ABHANDLUNGEN / ARTICLES

Social Rights and WTO Law
Is socio-economic Certification of Bioenergy compatible with International Trade Law?

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Introduction

Modern bioenergy is gaining prominence with new forms of land use, based on cash crops and plantations and with the use of technologically advanced processing of biomass into liquid biofuels. This "move to bioenergy" has far reaching and world wide implications for the promotion and protection of a range of economic and social human rights. Replacing traditional food production by large scale biomass-production in third world countries not only affects rural land use, ownership structures and employment opportunities, it can also affect the availability of locally produced food in local communities. Moreover, it may also increase the dependence on foreign imports and on ever more volatile global food prices. It seems undisputed that such developments have a human rights dimension, in particular through their impact on the enjoyment of the right to an adequate standard of living and the right to adequate food. As the concrete effects of the move to bioenergy can only assessed through contextual and individualized studies, some general legal questions have arisen in the bioenergy debate. In order to mitigate negative repercussions of the "green gold rush", private and public actors have considered introducing socio-economic certification measures (alongside ecological ones) regarding the production of bioenergy with the aim of restricting imports of bioenergy, the production process of which did not fulfil specific criteria. One of the central arguments in the political debate against the introduction of such certification measures was their perceived incompatibility with non-discrimination rules under international trade law. This article focuses on the human rights dimension of bio-energy production and analyzes the claim of incompatibility of rights-based certification with WTO Law.

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The text falls into two parts. Part I focuses on relevant standards derived from international human rights law, while Part II assesses their implications from an international trade law perspective. The analysis of relevant principles and provisions shows that many states have entered into relevant binding obligations under both these regimes. Hence, there is the possibility that obligations under one regime require a state to take specific measures which might conflict with obligations under the other regime. Thus the question arises how to deal with such potentially contradicting legal prescriptions. In international law, there is a strong presumption against normative conflict.[1] As a recent report of the International Law Commission put it: "Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict." The suggestion of harmony between different legal regimes has evolved into a widely accepted principle of interpretation in international law. When creating new obligations, States in general are assumed not to derogate from their obligations. As the International Court of Justice stated in the *Right of Passage* case[2]:

> "it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it."

Many findings contained in this study can be seen as the result of the application of this general rule of interpretation. However, in some cases, harmonisation through interpretation in the light of provisions of the respective other regime might not be possible. In case of emerging genuine conflicts between obligations under international human rights law and international trade law obligations in the field of bioenergy regulation, international law as it stands today does not establish general rules prioritizing one source of obligations over another.[3] According to the International Law Commission, WTO law is not isolated from general international law, nor does it automatically override other special regimes of international law, such as human rights law. The available priority rules such as the *lex*

1 Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by *Martti Koskenniemi*, A/CN.4/L.682, 13 April 2006, paras. 37-43; *Sir Robert Jennings / Sir Arthur Watts* (eds.), Oppenheim's International Law (London: Longman,1992) (9th ed), p. 1275. For the wide acceptance of the presumption against conflict see *J. Pauwelyn*, Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law, Cambridge Studies in International and Comparative Law, 2003, pp. 240-244.

2 Case concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India) ICJ Reports 1957 p. 142.

3 See Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by *Martti Koskenniemi*, note 1, paras. 87-99; on the problem of so called "self-contained regimes" in international law: *B. Simma*, Self Contained Regimes, in: Netherlands Yearbook of International Law (1985), 127-136.

specialis rule do not establish a general hierarchical relationship between human rights law and international trade law. Only in case of human rights obligations belonging to *ius cogens* is a clear hierarchy in favor of human rights norms established.[4] Thus, such conflicts would have to be resolved on a case by case basis by competent (quasi-) judicial and political actors.

Part I: Bioenergy, Human Rights and Food Security Certification

Bioenergy is a renewable source of energy, which has the potential to provide new employment and income opportunities for rural populations. In principle, the move to bioenergy could benefit the masses of poor small-scale farmers. At the same time, however, poor and landless people are themselves consumers and marginal price increases may ruin the livelihoods of those who spend up to 80 percent of their income on food. FAO research shows that food prices will be increasingly linked to oil prices. As most of the 82 low-income countries with food deficits are also net oil importers, the competing pressures on crop use will increase. Moreover, the expansion of land used for the production of biomass feedstock raises concerns related to food security. As the biofuels industry becomes an increasingly attractive investment opportunity, the concentration of a few large corporations on the agricultural commodity market may be to the detriment of smallholders.

As countries set well-intended and ambitious blending targets for the proportion of bioenergy to be reached in coming years, socio-economic criteria so far have not played a significant role in bioenergy legislation. The 2009 EC-Directive on the promotion of the use of energy from renewable sources for instance does not set out criteria for socio-economic certification of bioenergy, while not precluding such an option for the implementation of the directive. There is, however, an uncontested need for national and international regulation of the socio-economic consequences of the move to bioenergy. A range of recent initiatives and studies has developed standards and proposals for certification focusing mainly on ecological criteria. In contradistinction to these studies the following report focuses on socio-economic criteria from an international law perspective. It assesses relevant human rights standards in the light of the move to bioenergy and analyses international trade law implications of proposed regulatory initiatives.

A. Global food security standards and bioenergy

The FAO defines food security as a "situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life". The most comprehensive

4 Obligations under Article 11 CESCR are generally not considered ius cogens.

global standard on the right to adequate food is contained in the FAO Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security (Voluntary Guidelines). This document takes a rights based approach to national food security and was adopted by consensus by the 127th FAO Council in 2004. The objective of the Voluntary Guidelines is to provide practical guidance to States in their implementation of the right to adequate food in the context of national food security, in order to achieve the goals of the World Food Summit Plan of Action. The guidelines provide a global instrument to combat hunger and poverty and to accelerate the attainment of the Millennium Development Goals. The central recommendations contained in this document are based on principles and obligations emanating from right to adequate food, which is not only set out in the Universal Declaration of Human Rights but also in the International Covenant on Economic, Social and Cultural Rights (CESCR). Non of these instruments refers specifically to the nexus between food security and bioenergy. The following analysis, however, attempts to assess these norms in the context of new challenges to food security posed by the rapid development of bioenergy. It will start with an overview of basic obligations stemming from international human rights law and then – as a second step – analyze the Voluntary Guidelines from a bioenergy angle.

I. Overview of obligations and responsibilities emanating from the right to adequate food enshrined in Article 11 CESCR

According to General Comment No. 12 of the Committee on Economic, Social and Cultural Rights, the right to food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.[5] As it is the case with all the rights set out in the CESCR, some dimensions of this right need only be realized progressively. However, the CESCR Committee makes it clear that States have a core obligation to take necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of Article 11.[6] In the bioenergy context, the following general legal obligations might therefore become relevant.

1. Ensuring economic accessibility in the face of high food prices

Regarding high food-prices, which can be linked to enhanced bioenergy production, the question of economic accessibility of food comes to the fore. According to the General

5 General Comment No. 12, "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Adequate Food", E/C.12/1999/5, 12 May 1999, para 5.

6 General Comment, note 5, para 6.

Comment, economic accessibility implies that personal or household financial costs associated with the acquisition of food should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised.[7] FAO research shows that food prices will come increasingly to be linked to global energy prices. Given that price increases disproportionately affect poor people, States are under an obligation to take measures to alleviate the effects of price increases on the most vulnerable segments of the population. National food accessibility safety nets including a range of corrective measures are required to counter the increasing interdependence between energy prices and food prices. Such safety nets can include priority rules for national and local consumption and trade related measures, such as import subsidies or export taxes taken in order to combat food insecurity at home.[8]

2. *Ensuring a hunger eradication focus in legislation, strategies and policies related to bioenergy*

Obligations under the CESCR require States to assess the implications of bioenergy legislation and policies, including trade policies, for national food-security. In the implementation of such policies, States should respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination. Land allocation policies in the bioenergy context should also be consistent with other human rights norms, such as the prohibition of forced evictions (Article 11:1 CESCR) in case expropriation measures for enhanced bioenergy production are envisaged. Legislation should help to secure equitable access to land, guarantee secure tenure and strengthen propoor growth. In general, violations of the CESCR occur when a state fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation, it is important to distinguish the inability from the unwillingness of a State party to comply.[9] Violations can occur through direct action of States or other entities insufficiently regulated by States.

3. *International Obligations*

In addition, States must take into account their international legal obligations regarding the right to food when entering into agreements with other States or with international organizations. According to General Comment No. 12, States parties should also take steps to

7 General Comment, note 5, para 13.

8 On WTO compatibility see below part II B of this study.

9 General Comment, note 5, para 17.

respect the enjoyment of the right to food in other countries. States parties should, by way of international agreements, ensure that the right to food is given due attention and should consider the development of further international legal instruments in that regard.[10] Thus, international human rights law addresses not only the effects of regional and national policymaking on citizens at home but increasingly refers to the effects such policies might have on foreign populations (international obligations).[11]

In line with General Comment No. 12, the role of the United Nations agencies, including through the United Nations Development Assistance Framework (UNDAF) at the country level, in promoting the realization of the right to food is of special importance.[12] In the context of the evolving crisis in food prices, coordinated efforts towards the realization of the right to food could be undertaken to enhance coherence and interaction among all the actors concerned, including the various components of civil society. In the bioenergy context, the food organizations, FAO, WFP and the International Fund for Agricultural Development (IFAD) in conjunction with the United Nations Development Programme (UNDP), UNEP, UNICEF, the World Bank and the regional development banks could also cooperate on the implementation of the right to food at the national level, building on their respective areas of expertise. The international financial institutions, notably the International Monetary Fund (IMF) and the World Bank could pay greater attention to the protection of the right to food in their lending policies and credit agreements and in international measures to deal with the nexus between bioenergy and food security.

II. Specific requirements for national legislation, strategies and policies regarding national bioenergy production

Successful food security strategies in the context of increased bioenergy production will depend on various institutional, social, economic, political and ecological circumstances, which vary substantially from country to country. Legislation, strategies and policies ensuring food security in this context should therefore not only be tailored to national and local conditions but should also leave room and flexibility for short term adaptations to global food price developments. Given the general obligations and responsibilities set out above, national legislation on bioenergy and food security should inter alia integrate the following aspects:

10 General Comment, note 5, para 36.

11 General Comment, note 5, para 36-41.

12 Ibid.

1. Priority for local and national food supply

This aspect becomes relevant when bioenergy plantations spread to arable lands competing with traditional food-crops for arable soil and scarce water resources, as is often the case with sugarcane cultivation. Bioenergy cultivation which is restricted to marginal agricultural land or cultivable wasteland is less likely to conflict with the food production for local or national consumption. The mapping and identification of such land would help to increase bioenergy production in a food-secure manner. In general, countries are under an obligation to assess the impact of increased bioenergy production on national and local and national food supply and to design strategies for land use accordingly.[13] Such strategies might involve maximum percentage thresholds for land used for bioenergy production. Regulations could make permissions for bioenergy production dependent on the condition that a certain percentage of the land will still be used for food production for national and local consumption. FAO, UN agencies as well as other international institutions may, when required by States, assist in the conduct of such food security assessments of bioenergy legislation and strategies.

2. Prohibition of forced evictions and of violations of traditional land rights

In line with the Voluntary Guidelines, States should respect and protect assets that are important for people's livelihoods. States are under an obligation to protect farmers and smallholders of forced evictions carried out in the context of enhanced land use for bioenergy production.[14] States should, to the maximum extent possible, refrain from claiming or confiscating housing or land for enhanced bioenergy production, in particular when such action does not contribute to the enjoyment of human rights. For instance, an eviction may be considered justified if measures of land reform or redistribution, especially for the benefit of vulnerable or deprived persons, groups or communities are involved. According to the UN Basic Principles and Guidelines on Development-based Evictions, States must ensure that adequate and effective legal or other appropriate remedies are available to those who undergo, remain vulnerable to, or defend against forced evictions in the context of enhanced bioenergy production.[15] Traditional land rights and other rights of indigenous people should be respected.

13 On this obligation in general terms: General Comment, note 5, para 21.

14 On the prohibition of forced evictions: UN-Basic Principles and Guidelines on Development-based Evictions, contained in E/CN.4/2006/41, 21 March 2006, para 1.

15 UN-Basic Principles and Guidelines on Development-based Evictions, note 14, para 22.

3. Development of jobs and rural growth through energy cropping systems

According to Guideline 8 of the Voluntary Guidelines, States should design and implement programmes that include different mechanisms to ensuring that the poorest populations benefit from agricultural development. In addition, the Guidelines aim at fostering the use of agricultural production methods, which provide opportunities for work providing remuneration allowing for an adequate standard of living for rural wage earners and their families.[16] Given that bioenergy can be produced in multiple ways and according to diverging production models,[17] national regulators should prescribe or promote those models that create local employment. Attention should be paid to fair and healthy working conditions and the problem of child labour in line with relevant international standards. Furthermore the role of women and their contribution to rural livelihoods, primarily through small-scale farming, should be respected and promoted (see 2008-FAO Report *Gender and Equity Issues in liquid Biofuels Production*). Country studies suggest that the choice of the production model is decisive to the question whether bioenergy production fosters local development.[18] It is within the responsibility of the legislator to regulate land use for bioenergy production in a way that promotes rural livelihoods.

4. Preservation of local water resources and the right to water

Bioenergy production can lead to water pollution and can require high amounts of irrigation water. In areas with scarce water resources bioenergy production can conflict with governmental obligations emanating from the human right to water. Water-related human rights obligations are derived from Article 11:1 and Article 12 of CESCR. According to General Comment No. 15 of the Committee on Economic, Social and Cultural Rights, "the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements".[19]

16 General Comment, note 5, para 21.

17 *D. Kashyap / M. Glueck*, Liquid Biofuels for Transportation: India country study on potential and implications for sustainable agriculture and energy, 2006, 64-70.

18 Ibid., 62.

19 General Comment No. 15, "Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Water", E/C.12/2002/11, 20 January 2003, para 2; Water – related individual rights have been recognized in various legal and political documents: Convention on the Elimination of All Forms of Discrimination Against Women; Art. 24, para. 2 (c), Convention on the Rights of the Child; Arts. 20, 26, 29 and 46 of the Geneva Convention relative to the Treatment of Prisoners of War, of 1949; arts. 85, 89 and 127 of

Individual access to clean water is the precondition of the enjoyment of other rights. According to General Comment No. 15, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease.

The Committee also notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food.[20] Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology. Referring to the duty in Article 1, paragraph 2, of the Covenant, which provides that a people may not "be deprived of its means of subsistence", the Committee requires States parties to ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples. All of these water-related obligations and responsibilities seem highly relevant for legislation and regulatory activities in the context of water-intensive bioenergy production.

5. Participation of local people in decision making

According to recognized cross-cutting human rights principles, the formulation and implementation of national bioenergy strategies and policies should respect, inter alia, the principles of non-discrimination and people's participation.[21] The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning enhance bioenergy production. Individuals and groups should be given full and equal access to information concerning bioenergy production held by public authorities or third parties.

the Geneva Convention relative to the Treatment of Civilian Persons in Time of War, of 1949; Arts. 54 and 55 of Additional Protocol thereto of 1977; Arts. 5 and 14 Additional Protocol II of 1977; preamble, Mar Del Plata Action Plan of the United Nations Water Conference; see para. 18.47 of Agenda 21, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I and Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1) (United Nations publication, Sales No. E.93.I.8), vol I: Resolutions adopted by the Conference, Resolution 1, Annex II; Principle No. 3, The Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment (A/CONF. 151/PC/112); Principle No. 2, Programme of Action, Report of the United Nations International Conference on Population and Development, Cairo, 5-13 September 1994 (United Nations publication, Sales No. E.95.XIII.18), Chap. I, Resolution 1, Annex; paras. 5 and 19, Recommendation (2001) 14 of the Committee of Ministers to Member States on the European Charter on Water Resources.

20 See also General Comment, note 5.

21 FAO-Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, preface para 7.

6. Monitoring

In order to live up to the above mentioned obligations and responsibilities and in line with the Voluntary Guidelines, States should establish mechanisms to assess, monitor and evaluate the effects of enhanced bioenergy production on the progressive realization of the right to adequate food. States could consider conducting "Right to Food Impact Assessments" in order to identify the impact of relevant bioenergy policies, programmes and projects on the progressive realization of the right to adequate food of the population at large and vulnerable groups in particular. Such assessments could form a basis for the adoption of the necessary corrective measures.[22] Monitoring could involve the creation of national ombudspersons for food security and bioenergy and co-operation with FAO and UN-special procedures dealing with the right to food.

B. Socio-economic certification of bioenergy as a means to ensure adherence to global standards

In general, mandatory and voluntary certification schemes are being increasingly recognized as valuable tools to harness market forces to create incentives in support of sustainability outcomes.[23] In order to be successful, relevant standards must be widely accepted and well known to stakeholders and consumers.[24] However, a general concern regarding sustainability certification arises from the fear that sophisticated certification mechanisms overburden developing countries that are not able to meet the standards or that find it difficult to comply with the administrative requirements involved. Due to unpredictable market dynamics, certification mechanisms must also be continuously reviewed and adapted to changing societal and market conditions.

A number of stakeholder groups has recognized the need for bioenergy sustainability certification. There have been various initiatives directed at the development of concrete bioenergy certification systems.[25] The IAEA Bioenergy Task 40 on International Sustainable Bioenergy Trade, consisting of governamental bodies, NGOs and industry, aims to investigate a policy framework for a bioenergy commodity market.[26] Another initiative is the G8 Global Bioenergy Partnership (GBEP), providing a coordination forum for G8

22 FAO-Voluntary Guidelines, note 21, guideline 17.

23 *C. Roheim Wessells et al.*, Product certification and ecolabelling for fisheries sustainability. FAO Fisheries Technical Paper, 2001, 68-69.

24 Ibid., 68-69.

25 *J. van Dam / M. Junginger*, Overview of recent developments in sustainable biomass certification, 2006.

26 IEA Bioenergy Task 40 (www.bioenergtrade.org).

countries regarding bioenergy policies.[27] Further fora are the Roundtable on Sustainable Palm Oil (RSPO)[28] and the Roundtable on Sustainable Soy (RTRS).[29] Recent research has provided several valuable overview documents regarding these and various other initiatives.[30] From different perspectives, governments, companies and civil society organisations have started to develop possible standards and criteria for the sustainable production of biofuels. Most of these initiatives focus on environmental criteria for bioenergy certification.[31] Various initiatives from NGOs also include socio-economic criteria.[32] In contradistinction to this study, however, these initiatives do not derive their criteria from explicit provisions of international human rights law related to the right to food. A coalition of Dutch NGOs has postulated the introduction of food security criteria, including concern for land competition and local socio-economic development. In the same vein, the World Wild Life Fund (WWF) and the Brazilian NGO-network FBOMS have stressed the importance of paying attention to land-use conflicts and priority for food supply.[33] All three proposals also focus on labour conditions and human health impacts as relevant socio-economic criteria.

As to the practicalities of bioenergy certification, there seems to be an emerging consensus that there should be an internationally accepted framework for certification,[34] that a great diversity of competing systems would be a problem and that a common certification system should include a wide variety of stakeholders to ensure credibility.[35] At the same time, a 'one size fits all' approach should be avoided, since countries need to have sufficient flexibility to adapt criteria to their particular food security needs. It also seems clear that developing countries will need assistance in the implementation of such mechanisms. Given the relevance of the FAO Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security and the status of these Guidelines as a consensus document adopted by 187 States, adjusted standards for food

27 *Clini / Bauen*, Global Bioenergy Partnership -White Paper, 2005.

28 RSPO, RSPO Principles and Criteria for Sustainable Palm Oil Production, 2005.

29 On this initiative *J. van Dam / M. Junginger*, note 25, 19.

30 Ibid.

31 Ibid.

32 With a comprehensive overview over developed criteria *U.R. Fritsche et al.*, Sustainability Standards for Bioenergy, 2006.

33 Ibid.

34 IEA Bioenergy Task 40 (www.bioenergtrade.org).

35 *P. Forest*, Developing a mechanism for palm oil tracebility from plantation to end user, annex 6, commended by RSPO, 2006.

security and bioenergy production could take the form of an annex to the Voluntary Guidelines. Such an annex could include common food security criteria for bioenergy production, a blueprint of a globally co-ordinated certification mechanism[36] as well as a set of national, regional and global emergency measures to deal with rising food prices.

Conclusion

Customary international law, the International Covenant on Economic, Social and Cultural Rights and the FAO Voluntary Guidelines prescribe a number of concrete obligations and responsibilities relevant to the nexus between food security and bioenergy production. These range from measures to prevent and alleviate hunger and water deprivation to the prohibition of gender discrimination and forced evictions. First country studies suggest that the choice of the production model is decisive regarding the question whether bioenergy production contributes or threatens local and national food security.[37] It is within the responsibility of the legislator to devise land use for bioenergy production in a way that increases national food security through the promotion of rural livelihoods.

Food security risks involved in the move to bioenergy production necessitate public regulation. Legislation, programmes and strategies in the field of bioenergy production should focus on hunger eradication and should provide for the participation of local communities in policy making. It may be necessary to adopt emergency measures to alleviate the effects of rising food prices. Moreover, food security assessment and monitoring are vital elements of any legislative or regulatory undertaking in the field of bioenergy. Socio-economic certification can be a crucial element of such strategies. Recent research on certification suggests that a proliferation of criteria and standards would be counterproductive. International institutions, such as the FAO thus have a crucial role to play in leading states to a co-ordinated approach regarding food security in bioenergy production and measures addressing the global food price crisis.

Part II: WTO Law Implications

The following analysis will assess cross-cutting legal principles of WTO law contained mainly in the General Agreement on Tariffs and Trade (GATT) 1994 which might be affected by socio-economic certification of imported bioenergy products (A). Secondly, it will also address the WTO compatibility of specific measures taken by food-importing

36 The question of WTO-compatibility of certification schemes will be at the centre of part II on international trade law implications.

37 *D. Kashyap / M. Glueck*, note 17, 62.

countries to counter negative effects of food price increases on national food security in the context of increased bioenergy production (B).

A. Socio-economic certification of imported bioenergy

Certification schemes relating to socio-economic criteria of bioenergy production can take various forms. Such schemes may be established by global, regional or national institutions. They can be run by private or public actors. They can be mandatory or voluntary and they can entail various diverging consequences once a bioenergy product fails to fulfil certain criteria, ranging from a ban on the product to labelling purely for consumer information purposes. With regard to the environmental performance of bioenergy products, for instance, a number of schemes are under discussion regarding regional and national legislation, i.e. differential taxation and financial incentives for using certified biofuel, mandatory standards based on percentages or quantities of certified bioenergy in fuel blends or for specific purposes (public transportation) and limits on the amount of non-certified biofuel that can be contained in an authorized fuel blend.

The WTO legality of these measures depends on the entirety of any given, scheme and eventually will have to be decided on a case by case basis. A common feature of socio-economic certification based on the food security criteria discussed in Part I is that they relate to the way that bioenergy has been produced and not to the physical characteristics of bioenergy products. Regulation (certification) which refers to these so called "processes and production methods" (PPMs) in foreign countries is one of the most disputed issues in WTO law. Case law in this area is sparse and the issue of legality of PPMs is far from being settled as a matter of WTO law.

This debate has primarily concentrated on the WTO legality of environmental PPMs. A general analysis of the legal implications of socio-economic certification can demonstrate whether and to what extent WTO law leaves room for socio-economic certification of bioenergy products. For this purpose, the report differentiates between two different groups of certification measures: first, socio-economic certification measures which are of a voluntary nature and are not linked directly or indirectly to benefits or disadvantages granted or imposed by public legislation; and, second, measures of a voluntary or mandatory nature which directly or indirectly entail benefits or disadvantages granted or imposed by public legislation or regulation.

I. Socio-economic certification of bioenergy and the TBT Agreement

The TBT Agreement sets out rules for technical product standards and regulations. It differentiates between binding technical norms (regulations) on the one hand and non-binding norms (standards) on the other hand. The main thrust of the agreement is to promote standards and regulations that are based on international standards. According to Article 2.5 TBT, such measures are presumed not to create an unnecessary obstacle to

trade. The TBT Agreement covers certification measures based on product characteristics and processes and production methods reflected in the physical characteristics of the product. Regarding the issue of bioenergy production it is disputed whether the agreement also includes socio-economic certification based on (bioenergy-) production methods that have no effect on the physical characteristics of a product. The WTO political and dispute settlement organs, including the TBT Committee have so far not decided this issue.

Under the definitions provided in Annex 1 of the TBT agreement, a "technical regulation" is a "document 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" (emphasis added). A "standard" is a "document which lays down product characteristics or their 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" (emphasis added).

The first sentence of the two definitions links the words "product characteristics" and "processes and production methods" with the terms "or their related". This formulation indicates that process-related measures with no effect on the physical characteristics of the product are not included in the definition. However the connecting term "or their related" is missing in the second sentence. Some authors infer from this fact that the definition might also include measures relating to PPMs that have no relevance whatsoever for the characteristics of the product. This assumption is rebutted by most scholars with the argument that the insertion of "related" in the negotiations[38] in the first sentence was meant to exclude non-product related PPMs from the scope of application of the TBT agreement.[39] The first sentence of the definitions therefore sets out the widest possible definition of the scope of application of the agreement.[40] Thus, PPMs unrelated to product characteristics are not included in the TBT Agreement definition of a "technical regulation" or a "standard".

38 See G/TBT/W/11 of 29 August 1995.

39 *G.G. Sander / A. Sasdi*, Freihandel und Umweltschutz. Legitimation und Grenzen grüner Handelsbeschränkungen in EU und WTO, 2005, 186; *S.W. Chang*, "GATTing a Green Trade Barrier. Eco-Labelling and the WTO Agreement on Technical Barriers to Trade", Journal of world trade 31 (1997), 137-159, 147; *A. Pastowski et al.*, Sozial-ökologische Bewertung der energetischen Nutzung von importierten Biokraftstoffen am Beispiel Palmöl. Studie im Auftrag des Bundesministeriums für Umwelt, Naturschutz und Reaktorsicherheit (Bearb. Wuppertal Institut für Klima, Umwelt und Energie), 2007, 122.

40 *A. Pastowski et al.*, note 39, 122; *M. Hilf / S. Oeter*, WTO-Recht. Rechtsordnung des Welthandels, 2005, 353; *M. Wolkewitz*, Das Verhältnis zwischen internationalem Freihandel und Umwelt-

The distinction between product-related PPMs and non-product-related PPMs is not always clear-cut. Responding to this, in July 1995 the TBT Committee formally adopted the decision that all mandatory labelling requirements have to be notified irrespective of the kind of information which is provided by the label.[41] This Decision clarifies WTO Members' obligations under the notification provisions of the TBT Agreement. It was not meant to change the above mentioned definition of "standards" and "regulations" in that Agreement. In the context of socio-economic certification the Decision makes clear that, for the sake of regulatory transparency, the TBT Committee requires all certification measures to be notified by the relevant state.

In summary, it can be concluded that the TBT Agreement is not applicable to socio-economic certification measures relating to processes and production methods of bioenergy which have no impact on the physical characteristics of the product. This is not altered by the fact that, for the sake of transparency, all certification measures must be notified to the TBT Committee.

II. Socio-economic certification and the GATT

1. Voluntary socio-economic certification which is not linked directly or indirectly to advantages or disadvantages granted or imposed by public authorities

Voluntary socio-economic certification without government involvement is clearly beyond the scope of GATT disciplines. However, the GATT legality of voluntary certification with government involvement must be addressed in more detail. In the GATT panel report *Tuna I*, a voluntary labelling scheme, based on the US Marine Mammal Act and the Dolphin Protection Consumer Information Act (DPCIA), was designed to inform consumers about those tuna products which were caught in a dolphin-friendly manner in a certain area of the Pacific Ocean. It applied to US products and foreign tuna products alike. Mexico argued that this measure was inconsistent with US obligations under Art. XI: 1 (general elimina-

schutz. Spielräume im Spannungsverhältnis zwischen Liberalisierung und Reglementierung, 2004, 27; *J. Wiers*, Trade and Environment in the EC and the WTO. A Legal Analysis, 2002, 298; *S. Charnovitz*, "The Law of Environmental "PPMs" in the WTO. Debunking the Myth of Illegality", The Yale Journal of International Law 27 (2002), 59-110; for the applicability of the TBT-agreement, however: *A. Okubo*, "Environmental Labeling Programs and the GATT/WTO Regime", Georgetown international environmental law review 11 (1999), 599-646, 627.

41 GATT Secretariat, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regard to Labelling Requirements, Voluntary Standards, and Processes and Production Processes Unrelated to Product Characteristics, WT/CTE/W/10/; G/TBT/1/Rev.1, Aug. 10, 1995, also available on http://wto.org/ddf/ep/Z2/Z2511e.wpf>.

tion of quantitative restrictions) and Art. I:1 (general most-favoured-nation treatment).[42] The panel rejected this argument, stating that the voluntary labelling scheme did not discriminate between products from specific countries but referred to all products, regardless of origin, that had been caught in a particular area of the Pacific Ocean. Furthermore the panel stressed that the labelling provisions prevented tuna-products without the "Dolphin-Safe" label being sold in the US, nor granted any advantage from the US government for products carrying the label. Advantages would only occur if consumers who, as a result of the label, were put in a position to discriminate between dolphin friendly tuna and non-dolphin friendly tuna, preferred tuna products carrying the label. In other words the panel concluded that voluntary labelling that is not linked to advantages or disadvantages granted by public authorities and which applies to all products on the market (irrespective of origin) is in conformity of the GATT.[43]

Hence, voluntary socio-economic certification which is not linked to direct or indirect advantages or disadvantages granted or imposed by public authorities and which is applied to all products on the market irrespective of the exporting country is in conformity with the GATT.

2. *Voluntary or mandatory socio-economic certification of bioenergy, which is directly or indirectly linked to disadvantages or advantages granted by public authorities*

Socio-economic certification schemes for bioenergy can also be linked to public advantages or disadvantages. The most far-reaching measure from the perspective of the GATT would be a ban on non-certified bioenergy. Other regulatory options range from differential taxation of certified bioenergy to requirements to use particular percentages or quantities of certified bioenergy in fuel blends or for specific purposes (such as public transportation). In the following, certification measures which are directly or indirectly linked to disadvantages or advantages granted or imposed by public authorities will be assessed in the light of the relevant GATT provisions.

42 Tuna I, para 5.42- 5.43.

43 *C. López-Hurtado*, "Social labelling and WTO law", Journal of international economic law 5 (2002), 719-746; A. Okubo, "Environmental Labeling Programs and the GATT/WTO Regime", Georgetown international environmental law review 11 (1999), 599-646, 633; *M. Hilf / S. Oeter*, note 40, 590; *A. Pastowski et al.*, note 39, 125.

a. Article XI: I – General Elimination of Quantitative Restrictions

Article XI:1 GATT prohibits any quantitative measures restricting market access at the border. This provision is to be contrasted with Article III GATT, which applies to regulatory measures (fiscal and non-fiscal) which place imported products in a less favourable position compared to domestic products once they have entered the market.[44] A strict ban or quota for imported bioenergy which fail to comply with criteria set out in a socio-economic certification-scheme would be in contravention of Article XI:1 regardless of its purpose. However, such a measure might still be justified under Article XX GATT (see on this general exception below).

It has also been argued that all measures that relate to PPMs automatically fall under the prohibition in Article XI:1 GATT. This argument is based on the assumption that Article III:4 GATT cannot be applied to bioenergy certification relating to PPMs.[45] As will be demonstrated in the next sections of this report, this assumption is not supported by more recent decisions of the Appellate Body (*US - Shrimp*) and must be considered to be incorrect.[46]

b. Article III National Treatment

"National Treatment" under GATT means that imported products will be accorded no less favourable treatment than domestic products. There are slightly different rules for taxation (Article III:2) and other forms of regulation (Article III:4). Most of the regulatory measures that can be attached to socio-economic certification in order to privilege certified bioenergy products would have to be considered in the context of this obligation. Any measure, whether fiscal or non-fiscal, which foresees less favourable treatment for imported bioenergy than for a "like" product grown or produced domestically might violate Article III GATT. The central question is whether a particular measure is more burdensome for foreign producers than domestic producers. Two preconditions must be fulfilled in order to come to the conclusion that "national treatment" has not been granted: first, the challenged treatment must be given to a product "like" other (domestic) products not disfavoured by the measure. Otherwise there would be no discriminatory treatment. And second, the treat-

44 *G.G. Sander / A. Sasdi*, note 3, 133 et sequ.; *J. Wiers*, note 40, 277. Note Ad Article III states that border measures enforcing a domestic measure are to be treated as domestic measures.

45 GATT Dispute Panel Report on United States: Restrictions on Imports of Tuna, 33 ILM 839, (not adopted). [hereinafter Tuna II case].

46 *R. Howse / D. Regan*, "The Poduct/Processs Distinction - an Illusory Basis for Disciplining "Unilateralism" in Trade Policy", European Journal of International Law 11 (2000), 249-289; *A. Pastowski et al.*, note 39, 124.

ment accorded to the imported product must be "less favourable" than the treatment accorded to domestic products.

- Socio-economic certification and the question of "like" bioenergy products

The Appellate Body in *EC-Asbestos* found that the question of likeness is to be answered by reference to the extent to which the following elements are being found in common in the two products: physical characteristics, end-use, consumer preference and to some extent tariff classification.[47] The main problem regarding socio-economic certification of bioenergy products is that they do not relate to physical product characteristics but to production and process methods (PPMs). With regard to the likeness test often the only difference between the products will be one of consumer preference.[48] However, as dynamic developments in the area of human rights-labelling demonstrate, socio-economic criteria are of increasing importance to consumers. It could therefore be argued that bioenergy produced in violation of the above mentioned socio-economic criteria are not 'like' products which have been produced in conformity with these criteria even though they have similar (or even identical) product characteristics.[49] It should be borne in mind, however, that the more remote the distinguishing conditions in the scheme are from features that consumers can associate with a particular product, the more probable the products are "like".[50] In general, socio-economic criteria should refer to concrete methods involved in production process, such as minimum standards regarding the way that energy products are produced. A general reference to a lack of protective legislation in a foreign country, without any further evidence that socio-economic standards are in fact violated in the production process, seems too unspecific to distinguish bioenergy products as "unlike".[51]

Current initiatives to introduce a separate harmonised product classification for bioenergy products – if successful – could potentially have an influence on the legal assessment of socio-economic certification measures. It might become more difficult for importing states to argue that a product falling under this new classification category is "unlike" other products in the same category because the production process did not conform to socio-economic standards.

47 WTO-Appellate Body Report, EC-Asbestos, WZT/DS135/AB/R, adopted 12 January 2000, para 103 and 109; see on Trade and Human Rights, *L. Bartels*, Trade and Human Rights, in: D. Bethlehem et al. (eds), Oxford Handbook of International Trade, OUP, 2008,forthcoming, p. 14, manuscript on file with author.

48 See on this problem, *L. Bartels*, note 47, p. 14.

49 *R. Howse / D. Regan*, note 46, 249-289.

50 IPC-Discussion Paper, October 2006.

51 *S. Charnovitz*, note 40, 59-110, 107.

- Socio-economic certification and the question of "less favourable" treatment

It has been recognized in recent WTO jurisprudence that not every negative effect on a "like" foreign product will amount to "less favourable treatment".[52] In *Dominican Republic - Cigarettes* the Appellate Body held that a detrimental effect on a given imported product does not necessarily amount to less favourable treatment if it is explained by factors or circumstances unrelated to the foreign origin of the product.[53] Following this case, in *EC - Biotech* a panel took a flexible approach to "less favourable treatment", entitling regulatory authorities to take into account factors such as risk assessments, even if these *de facto* constitute a burden for foreign exporters. The question whether socio-economic production conditions in the exporting country can be a legitimate factor to be considered by the regulator without constituting "less favourable" treatment has not been clarified in WTO dispute settlement. It seems clear, however, that the insistence on relevant socio-economic standards in the production process of foreign products will amount to discriminatory treatment if it is not applied equally to domestic and foreign producers. Some authors have argued that a decisive factor in this regard is the question whether the national regulator bases its criteria on international standards (i.e. international human rights law), so long as they are not origin specific.[54] It has been argued that in these cases certification measures do not provide "less favourable treatment" in line with the reasoning of the Appellate Body in *Dominican Republic - Cigarettes*. In the food security context it would therefore be advisable to base criteria used in socio-economic certification on universally recognized standards.

Given that there is still considerable opinion against the emerging position that regulatory criteria referring to production processes (PPMs) can lead to the conclusion that products are "unlike" or not treated "less favourably" in the sense of Article III GATT the following conclusions can be drawn: Voluntary or mandatory socio-economic certification measures which are directly or indirectly linked to disadvantages or advantages granted by public authorities do not necessarily violate Article III GATT. Such certification measures can, however, amount to discrimination against foreign products in the sense of Article III GATT, in particular if they are used as disguised protectionist measures or in an origin oriented manner. Even if a specific measure is in contravention of Article III GATT it may still be justifiable as an exception under Article XX GATT (see on Article XX below).

52 *L. Bartels*, note 47, p. 14; *J. Pauwelyn*, "The Unbearable Lightness of Likeness", available at www.law.duke.edu/fac/pauwelyn/pdf/unbearable_ lightness.pdf, 10-12.

53 WTO Appellate Body Report, Dominican Republic-Cigarettes, WT/DS302/AB/R, adopted 19 May 2005, para 96; on this case: *L. Bartels*, note 47, p. 14.

54 *L. Bartels*, note 47, p. 15.

c. Article I:1 General Most Favoured Nation Treatment

The central non-discrimination principle of the GATT is the most favoured nation obligation, according to which all foreign products must be treated equally. This obligation covers both border and internal measures. Foreign products may not be accorded "less favourable" treatment than "like" products from other foreign countries. Thus, in the context of certification measures referring to production methods in foreign countries (PPMs) similar questions arise (see under b.). In order not to violate Article I:1 GATT, socio-economic certification measures need to apply the same standards to all exporting countries. Even if a specific measure is in contravention of Article III GATT it may still be justifiable as an exception under Article XX GATT (see on Article XX GATT below).

d. Article XX General Exceptions

Even if socio-economic certification measures violate Article XI:1 (general elimination of quantitative restrictions), Article III:4 (national treatment on internal taxation and regulation) and Article I:1 (most-favoured-nation treatment) they may nevertheless be justified under the general exceptions set out in Article XX GATT. This provision saves regulatory measures from illegality provided that they fall under one of the enumerated exceptions in Article XX (a-j) GATT and that they pass a further non-discrimination test contained in the chapeau of Article XX GATT.

- Article XX b) Protection of Human Life and Health

Socio-economic certification of bioenergy relating to processes and production methods could fall under the exception in Article XX (b). There is a clear relationship between the exception clause and the relevant international social standards referred to in Part I of this study. As the UN Secretary-General stressed in his report on globalization and its impact on the full enjoyment of all human rights[55]:

> "The exceptions referred to [in Article XX] call to mind the protection of the right to life, the right to a clean development, the right to food and health, the right to self determination over the use of natural resources, the right to development and freedom from slavery to mention a few"

It seems clear that the exception for measures "necessary to protect human ….life and health" in Article XX(b) can be used to safeguard human rights within the territory of the state that adopts the relevant measure.[56] What is less clear is the question to what extent this exception allows for measures linked to an assessment of foreign processes and pro-

55 UN-Doc A/55/342, 31 August 2000.

56 *L. Bartels*, "Art. 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 (2002), 353-403, 354.

duction methods based on standards prescribed by international bodies or even by the importing state itself. In these cases the question of extraterritorial effects of internal regulatory measures becomes an issue. The first Appellate Body decision that ruled on the legality of measures relating to processes and production methods in foreign countries taken under Article XX GATT was *US-Shrimp*, which involved an import ban on shrimp from countries that did not have a turtle-conservation regime comparable to that of the United States. In the decision the Appellate Body clarified that measures requiring exporting countries to comply with certain standards in the production process cannot be excluded a priori from justification under Article XX GATT. The Appellate Body hereby further inspired the debate about whether the exceptions in Article XX included only inward oriented regulatory measures or also outward-oriented ones.[57] In the words of the Appellate Body[58]:

> "It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country unilaterally prescribed by importing country, renders a measure a priori incapable of justification under Art. XX. Such an interpretation renders most, if not all, of the specific exceptions of Art. XX inutile, a result abhorrent to the principles of interpretation we are bound to apply".

The Appellate Body did not pass upon the question of whether there is an implied jurisdictional limitation on the exceptions set out under Article XX. Instead it held that for the purposes of Article XX (g) there was a "sufficient nexus" (here territorially) between the protected entities (migrating turtles) and the state (US) taking the measures.[59] In the case of socio-economic certification measures falling under Article XX (b) the question arises whether a similar requirement would apply. In the absence of WTO case law on socio-economic certification measures it remains to be seen whether a connection between the protected entity and the state taking the measure will be required by WTO adjudicators. The insistence on some connection between the protected entity and the importing state, however, resonates with the rules of international customary law on extraterritorial jurisdiction.[60] But what would be the nexus between socio-economic certification measures

57 *C. López-Hurtado*, "Social labelling and WTO law", Journal of international economic law 5 (2002), 719-746, part B; *R. Howse et al.*, WTO-Disciplines and Biofuels: Opportunities and Constraints in the Creation of a Global Marketplace, 2006.

58 United States – Import Prohibitions of Certain Shrimp Products, WT/DS58/AB/R, Report of the Appellate Body, 12 October 1998 [use the date of adoption, not the date of circulation], para 121.

59 United States – Import Prohibitions of Certain Shrimp Products, note 58, para 133.

60 On this point comprehensively: *L. Bartels*, "Art. 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 (2002), 353-403.

taken for instance by the European Union and bioenergy products from a non-European exporting country? A legal nexus could be obligations or responsibilities emanating from treaties or standards both countries have signed up to.[61] In the food security context, Article 11 of the International Covenant on Economic, Social and Cultural Rights and the Voluntary Guidelines on the Right to Adequate Food come to mind. One could argue that the exporting state, which has signed up to a specific human rights standard, is estopped from opposing regulatory standards in the importing state attempting to enhance compliance with such a joint standard.[62]

In addition, any measure taken under Article XX (b) must be necessary in order to achieve one of the enumerated objectives. In *EC - Asbestos*, the Appellate Body confirmed that a measure is "necessary" within the meaning of GATT Article XX(b) if less trade restrictive measures, which a Member could reasonably be expected to employ to achieve the regulatory objective, are not available to it. Furthermore, the greater the contribution of the measure to the end pursued, the more likely it will be considered "necessary" by the Appelate Body (*Brazil – Tyres*).[63]

- The Chapeau of Article XX

The Chapeau of Article XX requires that a measure may not be applied in a manner that constitutes a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction on international trade". The focus is on the concrete application of the measure. In *Brazil-Tyres* the Appellate Body underlined that the Chapeau is an expression of the principle of good faith. It serves to avoid an abusive exercise of the exceptions set out in Article XX.[64] The task of interpreting the chapeau for the Appellate Body is essentially one of marking out a line of equilibrium between the right of a member to invoke an exception under Article XX and the rights of other members under varying substantive GATT provisions.[65]

- Unjustifiable discrimination

Socio-economic certification measures would have to be applied in a manner that does not constitute "unjustifiable discrimination between countries where the same conditions pre-

61 Ibid.

62 Ibid.

63 Brazil – Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, 17 December 2007, paras. 148-155.

64 Brazil – Measures Affecting Imports of Retreaded Tyres, note 63, paras. 213-216; see also United States – Import Prohibitions of Certain Shrimp Products, note 58, para 158.

65 United States – Import Prohibitions of Certain Shrimp Products, note 58, para 159.

vail". In *Brazil-Tyres* the Appellate Body held that "analyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination".[66] The rationale of the measure must relate to pursuit of one of the objectives set out in the paragraphs of Article XX. In this case the Appellate Body concluded that the Brazilian measure was unjustifiable because "it was based on a rationale that bears no relationship to the objective of the measure".[67]

In *US-Shrimp* the disputed US measure was considered "unjustifiable discrimination" because in its practical application it required all exporting states to adopt essentially the same policy as that enforced within the US.[68] What amounted to "unjustifiable discrimination" in this case was not the extraterritoriality of the measure but the fact that it established a rigid and unbending standard by which US officials decided whether or not countries could be certified, without taking into account different conditions prevailing in the territories of those other member states.[69] In the context of socio-economic certification this would mean that any socio-economic standard developed for the production of bioenergy would have to leave enough room for flexibility in its application in order to take into consideration different conditions in exporting countries. In the words of the Appellate Body[70]:

> "We believe that discrimination results 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".

Another factor that led the Appellate Body in *US-Shrimp* to the conclusion that the US measure constituted "unjustifiable discrimination" in the sense of the Chapeau was the fact that the US had applied the measure without previous efforts to negotiate with the respective countries bilaterally or multilaterally on enhanced protection measures for the endangered turtles.[71] The Appellate Body found that existing multilateral agreements regulating the political and legal framework of the protection measures could be seen as an expression of the equilibrium of interests which the Chapeau of Article XX was supposed to maintain.[72] This again demonstrates that an important factor for the WTO legality of socio-economic certification measures is the question whether countries imposing the measure do

66 Brazil – Measures Affecting Imports of Retreaded Tyres, note 63, paras. 225-227.

67 Brazil – Measures Affecting Imports of Retreaded Tyres, note 63, paras. 231-232.

68 United States – Import Prohibitions of Certain Shrimp Products, note 58, para 161.

69 United States – Import Prohibitions of Certain Shrimp Products, note 58, para 164.

70 United States – Import Prohibitions of Certain Shrimp Products, note 58, para 165.

71 United States – Import Prohibitions of Certain Shrimp Products, note 58, para 167 et seq.

72 United States – Import Prohibitions of Certain Shrimp Products, note 58, para 170.

so in a co-operative spirit based on shared standards, in the development of which exporting countries had a say. Regarding the reasoning of the Appellate Body in *Brazil – Tyres* and *US-Shrimp* it can be concluded that socio-economic certification of bioenergy products based on specific global standards is not only unlikely to conflict with the substantive provisions of the GATT but could also eventually been saved from illegality by Article XX GATT.

- Arbitrary Discrimination and Disguised Restrictions of International Trade

There is little jurisprudence on these criteria of the Chapeau of Article XX. In general, the Appellate Body also seems to subsume the principles of due process and procedural fairness under the "arbitrary discrimination" criterion. Hence, a socio-economic certification measure would have to bear a direct relationship to the objective of enhanced food-security and would have to be applied equally (irrespective of the origin of the product) and in a fair and transparent manner. Whenever such measures are (also) applied to pursue a (disguised) protectionist agenda, they are unlikely to pass as a justifiable exception under the chapeau of Article XX GATT. Reliance on objective and globally shared socio-economic criteria in the application of such measures would help to demonstrate that specific certification measures do not aim at protecting domestic producers but are taken to implement globally shared social standards.

In summary, it can be concluded that voluntary or mandatory socio-economic certification measures which are directly or indirectly linked to disadvantages or advantages granted by public authorities do not necessarily violate WTO law. The reliance on universally agreed socio-economic standards for bioenergy production reduces the risk of violating substantive provisions of the GATT. Even if such measures are found in contravention of the relevant substantive GATT provisions by WTO adjudicators, they may still be justifiable as an exception under Article XX GATT.

Conclusion

On the specific question of socio-economic certification no panel or Appellate Body reports and no explicit provisions exist under WTO law. Concrete measures will have to be assessed on a case by case basis taking into account all relevant factors and circumstances of the applied measure. Despite the resulting insecurity as to the question of how WTO bodies would actually deal with this issue in case of a concrete dispute, the analysis of the relevant provisions leads to the following conclusions with regard to the legal context, in which socio-economic certification takes place:

Voluntary socio-economic certification which is not linked to direct or indirect advantages or disadvantages granted or imposed by public authorities is in conformity with WTO law. Moreover, the TBT Agreement is not applicable to socio-economic certification measures relating to production-processes which have no impact on the physical character-

istics of the product.[73] Even voluntary or mandatory socio-economic certification measures which are directly or indirectly linked to disadvantages or advantages granted or imposed by public authorities do not necessarily violate WTO law. Whenever a specific measure is in contravention of the relevant GATT provisions it may still be justifiable as an exception under Article XX GATT.

In more concrete terms, socio-economic certification schemes which are linked to import bans, tax cuts or other specific benefits or disadvantages granted or imposed by public authorities can collide with various norms of the GATT, such as Article XI:1 (general elimination of quantitative restrictions), Article I:1 (general most-favoured-nation treatment) and Article III:4 (national treatment on internal taxation and regulation). Violations of these provisions can not be deduced from the mere fact that such certification measures will relate to processes and production methods (PPMs). The reference to process-related factors in a certification-scheme alone does not amount to a prima facie violation of the GATT (*US-Shrimp*).[74]

Socio-economic certification measures can, however, amount to a discrimination against foreign products in the sense of the relevant provisions, in particular when they are used in an origin-specific manner. Rather than referring to general governmental policies in exporting countries, socio-economic certification should be based on *how-produced* standards aimed directly at odious production practices. Even if a certification measure violates one of the GATT non-discrimination rules it may still be justifiable under Article XX GATT (general exceptions). In order to be justified, the measure needs to fulfil a number of conditions emanating from Article XX itself (*US-Shrimp*).

An international co-operative effort regarding a joint certification standard based on universally accepted human rights standards as well as globally co-ordinated implementation activities would help to prevent the occurrence of trade related disputes over these measures. Measures taken on the basis of such universally agreed socio-economic standards for the production processes of bioenergy are unlikely to conflict with substantive provisions of the GATT and – in case of a conflict – are more likely to be saved from illegality as an authorized exception under Article XX GATT.

73 *M. Josh*i, "Are Eco-Labels Consistent with World Trade Organization Agreements?", Journal of World Trade 38 (2004), 69-92, 74; *S. Charnovitz*, note 40, 59-110, 65; *M. Hilf / S. Oeter*, note 40, 353-354. *A. Pastowski et al*, note 39, 122.

74 *R. Howse / D. Regan*, "The Poduct/Processs Distinction - an Illusory Basis for Disciplining "Unilateralism" in Trade Policy", European Journal of International Law 11 (2000), 249-289; *C. López-Hurtado*, note 57, 719-746; *S. Charnovitz*, note 40, 59-110.