

# WARNING: MAY CAUSE WARMING

## Potential Trade Challenges to Private Environmental Labels

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## I. SUPERMARKET SEMANTICS

Browsing the aisles of her local grocery store, a shopper may come across a dusty unmarked bin with carrots in it. She may see a shelf of brightly colored cereal boxes touting their contents' health benefits. Elsewhere in the store may be an iced container of sustainable shrimp from Thailand with a circled blue checkmark next to it. Perhaps there are local leeks, organic okra, or eggs from free-ranging chickens. The shopper may select the cereal on the basis of its health claims, the shrimp on the basis of its environmental friendliness, or maybe just the carrot because she is sick of all this labeled nonsense.

Whatever the shopper's choices, the cacophony of product labels has probably affected her selections.<sup>1</sup> Her selections, in turn, have probably affected sellers' product development and marketing choices. Indeed, in response to growing interest in "green" goods, firms are developing and marketing a multitude of new products with environment-related attributes.<sup>2</sup> Many of these products bear labels that are administered by private standards and certification systems, such as MSC-certified seafood, UTZ-certified tea, Fairtrade coffee, or Rainforest Alliance chocolate. Demand has prompted firms, nongovernmental organizations ("NGOs"), and private foundations to invest hundreds of millions of dollars to support the creation and implementation of such systems.<sup>3</sup> But the increase in privately administered labels is not beneficial to all. In particular, these systems often disadvantage firms that lack the resources or technical expertise to achieve compliance with environmental standards,

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1. For an overview of the effects of labels on consumer behavior, see generally Julie A. Caswell & Daniel I. Padberg, *Toward a More Comprehensive Theory of Food Labels*, 74 AM. J. AGRIC. ECON. 460 (1992).

2. See, e.g., STEERING COMM. OF THE STATE-OF-KNOWLEDGE ASSESSMENT OF STANDARDS & CERTIFICATION, TOWARD SUSTAINABILITY: THE ROLES AND LIMITATIONS OF CERTIFICATION ES-4 (2012) [hereinafter CERTIFICATION REPORT] (providing data on the growth of ecolabels from 1964 through 2011, with a final count of 425 ecolabels in 246 countries and twenty-five industrial sectors at the end of 2011); see also *Green Is the New Black*, ADWEEK (June 24, 2009), <http://www.adweek.com/news/advertising-branding/green-new-black-105996> (counting 458 new products with "eco-friendly claims" entering the market in the first quarter of 2009 alone).

3. CERTIFICATION REPORT, *supra* note 2, at 2. The CERTIFICATION REPORT itself was commissioned by the David and Lucile Packard Foundation and the Walton Family Foundation as each sought to better understand the impacts of its investments in the Marine Stewardship Council and other private environmental-certification and environmental-labeling systems. *Id.* at ES-5. Mars, Incorporated, having also recently committed to sourcing some of its ingredients from sustainable sources, also supported the study. *Id.*

barring them from access to the labels.<sup>4</sup> One strategy that some exporting countries have used to oppose publicly administered environmental-certification and environmental-labeling systems is through suit in the World Trade Organization (“WTO”).<sup>5</sup> The more widespread support for private environmental labeling becomes, the more likely it is that exporting countries may attempt to sue them in the WTO as well.<sup>6</sup> When the activities of a private environmental-labeling system are subject to WTO jurisdiction, however, is an open question,<sup>7</sup> and the subject of this Note.

This Note proposes an analytical framework for anticipating the circumstances under which the WTO may claim jurisdiction over a private environmental-certification and environmental-labeling system. Part II reviews the WTO’s role in the global trading regime, discusses gaps and gap-filling organizations in the governance of global trade, and situates the role of private environmental labeling in the stream of global commerce. Part III analyzes the limits of the WTO’s jurisdictional reach and describes a four-factor test by which to anticipate a claim of jurisdiction over a private environmental-labeling system. Part IV outlines the likely complaint that will be filed and

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4. See Manoj Joshi, *Are Eco-Labels Consistent with World Trade Organization Agreements?*, 38 J. WORLD TRADE 69, 70–72 (2004) (arguing that environmental labeling “results in discrimination against foreign producers and acts as a non-tariff barrier to trade” and reviewing studies tending to demonstrate that the products of developing countries are the most vulnerable to such discrimination); see also Sanford E. Gaines, *Processes and Production Methods: How to Produce Sound Policy for Environmental PPM-Based Trade Measures?*, 27 COLUM. J. ENVTL. L. 383, 427 (2002) (describing developing countries’ “vociferous opposition” to environmental packaging and environmental labeling).

5. See Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 540–52 (2004) (discussing challenges to product-labeling schemes in the WTO); *infra* Part III.A.2.

6. See Steven Bernstein & Erin Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. INT’L ECON. L. 575, 575–78 (2008) (noting the proliferation of transnational environmental standards developed by nongovernmental systems and arguing that such systems will pose threats to the legitimacy of the WTO as well as confusion to its dispute-settlement mechanism in the event of suit).

7. See, e.g., Mark A. Cohen & Michael P. Vandenberg, *The Potential Role of Carbon Labeling in a Green Economy*, ENERGY ECONOMICS (SPECIAL ISSUE) (forthcoming 2012) (manuscript at 26–30), available at [http://www.law.northwestern.edu/colloquium/environmental/documents/Michael\\_The\\_Potential\\_Role\\_of\\_Carbon\\_Labeling\\_in\\_a\\_Green\\_Economy.pdf](http://www.law.northwestern.edu/colloquium/environmental/documents/Michael_The_Potential_Role_of_Carbon_Labeling_in_a_Green_Economy.pdf) (expressing uncertainty over the resolution of potential trade challenges relating to private carbon-labeling schemes); see also Bernstein & Hannah, *supra* note 6, at 577, 604 (noting that once firms join private certification and labeling schemes “they are subject to governance, rules, and enforcement that have more in common with state regulation than standards of voluntary bodies that can be abandoned with little consequences” and that there is “enough trade law surrounding the issue that the temptation will be to develop it further to gain jurisdiction over non-state social and environmental standardization systems”).

then applies the proposed framework to three prominent environmental-labeling systems. This Note closes by arguing that the WTO should only make jurisdictional claims over private environmental labels under very narrow circumstances.

## II. THE ARCHITECTURE OF GLOBAL TRADE

### A. *A Brief History of the WTO*

The World Trade Organization is the sole multilateral institution regulating the rules of global trade.<sup>8</sup> It is the primary source of international trade law and the principal forum at which trade disputes are settled.<sup>9</sup> This Section traces the organization's peculiar beginnings before discussing its present incarnation, dispute-settlement mechanism, and record to date.

The WTO's origins lie in failed negotiations to create an International Trade Organization ("ITO") in the wake of World War II.<sup>10</sup> The United Nations Conference on Trade and Employment sought to create a specialized U.N. agency focused on trade and related issues to avoid repeating the catastrophic trade policies of the interwar years.<sup>11</sup> Although an ITO charter was successfully negotiated, the United States declined to ratify the agreement, and the rest of the world, not wishing to join a trade organization in which the world's largest trading economy was not involved, followed suit.<sup>12</sup>

The sole legal instrument to survive these negotiations was the General Agreement on Tariffs and Trade ("GATT").<sup>13</sup> In contrast to the more holistic hopes for an ITO, the GATT's substance was largely

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8. *What Is the WTO?*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (last visited Sept. 18, 2012).

9. PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 59 (2d ed. 2008).

10. *Id.* at 78.

11. MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 2–3 (2d ed. 2006); see also Kyle Bagwell & Robert Staiger, *The World Trade Organization: Theory and Practice*, 2010 ANN. REV. ECON. 223, 237–38 (discussing the "protectionist outbreak" of the 1920s and 1930s and "spate of retaliatory tariffs" following the enactment of the U.S. Smoot-Hawley Tariff Act of 1930); John H. Jackson, *The Perils of Globalization and the World Trading System*, 24 FORDHAM INT'L L.J. 371, 372 (2000) (noting that one of the primary objectives of the ITO and other Bretton Woods institutions was to "avoid the problems that occurred in the inter-war period, which were blamed for leading to the Second World War").

12. MATSUSHITA ET AL., *supra* note 11, at 2.

13. VAN DEN BOSSCHE, *supra* note 9, at 79.

limited to tariff reductions on trade in goods.<sup>14</sup> Having come into existence under a Protocol of Provisional Application in expectation of the eventual establishment of an ITO—yet in the ongoing absence of such an agency—the GATT became the de facto mechanism governing international trade, a role it played for nearly fifty years.<sup>15</sup> But the GATT grew, its needs grew with it, and calls for a “world trade organization” began mounting in the early 1990s.<sup>16</sup>

On January 1, 1995, seventy-six member countries finished negotiating the Agreement Establishing the World Trade Organization (“Marrakesh Agreement”), with a mandate recognizing that trade policy should be used to raise standards of living, to ensure full employment and economic growth, and to seek “the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so.”<sup>17</sup> Annexed to the Marrakesh Agreement are over sixty legal instruments (“Uruguay Round agreements” or “WTO agreements”), including an updated and extended version of the original GATT.<sup>18</sup> With the exception of the Annex 4 plurilateral agreements, all of the WTO agreements are binding on all WTO members as a single body of law.<sup>19</sup>

The WTO’s near-universal membership notwithstanding, neither joining nor staying in the club is easy. “Grandfather rights”

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14. *Id.*

15. *Id.* at 80.

16. The GATT had a number of deficiencies as an international organization, foremost of which was its lack of legal personality. *Id.* Stemming from this deficiency was the lack of clarity surrounding the GATT’s authority. Further, the Protocol of Provisional Application also permitted “grandfather rights” by allowing parties to join the GATT system and still maintain legislation inconsistent with the GATT. *Id.* Calls enumerating the GATT’s defects came from the academic and policy worlds alike. For an example of GATT-related critiques by one of the first scholars to suggest a “world trade organization,” see generally JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990).

17. Marrakesh Agreement Establishing the World Trade Organization, pmbl., cl. 1, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]; VAN DEN BOSSCHE, *supra* note 9, at 84. Interestingly, the Marrakesh Agreement’s first clause is a verbatim copy of the original GATT’s first clause, with the exception of the above-quoted portion referencing sustainability and the environment. See General Agreement on Tariffs and Trade, pmbl., cl. 1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (setting out policy objectives as “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods”).

18. VAN DEN BOSSCHE, *supra* note 9, at 44.

19. *Id.* Unlike all other WTO agreements, the Annex 4 agreements require separate consent, and such consent is not required in order to become a member of the WTO. *Id.*

and reservations are not permitted,<sup>20</sup> and negotiations for accession have, in some cases, taken decades.<sup>21</sup> Once admitted, members' obligations are both positive and negative, substantive and procedural in nature. Members must actively ensure the conformity of their laws, regulations, and administrative procedures with WTO obligations.<sup>22</sup> They are also prohibited from undertaking a range of trade measures, such as the imposition of import quotas.<sup>23</sup> Substantive obligations include tariff commitments, as well as most-favored-nation ("MFN") and national-treatment obligations.<sup>24</sup> Procedural obligations include mandatory submission to WTO review of national trade policies and, perhaps most importantly, to the WTO's system of dispute settlement.<sup>25</sup>

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20. Marrakesh Agreement, *supra* note 17, at art. XVI:5; MATSUSHITA ET AL., *supra* note 11, at 7.

21. China, for example, was required to negotiate a number of bilateral market access agreements, notably with the United States and the European Union, before an accession protocol would even be discussed. VAN DEN BOSSCHE, *supra* note 9, at 113. The entire process took fourteen years and resulted in nine hundred pages of legal text. *Id.* China acceded to the WTO in 2001. *Id.* In a more recent example, Russia only acceded to the WTO in 2012, following protracted negotiations that began in 1993 and stalled over disagreements regarding its domestic energy prices. See *Accessions: Russian Federation*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_russie\\_e.htm](http://www.wto.org/english/thewto_e/acc_e/a1_russie_e.htm) (last visited Sept. 18, 2012) (announcing Russia's accession); see also David Jolly, *W.T.O. Grants Russia Membership*, N.Y. TIMES, Dec. 16, 2011, <http://www.nytimes.com/2011/12/17/business/global/wto-accepts-russia-bid-to-join.html?pagewanted=all> (discussing the lengthy negotiations).

22. Marrakesh Agreement, *supra* note 17, at art. XVI:4; see also Sylvia Ostry, *WTO: Institutional Design for Better Governance*, in EFFICIENCY, EQUITY AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 361, 363–64 (Roger B. Porter et al. eds., 2001) (discussing WTO's growing role as a regulator requiring action rather than only prohibiting trade discrimination).

23. See, e.g., GATT, *supra* note 17, at art. XI (prohibiting import quotas).

24. GATT Article I sets out the MFN principle: "[A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." GATT, *supra* note 17, at art. I. Under the MFN principle, also called the nondiscrimination principle, any trade concession one country grants to another must then be extended to all members of the WTO. See Bagwell & Staiger, *supra* note 11, at 244–47, for a discussion of the benefits of MFN from an economist's perspective. GATT Article III, in turn, sets out the national treatment principle, under which products may not be treated any differently from domestic products after having entered the domestic market in question. GATT, *supra* note 17, at art. III.

25. See Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 23.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] ("When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.").

The WTO's Dispute Settlement Mechanism ("DSM") has been characterized as "the central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy."<sup>26</sup> It stands out among international tribunals as a particularly legalistic, rules-oriented approach to dispute settlement in lieu of the more consultative, negotiation-based approaches that characterize many other international dispute-settlement tribunals.<sup>27</sup> For example, the DSM's jurisdiction is compulsory and exclusive in nature; it automatically grants requests for adjudication, provides for strict deadlines in proceedings, and grants itself the authority to determine the "reasonable time" allowed to offending members to comply with rulings.<sup>28</sup> The DSM has also been among the most prolific international tribunals, having handled over four hundred disputes in its less than thirty years of existence.<sup>29</sup> The range of members availing themselves of the DSM has been broad, with significant participation by both the developed and developing worlds.<sup>30</sup>

Although Part III will address the WTO's jurisdictional analysis, an understanding of the mechanics of a dispute and available remedies may provide insights into the circumstances under which future suits will be filed. In a typical dispute, one member will complain that another has failed to comply with its obligations,

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26. Renato Ruggiero, Director-General, World Trade Org., Address to the Korean Business Association (Apr. 17, 1997), available at [http://www.wto.org/english/news\\_e/spr\\_r/seoul\\_e.htm](http://www.wto.org/english/news_e/spr_r/seoul_e.htm); see also JOHN H. JACKSON, WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 124 (2d ed. 1997) (describing the WTO dispute-settlement process as "an achievement that may be the core 'linchpin' of the whole trading system and the effective implementation" of the WTO agreements).

27. VAN DEN BOSSCHE, *supra* note 9, at 180. Interestingly, in the discussions leading to DSM's creation, some feared that such a judicialized approach would diminish the WTO's credibility because members would ignore the DSM's decisions when they were not in the national interest. These fears do not appear to have been born out. See Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303, 321 (2004) (observing that the DSM's procedural rules set within a mandatory dispute-settlement system "ha[ve] produced a mechanism that is the envy of other international institutions").

28. DSU, *supra* note 25, at arts. 4.3, 6.1, 16.4, & 21.3. For a reiteration of the exclusive nature of WTO jurisdiction, see Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, ¶ 7.49, WT/DS152/R (Dec. 22, 1999) (interpreting Article 23.1 to "impose[] on all Members [a requirement] to have recourse to the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. . . . Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system. . . . This, what one would call exclusive dispute resolution clause, is an important new element of Members' rights and obligations under the DSU." (internal quotation marks omitted)).

29. VAN DEN BOSSCHE, *supra* note 9, at 169; *Chronological List of Disputes Cases*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (last visited Sept. 18, 2012).

30. VAN DEN BOSSCHE, *supra* note 9, at 169.

thereby nullifying or impairing the benefits of membership accruing to the complaining member.<sup>31</sup> Members are frequently persuaded by businesses to file such complaints, and members are deemed to have standing when they consider that so doing “would be fruitful” and would “secure a positive solution to a dispute.”<sup>32</sup> This language has been interpreted broadly.<sup>33</sup> A member has never been determined not to have standing.<sup>34</sup>

Following the complaint, a mandatory consultation phase begins.<sup>35</sup> If the dispute is not settled during consultations, then the complainant may resort to adjudication by requesting the establishment of a dispute-settlement panel.<sup>36</sup> Panels are usually composed of three individuals chosen from lists of experts maintained by the WTO Secretariat.<sup>37</sup> Once appointed, the panel accepts written submissions from parties and third parties, holds hearings, and, when it deems necessary, consults experts for assistance.<sup>38</sup> The panel then issues a ruling, and in the event of disagreement, any party to the dispute may then appeal that ruling to the Appellate Body.<sup>39</sup> Unlike the panels, the Appellate Body is a standing group of seven

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31. Bagwell & Staiger, *supra* note 11, at 240.

32. DSU, *supra* note 25, at art. 3.7 (“Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”).

33. For example, in one case the United States had sued the European Communities with regard to import measures relating to bananas. Europe argued that the United States had no “legal interest” in the dispute because U.S. banana production was minimal and, moreover, the United States does not export bananas. The Appellate Body held that the United States did have standing to bring the claim, writing:

[A] Member is expected to be largely self-regulating in deciding whether any such action would be ‘fruitful.’ . . . We agree that neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contains any explicit requirement that a Member must have a ‘legal interest’ as a prerequisite for requesting a panel. We do not accept that the need for a legal interest is implied in the DSU or in any other provision of the *WTO Agreement*.

Appellate Body Report, *European Communities—Regime for the Importation and Distribution of Bananas*, ¶ 142, WT/DS27/AB/R (Sept. 9, 1997).

34. MATSUSHITA ET AL., *supra* note 11, at 114.

35. DSU, *supra* note 25, at art. 3.7.

36. DSU, *supra* note 25, at art. 6.1. Other methods of dispute settlement are available, but adjudication is the most common choice. MATSUSHITA ET AL., *supra* note 11, at 115.

37. MATSUSHITA ET AL., *supra* note 11, at 115.

38. DSU, *supra* note 25, at art. 13.2. The Appellate Body appears to have—or at least to have taken—broad authority to conduct its own fact finding. In one case, the Appellate Body permitted a panel to base its findings on evidence that had not even been shown to the parties to the dispute. Appellate Body Report, *Thailand—Anti-Dumping Duties on Angles, Shales and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/ABR (Apr. 5, 2001).

39. DSU, *supra* note 25, at art. 17.4.



individuals appointed to four-year terms.<sup>40</sup> Its members are selected on the basis of their expertise in trade law and their representativeness of the WTO's membership.<sup>41</sup> They are not affiliated with any government and are prohibited from accepting or seeking instruction from any international, governmental or nongovernmental organization, or any private source.<sup>42</sup> Like the panels, however, the Appellate Body also hears cases in divisions of three.<sup>43</sup> The Appellate Body may affirm, modify, or reverse the panel. Typically, parties to the dispute must unconditionally accept panel and Appellate Body rulings.<sup>44</sup> These rulings are not only binding on the parties to the dispute but also retain some persuasive authority over future adjudication.<sup>45</sup> However, the DSM is not a common law jurisdiction. Article 3.2 of the Dispute Settlement Understanding ("DSU") provides that rulings "cannot add to or diminish the rights and obligations provided in the covered agreements."<sup>46</sup> Only the WTO's executive bodies, the General Council, and the more senior Ministerial Conference may adopt authoritative interpretations of the WTO agreements.<sup>47</sup>

If the complaining member prevails in a dispute, then several remedies become available. Typically, a panel or the Appellate Body recommends that the offending member bring its measures into conformance with the ruling within a reasonable period of time.<sup>48</sup> If the offending member fails to do so, the harmed member may seek trade sanctions in the form of either compensation or retaliation. With

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40. VAN DEN BOSSCHE, *supra* note 9, at 259.

41. *Id.*

42. *Id.*

43. *Id.*

44. DSU, *supra* note 25, at art. 17.14.

45. See David Palmetier & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 401 (1998) (stating that adopted reports have "strong persuasive power" and may be thought of as a form of "nonbinding precedent"). With regard to the persuasive authority of GATT reports in particular, see also Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶108, WT/DS10/AB/R, WT/DS10/AB/R (Oct. 5, 1996) [hereinafter *Japan—Alcoholic Beverages*] ("Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute.").

46. DSU, *supra* note 25, at art. 3.2. This observation is repeated later in the DSU as well. See *id.* at art. 19.2 ("[T]he panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.").

47. Marrakesh Agreement, *supra* note 17, at art. 9.2 ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.").

48. DSU, *supra* note 25, at art. 19.1.

regard to the former, members may negotiate directly on the appropriate level of compensation, generally made in the form of additional trade concessions.<sup>49</sup> If compensation is not offered or if an offer is rejected, the harmed member may retaliate with discriminatory suspension of tariff concessions.<sup>50</sup> The WTO must authorize and monitor the retaliation.<sup>51</sup> Retaliatory measures must be equivalent to the nullification or impairment, and the WTO prefers “parallel” retaliation through suspension of concessions in the same economic sector at issue in the dispute.<sup>52</sup> In practice, members rarely resort to remedial measures, but the DSM’s record of successful dispute settlement suggests that they serve as credible threats providing sufficient deterrence to ongoing infringement of the WTO agreements.<sup>53</sup>

In sum, then, the WTO is arguably the most influential international organization ever created.<sup>54</sup> It is also the youngest.<sup>55</sup> Its exceptional history places it squarely outside of the U.N. system, yet its membership covers most of the world. Members have been largely compliant with the many elements of their obligations, and when compliance has been questionable, the DSM has proved a strikingly effective means for both remedy and enforcement.<sup>56</sup>

But the WTO’s peculiar mix of broad influence and specific focus has also garnered significant criticism.<sup>57</sup> Member obligations

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49. Bagwell & Staiger, *supra* note 11, at 240.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 224 (“The GATT/WTO is widely acknowledged to be one of the most successful international institutions ever created.”).

55. VAN DEN BOSSCHE, *supra* note 9, at 76.

56. See Alan Wm. Wolff, *Problems with WTO Dispute Settlement*, 2 CHI. J. INT’L L. 417, 417–20 (2001) (describing the merits of the DSM); see also Guzman, *supra* note 27, at 321 (observing that the DSM’s procedural rules set within a mandatory dispute settlement system “has produced a mechanism that is the envy of other international institutions”).

57. See, e.g., Guzman, *supra* note 27, at 304 (noting some critics’ argument that “the tremendous power of the organization, combined with its efforts to influence policies in non-trade areas, has elevated trade at the expense of other issues”); see also LORI WALLACH & MICHELLE SFORZA, *THE WTO: FIVE YEARS OF REASONS TO RESIST CORPORATE GLOBALIZATION* 27 (1999) (“The WTO has been a disaster for the environment.”); Guy de Jonquières *Prime Target for Protests*, FIN. TIMES, Sept. 24, 1999, at 11 (describing the WTO as “pathologically secretive, conspiratorial and unaccountable to sovereign states and their electorate”); Geoffrey Lean, *Trade Wars—The Hidden Tentacles of the World’s Most Secret Body*, THE INDEPENDENT (London), July 18, 1999, at 13 (describing the WTO as “what is probably the most powerful organisation on Earth” and arguing that the way it has used its “powers is leading to a growing suspicion that its initials should really stand for World Take Over,” noting also that “[i]n a series of rulings it has

requiring affirmative government action have placed the WTO in the sometimes awkward position of adjudicating the legality of national laws that may not deal exclusively or even primarily with trade.<sup>58</sup> Although the WTO's evolution out of the GATT system represents in part a recognition of the impracticability of addressing trade separately from other global challenges, it has been widely criticized for its arguably myopic focus on trade to the detriment of other concerns, such as human rights, labor, and the environment.<sup>59</sup>

The massive protests leading to the collapse of the 1999 WTO Ministerial Conference in Seattle served to highlight the dissatisfaction among many with the WTO's role in global governance.<sup>60</sup> The WTO's own launch of the Doha Development Round in 2001 represents a significant attempt by members to respond to these concerns by including issues not directly related to trade in WTO negotiations. Now over one decade old, however, the Doha Development Round remains stalled, numerous calls to reinvigorate it notwithstanding.<sup>61</sup>

### *B. Gaps in Trade Governance: The Case of the Environment*

Concerns over trade and the environment were among the most visible in the Seattle protests, and not without reason. Such concerns

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struck down measures to help the world's poor, protect the environment, and safeguard health in the interests of private—usually American—companies”). Foreign policy commentator Daniel Drezner has noted that fewer protests have occurred regarding recent WTO activities and suggests that this is evidence of its lack of progress on issues such as those established in the Doha Round, and he has noted “this is a bad sign for trade.” *Why is the WTO Protest-Free?*, FOREIGN POLY (Sept. 15, 2010, 5:41 PM), [http://drezner.foreignpolicy.com/posts/2010/09/15/why\\_is\\_the\\_wto\\_protest\\_free](http://drezner.foreignpolicy.com/posts/2010/09/15/why_is_the_wto_protest_free). One reasonable interpretation of the recent decline in interest in the WTO takes into account the global financial crisis and recession, which has shifted much civil attention to financial institutions and away from trade. *Id.*

58. See Guzman, *supra* note 27, at 303 (noting that the WTO is “engaged in monitoring and adjudicating the legality of domestic rules that are not primarily or exclusively about trade”).

59. See Lean, *supra* note 57; see also DANIEL C. ESTY, THE GREENING OF THE GATT 42 (1994) (enumerating environmentalists' critiques of the GATT and proposing ways to permit the GATT framework to improve on its otherwise poor record of permitting sovereign nations to regulate environmental harms); Margaret Graham Tebo, *Power Back to the People*, 86 A.B.A. J. 52, 54 (2000) (noting that a member of the U.S. House of Representatives, shortly in advance of the Seattle meetings, commented that it was important to make labor standards, environmental standards, and human rights as important to “our trade bureaucrats” as more traditional trade issues).

60. See, e.g., Guzman, *supra* note 27, at 304 (describing the 1999 Ministerial Conference as a “dramatic failure”).

61. E.g., Jagdish N. Bhagwati, Op-Ed., *The Wrong Way to Free Trade*, N.Y. TIMES, July 24, 2011, <http://www.nytimes.com/2011/07/25/opinion/25bhagwati.html>.

encompass a range of sensitive issues, including whether countries gain competitive advantage by lowering their environmental standards, whether the increased economic activity caused by globalized trade leads to unsustainable use of natural resources, and whether governments use the rules of global trade to avoid or override environmental regulation.

Scholars of trade and the environment have identified two specific sets of threats to the environment posed by the globalization of trade.<sup>62</sup> First, the use of resources from developing countries to support consumer demand in developed countries can lead to environmental harms within developing countries that are not internalized by developed-country consumers.<sup>63</sup> Second, the use of resources from global commons can contribute to harms such as resource exhaustion—in the case of open-seas fisheries, for example—and global climate change.<sup>64</sup>

These two sets of threats have proved difficult to address by the traditional actors in global governance, namely, states and the international organizations they create. In the case of states, exporting countries may lack the expertise or resources to regulate domestic resource usage.<sup>65</sup> Also, domestic needs may be so urgent that economic growth becomes imperative, regardless of environmental harms.<sup>66</sup> Across exporting countries, such conditions may give rise to race-to-the-bottom dynamics in which countries compete for business by offering the most permissive regulatory regime.<sup>67</sup> Importing countries, in turn, cannot regulate firms operating outside of their

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62. Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 919 (2007).

63. *Id.* Given the increasing number and severity of environmental harms caused by globalized trade, scholars have begun to propose an increasingly broad array of potentially WTO-compliant environmental measures. See, e.g., Jon M. Truby, *Towards Overcoming the Conflict Between Environmental Tax Leakage and Border Tax Adjustment Concessions for Developing Countries*, 12 VT. J. ENVTL. L. 149, 149 (2010) (arguing that border tax adjustments may be a WTO-compliant method for addressing environmental leakages posed by the globalization of trade).

64. Vandenbergh, *supra* note 62, at 919.

65. *Id.*; see also Errol E. Meidinger, *Forest Certification as Environmental Law Making by Global Civil Society*, in SOCIAL AND POLITICAL DIMENSIONS OF FOREST CERTIFICATION 293, 309 (Errol Meidinger, Chris Elliott & Gerhard Oesten eds., 2003) (discussing the “painfully slow” character of nation-state negotiations and contrasting them with the “remarkably rapid” growth in border-crossing environmental problems).

66. Vandenbergh, *supra* note 62, at 920.

67. See Ian Sheldon, *Trade and Environmental Policy: A Race to the Bottom?*, 57 J. AGRIC. ECON. 365, 368 (2006) (discussing race to the bottom dynamics with regard to agriculture-related regulatory regimes).

sovereign borders. When such firms do operate within the importing state's borders, the state may nonetheless also lack the political will to regulate, particularly when large, profitable multinational corporations ("MNCs") are involved. Citizens of importing states who hold preferences for reducing global environmental harms face enormous collective-action problems in inducing their governments to act.<sup>68</sup> These problems may be exacerbated by the fact that both the activity and the resultant harm took place in a distant country, diminishing the sense of necessity or urgency. Finally, firms operating in importing and exporting states alike all have obvious incentives for overusing global commons resources.

In the case of international organizations, U.N. attempts to directly regulate firms operating across sovereign borders have been met with severe opposition and remain unlikely to succeed.<sup>69</sup> U.N. efforts to regulate states' usage of global commons resources, and particularly to mitigate climate change, have also been contentious. Even if a U.N. process does produce an agreement on global commons issues, implementation and enforcement still pose significant challenges.

Although the WTO itself has recognized the important relationship between trade and the environment,<sup>70</sup> it remains emphatic in its stance that its regulatory duties extend only to trade.<sup>71</sup> The factual record does not offer much cause for hope. When confronted with environment-related trade disputes, the DSM has almost invariably struck down measures favoring greater environmental protection.<sup>72</sup>

The environmental threats posed by the globalization of trade thus constitute significant gaps in global governance. As mentioned above, some individuals do hold preferences for more and better environmental regulation. Although their governments may remain unresponsive to these preferences, individuals may also express

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68. Vandenberg, *supra* note 62, at 920.

69. See JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 208–09 (3d ed. 2010) (discussing the U.N. Human Rights Commission's Draft Code of Conduct on Transnational Corporations and the severe opposition to it); see also United Nations Conference on Trade and Development, *Draft Code of Conduct on Transnational Corporations*, U.N. Doc. E/1990/94 (June 12, 1990).

70. As discussed above, the goals of sustainable development and environmental stewardship remain enshrined in the Marrakesh Agreement itself. See *supra* note 17 and accompanying text.

71. See *infra* Part III.A.2.

72. See *infra* Part III.A.2 and accompanying notes.

preferences in their capacity as consumers in private markets. And markets, of course, can be highly responsive to consumer behavior.

### *C. The Gap Fillers: Private Environmental Governance*

Private forms of governance can often arise to meet unfulfilled public demands for governance.<sup>73</sup> Indeed, private institutions have already done significant work to fill the gaps in global environmental governance.<sup>74</sup> As consumers have expressed preferences for goods produced by more sustainable practices, firms have responded by offering them. To do so, firms often participate in standard setting, either collectively or unilaterally.<sup>75</sup> Once set, the private standards affect firms' choices about issues such as which goods to produce, how to produce them, and which products to buy for use as inputs.<sup>76</sup>

Certification and labeling systems are a particularly formalized version of standard setting.<sup>77</sup> At the center of a certification and labeling system is the standard, or defined set of criteria, to which the regulated product must conform.<sup>78</sup> The standard is then coupled with a certification program through which formal decisions on compliance are made. These decisions are often based on the results of an audit or assessment conducted by an accreditation body.<sup>79</sup> This body is

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73. Thomas P. Lyon, *Environmental Governance: An Economic Perspective*, in GOVERNANCE FOR THE ENVIRONMENT: NEW PERSPECTIVES 34, 51–54 (Magali A. Delmas & Oran R. Young eds., 2009) (arguing that demand for governance with regard to environmental issues in particular sometimes arises from consumers seeking products from firms that have a record of fair treatment and payment of their workers and/or environmentally responsible operations). There is an extensive body of literature that characterizes these systems as “non-state market driven” (“NSMD”) governance systems. See, e.g., Graeme Auld, Cristina Balboa, Steven Bernstein & Benjamin Cashore, *The Emergence of Non-State Market-Driven (NSMD) Global Environmental Governance: A Cross-Sectoral Assessment*, in GOVERNANCE FOR THE ENVIRONMENT: NEW PERSPECTIVES 183 (Magali A. Delmas & Oran R. Young eds., 2009). For a broader description of consumer “voting” through the process of revealed preference and consumption, see Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L.J. 377, 381–85 (1998).

74. Bernstein & Hannah, *supra* note 6, at 579 (“[M]ost NSMD systems have emerged where international agreements are either weak or absent, leaving them as one of the few viable alternatives to regulate or socially embed the global marketplace.”).

75. Vandenbergh, *supra* note 62, at 921–22. Internal firm procurement policies are an example of unilateral standard setting. This Note addresses collective systems of standard setting.

76. *Id.*

77. Tracey M. Roberts, *Innovations in Governance: A Functional Typology of Private Governance Institutions*, 22 DUKE ENVTL. L. & POL'Y F. 67, 84 (2011) (discussing certification and labeling systems).

78. CERTIFICATION REPORT, *supra* note 2, at 9.

79. *Id.* at 10.

typically responsible for evaluating the competence of the certification program and of auditors.<sup>80</sup> A logo-licensing or marketing body may be a legally separate but linked organization that creates and grants the final label.<sup>81</sup> Other organizations may support the labeling system by assisting in capacity building in less-developed areas or reporting on the overall effects of the system.<sup>82</sup> In short, these systems have the effect of subjecting the regulated firms to “governance, rules, and enforcement that have more in common with state regulation than standards of voluntary bodies that can be abandoned with little consequence.”<sup>83</sup>

The WTO itself recognizes the growing importance of environmental-certification and environmental-labeling systems, as well as the complex trade-related issues they raise. In 2001, the Ministerial Conference assigned its Committee on Trade and Environment (“CTE”) to take up the issue of environmental labeling with the goal of recommending areas in need of clarity or additional negotiation.<sup>84</sup> Since doing so, the CTE has acknowledged that labeling systems can be economically efficient, useful for consumers, and less trade restrictive when they are voluntary, market based, transparent, and allow for open participation in their design.<sup>85</sup> But it remains concerned that environmental-labeling systems could also be veiled barriers to trade.<sup>86</sup> In general, the CTE now appears to have been studying these systems for over a decade without taking any particular stance on them.

Lacking authoritative guidance on environmental labels from the Ministerial Conference or General Council, the DSM has remained skeptical.<sup>87</sup> It has struck down numerous government-administered

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80. *Id.*

81. *Id.*

82. *Id.* This is not to say that all labeling systems are responsible stewards of the environment. For a discussion of product-labeling and marketing schemes that aim to take advantage of consumer demand for green goods without offering legitimate environmentally responsible behavior, see generally Thomas Lyon & John W. Maxwell, *Greenwash: Corporate Environmental Disclosure Under Threat of Audit*, 20 J. ECON. & MGMT. STRATEGY 3, 3–41 (defining and describing “greenwashing”).

83. Bernstein & Hannah, *supra* note 6, at 577.

84. *Items on the CTE’s Work Programme*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/envir\\_e/cte00\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/cte00_e.htm) (last visited Sept. 18, 2012).

85. The CTE maintains a web page on environmental-labeling systems where it lays out these concerns. See *Labelling*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/envir\\_e/labelling\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm) (last visited Sept. 18, 2012).

86. *Id.*

87. As discussed in Part II.A, only the Ministerial Conference and General Council have the authority to adopt binding interpretations of the WTO agreements as they apply to specific

programs, the most recent of which was the U.S. dolphin-safe tuna label.<sup>88</sup> Given the Conference's silence on and the DSM's apparent antipathy for environmental labels, a WTO claim of jurisdiction over the activities of a private environmental-labeling system could lead to significant, negative consequences for the systems themselves, the firms that have invested in them, and the private consumer who—in attempt to fulfill her unmet demand for environmental governance—wishes to express her preferences through private market activity.

### III. EDGES OF THE ARCHITECTURE: WTO'S JURISDICTIONAL ANALYSIS

Before the WTO could adjudicate any issue regarding a private environmental-labeling system's activities, it would, of course, need to have jurisdiction over the dispute. The WTO must satisfy two jurisdictional requirements in order to adjudicate any dispute.<sup>89</sup> First, it must have jurisdiction over the "basis" of the dispute.<sup>90</sup> The basis is the dispute's cause of action, or subject matter.<sup>91</sup> Second, it must have jurisdiction over the "object" of the dispute. The object of the dispute is the party against whom the cause of action is directed.<sup>92</sup> The question of when a private environmental-labeling system may be subject to WTO jurisdiction may thus be considered in two parts. First, when will the activities of an environmental-labeling system give rise to a valid basis for a dispute? Second, when will the activities of a private organization give rise to a valid object of that dispute? This Part considers those two questions in turn.

#### *A. Basis of the Dispute*

This Section describes the WTO's jurisdictional analysis with respect to the basis of a dispute. It begins with a description of the general rules by which the WTO may take jurisdiction over the basis

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circumstances. *See also* Marrakesh Agreement, *supra* note 17, at art. 9.2 ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."). For a discussion of the history of cases to have come before the WTO involving environmental labels, see *infra* Part III.A.2.

88. *See infra* Part III.A.2.

89. The WTO's Dispute Settlement System Training Module provides a helpful overview of its jurisdiction. *See Possible Object of a Complaint—Jurisdiction of the Panels and the Appellate Body*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c5s1p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c5s1p1_e.htm) (last visited Sept. 18, 2012).

90. *Id.*

91. *Id.*

92. *Id.*



of the dispute and then analyzes the cases in which the WTO has applied these rules to disputes involving environmental-certification and environmental-labeling systems.

### 1. Violations, Non-Violations, and the Kitchen Sink

The WTO has nearly unlimited latitude in determining whether it has jurisdiction over the basis of a dispute. Under Article 1.1 of the Dispute Settlement Understanding, the WTO's jurisdiction extends over all disputes arising under the covered WTO agreements.<sup>93</sup> Each of the covered agreements contains at least one dispute-settlement provision setting out the available causes of action.<sup>94</sup> Most of the covered agreements adopt the GATT provisions on dispute settlement by reference to GATT Articles XXII and XXIII.<sup>95</sup> Under GATT Article XXIII:1, a member may invoke the DSM if it considers that any benefit accruing directly or indirectly to it is being:

nullified or impaired or that the attainment of any objective of the Agreement is being impeded as a result of:

- (a) the failure of another Member to carry out its obligations under this Agreement, or
- (b) the application by another Member of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation.<sup>96</sup>

These three causes of action are termed violation, non-violation, and situation complaints, respectively. Notably, the Article's introductory clause also requires a resultant harm to the suing member, namely, nullification, impairment, or impediment.

Violation complaints are the most common basis of a dispute. In order to succeed on this ground, the complainant must establish that the responding member has, not surprisingly, violated at least one of its obligations.<sup>97</sup> Importantly, when a panel or the Appellate Body finds a violation, it presumes the harm, and the complainant

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93. DSU, *supra* note 25, at art. 1.1.

94. VAN DEN BOSSCHE, *supra* note 9, at 182.

95. *Id.* All of the WTO agreements discussed in this Note adopt the GATT provisions on dispute settlement.

96. GATT, *supra* note 17, at art. XXIII:1.

97. Alan Yanovich & Tania Voon, *What Is the Measure at Issue?*, in CHALLENGES AND PROSPECTS FOR THE WTO 115, 118 (Andrew Mitchell ed., 2005).

need not demonstrate nullification, impairment, or impediment.<sup>98</sup> Although this presumption is theoretically rebuttable, no respondent has successfully overcome it.<sup>99</sup>

Non-violation and situation complaints rarely form the basis of a dispute, but their potential effects are far reaching. A non-violation complaint can succeed even if the responding member has complied with all of its enumerated obligations.<sup>100</sup> Non-violation complaints have been rare, however, and none has succeeded.<sup>101</sup> The Appellate Body has further stated that non-violation remedial measures “should be approached with caution and should remain . . . exceptional.”<sup>102</sup> No situation complaint has ever been filed; yet, in theory, such a complaint could succeed in the absence of any action at all by a member. Notwithstanding these two complaints’ infrequent invocation, their availability remains notable for the broad scope that they grant to the WTO in determining whether a cause of action is justiciable.

## 2. Violations by Environmental Labels, and the Kitchen Sink

The history of cases involving government-administered environmental-labeling systems may provide a framework for anticipating the basis for disputes involving private systems. This history suggests that violation complaints may be filed under both the Agreement on Technical Barriers to Trade (“TBT”) and the GATT. It also suggests that environmental-labeling systems may be excepted from liability under GATT Article XX, but that such exception is unlikely.

The TBT would likely be the most relevant agreement in a suit against a private environmental-labeling system for at least three reasons. First, the WTO has construed the TBT provisions covering mandatory standards established by governmental bodies (termed “technical regulations”) in a way that blurs the line between

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98. DSU, *supra* note 25, at art. 3.8 (“In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.”).

99. VAN DEN BOSSCHE, *supra* note 9, at 184.

100. Yanovich & Voon, *supra* note 97, at 119.

101. VAN DEN BOSSCHE, *supra* note 9, at 185.

102. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-containing Products*, ¶ 186, WT/DS135/AB/R (Mar. 12, 2001).

mandatory and voluntary, rendering ostensibly voluntary systems subject to high levels of scrutiny.<sup>103</sup> Second, the test adopted to determine whether technical regulations violate national-treatment principles may be self-fulfilling when applied to many labeling programs. Third, in cases of conflicting provisions, the TBT prevails over GATT, and as such, TBT claims are usually evaluated first.<sup>104</sup>

In May 2012, the Appellate Body addressed all three of these issues in a decision with potentially far-reaching consequences for environmental labels reviewed under the TBT. In this case, Mexico sued the United States for alleged violations of both the TBT and the GATT. The U.S. measures at issue related to a U.S. Department of Commerce dolphin-safe label for canned-tuna products.<sup>105</sup> The Appellate Body held that the program, which identifies tuna caught using methods that tend not to harm dolphins, violates national-treatment principles embodied in TBT Article 2.1 because it “has a detrimental impact on the competitive opportunities of Mexican tuna products” in the U.S. market.<sup>106</sup>

With regard to the first issue, the decision suggests that the WTO may take an exceptionally broad view of the meaning of “mandatory” under the TBT.<sup>107</sup> This finding is significant because it

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103. Agreement on Technical Barriers to Trade, art. 2.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT] (providing that “in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country”). By providing that imported products receive treatment that is not less favorable than that accorded to like products of national origin, Article 2.1 thus provides that national-treatment principles apply to the usage of technical regulations. By providing that all imported like products receive the same treatment, Article 2.1 also invokes the application of most favored nation treatment to technical regulations. The language rendering technical regulations subject to high levels of scrutiny is the wording that members “shall ensure” the national treatment and MFN status of imported products. *Id.*

104. *General Interpretative Note to Annex 1A*, WORLD TRADE ORG., [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/wto\\_agree\\_04\\_e.htm#general](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_04_e.htm#general) (last visited Sept. 18, 2012) (“In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization . . . the provision of the other agreement shall prevail to the extent of the conflict.”).

105. Appellate Body Report, *United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, ¶ 2, WT/DS381/AB/R (May 16, 2012) [hereinafter *United States—Tuna II*].

106. *Id.* ¶ 235.

107. *Id.* ¶ 196 (“To us, the mere fact that there is no requirement to use a particular label in order to place a product for sale on the market does not preclude a finding that a measure constitutes a ‘technical regulation’ within the meaning of Annex 1.1.”).

subjects labeling systems to the highest levels of scrutiny under the TBT.<sup>108</sup> Both the *Tuna–Dolphin I* Panel and the Appellate Body determined that the dolphin-safe label was “mandatory” within the meaning of the TBT, even though the program did not require tuna products be labeled “dolphin-safe” to be sold on the U.S. market.<sup>109</sup> At the Appellate Body level, this determination rested on findings that, first, the measures are comprised of acts attributable to the U.S. government and, second, the measures occupy the field of dolphin-safe labeling for canned tuna on the U.S. market.<sup>110</sup> The result of this interpretation is a stark departure from the plain meaning of the word “mandatory.” Moreover, the “entire field” argument seems disingenuous given that this “field” is so narrow that it did not, for example, cover sustainability labeling or safe fishing practices for canned fish but rather sought to cover only dolphin-safe labeling for canned-tuna products on the U.S. market.<sup>111</sup> If applied to a private system, one may wonder whether such field occupation is not redundant of the function of trademarked labels.

Second, with respect to the test for violations of Article 2.1, the Appellate Body adopted a competition-based test to determine compliance. This test asks whether the technical regulation “has a detrimental impact on the competitive opportunities” for the products at issue.<sup>112</sup> The Appellate Body has pointedly announced that this test does *not* focus on “the legitimate objectives and purposes” of the measures.<sup>113</sup> Rather, objectives and purposes should only be taken into account “to the extent that they are relevant to the examination of certain likeness criteria and are reflected in the products’ competitive

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108. See TBT, *supra* note 103, art. 2.1 (providing that “in respect of technical regulations, products imported from the territory of any Member *shall be* accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country” (emphasis added)); *supra* note 103 and accompanying text.

109. *United States–Tuna II*, *supra* note 105, ¶ 199.

110. *Id.*

111. *Id.* ¶ 193 (“[T]he US ‘dolphin-safe’ labelling provisions set out ‘certain requirements that must be complied with in order to make *any* claim relating to the manner in which the tuna contained in [a] tuna product was caught, in relation to dolphins’. The US measure thus covers the entire field of what “dolphin-safe” means in relation to tuna products in the United States.”).

112. *Id.* ¶ 235.

113. Appellate Body Report, *United States–Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 112, WT/DS406/AB/R (Apr. 4, 2012) (“We disagree with the Panel that the text and context of the *TBT Agreement* support an interpretation of the concept of ‘likeness’ in Article 2.1 of the *TBT Agreement* that focuses on the legitimate objectives and purposes of the technical regulation, rather than on the competitive relationship between and among the products.” (citation omitted)).

relationship.”<sup>114</sup> In effect, the test thus serves to exclude legislative purpose from the analysis of national legislation. Applying this test to the dolphin-safe tuna program, the Appellate Body found that “the lack of access to the ‘dolphin-safe’ label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market.”<sup>115</sup> Given that setting on dolphins tends to be unsafe for them, the Appellate Body’s reasoning arguably becomes tautological.<sup>116</sup> Normatively, products that cannot comply with labeling requirements should not have access to those labels. As such, the reasoning of this case, if applied to any labeling system, seems to create a per se violation of Article 2.1.

With regard to the third issue, the Appellate Body has arguably confused its prior jurisprudence on judicial economy. In past cases, the Appellate Body has chosen to “only address those claims which must be addressed in order to resolve the matter in issue in the dispute.”<sup>117</sup> In this case, however, the Appellate Body responded to the Panel’s attempt at judicial economy by observing that it was based on the flawed assumption that TBT Article 2.1 and GATT Articles I and III are “substantially the same.”<sup>118</sup> The Appellate Body wrote that “the scope and content of these provisions is not the same,” but declined to elaborate.<sup>119</sup> It also did not rule on the GATT claims. Even if a TBT claim were successful, then, a future panel might choose to rule in the alternative on GATT claims as well, making past jurisprudence on GATT claims important to the analysis of a private environmental-labeling system under WTO law.

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114. *Id.* ¶ 156.

115. *Id.* ¶ 235.

116. The Appellate Body did not disagree that the practice of setting on dolphins is harmful to them. Rather, its reasoning seemed to rely on the uneven nature of the application of the U.S. prohibitions on setting on dolphins. *Id.* ¶ 241 (noting Mexico’s argument that areas outside of the Eastern Tropical Pacific (“ETP”) were subject to “relaxed compliance standards” because tuna caught outside of the ETP did not need to be verified for having not employed the method of setting on dolphins). The United States presented evidence that the practice of setting on dolphins was not widely practiced outside of the ETP, and further argued that it lacked the resources to certify that tuna were not harvested by setting on dolphins everywhere in the world. BRENDAN MCGIVERN, WHITE & CASE, WTO APPELLATE BODY REPORT: UNITED STATES–TUNA II, at 2 (2012), available at <http://www.whitecase.com/articles-05312012/>. The Appellate Body did not accept this argument. *Id.*

117. Appellate Body Report, *United States–Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, 19, WT/DS33/AB/R (Apr. 25, 1997).

118. *United States–Tuna II*, *supra* note 105, ¶ 405.

119. *Id.*

With regard to GATT claims relating to certification and labeling programs, WTO jurisprudence distinguishes between systems with criteria based on physical characteristics and those based on process and production methods (“PPMs”).<sup>120</sup> Many environmental-labeling systems employ PPM criteria, such as whether timber was sourced using sustainable logging activities or whether shrimp were harvested with trawlers that tend not to kill sea turtles. Historically, the WTO has strongly disfavored PPM-based systems.

An earlier iteration of the labeling dispute between the United States and Mexico over dolphin-safe tuna set out the most widely discussed articulation of the WTO’s PPM-related concerns.<sup>121</sup> At the center of that case were federal regulations issued pursuant to the Marine Mammal Protection Act (“MMPA”), which sought to restrict imports of tuna harvested using methods that tended to result in higher dolphin kill rates.<sup>122</sup> The United States argued that because the MMPA applied to both domestic and imported tuna, the challenged regulations were “internal regulations” governed by—and acceptable under—the GATT Article III provisions on national treatment.<sup>123</sup> The Panel disagreed with the U.S. argument, however, holding that regulations governing dolphins killed incidentally to the harvesting of tuna “could not possibly affect tuna as a product.”<sup>124</sup> Because import restrictions on tuna caught using certain *processes* did not regulate the “products as such,” they could not constitute internal product regulations and were thus discriminatory.<sup>125</sup> By excluding process-based distinctions from the “likeness” analysis, the Panel effectively rendered all process-based systems per se violations of the

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120. For an example of the argument regarding trade concerns on PPM characteristics, see John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1243 (1992) (noting the concern that “if a nation is allowed to use [a] process characteristic as the basis for trade-restrictive measures, then the result would be open to a Pandora’s box of problems that could open large loopholes in the GATT”). Cf. Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT’L L.J. 459, 493–98 (1994) (arguing that PPM measures are both legal and serve practical uses; providing a history of environmentally motivated trade measures based on PPM measures).

121. Kysar, *supra* note 5, at 540–41.

122. Under the MMPA, U.S. federal regulations required foreign fish processors to obtain U.S. certification that their tuna-harvesting methods resulted in a dolphin kill rate “comparable” to that of the U.S. tuna industry in order to export to the United States. Tuna exports lacking such a certification were banned. Panel Report, *United States—Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter *Tuna–Dolphin I*].

123. John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 6 (2004).

124. *Id.*

125. *Id.*

GATT Article XI prohibition on import quotas, since they effectively functioned as quotas of zero.<sup>126</sup> PPM issues have proved highly contentious.<sup>127</sup> Although there is a robust literature highlighting the many circumstances under which PPM distinctions should be legitimate, as of this writing, the WTO appears to maintain its distinctive distaste for PPM-based certification and labeling systems.<sup>128</sup>

In theory, PPM-based certification and labeling systems may be eligible for exception from liability under GATT Article XX. The circumstances under which exception may be possible are identified in the *Shrimp–Turtle* cases. These disputes related to U.S. trade restrictions designed to protect endangered sea turtle species that could be harmed by certain methods for harvesting shrimp.<sup>129</sup> Pursuant to the Endangered Species Act, the U.S. Department of State issued guidelines requiring countries to obtain national certification of their shrimp-harvesting systems in order to export to the United States.<sup>130</sup> Uncertified shrimp imports were prohibited.<sup>131</sup> Like the *Tuna–Dolphin I* Panel, this Panel found that the U.S. measures violated Article XI’s prohibition on import quotas, and the Appellate Body upheld the ruling.<sup>132</sup> In so doing, it also set out a two-part test for determining whether a measure falls within the scope of GATT Article XX, known as the General Exceptions clause. First, “provisional justification by reason of characterization of the measure”

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126. Kysar, *supra* note 5, at 547.

127. At base, the question often comes down to: Does a consumer have a right to know the provenance of her goods? The PPM debate can thus often seem unintuitive, as the WTO’s answer seems to have been a resounding “no.” See also MATSUSHITA ET AL., *supra* note 11, at 808–11 (presenting both sides of the PPM debate).

128. See Kysar, *supra* note 5 (providing a lengthy set of citations regarding process-based systems and their acceptability).

129. Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp–Turtle II*]; Panel Report, *United States–Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998) [hereinafter *Shrimp–Turtle I*].

130. *Shrimp–Turtle I*, *supra* note 129, ¶¶ 14–26.

131. *Id.*

132. *Shrimp–Turtle II*, *supra* note 129, ¶¶ 187–88. Both the Panel’s ruling and the Appellate Body’s ruling were highly controversial. Many argued that the opinions offered resounding proof that the WTO was strongly anti-environment, arguments of which the Appellate Body were not unaware. See, e.g., *id.* ¶ 185 (“[W]e wish to underscore what we have *not* decided in this appeal. We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should.”).

under one of the enumerated exceptions of Article XX is required.<sup>133</sup> Enumerated measures include those “necessary to protect human, animal or plant life or health” and those “relating to the conservation of exhaustible natural resources,” among others.<sup>134</sup> Second, the responding member must demonstrate “further appraisal of the same measure under the introductory clauses of Article XX.”<sup>135</sup> The meaning of this verbiage is not entirely clear. Thus far, the WTO has read Article XX narrowly in the context of environmental issues.<sup>136</sup>

This Section has explored how the WTO has regulated some of the public regulators of environmental behavior. Government-administered environmental-certification and environmental-labeling systems have proved vulnerable to trade challenges under both the TBT and the GATT. For this reason, in addition to those discussed in Part II.C, one may wonder whether private environmental-certification and environmental-labeling systems could replace government systems to become one of the more active and effective regulators of global environmental behavior. The next Section analyzes when the WTO may attempt to regulate the private regulators.

### *B. Object of the Dispute*

This Section describes the WTO’s jurisdictional analysis with respect to the object of a dispute. It begins with a description of the rules by which the WTO may take jurisdiction over the object of a dispute and analyzes the cases in which the WTO has applied these rules to disputes involving private parties. It closes with a proposal of

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133. *Id.* ¶ 118.

134. GATT, *supra* note 17, at art. XX(b), XX(g).

135. *Shrimp-Turtle II*, *supra* note 129, ¶¶ 187–88.

136. The WTO itself would not agree with this assessment. One of the reports it cites most frequently when striking down measures aimed at protecting the environment provides what appears to be strong advocacy for environmental measures. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 29–30, WT/DS2/AB/R (Apr. 22, 1996) (“WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.”); cf. Sanford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L ECON. L. 739, 743–44 (2001) (discussing the extent to which Article XX does not provide an effective exception for environmental measures); David A. Wirth, *International Trade Agreements: Vehicles for Regulatory Reform?*, 1997 U. CHI. LEGAL F. 331, 336 (noting that Article XX paragraphs (b) and (g) have been “interpreted rather restrictively”).



a four-factor test by which to anticipate a claim of jurisdiction over the activities of a private certification and labeling system.

### 1. Members Only

The WTO's dispute-settlement system is only available to members.<sup>137</sup> As such, only WTO members may be the object of a dispute. Unlike the theoretically infinite number of potentially valid bases of a dispute, the number of potentially valid objects of a dispute is limited to one or a group of the 157 members of the WTO. Precisely when countries become objects of a dispute is a question answered by the DSU, under which members must “identify the specific measures” about which they are complaining when requesting adjudication.<sup>138</sup> Under public international law and WTO practice, a “measure” is “any act or omission attributable to a WTO member.”<sup>139</sup> A member thus becomes an object of a dispute when the “act or omission”—that is, the basis of the dispute—is “attributable” to it.<sup>140</sup>

WTO members are, of course, countries.<sup>141</sup> To determine which activities are attributable to countries, the WTO again applies traditional public international law, under which the activities of all levels and all branches of a country's government are attributable to it.<sup>142</sup> Although one may like the analysis to stop there, it does not.

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137. See e.g., *Shrimp-Turtle II*, *supra* note 129, ¶ 101 (“[A]ccess to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized . . . .”)

138. DSU, *supra* note 25, at art. 6.2.

139. See, e.g., Appellate Body Report, *United States-Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ¶ 81, WT/DS244/AB/R (Dec. 15, 2003) (“[A]ny act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.”)

140. Yanovich & Voon, *supra* note 97, at 119.

141. Customs territories and areas whose sovereignty are disputed may also be members of the WTO. Hong Kong and Macau are both WTO members, yet they are part of the People's Republic of China. Taiwan's sovereign status is unclear, yet “Chinese Taipei” is also a member. WORLD TRADE ORG., *Understanding the WTO*, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Sept. 18, 2012) (listing WTO members).

142. See, e.g., WORLD TRADE ORG., *supra* note 89 (“Under traditional public international law, subjects of international law, typically States, are responsible for the activities of all branches of government within their system of governance, and also for all regional levels or other subdivisions of government.”). The most prominent statement of this interpretation may be traced to the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/SER.A/2001/Add.1. See also Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 563 (2001) (“In their examination of WTO claims, [the panels and Appellate Body] have applied general

## 2. To Attribute or Not to Attribute

Past cases demonstrate that private conduct may also be justiciable by the WTO. The Panel Report in *Japan–Film* is frequently cited for its articulation of the test under which the activities of a private party may be attributed to a WTO member. In that case, the Panel considered whether a code of conduct created by a private retailers council was attributable to Japan and found in the affirmative.<sup>143</sup> Writing that its inquiry was led by a “focus on the status its actions are given in the eyes of the Japanese Government and the . . . industry,” it concluded that a government agency’s approval of the code rendered the code attributable to Japan.<sup>144</sup> That approval helped create “a sufficient likelihood” that private parties would conform with the code as though it were a legally binding governmental measure.<sup>145</sup> The Panel declined to delineate a precise rubric for a finding of “sufficient government involvement,” writing only that “[i]t is difficult to establish bright-line rules in this regard” and that the “possibility will need to be examined on a case-by-case basis.”<sup>146</sup> Cases both before and since *Japan–Film* have presented the GATT/WTO with a handful of occasions on which to consider when private conduct has sufficient government involvement such that it is attributable to a WTO member. Together, these examples may help to provide some principles by which to consider future applications of the sufficient-government-involvement analysis.

The first occasion on which the WTO’s predecessor, the GATT, considered whether private conduct was attributable to a government came in a 1960 Panel’s Review Pursuant to Article XVI:5 of the GATT. Under Article XVI, a contracting party was required to provide notification in the event that it granted or maintained a subsidy.<sup>147</sup> One issue in the Review was whether subsidies financed by nongovernmental levies were notifiable under Article XVI.<sup>148</sup> By implication, then, the issue was whether nongovernmental levies could

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rules of international law, in particular on . . . state responsibility (such as . . . attribution), referring each time to the work of the ILC on the subject.”)

143. Panel Report, *Japan–Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.56, WT/DS44/R (Mar. 31, 1998) [hereinafter *Japan–Film*].

144. *Id.*

145. *Id.*

146. *Id.*

147. GATT, *supra* note 17, at art. XVI.

148. Panel Report, *Review Pursuant to Article XVI:5*, L/1160 (May 24, 1960), GATT B.I.S.D. (9th Supp.) at 188 (1961) [hereinafter *1960 Review*].

be attributable to GATT contracting parties. On the one hand, the Panel found “no obligation to notify schemes in which a group of producers voluntarily taxed themselves in order to subsidize the exports of a product.”<sup>149</sup> On the other, it felt that parties had an obligation to notify all schemes “in which the government took a part either by making payments into the common fund or by entrusting to a private party the functions of taxation and subsidization.”<sup>150</sup> The Panel determined that the question of whether to notify is informed by “the source of the funds and the extent of government action, if any, in their collection.”<sup>151</sup> The Panel declined to formulate “a precisely worded recommendation designed to cover all contingencies,” but stated that governments should “notify all levy/subsidy schemes . . . which are dependent for their enforcement on some form of government action.”<sup>152</sup> The resonance of the Review’s analysis should not be considered less relevant because of its age. Indeed, its entire discussion of nongovernmental levies has been included as an interpretive gloss in the WTO’s Analytical Index of the GATT, and the Panel in *Japan–Film* relied principally on it in setting out its sufficient-government-involvement test.<sup>153</sup>

Another occasion on which the GATT considered whether private conduct was attributable to a government was an adjudicative decision. The issue in *EEC–Apples* related to a complex system of import licensing and other regulations designed to limit the amount of apples on the European market.<sup>154</sup> One element of this system permitted nongovernmental producer groups to withdraw apples from the European market under certain circumstances.<sup>155</sup> Europe argued that this system of withdrawals could not constitute a governmental measure because it was carried out by nongovernmental entities on a voluntary basis.<sup>156</sup> After citing the reasoning of the 1960 Review, the

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149. *Id.* ¶ 12.

150. *Id.*

151. *Id.*

152. *Id.*

153. Like adopted reports themselves, the discussions cited in the Index are not binding on future panels or the Appellate Body, but they are selected for inclusion on the basis that they both clarify and inform the DSM’s interpretive approach to the covered agreements. See *Japan–Alcoholic Beverages*, *supra* note 45 (discussing the relevance of GATT reports to WTO panel and Appellate Body interpretations).

154. See Panel Report, *European Economic Communities–Restrictions on Imports of Dessert Apples–Complaint by Chile*, L/6491 (June 22, 1989), GATT B.I.S.D. (36th Supp.) at 93 (1989) [hereinafter *EEC–Apples*].

155. *Id.* ¶ 2.1.

156. *Id.* ¶ 3.11.

Panel held that the withdrawal system was “governmental.”<sup>157</sup> The Panel recognized that the overall system “combined elements of public and private responsibility,” but explained that the system as a whole was nonetheless attributable to the government because it had: (1) been established by government, (2) depended on government financing for its operations, and (3) carried out its operations in ways prescribed by regulation.<sup>158</sup>

At least three WTO cases since *Japan–Film* have addressed the issue of when private conduct becomes subject to WTO law. In *Canada–Dairy*, the Appellate Body affirmed the Panel’s finding that the activities of several provincial marketing boards comprised of private-sector producers were attributable to Canada on two grounds.<sup>159</sup> First, the “source” of the boards’ “powers” was deemed governmental because they acted in a capacity that was created and delegated to them by the federal and regional governments of Canada.<sup>160</sup> On appeal, Canada argued that a private entity’s conduct could not be attributable to the government on the sole basis of the delegation of authority.<sup>161</sup> Although the Appellate Body did not explicitly agree with this contention, it emphasized that the Panel’s finding rested not only on the boards’ sources of powers but also on the “functions” they performed.<sup>162</sup> On this issue, the Appellate Body provided an extended discussion of the character of governmental functions. It began by analyzing dictionary definitions, finding that governmental functions include “regulation, restraint, supervision, or control.”<sup>163</sup> With respect to the boards at issue, the Appellate Body highlighted their regulatory and advocacy functions. The boards’ regulatory activities included their issuance and administration of quotas, pooling of returns, pricing activities, record keeping, inspection activities, and maintenance of agreements that permitted them to cooperate with other provincial marketing boards.<sup>164</sup> The Appellate Body further noted that the stated mission of

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157. *Id.*

158. *Id.* ¶ 12.9.

159. Panel Report, *Canada–Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R (Oct. 13, 1999) [hereinafter *Canada–Dairy*].

160. *Id.* ¶ 98.

161. *Id.* ¶ 100.

162. *Id.*

163. *Id.* ¶ 97; see also *Japan–Film*, *supra* note 143, ¶ 10.376 (stating that the words “laws, regulations and requirements” in GATT Article III:4 “should be interpreted as encompassing a broad range of government action and action by private parties that may be assimilated to government action”).

164. *Id.* ¶ 99.

these boards was to promote the interests of the dairy sector and determined this to be a governmental function as well. “In our view,” the Appellate Body wrote, “it is part of the normal function of ‘governments’ to promote the perceived interests of the State, and this may involve securing the interests of one or more sectors of the community.”<sup>165</sup>

Two additional cases—determined within weeks of each other—have grappled with the issue of WTO jurisdiction over private conduct in the context of activities involving elements of both government conduct and private choice. In *Korea–Beef*, the measure at issue was a scheme instituted by the central Korean government whereby retailers had to choose to sell either domestic or imported beef exclusively.<sup>166</sup> Many retailers chose to sell domestic beef, and thus had to stop selling imported beef.<sup>167</sup> Arguing that the reductions in retail sales of imported beef were not attributable to the government, Korea pointed to the fact that the situation was ultimately the product of private choice.<sup>168</sup> The Appellate Body disagreed, arguing that “the intervention of some element of private choice does not relieve Korea of responsibility” for creating competitive conditions in which imported goods are treated in no less favorable a manner than domestic goods.<sup>169</sup>

In *Argentina–Hides and Leather*, by contrast, the Panel found government authorization of a private-industry association’s participation in customs-control procedures insufficient for attributing its conduct to Argentina.<sup>170</sup> Europe argued that the association’s members effectively intimidated domestic producers from exporting raw hides to the extent of creating an export restriction in violation of GATT Article XI:1.<sup>171</sup> Citing *Japan–Film* and the “sufficient government involvement” language, the Panel wrote that members

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165. *Id.* ¶ 101.

166. Appellate Body Report, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 146, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter *Korea–Beef*].

167. *Id.*

168. *Id.*

169. *Id.*; see also Rex J. Zedalis, *When Do the Activities of Private Parties Trigger WTO Rules?*, 10 J. INT’L ECON. L. 335, 340–44 (2007) (discussing two GATT reports that have also grappled with the relationship between governmental conduct and private choice). As these cases do not involve private conduct as the initiating activity, they are not relevant to the framework developed here.

170. Panel Report, *Argentina–Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, ¶ 11.22, WT/DS155/R (Dec. 19, 2000) [hereinafter *Argentina–Hides and Leather*].

171. *Id.* ¶¶ 4.5–4.6.

are not “under an obligation to exclude any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade-restrictive.”<sup>172</sup> The private-industry association’s “mere presence” at customs-controls points was insufficient grounds for concluding that the association’s actions were attributable to Argentina.<sup>173</sup>

### 3. When to Attribute: A Framework for Anticipating a Jurisdictional Claim

Taken together, these cases suggest that one framework for anticipating a WTO claim of jurisdiction over the conduct of a private certification and labeling system takes into account the organization’s: (1) source of authority, (2) source of funds, (3) functions, and (4) enforcement systems. This Section addresses each issue in turn.

If a private organization’s authority either derives or appears to derive from a governmental source, its actions may be attributable to a WTO member. Under *Canada–Dairy*, the activities of a body composed of private citizens were governmental in part because that body acted under “authority delegated to them” by the Canadian government.<sup>174</sup> Moreover, the language in the 1960 Review Pursuant to Article XVI:5 regarding a government’s “entrusting” of certain functions to a private body also suggests that the original source of the body’s mission or authority may be relevant to the inquiry.<sup>175</sup> The *Japan–Film* case suggests that the WTO may also analyze “authority” on subjective grounds. Indeed, that Panel’s inquiry was led by a “focus on the status [the private body’s] actions are given in the eyes of the . . . Government and the . . . industry.”<sup>176</sup> Some element of private choice does not relieve a government of responsibility for private conduct, but under *Japan–Film* and *Argentina–Hides and Leather*, a “sufficient

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172. *Id.* ¶¶ 11.18–11.19.

173. *Id.* ¶ 11.19 (“[W]e do not think that it follows from [the *Japan–Film*] panel’s statement or from the text or context of Article XI:1 that Members are under an obligation to exclude any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade-restrictive.”).

174. *Canada–Dairy*, *supra* note 159, ¶ 98.

175. *1960 Review*, *supra* note 148, ¶ 12.

176. *Japan–Film*, *supra* note 143, ¶ 10.213.

likelihood” that the private conduct will be viewed as governmental does seem to be required.<sup>177</sup>

A private organization with sources of financing that include government funds may find its activities attributable to a WTO member. For example, the *EEC–Apples* Panel analyzed the private organization’s dependence on public financing when considering whether its activities were “governmental.”<sup>178</sup> The Review’s discussion of private bodies’ sources of funds encompassed both government “payments into” private bodies and a somewhat more expansive “source of funds” analysis.<sup>179</sup> Indeed, one of the most powerful tools governments have to influence private conduct is their substantial purchasing power.<sup>180</sup> However, procurement policies that support or require certified products for government purchases are unlikely to play a prominent role in a sufficient-government-involvement analysis, because they are not reviewable at all under any of the binding WTO agreements.<sup>181</sup> The WTO reviews government procurement under the Government Procurement Agreement (“GPA”), which is one of the aforementioned Annex 4 plurilateral agreements to which parties must separately consent.<sup>182</sup> To date, few members have consented to the GPA.<sup>183</sup>

If a private organization’s functions are deemed to be governmental, its activities in carrying out these functions may be attributable to a WTO member. The WTO arguably takes an expansive view of functions that may be governmental. Under both the Review and *Canada–Dairy*, the imposition of taxes, levies, or fees

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177. *Id.*; see *Argentina–Hides and Leather*, *supra* note 170, ¶ 11.22 (discussing the insufficiency of “mere presence”).

178. *EEC–Apples*, *supra* note 154, ¶ 3.11.

179. *1960 Review*, *supra* note 148, ¶ 12.

180. See Jeffrey L. Dunoff, *Linking International Markets and Global Justice*, 107 MICH. L. REV. 1039, 1039 (2009) (“The U.S. government is the planet’s largest purchaser of goods and services; worldwide, states spend trillions of dollars on procurement each year.”).

181. For present purposes, only GATT Article III (addressing national treatment) and the TBT are relevant. See GATT, *supra* note 17, at art. III:8(a) (“The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purposes for governmental purchases . . . .”); TBT, *supra* note 103, at art. 1.4 (“Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this agreement but are addressed in the Agreement on Government Procurement . . . .”).

182. See *supra* Part II.A.2.

183. For a current list of Members who have become Parties to the GPA, see *Parties and Observers to the GPA*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm#parties](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties).

are governmental activities.<sup>184</sup> Likewise, the distribution of funds pooled by such taxes, levies, or fees may also be governmental.<sup>185</sup> Under *Canada–Dairy*, “regulation,” “restraint,” “supervision,” and “control” are also governmental functions, as is promoting “the perceived interests of the State, and . . . securing the interests of one or more sectors of the community.”<sup>186</sup>

Finally, and perhaps most intuitively, the extent of government involvement in carrying out an organization’s functions is likely to inform a panel considering whether to exercise jurisdiction over private conduct. The Review made particular note of government assistance in “enforcement” of the private system at issue.<sup>187</sup> Likewise, the Panel in *EEC–Apples* and the Appellate Body in *Canada–Dairy* both suggested that the private bodies’ regulatory activities were enforceable by government entities.<sup>188</sup>

The WTO has thus found numerous violations by environmental-certification and environmental-labeling systems, and some of these findings have rested on highly fact-specific or otherwise unpredictable grounds. In five out of six disputes involving private conduct, the WTO determined that it can attribute private conduct to WTO members and thereby regulate those activities. As discussed in Part II, environmental-certification and environmental-labeling systems may be thought of as actors in a growing global network of private environmental governance.<sup>189</sup> Whether normatively or by default, these actors have served a gap-filling purpose in the face of an ongoing absence of public environmental governance. If the WTO claims jurisdiction over an institution of private environmental governance, it may restrict the gap-filling functions that they serve. The next Part considers whether public law will seek to regulate these private regulators.

#### IV. A LABEL BY ANY OTHER LABEL: APPLYING THE ANALYTICAL FRAMEWORK

If a dispute involving the activities of a private environmental-labeling system were to come before the WTO, it would likely take the

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184. *Canada–Dairy*, *supra* note 159, ¶¶ 11, 101; *1960 Review*, *supra* note 148, ¶ 12.

185. *1960 Review*, *supra* note 148, ¶ 12.

186. *Id.* ¶ 97.

187. *Id.* ¶ 12.

188. *Id.*

189. *See supra* Part II.C.



following form. The complaining member would be an exporting country from the developing world. The responding member would be an importing country from the developed world. Because of the compulsory nature of the WTO's jurisdiction, the responding member would not be able to avoid adjudication in the event of a claim of jurisdiction. Because of its exclusive nature, the issue would not have been tested in another international forum, and finally, because of the contentious nature of WTO jurisdiction, the parties would not be able to anticipate how the WTO would rule in advance of the issuance of the binding ruling.

#### *A. Basis of the Dispute*

The basis of such a dispute would take the form of a violation complaint under at least the TBT and the GATT. The WTO would consider the TBT claims first.<sup>190</sup>

The TBT claims would invoke Articles 2, 4, and 3. Under TBT Article 2, members are required to “ensure” that mandatory systems of technical regulations prepared, adopted, and applied by central government bodies conform with MFN and national-treatment principles.<sup>191</sup> Article 4 sets out a lower standard for governments' voluntary standards systems, requiring only that members take “reasonable measures” to ensure MFN and national-treatment standards are met.<sup>192</sup> Article 3 requires that members take “reasonable measures” to ensure that nongovernmental bodies that prepare, adopt, and apply mandatory systems of technical regulations also comply with MFN and national treatment principles.<sup>193</sup> It also requires that members both refrain from taking measures which “require or encourage” nongovernmental bodies to act inconsistently with Article 2 and affirmatively “formulate and implement positive measures . . . in support of the observance of the provisions of Article 2” by nongovernmental bodies.<sup>194</sup> No claim in the history of the WTO has cited Article 4, and no panel has yet ruled on an Article 3 claim.<sup>195</sup>

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190. See *supra* note 104 and accompanying text.

191. TBT, *supra* note 103, at art. 2.1.

192. *Id.* at art. 2.4.

193. *Id.* at art. 3.

194. *Id.*

195. Of the forty-five TBT claims that have been filed since 1995, only two have cited Article 3. One of these was settled without adjudication. The other, filed in 1998, appears to be stalled. See Request for Consultations from Canada, *United States—Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*, WT/DS144/1 (Sept. 29, 1998); see also *United*

Given that the most stringent requirements for MFN and national treatment are under Article 2, and especially given the recent decision that a nonobligatory labeling system was nonetheless “mandatory,” the complaining member may argue that there is sufficient government involvement with the activities of the private organization such that its activities are directly subject to Article 2. The responding member would have no opportunity for exception from liability, as the TBT contains no environmental exception analogous to GATT Article XX. If a TBT claim were successful, the WTO might exercise judicial economy and refrain from ruling on the GATT claims, but it might not.<sup>196</sup> In the event of the latter, the GATT general exceptions clause would come into play, and the responding member could seek exception from GATT liability.

The WTO may consider GATT claims under Articles I, III, and XI. It would likely apply its stringent PPM analysis under which labeling systems that distinguish products on the basis of process and production methods are reviewed under Article XI rather than Article III. Under Article XI, a complaining member may argue that the PPM-based system functioned as a de facto import quota.<sup>197</sup> Under Article I, the member may allege that the system functions as a de facto system that discriminates between imports on the basis of national origin.<sup>198</sup> The complaining member may also allege that the less stringent requirements of Article III are inapplicable because PPM measures are inherently discriminatory. The responding member would seek exception for the system’s activities under Article XX, but as discussed above, panels and the Appellate Body have read this exception narrowly.<sup>199</sup>

The basis of the dispute would thus likely be broad. Considering past cases involving governmental systems, if the object

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*States—Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds144\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds144_e.htm) (July 24, 2012) (describing the dispute as “in consultations”). For a list of all claims made under the TBT, see *Disputes by Agreement*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A22#selected\\_agreement](http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A22#selected_agreement) (last visited Sept. 18, 2012).

196. See Panel Report, *United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, ¶¶ 7.747–7.748, WT/DS381/R (Sept. 15, 2011) (noting that past WTO practice has been to exercise judicial economy when declining to rule on Mexico’s GATT claims); cf. *supra* notes 118–19 and accompanying text (discussing WTO’s finding of false judicial economy in *United States—Tuna II*).

197. GATT, *supra* note 17, at art. XI:1.

198. *Id.* at art. I.

199. See *supra* notes 129–36 and accompanying text.

of the dispute were valid, the complaining member may have a strong case.

### *B. Object of the Dispute: The Case Studies*

The object of a dispute regarding a private environmental-labeling system would, of course, be a WTO member. The following case studies apply the framework set out in Part III.B.2 to three prominent private labeling organizations in order to determine the circumstances under which their activities might be found attributable to a member, thereby creating a valid object for this dispute.

#### 1. Forest Stewardship Council

The Forest Stewardship Council (“FSC”) is an NGO whose mission is to promote responsible management of the world’s forests. To this end, the FSC offers a voluntary certification and labeling program for forest products from sustainably harvested and verified sources. As of August 2012, it has certified over 164 million hectares of forest lands in eighty-one countries.<sup>200</sup> If sued, the WTO might claim jurisdiction over the FSC’s certification and labeling system on the basis that the European Union is sufficiently involved with the FSC’s activities.

The FSC’s source of authority is distinctly nongovernmental. Indeed, it was established shortly following international efforts to create a binding international forestry convention failed.<sup>201</sup> Industry actors seeking to distinguish their products cooperated with NGOs to create the FSC in 1993.<sup>202</sup> Its highest decisionmaking body is the General Assembly of FSC members.<sup>203</sup> FSC members include NGOs, indigenous peoples’ associations, unions, academic institutions, industry associations, certification bodies, and individuals.<sup>204</sup> It is governed by a board of directors comprised of nine individuals, none of

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200. See FOREST STEWARDSHIP COUNCIL, <http://www.fsc.org/> (providing current facts and figures regarding certification on homepage).

201. CERTIFICATION REPORT, *supra* note 2, at 30.

202. *Id.*

203. See *Governance*, FOREST STEWARDSHIP COUNCIL, <http://www.fsc.org/governance.14.htm> (last visited Aug. 26, 2012).

204. *Id.*

whom is directly affiliated with a government.<sup>205</sup> The FSC operates in more than fifty countries.<sup>206</sup>

Multiple governmental sources have provided funding for the FSC using several methods. First, governments have sought FSC certification themselves, and all parties seeking certification must pay fees to the FSC to do so.<sup>207</sup> This is a common practice in some eastern European countries with large state-owned forests, including Estonia, Latvia, and Poland.<sup>208</sup> Governments have also provided funding to the FSC through donations. Interestingly, during the mid-1990s, Austria was among a group of countries, states, and cities that banned imports of ecologically unsound timber.<sup>209</sup> Its ban was challenged as a trade barrier.<sup>210</sup> Austria rescinded the ban but directed that government funds previously allocated for the ban's implementation be paid directly to the FSC itself.<sup>211</sup> In response to public pressure, Switzerland and the Netherlands have also provided financial support to the FSC.<sup>212</sup>

A number of countries, particularly in Europe, have incorporated FSC standards into their procurement policies.<sup>213</sup> This practice provides significant financial support to the organization, but a procurement policy alone is probably beyond the scope of the WTO's analysis for purposes of GATT or TBT claims.<sup>214</sup> However, a complaining party could argue that procurement policies are analogous to nonbinding guidance. To the extent that governments openly communicate their procurement policies, they could be viewed as contributing to a "sufficient likelihood" that other private parties would emulate government purchasing practices. As seen in *Korea-Beef*, some element of private choice does not cut off the governmental

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205. *Id.*

206. *FSC Canada Appoints Francois Dufresne as its New President*, FOREST STEWARDSHIP COUNCIL (May 7, 2012), <http://www.fsc.org/national-news.328.39.htm>.

207. Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUR. J. INT'L L. 47, 59 (2006).

208. BENJAMIN CASHORE, GRAEME AULD & DEANNA NEWSOM, GOVERNMENT THROUGH MARKETS: FOREST CERTIFICATION AND THE EMERGENCE OF NON-STATE AUTHORITY 8 (2006). The U.S. state of Pennsylvania has also been quite active with FSC certification; over two million acres of publicly owned forests are FSC-certified. CERTIFICATION REPORT, *supra* note 2, at 30.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 93-94.

214. *See supra* Part III.B.2.

nature of otherwise public conduct.<sup>215</sup> That said, this argument seems fairly tenuous and unlikely to succeed.

The WTO may also find some of the FSC's functions to be governmental. The chief criterion for FSC certification is compliance with all applicable laws.<sup>216</sup> The rationale for this criterion is based on the practical reality that in some countries as much as eighty percent of timber is harvested illegally, often in violation of local laws protecting forests or indigenous communities.<sup>217</sup> Monitoring legality could be framed as a regulatory or supervisory function, which, in turn, is a governmental function. In the alternative, monitoring legality sometimes serves the purpose of protecting indigenous communities, and "securing the interests of one or more sectors of the community" may also be a governmental function.<sup>218</sup> However, like many private certification and labeling systems, the FSC does not monitor compliance or issue certificates itself. It accredits independent organizations, which then have the authority to determine compliance and make certification decisions.<sup>219</sup> This structure may complicate the WTO's analysis on the issue, but the fact that the FSC still functions to support the monitoring of legality likely renders at least some of its functions "governmental," and a number of these functions are carried out in Europe.

Although governments have not assisted in the enforcement of FSC standards, accredited FSC-certification bodies assist governments in the monitoring of compliance with their own measures.<sup>220</sup> When Bolivia passed a requirement that forest concessionaries meet certain sustainability standards, for example,

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215. *Korea–Beef*, *supra* note 166.

216. See *Mission & Vision: Protecting Forests for Future Generations*, FOREST STEWARDSHIP COUNCIL, <http://us.fsc.org/mission-and-vision.187.htm> (last visited Sept. 18, 2012) (Principle 1 of the FSC Principles and Criteria requires forest managers to comply with all applicable laws and international treaties.).

217. *Id.*

218. *Canada–Dairy*, *supra* note 159, ¶ 97.

219. *Accreditation Program*, FOREST STEWARDSHIP COUNCIL, <http://www.fsc.org/accreditation.28.htm> (last visited Sept. 18, 2012).

220. Government policies adopted in the United States and European Union aimed at addressing the import of illegal forest products have indirectly promoted forest-certification programs such as the FSC's. CERTIFICATION REPORT, *supra* note 2, at 31–32. The Lacey Act in the United States and the Forest Law Enforcement Governance and Trade Initiative in the European Union both require that importers show they are not importing illegally harvested wood. *Id.* Certification schemes that encompass chain-of-custody requirements to verify the source of imported products have emerged as an effective way to demonstrate this due diligence. *Id.*

the FSC was the only certification body that met those standards.<sup>221</sup> It became the de facto auditor for Bolivia while the government worked toward developing its own auditing scheme.<sup>222</sup> Evidently enough, the FSC's involvement with Bolivia would not be directly applicable to a government-involvement analysis if the responding member were the European Union. However, European governments may wish to avoid working with the FSC in the certification of their forest products for compliance with various levels of European law in order to avoid further government involvement with the FSC from an enforcement perspective.

Finally, the effective operation of the FSC-standards system may be viewed as discriminatory against some foreign products. Given the importance of legality to FSC certification, local regulatory conditions have, in practice, affected whether forest managers can become certified. In Indonesia, for example, the state owns all forest lands.<sup>223</sup> Although recent policies recognize traditional and customary rights, the Indonesian government does not appear to have clearly enforced them.<sup>224</sup> High levels of illegal activity and local government complicity in these activities appear to persist.<sup>225</sup> Although Indonesia has developed its own certification system and joined it with that of the FSC, few Indonesian forests have been certified.<sup>226</sup>

In sum, the FSC has nongovernmental authority, but it often serves to support governmental authorities. Some of its funds are governmental, but these have diminished significantly since the 1990s. And funds analyses are unlikely to form part of the attribution analysis. Although the FSC has some regulatory, supervisory, and advocacy functions, it does not directly carry out the activities that serve these functions. Moreover, unlike the Canadian marketing boards in the *Canada–Dairy* case, for example, the FSC does not serve the governmental functions of only one government. Rather, it serves these functions for each of the eighty-one countries in which it certifies forests. FSC activities may be vulnerable to challenge in the WTO, but such a suit would likely be complicated due to the large geographic scope of its activities. Given that many developing countries use FSC

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221. *Id.* at 33.

222. *Id.*

223. *Id.* at 31.

224. *Id.*

225. *Id.*

226. *Id.*

standards and certification, the international community may exert significant pressure on members to refrain from filing a complaint.

## 2. Marine Stewardship Council

The Marine Stewardship Council (“MSC”) is an independent nonprofit organization that administers a prominent certification and labeling program with the goal of promoting sustainable fishing practices. At least two dozen of the world’s largest MNCs in the retail food sector use the MSC logo, including Wal-Mart in the United States and Sainsbury’s in the United Kingdom.<sup>227</sup> Its label appears on more than ten thousand products worldwide, representing a total retail value of \$2.2 billion.<sup>228</sup> Almost seven percent of global wild landings of fish for human consumption are MSC certified.<sup>229</sup> In the United States, the MSC has certified or is in the process of certifying sixty percent of fishery landings.<sup>230</sup> Despite its size, if sued, the WTO would probably not claim jurisdiction over the MSC’s activities.

Like the FSC, the MSC was established in the mid-1990s through cooperative efforts of NGOs and MNCs, making its original grant of authority and ongoing powers distinctly nongovernmental.<sup>231</sup> Its governance structure is typical of a nonprofit organization, being led by a Board of Trustees and supported by several advisory boards whose members have few governmental connections.<sup>232</sup> Over ninety percent of the MSC’s income is derived from charitable grants and activities.<sup>233</sup> In its most recent fiscal year, less than five percent of the MSC’s funding came from government agencies directly.<sup>234</sup>

Like any private certification and labeling system, however, the MSC serves an arguably regulatory function. Like the FSC, legality is a factor in its certification system, but MSC standards do not emphasize legality to the same extent that FSC standards do.<sup>235</sup>

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227. Vandenberg, *supra* note 62, at 923.

228. CERTIFICATION REPORT, *supra* note 2, at A-75.

229. *Id.*

230. *Id.*

231. *See id.* at 12 (discussing how cooperative efforts between Unilever and Rainforest Alliance eventually led to creation of the MSC in 1997).

232. *See Structure, Governance*, MARINE STEWARDSHIP COUNCIL, <http://www.msc.org/about-us/governance/structure/> (last visited Aug. 26, 2012) (describing governance structure).

233. *Our Finances*, MARINE STEWARDSHIP COUNCIL, <http://www.msc.org/about-us/finances> (last visited Aug. 26, 2012).

234. *Id.*

235. MSC’s overall standards scheme is publicly available. MARINE STEWARDSHIP COUNCIL, MSC FISHERY STANDARD: PRINCIPLES AND CRITERIA FOR SUSTAINABLE FISHING (2010), *available*

Rather, the MSC attempts to directly promote sustainable fishing practices and minimize environmental impacts.<sup>236</sup>

Unlike how the FSC approaches monitoring, the MSC “relies heavily on the effective implementation of government fisheries regulations to ensure” that the public fisheries it certifies are compliant with MSC standards.<sup>237</sup> It requires that fisheries be subject to an effective “management system that respects local, national and international laws and standards and incorporates institutional and operational frameworks that require the use of the resource to be responsible and sustainable.”<sup>238</sup> In most cases, this management system is a government agency.<sup>239</sup> For example, the government of South Georgia and the South Sandwich Islands owns and manages a number of fisheries; it is also the direct holder of an MSC license for Patagonian toothfish.<sup>240</sup> As such, the MSC’s enforcement systems may be subject to the characterization that they are governmental.

Like the pattern of FSC-certified forests, the geographic pattern of MSC-certified fisheries suggests that certification may be more difficult for fisheries in countries with lax regulatory regimes.<sup>241</sup> This fact may tend to sway a panel in favor of a potential complainant in the face of, for example, a TBT Article 2.1 claim.

Thus, the MSC has nongovernmental authority, and although it has regulatory functions, these are not a close substitute for public regulatory functions like the FSC standards are. Its source of funds is by and large private, and its standards have not been incorporated into any government’s procurement policies. Like the FSC, the MSC also works in many countries, complicating the question of the WTO member at which a complaint might potentially be directed. The final issue, then, would be the fact that the MSC relies on government agencies to ensure parties comply with all local laws. Because government agencies ensure compliance with laws as a matter of their own functions and not simply to serve the MSC, this element of the

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at [http://www.msc.org/documents/scheme-documents/msc-standards/MSC\\_environmental\\_standard\\_for\\_sustainable\\_fishing.pdf](http://www.msc.org/documents/scheme-documents/msc-standards/MSC_environmental_standard_for_sustainable_fishing.pdf).

236. *See id.* (setting out sustainability and the minimization of environmental impacts before legality).

237. CERTIFICATION REPORT, *supra* note 2, at 31.

238. MARINE STEWARDSHIP COUNCIL, *supra* note 235, at 6.

239. CERTIFICATION REPORT, *supra* note 2, at 31.

240. CHRISTINE CAREY & ELIZABETH GUTTENSTEIN, GOVERNMENTAL USE OF VOLUNTARY STANDARDS: INNOVATION IN SUSTAINABILITY GOVERNANCE 18 (2008).

241. CERTIFICATION REPORT, *supra* note 2, at 31 (observing that more developed world fisheries tend to become MSC-certified than their developing world counterparts and suggesting that this may be related to the effectiveness of government management systems).



MSC standards and certification system alone is unlikely to give rise to a jurisdictional finding.

### 3. Blue Angel

The Blue Angel certification and labeling system is a voluntary program that seeks to provide economic incentives to manufacturers to develop products whose raw materials, production processes, and product-use and product-disposal methods are less harmful to the environment than conventional products. Blue Angel is the oldest environmental-labeling system in the world and currently covers 11,500 products, produced by over one thousand companies, covering ninety product categories.<sup>242</sup> Although relatively unknown in the United States, it is prominent in Europe. The WTO probably would exercise jurisdiction over this system on the basis of its involvement with the European Union.

Blue Angel's source of authority is governmental. It was established by the German government in 1978.<sup>243</sup> Given the label's prominence in Europe, it is possible that the system is self-sustaining without additional public grants of financing, but data on the system's finances do not appear to be available. Its stated functions include promoting both environmental protection and consumer protection.<sup>244</sup> Blue Angel's enforcement systems, however, are not purely governmental. It is managed by four distinct entities, only two of which are governmental. Agencies of the federal German government own the label and set out the technical criteria to which products must conform in order to gain access to the label.<sup>245</sup> But an independent Environmental Label Jury, composed of representatives from firms, industry associations, trade unions, and local authorities, grants certification.<sup>246</sup> RAL gGmbH is a private body that awards the label.<sup>247</sup>

Although the Blue Angel system does not hold itself out as a government agency, the German government is probably sufficiently involved in it that a complaining member would have a case against the European Union for Blue Angel's activities. Like the regime in

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242. *The Blue Angel-Eco-Label With Brand Character*, THE BLUE ANGEL, [http://www.blauer-engel.de/en/blauer\\_engel/index.php](http://www.blauer-engel.de/en/blauer_engel/index.php) (last visited Aug. 26, 2012).

243. *Id.*

244. *The Blue Angel-What's Behind It?*, THE BLUE ANGEL, [http://www.blauer-engel.de/en/blauer\\_engel/whats\\_behind\\_it/index.php](http://www.blauer-engel.de/en/blauer_engel/whats_behind_it/index.php) (last visited Aug. 26, 2012).

245. *Id.*

246. *Id.*

247. *Id.*

*EEC-Apples*, this regime has elements of both public and private responsibility, but it operates pursuant to government mandate. Given the recent decision on the dolphin-safe label for tuna, in which a nonobligatory labeling system was deemed “mandatory” and thus subject to TBT Article 2, Blue Angel may be particularly vulnerable to claims under Article 2.

Each of these environmental-labeling systems thus exhibits some form of government involvement. The source of authority for the Blue Angel system is primarily governmental. The source of funds and functions of the FSC are arguably governmental, and the enforcement of the MSC system often seems governmental. The application of this Note’s four-part framework to these organizations—more than predicting any specific outcome—suggests that the WTO may rule in different ways depending on very specific circumstances of the labeling system at issue.

### *C. The WTO Should Adopt a Narrow Jurisdictional Analysis*

This prediction notwithstanding, the WTO should exercise jurisdiction over private environmental-labeling systems under only the narrowest of circumstances. This Section suggests one possible approach incorporating the above-described framework before discussing the three principal reasons why the WTO should regulate narrowly.

One principled approach to the regulation of private environmental-certification and environmental-labeling systems would take into account government involvement at each stage of the four-part framework and only exercise jurisdiction when all four parts exhibit significant government involvement. First, a finding of private sources of authority should be dispositive in favor of a finding of no jurisdiction. Even if an organization had some government involvement at its inception, the WTO’s analysis should take into account whether the organization’s ongoing authority is governmentally or privately derived. Second, the WTO’s analysis of an organization’s financial position should ignore government procurement policies entirely, as they are not reviewable under the binding WTO agreements.<sup>248</sup> With regard to the third element of the proposed framework, one option would be to consider whether the function is one that the government would otherwise conduct. Protecting the interests of certain communities or sectors should not

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248. See *supra* Part III.B.3 (discussing the Annex 4 plurilateral agreements).

be considered a governmental function because it encompasses far too many nongovernmental activities. This should be the least important factor in the analysis. Finally, the WTO's enforcement-related analysis should focus on whether the government that is providing assistance with enforcement would be taking such action if not for the presence of the organization. If the government would otherwise be enforcing the activity at issue, its enforcement should not be considered involvement with private conduct.

The WTO should adopt a narrow application of the sufficient-government-involvement analysis for at least three reasons. First, and most practically, the WTO lacks both the expertise and the resources to evaluate environmental measures.<sup>249</sup> The recent *United States–Tuna II* decision offers particularly compelling evidence in favor of a conservative approach to jurisdictional claims. Although the DSU empowers the panels and Appellate Body to engage outside experts, both the Panel and Appellate Body in this case chose to forgo that option.<sup>250</sup> Neither provided any explanation for having done so, leaving observers to wonder about the basis on which trade experts in Geneva, Switzerland, could plausibly claim the competence to evaluate U.S.-consumer protection and global dolphin welfare.<sup>251</sup> Given that environmental certification and labeling can be highly technical—and bear little if any subject-matter relationship to international trade—this approach seems inappropriate. The WTO also lacks the resources to open its doors to a wider range of disputes than it already hears.<sup>252</sup> Given the lack of expertise, lack of resources, and what may be an organizational culture that minimizes the value of nontrade-related expertise, the WTO should take a restrained view of its jurisdictional reach over private environmental-certification and environmental-labeling systems.

Second, the WTO is not accountable to the individuals and organizations that have supported the growth of private

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249. See, e.g., Marie Wilke & Hannes Schloemann, *Not-So-Voluntary Labelling in the WTO Tuna-Dolphin Dispute*, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (Nov. 2011), <http://ictsd.org/i/news/bioresreview/117757/> (noting that the *United States–Tuna II* panel “clearly struggled with” the task it set out for itself of reviewing dolphin welfare and U.S. consumer protection).

250. *Id.*; see also DSU, *supra* note 25, at art. 13.2 (“Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.”).

251. Wilke & Schloemann, *supra* note 249.

252. See Andrew T. Guzman, *Determining the Appropriate Standard of Review in WTO Disputes*, 42 CORNELL INT'L L.J. 45, 48–49 (2009) (describing the DSM's lack of resources to review national policies).

environmental governance. Its members are national governments, and the WTO's decisionmaking bodies are far removed from private citizens, firms, and NGOs. As these latter groups are the ones that drive private environmental certification and labeling, the WTO should maintain a restrained view of its jurisdictional reach over environmental certification and labeling in order to address justice concerns and heed its practical limitations.

Third, a claim of jurisdiction over a private environmental-labeling system is at odds with the missions and purposes of the WTO. Since its inception, the overarching mission of both the WTO and the GATT before it has been trade liberalization.<sup>253</sup> Private labeling systems are, by their very nature, market driven.<sup>254</sup> The WTO exists to support private markets, not to stymie their growth. Moreover, as discussed above, the one addition that was made to the WTO preamble to differentiate it from the original GATT is language regarding sustainability and environmental protection. A responsible reading of the documents creating the WTO and its dispute-settlement bodies should not ignore this history. The WTO presides over a globalized economy that has both externalized many environmental harms associated with cross-border trade and undervalued the cost of global commons resources.<sup>255</sup> It sits in a web of governance structures, many of which are private.<sup>256</sup> Regardless of whether private environmental governance is viewed as normatively desirable or simply a matter of default, that existence remains, and it appears to be growing.<sup>257</sup> The WTO should recognize that it is not the only regulator of cross-border behavior, that it cannot be the only regulator, and that it should not be the only regulator, particularly of cross-border environmental behavior.

The WTO's sufficient-government-involvement analysis has great value because it allows the organization to evaluate when ostensibly private organizations are nothing more than organs of the state. In the United States, the lines between public and private may often seem clear, but not every WTO member is like the United States. In some developing countries, for example, the largest and most powerful firms are owned by the state.<sup>258</sup> The lines between

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253. See Marrakesh Agreement, *supra* note 17, pmb1.

254. See *supra* Part II.C.

255. See *supra* Part II.B.

256. See *supra* Part II.B.

257. See *supra* Part II.B.

258. See, e.g., Donald Greenless & David Lague, *PetroChina Shares Triple Value in Record IPO*, N.Y. TIMES, Nov. 5, 2007, <http://www.nytimes.com/2007/11/05/business/>

public activity, market activity, and private conduct can be difficult to draw. The WTO should retain tools at its disposal for drawing these lines, and the fact-specific nature of this inquiry does suggest that bright-line rules would be difficult to adopt. This Note's proposed framework offers the WTO a flexible yet principled way in which to approach the analysis, and a narrow application will serve both practical and normative purposes.

## V. CONCLUSION

In an influential article on the global distribution of power, Jessica Mathews observes that the end of the Cold War brought on “a novel redistribution of power among states, markets, and civil society.”<sup>259</sup> She goes on to write: “National governments are not simply losing autonomy in a globalizing economy. They are sharing powers . . . with businesses, with international organizations, and with multitudes of . . . nongovernmental organizations.”<sup>260</sup> Global trends of the last three decades have increasingly favored private enterprise and free markets over government intervention.<sup>261</sup> Private certification and labeling systems with environmental missions are among the businesses and NGOs with which states now share power. They serve governance purposes only to the extent that consumers are willing to pay for them. As such, they presumably support global trends toward using private markets to solve public problems. If the WTO chooses to exercise jurisdiction over a private labeling system and subsequently rules as it has ruled on other labeling systems, it may thereby deregulate the private regulators whose services people want to buy.

The environmental problems posed by the growing internationalization of trade are global in scale. With regard to climate change in particular, the large and increasing quantities of greenhouse gases emitted since the Industrial Revolution have been termed the greatest market failure of our time.<sup>262</sup> At this stage of

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worldbusiness/05iht-05bubble.8186962.html?\_r=1&pagewanted=all (describing PetroChina as “the state oil and gas giant,” noting its listing on the New York Stock Exchange).

259. Jessica Mathews, *Power Shift*, 76 FOREIGN AFF. 50, 50 (1997).

260. *Id.*

261. Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297, 297 (2007).

262. NICHOLAS STERN ET AL., THE STERN REVIEW: THE ECONOMICS OF CLIMATE CHANGE 105 (2006).

scientific understanding about climate change, however, those large and increasing quantities could be termed a governance failure as well. And as any trip to the local grocery store may suggest, private markets have begun to fill the gap left by public governance.

Private environmental governance may not provide first-best solutions, but in the face of ongoing public inaction on climate in particular, it fills gaping holes in global governance. When confronted with the issue of whether to exercise jurisdiction over a private environmental-labeling system, the WTO should acknowledge its placement and purpose in the network of global governance. Although its influence and authority are formidable, it is but one actor among many. The WTO regulates trade, not the environment. The WTO should adopt a narrow interpretation of the sufficient-government-involvement analysis and let markets and environmental organizations address the increasing need for attention to global environmental challenges.

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