private regulation, and VSS in particular. Enforcement can contribute to lessen their negative effects on market access and to allow the mediation between trade and societal concerns to be performed under the scrutiny of institutions that are democratically legitimised to undertake such a task. Enforcement or, better soft forms thereof, could also 'pick a winner' among several similar standards making the same claim.

Sectoral and multi-stakeholder VSS can be considered as horizontal agreements between undertakings, or decisions of an association of undertakings in the meaning of Art. 101(1) TFEU. In spite of the strongly regulatory character possessed by some initiatives, the presence of undertakings in the standard-setting process has the effect of rendering competition rules applicable, even if firms constitute a minority of the actors involved. Standard-setting in the domain of sustainability constitutes an economic activity due to the presence of undertakings and of a market for sustainability standards. It would not be possible to exempt VSS with a strong professed regulatory rationale from competition scrutiny under the public authority venue for immunity. Similarly, it is unlikely that VSS would be excluded from competition law because they pursue a public policy goal. Possibly only national sectoral VSS can be considered in the pursuit of a national interest, provided that the Court accepts their objective as to contribute to the proper functioning of a sector. Also their formally voluntary character is difficult to reconcile with the application of the *Wouters* exception only to mandatory private measures. VSS are thus covered by competition rules, and present a number of problematic features *vis-à-vis* Art. 101 TFEU, and also Art. 102 TFEU.

The Commission's Guidelines on standardisation agreements is the starting point of an analysis of VSS under competition provisions. It prescribes procedural requirements compliance with which by standardising bodies normally result in a standard generating pro-competitive effects. Participation in the standard-setting should be unrestricted and non-discriminatory; access to the information concerning the standard should be possible and transparent, possibly for all interested parties, competitors included. A standard should also be voluntary. Such an assessment may, to some extent, include factual factors which negatively affect the actual voluntary character of the standard, such as consumer preferences and pressure put by the standardising body to comply with its standards.

Restrictions to competition generated by VSS are to be assessed on the market for the sustainable product covered by the scheme. Empirical studies demonstrate a host of possible negative effects on market parameters in specific cases. Restrictions to competition are connected to the lack of an effective voluntary character of the scheme, and to the possibility offered to producers to use alternative schemes, or market their products as 'regular' products. VSS confer a competitive advantage on producers which qualify and contribute to the establishment of monopolistic competition. Generally, however, in the lack of market power and barriers to enter the market, detrimental effects on competition can be expected to be circumscribed to the short term. The limited, albeit growing, demand for sustainable products may nonetheless contribute to the existence of detrimental outcomes also in the longer term. Other negative effects on market parameters can materialise as well, such as a decline in product variety, a price increase or even output restrictions.

This is not to say that VSS do not generate pro-competitive effects. As a matter of fact, crucial positive gains for consumers come about in the form of increased product quality. Labelling schemes are fundamental in empowering consumers to confidently purchase certain products which incorporate 'invisible' sustainability features, and thereby permit a market for sustainable products to exist and operate effectively. The main objective of many initiatives is the abatement of an externality arising in the production process, which can also be included among the pro-competitive factors under Art. 101(3). However, the narrow approach to efficiencies advocated by the Commission limits the accountable efficiencies resulting from the abatement of an externality to a number of environmental gains which can be transposed into strict economic terms, such as the reduction of polluting emissions. Accounting for other gains, in particular those generated in developing countries' markets and which benefit workers, is even more complicated.

The final outcome of an assessment under Art. 101(3) TFEU is unpredictable and depends on the scheme in question, but it is conceivable that certain schemes may fail to generate sufficient positive efficiency to pass the narrow consumer welfare test. The simplest situation concerns labelling schemes. As long as the claim is truthful and compete, it is likely that the gains resulting from the provision of information to consumers and the market creation effects of a label, in combination with the increase in product quality bought about by the standards, are sufficient to more than offset possible anti-competitive effects. In the lack of a label, as VSS fail to generate most of the positive efficiencies normally associated to standardisation, a careful assessment of all pro- and anti- competitive effects is required. Depending on the extent of the negative effects on market parameters, and on the possibility to employ a broader approach to the efficiencies that can be taken into consideration, a finding of either net restriction or net efficiency is possible. It should be noted that a narrow approach to accountable efficiencies is particularly detrimental to justify social schemes

addressing labour conditions, and environmental schemes which address environmental externalities which are of a more general nature and are not easily transposable in economic terms, such as the protection of biodiversity.

Generally, from a review of the applicable provisions, it can be concluded that standard-setting bodies should closely follow the safe harbour requirements to minimise the chance of a breach of Art. 101 TFEU. Compliance with the procedural requirements contained in the ISEAL Code of Good Practice is likely to result in compliance also with the safe-harbour requirements. Other features of the standards in question also could limit the generation of restrictive effects to competition according to the Commission's Guidelines, such as the standard coverage of a limited part of the end features of a product, and the presence of management system standards which do not rigidly specify product requirements.

Company VSS seem to escape the application of most competition provisions. They are likely not to fall under the block exemption for vertical agreements and are likely not to raise exploitative concerns under Art. 102 TFEU. The prohibition of exclusionary abuse enshrined by Art. 102, however, may be relevant for sectoral and multi-stakeholder VSS. Discriminatory and unjustified denial of access to an essential VSS for the purpose of market access may constitute a breach of Art. 102 TFEU. Schemes which are very popular on the market may be subject to such discipline and should therefore be attentive about their criteria for acceding to the standards, and ensure that denial to the certification only occurs if the entity at hand does not comply with the standards.

In case of public use of a VSS at a Member State level, it is possible that the act of approval would immunise the scheme at hand from competition scrutiny. This does not just confirm that structured interactions with public authority enhance the schemes' legitimacy, but also shows that they may offer shelter from legal scrutiny. It is thus essential that legislators exercise the proper amount of scrutiny on the schemes recognised, both concerning their effects and their procedures. A State-orchestrated effort to set social and environmental standards involving a broad set of actors under open and deliberative procedures is very likely to result in competition immunity. Freedom of movement and, most likely, WTO provisions are nonetheless applicable.

From a normative perspective, certain conclusions can be drawn concerning the possibility to employ the current EU competition law framework to address the challenges posed by VSS. The guidance offered by the Commission in its Guidelines on Art. 101 *vis-à-vis* standardisation agreements should be approached with caution when dealing with VSS. VSS generate much lower gains than those generated by technical standards which are given considerable weight in the Guidelines, such as gains from product interoperability, network externality, market penetration and

integration. Their lack may therefore complicate the justification of anti-competitive effects. As anti-competitive effects are indeed possible and sometimes absent certain gains conventionally associated with standardisation, it is here submitted that enforcement authorities should be less deferential in their appraisal of VSS than of technical standards. In particular, the assessment of safe harbour requirement should be matched by a careful appraisal of the effects of the schemes.

A more intrusive inquiry should be counterbalanced by a broad approach towards accountable efficiency. An appraisal inuring into the broad effects of the scheme is further to be preferred over considerations of whether consumers are willing to pay for the improvements brought about by the standards. An approach towards efficiencies which is not too narrow would be able to encompass also market access and consumer confusion. Efficiency and consumer welfare are affected by restrictions to market access whenever standards exclude producers that are price and quality-competitive but cannot qualify, either because of the high cost of compliance and certification, or because the standard puts them in an objective disadvantage, or simply is inapplicable. Only Court guidance could clarify the extent to which certain elements in the competition analysis can accommodate social welfare considerations, and in particular its jurisdictional borders.

Confusion among consumers can be considered in economic terms, if partially. For example, the proliferation of initiatives lessens the allocative efficiency gains generated by labelling schemes. Incorrect or partial claims from schemes can also be considered as diminishing the gains for consumers because they penalise certain products which do not qualify, or which in fact possess very similar sustainable features, if a perspective broader than that of the label is employed. It is therefore important that competition authorities do not equate the presence of a label with the provision of information gains and efficiencies. A careful appraisal should look at how the label communicates the objective of the scheme, whether the scheme generates other effects which may impact consumer preference, and whether the understanding consumers have of the label matches the information it actually provides.

VSS negatively impact consumer welfare also if they have the effect of depriving final consumers from the opportunity of consuming cheaper products, or limiting the offer of products that actually share the same features - with a direct negative impact on consumer welfare. Granted, to return to the two examples mentioned in the Introduction, at least theoretically, air-miles labels contribute to enhance consumer welfare at least for some consumers. To those who want to purchase labelled products, transport emissions matter regardless of whether more price-competitive products are on sale. Their welfare is therefore increased; similar considerations could apply to a number of schemes. But, at the risk of adopting a paternalistic perspective - which does not seem unwarranted where the livelihood of producers in the global

South could be threatened by the lack of market access - it must be noted that consumer welfare could be increased even more if overall 'green' products are to be allowed on the market.

If the maximisation of efficiency is the task of competition law, certain situations are controversial under a narrow approach to consumer welfare and economic efficiency. There are scenarios where a VSS is sub-optimal from the perspective of social welfare, but still generates *some* positive efficiency when the welfare of consumers is considered - who can be a smaller group and are the professed ultimate target of EU competition law. This could occur where a scheme makes a claim which is at least partially correct, which results in products of improved quality, and generates at least some effects in terms of externality abatement - regardless of its negative effects on market access. This poses the question of the extent to which consumer welfare, in the specific form of allocative efficiency resulting from meeting and fulfilling specific consumer preferences, is allowed to trump social welfare considerations, another issue that deserves Court guidance. Can it be assumed that at *any* time consumers will benefit from *any* VSS as long as it generates *some* positive effects in terms of ensuring sustainable features of a product and related externality abatement? Hopefully, this Chapter has offered some food for thought.

From a policy perspective, the question is whether competition between VSS, under the belief that innovation and efficiencies are always delivered under a competitive process, is something inherently desirable. Generally, a debate is required over whether the possibility that cut-throat market competition between regulatory regimes may, ultimately, affect their perception and effectiveness to the irreparable damage of their trustworthiness, the crucial driver behind labels and certification. This is all the more true at a stage in which momentum is arguably required for consolidation between initiatives that do not have an inherent economic interest in reciprocal recognition and equivalence. In other words, unfettered competition is likely to neither stop proliferation nor guarantee that VSS effectively correct externalities. It should not be forgotten that recognition and equivalence agreements by private standard-setters may be considered as restrictions of competition by object, and whose main beneficiaries are economic operators which would face lessened market entry hurdles, with more limited gains for consumers. Under competition law a tension could arise between the need to avoid concentration in the standardisation domain on the one hand and the need to prevent that the proliferation of schemes from negatively impacting allocative efficiency and the related imperative of mutual recognition and equivalence on the other.

A certain amount of optimism is required to believe in the capacity of *all* private actors to deliver public good *all* the time - especially without encroaching upon other public and private interests, as well as on the international obligations concerning market

access into which WTO Members have entered. The political cost of 'patrolling' sustainability, and private parties' interests therein could be high. But the employment of competition law could also ensure that the EU will not be held responsible under international trade law for regulatory activities that might be difficult to reconcile with international economic law. Other forms of actions such as official endorsement or use of VSS may have the result of triggering the WTO rules for state attribution of private conduct, and therefore the EU may be responsible for possible infringements of WTO law resulting from the regulatory activities of private parties, as the following Chapters will show. At the same time, an obligation is likely to be present to enforce competition law against private standards which restrict trade which are covered by, and in breach of, the TBT Agreement - to which Chapter 5 and 6 now turn.

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

1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 Relevant Articles on State Responsibility for Internationally Wrongful Acts

The Articles on State Responsibility for International Wrongful Acts (ASR) are the final outcome of a lengthy codification process that culminated with their adoption by the General Assembly of the United Nations in 2001.[9] It is accepted that at least some Articles of the ASR, such as those on attribution here discussed, constitute customary international law.[10] The ASR constitute the principles, formulated by way of codification and progressive development, under which a State is to be held responsible for a breach of international law. The Articles address the secondary rules of State responsibility, i.e. the general conditions under which a State is to be considered as responsible for a breach of its international obligations, without attempting to define the actual content of such obligations.[11] Chapter II of the ASR illustrates a situation under which conduct not *prima facie* from the State can nevertheless be attributed to it. Attribution to the State constitutes the first of the two elements that give rise to State responsibility, the second being the presence of an internationally wrongful act.[12]

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

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

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

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

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

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

14 *Ibid.*

2.1 Article 4 - Conduct of organs of a State

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

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

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

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

[15] Yearbook of the International Law Commission, 2001, vol. II, Part Two, 40.
[16] Yearbook of the International Law Commission, 2001, vol. II, Part Two, 42.
[17] *Ibid.*
[18] Yearbook of the International Law Commission, 2001, vol. II, Part Two, 42-43.

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

A relevant difference between Art. 4 and Art. 5 appears thus to be the reference to 'organs' in the former and to 'entities', or 'bodies' in the latter. Under Art. 4 ASR, the conferral upon an organ of governmental power occurs by means of law. It seems that the State organs covered by Art. 4 ASR must be created *ex novo* by means of law. Conversely, under Art. 5 ASR, an already existing 'body' is vested of governmental authority by means of delegation. It could be said that, in such a case, the State strips itself of certain powers to include situations where bodies exercise regulatory powers in the public interest - a function typically connected with governmental authority in modern Western States. The conduct of standard-setters which is based on directly delegated powers, or conferred as a special task in the public interest, could be attributable to the State under Art. 5 ASR. This could be the case, for example, of the European system for technical standardisation. Concerning the governmental function being delegated, the purpose for which conferral is made and the extent of accountability to the State, it is rather uncontroversial to consider regulation as a typical governmental function. Furthermore, delegation occurs with the purpose of regulating in the public interest[21] and under a system of control from the legislator.[22] The same could not be said for VSS, which are created by private actors independently from public approval and control.

2.3 Article 8 - Conduct directed or controlled by the State

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

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

[20] *Ibid.*

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

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

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

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

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

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

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

[24] *Ibid*.

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

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

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

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

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

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

and thereby escapes competition scrutiny. This occurs in the presence of procedural obligations imposed by the State, which ensure that private actors operate in the public interest, and provides that the final responsibility falls on the State. Similarly, in US antitrust law, *Parker* immunity is granted to private parties if the private measures can be brought back to a clearly articulated and affirmatively expressed state policy, and that policy is actively supervised by the State.[31] Although not explicitly referred to as instances of 'direction and control', these two examples - especially the US case[32] - are illustrative of a common strictness in attributing private actions to the State where the borders of delegation are blurry.

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

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

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

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

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

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

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

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

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

3 The WTO rules on attribution: VSS under the GATT

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

[34] Yearbook of the International Law Commission, 2001, vol. II, Part Two, 52.
[35] *Case Concerning United States Diplomats and Consular Staff in Teheran (USA v Iran)*, Merits, Judgement, I.C.J. Reports 1980, 3, paras. 73-74.
[36] Yearbook of the International Law Commission, 2001, vol. II, Part Two, 53.
[37] *Case Concerning United States Diplomats and Consular Staff in Teheran (USA v Iran)*, Merits, Judgement, I.C.J. Reports 1980, 3, para. 74.
[38] *Ibid.*

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

3.1 WTO law and the Articles on State Responsibility

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2 Private and public elements of a measure and its effects

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.3 WTO law and private parties' actions

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

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

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

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

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

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

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

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

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

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

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

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

[66] Panel Report, *European Economic Communities - Restrictions on Import of Dessert Apples (Complaint by Chile)* L/6491, GATT B.I.S.D. (36th Sup) at 93, adopted 22 June1989, para. 12.9.

[67] Panel Report *European Economic Communities - Restrictions on Import of Dessert Apples (Complaint by Chile)* L/6491 (22 June1989), GATT B.I.S.D. (36th Sup) at 93, para. 2.2.

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

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

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

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

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

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

[70] Appellate Body Report, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Canada - Dairy)*, WT/DS/103/AB/R, adopted 13 October 1999, para. 97.
[71] *Canada - Dairy,* WT/DS/103/AB/R, para. 98.
[72] *Canada - Dairy,* WT/DS/103/AB/R, para. 101.
[73] *Japan - Film,* WT/DS44/R, para. 2.51.
[74] *Japan - Film*,WT/DS44/R, para. 4.2.

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

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

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

[75] *Japan - Film*, WT/DS44/R, para. 5.527.
[76] *Japan - Film*, WT/DS44/R, para. 6.221.
[77] *Japan - Film*, WT/DS44/R, para 6.228.
[78] *Japan - Film*, WT/DS44/R, para. 10.327.
[79] *Ibid.*
[80] *Japan - Film*,WT/DS44/R, para. 10.328.
[81] *Ibid.*
[82] Panel Report, *Japan - Trade in Semiconductor (Japan - Semiconductors)*, L/6309 - 35S/116, adopted 4 May 1988, paras. 34-35.
[83] *Japan - Semiconductors*, L/6309 - 35S/116, paras. 13-15.

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

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

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

[84] *Japan - Semiconductors*, L/6309 - 35S/116, para. 51.
[85] *Ibid.*
[86] *Japan - Semiconductors*, L/6309 - 35S/116, para. 109.
[87] *Japan - Semiconductors*, L/6309 - 35S/116, para. 110.
[88] *Japan - Film*, WT/DS44/R, para. 10.45.

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

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

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

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

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

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

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

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

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

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

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

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

[94] *Japan - Film*, WT/DS44/R, para. 10.16.
[95] Zedalis, R. (2007) *Supra at 33*, 357.
[96] Zedalis, R. (2007) *Supra at 33*, 360.
[97] *United States Diplomatic and Consular Staff in Tehran, Judgement*, I.C.J. Reports 1980, 15, para. 74.

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

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

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

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

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

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

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

The later WTO panel in *India - Autos* decided to follow more closely the approach from the two GATT panels. It identified two distinct situations that would satisfy the term 'requirement' in Art. III:4 of the GATT: 'obligations which an enterprise is "legally bound to carry out"; and those which an enterprise voluntarily accepts in order to obtain an advantage from the government'.[103] The enforceability of a measure, regardless of the means actually employed (or not employed) to enforce it, constitutes a sufficient basis for a voluntary measure to constitute a 'requirement' in the meaning of Art. III:4.[104] The panel however still included the additional requirement of an advantage needed to be

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

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

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

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

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

[104] *Ibid.*

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

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

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

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

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

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

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

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

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

3.4 Attribution of VSS to a Member under the GATT

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

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

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

covers 'all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges',[108] and therefore comparable to 'all measures' that can be subjected to a non violation complaint under Art. XXIII:1(b). By means of comparison, the scope of Art. III:4, which the following analysts focuses on, appears narrower and limited to 'laws, regulations and requirements affecting[109] [foreign like products'] internal sale, offering for sale, purchase, transportation, distribution or use'. In *Japan - Film*, however, the panel noted that for the purpose of that dispute the scope of Art. III:4 overlaps with that of XXIII:1(b).[110] It can therefore be assumed that the same 'system of incentives and disincentives' that was at issue under Art. XI in most of the attribution case-law discussed above, can be considered under Art. III:4, and thus also Art. I:1 GATT.

Of particular pertinence under WTO law[111] are the different types of interaction between public authorities in the performance of market regulatory tasks and VSS described in Section 4 of Chapter 2, which may be considered as 'links' for a possible finding of attribution. The following Sections therefore discuss three distinct scenarios, with respect to the EU-VSS interactions previously studied under EU law: EU use of VSS; EU facilitation of VSS; and cases of support and lack of connection with a private scheme.

3.4.1 WTO Members as users

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

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

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

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

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

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

legislative requirements. Depending on the case, States may indicate which specific VSS is required, or may allow producers[113] to choose which scheme to employ.

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

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

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

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

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

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

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

3.4.2 WTO Members as facilitators

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

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

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

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

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

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

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

[118] Revised GPA, Art. I(u).

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

3.4.3 WTO Members as supporters and lack of interaction

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

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

[119] Revised GPA, Art. X:4.
[120] Revised GPA, Art. X:6.
[121] Revised GPA, Art. IV.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[127] General interpretative note to Annex 1A.

[128] Section 2.1.1 and Section 2.2.2 of Chapter 6.

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

4.1 Mandatory versus voluntary character of a measure

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

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

[129] See Sections 3 and 4 of Chapter 6.

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

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

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

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

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

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

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

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

[134] *US - Tuna II*, WT/DS381/AB/R, para 195.
[135] *US – Tuna II*, WT/DS381/R, para. 7.150.
[136] Delimatsis, P. (2014) 'Relevant international standards' and 'recognised standardisation bodies' under the TBT Agreement. TILEC Discussion Paper DP, 2014-031, 14.
[137] *US - Tuna II*, WT/DS381/AB/R, para. 196.
[138] *US - Tuna II*, WT/DS381/AB/R, para. 198.
[139] Mavroidis, P.C. (2013) *Supra at 130,* 522-523.

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

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

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

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

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

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

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

4.2 Bodies covered by the Agreement

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

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

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

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

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

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

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

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

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

[145] *US - Tuna II*, WT/DS381/AB/R, para. 355.
[146] *US - Tuna II*, WT/DS381/AB/R, para. 356.
[147] *US - Tuna II*, WT/DS381/AB/R, para. 360.
[148] *US - Tuna II*, WT/DS381/AB/R, para. 360.

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

The definition of a non-governmental body is not of great assistance for this purpose, as it provides that such body is a 'body other than a central governmental body or a local governmental body, including a non-governmental body which has the legal power to enforce a technical regulation'.[149] The letter of Art. 3 TBT read in conjunction with the definition of a non-governmental body suggests that also non-governmental bodies can at least prepare and adopt technical regulations, without delegation being a requirement. Art. 3.5 TBT stipulates that Members are fully responsible for the observance of all substantive obligations contained in Art. 2 of the TBT Agreement, and positive measures shall be taken to ensure compliance from all bodies which are not central bodies in a Member's territory. This represents an extension of the customary rules for attribution, both as provided by the ASR and by WTO case-law, as a State could become responsible for actions of non-governmental bodies even in the absence of any form of 'link' with such bodies, except their mere presence in its territory. Although Art. 3.1 provides that Members shall take reasonably available measures to ensure compliance with the TBT Agreement by central, local and non-governmental bodies, Art. 3.5 clarifies that Members are fully responsible. In addition, the 'best endeavour' wording of Art. 3.1[150] is made more binding by the provision in Art. 3.5 TBT that Members shall take positive measures as well to ensure that bodies other than central governmental bodies comply with the substantive provisions of Art. 2 TBT.

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

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

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

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

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

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

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

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

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

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

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

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

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

4.2.2.1 Recognised standard-setting bodies

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

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

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

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

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

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

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

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

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

[159] Annex 1.2 TBT.

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

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

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

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

4.2.2.2 Companies as recognised standard-setting bodies

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

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

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

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

The outcome seems to correspond to the intention of the negotiations, which points in favour of the inclusion of company standards under the scope of the TBT Agreement, and is thus evidence of a very broad scope of application of the TBT Code. Negotiating history suggests that several delegations were concerned with the trade barrier effects generated by non-governmental bodies unconnected with governments which were capable of drafting product standards.[165] The definition of standards in the Tokyo Round Standards Code explicitly excluded 'technical specifications prepared by an individual company for its own production or consumption requirements.'[166] Such an exclusion was not reiterated in the final text of the TBT Agreement, arguably showing the intention of covering also company standards. This seems to be supported by the fact that neither the ISO/IEC Guide 2:1991 [167] exclude company standards from the definition of 'standard'.[168]

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

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

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

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

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

[168] ISO/IEC Guide 2: 2004, art. 3.2

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

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

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

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

4.2.2.3 Extent of the obligation imposed on Members

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

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

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

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

172 Art. 4.1 TBT Agreement.

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

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

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

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

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

It seems therefore reasonable to expect flexibility in giving rise to State responsibility according to the type of body whose standards are contested, with the largest leeway for company standards. Indeed, doing otherwise would be against the level of governmental intervention which is expected in market economies, which should not exceed the level sufficient to enforce, for example, law aimed at protecting consumers, and preventing anticompetitive practices such as those discussed in Chapter 4.[177] An undifferentiated enforcement obligation would also represent an unreasonable - and arguably unenforceable - hindrance of private autonomy. It would be unacceptable to require Members to strictly enforce standardising bodies' compliance with, for example, 3.F of the TBT Code of Good Practice, which provides that international standards shall be used as a basis for the standardising body at issue. As standardising bodies also include single companies, the outcome would constitute a severe intrusion from WTO Members into companies' freedom to structure their business and their commercial relations with suppliers, and to respond to consumer demand for products and specific features thereof. Flexibility for for company standards may also be implementing by interpreting the TBT Code provisions as simply imposing an obligation on Members not to encourage TBT Code-inconsistent behaviour, and Members do not actually have to take measures to ensure compliance, or cannot be held responsible for such standards.

4.2.2.4 Reasonable measures which may be available for compliance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally, the extent of the obligation on the Members is also limited by the presence of a peculiar provision in Art. 14.4 TBT, concerning 'Consultation and Dispute Settlement'. It is there provided that a dispute settlement can be invoked when a Member considers that another Member has not achieved satisfactory results under *inter alia* Articles 3 and 4 TBT, but only if its trade interests are significantly affected. Unclarity over what constitutes a 'satisfactory result' aside, this provision appears to limit the access to dispute settlement only in cases where Members are actually affected by a technical regulation or a standard that can be connected to another Member. By means of comparison, under the GATT, no requirement of being affected by a measure exists, and in theory *any* Member can file a dispute under Art. XXIII:1.[187] The same seems to hold true at least for Art. II of the GATS.[188] Such a provision also has the effect of limiting the circumstances under which a State could be held responsible for breaches of the TBT Agreement committed by a private standard setter in its territory.

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

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

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

4.2.3 Which bodies can draft international standards?

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

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

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

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

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

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

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

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

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

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

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

4.3 VSS bodies under the TBT Agreement

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

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

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

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

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

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

4.3.1 VSS under Articles 3 and 4 of the TBT Agreement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[204] TBT Committee, Decisions and Recommendations Adopted by the Committee since Jan. 1, 1995 – Note by the Secretariat, 28 November 200 G/TBT/1/Rev.7, 27.

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

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

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

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

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

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

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

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

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

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

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

5 VSS under the SPS Agreement

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

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

[213] As provided in Annex A.1, the SPS Agreement covers four different types of SPS measures, i.e. any measure applied:
(a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
(b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
(c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or
(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

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

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

5.1 Personal scope of application of the SPS Agreement

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

5.2 Art. 13 of the SPS Agreement

In spite of the above, it must be noted that the SPS Agreement contains an obligation addressing SPS measures drafted by private bodies, albeit indirectly. Art. 13 SPS resonates of a similar language of Art. 4 TBT, in so far it provides that i) Members shall implement positive measures aiming at ensuring SPS-compliance by bodies other than central governmental bodies; ii) shall not take measures which, directly or indirectly, require or encourage non-governmental entities [218] to act inconsistently with the Agreement; iii) must not take measures which have the effect to require or encourage regional, local and non-governmental bodies to act inconsistently with the Agreement; and iv) must ensure that they rely on the services of non-governmental entities in the implementation of SPS measures only if those entitles are in compliance with the SPS Agreement.

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

[216] Art. 5 of the SPS Agreement.
[217] Annex A:5 of the SPS Agreement.
[218] Although the TBT Agreement refers to bodies and not to entities, it seems that the two words can be used interchangeably as synonyms, especially since the Appellate Body has defied a body as a 'legal or administrative *entity* that has specific tasks and compositions' (italic added).

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

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

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

5.3 Private standards within the SPS Committee

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

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

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

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

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

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

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

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

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

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

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

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

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

[227] *Ibid.*

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

6 Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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 is 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

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[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 specials 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 applicable[11] whenever measures[12] 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 Agreements[16]). 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 fort 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 drafters[22] 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 been 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 conten*t 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.

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[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 prospective 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 territory[42] or the implementation of an agreement in a specific State[43] 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 that 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 America148 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., Koekkoek, 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]

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[50] *US - Shrimp*, WT/DS58/AB/R, para. 177. The measure in *US - Shrimp* prohibited the importation of shrimp originating form 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/DS/381/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 standards[55] 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.

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[65] Büthe, 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 addresses 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 regulations[75] 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-effect[78] approach to likeness in the TBT Agreement, as supported by the panel in *US - Clove Cigarettes*.[79] Instead, the four 'traditional' Border Tax Adjustment criteria[80] - 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]

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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.

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[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 rejected[110] 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 to 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.

regulate[114] - 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-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 where 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 requirements[133] 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 complaint 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 GATT[153] 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/DS02/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 police 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/DS/363/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 offseting 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; Szwedo 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 that 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 provisions [192] 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

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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 cases[225] 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 *senso 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 morals[241] and public health[242] 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]

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[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 objectives[268] 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 but 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 existence[294] 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 responsibly 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.

Chapter 7
Conclusion

In the international trade domain, where a mediation is required between opposing values and interests, private standards are likely to proliferate and consolidate their positions as transnational regulators. The growing popularity of voluntary sustainability standards (VSS) is steered by economic forces such as increasingly intense consumer preferences and retailers liability-limitation strategies, which are not going to decline in the medium run. Political factors account for VSS' diffusion as well, as testified by a public preference for private market-based approaches in the domain of sustainability. Most importantly, as public institutions fail to deliver multilateral solutions to global issues connected to the mediation between trade, and labour and environment, the regulatory role of private actors at the transnational stage in such domains increases.

It is therefore important to explore the venues by means of which legal tools of European and international economic law can directly and indirectly contribute to the regulation and review of VSS. This book has appraised different means to control, review, coordinate and influence VSS with the view to ratchet-up the quality and better exploit the regulatory potential of private parties, and to offer a remedy to problems arising on the market. It has considered and assessed several available possibilities at different regulatory levels, such as meta-regulation deriving from WTO obligations; influence, coordination and review resulting from certain EU instruments of regulation; and the application of legal rules pertaining to the domain of internal market law such as the Treaty freedoms and competition law. It has tried to predict the impact of such rules on VSS and has designed normative tests to enhance such an impact and their influence on VSS' substantive requirements.

1 A multi-level system of control

In spite of a possible perception that transnational private regulatory activity may be elusive to certain rules and principles of European and international economic law, this book illustrates the presence of a multilevel system of control with the potential to apply to many types of VSS. It takes the form of a broad set of 'constitutional' meta-requirements laid down by WTO law, as discussed in Section 2.2 of Chapter 6. WTO rules additionally set the boundaries of an enforcement obligation for Members to take reasonably available measures to ensure compliance by standardising bodies with such substantive and procedural requirements contained in the TBT Code of Good Practice. As seen in Sections 4.2 and 4.3 of Chapter 5, the bodies to which these requirements are addressed do not just include bodies exercising elements of public authority, but also encompass a large number of private standardising bodies, and possibly even a broad group of economic actors. The WTO potential to indirectly impose procedural and substantive meta-requirements on private regulation taking the form of standards is therefore far reaching.

Among the reasonably available measures for compliance with the TBT Code which WTO Members are required to undertake, Section 3 of Chapter 3 discussed the incentives and control mechanisms on standards' substance and procedures which find their way in to a number of EU instruments for market regulation and which, at a varying extents, apply to VSS. Reasonably available measures may also include competition law enforcement. Sections 2 and 3 of Chapter 4 illustrated that, at least under EU law, competition rules are implemented by sophisticated legal tests to appraise and balance positive and negative effects generated by a private regulatory scheme, and its impact on the welfare of consumers. Section 2 of Chapter 3 has also shown that EU freedom of movement provisions have the potential to apply to private standards which constitute barriers to market acces.

Such a multilevel system of control does not just consist of meta-rules and procedural requirements capable of exercising an indirect influence on the substance of the standards and the procedures underpinning it (the TBT Code). It also empowers public authorities to directly evaluate VSS' effects both on the market (fundamental freedoms and competition law) and on the externality they aim at addressing (competition law). It can thus be expected that the substance of VSS - and consequently their trade barrier effects and possibly even the consumer confusion they generate - may be affected by the application of certain provisions of economic law.

1.1 Normativity in the application of the legal provisions

This multilevel system of control requires normative interpretation to remedy the legal underdevelopment of certain provisions here considered to be effectively applied to VSS with the objective of their review for the elimination of trade barriers and consumer confusion. As a starting point, it must not be forgotten that certain legal rules do not apply directly to VSS. This is the case of the WTO provisions of both the GATT, and the TBT and SPS Agreements. In the lack of connecting links with WTO Members, Chapter 5 concluded that private standards are very unlikely to be directly covered by the scope of such agreements. Other legal provisions are instead applicable to VSS, but require an extent of adaptation in order to address the issues here considered. This is the case of EU competition provisions, which are likely to apply to private standards in the domain of sustainability. However, Sections 2.3 and 2.4 of Chapter 4 showed the necessity to employ a different approach to the frame of analysis that competition authorities apply to technical standards, in light of the different objectives and effects of VSS. Also, the TBT Code meta-rules for technical standards are applicable to many VSS. In Sections 3 and 4 of Chapter 6 it was submitted that such provisions should be interpreted and applied in a manner that does not conflict with measures like VSS which structurally modify the conditions of competition, and often do so to the detriment of the group of imported products.

Other legal rules necessitate a new legal test altogether in order to even subject VSS under their scope of application. As seen, Art. 34 TFEU does not seem to be applicable to private measures. Under a closer scrutiny of case-law, however, such a position is untenable. Therefore, Section 2.3 suggested a test for the application of Art. 34 TFEU to VSS which is different from the test that would be applicable to public measures, and also mediates between the fundamental freedom to accede to a market and the fundamental rights which may be at stake for certain schemes.

Finally, other provisions apply as they are to VSS. Albeit not always resulting in review, they instead bring about an extent of coordination of regulatory effects and influence on the substance and the procedures of schemes. As discussed in Section 3 of Chapter 3, several EU measures in the domain of market regulation are capable of sorting such effects on VSS. These measures are as diverse as the supply-chain regulatory tools in the Renewable Energy Directive or the FLEGT scheme, the system of incentives and requirements established by the Public Procurement Directive and explicitly harmonising instruments which guarantee baseline requirements in view to ensure consumer trust such as the Organic Products Regulation. As argued in Section 3.4 of Chapter 5, some of these measures which more explicitly incorporate private instruments into public measures may result in the establishment of a sufficiently strong link to trigger WTO review over the VSS in question, for which the EU would bear full responsibility.

This book therefore shows that provisions of EU and international economic law can be interpreted with the view to apply to private standards in the domain of sustainability in a manner which protects private autonomy and permits private actors to experiment with a host of regulatory approaches. At the same time, however, in order to preserve private autonomy, this results in the capacity to address and remedy only the worst instances of discrimination, trade-restrictions under protectionist motives, and blatantly ineffective regimes which, in the EU, enjoy a market gate-keeping power. The potential to employ economic law tools to influence and review private regulation in the domain of sustainability is encouraging in areas like EU competition law, and is therefore worthy of further exploration.

1.2 Variations due to different VSS' rationales

As discussed in Chapter 2, VSS can be understood as public, sectoral and private goods. A framework which classifies private standards on the basis of their institutional arrangement and outputs allows to catch the nuances in regulatory approaches, and to fine-tune the application of legal rules by taking into account an argument of private autonomy. Albeit all contributing at varying extents to the production of global public goods, multi-stakeholder VSS are public goods which pursue public policy objectives; sectoral VSS are club goods pursuing self-regulatory goals concerning

product quality; company VSS are private goods pursuing efficiency and profitability-based objectives. Private regulatory regimes in other issue areas may potentially be fitted in such a categorisation, with the same normative implications *vis-à-vis* the expected role of the State in their regulation.

This book has shown that EU and international economic law can also be interpreted in a nuanced manner which is appropriate for the specific rationales behind multi-stakeholder, sectoral and company VSS. A rather accepted normative approach to free movement shows that it can discipline, however deferentially, multi-stakeholder and sectoral VSS which are indispensable for market access. Sectoral schemes applying mandatorily in a supply chain are more likely to be indispensable, and can be considered in the same manner as other forms of self-regulation also with respect to their justification. Multi-stakeholder schemes appear to give more weight to the pursuit of typically public goals over private goals, and may be allowed to employ public policy grounds when failure to comply with the standard results in the lack of market access. Company standards are likely to be excluded from the application of freedom provisions, and most likely also to fall within the scope of the *de minimis* for vertical agreements between undertakings. EU competition law applies with the same standard of review both for multi-stakeholder and sectoral VSS. A broad approach to accountable efficiencies would be more likely to result in a finding of net efficiency for multi-stakeholder VSS, and therefore gives more leeway to affect market parameters for initiatives which make a *prima facie* valid claim to regulate in the interest not just of business constituencies.

WTO meta-requirements in the TBT Code have never been subject to interpretation by the Appellate Body. Nonetheless, with the assistance of similar provisions in the TBT Agreement, they can be interpreted with refinements which recognise more deference *vis-à-vis* the non-discrimination obligation for schemes pursuing efficiency-based and product quality goals, which is a possible way to frame the legitimate objective of, respectively, company and sectoral VSS. Multi-stakeholder VSS pursuing public policy objectives can be addressed deferentially as well, if their standards are closely aligned to multilateral agreements, or they constitute a form of implementation thereof. Conversely, the concept of non-discrimination can be applied more strictly to multi-stakeholder schemes in contested domains or based on controversial methodologies. Non-discrimination for those schemes can be operationalised in a more stringent manner which resembles its application under the TBT Agreement to public measures. Members would therefore be under an obligation to take reasonably available measures in particular for these types of schemes.

Indeed, the tests discussed above under freedom of movement and the TBT Code meta-requirements are able to address only the most severe cases of trade barriers, arguably connected with protectionism resulting from multi-stakeholder and sectoral

schemes. This is consistent with an argument that holds that private parties should be allowed to self-regulate, to respond to consumer demand, and even to pursue public goals within the frame of their autonomy. At the same time, at least under EU freedom of movement, schemes possessing features typical of public rules such as a deliberative process for their creation, broad representation of conflicting constituencies and a claim to regulate in the public interest may be subject to forms of review which are similar to those public measures would be subject to. Such similarity is however limited to a large set of grounds for justification and a relatively accommodating proportionality appraisal, and not so much to the requirement that they should not constitute an hindrance to market access. Competition law has the potential to address a broader set of transnational private regulatory instruments, and possibly with a more stringent approach. While hard forms of enforcement may be inappropriate, competition authorities have the possibility to use competition tools to evaluate comprehensively the effects of many schemes, and establish soft forms of enforcement or competition advocacy.

Specific forms of interactions between public and private authority under EU law show that synergies can be created by formally recognising VSS' implementing role and by coordinating such role by means of public regulatory instruments - which can also lessen negative effects on the market. This incorporation of private parties in regulatory governance takes place by means of mechanisms which do not always clearly fit into the classic categories for delegation, or self- and co-regulation. Nonetheless, EU regulatory instruments operating in tandem with VSS represent compelling *ad hoc* solutions to influence both substantively and procedurally VSS by means of soft and harder tools which operationalise WTO meta-requirements. This case-by-case approach, at least in theory, is a powerful mechanism for coordinating regulatory effects, for influencing VSS, and possibly even for subjecting them to Court review. Granted, concerns of WTO-compliance may arise and render problematic the employment of instruments affecting processes extraterritorially. EU regulators should therefore carefully ensure that the schemes employed are in compliance with all relevant WTO obligations.

2 Structural difficulties

Certain characteristics of VSS remain however problematic under all legal areas here considered even by embracing a normative vantage point *vis-à-vis* legal provisions. Such features reveal a persistent uneasiness of EU and international economic law with specific recurring features of transnational private regulation limiting the influence which can be exerted by means of such legal regimes. These features concern all three of VSS' definitional elements, i.e. their voluntary character, their domain of application to the pursuit of sustainability, and their taking the form of standards.

2.1 Voluntary character

The treatment of voluntary private measures has been addressed by adjudicatory organs under all three legal areas here reviewed. WTO law explicitly rejects that a private standard may become mandatory for the purpose of WTO rules because of market forces. Only elements connected to public authority, such as delegation of regulatory powers, may turn a private voluntary measure into a (public) mandatory one under the TBT Agreement. In other words, a private standard cannot become a technical regulation because it is mandatory for market access. Under the GATT, voluntary private measures may be covered, but only if connected to public authority by means of attribution. *De facto* mandatory private measures cannot be directly reviewed under WTO law, if such *de facto* mandatory character is exclusively connected to market forces, as it happens for VSS. Functionally equivalent forms of public authority can thus be exercised by private actors only by virtue of delegation or attribution.

Conversely, EU internal market law has been more open to different factors affecting the voluntary character of a measure, which may trigger the application of the Treaty rules. Under the Treaty freedoms, albeit not explicit yet, functionally equivalent forms to public authority of collective regulation may also be exercised by virtue of factors like consumer and retailer preferences. It should be noted that in the lack of such an acknowledgement it is rather unlikely that VSS would be caught under the Treaty freedoms. A private standardising body drafting formally voluntary standards, including in the domain of sustainability, may exercise a gate-keeping power on the market or on a subset thereof, especially if such power is viewed in light of a broader regulatory framework supporting private regulation. Also multi-stakeholder and sectoral VSS, whose standards may be formally voluntary, could therefore be caught by the Treaties even if their standards are not *de jure* mandatory.

This flexibility towards the determinants of functionally equivalent forms of public authority is the outcome of the elevation of Treaty freedoms to the status of fundamental rights; other fundamental rights may however counterbalance and limit the expansion of the personal scope of Art. 34 TFEU. It should however not be forgotten that the test for market access appears to be very strict and arguably requires the impossibility to market a product in order for a breach to be triggered. This means that the voluntary character must turn into a fully mandatory character in the actual presence of no available alternative than compliance with the standards. Again, not many schemes would be capable of generating such effects, albeit the situation may be evolving in certain commodity sectors. Also EU competition law seems to acknowledge that different elements may inhibit the actual voluntary character of a standardisation agreement. A 'less voluntary' agreement between

undertakings is increasingly more prone to generate anti-competitive effects. This shows that, under EU law, a scheme may be subject to increased scrutiny as it becomes more popular, and its actual voluntary character evolves.

2.2 Pursuing sustainability through management system standards

The second contentious point concerns the approach followed by VSS to pursue sustainability, which is often operationalised by means of management standards. As explained in Section 5 of Chapter 2, such an approach to the prescription of sustainable practices makes it complex to appraise the effects of a set of standards, as it leaves a wide margin for its implementation to the entity seeking certification. The impossibility to even just generally evaluate the impact of a scheme remains a problem for the legal analysis, in spite of a certain agreement that management standards can be an effective tool for change. This is particularly true under legal tests which require quantification of the effects, such as the appraisal of efficiencies in the form of externality abatement under EU competition law. The resulting outcome may exacerbate the tension between EU competition law and agreements pursuing also non-competition concerns, since EU competition law requires an overall effect substantiation in economic terms which cannot be made if not on a producer-by-producer basis.

Also under WTO law management system standards are problematic as such standards do not seem to be covered by the scope of the TBT Agreement. In spite of an obligation to comply with the TBT Code which arguably applies to all standardising bodies excluding certain companies' standards, WTO Members may not be under an obligation to take reasonable measures to ensure compliance for standards which are in breach with the provisions of the TBT Code, but are not standards covered by the scope of the TBT Agreement. This may be seen as a formalistic issue, but it is evidence of economic law's uneasiness with instruments incorporating prescriptive elements in procedural forms, and not in more 'common' forms which directly prescribe product characteristics and production methods. Formalistic considerations should nonetheless not be a reason to exclude regulatory instruments impacting on the market from scrutiny, both under WTO law and competition law.

2.3 Normative standards

The third point of contention generally concerns the treatment of standards which are not technical standards, but that instead incorporate normative considerations. Under EU internal market law, a long and still ongoing process has finally contributed to bring an extent of clarification over the substantive and procedural discipline of private technical standards, both within and outside formal delegation of regulatory powers by EU institutions and Member States. For normative private standards

addressing policy externalities or mediating between different values, there are many arguments against the extension of a similarly hands-off approach. This process of 'constitutionalisation' of this specific form of private regulation should begin by recognising the obvious, i.e. that standards like VSS are not like technical standards pursing network coordination problems.

Their differences do not just pertain to questions of legitimacy to regulate and mediate between conflicting interests in the generation of distributional concerns but, very important under EU competition law, also encompass different economic effects. It would thus be inappropriate for competition authorities to embrace the same deferential approach as for technical standards, which gives rise to a presumption of net efficiency to standards elaborated under certain procedural requirements, in the lack of many of the efficiencies normally generated by technical standardisation. Also under freedom of movement law, arguments that technical standards may be difficult to approach by Courts and a procedural review would be sufficient, should be reconsidered for normative standards which are well-spread and increasingly important to enter a market. In the end, freedom of movement frequently deals with conflicting objectives. This does not necessarily encroach upon the domain of private autonomy, provided a relaxed assessment of proportionality and the presence of a comprehensive justificatory regime which recognises the possibility to pursue product quality as a goal private actors can attain in the exercise of self-regulatory functions.

3 Implications for VSS

The multilevel system of control which EU and international economic law has the potential to exert on VSS can be translated into certain substantive requirements VSS should abide by, in order to err on the side of caution. Scheme holders' perception of legal constraints are difficult to appraise in the absence of an empirical assessment; especially multi-stakeholder and sectoral bodies should however be aware of the direct and indirect implications stemming from the legal provisions discussed in this book. From the meta-rules of the TBT Code, to avoid discrimination a requirement can be distilled that standards must be based as close as possible on the requirements or objectives of an international agreement or, in the lack thereof, must bear a rational connection with scientific evidence. Also coherence towards the risks regulated within the objective of the schemes is required, in particular if the inclusion or exclusion of certain requirements is likely to have different impacts among different groups of entities seeking certification. Whether this requirement can be difficult to transpose from abstract to more practical terms, generally a scheme should address similar concerns in a similar manner, which can be described as in practice requiring a consistent and all-embracing approach in the pursuit of its objective.

A certain amount of effectiveness in the achievement of the goal pursued is required in order to separate trade-barriers with an arguably protectionist rationale from schemes legitimately pursuing public goals. To draft standards which allow one to more or less precisely quantify a scheme's effectiveness - including its consequences on competition parameters - would be ideal, especially for the purpose of competition rules. Since it is at times difficult to ensure that a standard's effects are quantifiable and therefore the substance of the rules may be difficult to approach from public authorities, procedural requirements are of paramount importance. They include transparency and openness during the standard-setting, albeit the actual extent may vary according to the provisions considered. The voluntary character of the standard should be ensured by not putting pressure on undertakings for compliance, albeit factors outside the control of VSS, such as consumer preferences, may increase the chances of legal scrutiny. The basic substantive and procedural requirements listed here should be uncontroversial, and are actually in the interest of transnational bodies with a meaningful intention to contribute to public goals, and not just pursue the self-serving interests of their business members.

4 Towards ad hoc solutions?

All in all, this book has shown that direct review and influence over a specific subset of global public goods may be limited to instruments indispensable for market access under freedom of movement, and may be more thoroughly exercised by means of competition law enforcement. The question that remains open is whether this frame of EU public influence and control, in the frame of WTO meta-requirements, is sufficient and appropriate for private rules which, some more explicitly than others, build on existing multilaterally agreed instruments and affect the rights deriving from them. A 'light-touch' analysis, for example resulting from the application of EU competition law to technical standards, or sport rules under the freedom movement, is less controversial and indeed appropriate for rules which are either novel and therefore clearly filling a regulatory void, or are part of a 'self-contained' regime where state activity has traditionally been minimal - and are generally less prone to structurally generate distributional concerns.

It seems thus that the supervisory role which can be exercised over VSS via certain EU economic law provisions is not fully capable of addressing distributional concerns for the large number of standards which are below the radar of legal review. While the normative approaches here elaborated are appropriate in light of the regulatory autonomy of the bodies considered, the provisions of economic law considered here struggle much more when it comes to identifying a balance between private autonomy and the impact on the schemes on pre-existing rights and obligations of the affected actors not merely understood in terms of market access, and which at times are even located outside the EU. Granted, the growing popularity of certain schemes

may result in an increased amount of legal review under freedom of movements but, currently, many schemes escape its application. It is however unlikely that expanding the application of EU internal market provisions to address more schemes would not generate equally serious concerns over private autonomy to regulate and self-regulate.

However, the promising regulatory capacity of *ad hoc* public regulatory solutions where public and private authority work in partnership towards the achievement of public goals should be further explored, and combined with the interpretation of international and European economic law provisions here provided. Future research should investigate which policy area may benefit from increased forms of coordination between public and private authority, lay down more detailed criteria to identify suitable private instruments to be incorporated in public regulation, and identify regulatory patterns that could be fruitful for that purpose in order to coordinate and influence VSS in a host of regulatory domains.

Private rules can be employed for the implementation of broader requirements, or for extraterritorial verification of regulatory compliance which can remedy enforcement problems in jurisdictions abroad. For example, the potential of VSS to guarantee regulatory compliance within a commodity supply chain should be further explored by EU regulators within a more structured legal frame, whose both private and public elements are in line with the obligations, among others, of EU and WTO law. These types of interaction do not just constitute promising mechanisms to exert influence on private standards and steer private transnational regulation by means of incentives and the legitimacy generated by the association of private standards to public authority, but also bring back, if partially, the regulation of transnational phenomena to public authority.

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Summary

The emergence, consolidation, and proliferation of private product standards in the domain of sustainability has been one of the most striking features in global governance in the social and environmental fields. Companies, sectoral associations and multi-stakeholder organisations set and enforce standards defining products and process features in domains ranging from forestry to fisheries, from agricultural products to raw materials, and from textiles to biofuels. Certified goods, as well as Fair trade and animal welfare-compliant products are now ubiquitous in European stores and homes. Voluntary sustainability standards (VSS) are non-mandatory (in some cases market-based) regulatory schemes designed by private bodies with the purpose of addressing, directly or indirectly and by means of third-party certification of products and processes, the social and environmental impact resulting from the production of goods. As these initiatives do not just represent a market niche but go mainstream, the study of their effects and the possibilities for regulators to intervene in their coordination, influence and review becomes pressing. Following the assertion that public authorities should play an increasingly visible role in transnational private regulation by means of directing mechanisms, this book examines the interaction between VSS and the rules and meta-rules of European and international economic law regimes. The goal of this dissertation is to assess the extent to which European Union (EU) internal market law and World Trade Organisation (WTO) law apply, or can be interpreted to apply to VSS, in particular with the goal to address and remedy barriers to market access and consumer confusion generated by private standards.

This book illustrates the presence of a multilayered system of norms at the WTO and EU level which applies or has the potential to apply to many different types of VSS. WTO provisions enshrined in the Technical Barriers to Trade (TBT) Agreement lay down broad 'constitutional' meta-requirements applying to private standards also in the sustainability domain. Such application is however indirect, i.e. mediated by 'reasonably available' measures WTO Members are required to take to ensure private standards' compliance with such principles. EU internal market law, and in particular freedom of movements provisions, could apply under certain conditions to voluntary private standards which affect market access. Furthermore, standards which are drafted by undertakings and have an impact on market parameters and consumer welfare fall under the scrutiny of EU competition law. The underdevelopment of these legal areas, in particular *vis-à-vis* private standards, however requires normative interpretation to understand their possible application to VSS. This book shows that the non-discrimination and necessity provisions applicable to private standards and contained in WTO Agreements, freedom of movement obligations under Art. 34 TFEU, and EU competition law discipline under Articles 101 and 102 TFEU, can all be interpreted in a manner which remedies the most serious trade barrier effects and

confusion generated by the schemes, potentially even permitting an extent of review over the standards' contribution to their objective.

The analysis in Chapter 3 concluded that, in addition to the freedom of circulation of persons, also Art. 34 TFEU is in principle applicable to private measures, provided that compliance with a standard is an essential condition for market access. Where a VSS exercises a market gate-keeping power it could be held in breach of Art. 34 TFEU. However, in many cases, such an infringement would be justifiable under public policy objectives, or under the fundamental right of private autonomy. Chapter 4 revealed a host of problems in treating VSS in the same deferential manner as technical standards under Art. 101 TFEU. The hands-off approach which characterises competition scrutiny of technical standards would be inappropriate for highly normative standards that do not generate many of the efficiencies traditionally associated to technical standardisation. Instead, Chapter 4 argued that a better analytical approach to VSS should always include a full appraisal of their anti-competitive effects and the efficiencies generated. The latter should be understood broadly as to permit all positive effects generated by private standards to account for their justification, and to empower a competition authority to fully appraise all negative and positive effects generated by a private scheme.

Chapter 6 elucidated how the WTO principle of non-discrimination may be structurally conflicting with standards whose explicit objective is to modify the conditions of competition between products by identifying 'quality' goods. In addition, WTO Members' implementation of the provisions of the TBT Code of Good Practice for standards would be very burdensome if the obligation to scrutinise all the regulatory distinctions of a standard were to be interpreted in the same manner as for public measures. A possible deferential approach to non-discrimination could limit the appraisal to assessing whether the standard is aligned to provisions of internationally agreed upon agreements in the social and environmental domains, and to conduct and in-depth assessment only in cases of deviations, more stringent requirements, or in the absence of international agreements. This disciplined approach to non-discrimination, coupled with a necessity obligation taking the form of a suitability test and a relaxed application of the obligation to base standards on international standards, would be capable to address and remedy the most blatant cases of discrimination and market restriction, possibly under a protectionist rationale, while leaving sufficient scope for private autonomy and experimentation in regulatory approaches.

This dissertation has exposed a tension between EU and international economic law and voluntary measures which are an emanation of authority unconnected to public authority. As the actual voluntary character of a private standard may vary in practice,

under EU freedom of movement and competition law a closer scrutiny of VSS is to be expected as standards become less of a voluntary choice for producers. A certain uneasiness of the law, especially under WTO rules, can be observed with respect to the formal features of the prescriptive content of standards. The frequent employment of management system requirements could exclude certain VSS from the application of WTO discipline, and would complicate considerably the assessment under competition law of the positive effects generated by a scheme. All in all, the highly normative content of VSS and the potential distributive effects generated require different legal approaches than those applied to other private regimes. The process of constitutionalisation of this specific form of private regulation has a long way to go.

This book also shows that *ad-hoc* solutions such as those employed under EU law could be effective under specific circumstances to direct, orchestrate and coordinate private standards to limit trade barrier effects, ensure consumer trust, and schemes' effectiveness. These solutions encompass a host of different measures in the domain of market regulation that, without directly regulating private schemes, are nevertheless capable of indirectly addressing and improving procedural and substantive features of VSS. The employment of private standards is increasingly permitted in trade measures to serve as a verification of compliance with certain requirements, or as a tool to demonstrate the legality of the products in question. The possibility to employ a standard comes with strings attached; often requirements are laid down addressing features of the standard or the process that brought it to existence. These types of interaction between public and private authority constitute promising mechanisms to exert influence on private standards and steer transnational private regulation by means of incentives and the legitimacy generated by the association of private standards to public authority. They also bring back, if partially, the regulation of transnational phenomena under a degree of control of the public authority.

Samenvatting

De opkomst, bestendiging en groei van private standaarden in het domein van duurzaamheid is één van de meest opvallende kenmerken van de 'global governance' op het gebied van milieu en fair trade. Bedrijven, brancheverenigingen en samenwerkingsverbanden tussen overheden, NGOs en het bedrijfsleven maken en handhaven standaarden die voorwaarden opleggen aan producten dan wel productieprocessen binnen een bepaalde leveringsketen. Dit vindt plaats in zulke uiteenlopende sectoren als bosbouw en visserij, variërend van landbouwproducten tot grondstoffen en van textiel tot biobrandstoffen. Gecertificeerde goederen, evenals eerlijke handel en dierenwelzijn-conforme producten zijn nu alomtegenwoordig in de Europese winkels en woningen. Vrijwillige duurzaamheidsstandaarden (VDS) zijn niet verplichte (in sommige gevallen vanuit de markt geïnitieerde) reguleringssystemen, ontworpen door private lichamen met de bedoeling om de sociale en milieu-impact van productieprocessen aan te pakken, door middel van directe dan wel indirecte certificering van producten en processen door derden. Omdat deze initiatieven niet langer een niche betreffen, maar gemeengoed zijn geworden, is het van belang om de effecten hiervan te bestuderen en te begrijpen welke mogelijkheden overheden hebben om in te grijpen in de coördinatie, invloed en beoordeling van deze standaarden. Vanuit de aanname dat publieke autoriteiten een steeds zichtbaarder rol zouden moeten spelen in transnationale private regulering middels overheidsinstrumenten, onderzoekt dit boek de interactie tussen VDS en regels – inclusief wat men 'overkoepelende regels' zou kunnen noemen -- van Europese en internationale handelsrechtelijke regimes. Het doel van deze dissertatie is te beoordelen in hoeverre het recht van de interne markt van de Europese Unie (EU) en het recht van de Wereldhandelsorganisatie (WHO) van toepassing zijn, of hoe deze zo geïnterpreteerd kunnen worden dat ze van toepassing zijn op VDS. In het bijzonder is hierbij het doel om barrières die VDS aan markttoegang opwerpen en eventuele verwarring die ze oproepen bij consumenten, aan de orde te stellenen te beperken.

Dit boek illustreert het bestaan van een gelaagd systeem van normen op het niveau van de WHO en EU, dat van toepassing is, of althans het potentieel heeft om van toepassing te zijn, op vele typen VDS. WHO-bepalingen vastgelegd in de Technical Barriers to Trade (TBT) Overeenkomst, stellen brede 'constitutionele', overkoepelende eisen die ook gelden voor private standaarden binnen het domein van duurzaamheid. De toepassing daarvan is echter indirect, dat wil zeggen dat WHO lidstaten gehouden zijn om 'redelijk te verwachten' maatregelen te nemen om dergelijke private VDS de overkoepelende eis te te laten naleven. EU-wetgeving op de interne markt, in het bijzonder de beginselen van vrij verkeer, kunnen onder bepaalde omstandigheden van toepassing zijn op VDS die een vrije markttoegang aantasten. Bovendien vallen standaarden die worden opgesteld door bedrijven met een impact op de parameters van de markt en het welzijn van de consument onder het Europese mededingingsrecht. De onderontwikkeling van de hier

beschouwde rechtsgebieden, althans ten aanzien van hun toepassing op private standaarden, impliceert dat een meer normatieve invulling nodig is om de mogelijke mate van hun toepasbaarheid op VDS te begrijpen. Dit boek toont aan dat non-discriminatore en proportionele toepassing van bepalingen op VDS, zoals vervat in de WHO overeenkomsten, in de vrij verkeer beginselen van artikel 34 VWEU en ook in het Europees mededingingsrecht, met name artikelen 101 en 102 VWEU, zodanig geïnterpreteerd kunnen worden dat negatieve gevolgen zoals handelsbarrières en verwarring veroorzaakt door de private systemen verminderen, en dat de artikelen potentieel zelfs de beoordeling toestaan of de doelen van de standaarden zelf behaald worden.

Na de analyse in hoofdstuk 3 werd geconcludeerd dat, naast het vrije verkeer van personen, ook artikel 34 VWEU in principe van toepassing is op VDS, mits naleving van een standaard een essentiële voorwaarde is voor toegang tot de markt. Wanneer een VDS feitelijk een machtige poortwachter wordt kan deze strijdig zijn met artikel 34 VWEU. Niettemin kan in veel gevallen een inbreuk gerechtvaardigd zijn vanwege bepaalde beleidsdoeleinden of vanwege het fundamentele recht op private autonomie. Hoofdstuk 4 besprak de problemen die zich voordoen wanneer VDS op gelijke voet met technische standaarden worden behandeld onder artikel 101 VWEU. Deze hands-off benadering is niet geschikt voor VDS omdat deze niet de marktefficiëntie genereren die van oudsher met technische standaarden wordt geassocieerd. In plaats daarvan, zo stelde hoofdstuk 4, zou een betere benadering om VDS te analyseren tevens een volledige beoordeling moeten behelzen van hun concurrentiebeperkende effecten in aanvulling op hun efficiëntieversterkende effecten. Dat laatste moet breed begrepen worden, in die zin dat zou moeten worden toegestaan dat alle positieve effecten die VDS opleveren mee worden gewogen in de beoordeling van hun toelaatbaarheid, daarmee toezichthouders in staat stellend alle effecten van een private standaard te beoordelen.

In hoofdstuk 6 werd besproken dat het essentiële WHO-beginsel van non-discriminatie structureel in conflict is met standaarden waarvan het expliciete doel is om concurrentievoorwaarden tussen producten te veranderen door 'kwaliteitsgoederen' te onderscheiden. Handhaving door lidstaten van de WHO kan bovendien belastend zijn in het licht van een verplichting om nauwlettend te onderzoeken hoe een bepaalde standaard onderscheid maakt tussen producten. Een mogelijke goede benadering van non-discriminatie zou de beoordeling kunnen beperken tot de vraag of standaarden zijn afgestemd op internationale overeenkomsten op milieu- en sociaal gebied, waarbij diepgaande evaluaties enkel plaatsvinden in gevallen van afwijkingen, strengere eisen of het ontbreken van internationale overeenkomsten. Deze, wat men zou kunnen noemen gedisciplineerde benadering van non-discriminatie, gecombineerd met een noodzakelijkheidstoets waarbij beoordeeld wordt of de standaarden passend zijn, en een soepele toepassing van de verplichting om standaarden te baseren op internationale

normen, zou de meest grove zaken van discriminatie en marktbeperking, bijvoorbeeld op grond van protectionistische redeneringen, kunnen voorkomen terwijl er voldoende ruimte blijft voor private autonomie en experimenten met verscheiden methodes van regulering.

Deze dissertatie heeft een spanning blootgelegd tussen EU- en internationaal economisch recht aan de ene kant en vrijwillige maatregelen, die een uitvloeisel zijn van niet aan overheden verbonden autoriteit, aan de andere kant. Op grond van het EU-recht valt een kritischer beoordeling van VDS te verwachten naarmate standaarden steeds minder een vrijwillige keuze voor producenten inhouden. Een zekere onwennigheid van het recht, zeker waar het gaat om WHO regels, is waar te nemen met betrekking tot de formele aspecten van standaarden die voorschriften bevatten. Het vaak voorkomende gebruik van eisen aan managementsysteem in bepaalde VDS, zou deze kunnen uitsluiten van de toepassing van WHO recht, en zouden bovendien de beoordeling van de positieve effecten genereerd door VDS aanzienlijk bemoeilijken. Al met al vereisen de sterk normatieve inhoud van VDS, en de potentieel herverdelende effecten die ze veroorzaken, een andere juridische aanpak dan andere private regimes. Het proces van het constitutionaliseren van deze specifieke vorm van private regulering heeft nog een lange weg te gaan.

Dit boek heeft ook aangetoond dat ad hoc oplossingen, zoals die gebruikt door het EU recht, in bepaalde omstandigheden effectief kunnen zijn in het bijsturen en coördineren van private standaarden, om zodoende handelsbarrières te beperken, consumentenvertrouwen te garanderen en de effectiviteit van de regelingen te bevorderen. Deze oplossingen bevatten een scala aan verschillende middelen op het gebied van marktregulering die, zonder dat ze direct private standaarden reguleren, niettemin in staat zijn om – indirect – procedurele en inhoudelijke onderdelen van VDS te adresseren en verbeteren. Het gebruik maken van private standaarden is in steeds grotere mate toegestaan in handelsbeperkende maatregelen, om te dienen als een verificatie van naleving van specifieke vereisten, of als een middel om de rechtmatigheid van bepaalde producten aan te tonen. De mogelijkheid om van standaarden gebruik te maken komt met addertjes onder het gras; vaak zijn er materiele of procedurele eisen in het leven geroepen waaraan de standaard zal moeten voldoen om erkend te worden in publiekrechtelijke instrumenten. Deze vormen van interactie tussen publieke en private autoriteit vormen veelbelovende middelen om invloed uit te oefenen over private standaarden en om transnationale private regulering te sturen door middel van prikkels en om de legitimiteit te verbeteren vanwege de associatie van de private standaarden met het publieke gezag. Het brengt tegelijkertijd, zelfs als is het gedeeltelijk, de regulering van een transnationaal fenomeen terug binnen de controle van het publieke gezag.

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