



CSR and the Law of the WTO – The  
Impact of *Tuna Dolphin II* and *EC–Seal Products*

Carola Glinski\*

---

\* Postdoctoral fellow researcher at the Centre for Enterprise Liability (CEVIA),  
Faculty of Law, University of Copenhagen, Denmark, E-  
Mail: [carola.glinski@jur.ku.dk](mailto:carola.glinski@jur.ku.dk).

1.	INTRODUCTION .....	122
2.	SETTING THE SCENE: EXTRATERRITORIALITY – OR ADMISSIBILITY OF NON-PRODUCT-RELATED PRODUCTION REQUIREMENTS ...	124
2.1.	NON-DISCRIMINATION UNDER GATT .....	126
2.1.1.	ARTICLE III:4 GATT .....	126
2.1.2.	ARTICLE XX GATT .....	130
2.2.	THE TBT AGREEMENT .....	134
2.2.1.	THE SCOPE OF APPLICATION.....	134
2.2.2.	DISCRIMINATION OF ‘LIKE PRODUCTS’ UNDER THE TBT AGREEMENT .....	136
2.2.3.	INTERIM CONCLUSION ON THE EXTRATERRITORIALITY ISSUE .....	137
3.	ATTRIBUTION OF PRIVATE OR VOLUNTARY CSR MEASURES TO THE STATE .....	138
3.1.	THE DISCUSSION .....	138
3.2.	THE IMPACT OF <i>TUNA DOLPHIN II</i> : MANDATORY VS. VOLUNTARY .....	140
3.3.	CONCLUSION.....	142
4.	CSR REGULATION AS ‘INTERNATIONAL STANDARDS’ .....	143
4.1.	THE DISCUSSION .....	145
4.2.	THE IMPACT OF <i>TUNA DOLPHIN II</i> .....	146
5.	CONCLUSION AND PROSPECTS.....	147

## ABSTRACT

This article deals with WTO law as a possible obstacle to pursue CSR policies. Drawing in particular from the reports in *Tuna Dolphin II* and *EC – Seal Products*, it discusses the three main issues within WTO law related to the hybrid character of CSR regulation between private and public and between national and international: First, the general admissibility for the importing state to address socially and/or environmentally responsible production standards abroad and thus – from its perspective – extraterritorial situations (so-called ‘non-product-related production measures’); second, the attribution of (more or less) private CSR regulation to the importing state; and third, the question whether and under which conditions private (transnational) CSR standards can be regarded as ‘international standards’ under the law of the WTO.

## 1. INTRODUCTION

This article deals with the relation between ‘corporate social responsibility’ (CSR) regulation and the law of the WTO. CSR regulation has gained new momentum in the aftermath of the Rana Plaza collapse in Bangladesh and the fire in the Ali Enterprises factory in Pakistan, with academic discussion<sup>1</sup> and pending litigation on corporate liability of multinational corporations or supply chain liability, for example, in Germany<sup>2</sup> and Canada.<sup>3</sup> At the same time, these disasters have led to new private CSR initiatives such as the so-called ‘Bangladesh Accord’<sup>4</sup> but also to new public-private CSR governance structures such as (national and international) ‘CSR alliances’ like the German ‘*Bündnis für nachhaltige Textilien*’ (Alliance for sustainable garment).<sup>5</sup> In fact, CSR regulation comes in a great variety of forms, including: purely private business self-regulation; agreements between business and labour organisations or NGOs that have been adopted by certain or a considerable number of corporations nationally, EU-wide or internationally; private standards and labels, again nationally, EU-wide or internationally developed and/or adopted; and forms of public promotion of or state involvement in the setting of CSR standards like round tables for the development of CSR standards and labels, the adoption of legal minimum standards for

<sup>1</sup> See, for example, C. van Dam, ‘Tort Law and Human Rights: Brothers in Arms’ (2011)

<sup>2</sup> Journal of European Tort Law 221; P. Rott and V. Ulfbeck, ‘Supply Chain Liability of Multilateral Corporations?’ (2015) European Review of Private Law 415.

<sup>3</sup> LG Dortmund, 7 O 95/15. For details, see P. Wesche and M. Saage-Maaß, ‘Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from *Jabir and Others v KiK*’ (2016) 16 Human Rights Law Review 370.

<sup>4</sup> *Das v. George Weston Limited*, No. CV-15-526628 (Ont. Superior Ct. filed Apr. 22, 2015).

<sup>5</sup> Accord on Fire and Building Safety in Bangladesh, <<http://bangladeshaccord.org>> accessed 29 May 2017.

<sup>6</sup> <[www.textilbuendnis.com/de](http://www.textilbuendnis.com/de)> accessed 29 May 2017.

voluntary labels or state based voluntary labels, agreement based ‘CSR alliances’, and CSR standards in public procurement or in public support schemes. Other state based CSR mechanisms could be the mandatory use of certain certificates, mandatory product related minimum production requirements or CSR reporting duties.

CSR regulation usually encompasses certain minimum production standards concerning environmental protection, human rights, labour and employment issues, health and safety issues, and bribery within the whole production chain. It is based on the idea that corporations are responsible for their impact on workers, the environment or neighbourhoods in situations or states with weak legal protection standards or weak enforcement mechanisms. Thus, CSR regulation is of particular importance with regard to transnational production chains where protection standards vary greatly between states.

In turn, the law of the WTO, namely the GATT<sup>6</sup> and the TBT Agreement,<sup>7</sup> are concerned with the promotion of free trade through the obligation not to treat foreign products less favourable than ‘like products’ of national origin (‘national treatment’, Article III GATT) or less favourable than products originating from other countries (‘most favoured nation treatment’, Article I GATT), the prohibition of unnecessary restrictions to trade (Article XI GATT) and the requirement to base product regulation, labels and standards on international standards (Articles 2.4 and 2.5 TBT). Due to its regulatory impact on internationally traded products, their market access and competitive opportunities, CSR regulation is often thought to be in conflict with the law of the WTO; whereas it might also provide for international standards that national regulation can be based upon.

Three main issues within WTO law related to the hybrid character of CSR regulation between private and public and between national and international can be identified: First, the general admissibility for the importing state to address socially and/or environmentally responsible production standards abroad and thus – from its perspective – extraterritorial situations (so-called ‘non-product-related production measures’); second, the attribution of (more or less) private CSR regulation to the importing state; and third, the question whether and under which conditions private (transnational) CSR standards can be regarded as ‘international standards’ under the law of the WTO.

All these aspects have been unsettled until now. This article first provides an overview of the long-standing discussions related to these aspects. It then analyses to what extent the two recent rulings of the WTO

---

<sup>6</sup> General Agreement on Tariffs and Trade.

<sup>7</sup> Agreement on Technical Barriers to Trade.

dispute settlement bodies in *Tuna Dolphin II*<sup>8</sup> and *EC – Seal Products*,<sup>9</sup> which deal not only with environmental but also with ethical concerns, further concretise the responsibility of the state for voluntary measures and the procedural fairness requirements for international standards, contribute to the solution of CSR related problems.

## 2. SETTING THE SCENE: EXTRATERRITORIALITY – OR ADMISSIBILITY OF NON-PRODUCT-RELATED PRODUCTION REQUIREMENTS

The extent to which the law of the WTO permits Members to take (regulatory) action dealing with situations beyond Member's borders, has been discussed for long amongst WTO lawyers and Members. This discussion has also been led under the heading of the admissibility of so-called 'non-product-related process and production methods' ('nprPPMs'), which might negatively restrict importation or marketing chances of goods produced abroad. NprPPMs mean production requirements for certain products which cannot be traced in the physical characteristics of the product itself, for example, environmental, labour or health and safety standards for production processes.

Proponents of the admissibility of CSR regulation and production related standards argue that they are an important means to socially embed transnational markets, which can bridge the boundaries of state based law.<sup>10</sup> Their argument is that transnational trade is inevitably linked to the issue of exploitation of the environment and vulnerable parts of the population. The WTO Members should take reasonable measures to encourage corporations to pursue CSR objectives and/or adopt related standards. Without the possibility to link trade policies with production standards, in particular where internationally accepted minimum standards exist, the WTO would undermine social and environmental protection in the international arena and would put its own legitimacy at risk.<sup>11</sup>

<sup>8</sup> *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS/381/AB/R (hereinafter: *Tuna Dolphin II*).

<sup>9</sup> *EC – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS/400/AB/R, WT/DS 401/AB/R (hereinafter: *EC – Seal Products*)

<sup>10</sup> See e.g. the UN Framework (John Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights', UN doc. A/HRC/8/5 of 7/4/2008), and the Guiding Principles for Business and Human Rights (John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', UN doc. A/HRC/17/31 of 31/3/2011) which are based upon the idea to embed global liberalism, prominently developed by K. Polanyi, *The Great Transformation* (Farrar and Rinehart, New York, 1944). See also J. Ruggie, 'Taking Embedded Liberalism Global: The Corporate Connection', in D. Held and M. Koenig-Archiburgi (eds), *Taming Globalization: Frontiers of Governance* (Cambridge University Press, Cambridge, 2003) 93.

<sup>11</sup> See e.g. S. Bernstein and E. Hannah, 'Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space' (2008) 11 *Journal of International Economic Law* 575; C. Vidal-Léon, 'Corporate Social Responsibility, Human Rights and

Opponents of production related requirements argue that they would produce external effects on the territory of the exporting states and interfere with their sovereignty, in particular when imposed unilaterally by the importing state. Thus, they could be regarded as coercion or imperialism or at least as paternalism to the detriment of comparative (cost-price) advantages of developing countries which impose additional costs upon poor producers and which thus constitute disguised protectionist or discriminatory practices. This position is particularly prominent amongst developing countries and has gained much attention in relation to environmental standards and environmental labelling.<sup>12</sup> Furthermore, developing countries are strictly opposed to link trade and (core) labour standards, arguing that they are intrinsically linked to (disguised) protectionist practices.<sup>13</sup>

Again, proponents argue that, strictly speaking, production requirements do not regulate extraterritorial situations as such but only requirements for products to be brought into the importing state and thus a domestic issue. CSR standards address rules for the importer's own behaviour and the issue of contributing to or benefitting from production practices regarded as immoral, socially unacceptable or detrimental to the environment via one's own consumption. Also, regarding economic effects abroad, there is said to be no principal difference to product requirements.<sup>14</sup>

Proponents of CSR regulation base their arguments on the fact that a distinction between product or production related measures has no founding in the wording of the GATT and the fact that there is no adopted ruling of a dispute settlement body concerning CSR related production methods to the contrary. Opponents of production based regulation base their legal arguments on early case law like the (never adopted) Panel

---

the World Trade Organisation' (2013) 16 *Journal of International Economic Law* 893, with further references.

<sup>12</sup> See in particular, M. Joshi, 'Are Eco-Labels Consistent with World Trade Organization Agreements?' (2004) 38 *Journal of World Trade* 69, at 72, who refers, among others, to a study of the WTO Committee on Trade and Environment on discriminatory effects of environmental labelling. See also Vidal-Léon (n. 11), at 899 ff., who refers to several studies on the effects of CSR codes of conduct on international trade.

<sup>13</sup> See e.g. Vidal-Léon (n. 11), at 898 ff. with further references; M. Du, 'Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organisation' (2016) 50 *Journal of World Trade* 675, at 694 ff.

<sup>14</sup> See, e.g., R. Howse and D. Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy' (2000) 11 *European Journal of International Law* 249, at 269 ff., who for the latter explicitly refer to environmental standards as opposed to labour standards which are more likely to be protectionist, except for those based on generally accepted core minimum requirements like the ILO core conventions.

decisions in *Tuna Dolphin I*<sup>15</sup> where the Panel argued that a distinction between dolphin-friendly and dolphin-unfriendly caught tuna constituted discrimination.<sup>16</sup>

In legal terms, this dispute relates to the legal character of the WTO and to the question whether WTO agreements, namely the GATT and the TBT Agreement, only create a negative right of States not to be discriminated against by differentiating products on the basis of their national origin, or whether they create a general positive right of market access which can only be denied for certain codified or accepted reasons.<sup>17</sup>

Doctrinally, this dispute affects the interpretation, in particular, of Articles III:4 and XX GATT, and the applicability and interpretation of the TBT Agreement; which we turn to hereinafter.

## 2.1. NON-DISCRIMINATION UNDER GATT

### 2.1.1. ARTICLE III:4 GATT

#### (a) *The discussion*

Article III:4 GATT requires imported products to be treated ‘no less favourable than ... like products of national origin in respect of all laws, regulations and requirements affecting their internal sale ...’.<sup>18</sup> This requirement has been interpreted not only as a prohibition of discrimination on the basis of the national origin of the product (*de jure* discrimination) but also as encompassing *de facto* discrimination, which results from origin-neutral requirements.<sup>19</sup> This translates into the question whether physically identical products have to be considered as ‘like products’ or may be considered as ‘unlike’ on the basis of differences in the way they were produced. Or, if they are regarded as like products, the question would be to what extent reduced competitive opportunities of imported products due to origin-neutral production requirements necessarily lead to legally relevant *de facto* discrimination. Authors have suggested that the question of likeness should not be decided by physical identity but by the ordinary legal approach as to whether a product differs in a relevant respect that justifies different treatment in a non-protectionist regulatory policy.<sup>20</sup>

<sup>15</sup> *US – Restrictions on Imports of Tuna* (1991) 30 ILM 1594; *US – Restrictions on Imports of Tuna* (1994) 33 ILM 936 (not adopted).

<sup>16</sup> See *infra*, 2.1.1.

<sup>17</sup> For an encompassing analysis, see Howse and Regan (n. 14), at 269 ff., 276; See also S. Charnovitz, ‘The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality’ (2002) 27 *Yale Journal of International Law* 59.

<sup>18</sup> Similar requirements are imposed by the ‘Most Favoured Nation’ treatment standard in Article I:1 GATT in relation to products originating from any other country.

<sup>19</sup> See, e.g., L. Ehring, ‘De Facto Discrimination in World Trade Law: National and Most-Favoured Nation Treatment’ (2002) 36 *Journal of World Trade* 921.

<sup>20</sup> See in particular Howse and Regan (n. 14), at 261 f.

In contrast, early decisions by the GATT and WTO dispute settlement bodies, such as the Panel decisions in *Tuna Dolphin I*<sup>21</sup> where the panel ruled that a distinction between dolphin-friendly and dolphin-unfriendly caught tuna constitutes a discrimination amongst like products as well as a few other early rulings, however unrelated to CSR policies, such as *US – Malt Beverages*<sup>22</sup> where the panel considered beer produced by large breweries not unlike beer produced by small breweries; *US – Taxes on Automobiles*<sup>23</sup> where a fleet averaging method was regarded as not relating to the product (car) but to the producer; *US – Gasoline*<sup>24</sup> where the panel held that it was not admissible to differ on the basis of characteristics of the producer and the nature of the data held by it; suggested that a regulatory distinction on the basis of production or producer characteristics would be inadmissible.

Instead, since *Japan – Alcoholic Beverages*,<sup>25</sup> the Appellate Body emphasised a competition-focused determination of whether products are ‘like’ which is based on ‘four categories of “characteristics” that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes’, and on the question whether the measure modifies the conditions of competition to the detriment of imported ‘like’ products in order to establish *de facto* discrimination. In this approach the potentially legitimate and non-protectionist objective of a regulation, be it product or production related, was of no relevance at all.

This strict competition-based approach, however, was opened up to some extent in subsequent rulings such as *EC – Asbestos*: Here, the Appellate Body held that although the ‘determination of “likeness” under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products,’<sup>26</sup> significant health risks (of building materials containing asbestos as opposed to other building materials) could be of relevance for two of the criteria, namely for differences in the physical characteristics of the product and for differences in consumer preferences. Thus, they might not be ‘like’ one

---

<sup>21</sup> n. 15.

<sup>22</sup> *US – Measures Affecting Alcoholic and Malt Beverages*, BISD 39 (1992) 206.

<sup>23</sup> *US – Taxes on Automobiles* (1994) 33 ILM 1397 (not adopted).

<sup>24</sup> *US – Standards for reformulated and Conventional Gasoline*, WT/DS2/R.

<sup>25</sup> *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, paras 19 ff.

<sup>26</sup> *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, para. 99.

another although they compete on the same market.<sup>27</sup> The Appellate Body further held that in case products have been determined to be like products, this does not necessarily imply that Members may not draw any regulatory distinctions.<sup>28</sup> In *Thailand – Cigarettes*, the Appellate Body further clarified that there must be a ‘genuine relationship’ between the measure at issue ‘and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably’.<sup>29</sup>

Nevertheless, it remained unclear from these decisions whether and under what conditions *de facto* discrimination of a competition modifying measure could indeed be excluded on the basis of legitimate regulatory intent and whether this could also apply to production related requirements.<sup>30</sup> This question was of particular relevance for the potential application of *US – Clove Cigarettes*,<sup>31</sup> which applied a two steps inquiry in order to define *de facto* discrimination under Article 2.1 TBT Agreement; a provision which requires, in addition to the question whether the measure modifies the conditions of competition, also the finding that the detrimental impact on competitive opportunities indeed reflects discrimination.<sup>32</sup>

---

<sup>27</sup> *EC – Asbestos*, WT/DS135/AB/R, para. 113. Although ‘[t]he kind of evidence to be examined in assessing the ‘likeness’ of products will, necessarily, depend upon the particular products and the legal provision at issue. When all the relevant evidence has been examined, panels must determine whether that evidence, as a whole, indicates that the products in question are ‘like’ in terms of the legal provision at issue.’; *ibid.*, paras 101–103.

<sup>28</sup> In *EC – Asbestos*, WT/DS135/AB/R, para. 100, the Appellate Body found that a Member may draw distinctions between products which have been found to be ‘like’, without, for this reason alone, according to the group of ‘like’ *imported* products ‘less favourable treatment’ than that accorded to the group of ‘like’ *domestic* products.

<sup>29</sup> *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS/371/AB/R, para. 134.

<sup>30</sup> In favour of the relevance of the regulatory intent: Howse and Regan (n. 14); sceptical Charnovitz (n. 17), at 91.

<sup>31</sup> *US – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS/406/AB/R, paras 161 ff.

<sup>32</sup> See R. Howse, J. Langille, K. Sykes, ‘Pluralism in Practice: Moral Legislation and the Law of the WTO after Seal Products’ (2015) New York University School of Law, Public Law and Legal Theory Research Paper Series, Working Paper No. 15-05, April 2015, 81, at 126 ff.; see also R. Howse, J. Langille and K. Sykes, ‘Sealing the Deal: The WTO’s Appellate Body Report in *EC – Seal Products*’ (2014) 18(12) American Society of International Law; <[www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93-seal-products](http://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93-seal-products)> accessed 1 September 2017. For the TBT Agreement, see *infra*, 2.2.2.

(b) *The impact of EC – Seal Products*

*EC – Seal Products*<sup>33</sup> concerned a European importation and marketing ban on seals products, motivated by European moral concerns about seal killing (methods) but accompanied by an exception for indigenous subsistence hunting.<sup>34</sup> In fact, this ban affected the vast majority of Canadian and Norwegian seal products, which derive from commercial hunting, whereas the European (indigenous Greenlandic) seal products fell under the exception. Thus, the Appellate Body had to deal exactly with the question in how far (a distinction based on) a legitimate regulatory intent might exclude discrimination in the terms of Articles I:1 and III:4 GATT, and whether a production related restriction could be regarded as informed by a legitimate regulatory intent. The Appellate Body, however, held that the decisive question was solely whether the measure had a detrimental impact on competitive opportunities of imported products. The relevance of the regulatory intent was rejected as there was no basis for the latter in the wording of Article III:4.<sup>35</sup> Consequently, the fact that the measure impacted far more on Canadian and Norwegian seal products than on European products was regarded as sufficient to establish less favourable treatment in terms of Article III:4.<sup>36</sup>

As a consequence, any change in the competitive relations to the disadvantage of (certain) imported ‘like products’<sup>37</sup> which is caused by a governmental measure could be regarded as *de facto* discrimination in terms of Article III:4, no matter how legitimate the governance issue.<sup>38</sup> A discriminating measure could only be justified under Article XX if it was necessary to pursue one of the listed legitimate policy objectives. Actually, it has been doubted that the Appellate Body really meant to take such a rigorous stance, as this would mean that very many legislative measures by WTO Members would be *prima facie* illegal under WTO law; an outcome which has been regarded to be ‘extreme and hard to reconcile with the intent and text of GATT’.<sup>39</sup>

---

<sup>33</sup> *EC – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS/400/AB/R, WT/DS 401/AB/R.

<sup>34</sup> On the background and the relevant EU law, see J. Beqiraj, ‘The Delicate Equilibrium of EU Trade Measures: The Seals Case’ (2013) 14 German Law Journal 279.

<sup>35</sup> *EC – Seal Products*, WT/DS/400/AB/R, WT/DS 401/AB/R, para. 5.90.

<sup>36</sup> *ibid.*, paras 5.94, 5.105, 5.110.

<sup>37</sup> The question of ‘likeness’ was not discussed in *EC – Seal Products*.

<sup>38</sup> *EC – Seal Products*, WT/DS/400/AB/R, WT/DS 401/AB/R, para. 5.125. For detailed analysis, see Howse, Langille and Sykes, ‘Pluralism in Practice’ (n. 32), at 127 ff.

<sup>39</sup> See Howse, Langille and Sykes, ‘Sealing the Deal’ (n. 32). For detailed analysis, see Howse, Langille and Sykes, ‘Pluralism in Practice’ (n. 32), at 132 ff., 146.

## 2.1.2. ARTICLE XX GATT

*(a) The discussion*

With this rigorous approach to Article III.4 GATT, Article XX GATT is conferred upon the role of protecting policy space for legitimate regulatory measures. Under Article XX GATT, a potential infringement of Article III.4 GATT – and also of Article XI GATT which prohibits (quantitative) trade restrictions - evoked by a (production related) CSR measure can be justified in case it is necessary to pursue legitimate policy objectives such as (a) the protection of public morals, (b) the protection of human, animal or plant life or health or (g) relate to the conservation of exhaustible natural resources. Here again, the question whether these policy objectives can also be related to activities or situations *outside* the importing State's territory has been the subject of a controversial debate. Opponents of an extraterritorial application in particular of Article XX(a) and (b) still base their opinion on the early *Tuna Dolphin I* rulings where the panel held that Article XX(b) does not cover extra-territorial measures such as the protection of dolphins outside US territory.

Proponents of the admissibility of CSR regulation related to situations abroad, invoke in particular *US - Shrimp-Turtle*<sup>40</sup> where the Appellate Body regarded the US importation requirement that shrimps have to be harvested under conditions that do not adversely affect sea turtles (an endangered species) to be justified under Article XX(g) as long as good faith efforts were undertaken with a view to the adoption of an international standard in this regard. The Appellate Body stated that it would not 'pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation' as in the specific circumstances of that case, there was 'a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)'.<sup>41</sup> Thus, as the Appellate Body referred to the fact that the protected turtles also traversed US waters, strictly speaking, the ruling did not concern a (purely) extraterritorial issue.<sup>42</sup> Moreover, the protection of exhaustible resources under Article XX(g) has generally been interpreted as less restrictive than the other justifications.<sup>43</sup>

As the very idea of the US measure was the preservation of an endangered species as such and not of domestic turtles, this decision has nevertheless been interpreted as permitting extraterritorial production measures at least as far as environmental protection is concerned; which has been regarded as being in line with the fact that environmental degradation or pollution is a globally interrelated and transboundary

---

<sup>40</sup> *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R.

<sup>41</sup> *ibid.*, para. 133.

<sup>42</sup> For detailed analysis of case law and discussions, see in particular Charnovitz (n. 17), at 92 ff., 99 ff. See also Howse and Regan (n. 14).

<sup>43</sup> See Charnovitz (n. 17), at 92 ff.

issue.<sup>44</sup> In contrast, the potential justification of CSR standards relating to purely domestic health and safety issues or the protection of human and labour rights under Article XX (a) or (b) remained contested.<sup>45</sup>

*(b) The Impact of EC-Seal Products*

In *EC - Seal Products*, the European Union initially justified the importation and marketing ban on seals products with public concerns about seal killing (methods) under Article XX(a) and (b). The Appellate Body, however, considered only Article XX(a). It upheld the Panel's finding that the EU regulation was necessary to protect public morals within the meaning of Article XX(a) although the public morals were (also) concerned with the protection of extraterritorial seals. With regard to the extraterritorial issue, the Appellate Body held that '[a]s set out in the preamble of the Basic Regulation, the EU Seal Regime is designed to address seal hunting activities occurring "within and outside the Community" and the seal welfare concerns of "citizens and consumers" in EU Member States. The participants did not address this issue in their submissions on appeal. Accordingly, while recognizing the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature or extent of that limitation, we have decided in this case not to examine this question further.'<sup>46</sup>

The general approach towards Article XX(a) is first, to examine whether the objective of the measure falls within the scope of protection of public morals and second, whether it is necessary, which includes a weighing and balancing of the relative importance of the interests at stake, the contribution of the measure to meeting the objective, and the trade restrictive impact of the measure; also, alternative measures to achieve the same objective are analysed.

With regard to the highly contested issue whether the European ban falls within the scope of public morals (and prevents harm to European citizens), the Panel had held that 'Members should be given some scope to define and apply for themselves the concepts of "public morals" in their respective territories, according to their own systems and scales of values. ... [W]e are nevertheless persuaded that ... animal welfare is an issue of ethical or moral nature in the European Union. International doctrines and measures of a similar nature in other WTO Members ... illustrate that animal welfare is a matter of ethical responsibility for human beings in general.'<sup>47</sup> This wide interpretation of public morals was upheld by the Appellate Body: 'Members have the right to determine the level of protection that they consider appropriate. ... Members may set different

<sup>44</sup> See Howse, Langille and Syke, 'Pluralism in Practice' (n. 32), 124 ff.

<sup>45</sup> On these, see MJ Trebilcock and R Howse, 'Trade Policy & Labour Standards' (2004-2005) 14 *Minnesota Journal of Global Trade* 261.

<sup>46</sup> *EC - Seal Products*, WT/DS/400/AB/R, WT/DS 401/AB/R, para 5.173.

<sup>47</sup> *EC - Seal Products*, WT/DS/400/R, WT/DS 401/R, para. 7.409.

levels of protection even when responding to similar interests of moral concern ... [W]e do not consider that the European Union was required by Article XX(a), as Canada suggests, to address such public moral concerns [slaughterhouses and terrestrial wildlife hunts] in the same way.<sup>48</sup> Thus, the Appellate Body was convinced ‘that the principal objective of the EU Seal Regime is to address EU public moral concerns regarding seal welfare, while accommodating IC [indigenous communities] and other interests so as to mitigate the impact of the measure on those interests.’<sup>49</sup>

The Panel – upheld by the Appellate Body – also regarded the highly trade restrictive importation and marketing ban as necessary, due to the consideration that the protection of public morals is of highest importance and that ‘[t]o the extent that such seal products are prohibited from the EU market, we find that the ban makes a material contribution to the objective of the measure’ ‘by reducing, to a certain extent, the global demand for seal products and by helping the EU public avoid being exposed to seal products ... derived from seals killed inhumanely.’<sup>50</sup> Also, potential alternative less trade restrictive measures, namely labelling requirements certifying compliance with animal welfare standards, had been dismissed as they would not effectively address the moral concerns and pose significant difficulties in terms of monitoring and compliance.<sup>51</sup>

What remains is the so-called chapeau in Article XX, which provides for a safeguard that ‘such measures 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’ aims at ensuring that a trade restrictive measure which can invoke one of the exceptions is *applied* in ‘good faith’ and not misused for protectionist purposes. Often, the chapeau is used to address inconsistencies in the measure. In *EC – Seal Products*, the Appellate Body found inconsistencies with the exception of indigenous hunts which it held to amount to arbitrary or unjustifiable discrimination and thus not to meet the requirements of the chapeau. In particular, the exception did not address animal welfare issues of indigenous hunts and did not safeguard sufficiently that no commercial hunts could fall under the exception. Moreover, access of Canadian Inuit to the exception should be facilitated.<sup>52</sup>

*(c) Public morals and human rights and labour standards*

Although *EC – Seal Products* dealt with animal welfare, its (potential) significance for CSR regulation, in particular human rights and labour standards, seems obvious. The relevance of the public moral exception in

<sup>48</sup> *EC – Seal Products*, WT/DS/400/AB/R, WT/DS 401/AB/R, para. 5.200.

<sup>49</sup> *ibid.*, para 5.167.

<sup>50</sup> *EC – Seal Products*, WT/DS/400/R, WT/DS 401/R, para. 7.637.

<sup>51</sup> *ibid.*, paras 7.496 ff. For detailed analysis, see Howse, Langille and Sykes, ‘Pluralism in Practice’ (n. 32).

<sup>52</sup> *EC – Seal Products*, WT/DS/400/AB/R, WT/DS 401/AB/R, para. 5.337.

Article XX(a) for the protection of human rights and labour rights has always been highlighted by authors like *Charnovitz* who regarded internationally recognised human rights standards as a classical application of the concept,<sup>53</sup> or *Trebilcock* and *Howse* who state that a ‘conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning of the concept’ and that Article XX(a) should thus ‘extend to universal human rights, including labor rights’.<sup>54</sup> This approach now seems, in principle, to be uncontested also with authors that are concerned about the trade restricting effect of CSR approaches: ‘If we agree that human rights are more important than animal welfare in our value scale, internationally recognized human rights norms and standards should definitely come within the scope of the “public morals”’.<sup>55</sup>

Also, following *EC – Seal Products*, the extraterritoriality of protected subjects seems to no longer be an obstacle, at least for Article XX(a). Although the Appellate Body did not address this issue fundamentally, the fact that the measure aimed at the protection of moral concerns of European citizens and consumers was regarded as sufficient.<sup>56</sup>

The challenge now relates to striking the balance between the protection of extraterritorial concerns and its misuse as a ‘catch all justification’ for concerns that are otherwise (potentially) not permitted<sup>57</sup> or for protectionist purposes.<sup>58</sup>

Indeed, Article XX provides for legal safeguards against the misuse of alleged CSR aims for protectionist purposes, namely the necessity to provide evidence for the high national value of the particular CSR concern, the necessity of the measure, and the chapeau.<sup>59</sup> Although *EC – Seal Products* dealt with a specific European concern which was neither established with reference to an internationally recognised standard nor

---

<sup>53</sup> S. Charnovitz, ‘The Moral Exception in Trade Policy’ (1998) 38 *Virginia Journal of International Law* 689, 717–742.

<sup>54</sup> *Trebilcock and Howse* (n. 45), at 290.

<sup>55</sup> *Du* (n. 13), at 695. See also P. Serpin, ‘The Public Morals Exception after the WTO Seal Products Dispute: Has the Exception Swallowed the Rules?’ (2016) *Columbia Business Law Review* 217, at 245 ff.

<sup>56</sup> Para 5.173. For detailed analysis, see *Howse, Langille and Sykes*, ‘Pluralism in Practice’ (n. 32), at 124 et seq., who argue that the measure is exactly concerned about the conduct of EU citizens and consumers who do not want to create a market for cruelly killed seals or become accomplices to these practices.

<sup>57</sup> ‘[I]t is simply a shift from protecting foreign seals to EU citizens’ feelings about the seals’, see *Du* (n. 13), at 689.

<sup>58</sup> ‘[W]hy couldn’t the US government claim that the US citizens have legitimate moral concerns on gender equality in Saudi Arabia, human rights in Myanmar and labour standards in China?’, see *Du* (n. 13), at 695.

<sup>59</sup> See *Serpin* (n. 55).

necessarily consistent with (all) other animal treatment concerns,<sup>60</sup> for establishing a legitimate CSR concern, it might be helpful to refer to internationally recognised human rights or core labour standards<sup>61</sup> and to pursue a consistent policy in this regard. Similar considerations would, in principle, apply for compliance with the Chapeau. Here, it would be of particular relevance whether a CSR measure does not target specific countries, as opposed to other countries where similar conditions exist.<sup>62</sup> With regard to the element of necessity, it is noteworthy that the Panel and the Appellate Body both did not regard a labelling requirement as an alternative, less restrictive instrument; and this was not only because of monitoring and verification problems but also because a mere labelling requirement would not effectively meet the relevant moral concerns.<sup>63</sup>

## 2.2. THE TBT AGREEMENT

### 2.2.1. THE SCOPE OF APPLICATION

The TBT Agreement is applicable to ‘technical regulations’ and ‘standards’. A technical regulation is defined as a [d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.<sup>7</sup> As opposed to a technical regulation, compliance with a standard is voluntary.<sup>64</sup> Art. 2.1 TBT lays down most-favoured nation and national treatment requirements for like products that are, in principle, similar to those of the GATT.<sup>65</sup> Article 2.2 TBT prohibits technical regulations from being more trade restrictive than necessary to fulfil a legitimate objective which includes the prevention of deceptive practices, the protection of human

---

<sup>60</sup> See Howse, Langille and Sykes, ‘Pluralism in Practice’ (n. 32), at 114 ff., who argue that the Appellate Body did not require philosophical consistency with other moral concerns; at 117 ff., they also argue that the protection of public morals can less be addressed by international standards and principal and instrumental consistency.

<sup>61</sup> See also Charnovitz (n. 53), at 742.

<sup>62</sup> Trebilcock and Howse (n. 45), at 290; Howse, Langille and Sykes, ‘Pluralism in Practice’ (n. 32), at 117 ff.

<sup>63</sup> See *supra*, 2.1.2. (b).

<sup>64</sup> TBT Agreement, Annex I 1. A standard is defined in Annex I 2. as a [d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.<sup>7</sup>

<sup>65</sup> See *infra*, 2.2.2., although the Appellate Body does regard the scope and content of these provisions not to be entirely identical, see e.g. *Tuna Dolphin II*, WT/DS381/AB/R, para. 405.

health or safety, animal or plant life or health, or the environment. The list is non-exhaustive. For example, the Appellate Body has also accepted consumer protection and fair competition as legitimate objectives.<sup>66</sup>

*(a) The discussion*

Here, it had been discussed for long whether or not the TBT Agreement is applicable to (extraterritorial) production methods at all (or whether they fall under the GATT instead). The opponents of an inclusion of 'nprPPMs' into the TBT Agreement argued with the wording of Annex I 1., which refers to product characteristics or '*their related*'<sup>67</sup> processes and production methods whereas '*related*' was interpreted as traceable within the physical characteristics of the concrete product. A subsequent question was whether labelling requirements would also have to relate to the physical characteristics of the product, as the second sentence of Annex I 1. does not explicitly contain this reference.<sup>68</sup>

*(b) The impact of Tuna Dolphin II*

*Tuna Dolphin II*<sup>69</sup> dealt with US provisions which only allow the use of a 'dolphin-safe' label or any other form of description as 'dolphin-safe' for tuna caught in the Eastern Tropical Pacific Ocean (ETP) on the US market if dolphins are not intentionally chased, encircled or netted during an entire tuna fishing trip and if this is confirmed by an independent observer - thus with an extraterritorial fishing method. Neither the Panel nor the Appellate Body discussed a (potential) distinction between product related and non product related process and production methods at all. The Panel regarded the US labelling provisions as product related as they 'apply to a product' without even considering the fact that the label deals with 'dolphin-safe' fishing methods, which cannot be traced in the tuna (products).<sup>70</sup> This finding remained uncontested. The Appellate Body even regarded the US regulation as more encompassing than a mere labelling requirement, because it laid down comprehensively the use of the term 'dolphin-safe', and thus as a technical regulation within the meaning of the first sentence in Annex I.1. - again without even mentioning a

<sup>66</sup> See *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 287.

<sup>67</sup> Emphasis added by the author.

<sup>68</sup> See e.g. Joshi (n. 12), at 74 f. with reference to the negotiation history of the agreement. See also S. Puth, *WTO und Umwelt – Die Produkt-Prozess-Doktrin* (Duncker & Humblot, 2003), at 217 ff.; C. Tietje, 'Voluntary Eco-Labeling Programmes and Questions of State Responsibility in the WTO/GATT Legal System' (1995) 29(5) *Journal of World Trade* 123, at 135. For deviating views see E. Vranes, *Trade and the Environment, Fundamental Issues in International Law, WTO Law and Legal Theory* (Oxford University Press, Oxford, 2009), at 319 ff., 342 ff.; C. Conrad, *Process and Production Methods (PPMs) in WTO Law – Interfacing Trade and Social Goods* (Cambridge University Press, Cambridge, 2011), at 385 ff.

<sup>69</sup> *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381.

<sup>70</sup> *Tuna Dolphin II*, WT/DS381/R, paras 7.71 ff.

potentially required relation to the physical characteristics of the product.<sup>71</sup> It held that ‘the US measure prescribes in a broad and exhaustive manner the conditions that apply for making any assertion on a tuna product as to its "dolphin-safety", regardless of the manner in which that statement is made. As a consequence, the US measure covers the entire field of what "dolphin-safe" means in relation to tuna products. For these reasons, we *find* that the Panel did not err in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1.1 to the *TBT Agreement*.<sup>72</sup> Thus, according to that ruling, the TBT Agreement covers all (technical) product requirements, be they product related or production related.<sup>73</sup> Accordingly, authors have already claimed the ‘end of the PPM distinction’.<sup>74</sup>

#### 2.2.2. DISCRIMINATION OF ‘LIKE PRODUCTS’ UNDER THE TBT AGREEMENT

Similar considerations as under the GATT apply to the feasibility of a different treatment of ‘like products’ based upon different production methods under the TBT Agreement. As opposed to the latest ruling under the GATT in *EC – Seal Products*, however, the Appellate Body in *Tuna Dolphin II* followed the line of reasoning set up in *US - Clove Cigarettes*<sup>75</sup> that it takes two steps to define *de facto* discrimination. In addition to the question whether the measure modifies the conditions of competition, it must be established that the detrimental impact on competitive opportunities reflects discrimination. The latter translates into the question whether the measure pursues legitimate objectives and could be regarded as ‘calibrated’ and ‘even-handed’.<sup>76</sup> Again, the legitimacy of addressing fishing methods which adversely affect animals (dolphins) which are neither endangered nor present inside US territory was not questioned at all. However, the labelling requirement reduced competitive opportunities of Mexican tuna products considerably, because the Mexican fleet was still setting on dolphins in order to catch the tuna. The Panel had found that it was not the US measure as such, which made it impossible or difficult for Mexican tuna producers to comply with, but the persisting fishing and purchasing choices of the Mexican producers

<sup>71</sup> *Tuna Dolphin II*, WT/DS381/AB/R, paras 190 ff.

<sup>72</sup> *ibid.*, para 199.

<sup>73</sup> For detailed analysis, see R. Howse and M.A. Crowley, ‘Tuna-Dolphin II: a legal end economic analysis of the Appellate Body Report’ (2014) 13 *World Trade Review* 321, at 325 ff.

<sup>74</sup> J. Pauwelyn, ‘Tuna: The End of the PPM distinction? The Rise of International Standards?’, <worldtradelaw.typepad.com/ielpblog> accessed 29 May 2017.

<sup>75</sup> *US - Clove Cigarettes*, WT/DS/406/AB/R, para 161 et seq.

<sup>76</sup> *Tuna Dolphin II*, WT/DS381/AB/R, para. 215: ‘whether that technical regulation is even-handed’, ‘panel must further analyse whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.’

themselves and thus it was ‘not persuaded that ... the United States affords Mexican tuna products “less favourable treatment” than that afforded to tuna products originating in the United States or in any other country ...’.<sup>77</sup> The Appellate Body, however, did not regard the measure as even-handed, mainly due to the fact that the labelling requirements did not include comparable requirements for tuna caught outside the crucial maritime area where the tuna/dolphin gatherings occurred (Eastern Tropical Pacific).<sup>78</sup>

Thus, as opposed to Article III:4 GATT, in principal, a governmental measure which leads to a change in competitive relations does not necessarily constitute an infringement of Article 2.1 TBT as long as it can be based upon a legitimate regulatory distinction and is applied in a ‘calibrated’ and ‘even-handed’ manner. To this end, it is legitimate to distinguish on the basis of production methods which are concerned with the protection of at least certain extraterritorial objects or subjects, such as animals.

### 2.2.3. INTERIM CONCLUSION ON THE EXTRATERRITORIALITY ISSUE

Both rulings, *Tuna Dolphin II* and *EC – Seal Products*, dealt with animal welfare. Nevertheless, they provided for some clarification of the admissibility of CSR production requirements, which could be summarised as follows: First, the WTO provides for no principal obstacle to a measure dealing with extraterritorial situations. Although there are doctrinal differences concerning the national treatment requirements in GATT and TBT, these differences are not related to the extraterritoriality of a measure, and the protection of extraterritorial animals has been regarded as a legitimate policy aim under both agreements, at least as long as it related to the sale of products on the domestic market of the regulating state. Second, the impact, at least of *EC – Seal Products*, is not delimited to *animal* welfare, as the same moral considerations all the more apply to *human* welfare as laid down in many human rights or core labour rights oriented CSR standards. Third, although the previous rulings justified extraterritorial production requirements ‘only’ with Articles XX(a) and (g) GATT and legitimate policy aims under the TBT Agreement, there is no reason not to extend this extraterritorial approach also to Article XX(b) GATT, which protects human, animal or plant life or health and which could be invoked for health and safety at workplace requirements. *EC – Seal Products* addressed moral perceptions about animal welfare, and *Tuna Dolphin II* animal welfare as such, while both

<sup>77</sup> *Tuna Dolphin II*, WT/DS381/R, paras 7.319., 7.377., 7.375 and 7.378.

<sup>78</sup> *Tuna Dolphin II*, WT/DS381/AB/R, paras 228 ff., 282 ff. For critical analysis of the application of the evenhandedness test in this ruling, see in particular, Howse and Crowley (n. 73), 328 ff, who argue that in order for an origin neutral requirement to be not evenhanded it requires not a random effect on marketing shares but a regulatory specific obstacle for foreign products such as e.g. a requirement for a very specific technology.

species, seals and dolphins, were not endangered. Thus, the measures were not related to the protection of global exhaustible resources as mentioned in Article XX(g) GATT but simply protected the welfare of extraterritorial animals, which constitutes a classical Article XX(b) GATT situation.

Thus, although there seem to be no more fundamental obstacles to the pursuance of CSR goals, they have to be drafted carefully in order not to be regarded as disguised protectionist measures (in particular under the chapeau of Article XX GATT). The devil will be in the details of the concrete case.

### 3. ATTRIBUTION OF PRIVATE OR VOLUNTARY CSR MEASURES TO THE STATE

#### 3.1. THE DISCUSSION

As mentioned above, most CSR measures, however, are not imposed upon corporations by compulsory state law requirements but range from purely private (self-)regulation to various forms of state incentives. The law of the WTO, however, is, in principle, concerned with trade restrictive measures of Member States, not of private actors. For example, the GATT speaks in Article III:1 and III:4 of 'laws, regulations and requirements' of a 'contracting party', and in Article XI of 'measures' by a 'contracting party' or of 'governmental measures'. The TBT Agreement refers to 'technical regulations' or 'labelling requirements'.

Nevertheless, one line of argument is based upon the observation that the *de facto* practice of private market actors can be as trade restrictive and as coercive as mandatory state law requirements. For example, it is argued that *de facto* adherence to a voluntary label could render the related voluntary requirements *de facto mandatory* and should thus be an issue of WTO law.<sup>79</sup>

In fact, private activities have already been discussed under the umbrella of WTO law, however with regard to the question of what types of state involvement in private actions are necessary to trigger WTO rules. Both Panels in *Japan – Restriction on Imports of Certain Agricultural Products*,<sup>80</sup> which concerned a non-legally binding agricultural programme, and in *Japan – Trade in Semiconductors*,<sup>81</sup> which concerned a voluntary export limiting scheme which private producers adhered to, found that a governmental 'measure' in the terms of Article XI GATT encompasses more than a 'law or regulation'. Also, both rulings focused on the effectiveness of the measure, not on its legal character. However, two criteria were set up in order for a private measure to be attributed to the State and thus to constitute a *governmental* measure: there have to be sufficient state incentives for the measure to take effect, and the measure

<sup>79</sup> See e.g. Vidal-Léon (n. 11), at 898 ff.

<sup>80</sup> *Japan – Restrictions on Imports of Certain Agricultural Products*, BISD 35S/163 (1988).

<sup>81</sup> *Japan – Trade in Semiconductors*, BISD 35S/116 (1988).

has to be essentially dependant on government action or intervention.<sup>82</sup> In *EEC – Dessert Apples*,<sup>83</sup> the Panel regarded a privately administered apple marketing scheme, which had been established by an EEC regulation and the operation of which was based upon EEC decisions and public financing, as a governmental measure.<sup>84</sup> *Japan – Kodak/Fuji*<sup>85</sup> concerned a private self-regulatory code of conduct of the Japanese photographic film and paper industry which was accompanied by private enforcement councils and which impacted upon the competitive opportunities of US producers. The government was involved in the drafting of the code and approved the final code. The panel regarded this involvement as sufficient to qualify as a governmental measure, in particular, in order to prevent WTO disciplines to be circumvented through a Member's delegation of quasi-governmental authority to private enforcement bodies.<sup>86</sup> *Korea – Beef*<sup>87</sup> concerned a Korean so-called 'dual retail' scheme which required retailers to choose between either selling domestic or selling foreign beef only. Although the decision of the private retailers on what to sell was completely voluntary, the Appellate Body held that '[t]he legal necessity of making a choice was, however, imposed by the [governmental] measure itself.'<sup>88</sup> This ruling has also been confirmed by the Appellate Body in *US – COOL*<sup>89</sup> dealing with origin labelling requirement.<sup>90</sup> In *Canada – Automobiles*,<sup>91</sup> the Appellate Body regarded a Canadian voluntary 'value-added content' scheme which led to importation duty exceptions as mandatory.

Within the field of CSR measures, the public-private, mandatory-voluntary distinction has gained particular attention in the area of voluntary (eco-) labels. Here, one line of argument considers voluntary labels as a means of market-based self-regulation - regardless of whether the label is privately or publicly administered, at least as far as no concrete compliance incentives are included - which does not invoke WTO disciplines. Moreover, voluntary labels are considered as less trade restrictive than other measures which aim at the protection of legitimate

---

<sup>82</sup> For detailed analysis, see R.J. Zedalis, 'When do the Activities of Private Parties Trigger WTO Rules?' (2007) 10 *Journal of International Economic Law* 335, at 340 ff.

<sup>83</sup> *EEC – Restrictions on Imports of Dessert Apples-Complaint by Chile*, GATT Doc. L/6491, 36S/93 BISD (1990).

<sup>84</sup> See Zedalis (n. 82), at 343 ff.

<sup>85</sup> *Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R.

<sup>86</sup> For detailed analysis, see Zedalis (n. 82), at 344 ff.

<sup>87</sup> *Korea – Measures Affecting Import of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R and WT/DS169/AB/R.

<sup>88</sup> *ibid.*, para 146.

<sup>89</sup> *US – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS/384/AB/R, WT/DS/386/AB/R.

<sup>90</sup> *ibid.*, para 291.

<sup>91</sup> *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R.

goals.<sup>92</sup> Others argue that the *de facto* practice of private market actors can be as coercive as mandatory requirements.<sup>93</sup> Thus, the *de facto* adherence to e.g. a voluntary label can render the respective voluntary requirements *de facto mandatory*. The situation becomes even more complicated when state measures provide for certain incentives to comply with a voluntary (labelling) requirement.<sup>94</sup>

### 3.2. THE IMPACT OF *TUNA DOLPHIN II*: MANDATORY VS. VOLUNTARY

Under the TBT Agreement, the full state responsibility for product or labelling requirements translates to the question whether *compliance* with these requirements *is mandatory*.<sup>95</sup> *Tuna Dolphin II* dealt with mandatory minimum requirements for a voluntary 'dolphin-safe' label or any other voluntary 'dolphin-safe' description. Hitherto, the great majority of authors had categorised this type of regulation, which lays down (mandatory) requirements for a voluntary label, as voluntary.<sup>96</sup>

The Panel, however, regarded the labelling requirement as mandatory. The Panel admitted that there was 'a basic distinction between a "requirement", which refers to the conditions or criteria to be fulfilled in order to comply with a document, and the notion of "mandatory" requirement as a condition made *compulsory by law*.'<sup>97</sup> Thus, the characterisation 'must be based on considerations other than, or beyond, the mere fact that such document establishes criteria for the use of a certain label.'<sup>98</sup> It then, however, focussed on the fact that '[i]n particular, the measures prescribe "in a negative form" [...] that no tuna product may be labelled dolphin-safe or otherwise refer to dolphins [...] if it does not meet the conditions set out in the measures, and thus *impose* a prohibition ("in a binding and exclusive manner" 'subject to specific enforcement measures'<sup>99</sup>) on the offering for sale in the United States of tuna products

---

<sup>92</sup> E.g. H.R. Trüeb, *Umweltrecht in der WTO* (Schulthess, 2001), 453. Joshi (n. 12), at 69 ff., sees no sufficient relation between a voluntary eco-label and a national measure – regardless of whether the label is privately or publicly administered. From *Japan – Measures Consumer Photographic Film and Paper*, WT/DS44/R, and *Canada – Certain Measures Affecting the Automobile Industry*, WT/DS139/AB/R, WT/DS142/AB/R, results that a relation between compliance with the label and a national benefit is necessary.

<sup>93</sup> See e.g. Vidal-Léon (n. 11), at 898 ff.

<sup>94</sup> For an overview of the discussion, see e.g. E. Vranes, 'Climate Labelling and the WTO' (2011) 2 *European Yearbook of International Economic Law* 205, at 207 f.; Joshi (n. 12), at 69 ff.; J. Pauwelyn, 'Recent Books on Trade and Environment: GATT Phantoms Still Haunt the WTO' (2004) 15(3) *European Journal of International Law* 575.

<sup>95</sup> See Annex 1.1 of the TBT Agreement.

<sup>96</sup> See, e.g., Vranes (n. 94), at 209 ff.; Joshi (n. 12), at 70 ff.; Puth (n. 68), at 40, 217; Trüeb (n. 92), at 448; Conrad (n. 68), at 382 ff.

<sup>97</sup> *Tuna Dolphin II*, WT/DS381/R, para VII.116.

<sup>98</sup> *ibid.*, para VII.117.

<sup>99</sup> *ibid.*, paras VII.127 ff.

bearing a label referring to dolphins and not meeting the requirements that they set out.<sup>100</sup>

Although the Appellate Body admitted that the fact of a (mandatory) ‘requirement’ (for a voluntary label) does not in itself render a measure a technical regulation,<sup>101</sup> it upheld the findings of the Panel with regard to the particular circumstances of the case, and especially to the fact that legislation by state authorities that contains specific enforcement mechanisms lays down exclusive requirements for the broad subject of dolphin safety.<sup>102</sup> In detail, the Appellate Body considered ‘whether the measure consists of a law or a regulation enacted by a WTO Member, whether it prescribes or prohibits particular conduct, whether it sets out specific requirements that constitute the sole means of addressing a particular matter, and the nature of the matter addressed by the measure.’<sup>103</sup> It held that ‘the US measure prescribes in a broad and exhaustive manner the conditions that apply for making any assertion on a tuna product as to its "dolphin-safety", regardless of the manner in which that statement is made. As a consequence, the US measure covers the entire field of what "dolphin-safe" means in relation to tuna products. For these reasons, we *find* that the Panel did not err in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1.1 to the *TBT Agreement*.’<sup>104</sup>

Thus, at least this type of exclusive and encompassing requirements for a specific subject addressed by a voluntary label or description laid down by state regulation can be regarded as a technical regulation for which the respective state is fully responsible, although this has been highly criticised in the literature.<sup>105</sup>

---

<sup>100</sup> *ibid.*, para. VII.131.

<sup>101</sup> *Tuna Dolphin II*, WT/DS381/AB/R, paras 187 f.

<sup>102</sup> *ibid.*, paras 188 ff., 193. Hereby, the Appellate Body highlights the ruling in *EC – Sardines*, WT/DS231/AB/R, para. 176, that a regulation must apply to an identifiable product or group of products, it must lay down characteristics of the product, and ‘compliance with the product characteristics must be mandatory’. According to the Appellate Body the situation in both cases is similar: Whereas in *EC – Sardines* other species of sardines could be marketed on the EC market, provided they are not called ‘sardines’, here, tuna products could be marketed, provided they are not called ‘dolphin-safe’ (!). On this see also the *amicus curie* submission by R. Howse, <[www.worldtradelaw.net/amicus/howsetunaamicus.pdf](http://www.worldtradelaw.net/amicus/howsetunaamicus.pdf)> accessed 29 May 2017, at 4 ff., who highlights the point that it depends on the relevant ‘identifiable product’ if a regulation could be regarded as mandatory. In *EC – Sardines*, the relevant product was ‘sardines’ whereas here the relevant product in *Tuna Dolphin II* was defined as ‘tuna’ or ‘tuna products’, not as ‘dolphin-safe tuna’ (!).

<sup>103</sup> *ibid.*, para. 188.

<sup>104</sup> *ibid.*, para. 199.

<sup>105</sup> See e.g. Howse and Crowley (n. 73), at 324, who regard this characterization as a ‘fundamentally erroneous finding’.

### 3.3. CONCLUSION

From the above, a certain likelihood of CSR measures to be attributed to the state can be deduced. Mandatory production requirements for certain products, such as the turtle extruder in shrimp catching in *US-Shrimps-Turtles*, are clearly regarded to be state measures. This applies equally to potential CSR measures such as an importation and marketing ban for carpets knotted by children or garments not produced under certain minimum fire safety conditions. Although less intrusive, mandatory certification requirements, for example the requirement to put a label on carpets either declaring ‘knotted without child labour’ or ‘knotted by children’ would also be regarded as compulsory and thus attributable to the state. The same should apply to reporting duties, such as those laid down in the new EU CSR Reporting Directive 2014/95/EU,<sup>106</sup> which require certain big companies to report on their CSR activities or to declare that they do not have any CSR policies in place, and which are also meant to inform and influence market actors. Other examples are sec. 1502 of the US Dodd Frank Act<sup>107</sup> or the proposed EU Regulation on conflict minerals.<sup>108</sup> This can be derived from *Korea – Beef* and *US – COOL*, which also dealt with the legal necessity to make a decision and to declare.

Also, minimum requirements for voluntary certificates as a precondition for either support schemes, such as those laid down in the EU Renewable Energy Directive for biofuels<sup>109</sup>, or for public procurement, would likely be regarded as state based. Considerable financial support or public supply contracts, the conditions of which are codified in domestic legislation, could be regarded as ‘sufficient state incentives for the measure to take effect, and the measure to be essentially dependant on government action’ as referred to in *Japan – Trade in Semiconductors* and other decisions. Even without state incentives, encompassing mandatory minimum requirements for a certain type of voluntary label, thereby excluding alternative labels as in *Tuna Dolphin II*, evoke full state responsibility.

In contrast, although it is not entirely clear, the reasoning in *Tuna Dolphin II* suggests that mandatory minimum requirements for a state based voluntary label which, however, do not exclude alternative labels, might not be regarded as (technical) regulation but merely as voluntary

---

<sup>106</sup> Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, [2014] OJ L 330/1.

<sup>107</sup> Dodd–Frank Wall Street Reform and Consumer Protection Act.

<sup>108</sup> Proposal for a Regulation setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas, COM(2014) 111 final.

<sup>109</sup> Directive 2009/28/EC on the promotion of the use of energy from renewable sources [2009] OJ L 140/16.

standards. Furthermore, there is no indication in WTO dispute settlement reports of state responsibility for purely private standards, even if they create a *de facto* obstacle to trade.<sup>110</sup> Similarly, the political promotion of voluntary CSR standards, the organisation of round tables with business representatives (and NGOs) in order to set up CSR standards and other assistance in the drafting or implementation of standards like national ‘alliance for sustainable garment’ would not be characterised as state based as long as resulting private CSR schemes provide for no indication that they in fact constitute a delegation of quasi-governmental authority to private bodies and thereby try to circumvent state responsibility (as was the situation in *EEC – Dessert Apples* or *Japan – Kodak/Fuji*).<sup>111</sup> In order to approach this distinction, *Zedalis* has suggested to refer to the general rules of state responsibility under public international law where state planning, direction and support or control are regarded to be necessary, thus a relatively high threshold.<sup>112</sup>

Instead, voluntary standards would come under Article 4 of the TBT Agreement which requires Member States to ‘ensure that their central government standardizing bodies ... take such reasonable measures as may be available to them to ensure that ... non-governmental standardizing bodies within their territories ... [accept and comply] with the Code of Good Practice’, that is, the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement. The Code of Good Practice, in principle, requires standardisation bodies to ensure that their standards do not create unnecessary obstacles to trade, treat products from one country no less favourable than others and, in particular, to base their standards on international standards as far as appropriate. With regard to *transnational* private CSR standardisation activities, however, it would seem difficult to attribute their activities to a particular state that might then be required to take reasonable measures to influence them.<sup>113</sup>

#### 4. CSR REGULATION AS ‘INTERNATIONAL STANDARDS’

Rather than being an obstacle to trade, private CSR regulation could in fact play a positive role in constituting ‘international standards’ under the TBT Agreement, which could justify national CSR approaches based upon these standards. The TBT Agreement aims at achieving international

---

<sup>110</sup> Although it was argued that in situations where a small number of retailers account for a high proportion of market share ‘the distinction between private voluntary standards and mandatory ‘official’ or ‘public’ requirements can blur.’ See Private Standards and the SPS Agreement: Note by the Secretariat, Committee on Sanitary and Phytosanitary Measures, 24 January 2007, G/SPS/GEN/756, para 9.

<sup>111</sup> See also *Zedalis* (n. 82), at 345 ff.

<sup>112</sup> *Zedalis* (n. 82), at 356 ff.

<sup>113</sup> See also Vidal-Léon (n. 11), at 903 ff., who has spotted this problem with a view to the drafting of technical regulations.

harmonisation of technical regulations including marking and labelling standards through the recognition of international standards. To this end, Article 2.4 requires Member States to base their technical regulation on international standards. Vice versa, those national measures that are based on an international standard are (rebuttably) justified as not being arbitrary, discriminatory or unnecessarily protective and thus in conformity with the TBT Agreement, Article 2.5 TBT.

According to Annex 1, point 2 TBT a 'standard' is a '[d]ocument approved by a recognised body that provides, for common and repeated use, rules, guidelines and characteristics for products and related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with ... labelling requirements as they apply to a product, process or production method'. A standard constitutes an international standard, when it is adopted by an international '[b]ody or system whose membership is open to the relevant bodies of at least all Members', Annex 1, point 4. A 'standardizing body' is defined as a 'body that has recognised activities in standardization'.<sup>114</sup> Therefore, an 'international standard' has to be approved 'by an "international standardizing body"', that is, a body that has recognised activities in standardization and whose membership is open to the relevant bodies of at least all Members.<sup>115</sup> Annex 3 of the TBT explains that its requirements are open for acceptance for all standardising bodies, be they governmental or non-governmental, local, national, regional or international. A non-governmental body is defined as one 'which has legal power to enforce a technical regulation', Annex 1 point 8.<sup>116</sup>

The TBT Committee's Decision on Principles for the Development of International Standards ('Committee Decision')<sup>117</sup> adds the procedure-oriented principles of transparency, openness, impartiality and consensus, effectiveness, relevance and coherence, and of addressing the concerns of developing countries for the development of international standards.

---

<sup>114</sup> ISO/IEC Guide 2: 1991.

<sup>115</sup> *Tuna Dolphin II*, WT/DS381/AB/R, paras 349 ff, in particular at 359. Here, the Appellate Body also clarified that a 'body' ('legal or administrative entity that has specific tasks or composition' (ISO/IEC Guide 2: 1991, 4.1)) is enough to enact an international standard; it is not necessary to have an 'organization' ('body that is based on the membership of other bodies or individuals and has an established constitution and its own administration' (ISO/IEC Guide 2: 1991, 4.2)), *ibid*, at 351 ff.

<sup>116</sup> See also J. Pauwelyn, 'Non-Traditional Patterns of Global Regulation: Is the WTO 'Missing the Boat?'' in C. Joerges and E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart Publishing, Oxford, 2011) 199, at 210.

<sup>117</sup> Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, Annex IV, G/TBT/9, 13 November 2000, Sec. A. 24-26.

#### 4.1. THE DISCUSSION

There is no doubt that private organisations, such as the International Organization for Standardization (ISO), can be international standardisation bodies. The question is, however, whether it is necessary for an international standardisation body to be composed of ‘national bodies’ or whether purely private stakeholder driven systems, which adhere to fair and inclusive procedures, could also be regarded as ‘international bodies’.<sup>118</sup> On the one hand, an organisation that is composed of national bodies guarantees far better the necessary international consensus, given that it is the national bodies which have to implement the international standards in their national norms. On the other, private CSR standards which have been directly negotiated in line with procedural fairness between the relevant interests – for example, industry, environmental protection and consumer interests including industry and civil society from developing countries – could reflect a more direct and inclusive consensus between the concerned different protection interests and could be more flexible with regard to local particularities.<sup>119</sup> Pauwelyn has characterised this conflict as ‘thin (state driven) consent’ vs. ‘thick (stakeholder driven) consensus’.<sup>120</sup> The principles of the Committee Decision have not solved the conflict as now delegations *and* a fair inclusive procedure are mentioned.

Indeed, there is an increasing amount of encompassing private transnational CSR standard setting systems which systematically adjust their structure and procedures to the above mentioned requirements of the Annex to the TBT Agreement, such as the ‘Forest Stewardship Council’, the ‘Marine Stewardship Council’ or ‘Fair Trade’ labels.<sup>121</sup> At the

---

<sup>118</sup> For details of the discussion, see H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrated Markets* (Hart Publishing, Oxford, 2005), 185 ff.

<sup>119</sup> See, e.g., Schepel (n. 118), at 28, 35. See also E. Meidinger, ‘Multi-Interest Self-Governance through Global Product Certification Programmes’ in O. Dilling, M. Herberg and G. Winter (eds), *Responsible Business: Self-Governance and the Law in Transnational Economic Transactions* (Hart Publishing, Oxford, 2007) 259; K. Bizer, ‘Kooperative Umweltpolitik im internationalen Kontext – Global Law Making am Beispiel nachhaltiger Forstwirtschaft’ in B. Hansjürgens, W. Köck and G. Kneer (eds), *Kooperative Umweltpolitik* (Nomos 2003) 57 regarding the ‘Forest Stewardship Council’.

<sup>120</sup> See J. Pauwelyn, R. A. Wessel and J. Wouters, ‘Informal International Lawmaking: An Assessment and Template to keep it both Effective and Accountable’, in id. (eds), *Informal International Lawmaking* (Oxford University Press, Oxford, 2012) 500, at 524 ff. For procedural requirements in the ‘standardisation community’ see Schepel (n. 118), at 101 ff.; H. Schepel, ‘The Empire’s Drains: Sources of Legal Recognition of Private Standardisation under the TBT Agreement’ in C. Joerges and E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart Publishing, Oxford, 2011) 397, at 399 f.

<sup>121</sup> See also Bernstein and Hannah (n. 11).

same time, increasingly, national CSR regulation refers to these programmes or to their contents.<sup>122</sup>

#### 4.2. THE IMPACT OF *TUNA DOLPHIN II*

In *US – Tuna Dolphin II*, the Appellate Body rejected the Panel's finding, that a dolphin-safe label set up by an international organisation, the 'Interamerican Tropical Tuna Commission', was the relevant 'international standard' in terms of the TBT Agreement because it was not 'open to the relevant bodies of at least all Members.'<sup>123</sup> A possible membership to that commission was based on the requirements of either having a coastline bordering the Eastern Tropical Pacific Ocean (ETP) or having vessels fishing for tuna in the ETP or being otherwise invited to join the agreement, and thus did not provide for the inclusion of (Members pursuing) other interests than fishing. Instead, the Appellate Body clarified that for a standardisation 'body' it is not necessary to have an 'organization'- which is defined as a 'body that is based on the membership of other bodies or individuals and has an established constitution and its own administration'<sup>124</sup> - but the development of a single standard could be enough.<sup>125</sup> It further emphasised the TBT Committee's procedure-oriented principles of transparency, openness, impartiality and consensus, effectiveness, relevance and coherence, and of addressing the concerns of developing countries for the development of international standards<sup>126</sup> and highlighted that standards development must 'take place transparently and with wide participation' of 'all interested parties' which also aims at stakeholders<sup>127</sup> and 'must not privilege any particular interests.'<sup>128</sup>

This emphasis on (fair and inclusive) procedures where 'all interested parties' have the chance of giving input instead of on (state based) organisation can be regarded as a considerable step into the direction of recognition of private transnational CSR standards as 'international standards' in case they meet the relevant legitimacy requirements. Thus,

---

<sup>122</sup> See Bernstein and Hannah (n. 11). In Bolivian law and Brazilian administrative practice, enterprises which have been certified by the 'Forest Stewardship Council' are assumed to manage their forests in a sustainable way in accordance with the legal requirements. For Brazil, see C. Derani and J.A. Fontoura Costa, 'State and Private Sector in a Cooperative Regulation: The Forest Stewardship Council and other Product Labels in Brazil' in Dilling, Herberg and Winter (n. 119) 301; for Bolivia, see E. Meidinger, 'Forest Certification as Environmental Law Making by Global Civil Society' in E. Meidinger, C. Elliott and G. Oesten (eds), *Social and Political Dimensions of Forest Certification* (Kessel, 2003) 315. For more details see Meidinger (n. 119), at 275 ff.

<sup>123</sup> *Tuna Dolphin II*, WT/DS/381/AB/R, para. 386.

<sup>124</sup> ISO/IEC Guide 2: 1991, 4.2.

<sup>125</sup> *Tuna Dolphin II*, WT/DS/381/AB/R, paras 349 ff., in particular para 359.

<sup>126</sup> Committee Decision (n. 114), sec. A. 24-26.

<sup>127</sup> *Tuna Dolphin II*, WT/DS/381/AB/R, para. 379.

<sup>128</sup> *ibid.*, para. 384.

they can play an increasingly important role in defining whether or not a (national) concern is legitimate and whether or not a country has acted in a non-discriminatory manner.<sup>129</sup>

## 5. CONCLUSION AND PROSPECTS

The two Appellate Body rulings in *Tuna Dolphin II* and *EC – Seal Products* provide for a complex and mixed picture as to the admissibility of CSR measures. On the one hand, in *EC – Seal Products* the Appellate Body applied a very broad concept of (*de facto*) discrimination, with the consequence that every CSR regulation which impacts negatively on the competitive opportunities of imported products would be regarded *prima facie* as an infringement of Article III:4 GATT, which would have to be justified under Article XX GATT. Thus, this decision supports a broad interpretation of WTO law as creating a general positive right of market access which can only be delimited for certain legitimate codified or accepted reasons, an opinion which is primarily pursued by opponents to CSR regulation. On the other hand, the pursuance of extraterritorial protection aims was accepted in both decisions as a legitimate policy goal under Article XX GATT and under the TBT Agreement without further discussion. The protection of domestic moral perceptions (*EC – Seal Products*) and the relation to domestically marketed products (*Tuna Dolphin II*) have been regarded as sufficient territorial nexus,<sup>130</sup> an argument put forward by those who favour a narrow interpretation of WTO law, focusing on non-discrimination.

Second, while the extraterritoriality of CSR protection aims is not a fundamental hurdle to their admissibility under WTO law, the devil is within the details, and CSR measures, in particular those which aim at the protection of health and safety and labour standards, will have to be drafted carefully in order to not constitute a protectionist and disguised discriminatory measure.

Third, *Tuna Dolphin II* has extended state responsibility slightly by including mandatory legal requirements for the voluntary use of a label or declaration into the concept of technical regulations. However, there is no indication from the reasoning in *Tuna Dolphin II* or from other case law as

---

<sup>129</sup> See also J. Pauwelyn, 'Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How they May Outcompete WTO Treaties' (2014) 17 *Journal of International Economic Law* 739, at 742 ff.; see further N. Hachez and J. Wouters, 'A Glimpse at the democratic legitimacy of Private Standards: Assessing the Public Accountability of Global G.A.P.' (2011) 14 *Journal of International Economic Law* 677; for extensive discussion, see C. Glinski, 'Competing Transnational Regimes under WTO Law' (2014) 30(78) *Utrecht Journal of International and European Law* 44.

<sup>130</sup> On a suggestion on how to balance these two approaches, in particular consumer preferences and producer needs, see I. Cheyne, 'Proportionality, Proximity and Environmental Labelling in WTO Law' (2009) 12 *Journal of International Economic Law* 927.

to whether states should be held responsible for purely private CSR measures - beyond those enshrined in Article 4 TBT that states should take reasonable and available measures to ensure that also voluntary standardisation activities within their territories are based upon international standards and do not create unnecessary or discriminatory obstacles to trade.

*Tuna Dolphin II* has increased the likelihood for procedurally fair and inclusive (private) transnational CSR standards to be accepted as 'international standards' under the law of the WTO. Those private standards would in turn legitimise national CSR measures based upon them. This option indeed seems to be an incentive for a variety of private or public-private CSR initiatives to adopt their standards in the required inclusive (in particular with regard to the needs of developing countries) and procedurally fair manner. Building upon this incentive also seems to be the way forward with regard to a non-protectionist social embedding of transnational markets instead of trying to discipline even private CSR decisions with state responsibility.<sup>131</sup>

---

<sup>131</sup> In this direction, see also Bernstein and Hannah (n. 11).