Private Sustainability Standards and the WTO

A Case Study from Switzerland

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“[…] globalization is like a hundred-lane highway criss-crossing the world. If it is a free-for-all highway, its lanes will be taken over by the giant trucks from powerful economies. Bangladeshi rickshaw will be thrown off the highway.

In order to have a win-win globalization we must have traffic rules, traffic police, and traffic authority for this global highway. Rule of “strongest takes it all” must be replaced by rules that ensure that the poorest have a place and piece of the action, without being elbowed out by the strong.”

Muhammad Yunus

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List of Abbreviations

AIDCP	Agreement on International Dolphin Conservation Program
ACCTS	Agreement on Climate Change, Trade and Sustainability
BS	Bio Suisse
CEN	European Committee for Standardization
CENELEC	European Committee for Electrotechnical Standardization
CEPA	Comprehensive Economic Partnership Agreement between EFTA states and Indonesia
Cf.	confer (compare)
Codex	Codex Alimentarius Commission
COPANT	Pan American Standards Commission
CTE	Committee on Trade and Environment
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)
e.g.	exempli gratia (for example)
ed./eds	editor/editors
edn.	edition
EFTA	European Free Trade Association

EGA	Environmental Goods Agreement
EPC	Ecological Performance Criteria
et al.	et alii (and others)
etc.	et cetera (and so forth)
ETSI	European Telecommunications Standards Institute
EU	European Union
EU	European Union
e-WG	Electronic working group
FLO	Fairtrade Labelling Organizations International
fn./fns	footnote/footnotes
FOAG	Federal Office for Agriculture
FSC	Forest Stewardship Council
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GSP	Generalised System of Preferences
i.e.	id est (that is)
IFOAM	International Federation of Organic Agriculture Movements
ILA	International Law Association

IPPC	International Plant Protection Convention
IPS	IP-SUISSE
ITC	International Trade Center
ISEAL Alliance	International Social and Environmental Accreditation and Labelling Alliance
ISO	International Organization for Standardization
JSIs	Joint Statement Initatives
MDGs	Millenium Development Goals
MFN	most-favoured-nation treatment
MSC	Marine Stewardship Council
MSI/MSIs	multi-stakeholder initiative/multi-stakeholder initiatives
NPR-PPM/PPMs	non-product related process and production method/methods
OIE	World Organisation for Animal Health
p./pp	page/pages
para./paras	paragraph/paragraphs
PASC	Pacific Area Standards Congress
PPM/PPMs	process and production method/methods
RSPO	Roundtable of Sustainable Palm Oil *standard*

RTA/RTAs	Regional trade agreement/agreements
SCAs	supply chain actors
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SDGs	Sustainable Development Goals
SPS Agreement	Agreement on Sanitary and Phytosanitary measures
SPS Committee	Committee on Sanitary and Phytosanitary Measures
STE/STEs	State-trading enterprise/enterprises
TBT Agreement	Agreement on Technical Barriers to Trade
TBT Committee	Committee on Technical Barriers to Trade
TESSD	Structured Discussions on Trade and Enrivonmental Sustainability
TRQ/TRQs	tariff rate quota/quotas
UNFSS	United Nations Forum on Sustainable Development
US	United States
VITISWISS	Swiss Association for Sustainable Development in Viticulture
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
WWF	World Wildlife Fund

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Introductory remarks

Private sustainability standards play an important role in the governance of international trade and production. Since the 1990's, their number and coverage sharply increased, now surpassing the 450 mark and pertaining to a considerable proportion of global production and trade in approximately 600 product groups.[1] However, private sustainability standards are not evenly spread: they are most represented in the agricultural sector, followed by textiles, consumer products and processed foods.[2] To convey a sense of their growth, two examples are mentioned in here: the number of Marine Stewardship Council (MSC) certificate holders grew by five times between 2008 and 2019, now exceeding 5000 and accounting for a catch of approximately 14,7 million tonnes per year, while forest area certified with the Forest Stewardship Council (FSC) standard has more than quadrupled between 2003 and 2018, now covering over 200 million hectares.[3] 1

As a new regulatory form, private sustainability standards operate at the intersection of market-based instruments, regulation by information and voluntary private governance. These schemes enable producers, manufacturers and retailers to set credible signals for their products' sustainability features, and allow consumers to allocate their expenses according to their sustainability preferences. As a private-sector response to the asymmetry of information between producers and consumers, they incentivize the adoption of more sustainable processes and production methods (PPMs) and may compensate for higher production costs, given consumers' willingness to pay a price surplus for certified products.[4] In line with this, private sustainability standards carry the potential for fostering environmental, social and economic sustainability. 2

At the same time, the limited data that is available on their actual impact points to controversial outcomes. Private sustainability standards are often associated with considerable market power, which transforms them into factual market 3

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1 Julia Lernoud et al., "The State of Sustainable Markets 2017: Statistics and Emerging Trends." (ITC, 2017).

2 Bissinger et al., "Linking Voluntary Standards to Sustainable Development Goals" (International Trade Center, 2020).

3 FSC, Annual Report 2018, p. 1; Celebrating and supporting sustainable fisheries: The Marine Stewardship Council Annual Report 2019-20, p. 12 and p. 34.

4 UNCTAD, "UNCTAD, Framework for the Voluntary Sustainability Standards (VSS) Assessment Toolkit, UNCTAD/DITC/TAB/INF/2020/5," n.d., 9.

access requirements. As compliance and certification entail financial and technical challenges, private sustainability standards often limit international trade, particularly affecting small-scale producers in developing countries. The reported exclusion of these groups from global supply chains is likely to impact global food security, biodiversity and further social and economic sustainability considerations to the detriment.

4 Further concerns relate to private sustainability standards' transparency and ambitiousness. While some schemes assess the full range of environmental or social impacts throughout the certified products' lifecycle, the majority of these standards focuses on a limited range of aspects and risks to provide an uncomprehensive picture on products' sustainability impact. This lack of transparency seems to affect – in some cases even turn into the negative – standards' contribution to their stated sustainability goals.

5 Against this background, there is an urgent need to regulate private sustainability standards, and the World Trade Organization (WTO) has a key role to play in this respect. The multilateral trade agreements restrain Members from adopting trade-restrictive measures, without compromising their right to protect important societal values. In the context of sustainability standards, the Agreement on Technical Barriers to Trade (TBT Agreement) and the General Agreement on Tariffs and Trade (GATT) are of primary importance. These agreements lay down basic rules on non-discrimination and transparency, with the view to address the trade-restrictive effects of certain government measures.

6 The GATT establishes a general legal framework for measures affecting international trade in goods, centered around the principles of non-discrimination, the prohibition of quantitative restrictions and the notification of adopted measures. In contrast, the TBT Agreement deals specifically and in detail with technical regulations, standards and conformity assessment procedures. Its rules go beyond the disciplines foreseen in the GATT. The TBT Agreement disallows unnecessary obstacles to international trade, provides for enhanced transparency, and promotes the harmonization of national regulation around international standards. Notwithstanding these differences, both the TBT Agreement and the GATT strive at a sensitive balance between permitting Members the regulatory autonomy to protect legitimate interests and assuring that government measures do not hinder international trade in an undue manner or to an immoderate extent.

Private sustainability standards have regulatory effect and affect international trade. However, in themselves, they are not subject to WTO rules. The WTO Agreements are state-to-state treaties, binding only Members under public international law. Therefore, the conduct of private standardizing bodies cannot infringe the obligations flowing from the multilateral trade agreements, unless strong ties to the government trigger their applicability. For this reason, a distinct set of rules shall be agreed on to govern truly private schemes. However, Members decade-long efforts to this end have been largely fruitless. Since 2005, discussions on private standards inhabited multiple WTO committees, but agreement even on their notion is distant. The ongoing plurilateral negotiations , which seek to adopt guidelines for voluntary eco-labels, carry the potential to overcome the stall – but their success largely depends on other Members' willingness to cooperate. 7

This work presents a case study on Switzerland-based private sustainability standards. It is first of its kind, as it delivers a qualitative analysis on the landscape of private sustainability standards with the aim of dissecting any ascertainable nexus with government measures for the purposes of determining the applicability of WTO rules in place. It relies on a two-fold analysis: i) a qualitative analysis of the landscape of Swiss private sustainability standards; ii) an investigation into whether government incentives to or participation in such standards' adoption and implementation can be discerned. The findings indicate that Members' participation in non-governmental standard-setting correlates with trade-restrictive practices and is a major reason for their restraint from regulating private standards. Acknowledging that trade-restrictive private standards induced by Members are already subject to WTO rules could facilitate further negotiations and revive cooperation between Members. 8

Structure of this book

This book consists of three parts. Part I is a factual presentation, dealing with the opportunities and shortcomings – together the dichotomy – of private sustainability standards. Chapter 1 defines the term as used in this book, and groups the world of private sustainability standards into subgroups based on selected criteria, such as the nature of the standardizing body, material requirements and institutional design. Chapter 2 studies the ways private sustainability standards affect sustainable development – with a particular focus on trade as an engine for inclusive economic growth, poverty reduction and sustainable development. 9

10 Part II is dedicated to the pertinent rules of WTO law, read in the context of general international law. Chapters 3 and 4 present the regulatory framework laid down in the TBT Agreement and the GATT. Thereby Part II underlines the potential of certain rules – such as the transparency and the non-discrimination obligations – to improve the standards' landscape, but calls for deepened commitments on technical assistance and special and differential treatment. Importantly, private sustainability standards in themselves are not subject to these agreements. Against this background, Chapter 5 deciphers the instances when Members nevertheless could be held liable for trade-restrictive private action.

11 Part III addresses regulatory challenges ahead. Chapter 6 presents a case study on Switzerland-based private sustainability standards, putting into practice the findings on the applicability of WTO disciplines to private action. It indicates that Members' participation in non-governmental standard-setting correlates with discrimination – and appears as a major reason for their restraint from regulating (government-induced) private standards. An analysis of Members' fruitless efforts to regulate private standards at the WTO in Chapter 7 reinforces this conclusion. Then two proposals by academics are presented in response to the trade-restrictive effects of private standards. Lastly, the oingoing plurilteral negotiations on (private) sustainability standards under the Structured Discussions on Trade and Environmental Sustainabliity and the Agreement on Climate Change, Trade and Sustainbility are discussed.

Part I The dichotomy of private sustainability standards

Introduction

Private sustainability standards play an important role in the governance of international trade and production. Since the 1990's, their number and coverage sharply increased, now surpassing the 450 mark and pertaining to a considerable proportion of global production and trade in approximately 600 product groups.[5] However, private sustainability standards are not evenly spread: they are most represented in the agricultural sector, followed by textiles, consumer products and processed foods.[6] To convey a sense of their growth, two examples are mentioned in here: the number of MSC certificate holders grew by five times between 2008 and 2019, now exceeding 5000 and accounting for a catch of approximately 14,7 million tonnes per year, while forest area certified with the FSC standard has more than quadrupled between 2003 and 2018, now covering over 200 million hectares.[7] 12

As a new regulatory form, private sustainability standards operate at the intersection of market-based instruments, regulation by information and voluntary private governance. These schemes enable producers, manufacturers and retailers to set credible signals for their products' sustainability features, and allow consumers to allocate their expenses according to their sustainability preferences. As a private-sector response to the asymmetry of information between producers and consumers, they incentivize the adoption of more sustainable PPMs and may compensate for higher production costs, given consumers' willingness to pay a price surplus for certified products.[8] In line with this, private sustainability standards carry the potential for fostering environmental, social and economic sustainability. 13

At the same time, the limited data that is available on the actual impact of private sustainability standards points to controversial outcomes. These schemes are often associated with considerable market power, which transforms them into factual market access requirements. As compliance and certi- 14

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5 Lernoud et al., "The State of Sustainable Markets 2017: Statistics and Emerging Trends."

6 Bissinger et al., "Linking Voluntary Standards to Sustainable Development Goals."

7 FSC, Annual Report 2018, p. 1; Celebrating and supporting sustainable fisheries: The Marine Stewardship Council Annual Report 2019-20, p. 12 and p. 34.

8 UNCTAD, "UNCTAD, Framework for the Voluntary Sustainability Standards (VSS) Assessment Toolkit, UNCTAD/DITC/TAB/INF/2020/5," 9.

fication entail financial and technical challenges, private sustainability standards often limit international trade, particularly affecting small-scale producers in developing countries. The reported exclusion of these groups from global supply chains is likely to impact global food security, biodiversity and further social and economic sustainability considerations to the detriment.

15 Further concerns relate to standards' transparency and ambitiousness. While some schemes assess the full range of environmental or social impacts throughout the certified products' lifecycle, the majority of these standards focuses on a limited range of aspects and risks to provide an uncomprehensive picture on products' sustainability impact. This lack of transparency seems to affect – in some cases even turn into the negative – standards' contribution to their stated sustainability goals.

16 Part I is dedicated to these questions. Chaper 1 defines the notion of private sustainability standards and introduces a typology based on the nature of the standardizing body, the standards' material requirements and their institutional design. This analysis is set to highlight interrelations between the chosen criteria and standards' sustainability outcomes, trade-restrictiveness as well as their potential WTO law implications. In light of these findings, Chapter 2 explores the controversy surrounding private standards' contribution to sustainability goals and their limiting effect on international trade.

17 In sum, Part I is set to explore the world of private sustainability standards and to uncover key determinants with respect to their sustainability outcomes. The finidings evince the need for increased transparency in the standards' landscape and underline the necessity of extending good practice obligations to private standard-setters.

Chapter 1: The notion of private sustainability standards

I. Private sustainability standards: a status review

The history of private sustainability standards goes back to the 1920s when first local standards of organic agricultural production emerged. In a bottom-up approach, these initiatives were brought together over time, creating a more unified interpretation of organic agriculture. The International Federation of Organic Agriculture Movements (IFOAM), founded in 1972, has played key role in this process. This approach of uniting multiple local standards in a common document characterizes the early stages of private sustainability standards' development and has only been followed in a couple of other instances.[9] 18

In the 1990s, following the example of the FSC[10], an increasing number of private sustainability standards have been launched either in certain sectors or on certain topics – such as sustainable fisheries, rainforest management and socially accountable production.[11] As a common attribute, these initiatives integrate a diverse group of stakeholders in the standard-setting process with the aim of reaching a set of globally applicable criteria of good conduct. In 2002, a core set of these multistakeholder initiatives (MSIs) established today's leading membership organization of non-governmental sustainability standard-setters, the International Social and Environmental Accreditation and Labelling Alliance (ISEAL Alliance).[12] 19

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9 A prominent example is that of the Fairtrade Labelling Organizations International (FLO). Upon its establishment in 1997, it brought together various national initiatives under its umbrella. Steering Committee of the State-of-Knowledge Assessment of Standards and Certification, "Toward Sustainability: The Roles and Limitations of Certification," June 2012, 6.

10 *See*: *infra* fn. 67.

11 The MSC, FLO, the Rainforest Alliance and the Sustainable Agriculture Network are relevant examples of MSIs.

12 *See*: *infra* n. 70. However, some MSIs endorse a corporate and top-down structure, more characteristic for commodity roundtables. For instance, MSC has been launched in 1997 as a partnership between WWF and Unilever to promote and reward sustainable fisheries. As Ponte notes, although it was generally inspired by FSC, "MSC was designed around a much more corporate and top-down structure, and mirrors a skewed

20 In the 2000s a similar but somewhat different approach evolved for specific commodities that have a wide-ranging impact on the environment, such as palm oil, soy and sugar.[13] On the World Wildlife Fund's (WWF) initiative, commodity roundtables – with the collaboration of other non-governmental organizations (NGOs) and in some cases, governments – have been launched, bringing together major global companies that utilize the specific product.[14] Accentuated industry participation is meant to ensure that a significant share of leading global companies join the better-practice initiatives. At the same time, the dominating role of commercial interests gives rise to concern: standards developed by industry-led commodity roundtables may be less rigorous or meaningful.[15] In addition, industry roundtables tend to discriminate against small players and actors from the global south more easily: a feature that may be explained by their exclusive and top-down governance structure.[16]

21 Lastly, since the 1990s a large number of private sustainability standards have been initiated by a range of other actors. These include NGOs, producers' collectives and retailers operating on the domestic or on the international level. These initiatives are as diverse as the standard-setters and their goals: some of them cover a whole sector or sectors and set requirements on a broad range of

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North–South geographic distribution of certification in capture fisheries. Stefano Ponte, "'Roundtabling' Sustainability: Lessons from the Biofuel Industry," *Geoforum* 54 (July 2014): 261–271, doi:10.1016/j.geoforum.2013.07.008.; Stefano Ponte, "The Marine Stewardship Council (MSC) and the Making of a Market for 'Sustainable Fish,'" *Journal of Agrarian Change* 12 (April 2012): 300–315, doi:10.1111/j.1471-0366.2011.00345.x.

13 Steering Committee of the State-of-Knowledge Assessment of Standards and Certification, "Toward Sustainability: The Roles and Limitations of Certification," 8.

14 WWF, Overview of activities, available at <https://www.worldwildlife.org/industries/championing-sustainable-solutions>.

15 *See*, *for instance*: Adrienne Johnson, "Green Governance or Green Grab? The Roundtable on Sustainable Palm Oil (RSPO) and Its Governing Processes in Ecuador," n.d., 22.
For instance, a study mandated by the Swiss Federal Office for the Environment finds that certified soy production in Brazil is *presumably* more sustainable than non-certified cultivation, as all participating farms in the sample refrained from forest clearing. However, weaknesses exist in particular in the areas of biodiversity and habitat connectivity, reduction of pesticide use and diversification of crop rotations. Jan Grenz and Graciele Angnes, "Wirkungsanalyse: Nachhaltigkeit der Schweizer Soja-Importe. Eine Studie im Auftrag des Bundesamtes für Umwelt" (Bundesamt für Umwelt BAFU / BFH-HAFL, 2020).

16 Ponte, "'Roundtabling' Sustainability."

sustainability attributes, while others address a limited number of (product-specific) sustainability issues.[17]

The adoption of private sustainability standards can be measured by reference to different factors, such as the number of standards in place, the number of certified producers or firms, and the coverage of certified production land.[18] With respect to the number of schemes in place, a sharp rise has started in the 1990s and continued until recent years: the spread of voluntary sustainability standards[19] came to a stagnation[20] in 2017, with over 450 standards in place – approximately 60% of them in the sector of agriculture.[21] While the number of sustainability standards has ceased to grow in the last three years, their coverage continued to spread: certification has intensified over the last decade and continues to increase, both in terms of the proportion of certified production 22

17 UNFSS, "3rd Flagship Report of the United Nations Forum on Sustainability Standards, 'Voluntary Sustainability Standards, Trade and Sustainable Development' 2018," 1, accessed February 17, 2020, https://unfss.org/home/flagship-publication/.

18 The recent stagnation with respect to the number of private sustainability standards may be explained by the saturation in certain sectors as well as by their consolidation through mergers and alliances. UNFSS, "4th Flagship Report of the United Nations Forum on Sustainability Standards, 'Scaling up VSS through Sustainable Public Procurement and Trade Policy' 2020," 7, accessed February 17, 2020, https://unfss.org/home/flagship-publication/.

19 The notion of 'voluntary sustainability standards' also includes schemes enacted by governments. Nonetheless, the ITC Standards Map and the Ecolabels Index databases reflect the evolution of private sustainability standards in a reliable manner, given that the number of governmental schemes is very limited. *See*: *infra* n. 25 and fn. 31.

20 The recent stagnation with respect to the number of (private) sustainability standards may be explained by the saturation in certain sectors as well as by their consolidation through mergers and alliances.

21 Ecolabel Index, List of standards, available at: <http://www.ecolabelindex.com/ecolabels/>. The ITC Standards Map, available at <www.standardsmap.org>, lists 273 voluntary sustainability standards at the time of writing. While both databases aim to map all existing voluntary sustainability standards, they use different methods to construct their databases. This explains the divergence in the number of schemes: Ecolabel Index is more comprehensive, as it aims to map all existing voluntary sustainability standards without review requirements, while the ITC Standards Map is more restrictive, as it provides detailed information on standards that has been reviewed by independent experts or by the standard-setter. *See also*: UNFSS, "4th Flagship Report of the United Nations Forum on Sustainability Standards, 'Scaling up VSS through Sustainable Public Procurement and Trade Policy' 2020," 8.

area and market share[22]. For instance, in certain crops the share of certified products is particularly high, in the case of cocoa and bananas it surpasses the 20% mark. Even so, in line with the available data less than 2% of total cropland is certified on a global scale.[23]

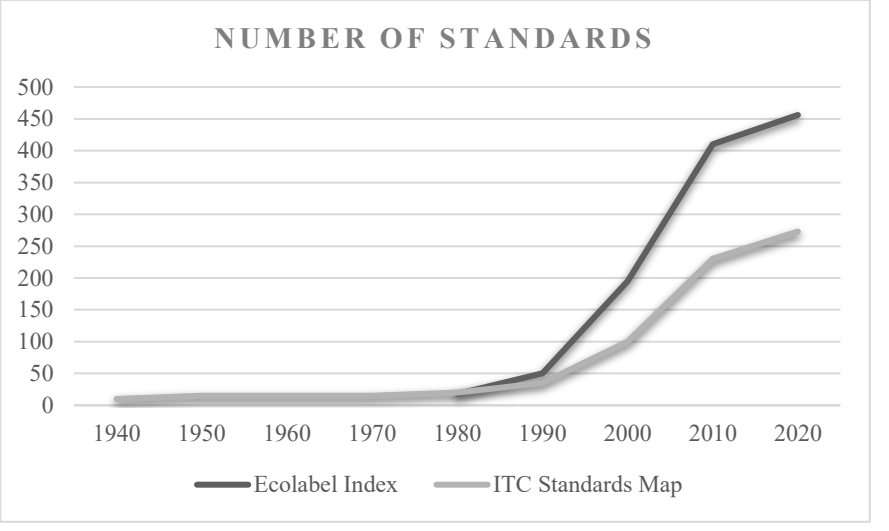

Figure 1: The evolution of sustainability standards

Source: based on UNFSS 4th Flagship Report, Figure 2

23 Certification with sustainability standards is not evenly distributed between countries. Considering the share of agricultural sustainability standards, it does not come by surprise that a high share of agricultural production is connected with more intensive certification. However, there are variations also between countries that produce the same crops. For instance, cocoa and coffee are grown in most tropical countries, but certified production of cocoa is mostly

22 Helga Willer et al., "The State of Sustainability Markets 2019: Statistics and Emerging Trends" (International Trade Centre (ITC), International Institute for Sustainable (IISD), Research Institute of Organic Agriculture (FiBL), October 2019).

23 Helga Willer and Julia Lernoud, *The World of Organic Agriculture. Statistics and Emerging Trends 2019*, ed. Helga Willer and Julia Lernoud (Frick and Bonn: Research Institute of Organic Agriculture FiBL and IFOAM Organics International, 2019), https://orgprints.org/37018/.

concentrated in Côte D'Ivoire, while that of coffee in Brazil, Central America and Colombia.[24] The extent of production (destined for exports) appears to influence, but not to determine the adoption of sustainability standards. Further country-level factors, such as the size of the economy may play a role in this respect. In addition, regarding the presence – referring to the number – of sustainability standards, the country's income level, consumer preferences and export concentration may play a role. [25]

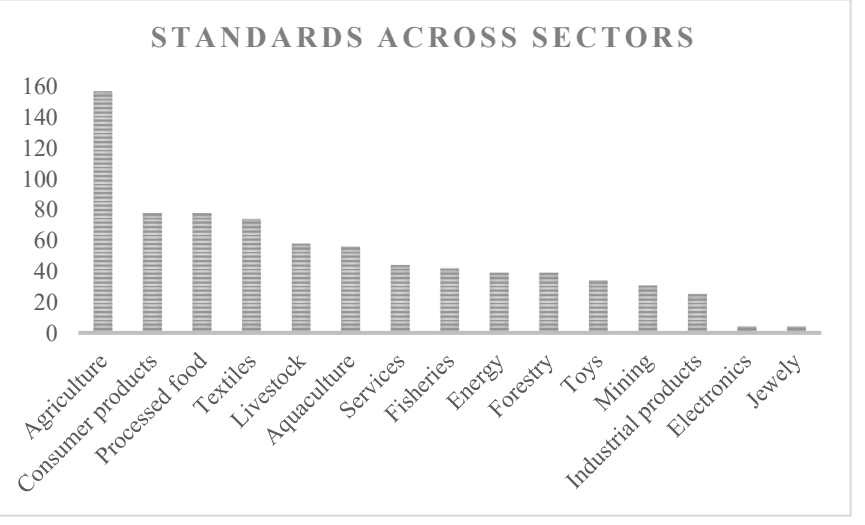

Figure 2: Standards across sectors

Source: based on UNFSS 4th Flagship Report, Figure 3

[24] UNFSS, "4th Flagship Report of the United Nations Forum on Sustainability Standards, 'Scaling up VSS through Sustainable Public Procurement and Trade Policy' 2020," 10.

[25] For instance Japan, the third largest economy in the world, ranks only 35th in the uptake of sustainability standards, while some lower-middle-income countries score high. *See*: UNFSS, 11.

24 Lastly, it is important to note the International Organization for Standardization's (ISO) activity in this field. In parallel to the rise of private sustainability standards, ISO has developed procedural standards on sustainability-related topics, such as environmental declarations and sustainability claims based on self-declarations[26] and has set guidelines for the assessment of compliance with standards.[27] These documents may be relied on by private standard-setters as a signal for their commitments to more consistent, transparent and credible operating practices[28]. However, private sustainability standards have developed and proliferated, for the most part, without state control or oversight[29] and are still not subject to binding rules – despite their numerous shortcomings will be addressed.

II. Definition of private sustainability standards

25 The term 'voluntary sustainability standard' is relatively new and has no single, widely recognized definition. The United Nations Forum on Sustainability Standards (UNFSS), a leading forum set to provide impartial information on voluntary sustainability standards, has proposed the following working definition: "[S]tandards specifying requirements that producers, traders, manufacturers, retailers or service providers may be asked to meet, relating to a wide range of sustainability metrics, including respect for basic human rights, worker health and safety, environmental impacts, community relations, land-use planning and others."[30] In contrast to the notion of private sustainability standards as defined in this work, the UNFSS definition also includes voluntary sustainability standards enacted by governments. However, the number of

26 *See*: *infra* n. 59 f.

27 International Organization for Standardization – International Electro-Technical Commission Directives, ISO/IEC 17065:2012. 'Conformity assessment – Requirements for bodies certifying products, processes and services'.

28 Steering Committee of the State-of-Knowledge Assessment of Standards and Certification, "Toward Sustainability: The Roles and Limitations of Certification," 8.

29 Phillip Paiement, *Transnational Sustainability Laws*, 1st ed. (Cambridge University Press, 2017), 2, doi:10.1017/9781108283694.

30 UNFSS, "1st Flagship Report of the United Nations Forum on Sustainability Standards, 'Voluntary Sustainability Standards: Today's Landscape of Issues & Initiatives to Achieve Public Policy Objectives' 2013," 2013, 4.

governmental norms is very limited as compared to the myriad of private sustainability standards in place.[31] Therefore, UNFSS studies appear as a well-suited source and will be relied on throughout Part I.

The ISEAL Alliance[32] uses the term 'standard system', defined as "the collective of organizations responsible for the activities involved in the implementation of a standard, including standard-setting, capacity building, assurance, labelling, and monitoring and evaluation".[33] This definition refers to standard schemes with an operational governance system, performing functions such as verification of conformity and decision-making. Yet, it covers most non-governmental sustainability standards. Stand-alone standards are the exception, rather than the rule – and even these norms may rely on sustainability schemes developed and monitored by other organizations. 26

The definition of 'private sustainability standards' adopted in this work is based on the general features of sustainability standards. It refers to certification schemes, including those without an integrated operational governance system, which 27

- lay down requirements for common and repeated use, related to sustainable development objectives, such as social, economic or environmental considerations
- are developed, and/or adopted, applied, and monitored by non-governmental entities[34] – although different levels of government involvement is present in many cases, and

31 In this sense Fiorini et al. underline that "[m]ost VSS systems are non-governmental and therefore fall in the category of private standards." Matteo Fiorini et al., "Institutional Design of Voluntary Sustainability Standards Systems: Evidence from a New Database," *Development Policy Review* 37, no. S2 (2019): 3, doi:10.1111/dpr.12379.

32 See: *supra* n. 19 and infra n. 70.

33 ISEAL Alliance, Principles for credible and effective sustainability standards, available at: <https://www.isealalliance.org/sites/default/files/resource/2017-11/ISEAL_Credibility_Principles.pdf>.

34 For the sake of comparison, it is noted that the ISO/IEC Guide 2 requires standards to be adopted by consensus by a body based on membership. International Organization for Standardization – International Electro-Technical Commission, Guide 2, General Terms and Their Definitions Concerning Standardization and Related Activities, Sixth Edition (1991); *See*: *infra* n. 142.

– are voluntary – although retailer's reliance may render them *de facto* mandatory.[35]

28 On a closer look, the above definition exposes the conceptual and terminological challenges surrounding private sustainability standards. Distinguishing government standards from private ones is not a straightforward exercise. In the same vein, we cannot draw a clear line between mandatory and voluntary schemes. Depending on the results of the inquiry, certain 'private sustainability standards' may or may not qualify as a standard in the sense of Annex 1.2 TBT Agreement.[36] Similar difficulties arise in selecting 'international standards' from the mass of other schemes: the categories are not mutually exclusive, and distinctions are often blurred. This ambiguity triggers a number of legal questions explored in Part II. Below, the distinction between governmental and private, respectively mandatory and voluntary schemes is explored – solely for the purposes of defining the notion of 'private sustainability standards'.

1. Governmental versus private standards

29 The term 'private standards' is used to describe schemes that are developed, published or owned by non-governmental organizations, whether those organizations are businesses, non-profit organizations or MSIs.[37] However, non-governmental schemes often show a connection to the government.

30 Firstly, the government may empower private standard-setters to perform certain public functions. For instance, in ISO, countries are represented by their national standardizing bodies. While national standardizing bodies are usually part of the central government, they may be organized as non-governmental entities – depending on political, economic and historical factors within a

35 However, private sustainability standards may serve as a basis for government measures, requiring compliance with the otherwise voluntary schemes. *Cf.*: *infra* n. 114 ff.

36 *See*: *infra* n. 134 ff.

37 UNFSS, "1st Flagship Report of the United Nations Forum on Sustainability Standards, 'Voluntary Sustainability Standards: Today's Landscape of Issues & Initiatives to Achieve Public Policy Objectives' 2013," 15.

country.[38] For instance, the British Standards Institute is established as a private non-profit organization, but recognized as a national standardizing body enacting national standards.[39] Against this background it stands to reason that, even if organized as non-governmental bodies, these entities exercise public functions outsourced by the government. This also holds true for regional groupings of national standardizing bodies, such as the European Committee for Standardization and its sister organizations.[40] As part of the 'New Approach', these organizations are often mandated by the European Commission to develop standards. Moreover, products manufactured in line with their requirements are presumed to fulfil market access requirements, turning these otherwise voluntary schemes into a factual prerequisite to access the internal market, even where a corresponding legal obligation is absent.[41] Secondly, governments may be owners or co-founders of private standard-setting organizations, and/or support them financially. In addition, state organs may partake in 'private' standard-setting activities and/or provide assistance or incentives for the standards' adoption and/or implementation.[42]

These examples illustrate the difficulty in separating governmental and private schemes. As regards terminology, this work includes privately organized schemes under the definition of private sustainability standards – even if they are connected to the government. However, the private nature of the standard-setter cannot be decisive in defining whether a Member's responsibility under 31

38 *Cf.*: The list of standardizing bodies which have accepted the Code of Good Practice, attached to the TBT Agreement, available at: <https://tbtcode.iso.org/sites/wto-tbt/list-of-standardizing-bodies.html>.

39 *See*: Webpage of the British Standards Institute, available at: <https://www.bsigroup.com/en-GB/about-bsi/uk-national-standards-body/what-is-the-national-standards-body/>.

40 Namely the European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (CENELEC) and the European Telecommunications Standards Institute (ETSI). Other regional standards groups exist as well, such as the Pan American Standards Commission (COPANT) in comprising the national standards bodies of the Americas or the Pacific Area Standards Congress (PASC) of the Pacific Rim National Standards Bodies.

41 However, as the CEN-CENELEC website underlines, "*laws and regulations may refer to standards and even make compliance with them compulsory*". *See*: <https://www.cencenelec.eu/standards/DefEN/Pages/default.aspx>.

42 *See*: *infra* n. 301 ff.

WTO law shall be triggered. Rather, it is to be decided on a case-by-case basis, depending on the existence, nature and intensity of a government nexus.[43]

2. Mandatory versus voluntary schemes

32 Private sustainability standards are voluntary in the sense that certification is not a legal requirement for market access. However, the considerable market power associated with a number of schemes renders them *de facto* mandatory to access global value chains.[44] For instance, given consumers preferences attached to the dolphins safe label, the scheme appeared as a factual prerequisite to enter the US market.[45] Similarly, retailers' reliance on certain private sustainability standards may transform these schemes into factual market access requirements.[46]

33 As defined in this work, the notion of private sustainability standards include any schemes which do not serve as a legal market access requirement. However, that there is no requirement to use a particular label in order to place a

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43 Mavroidis and Wolfe understand regulation as a continuum along four stages, when the government i) regulates on their own; ii) delegates regulation to an intergovernmental organization; iii) makes use of some sort of recognized non-governmental standardizing body; iv) leaves space for standardization by private bodies. According to this reading, some sort of connection always exists. *See*: Petros C. Mavroidis and Robert Wolfe, "Private Standards and the WTO: Reclusive No More," *World Trade Review* 16, no. 1 (January 2017): 2, doi:10.1017/S1474745616000379.

44 "OECD Working Party on Agricultural Policies and Markets, 'Private Standard Schemes and Developing Country Access to Global Value Chains: Challenges and Opportunities Emerging from Four Case Studies', AGR/CA/APM(2006)20," n.d. *See also*: UNFSS, "3rd Flagship Report of the United Nations Forum on Sustainability Standards, 'Voluntary Sustainability Standards, Trade and Sustainable Development' 2018," 23.

45 In a WTO dispute concerning this label, Mexico submitted that "*the application of a dolphin-safe label to tuna products has "significant commercial value" in the US market "given that consumers at each consumption stage demand this label in order to sell or buy tuna products*".
However, the label's market relevance was not the reason why the US measures at scrutiny were found to constitute a technical regulation. WTO, United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Produc, No. WT/DS381/R (WTO Panel Report September 15, 2011). *See also*: "Can Eco-Labels Tune a Market? Evidence from Dolphin-Safe Labeling | Elsevier Enhanced Reader," 355, accessed September 29, 2020, doi:10.1006/jeem.2000.1186.

46 *See*: *infra* n. 125.

product on the market does not exclude the possibility that the scheme will qualify as a mandatory norm.[47]

III. Categories of private sustainability standards

Private sustainability standards are developed by a wide range of actors with different key motivations for standard-setting. A basic body of standards for sustainable production has been adopted by MSIs, commodity roundtables and privately organized national, regional and international standardizing bodies, which have their main activity in standardization. In addition, a growing number of non-profit organizations, industry associations and corporations, including both retailers and manufacturers, have enacted their individual sustainability schemes. 34

The divergence of standard-setters is reflected, on the one hand, in the schemes' material requirements. Some standards focus on specific sectors or on specific environmental or social factors, while others cover the full or a partial range of the certified products' environmental impact. On the other hand, the standard-setters' motivation might influence the schemes' institutional design, including aspects of stakeholder participation, cost-sharing arrangements and transparency. 35

This section presents three distinct categorizations of private sustainability standards, based on the i) type of organization adopting the standards; ii) the type of material requirements laid down therein; and iii) the schemes' institutional design. Depending on these attributes, sustainability standards may be treated differently under the relevant WTO Agreements, contribute to sustainable development in different ways and impact various actors alongside the supply chain in different ways. The typology provides a generalized picture of these possible implications. 36

47 Mavroidis and Wolfe understand regulation as a continuum along four stages, when the government i) regulates on their own; ii) delegates regulation to an intergovernmental organization; iii) makes use of some sort of recognized non-governmental standardizing body; iv) leaves space for standardization by private bodies. According to this reading, some sort of connection always exists. *See*: Mavroidis and Wolfe, "Private Standards and the WTO," 2.

1. Nature of the standardizing body

37 The nature of the actor adopting a private sustainability standard is likely to entail legal implications under WTO law. First, the WTO Agreements' applicability will only be triggered if the private action is attributable to a Member or Members, or if the scheme was adopted by a 'recognized' standard-setter. Second, the TBT Agreement divides the world of standards into 'international' and other standards, and, in principle, requires the second group to 'be based' on the first one whenever a 'relevant' document exists.

38 'Attribution' requires the existence of a close nexus between the private action and the government. Pertinent examples include the entrustment of private bodies with public functions, or the existence of government incentives for the privates to adopt the standards at hand – in the context of WTO law, derived from in itself trade-restrictive measures. In contrast, 'recognition' – the WTO law counterpart of 'endorsement' – refers to Members' awareness of and normative support for private bodies' standard-setting activity. As the WTO Agreements are state-to-state treaties, only these instances substantiate their applicability to private sustainability standards.

39 'International standards' are schemes adopted by 'recognized' 'international standardizing bodies'.[48] This definition reveals that the element distinguishing 'international standards' from other schemes is the legal nature of the body adopting them. International standardizing bodies are recognized by the *community* of Members and have, per definition, a membership "*open on a non-discriminatory basis to relevant bodies of at least all WTO Members*"[49] at every stage of a standard's development.[50] In addition, they shall adhere to certain procedural principles concerning transparency, impartiality and consensus, relevance and effectiveness, coherence and consideration for developing country interests. Conversely, compliance with these requirements indicates that "the

48 Appellate Body Report, *US – Tuna II (Mexico)*, para. 363.

49 Annex 1.4 TBT Agreement.

50 WTO, TBT Committee, 'Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement', G/TBT/9, 13 November 2000, hereafter: TBT Committee Decision; Appellate Body Report, *US – Tuna II (*Mexico), para. 374.

body has 'recognized activities in standardization'" and thus, an international standard exists.[51]

Neither 'attribution to' nor 'recognition by' Members can be unambiguously ascribed to certain types of standardizing bodies. Similarly, standard-setters operating on an international scale may or may not exhibit the characteristics of a 'recognized international standardizing body' – the only actors that can adopt 'international standards'. Yet, certain types of standardizing bodies are more likely to show a nexus to the government, or to exhibit the characteristics of an 'international standardizing body'. 40

1.1 National, regional an international standardizing bodies

National standardizing bodies are occasionally, while regional standardizing bodies are generally, organized as private entities.[52] Yet, in most cases both groups exercise public functions outsourced by governments, triggering the WTO Agreements' applicability. On the other hand, national and regional standardizing bodies have, in most cases, a closed membership. Therefore, they cannot enact, in themselves, international standards, but shall use them as a basis for their own norms. 41

On the international level, ISO plays a prominent role in the development of private sustainability standards. Although composed of national standardizing bodies open to all countries, it is an independent non-governmental organization. It aims at consensus-based decisions, interlocking acts by a host of participant agents, including a technical committee, a group of experts and its members. On this account, ISO norms are broadly recognized to meet the requirements of 'international standards'. However, it is worth noting that ISO's definition of consensus is already met when "*sustained opposition to substantial* 42

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51 The extent to which the six principles laid down in the TBT Committee Decision inform the interpretation or application of a term or provision of the TBT Agreement in a specific case depends on the degree to which it 'bears specifically' on the interpretation and application of the respective term or provision. For instance, not required is, that an (international) standard is adopted by consensus. Appellate Body Report, *US – Tuna II (*Mexico), para. 372; Panel Report, *EC – Sardines*, para. 7.90. As regards the consensus rule, the Panel's approach reflects the TBT Agreement's definition of a 'standard', in deviation from the one laid down in the ISO/IEC Guide 2.

52 *See*: *supra* n 30.

issues by any important part of the concerned interests" is absent.[53] This broad definition allows for efficient standard-setting without unanimity. At the same time, norms enacted this way might lack the essential attributes of 'international standards' – a possibility reinforced by the underrepresentation of developing countries in the standard-setting process. Against this background, the question whether a particular ISO standard qualifies as an 'international standard' shall be assessed on a case-by-case basis, considering effective participation in the standard-setting process. If the answer is affirmative, the obligation to use 'relevant international standards' as a basis for governmental regulations renders these *de jure* voluntary norms enforceable upon WTO Members.[54]

43 It is ISO's aim that each of its standard responds to global market needs; its objective is to promote the development of standardization "*with a view to facilitating international exchange of goods and services, to improving the management of business processes, to supporting the dissemination of social and environmental best practices and to developing cooperation in the spheres of intellectual, scientific, technological and economic activity.*"[55] This frames the standard-setting activity of ISO in terms of trade. That commercial effectiveness is end and means of ISO standards may not surprise, as its standard-setting procedures grant central stage to businesses, while the participation of non-technical groups, such as civil society organizations, is very limited.[56]

44 Lindahl opines that, in contrast to ISO, in the framework of national standardization the exercise of state authority and the way it is structured (at least in principle) allows for the balancing of potentially competing interests, namely the facilitation of trade, social justice, the environment, and other interests.[57] While this may be true, one shall not forget that the same exercise of state

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53 ISO defines consensus as „general agreement, characterized by the absence of sustained opposition *to substantial issues* by any *important part of the concerned interests* and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments. NOTE: Consensus need not imply unanimity." *See*: ISO/IEC Directives, Part I: Procedures for the Technical Work, §2.5.6.

54 Hans Lindahl, "ISO Standards and Authoritative Collective Action: Conceptual and Normative Issues," in *The Law, Economics and Politics of International Standardisation*, ed. Panagiotis Delimatsis (Cambridge: Cambridge University Press, 2015), 51–53, doi:10.1017/CBO9781316423240.003.

55 Article 2.1 ISO Statutes (2018).

56 Lindahl, "ISO Standards and Authoritative Collective Action," 49.

57 Lindahl, 54.

authority – met with the aim to protect regional or domestic producers – can allow for the adoption of schemes that put foreign competitors at a disadvantage.

1.2 Multi-stakeholder initiatives

Some of the best-known private sustainability standards with a global reach have been adopted by MSIs, such MSC, FSC or the UTZ – Rainforest Alliance. These organizations involve various actors in their decision-making processes, including participants from the entire supply chain, actors from civil society[58] and, in nearly half of the cases, government representatives.[59] 45

MSIs' aim might be seen as the creation of standards 'for the common good', based on durable compromises or consensus between various members.[60] However, almost half of these organizations over-represent a single stakeholder group in their primary decision-making body, such as companies or civil society. This calls into question whether other stakeholders have a meaningful opportunity to influence the standard-setting process. For instance, in the decision-making bodies of the Roundtable on Sustainable Palm Oil (RSPO) and the Program for Endorsement of Forest Certification (PEFC), the number of industry representatives exceeds the number of stakeholders from any other group by a ratio of 4:1 or greater, accompanied by a lack of qualified 46

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58 Actors alongside the supply-chain include representatives of producers, manufacturers, distributors and consumers, while actors of civil society encompass, *inter alia*, research institutions, indigenous groups and other non-governmental organizations.

59 The primary decision-making body of MSIs active in standard-setting include in 98% of all cases both industry and civil society representatives, in 43% government representatives, in 14% affected populations and in 32% other representatives, such as socially responsible investors and independent consultants. MSI Integrity and the Duke Human Rights Center at the Kenan Institute for Ethics, "The New Regulators? Assessing the Landscape of Multi-Stakeholder Initiatives: Findings from a Database of Transnational Standard-Setting Multi-Stakeholder Initiatives," June 2017, 9, https://msi-database.org/data/The%20New%20Regulators%20-%20MSI%20Database%20Report.pdf.

60 Magnus Boström and Kristina Tamm Hallström, "NGO Power in Global Social and Environmental Standard-Setting," *Global Environmental Politics* 10, no. 4 (November 2010): 37, doi:10.1162/GLEP_a_00030. Sylvaine Poret, "Corporate–NGO Partnerships through Sustainability Labeling Schemes: Motives and Risks," *Sustainability (Basel, Switzerland)* 11, no. 9/ May-1 2019 (2019): 2, doi:10.3390/su11092689.

voting or balanced decision-making structures.[61] Against this background, it appears that depending on MSIs' composition, their aim is may shift from 'the common good' towards less altruistic goals, such as market positioning and increased profitability.[62]

47 While almost half of MSIs have government representatives on board, it is largely unknown how public participation impacts the standard-setting process. Direct government participation appears to be limited in most MSIs. However, representation in itself does not determine the effective decision-making power associated with a group or stakeholders, as the latter is largely defined by power dynamics and decision-making processes within the standards body.[63] Therefore, it shall be examined on a case-by-case basis whether the threshold of attribution is met, taking into account the participating government representatives' effective decision-making power.[64]

48 In either case, broad government participation in MSI's standard-setting activity, or their wide support for the implementation of certain MSI standards[65] signalize the 'recognition' of these initiatives. Furthermore, MSI's declared compliance with the procedural requirements posed on international standardizing bodies likewise indicates that their activities are 'recognized'.[66] Against

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61 MSI Integrity and the Duke Human Rights Center at the Kenan Institute for Ethics, "The New Regulators? Assessing the Landscape of Multi-Stakeholder Initiatives: Findings from a Database of Transnational Standard-Setting Multi-Stakeholder Initiatives," 11.

62 *Cf.*: The motives for Corporate-NGO partnerships. Poret, "Corporate–NGO Partnerships through Sustainability Labeling Schemes," 4f.

63 MSI Integrity and the Duke Human Rights Center at the Kenan Institute for Ethics, "The New Regulators? Assessing the Landscape of Multi-Stakeholder Initiatives: Findings from a Database of Transnational Standard-Setting Multi-Stakeholder Initiatives," 11.

64 MSI Integrity and the Duke Human Rights Center at the Kenan Institute for Ethics, 11.

65 One form of such support is reference to MSI standards in green public procurement – a practice of increasing importance across the globe. Overarching reliance by Members on certain private sustainability standards, such as FSC or PEFC for timber, is a signal of 'recognition'. *Cf*: UNEP, "UNEP, Comparative Analysis of Green Public Procurement and Ecolabelling Programmes in China, Japan, Thailand and the Republic of Korea: Lessons Learned and Common Success Factors," 2017..

66 This might take the form of ISEAL membership, which implies compliance with the ISEAL Codes of Good Practice, including the ISEAL Standard-Setting Code. *See*: *infra*, n. 71.

this background it stands to reason that MSIs in many cases exhibit the characteristics of an 'international standardizing body', given their general openness towards all stakeholders, their transparent working procedures and inclusive decision-making processes.[67]

1.3 Corporations and domestic industry associations

Corporations and domestic industry associations also develop private sustainability standards. Examples include Tesco's 'Nature's Choice' and Coop's 'Naturaplan' standards, as well as the 'IP Suisse' and the 'Bio Suisse' standards managed by the associations of Swiss farmers with integrated and organic production. Arguably, the main motive of these actors in developing and applying their own sustainability schemes is to distinguish their products from those of other retailers, respectively from those of other (foreign) producer groups. This approach provides them with the opportunity to improve their brand reputation and to increase their products' competitive standing. 49

Corporations and domestic industry associations may receive assistance from other private actors or from the public hand in developing and applying their sustainability schemes. Corporations often make use of the support of private standards firms in the development of their own product standards[68], or rely 50

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67 However, a case-by case analysis remains necessary. For instance, in the case of FSC, the answer seems to be affirmative. FSC is a Member of the ISEAL Alliance and one of the most often cited private sustainability standard in public procurement. Further, it is characterized by inclusive and transparent working procedures: FSC is governed by a General Assembly of members divided into environmental, economic and social chambers. The environmental chamber comprises environmental non-profit NGOs, research and academic institutions and individuals with an active interest in environmentally viable forest stewardship, while the economic chamber includes employees, certification bodies and industry and trade associations and consulting companies. Lastly, the social chamber consists of non-profit, non-governmental organizations, indigenous peoples' associations and unions as well as research, academic and technical institutions and individuals that have a demonstrated commitment to socially beneficial forestry. These members are, based on their place of incorporation, divided into Southern and Northern sub-chambers, which hold equal decision-making power. See: Forest Stewardship Council, Governance Strategy, available at: <https://www.fsc.org/en/governance-strategy>.

68 The term private standards firms refers to organizations developing 'custom-made' private (sustainability) standards for corporations. Arkady Kudryavtsev, *Private-Sector Standards as Technical Barriers in International Trade in Goods: In Search of WTO Disciplines* (Oisterwijk, the Netherlands: Wolf Legal Publishers (WLKP), 2015), 40.

completely on the requirements and certification system of more specialized standard-setters.[69] Furthermore, the government may participate in the development of these private schemes, and/or support their implementation – for instance with a view to influence agricultural production methods without resorting to (binding) government measures.

51 These standard-setters will seldom exhibit the characteristics of an international standardizing body given their often limited reach and closed decision-making structures. However, government involvement in and support for their activities might substantiate a 'sufficient nexus' for holding a Member responsible for WTO-inconsistent behavior.

2. Material requirements

52 Private sustainability standards take different approaches with respect to their sustainability claims. Some aim to assess the full range of environmental or social impacts of products, while others focus on a limited range of aspects, such as water use, labour rights or dolphin-friendly fishing practices. In principle, the approach chosen by the standard-setter towards achieving a legitimate policy goals does not affect WTO law compatibility. However, the nature of requirements laid down in standards may alter the range of the applicable WTO Agreements, and have implications on the schemes' contribution to sustainable development targets.

2.1 Processes and production methods

53 Private sustainability standards often lay down requirements related to the way of production. Standards based on processes and production methods (PPMs) are an instrument suited to address activities that affect the global commons, even if the activities take place abroad. However, the technical and financial challenges of compliance can restrict trade, and the transmission of values towards developing countries might be seen as a form of 'eco-imperialism'.[70] Furthermore, PPMs-based private standards can shield domestic producers from import competition, either by leveling the regulatory burden between products of different origin, or by setting requirements specifically tailored at

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69 For instance, the key requirement laid down in the Coop 'Naturaplan' standard is certification with the 'Bio Suisse' directive. *See*: *infra* n. 303 f.

70 Steve Charnovitz, "The Law of Environmental 'PPMs' in the WTO: Debunking the Myth of Illegality," *The Yale Journal of International Law* 27, no. 1 (January 2002): 62.

domestic producers. The trade-restrictive effect of such standards is reinforced when applied across the board at the retailer level. Against this background it may not surprise that WTO Members disagree about the legality of some PPMs-based measures.

Some PPMs alter, leave a trace, are detectable, or are closely related to the final product.[71] For instance, pesticide use leaves residues in the final agricultural products. Therefore, criteria limiting the use of plant protection agents are considered to be product-related. In contrast, whether the wood used for carpeting a table will be regrown later, or was cut down without replacement, will not leave a trace in the furniture – meaning that criteria related to sustainable forest management are considered to be non-product related (NPR).[72] Further examples of NPR-PPMs based requirements include rules on sustainable fishing, or requirements on social sustainability. A number of Members argue that measures which differentiate between products based on NPR-PPMs should be considered inconsistent with the WTO Agreements.[73] However, the WTO Agreements provide no basis for this conclusion.[74] The legality of such standards – whenever attributed to a Member – shall be assessed on a case-by-case basis.[75] 54

71 Charnovitz, 59.

72 WTO information website, available at: <https://www.wto.org/english/tratop_e/envir_e/labelling_e.htm>.

73 *See*: *infra* n. 120f.

74 The term product-related processes and production methods are not mentioned in the covered agreements. However, the TBT Agreement's scope of application appears to be restricted to product-related PPMs and product characteristics. *Cf*: Annex 1.1 and 1.2 TBT Agreement; Gabrielle Marceau, "A Comment on the Appellate Body Report in 'EC-Seal Products' in the Context of the Trade and Environment Debate," *Review of European, Comparative & International Environmental Law* 23, no. 3 (November 2014): 318–328, doi:10.1111/reel.12091.

75 *See*: Kateryna Holzer, *PPM-Based Border Adjustment under WTO Law*, *Carbon-Related Border Adjustment and WTO Law* (Edward Elgar Publishing, 2014), 95 ff., https://www.elgaronline.com/view/9781782549987.00015.xml.; Thomas Cottier and Tetyana Payosova, "Common Concern and the Legitimacy of the WTO in Dealing with Climate Change," in *Cottier, Thomas; Payosova, Tetyana (2016). Common Concern and the Legitimacy of the WTO in Dealing with Climate Change. In: Delimatsis, Panagiotis (Hg.) Research Handbook on Climate Change and Trade Law. Research Handbooks in Climate Law Series (S. 9-30). Cheltenham, Gloucestershire, United Kingdom: Edward Elgar 10.4437/9781783478446*

2.2 Life-cycle analysis versus issue-specific standards

55 Issue-specific standards address individual matters of concern to the public – such as sustainable forest management or fishing – without making general claims about product sustainability. In contrast, life-cycle analysis (LCA) standards measure a range of environmental and/or social and economic impacts captured in products. This latter approach aims to provide a holistic picture of products' sustainability impact without communicating value judgments.[76] Nevertheless, LCA standards are suggested to represent a more effective approach to ecolabeling, as they assist consumers at higher levels of purchase decisions resulting in greater sustainability impacts.[77]

56 LCA standards are also less vulnerable to major shortcomings of issue-specific schemes. Firstly, given their comprehensiveness, these schemes do not carry the risk of promoting products that perform well on one issue, but miss other

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<http://Dx.Doi.Org/10.4437/9781783478446>, ed. Panagiotis Delimatsis (Cheltenham, Gloucestershire, United Kingdom: Edward Elgar, 2016), 9–30, http://www.e-elgar.com/shop/eep/preview/book/isbn/9781783478446/.; Christiane R. Conrad, "Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals," Cambridge International Trade and Economic Law 5 (University Press, 2011).

76 Meaning that LCA standards do not rate the certified products based on their sustainability performance. *See*: Marc Frederik Goedkoop et al., *Product Sustainability Information: State of Play and Way Forward*, 2015, 6.

77 This holds especially true with respect to the environmental dimension. For instance, when planning a meal the decision between animal or vegetable ingredients is located on a higher, the decision between different types of vegetables or grains used for the vegetarian option on a lower level. Higher levels of purchasing decisions have a greater impact on environmental pollution. The amount of meat consumed each year plays a far more important role in the overall environmental impact of a household than the choice between two different types of beef (conventional or organic). *See*: Federal Office for Spatial Development, Federal Office for Spatial Development ARE, "Sustainable Development Strategy 2016-2019," 2016, https://www.are.admin.ch/are/en/home/medien-und-publikationen/publikationen/nachhaltige-entwicklung/strategie-nachhaltige-entwicklung-2016---2019.html., Chapter 4.2.1, Goal 1.4.; Niels Jungbluth, Sybille Büsser, Rolf Frischknecht, Marianne Leuenberger, Matthias Stucki, Feasibility study for environmental product information based on life cycle approaches, Study submitted by the ESU Services Ltd. to the Federal Office for the Environment (2011).

elements with a major influence on sustainability outcomes.[78] Furthermore, LCA schemes do not react to the trade-offs inherent to issue-specific standards. With respect to issue-specific standards, stricter certification conditions are associated with higher sustainability gains, but will likely decrease participation and thus, overall impact.[79] However, more inclusive issue-specific schemes may bring about a limited, or controversial sustainability impact.[80]

The implementation of life cycle assessment is, however, costly, and involves numerous challenges, such as i) the availability of individual, rather than average industry data; ii) difficulties to assess the precise environmental impacts of various products; iii) the inclusion of social and economic impacts as both methods are in their infancy; and the iv) difficulties to convert the results of LCA in a format easily understandable by non-experts.[81] In addition, some LCA standards do not take a holistic life-cycle approach ranging from raw material extraction to end-of-life disposal, but focus on key impacts or life-cycle stages, which can confuse consumers.[82] 57

78 For example the Smithsonian bird-friendly label for coffee sets the golden standard in terms of tree cover and bird habitat preservation, but it does not address other environmental issues, such as water and waste management in the coffee farm. Jason Potts, Jessica van der Meer, and Jaclyn Daitchman, "The State of Sustainability Initiatives Review 2010: Sustainability and Transparency," International Institute for Sustainable Development, 37 ff, accessed October 31, 2020, https://www.iisd.org/publications/state-sustainability-initiatives-review-2010-sustainability-and-transparency..

79 Potts, van der Meer, and Daitchman, 47.

80 For example, a study issued by the Marine Stewardship Council examined 10 fisheries with the aim of identifying benefits of certification. It found that only 8 of the 62 certification conditions were "most likely to induce environmental gains". In the end, it is unclear whether certification brings about a positive environmental impact. Potts, van der Meer, and Daitchman, 47., with reference to David Agnew et al., "Environmental Benefits Resulting from Certification against MSC's Principles and Criteria for Sustainable Fishing," ed. MRAG UK and Marine Stewardship Council, 2006. David Agnew, Chris Grieve, Pia Orr, Graeme Parkes and Nola Barker, Environmental benefits resulting from certification against MSC's Principles and Criteria for Sustainable Fishing, MRAG UK and Marine Stewardship Council (2006).

81 Goedkoop et al., *Product Sustainability Information*, 10–11.

82 Goedkoop et al., 6. In this respect, the ISO 14040 and 14044 standards set important procedural requirements on how to perform LCA, while the ISO 14020, 14021, 14024 and 14025 standards lay down requirements on environmental labelling. ISO 14020 contains general principles; for instance requiring that LCA results should address all

3. Institutional design

58 The institutional design of private sustainability standards is truly diverse. Firstly, we find variations with respect to the actor undertaking conformity assessment. This feature, together with the material requirements laid down in standards, respectively the information promulgated on product labels, are pertinent in determining the relevant international standard. Secondly, different support mechanisms and different cost-sharing arrangements across standards affect the viability of certification, especially for small-scale producers, and carry important implications for the schemes' degree of trade restrictiveness.

3.1 Type of the certification system

59 In most cases, standards do not exist in the abstract, but are the normative component of a certification scheme consisting of three stages: standard-setting, compliance and conformity assessment. Based on the actor performing the conformity assessment, we can distinguish schemes that rely on first-party, second-party or third-party verification. For environmental declarations, ISO has different standards in place depending on the type of declaration and the actor performing conformity assessment. An overview is shown in the table below, and the next paragraphs elaborate on these interactions.

Types of ecolabels according to ISO	
Type I **ISO 14024**	Third-party certified ecolabels with multi-issue claims based on products' life-cycle impacts.
Type II **ISO 14021**	Self-declared claims on single environmental aspects which can be substantiated with evidence.
Type III **ISO 14025 &** **ISO 14026**	Third-party certified environmental claims consisting of quantified product information based on life-cycle impacts.

relevant impact categories, without creating the impression that less important categories are relevant. *See*: Principle 5, ISO 14020:2000, 'Environmental Labels and Declarations – General Principles'.

Single issue schemes	Standards promulgating claims of environmental sustainability not based on products life-cycle impacts and not covered by ISO 14021 – *e.g.* FSC, MSC and organic labels – do not fall under any of the above categories, but are partially covered by ISO 14020, laying down general principles for environmental declarations.

Figure 3: Types of Ecolabels according to ISO

Source: based on ISO, Environmental labels (2019)

a Sustainability claims based on self-declarations

Self-declarations are claims made by producers, suppliers, distributors, retailers , "*or anyone else likely to benefit from such claims*".[83] They encompass both first-party verifications (referring to internal audits by producers or manufacturers) and second-party verifications (when verification is performed by another supply chain actor with an interest in making the claim).[84] While self-declaration implies the absence of independent certification, these schemes do not operate in a legal vacuum. The ISO 14021 standard lays down relevant principles for self-declared environmental statements, so-called Type II ecolabels.[85] ISO 14021 identifies and clarifies a number of commonly used claims, such as 'biodegradable', 'energy-efficient' or 'compostable', and specifies general requirements for the use of terms not already defined in the standard. In addition, it prohibits non-specific statements, such as 'environmentally friendly', 'green' or 'sustainable'. 60

This approach offers producers, manufacturers and retailers with the advantage of increased flexibility in responding to specific consumer requests and market requirements: it enables them to highlight a set of product characteristics in a cost-efficient and non-bureaucratic way. However, the same flexibility carries the risk that the interested actors accentuate properties of secondary relevance, instead of more informative aspects as regards 61

[83] ISO 14021:2016(en) Environmental labels and declarations — Self-declared environmental claims (Type II environmental labelling)

[84] ISO defines first-party verification as verification by bodies that are internal to the organization that provides the claim, and second-party verification as verification by bodies that have a user interest in the claim. *See*: ISO/IEC DIS 17029, Conformity Assessment — General principles and requirements for validation and verification bodies.

[85] With respect to the social and economic dimensions of sustainability, ISO has no product standard in place, but a guidance on organizational social responsibility. *See*: ISO 2600:2010, Guidance on social responsibility.

sustainability. This reality, together with the absence of independent testing, is often seen to reduce the meaningfulness of self-declared issue-specific sustainability claims.[86]

b Sustainability claims certified by third-parties

62 Third party certification is undertaken by bodies 'independent' from the actors making sustainability claims.[87] Depending on the nature of the declarations, third-party certified environmental sustainability standards shall be based on different ISO standards.[88] For standards with multi-issue claims based on products' life-cycle impacts, so-called Type I declarations, ISO 14024, is relevant. It defines rules for selecting product categories, as well as the pertinent environmental criteria and product function characteristics. In addition, it establishes the applicable certification procedures for awarding the label.

63 Type III declarations, referring to standards promulgating quantified product information based on life-cycle impacts, shall follow ISO 14025 and ISO 14026. ISO 14025 defines rules for developing the data which will serve as a basis for the footprint declarations and for assessing compliance. In addition, ISO 14026 provides guidance on how to communicate environmental footprint information in a transparent and robust way. Importantly, issue-specific standards do not fall under any of these categories, but are partially covered by ISO 14020, which specifies general guidelines for environmental declarations.[89]

64 Third-party verification is the most widespread way of conformity assessment, often associated with the highest level of credibility. While this truth may not be contested, it is important to note that third-party verification does not auto-

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86 *See, for instance*: Fabio Iraldo, Rainer Griesshammer, and Walter Kahlenborn, "The Future of Ecolabels," *The International Journal of Life Cycle Assessment* 25, no. 5 (May 2020): 833–839, doi:10.1007/s11367-020-01741-9.; Jason J. Czarnezki, Andrew Homant, and Meghan Jeans, "Greenwashing and Self-Declared Seafood Ecolabels," *Tulane Environmental Law Journal* 28, no. 1 (December 2014): 37–52.

87 ISO defines third-party certification as certification by bodies that are independent of the person or organization that provides the claim and have no user interests in that claim

88 With respect to the social and economic dimensions, *see*: *supra* n. 85.

89 Charles Allison and Anthea Carter, "Study on Different Types of Environmental Labelling (ISO Type II and II\ I Labels): Proposal for an Environmental Labelling Strategy," ed. DG Environment, European Commission, September 2000, IX.

matically guarantee impartiality or absence of conflicts of interest. The standard-setting can be done by any party, including the producer, the retailer or the certification body. In the first two instances, the standard is likely to reflect either the producers', or the retailers' interests. Similarly, if the standard-setter is also in charge of the certification, its wish for high implementation rates or bias against certain types of producers might influence its certification decisions.[90] In addition, a conflict of interest might arise depending on the cost-sharing arrangements in place: standard-setting and conformity assessment bodies that operate on a commercial basis in the marketplace might lose clients if their requirements and procedures are perceived as overly strict.[91]

3.2 Support mechanisms

Certification with private sustainability standards is often considered financially burdensome for producers. Besides costs, technical challenges of compliance may also hinder certification and pose obstacles to market access. To facilitate producers' participation in global supply chains private sustainability schemes often employ support mechanisms. However, support practices across standards vary greatly, which is likely to impact (small) producers' ability to participate in certification programs and thus, international trade. 65

a Cost sharing arrangements

Certification with private sustainability standards is often associated with costs that go beyond 'conventional' production. At the implementation level, improvements in agricultural and/or social practices and the establishment of a management system imply additional expenses. The amount of these costs depends on the degree of behavioral change that is required, and the producers' expertise to make the necessary changes.[92] Implementation costs may create 66

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90 Cora Dankers, *Environmental and Social Standards, Certification and Labelling for Cash Crops*, FAO Commodities and Trade Technical Paper 2 (Rome: FAO, 2003).

91 Dankers.

92 The EurepGAP standard is the predecessor of today's GlobalGAP standard. It was established in 1997, promulgated by the coalition of 13 major European food retailers. Today, its membership is significantly broader, including producers, input suppliers and certification bodies from across the globe. However, its executive power remains at retailers from the global North. Since the mid-2000s, GlobalGAP it is estimated to control over 85% of global retail sales of fresh fruits and vegetables. Peter Dannenberg and Gilbert M. Nduru, "Practices in International Value Chains: The Case of the Kenyan

high entry barriers, especially for small-scale farmers. Moreover, additional expenses are likely to be incurred at the certification level, for instance in the form of conformity assessment and/or membership fees.

67 These costs may be paid by a single participant of the supply chain or be shared amongst different supply chain actors (SCAs). A study based on the ITC Standards Map database indicates that in the majority of cases producers bear all costs, which can perpetuate entry barriers. However, in one quarter of the cases costs are shared between producers and other SCAs, while in a few cases other SCAs cover all costs.[93] Another study on the implementation of the GLOBALGAP standard in Kenya supports this finding. Support for producers with respect to implementation costs varied substantially between exporters, ranging from 100 percent to zero percent, while on average producers paid 36 percent of all implementation costs.[94]

Fruit and Vegetable Chain Beyond the Exclusion Debate," *Tijdschrift Voor Economische En Sociale Geografie* 104, no. 1 (2013): 41–56, doi:https://doi.org/10.1111/j.1467-9663.2012.00719.x.
Food safety lies at the core of this private standard, but it addresses environmental and social considerations, too. However, taking producers' perspective, the challenges surrounding certification with EurepGAP and with private sustainability standards are very similar. Therefore, findings with respect to EurepGAP serve as an important source of information regarding private sustainability standards trade impacts. Graffham et al. find that the costs of introducing EurepGAP are substantial, although they vary considerably. ranging from £100 to £2,800 per farm. Andrew Graffham, Esther Karehu, and James MacGregor, "Impact of EurepGAP on Small-Scale Vegetable Growers in Kenya," n.d., 92. *See also*: Spencer Henson and John Humphrey, "The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes," n.d., 59.

93 Fiorini et al., "Institutional Design of Voluntary Sustainability Standards Systems."

94 However, upon the of EurepGAP 2.1, approximately 60% of smallholders have been dropped by exporters or withdrawn from EurepGAP compliant schemes. The main reason for this was the lack of financial ability to meet implementation and certification costs. Graffham, Karehu, and MacGregor, "Impact of EurepGAP on Small-Scale Vegetable Growers in Kenya."

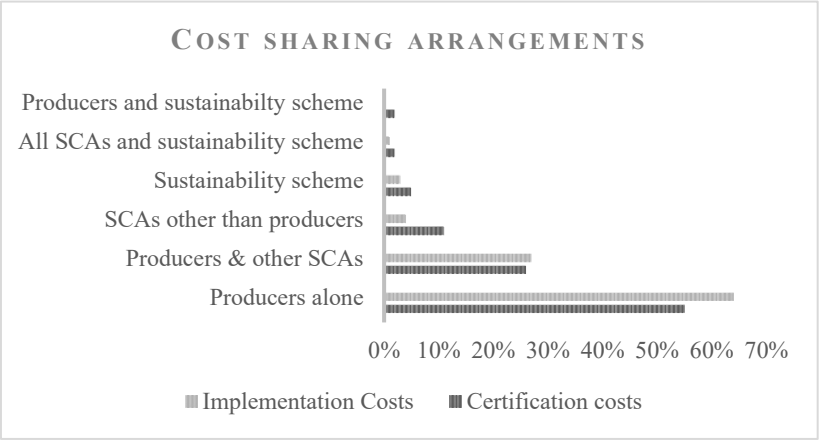

Figure 4: Cost sharing arrangements

Based on Fiorini et al., Institutional Design of Voluntary Standards Systems, p.8

b Technical assistance

Technical challenges of compliance are reported as a potential hinderance to certification with private sustainability standards, rendering access to (foreign) markets more difficult. To facilitate producers' participation in global supply chains and to improve their economic performance, private sustainability schemes often provide technical assistance. This can take various forms, ranging from the provision of guidance documents to assistance in meeting standards' requirements or support to improve production performance. Advance payments of the purchase price and investments into human capital are further forms of technical assistance practiced in a small number of schemes. 68

The level of technical assistance provided across schemes varies greatly. Support through guidance documents is available in nearly all standard systems, and more than half of the schemes provide technical assistance in meeting the standards' requirements. Significantly fewer schemes provide technical assistance to improve productivity, efficiency or market access, and only very few standards offer financial assistance or provide support in form of equipment.[95] 69

[95] Fiorini et al., "Institutional Design of Voluntary Sustainability Standards Systems."

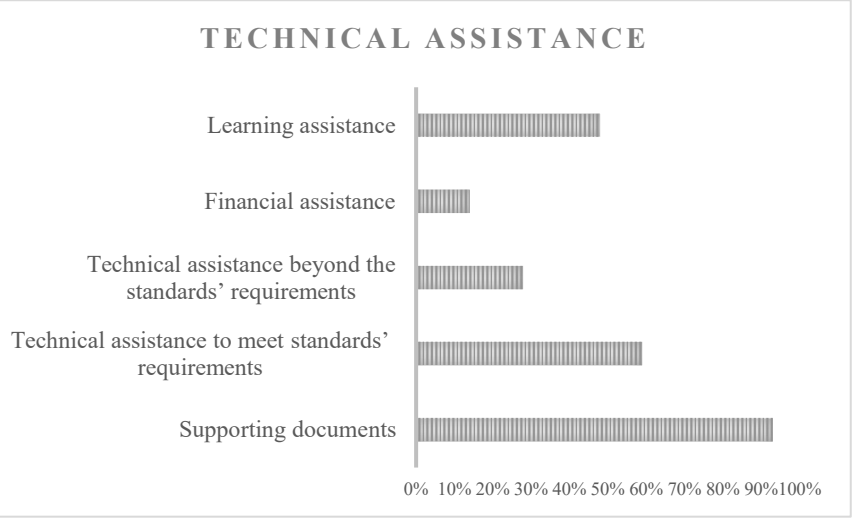

Figure 5: Technical assistance

Based on Fiorini et al., Institutional Design of Voluntary Standards Systems, p.8

c Indicators associated with support mechanisms

70 Support mechanisms in favor of producers appear to be associated with certain features of private sustainability schemes. Firstly, schemes participating in meta-standard frameworks, particularly in the ISEAL Alliance, are much more likely to offer ambitious technical assistance to producers and to share implementation and certification cost between different actors alongside the supply chain.[96] The ISEAL Alliance was founded by eight non-governmental initiatives[97] in 2002. 18 years later the number of members expanded to 23, with 3 more associate members in the process of becoming full members.[98]

71 The majority of the ISEAL Alliance's work programs revolve around the development, implementation and stewardship of internationally applicable

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96 Fiorini et al., 17.

97 These are the FLO, the FSC, the IFOAM, the International Organic Accreditation Services, the Marine Aquarium Council, MSC, the Social Accountability International, RA and the Sustainable Agriculture Network.

98 For the list of members, *see*: https://www.isealalliance.org/community-members?f%5B0%5D=community_status%3A176.

good practice guidelines for sustainability standards systems.[99] The most extensive and high-profile of these work streams culminated in the development of the so-called ISEAL Codes of Good Practice, including the ISEAL Standard-Setting Code.[100] This code builds on the CGP, and to a great extent overlaps with the 'Six Principles' for the development of international standards[101]. Committing to the ISEAL Standard-Setting Code is a requirement of membership to the Alliance and underpins the standard-setting activities of its members.[102]

Secondly, broader stakeholder participation is also positively associated with producer friendliness.[103] Producer's engagement in the management of private sustainability standards, if associated with decision making powers, is observed to enhance producer friendliness. The same holds true for consumer participation – as this group too, indirectly benefits from lower costs for producers. However, this connection is substantially weaker as compared to the impact of ISEAL Membership.[104] Lastly, the location of the standard-setter may also influence producer friendliness. A similar but weaker link is observed with respect to private sustainability standards located in OECD countries, which highlights the importance of the domestic regulatory context.[105] 72

99 Boudewijn Derkx and Pieter Glasbergen, "Elaborating Global Private Meta-Governance: An Inventory in the Realm of Voluntary Sustainability Standards," *Global Environmental Change* 27 (July 2014): 47, doi:10.1016/j.gloenvcha.2014.04.016.

100 The ISEAL Codes of Good Practice further include the ISEAL Assurance Code and the ISEAL Impacts Code. For more information, *see*: https://www.isealalliance.org/credible-sustainability-standards/iseal-codes-good-practice.

101 For the latest version of the Standard-setting Code, *see*: https://www.isealalliance.org/sites/default/files/resource/2017-11/ISEAL_Standard_Setting_Code_v6_Dec_2014.pdf. On the 'Six Principles', *see*: *supra* n. 145 and fn. 275.

102 Therefore, Members of the ISEAL Alliance likely qualify as international standardizing bodies in their respective fields. *See*: *supra*, n. 42 ff.

103 Fiorini et al., "Institutional Design of Voluntary Sustainability Standards Systems," 17.

104 Fiorini et al., 17.

105 Fiorini et al., 17.

73 In sum, the level of producer friendliness and the implied trade-restrictiveness of private sustainability standards is interrelated with the schemes' institutional design. The appropriate domestic regulatory context and increased stakeholder participation, through the inclusion of producers and consumers in decision making, could strengthen private sustainability standards' producer friendliness. Furthermore, the strong association of good practices with the standard-setters membership in ISEAL Alliance – and thus, their compliance with rules based on the TBT Agreement's CGP – highlights the role of meta-regulation and reinforces the call for introducing such rules that will apply to private standard-setters.

Chapter 2: The dichotomy of private sustainability standards

Private sustainability standards lay down requirements that significantly overlap with Sustainable Development Goals (SDGs), and thus carry the potential for fostering environmental, social and economic sustainability objectives in a direct way.[106] Moreover, private sustainability standards may contribute, in an indirect way, to the transfer of knowledge and technology, and help producers to access global supply chains – reducing poverty and strengthening global cooperation for sustainable development.[107] 74

However, as private sustainability standards set out requirements in addition to governmental regulations, certification can pose financial and technical challenges to producers and limit international trade. This effect is taking new dimensions given private sustainability standards' growing market power, particularly affecting small and medium-sized producers in developing countries. These groups may be capital-constrained, while the often prevailing lack of adequate infrastructures and services make compliance difficult and costly. 75

In the words of UNCTAD, "*the trade-offs between different sustainability targets, the cost of their complexity, the capabilities and investment they require and their lack of coordination with existing policies or local priorities can compromise the potential of [sustainability standards] to support SDGs, particularly by excluding smallholder farmers in developing countries from participation in sustainable global value chains.*"[108] This Chapter explores the dichotomy outlined in the citation, arising from trade-offs between ecological, social and economic sustainability goals. Further, it higlihts the potential of trade policy to contribute to sustainable development and identifies approaches that could help positioning (private) sustainability standards as catalyst of the SDGs. 76

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106 Bissinger et al., "Linking Voluntary Standards to Sustainable Development Goals."

107 UNCTAD, "UNCTAD, Framework for the Voluntary Sustainability Standards (VSS) Assessment Toolkit, UNCTAD/DITC/TAB/INF/2020/5."

108 UNCTAD, VI.

I. Private sustainability standards and sustainable development

1. Defining sustainable development

77 The concept of sustainable development has received increasing attention from the 1980s onwards. In response to concerns including rapid population growth and the resulting pressure on natural habitats, biodiversity and the global climate, in 1987 the World Commission on Environment and Development published its report 'Our Common Future', also known as the 'Brundtland Report'.[109] In the Chairman's Foreword, the report, sets up a "*global agenda for change*" by proposing "*long-term environmental strategies for achieving sustainable development*" that takes "*account of the interrelationships between people, resources, environment, and development*".

78 The report considered equity within and across generations as a fundament for meeting essential human needs without compromising the environment. It warned that a "*world in which poverty is endemic will always be prone to ecological and other catastrophes.*" Therefore, the poor shall receive a fair share of the available resources to sustain a 'new growth', while the more affluent shall adopt life-styles within the planet's ecological means – in a process of continuous change, influenced by technological development and institutional changes.[110] On this premise, it defined sustainable development as "*development that meets the need of the present without compromising the ability of future generations to meet their own needs.*"[111]

79 The Brundtland report marks the starting point of continuous action based on the paradigm of sustainability.[112] As a landmark of this process, in 2000 Members of the United Nations adopted the Millennium Development Goals

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109 World Commission on Environment and Development, "Our Common Future", United Nations General Assembly Document A/42/427.

110 "World Commission on Environment and Development, 'Our Common Future', United Nations General Assembly Document A/42/427," n.d., n. 27-30.

111 "Brundtland Report.", n. 27. Thirty years later, this remains the most frequently quoted definition of sustainable development. *See also*: James Bacchus, "The Willing World: Shaping and Sharing a Sustainable Global Prosperity" (Cambridge: University Press, 2018).

112 Whether sustainable development is an objective or a principle is still an open question. In the words of the Appellate Body, "The preamble of the WTO Agreement – which

(MDGs) with the view to reduce extreme poverty by 2015. Building on the MDGs, the 2030 Agenda for Sustainable Development was adopted in 2015, setting out a universally agreed international development agenda. At its heart are the 17 SDGs and their 169 targets, encompassing a wide range of social, economic and environmental goals. The SDGs are not only broader in scope than the MDGs, but also take a more inclusive approach: sustainable development shall rest on the cooperation of public and private actors, such as businesses and civil society.[113] Against this background, the range of actors operating private sustainability standards shall have an important role in shaping our common future in line with the SDGs.

informs not only the GATT 1994, but also the other covered agreements – explicitly acknowledges 'the objective of sustainable development'" *See*: Appellate Body Report, *US – Shrimp*, para. 129. Likewise, by adopting the SDGs, the Member States of the United Nations defined targets to achieve sustainable development. In contrast, the International Law Association's (ILA) Committee on the Role of International Law in Sustainable Natural Resource Management for Development argues that sustainable development is a principle of international law, which implies a "duty of countries to use natural resources in a manner that is sustainable, considering the obligation to undertake impact assessments of plans and projects that might affect sustainable development, transboundary resources management, the sharing of resources in the world interest, and taking into account the interests and needs of future generations." In addition, a 2018 Report of the Committee opines that the extent to which states' sovereignty prevails with regard to natural resources development,or be balanced with duties, may vary depending on whether the resources in question are truly of common global concern, of clearly transboundary nature, or limited to the confines and interests of a single state. *See*: International Law Association, Second Report of the Committee on the Role of International Law in Sustainable Natural Resource Management for Development, Sidney Conference (2018), available at: <https://www.ila-hq.org/index.php/committees>.

113 Bissinger et al., "Linking Voluntary Standards to Sustainable Development Goals."; Norichika Kanie and Frank Biermann, *Governing through Goals : Sustainable Development Goals as Governance Innovation*, Earth System Governance (Cambridge, Massachusetts, London: MIT Press, 2017).

2. Private sustainability standards and sustainable development

80 Private sustainability standards lay down requirements that significantly overlap with SDGs. A report published by the UN Conference on Trade and Development and its partner institutes[114] finds that, in a sample of 232 private sustainability standards, 200 or more are linked to SDG 2 (zero hunger), SDG 8 (decent work and economic growth), SDG 11 (sustainable cities and communities), and SDG 12 (responsible production and consumption).[115]

81 However, there is a considerable geographical variation in the schemes' coverage. For instance, 222 private sustainability standards are linked to SDG 8, many of which operate in North America, in Western Europe and in parts of South America and Asia. But significantly fewer standards cover Africa and the Middle East. Pronounced differences exist also across industry sectors and product fields. The agricultural sector is covered most densely by private sustainability standards; textiles and garments, consumer products and processed foods follow by a significant margin. Within the sectors, some products stand out. As an example, in the sector of agriculture 64 SDG 8-linked standards are in place for soy, 62 for coffee and 60 for cocoa.[116]

82 It is worthwhile to note that in the majority of cases not all targets are covered within SDGs, and some SDGs show only few or no connections to private sustainability standards. For instance, SDG 14 (life below water) has links merely to 61 private sustainability standards, SDG 13 (climate action) to 19, while SDG 17 (partnerships for the goals) is not addressed directly. The low number of standards related to these goals may be explained by their state-centric formulation.[117] However, the amount of standards in itself is not decisive with respect to the sustainability outcomes private initiatives may deliver; the number of private sustainability standards linked to SDGs is not directly linked to positive sustainability outcomes.

83 To the contrary, the proliferation of private sustainability standards may bring about negative side-effects, due to adverse competition between the schemes and increased certification costs. In addition, standards' level of ambition and

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114 Namely the International Trade Centre, the European University Institute, the University of Amsterdam and the German Development Institute.

115 Bissinger et al., "Linking Voluntary Standards to Sustainable Development Goals," 36.

116 Bissinger et al., 34–35.

117 Bissinger et al., ix.

institutional design are at least equally important aspects when assessing the effectiveness of standards with respect to sustainability outcomes. Against this backdrop, the following subsections consider direct and indirect sustainable development implications that private sustainability standards may bring about.

2.1 Direct effects

Sustainability standards can affect the behavior of producers, manufacturers, distributors and consumers in a direct way, enhancing sustainability outcomes. They enable producers, manufacturers and retailers to set credible signals for their products' sustainability features, and allow consumers to allocate their expenses according to their sustainability preferences. As a private-sector responses to the asymmetry of information between producers and consumers, private sustainability standards incentivize the adoption of more sustainable PPMs: given consumers' willingness to pay a price surplus for certified products, they can reimburse SCAs that adopt more sustainable PPMs.[118] 84

However, the direct effect of sustainability standards is subject to much debate. In most cases, data on their actual sustainability impact is available only to a limited extent, and/or suggests a controversial outcome. For instance, a study issued by the Marine Stewardship Council examined 10 fisheries with the aim to identify benefits of certification. Out of 62 certification conditions only 8 were found to most likely induce environmental gains, while the question whether certification brings about an overall positive sustainability impact remained unanswered.[119] 85

On the one hand, this controversy is rooted in the design of standards. Especially issue-specific sustainability standards imply some trade-offs with implications on their direct effect. Firstly, stricter certification conditions can lead to higher sustainability gains, but will likely decrease the participation of producers (with the highest potential for development). Thus, there seems to be a 86

[118] UNCTAD, "UNCTAD, Framework for the Voluntary Sustainability Standards (VSS) Assessment Toolkit, UNCTAD/DITC/TAB/INF/2020/5," 9.

[119] Aaron Cosbey et al., "Environmental Goods and Services Negotiations at the WTO: Lessons from Multilateral Environmental Agreements and Ecolabels for Breaking the Impasse," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 2010), 47, doi:10.2139/ssrn.1730402. with reference to Agnew et al., "Environmental Benefits Resulting from Certification against MSC's Principles and Criteria for Sustainable Fishing."

trade-off between a standard's global impact as a result of its greater inclusiveness and enhanced sustainability gain triggered by more ambitious requirements.[120] Secondly, sustainability standards that focus on a narrow set of issues tend to be more ambitious, are easier to implement and are more likely to achieve their stated goals. It is also easier to assess the achievement of aims set narrowly. Yet, this approach carries the risk that the standard will miss important elements that influence sustainability outcomes.[121] For instance, Dauvergne and Lister see big brand sustainability efforts as engines of increased consumerism, driven by business value – some of them little more than greenwash.[122] Therefore, they call for "*a shared governance approach with strong regulation, to go beyond the important but ultimately incremental brand market improvements.*"[123]

87 On the other hand, the controversy surrounding private sustainability standards' direct effect is related to the trade-offs between different dimensions of sustainability. For instance, environmental objectives might direct the operations of sustainability standards away from the poorest regions of our planet, given high entry barriers and potential difficulties of implementation. In the same vein, compliance and certification may only be accessible for the most productive (large) firms in view of the additional costs of certification, leaving vulnerable producers behind.[124] This logic of business and economic rational-

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120 Cosbey et al., "Environmental Goods and Services Negotiations at the WTO," 47.

121 For example the Smithsonian bird-friendly label for coffee sets the golden standard in terms of tree cover and bird habitat preservation, but it does not address other environmental issues, such as water and waste management in the coffee farm. Cosbey et al., 37 ff.

122 Peter Dauvergne and Jane Lister, "Big Brand Sustainability: Governance Prospects and Environmental Limits," *Global Environmental Change* 22, no. 1 (February 2012): 38, doi:10.1016/j.gloenvcha.2011.10.007.

123 Ibidem, 37.

124 UNFSS, "3rd Flagship Report of the United Nations Forum on Sustainability Standards, 'Voluntary Sustainability Standards, Trade and Sustainable Development' 2018," 7. With reference to Stacy M. Philpott et al., "Field-Testing Ecological and Economic Benefits of Coffee Certification Programs," *Conservation Biology*, 2007, doi:10.1111/j.1523-1739.2007.00728.x.; Catherine Tayleur et al., "Global Coverage of Agricultural Sustainability Standards, and Their Role in Conserving Biodiversity," *Conservation Letters* 10, no. 5 (September 2017): 610–618, doi:10.1111/conl.12314.; *See also*: Clara A. Brandi, "Sustainability Standards and Sustainable Development – Synergies and Trade-Offs of Transnational Governance," *Sustainable Development*

ity renders the system of private sustainability standards less suitable for poverty alleviation – which is, conversely, a prerequisite for environmental sustainability.[125]

2.2 Indirect effects: the role of trade towards achieving sustainable development

Private sustainability standards may not only influence PPMs and consumer decisions in a direct way. They can also bring about changes in market structures and global value chain participation, can incentivize knowledge transfer and can facilitate or hinder international trade. Through these systemic implications – or so-called indirect effects – private sustainability standards can as well affect sustainable development.[126] 88

Leading by example, certified producers and manufacturers may prompt their competitors (or other actors, in other sectors) to adapt more sustainable practices. Increased profitability of production will likely strengthen this demonstration effect and incentivize further investment. In addition – especially if coupled with ambitious technical assistance – sustainability schemes can transfer know-how and develop human capital. Ultimately, these factors can bring about increased productivity and economic growth and thus advance sustainable development.[127] 89

However, the key dimension of indirect effects is trade. Certification with private sustainability standards helps to reinforce or open new market access opportunities. This way, certification facilitates access to global supply chains. Conversely, sustainability standards can also operate as non-tariff barriers to trade and hinder market access. This outcome depends on standards' positive or negative impact on the 'level of discrimination' in destination markets and their effect on transaction costs incurred by SCAs.[128] 90

Private sustainability standards can change the effective level of discrimination between products of different provenance, as SCAs in different countries 91

(Bradford, West Yorkshire, England) 25, no. 1 (January 2017): 25–34, doi:10.1002/sd.1639.

125 *See*: *supra*, n. 78.

126 UNFSS, "3rd Flagship Report of the United Nations Forum on Sustainability Standards, 'Voluntary Sustainability Standards, Trade and Sustainable Development' 2018," 8.

127 UNFSS, 8.

128 UNFSS, 8–9.

do not have equal access to certification. Standard systems tend to devote more resources in countries with a profitable investment climate which will lower access barriers. However, producers in countries which may lack the enabling infrastructure will generally confront higher entry barriers (especially relative to their resources) for attaining certification. This trend puts producers with already poor access to international markets on disadvantage, raising barriers to trade and enfolding an effect similar to that of tariffs or subsidies.[129]

92 In line with the above, private sustainability standards can raise or cut trade costs. Their ultimate effect depends on the ratio of the additional costs incurred and gains from certification. The first element is shaped by the standards' design and the characteristics/initial practices of the producer[130], while the second hinges on the economic benefits of certification, such as expanded demand and productivity improvements associated with greater sustainability. The latter aspect is also influenced by the number of competing sustainability standards. A greater number of schemes implies a higher risk that producers will choose a system that has limited impact on market demand and can act as an incentive for certification with multiple standards, resulting in higher overall costs.[131]

93 Depending on how exactly they impact trade, private sustainability standards can facilitate or hinder sustainable development. This conclusion rests upon the role of international trade as "*an engine for inclusive economic growth and poverty reduction, [which] contributes to the promotion of sustainable development*."[132] Yet, trade in itself is no guarantee for economic growth, nor does economic growth automatically translate into sustainable development outcomes.

94 As the Addis Ababa Action Agenda emphasized, international trade encourages long-term investment in productive capacities, and can promote "*productive employment and decent work, women's empowerment and food security, as well as a reduction in inequality, and contribute to achieving the sustainable development*

129 UNFSS, 9.

130 *See*: *supra*, n. 66.

131 UNFSS, "3rd Flagship Report of the United Nations Forum on Sustainability Standards, 'Voluntary Sustainability Standards, Trade and Sustainable Development' 2018," 9.

132 "United Nations, Addis Ababa Action Agenda of the Third International Conference on Financing for Development, United Nations General Assembly Resolution A/RES/69/313 (2015)," n.d., para. 79.

goals". However it may not in and of itself be sufficient to induce these potential sustainable development effects.[133] In order to translate increased trade into sustainable development, the appropriate supporting policies, infrastructure and an educated work force shall be in place.[134]

II. Trade policy and sustainable development

95 The 2030 Action Agenda portrays international trade as an engine for inclusive economic growth, poverty reduction and sustainable development. Against this background it calls to promote "*a universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable*" multilateral trading system under the WTO.[135] This way it reiterates existing trade liberalization commitments – set to ensure market access on equal terms for all Members, while providing exceptions for important non-trade policy objectives and special and differential treatment for developing countries.[136]

96 With the effective implementation of WTO rules, international trade can be an important source of finance to both the private and the public sector. In low-income developing countries, revenues from international trade are of particular importance: in many cases, exports of goods and services account for 50 per cent or more of these Members' gross domestic product (GDP), while revenues from import and export tariffs and other trade-related measures constitute around 10–25 per cent of total public revenue.[137] Against this background it is of particular importance that private sustainability standards facilitate international trade.

97 At the same time, economic growth that results from international trade may not be distributed evenly on the domestic level. A reason for this is that trade

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133 "United Nations, Addis Ababa Action Agenda of the Third International Conference on Financing for Development, United Nations General Assembly Resolution A/RES/69/313 (2015)," para. 79.

134 "United Nations, Addis Ababa Action Agenda of the Third International Conference on Financing for Development, United Nations General Assembly Resolution A/RES/69/313 (2015)," para. 79.

135 "Transforming Our World: The 2030 Agenda for Sustainable Development, Resolution Adopted by the General Assembly on 25 September 2015, A/RES/70/1," n.d. para.68.

136 "UNCTAD, Trading into Sustainable Development: Trade, Market Access, and the Sustainable Development Goals, UNCTAD/DITC/TAB/2015/3," 2015, 3–4.UNCTAD, p. 3-4

137 UNCTAD, "UNCTAD, Non-Tariff Measures and Sustainable Development Goals: Direct and Indirect Linkages, UNCTAD Policy Brief No. 37, September 2015," 2015, 30.

policy for raising public revenue can cause distortions in the domestic market, with different welfare impacts across society.[138] Therefore, the Addis Ababa Action Agenda calls for 'complementary actions' to accompany trade policy and thus prepare a 'domestic enabling environment'.[139]

98 Accompanying trade policy instruments may include measures that guarantee social protection and fair competition, helping households and businesses to capture economic opportunities arising from trade. [140] In economic sectors where market failure exists, such as the development of small- and medium-sized enterprises, accompanying measures are particularly desired[141] and can ensure that international trade induces a transformation towards more sustainable economies and societies.

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138 The United Nations Development Programme's Human Development Report 2013 elaborates this point using the Human Development Index. The Human Development Index is composed of indicators alongside life expectancy, educational attainment and command over the resources needed for a 'decent living'. The report finds that nearly all states that experienced a significant increase in the trade-to- GDP ratio in 1990–2010 improved their Human Development Index scores on the social dimensions, but the reverse was not true. Over 15 per cent of the states studied exhibited negative changes in their Human Development Index scores despite an increase in the trade-to-GDP ratio. Against this background, whether trade growth contributes to sustainable development is very much context specific. Khalid Malik, *The Rise of the South: Human Progress in a Diverse World*, Human Development Report 2013 (Ney York, NY: United Nations Development Programm, 2013), 44.

139 "United Nations, Addis Ababa Action Agenda of the Third International Conference on Financing for Development, United Nations General Assembly Resolution A/RES/69/313 (2015)," para. 88.

140 Social measures are an important complementary action, given their capability to ensure that gains from trade are distributed across the economy Joseph Francois, Marion Jansen, and Ralf Peters, "Trade Adjustment Costs and Assistance: The Labour Market Dynamics," in *Trade and Employment: From Myths to Facts*, ed. Marion Jansen (ILO-EC, 2011), http://www.ilo.org/employment/areas/trade-and-employment/WCMS_166466/lang--en/index.htm.. Another relevant example is competition policy, which, by preventing or reducing anti-competitive practices, can enhance the participation of small and medium-sized enterprises in trade-related businesses. This way, it can support them in defending their income-generating capacity vis-à-vis enterprises with greater market power. "UNCTAD, Trading into Sustainable Development: Trade, Market Access, and the Sustainable Development Goals, UNCTAD/DITC/TAB/2015/3," 10.

141 L Alan Winters, "Trade and Poverty: Is There a Connection?," *Trade, Income Disparity and Poverty. World Trade Organization*, 2000, 43–69.

In the context of private sustainability standards this implies that, firstly, the international community shall enact rules ensuring that standards are drafted in an open, non-discriminatory and transparent manner, and that appropriate technical and financial assistance is available for (small-scale) producers. This way, private sustainability standards are likely to enhance, rather than hinder international trade.

Second, existing trade rules must be applied in an efficient manner, preserving the commitments of WTO Members and enabling international trade flows. Lastly, Members shall adapt their domestic trade policy to integrate sustainability concerns and to take steps towards establishing a 'domestic enabling environment': private sustainability standards may only enfold their full potential for the benefit of sustainable development if an adequate infrastructure absorbs and redistributes economic gains. 100

Conclusion

101 Private sustainability standards emerged as a new regulatory form. Their number and coverage has sharply increased over the last decades, now pertaining to a considerable proportion of global production and trade.[142] As their requirements significantly overlap with SDGs, they can catalyze environmental, social and economic sustainability objectives. However, to realize this potential, further action is needed.

102 Part I evinced that the nature and ambitiousness of material requirements laid down in private sustainability standards, alongside with the institutional design chosen by standard-setters, crucially shape sustainability impacts. Despite dedicated private-sector responses, substantial uncertainties remain regarding the direct effects of many private sustainability standards. In addition, the lack of technical and financial assistance and the great variation and intersection between schemes reportedly impacts market access to the detriment, and thus limit standards' contribution to sustainable development through indirect channels.

103 In line with the prevailing academic view, a "*central direction and guidance has to be institutionalized*" in order to counter the detrimental impact of private sustainability standards emerging from the uncoordinated actions by a panoply of independently operating actors.[143] By agreeing on appropriate rules for private standard-setters, the international community could counter the threat that unorchestrated practices undermine the ambitiousness of standards, limit international trade and hamper sustainable development.

104 The ISEAL Alliance's example underpins this appeal. Full membership in the organization closely corresponds with a high level of producer friendliness, involving direct support activities to producers, transparent practices and cost

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142 Lernoud et al., "The State of Sustainable Markets 2017: Statistics and Emerging Trends."

143 Derkx and Glasbergen, "Elaborating Global Private Meta-Governance," 41–42. With reference to K Abbott and D Snidal, "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State," in *The Politics of Global Regulation*, ed. Walter Mattli and Ngaire Woods (Princeton University Press, 2009). International Trade Center, "The Interplay of Public and Private Standards," 2011.

sharing arrangements.[144] ISEAL members are recognized as 'credible standards systems' which "*adhere to institutional design principles that include strong mechanisms for impact assessment and a commitment to continuous improvement, among others.*"[145] The performance of ISEAL Members conveys that requiring compliance with the TBT Agreement's principles, as laid down in ISEAL's Codes of Good Practice, is an effective tool towards achieving better sustainability outcomes.

At the WTO, discussions in response to the trade-restrictive effects of private standards have been launched in 2005. Yet, Members' considerable efforts to define the notion of private standards and to create best practice guidelines for non-governmental standard-setters have been largely fruitless. As to date these bodies have no obligation, but a mere opportunity to accept the TBT Agreement's code for standards. Part II is set to uncover the WTO's unleashed potential in regulating private sustainability standards. It introduces the rules laid down in the relevant agreements, and deciphers the instances when they shall come to application. 105

144 Fiorini et al., "Institutional Design of Voluntary Sustainability Standards Systems."

145 In addition, the report notes that „*[t]his aligns with research on the effectiveness of public-private partnerships showing that process design is a key condition for success.*" Bissinger et al., "Linking Voluntary Standards to Sustainable Development Goals," 6.

Part II WTO disciplines on private sustainability standards

Introduction

International trade can contribute to sustainable development. To realize this potential a well-functioning governance of cross-border trade, a further reduction of trade barriers and increased transparency for traders are needed. The WTO has a key role to play in this respect. The multilateral trade agreements restrain Members from adopting trade-restrictive measures, without compromising their right to protect important societal values. In the context of sustainability standards, the TBT Agreement and the GATT are of prime importance. These agreements lay down basic rules of non-discrimination and transparency, with a view to addressing the trade-restrictive effects of certain government measures. 106

The GATT establishes a general legal framework for measures affecting international trade in goods, centered around the principles of non-discrimination, the prohibition of quantitative restrictions, and the notification of adopted measures. In contrast, the TBT Agreement deals specifically and in detail with technical regulations, standards and conformity assessment procedures. Its rules go beyond the disciplines foreseen in the GATT. The TBT Agreement disallows unnecessary obstacles to international trade, provides for enhanced transparency, and promotes the harmonization of national regulation around international standards. Notwithstanding these differences, both the TBT Agreement and the GATT strive at a sensitive balance between ensuring Members' regulatory autonomy to protect legitimate interests and assuring that government measures do not hinder international trade in an undue manner or to an immoderate extent. 107

Private sustainability standards have regulatory effect and affect international trade. However, in themselves, they are not subject to WTO rules. The WTO Agreements are state-to-state treaties, binding only Members under public international law. Therefore the conduct of private standardizing bodies cannot infringe the obligations flowing from the multilateral trade agreements, unless strong ties to the government trigger their applicability, or Members violate an explicit obligation concerning non-governmental entities. The GATT contains no provisions that would directly require Members to take measures with respect to non-governmental entities. Therefore GATT rules are only applicable to private action if a 'sufficient link' to the government exists. Such nexus would also trigger the TBT Agreement's applicability. In addition, it calls 108

upon Members to take reasonably available measures to ensure that non-governmental standardizing bodies comply with the Agreement's principles.

109 The aim of Part II is to assess the WTO Agreements' role in the regulation of private sustainability standards. Chapters 3 and 4 discuss the key disciplines of the TBT Agreement and the GATT, highlighting their potential for the regulation of private sustainability standards. Chapter 3 is dedicated to the TBT Agreement, as it deals specifically and in detail with technical barriers to trade – the reason why WTO adjudicating bodies revise a measure's consistency with this agreement first. Nevertheless, the GATT is cumulatively applicable – as it will be explained below[146] – and is dealt with in Chapter 4. Chapter 5 then establishes the conditions that trigger these Agreements' applicability with respect to private sustainability standards.

110 As similar circumstances would lead to the applicability of the Agreement on Sanitary and Phytosanitary (SPS Agreement), the findings of Chapter 5 are relevant for the great number of private sanitary and phytosanitary standards. These non-governmental measures reportedly affect market access and pose particular challenges to small, developing-country producers.[147] However, given that SPS Agreement's material scope of application is limited to measures for the protection of human, animal or plant life or health from food-borne risks or from risks related to the spread of pests and diseases within the territory of a Member, this work does not deal with its regulatory framework. Lastly, while the TBT Agreement and the GATT only concern goods, private sustainability standards are increasingly applied to services as well. The General Agreement on Trade in Services (GATS) is only applicable to Members' commitments as specified in their schedules. Yet, the findings of Chapter 5 are relevant in the context of GATS, too.

146 *See*: *infra* n. 203.
147 *See*: *infra* n. 338 ff.

Chapter 3: Disciplines of the TBT Agreement

I. Scope of application

The TBT Agreement strives at a balance between Members' right to regulate and the pursuit of trade liberalization. It recognizes the legitimacy of domestic regulations aspiring towards certain non-economic policy objectives, such as the protection of the environment or the improvement of animal welfare. At the same time it requires that non-tariff measures are designed in a non-discriminatory manner and do not create unnecessary obstacles to international trade. In addition, it calls upon Members to harmonize their product regulations around standards set by international standardizing bodies. 111

Central government bodies are the principal group of entities addressed by the Agreement.[148] However, the TBT Agreement's application to non-governmental bodies is of increasing importance. In this respect Members are required to take such reasonable measures as may be available to them to ensure the compliance of non-governmental bodies with the Agreement and to refrain from conduct encouraging them to act in a manner inconsistent with its provisions. In addition, private action may be attributed to a Member and treated as its own if it was induced or encouraged by an in itself trade-restrictive government action, or if the Member has provided support for its implementation.[149] In contrast, private conduct in itself falls outside of the TBT Agreement's scope of application. 112

Thus, depending on the circumstances of the case, private sustainability standards may be covered by the TBT Agreement – as mandatory technical regulations or voluntary standards of governmental or non-governmental bodies – or, in the absence of any government involvement, fall outside of the Agreement's reach. This chapter defines the notion of and explains the differences between technical regulations and standards. Subsequently, it deals with the entities covered by the TBT Agreement. This analysis will allow the proper legal characterization of private sustainability standards under the TBT Agreement. 113

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148 Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, 4th ed. (Cambridge University Press, 2017), 885, doi:10.1017/9781316662496.

149 Appellate Body Reports, *US – COOL*, para. 291.

1. Technical regulations and standards

114 The TBT Agreement is applicable to a 'limited class of measures', namely technical regulations, standards and their conformity assessment procedures.[150] These are defined in Annex 1 to the Agreement.[151]

1.1 Definition of a technical regulation

115 Annex 1.1 TBT Agreement defines a technical regulation as a

"*[d]ocument*[152] *which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.*"

116 This definition was interpreted to require a holistic examination[153] of whether the measure i) is applicable to an identifiable product or group of products, ii) lays down product characteristics or their related production and processing methods (PPMs), including applicable administrative provisions and iii) requires mandatory compliance.[154] A positive finding leads to the applicability of Articles 2 and 3 TBT Agreement. Below, an overview of the single criteria is provided.

a Identifiable products or group of products

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150 Appellate Body Report, *EC – Asbestos*, para. 80.

151 In case a (private) measure does not show the characteristics set out in Annex 1.1 – 1.3 TBT Agreement, it does not fall under its scope of application. *See:* Panel Report, *EC – Asbestos*, para. 8.16. However, if linked to the government, the (private) measure might be examined under the GATT.

152 The use of the word 'document' furnishes (written) information or evidence on any subject and could therefore cover a broad range of instruments *See:* Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 886., with reference to Appellate Body Report, *US – Tuna II (Mexico)*, para. 185. The same term appears also in the definition of a standards; as regards technical regulation, however, further required is that the document have certain "normative content". *See:* Appellate Body Report, *EC – Seal Products*, para. 5.10.

153 Taking into account all relevant circumstances of the case. *See:* Appellate Body Report, *EC – Asbestos*, para. 64.; Appellate Body Report, *US – Tuna II (Mexico)*, para. 188.

154 Appellate Body Report, *EC – Sardines*, para. 176., with reference to Appellate Body Report, *EC – Asbestos*, paras 66–70.

As the Appellate Body stated, "*[a] "technical regulation" must, of course, be applicable to an "identifiable product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible.*"[155] This does not mean, however, that a technical regulation (or standard) must expressly identify the product or products it applies to: the measure's coverage may be derived from the characteristics it regulates.[156] Similarly, this criteria does not preclude a measure covering a broad range of products to be qualified as a technical regulation[157]: even a mandatory labelling requirement imposed on the majority of products sold in a market fulfills this criterion.[158] 117

b Product characteristics or their related PPMs

Product characteristics refer to any objectively definable features of a product. They include both intrinsic qualities, like the composition, size or shape of a product, and extrinsic ones such as its means of identification[159], presentation or appearance.[160] Not conclusive is whether a regulation defines the relevant characteristics in a positive (requiring that the covered products possess them) or in a negative way (providing that the products at hand must not possess them).[161] 118

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155 "*This consideration also underlies the formal obligation, in Article 2.9.2 of the TBT Agreement, for Members to notify other Members, through the WTO Secretariat, "of the products to be covered " by a proposed "technical regulation.*" *See:* Appellate Body Report, *EC – Asbestos*, para. 70., as referred to in Appellate Body Report, *EC – Sardines*, para. 180.

156 Appellate Body Report, *EC – Asbestos*, paras 70 ff.

157 The technical regulation in *EC – Trademarks and Geographical Indications (Australia)* covered all geographical indications and designations of origin regulated by the EU regulation under scrutiny *See:* Panel Reports, *EC – Trademarks and Geographical Indications*, para. 184.

158 Kudryavtsev, *Private-Sector Standards as Technical Barriers in International Trade in Goods*, 246 f., with reference to Tomer Broude et al., "WTO Technical Barriers and SPS Measures," *American Journal of International Law* 102, no. 4 (October 2008): 188, doi:10.2307/20456713.

159 For instance the naming of a product, *e.g.* a rule providing that only a certain species of sardines can be named as "preserved sardines" *See:* Appellate Body Report, *EC – Sardines*, paras 190 f.

160 Appellate Body Report, *EC – Asbestos*, paras 64 and 67.

161 Appellate Body Report, *EC – Asbestos*, para. 69. 'Characteristics' does not imply that a technical regulation necessarily regulates the features of a product in a comprehensive manner; a regulation may concern a single quality. *See:* Appellate Body Report, *EC – Asbestos*, para. 68.

119 However, product characteristics do not encompass features which are not reflected in the product itself. This conclusion is based on the Appellate Body's jurisprudence in *EC – Seal* products. The measure in that case restricted the importation of seal products based on criteria related to the identity of the hunter and the purpose of the hunt. At the panel stage the regulation was qualified as a technical regulation, since it was assumed to lay down product characteristics in the negative form, comparable to the prohibition of asbestos-containing products in *EC–Asbestos*.[162] On appeal, the Appellate Body clarified that unlike the import ban in *EC—Asbestos*, the EU Seal Regime was not concerned with the composition of the covered products (whether they "contain seal as an input") but – read together with its permissive elements – imposed market access conditions based on the mentioned requirements.[163] According to the Appellate Body, there is "*no basis in the text of Annex 1.1 TBT Agreement, or in prior Appellate Body reports, to suggest that [such criteria] could be viewed as product characteristics.*"[164]

120 Sustainability standards, in most cases, require compliance with certain PPMs – often not reflected in the certified product. Applying the TBT Agreement's rules to these schemes would most likely increase the transparency and limit the trade-restrictive effect of sustainability standards. Therefore a number of (developed) states proposed during the Uruguay Round negotiations to extend[165] the Agreement's coverage to include any PPM-based measure.[166] This proposal was met with strong opposition from developing countries, and stamped as an attempt to 'legalize' PPM-based trade restrictions.[167] In the text

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162 Panel Reports, *EC – Seal Products*, para. 7.104.

163 Namely the identity of the hunter and the type and purpose of the hunt. *See:* Appellate Body Report, *EC – Seal Products*, para. 5.45.

164 Appellate Body Report, *EC – Seal Products*, para. 5.45.

165 As compared to the Tokyo Round Standards Code which defined technical regulations and standards solely in terms of product characteristics. *See:* WTO, Committee on Trade and Environment - Committee on Technical Barriers to Trade, "Negotiation History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics, WT/CTE/W/10 - G/TBT/W/11," August 1995, para. 103, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=31257,28532,13465,27519,26653,3970,5515&CurrentCatalogueIdIndex=6&FullTextHash=.

166 WTO, Committee on Trade and Environment - Committee on Technical Barriers to Trade, paras. 120 and 127 f.

167 WTO, Committee on Trade and Environment - Committee on Technical Barriers to Trade, para. 122.

submitted to the Brussels Ministerial Conference the majority of references to PPM-based measures have been dropped, but references in the definitions of Annex 1 TBT Agreement have been retained.[168] In particular, the word 'related' has been inserted before the references to PPMs in Annex 1.1 and 1.2 TBT Agreement in order to exclude measures addressing non-product-related PPMs (NPR-PPMs). However, the term 'related' appeared in the definitions' first sentences only. Mexico, the party initiating the proposal, argued that this feature is of limited relevance as the second sentence is merely 'illustrative of the first'. Other states, prominently the United States, the European Communities and Canada, argued that the second sentence is 'additional to the first', which is evidenced by the use of the term 'also'.[169] Despite the lack of clarity, the definitions have been included in the TBT Agreement's final text.

In view of the increasing importance of sustainability standards, Members repeatedly addressed whether the TBT Agreement does or shall cover eco-labelling schemes (respectively NPR-PPMs). In the Committee on Trade and Environment (CTE)[170], the main forum for debate under the Doha agenda on ecolabels and their regulation in the WTO, a number of Members submitted proposals to clarify the Agreement's scope of application.[171] However, these 121

168 WTO, Committee on Trade and Environment - Committee on Technical Barriers to Trade, para. 144.

169 WTO, Committee on Trade and Environment - Committee on Technical Barriers to Trade, para. 147 ff.

170 WTO, Committee on Technical Barriers to Trade, "Draft Decision on Eco-Labelling Programmes by Canada, WT/CTE/W/38- G/TBT/W/30," July 1996. and WTO, Committee on Trade and Environment - Committee on Technical Barriers to Trade, "Communication from Canada, Elements of a Possible Understanding to the TBT Agreement: Eco-Labelling, WT/CTE/W/21 - G/TBT/W/21," February 1996, ttps://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=7036&CurrentCatalogueIdIndex=0&FullTextHash=1&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True. ; WTO, Committee on Trade and Environment - Committee on Technical Barriers to Trade, "Marking and Labelling Requirements, Submission by Switzerland, WT/ CTE/W/192 - G/TBT/W/162," June 2001, paras. 27–28.; WTO, Committee on Trade and Environment, "Labelling for Environmental Purposes, Submission by the European Communities under Paragraph 32(Iii), WTO, Committee on Trade and Environment, WT/CTE/W/225," March 2003..

171 For example Canada, Switzerland and the European Communities. United Nations Environment Programme, "The Trade and Environmental Effects of Ecolabels: Assess-

proposals were strongly opposed – Canada's valiant 1996 submission, which would have subjected any governmental and non-governmental eco-labelling programme to the TBT Agreement's disciplines was even withdrawn – and failed to bring about a commonly agreed outcome between Members on the TBT Agreement's coverage.[172]

122 The Appellate Body touched upon this question in 2014, and brought some clarity into the PPM-debate. In the *EC – Seal Products* dispute, it interpreted the term 'their related PPMs'. It observed that the disjunctive 'or' before the phrase indicates an additional or alternative role that 'related PPMs' may play vis-à-vis product characteristics".[173] However, the Appellate Body refrained from completing the legal analysis: while in principle able to, it did not rule on whether the EU Seal Regime laid down 'their related processes and production methods'. Thus, the "*important systematic question [concerning the line*

ment and Response," 2005, 28, https://unep.ch/etb/publications/Eco-labelpap141005f.pdf. with reference to WTO, Preparatory Committee for the World Trade Organization, Sub-Committee on Trade and Environment, "Report of the Meeting Held on 15-16 September 1994, PC/SCTE/M/3/Rev.1*," October 1994, para. 2.

172 Marceau and Trachtman underline in this context that "*[…] that the non-application of the TBT Agreement to PPM type regulations would not make such PPM regulations incompatible with WTO law. If the TBT Agreement does not cover or apply to PPM regulations, such regulations will be examined under Articles III/XI of GATT and may find justification under Article XX. To remove PPM type regulations from the coverage of the TBT Agreement would exempt them from the other requirements of the same TBT Agreement, including those on notification, harmonization and mutual recognition. Furthermore, as noted below, unlike the case of the SPS Agreement, the TBT Agreement contains no presumption of compliance with GATT. It would be curious if non-PPM technical regulations were subject to the more stringent requirements of the TBT Agreement, while the less transparent PPM type technical regulations, possibly justified under Article XX of GATT, were not.*" *See:* Gabrielle Marceau and Joel P. Trachtman, "A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade," *Journal of World Trade* 48, no. 2 (January 2014): 861.

173 "*We understand the reference to 'or their related processes and production methods' to indicate that the subject matter of a technical regulation may consist of a process or production method that is related to product characteristics*" *See:* Appellate Body Report, *EC – Seal Products*, para. 5.12.

between] PPMs that fall, and those that do not fall, within the scope of the TBT Agreement" was left open.[174] Certain is after the decisions that 'related PPMs' refer to processes and production methods with a 'sufficient nexus' to the characteristics of a product – and play an additional role to product characteristics.[175]

In sum, a core challenge of today's PPM debate is to determine the meaning of 'related PPMs'. Marceau observes that PPMs which leave a trace or are detectable in the final product are beyond doubt 'related' – but including only such PPMs under the notion of 'related PPMs' would leave their distinction from product characteristics meaningless. In addition, she notes that the language used by the Appellate Body seems to require less than leaving a trace or being physically incorporated into a product and concludes that "*a regulation based on the process and production method (e.g., methods of fishing tuna that do not kill dolphins) that has a nexus, connection or sufficient link with the regulated imported product (e.g., trade of tuna) could be considered a ["related PPM"].*"[176] 123

Uncontroversial is that a "*requirement concerning a product label is a labelling requirement that applies to a product*".[177] This holds true regardless of whether the content of a label refers to characteristics related to the product.[178] Therefore, private sustainability standards which (almost invariably) grant a *label* 124

174 Appellate Body Report, *EC – Seal Products*, para. 5.69. In any case, the decision clarified the important question whether (non-)product-related PPMs fall under the TBT Agreement's scope of application. This was subject to much (academic) debate – not least due to the Parties' disunity during the TBT Agreement's negotiations. *See:* WTO, Committee on Trade and Environment - Committee on Technical Barriers to Trade, "Negotiation History TBT Coverage, WT/CTE/W/10 - G/TBT/W/11," para. 20 f.

175 Which is a prerequisite to regard them as "related" to the characteristics of a product *See:* Appellate Body Report, *EC – Seal Products*, para. 5.12.

176 Marceau, "A Comment on the Appellate Body Report in *EC-Seal Products* in the Context of the Trade and Environment Debate," 327.

177 Panel Reports, *EC – Trademarks and Geographical Indications*, para. 7.449., emphasis added.

178 Accordingly, the TBT Committee's 1997 decision subjects labelling requirements to the obligation on notification "*not dependent upon the kind of information which is provided on the label*". *See:* WTO, Committee on Technical Barriers to Trade, "Decisions and Recommendations Adopted by the Committee since 1 January 1995 - Note by the Secretariat, G/TBT/1/Rev.12," January 2015, 22.; WTO, Committee on Technical Barriers to Trade, "First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade," November 1997, para. 12. *See also*: WTO, Committee on Technical Barriers to Trade, "G/TBT/1/Rev.12," 29.

upon certification, fulfill the second requirement of the three-tier-test as regards the existence of a technical regulation (or standard).

c Mandatory compliance

125 Technical regulations are mandatory, meaning that they "*regulate the 'characteristics' of products in a binding or compulsory fashion"*.[179] Compliance with standards, on the contrary, is voluntary. Still, the proper legal characterization of a measure is not always a 'straightforward exercise'. For instance, both types of measures may contain conditions that must be met in order to use a label. Consequently, this cannot be dispositive for the proper legal characterization of a measure under the TBT Agreement.[180] To this end further elements need to be considered, such as:

"*[…] whether the measure consists of a law or a regulation enacted by a WTO Member, whether it prescribes or prohibits particular conduct, whether it sets out specific requirements that constitute the sole means of addressing a particular matter, and the nature of the matter addressed by the measure."*[181]

126 The Appellate Body observed this in the *US—Tuna II* dispute, when faced with a measure laying down the conditions for labelling tuna as dolphin-safe in the US market. Compliance with the measure was not a precondition for market access. However, the labelling provisions were legally enforceable and covered "*not only the use of the particular label at issue, but more broadly the use of a range of terms for the offering for sale of tuna products, beyond even the specific 'dolphin-safe' appellation*".[182] In result, the measure set out and enforced a single definition of the term "dolphin-safe".

127 The United States took the view that "*a labelling requirement is 'mandatory' within the meaning of Annex 1.1 if there is a requirement to use a particular label in order to place a product for sale on the market.*"[183] This argument was (only) followed by the dissenting opinion on the panel stage. The lone panelist underlined the importance of distinguishing requirements for using a label and the obligation to use a label. In the panelist's view, only the latter one should qualify as a technical regulation. It opined that in the case at hand, the threshold

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179 Appellate Body Report, *EC – Asbestos*, para. 68.
180 Appellate Body Report, *US – Tuna II (Mexico)*, para. 171.
181 Appellate Body Report, *US – Tuna II (Mexico)*, para.188.
182 Appellate Body Report, *US – Tuna II (Mexico)*, para. 180.
183 Appellate Body Report, *US – Tuna II (Mexico)*, para. 181.

would be reached as soon as marketing tuna in the US market without the dolphin-safe label "*becomes impossible, not because it would contradict a mandatory provision in the measures, but because it would be prevented by a factual situation that is sufficiently connected to the actions of the United States*". [184] Thus, the analysis proposed by the lone panelist is two-fold. First, the impossibility of marketing tuna products in the US without the dolphin-safe label must be established. Second, such impossibility must arise from facts sufficiently connected to the US dolphin-safe provisions or to another governmental action.[185]

As Schepel points out, this approach equates the dolphin-safe label with any other label in the market and fails to give sufficient consideration to the actual problem of case – which is not the way the dolphin-safe label shaped consumer preferences, but the way the measure required operators to respond to consumer demand – namely in a single way.[186] Ultimately the measure was qualified as a technical regulation both by the (rest of the) panel and the Appellate Body. 128

With the words of the Appellate Body, 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"*".[187] Rather, for a measure to qualify as 'mandatory in the meaning of Annex 1.1 TBT Agreement, it already suffices that "*any 'producer, importer, exporter, distributor or seller' who wishes to receive a certification needs to comply with a measure*".[188] 129

Thus, a *de jure* voluntary measure will be qualified as a technical regulation if compliance with the scheme becomes mandatory due to governmental support or incentives for its adoption, respectively for its implementation. In assessing 130

184 Panel Report, *US – Tuna II (Mexico)*, para. 7.155.

185 Panel Report, *US – Tuna II (Mexico)*, para. 7.175.

186 Harm Schepel, "Between Standards and Regulation: On the Concept of 'de Facto Mandatory Standards' after Tuna II and Fra.Bo," in *The Law, Economics and Politics of International Standardisation*, ed. Panagiotis Delimatsis (Cambridge: Cambridge University Press, 2015), 211 f, http://www.cambridge.org/be/academic/subjects/law/international-trade-law/law-economics-and-politics-international-standardisation?format=HB.

187 Appellate Body Report, *US – Tuna II (Mexico)*, para. 196.

188 Appellate Body Report, *US – Tuna II (Mexico)*, para. 196.; The fact that the measure covered the *entire field* of what dolphin-safe means appears to have been decisive for in this holistic analysis. *See*: Panagiotis Delimatsis, "Relevant International Standards and Recognized Standardization Bodies under the TBT Agreement," *TILEC Discussion Paper No. 2014-031*, 2014, 13, doi:10.2139/ssrn.2489934.

this question, one needs to consider the measure's legal character, whether it prescribes or prohibits certain conduct, and whether it foresees a single way to achieve its stated goal instead of requiring a certain performance. Also relevant is the nature of the matters addressed by the scheme and the instruments chosen for its implementation. Yet, a positive finding does not depend on whether market access is preconditioned on compliance with the measure's requirements.[189]

131 This approach shall deter Members from avoiding the TBT Agreement's disciplines by using 'soft language' in their legislation – implemented in a *de facto* mandatory fashion.[190] Against this background, government's reliance on a certain private sustainability standard by requiring compliance with (the otherwise voluntary) program may qualify the scheme as a technical regulation under the TBT Agreement. As Schepel puts it, a private sustainability standard like the Forest Stewardship Council (FSC) – despite government protection and endorsement – will not be qualified as a technical regulation as long as the label merely communicates that timber was produced in line with the standard's requirement. The measure's qualification would however change if the government outlaws (all) other competing schemes.[191]

132 Conversely, the finding that a private standard works as *a de facto* condition for market access (and is 'as such' mandatory in order to enter the market) will not imply its characterization as a technical regulation. Private standards devoid of government involvement are not subject to the TBT Agreement's disciplines. This will also appear from the next subsection, which defines the notion of a standard under the TBT Agreement.

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189 Markus Wagner, "International Standards," in *Research Handbook on the WTO and Technical Barriers to Trade*, ed. Tracey Epps and Michael Trebilcock (Edward Elgar Publishing, 2013), 249, doi:10.4337/9780857936721. *See also*: Lukasz Gruszczynski, "Re-Tuning Tuna? Appellate Body Report in US – Tuna II," *European Journal of Risk Regulation* 3, no. 3 (September 2012): 433, doi:10.1017/S1867299X0000235X.

190 Interestingly, as Kudryavtsev notes, the TBT Agreement's predecessor, the Tokyo Round Standards Code, provided in the explanatory note to the definition of a technical regulation that it "*covers also a standard of which the application has been made mandatory not by separate regulation but by virtue of general law*" *See*: Kudryavtsev, *Private-Sector Standards as Technical Barriers in International Trade in Goods*, n. 735., with reference to Annex 1 of the Tokyo Round Agreement on Technical Barriers to Trade (Standards Code).

191 Schepel, "Between Standards and Regulation," 210.

1.2 Definition of a standard

Annex 1.2 TBT Agreement provides that a standard is a: 133

"*[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.*"

This definition has not been interpreted by WTO adjudicators yet. Nevertheless, based on its similarities to Annex 1.1 TBT Agreement, it can be assumed that also standards must be codified in a 'document' and be applicable to identifiable products or group of products.[192] 134

As regards the coverage of Annex 1.2 TBT Agreement, the Appellate Body observed that it "*contains language identical to that found in the second sentence of Annex 1.1", and also standards can deal with ""terminology", "symbols", "packaging", "marking", and "labelling requirements"*".[193] Further, the phrase 'characteristics for products or related processes and production methods' corresponds to the first sentence of Annex 1.1 TBT Agreement, which allows the conclusion that any standards' coverage is restricted to 'related PPMs'.[194] While the wording of Annex 1.2 TBT Agreement might be read to suggest that standards have a broader coverage, including "rules and guidelines" in addition to product characteristics and "related PPMs"[195], it is submitted that these kinds of measures may form part of a technical regulation, too.[196] 135

Both types of measures deal with the same subject matter, and may be enacted by the same types of bodies.[197] In line with this, the nature of compliance is 136

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192 *See*: *supra* fn. 152 and n. 117. *See also*: Kudryavtsev, *Private-Sector Standards as Technical Barriers in International Trade in Goods*, 258.

193 Appellate Body Report, *US – Tuna II (Mexico,)* para. 187.

194 *See*: *supra*, n. 118.

195 Kudryavtsev, *Private-Sector Standards as Technical Barriers in International Trade in Goods*, 260.

196 *See*: *A*ppellate Body Report, *US – Tuna II (Mexico)*, para. 3.

197 Technical regulations can be enacted and applied by central, local or non-governmental bodies, while standards may be enacted by international, regional, central, local or non-governmental standardizing bodies *See*: Annex 1.4-1.8 TBT Agreement.

perceived as the main – if not the sole – difference between standards and technical regulations.[198]

137 However, the wording of Annex 1.2 TBT Agreement mentions two further elements: the criteria laid down in standards must be provided 'for common and repeated use', and the document must be enacted by a 'recognized body'.[199] As underlined below, these elements are of core importance for the legal characterization of private sustainability standards under WTO law.

a Provided for common and repeated use

138 In line with Annex 1.2 TBT Agreement a standard provides certain requirements *for common and repeated use*. Thus, a standard must be developed and adopted with the aim of its wide and multiple application. A narrow interpretation of this definition could exclude private standards applied by retailers and manufacturers for their own commercial activities.[200] However, the Agreement's negotiating history suggests a broader reading. While the Tokyo Standards Code specified in an explanatory note that the definition of standards "*does not cover technical specifications prepared by an individual company for its own production or consumption requirements*", this clarification was not included into Annex 1 TBT Agreement during the Uruguay Round negotiations.[201] The omission supports the finding that retailers' schemes, although

198 Kudryavtsev, *Private-Sector Standards as Technical Barriers in International Trade in Goods*, n. 762.; Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 886. Humberto Zúñiga Schroder, *Harmonization, Equivalence and Mutual Recognition of Standards in WTO Law*, Global Trade Law Series, v. 36 (Alphen aan den Rijn : Frederick, MD: Wolters Kluwer Law & Business ; Distributed in North, Central and South America by Aspen Publishers, Inc, 2011), 9.; Michael Cardwell and Fiona Smith, "Contemporary Problems of Climate Change and the TBT Agreement: Moving beyond Eco-Labelling," in *Research Handbook on the WTO and Technical Barriers to Trade*, ed. Tracey Epps and Michael Trebilcock (Edward Elgar Publishing, 2013), 416, doi:10.4337/9780857936721.

199 Please note that the presence of these elements does not preclude or oppose a measure to be qualified as a technical regulation.

200 Kudryavtsev, *Private-Sector Standards as Technical Barriers in International Trade in Goods*, 260.

201 WTO, Committee on Trade and Environment - Committee on Technical Barriers to Trade, "Negotiation History TBT Coverage, WT/CTE/W/10 - G/TBT/W/11," para. 45 f.

applied by an individual company, may fall under the Agreement's scope of application.[202]

In fact, the Swiss sample analyzed in Part III indicates that retailers' schemes do not differ much from other kinds of private standards.[203] The respective companies occupy a substantial share of the domestic market and tend to apply their corporate (sustainability) schemes to products from a range of suppliers. Further, the requirements laid down in these schemes are most often based on 'regular' international, regional or domestic standards.[204] Thus, retailers' schemes often have a reach comparable to other private (sustainability) standards and require compliance with the same or similar criteria as their 'regular' counterparts. The main difference, as it appears, is that retailers' schemes link the aim of 'common and repeated use' with that of a uniform appearance. However, this gives no reason to exclude them from the TBT Agreement's scope of application. 139

b Approved by a recognized standardizing body

The term standardizing body is not defined in the TBT Agreement. Its Annex 3(B) merely makes clear that standardizing bodies might be central, regional or local governmental, or non-governmental bodies. These terms are defined in Annex 1 TBT Agreement. In the context of private sustainability standards, standards adopted by non-governmental bodies are in the focus of attention. Annex 1.8 TBT Agreement defines a non-governmental body as a "*(b)ody other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.*" 140

As Arcuri points out, this inclusive definition suggests the notion of a standardizing body to encompass – beyond the 'classical' standardizing bodies like 141

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202 The Appellate Body's jurisprudence in *US—Tuna II* also supports this interpretation, as it clarifies that a standardizing body may be engaged in the development of a single standard. *See*: Appellate Body Report, *US – Tuna II (Mexico)*, para. 360.

203 *See*: *infra* n. 301 ff.

204 For example, the Swiss retailer Coop has a market share of approximately 32%. Its organic food label 'Naturaplan' stands for compliance with the Bio Suisse directive, granting priority for domestic products. In contrast, in sectors where the Swiss market is more open, retailers' labels usually refer to established international standards. For instance, the Coop Oecoplan label certifies products' compliance with private international (*e.g.* FSC, GOTS, Ecocert), respectively regional (*e.g.* EU eco-label) or national governmental (*e.g.* Blauer Engel, Österreichisches Umweltzeichen, Nordic Ecolabel) standards. For further examples *see*: n. 301 ff.

ISO, IEC and IOE – entities that set standards only occasionally, since their main activity lies in other businesses. This implies that retailers, distributors or producers' associations may be qualified as a standardizing body under the TBT Agreement.[205] This conclusion is supported both by the provision's context and jurisprudence.

142 The ISO/IEC Guide 2 excludes entities other than 'organizations' from the definition of a standardizing body.[206] Since the introduction to Annex 1 TBT Agreement incorporates the definitions contained in the ISO/IEC Guide 2: 1991 into the Agreement, those of its terms which are defined in the Guide shall have the same meaning. Yet, definitions contained in Annex 1 TBT Agreement prevail over the Guide's definitions to the extent they depart from them.[207]

143 In contrast to the Guide, Annex 1.2 TBT Agreement refers to 'bodies'.[208] This suggests a more comprehensive coverage: while 'organizations' are based on membership of other bodies or individuals, a 'body' is defined as a "*legal or administrative entity that has specific tasks and composition*".[209] Thus, under the TBT Agreement standards may be enacted by a broad range of actors, including retailers and other private standard-setters – irrespective of whether based on the membership of other bodies or individuals.

144 Further, in the *US–Tuna II* case the Appellate Body stated that qualifying an entity as a standardizing body shall not depend on a quantitative benchmark of its standard-setting activity: the development of a single standard would already suffice.[210] Addressing the conditions which must be present for the 'recognition' of (international) standardizing bodies, the Appellate Body also set clear that the TBT Agreement does not require a standardizing body to

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205 Alessandra Arcuri, "The TBT Agreement and Private Standards," in *Research Handbook on the WTO and Technical Barriers to Trade*, ed. Tracey Epps and Michael Trebilcock (Edward Elgar Publishing, 2013), 505, doi:10.4337/9780857936721.

206 "International Organization for Standardization (ISO) / International Electro-Technical Commission (IEC) Guide 2, General Terms and Their Definitions Concerning Standardization and Related Activities, Sixth Edition," 1991. paragraphs 4.1 and 4.2.

207 Appellate Body Report, *US – Tuna II (Mexico)*, paras 353 f.

208 In contrast, the Guide refers to an 'organization', which is defined as a body based on membership of other bodies and individuals. *See*: Appellate Body Report, *US – Tuna II (Mexico)*, para. 355. with reference to "ISO/IEC Guide 2: 1991," para. 4.1 and 4.2. and Panel Report, *US – Tuna II (Mexico)*, para. 7.679.

209 Annex 1.2 TBT Agreement.

210 Appellate Body Report, *US – Tuna II (Mexico)*, para. 360.

have the preparation, approval or adoption of standards as its principal function.[211] Rather, it already suffices that the "*body has recognized activities in standardization*".[212] The question of 'recognition' is dealt with in Chapeter 5.

Setting a mark for more openness and better governance of international standard-setting bodies, in 2000 the TBT Committee agreed on six principles which should be observed by these entities. The 'Six Principles'[213] comprise stipulations on transparency, openness, impartiality, consensus, effectiveness, relevance and coherence. Furthermore, the 2000 TBT Committee Decision draws attention to the importance of addressing the concerns of the developing world. The Appellate Body qualified the decision as a subsequent agreement in the meaning of Article 31(3) a Vienna Convention on the Law of Treaties (VCLT). Therefore, it shall be read together with the TBT Agreement, representing a further aspect of recognition of international standardizing bodies.[214] 145

2. Conformity assessment procedures

The third type of measure covered by the TBT Agreement are conformity assessment procedures. The term is defined in Annex 1.3 TBT Agreement as "*[a]ny procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.*" The ISO definition, in contrast, describes conformity assessment as a "*demonstration that specified requirements relating to a product, process, system, person or body are fulfilled.*" [215] 146

This highlights that the TBT Agreement defines conformity assessment procedures different than defined by the ISO. It connects conformity assessment to the existence of a technical regulation or standard: conformity assessment procedures are only subject to the TBT Agreement's rules if they serve to assess whether the requirements of a document in the sense of Annex 1.1 or 1.2 TBT Agreement are met.[216] With the words of the Panel in *EC – Trademarks and Geographical Indications (Australia)*, "*[the definition in Annex 1.3 TBT* 147

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211 See similar the definition of a 'standards body' under "ISO/IEC Guide 2: 1991," para. 4.3.

212 ISO/IEC Guide 2: 1991, para. 4.3.

213 TBT Committee Decision, *supra* n. 275.

214 Appellate Body Report, *US – Tuna II (Mexico)*, paras. 371-372.

215 "ISO/IEC Guide 2: 1991," para. 12.

216 Panel Reports, *EC – Trademarks and Geographical Indications*, para. 7.512.

Agreement] shows that 'conformity assessment procedures' assess conformity with 'technical regulations' and 'standards'".

148 The explanatory note to Annex 1.3 TBT Agreement provides a non-exhaustive list of conformity assessment procedures which: "*[…] include, inter alia, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.*" The list demonstrates the wide spectrum of activities which may fall under Annex 1.3 TBT Agreement. As Appleton points out, the notion of conformity assessment procedures is not restricted to processes for the testing of certain characteristics of a product or its manufacture. Rather, in line with the definition of 'accreditation' provided by the ISO/IEC Guide 2: 1991[217], the term encompasses the work of national, regional and international accreditation organizations which evaluate the competence of other entities to conduct inspection, certification, testing, etc.[218] While accreditation is seen as a domain reserved for governmental action, or at least requiring governmental support or approval, the activities of (accredited) conformity assessment bodies belong in principle to the private domain.[219]

149 The ISO divides conformity assessment into three categories, depending on the person in charge to carry out the assessment. 'First party' refers to cases when assessment with the requirements (of the respective technical regulation or standard) is carried out by the supplier itself – *e.g.* self-declaration with testing at a self-designated lab. This type of conformity assessment is also known as supplier's declaration of conformity. 'Second party' describes assessment procedures performed by the customer of the product, while "Third party" conformity assessment is conducted by an independent party which is

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217 „*Procedure by which an authoritative body gives formal recognition that a body or person is competent to carry out specific tasks*" *See*: "ISO/IEC Guide 2: 1991," para. 13.7.

218 Arthur Edmond Appleton, "Conformity Assessment Procedures," in *Research Handbook on the WTO and Technical Barriers to Trade*, ed. Tracey Epps and M. J. Trebilcock, Research Handbooks on the WTO (Cheltenham, UK: Edward Elgar, 2013), 85.

219 Zúñiga Schroder, *Harmonization, Equivalence and Mutual Recognition of Standards in WTO Law*, 10.

neither the supplier nor the consumer of the product, but an accredited conformity assessment body in most cases.[220]

Conformity assessment procedures can constitute important trade barriers, especially for small exporters from developing countries. These actors may find conformity assessment requirements in export markets difficult to meet "*due to the limited physical and technical resources for national conformity assessment; insufficient number of accredited laboratories at the national or regional level; high costs as well as legal difficulties in obtaining foreign accreditation; difficulties in establishing internationally recognized accreditation bodies; difficulties in participating in international conformity assessment systems; as well as difficulties related to the implementation of ISO/IEC guides on conformity assessment procedures.*"[221] Against this background the obligations on technical assistance and special and differential treatment are of particular relevance.[222] 150

3. Entities covered by the TBT Agreement

The TBT Agreement is applicable to technical regulations, standards and conformity assessment procedures adopted or applied by the bodies specified in the Agreement.[223] It is primarily addressed to central government bodies. At the same time it explicitly aims to cover local government and non-governmental bodies, and includes rules on regional and international systems. 151

The notion of 'non-governmental body' under the Agreement is broad, capturing any (private) body other than central or local government ones. But the rules applicable to government bodies may as well be relevant to private standards. This is the case when private conduct is attributable to the government (for example on grounds of government incentives provided for a standard's 152

220 Arthur Edmond Appleton, "The Agreement on Technical Barriers to Trade," in *The World Trade Organization: Legal, Economic and Political Analysis*, ed. Patrick F. J. Macrory, Arthur Edmond Appleton, and Michael G. Plummer (New York: Springer, 2005), 87.

221 WTO, Committee on Technical Barriers to Trade, "Problems Faced by Developing Countries in International Stadnards and Conformity Assessment, Discussions of the TBT Committee in the Context of the Second Triennial Review of the TBT Agreement, Report by the Chairman," September 2001, para. 6. *See also*: Recital nine of the TBT Agreement's Preamble.

222 Articles 11 and 12 TBT Agreement. *See: infra* n. 197 f.

223 For the notion of a body, *see*: *supra,* n. 143 f.

adoption or application), or when a Member relies on a private standard as a basis for its own measures.

3.1 Central and local government bodies

153 A ‚central government body' is defined in Annex 1.6 TBT Agreement as the "*[c]entral government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.*"

Notably, Annex 1 TBT Agreement devotes a separate article to define the notion of a 'local government body', describing it as "*[g]overnment other than a central government (e.g. states, provinces, Länder, cantons, municipalities, etc.), its ministries or departments or any body subject to the control of such a government in respect of the activity in question.*"

The distinction makes clear that provincial, municipal and other local authorities – with considerable political, administrative and financial independence in a number of Members – require special consideration, and may not be subjected to the same disciplines as central government bodies. At the same time, both definitions extend to any body controlled by the respective entities. Therefore, it appears that non-governmental or local government bodies controlled by the central government will come under the more stringent disciplines foreseen for those entities.[224]

3.2 Non-governmental bodies

154 A non-governmental body is defined in Annex 1.8 TBT Agreement as a "*[b]ody other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.*" This inclusive definition – formulated in the negative, merely specifying the

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224 This conclusion is in line with the rules of customary international law on state responsibility. *Cf.:* Articles 4, 5 and 8 International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc. A/56/10" (Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected, 2001), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

bodies that fall outside of its scope – recognizes the vital role of privately organized standardizing institutes[225] in the development and implementation of technical standards and regulations.

There is, however, much debate on whether NGOs and commercial enterprises may qualify as a non-governmental standardizing body in the meaning of Article 4 and Annex 3.B TBT Agreement. One core legal question is whether non-governmental bodies *must* possess "*legal power to enforce a technical regulation*". Mavroidis and Wolfe argue that 'legal power' appears as a key term: "*[u]nless a government has conferred (transferred) legal power to a non-governmental standardizing body, it incurs no obligation with respect to its actions.*"[226] 155

However, Appleton notes that the wording of Annex 1.8 TBT Agreement only allows an interpretation that excludes commercial enterprises and NGOs from the Agreement's coverage if one reads a comma into the second clause (before "which").[227] This reinforces the reading of Bohanes and Sandford who see the express reference to non-governmental bodies that have the 'legal power to enforce a technical regulation' as an indication that the term 'non-governmental bodies' a priori includes entities that lack such legal power. With the words of Bohanes and Sandford: "*[the language of Annex 1.8 TBT Agreement] shows that, when the drafters envisaged a situation in which WTO Members entrust non-governmental entities with the performance of certain tasks, they described that situation explicitly. It is therefore not convincing to read these elements implicitly into the term "non-governmental entities". Indeed, such implicit reading is contrary to the Appellate Body's emphasis that a treaty interpreter should not read words into a treaty "that are not there".*"[228] 156

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225 Non-governmental bodies include, for example, ANSI (the American National Standards Institute) and CEN (the European Committee for Standardization), and arguably NGOs such as the Forest Stewardship Council (FSC) and commercial enterprises setting and applying various (sustainability) standards.

226 Mavroidis and Wolfe, "Private Standards and the WTO," 9.

227 Appleton opines that the second clause would be otherwise meaningless, but submits that this interpretation is preferable (over the one which leaves the Agreement's terms void), but limits the Agreement's scope of application. Arthur Edmond Appleton, "Supermarket Labels and the TBT Agreement: 'Mind the Gap,'" *Business Law Brief* Fall 2007 (n.d.): 12.

228 Bohanes and Sandford, "The (Untapped) Potential of WTO Rules to Discipline Private Trade-Restrictive Conduct," 38. with reference to Appellate Body Report*, India – Patents (US)*, para. 45; Appellate Body Report, *US – Line Pipe,* para. 250.

Against this background it appears that Annex 1.8 TBT Agreement devotes special attention to instances where the government delegates regulatory or enforcement power to a non-governmental body, rather than to limit the Agreement's scope of application to these cases. Paying increased attention to such schemes seems appropriate: a non-governmental body can arguably impose mandatory technical requirements only if the government has delegated regulatory or enforcement power to it.[229] In those instances the scheme may not only qualify as a TBT measure but will be directly attributable to the government.

158 In sum, this subsection finds that NGOs, commercial enterprises and other non-governmental bodies active in standardization may enact 'standards' – even if they do not possess legal power to enforce their schemes. Nonetheless, this reading implies no imbalance between Members' obligations and the ambit of their control: their 'recognition' of the non-governmental body's standard-setting activity is required for the TBT Agreement's application.[230]

3.3 Regional bodies or systems

159 A regional body or systems is defined in Annex 1.5 TBT Agreement as one with membership "*open to the relevant bodies of only some of the Members*".[231] The Agreement leaves the term 'relevant bodies' undefined. It is an open question whether it comprises only those entities whose participation in the regional body have been authorized by the government, or any 'recognized' standard-setting body *of a Member*. A systematic reading suggests this definition to comprise central government standardizing bodies and all local and non-governmental standardizing bodies within the territory of a Member.[232]

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229 Or if the government subsequently mandates compliance with the rule initially developed by the non-governmental body. Bohanes and Sandford, 38.

230 *See*: *supra* n. 288.

231 A limited obligation with respect to conformity assessment procedures applies to international bodies or system, as laid down in Article 9 TBT. An international body or system is, in line with Annex 1.4 TBT Agreement, "*open to the relevant bodies of at least all Members.*"

232 *Cf.*: Article 4.1 TBT Agreement. This reading is also supported by Article XXIV:12 GATT which calls upon Members to take "*such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.*" In contrast, Arkady notes that

II. Main obligations under the TBT Agreement

The development, adoption and application of technical regulations, standards and conformity assessment procedures are subject to common principles under the TBT Agreement.[233] These include non-discrimination, the prohibition of unnecessary obstacles to international trade, transparency obligations and provisions on special and differential treatment. These rules, with counterparts under the GATT, are complemented by specific 'TBT obligations', such as the use of relevant international standards as a basis for TBT measures and provisions on equivalence and mutual recognition.[234] 160

For technical regulations the applicable obligations are set out in the Agreement's main body. Article 2 TBT Agreement deals with technical regulations enacted by central government bodies, while Article 3 focuses on measures of local government and non-governmental bodies. The obligations on standards are contained in the Code of Good Practice (CGP), attached to the TBT in its Annex 3. In addition, Article 4.1 TBT Agreement calls upon Members to observe their standardizing bodies' compliance with the CGP.[235] 161

By virtue of Article 15.5 TBT Agreement the CGP is equally binding as the main Agreement's main text. Arguably, it is attached in a separate annex because it is mainly addressed to self-regulated and self-governed standardizing 162

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the definition requiring relevant bodies to be 'those of WTO Members' indicates a narrow interpretation. Kudryavtsev, *Private-Sector Standards as Technical Barriers in International Trade in Goods*, 291.

233 Delimatsis, "Relevant International Standards and Recognized Standardization Bodies under the TBT Agreement," 166. with reference to Appleton, "The Agreement on Technical Barriers to Trade," 388.

234 Note that TBT obligations on transparency go beyond those enshrined by the GATT. *See*: *infra* n. 190 ff.

235 Article 4.1 TBT Agreement concerns, one the one hand, central government standardizing bodies. Governments have full control over these entities, therefore their compliance with the CGP can and must be ensured. On the other hand, Article 4.1 TBT Agreement deals with local government and non-governmental standardizing bodies within Members' territories, as well as regional standardizing bodies of which they (or one or more bodies within their territories) are members. Often cases governments have limited control over these bodies. Therefore, Members have no obligation to ensure their compliance with the CGP, but merely to take the measures reasonably available to them to this end. In addition, Members shall not take measures which would require or encourage any of the covered standardizing bodies to act in a manner inconsistent with the CGP.

bodies, composed of private parties or of a multiplicity of public and private stakeholders. For this reason the TBT Agreement foresees the possibility for standardizing bodies established in the territory of any Member to accept the CGP.[236] Article 4.2 TBT Agreement provides for a presumption of compliance for standardizing bodies which have accepted and comply with the CGP. However, the obligations under Article 4.1 TBT Agreement remain intact regardless of whether recognized standardizing bodies accepted the CGP.

163 The corresponding obligations for conformity assessment procedures are set out in Articles 5-9 TBT Agreement.[237] In this section too, each provision has its own scope of application. Articles 5-6 TBT Agreement apply to conformity assessment procedures and their recognition by central government bodies, while Articles 7-8 TBT Agreement deal with conformity assessment procedures of local and non-governmental bodies. Lastly, Article 9 TBT Agreement concerns regional and international systems.

1.1 Non-discriminatory treatment of like products

164 The prohibition of discriminatory treatment between competing products of different origin is one of the core principles of WTO law.[238] The most-favoured nation treatment obligation (MFN) prohibits discrimination among products imported from different countries, while the national treatment obligation (NT) prohibits discrimination between domestic and imported products.[239] These principles are laid down in Article 2.1 TBT Agreement and in

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236 The CGP is open to acceptance by any standardizing body within the territory of a WTO Member, whether at the central, local or non-governmental level. Regional governmental or non-governmental standardizing bodies can also accede to the CGP. The ISO/IEC information center keeps track of such acceptances; the up-to-date list is available at https://tbtcode.iso.org/sites/wto-tbt/list-of-standardizing-bodies.html.

237 The title of this section 'Conformity with Technical Regulations and Standards' makes clear that conformity assessment procedures apply to technical regulations and standards likewise.

238 The Preamble of the WTO Agreements identifies the 'elimination of discriminatory treatment in international trade relations' as one of the two main means in attaining the objectives of the WTO. *See also*: Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 305 f.

239 In both cases, the obligations apply insofar the products' likeness is established. *See, for example*: Appellate Body Report, *US – COOL*, para. 267. Under the GATT, the NT and MFN obligations with regard to like products are laid down in separate provisions. *See infra* n. 208 ff.

paragraph D CGP as regards the preparation, adoption and application of technical regulations and standards. The corresponding obligation for conformity assessment procedures is laid down in Article 5.1.1 TBT Agreement.

a Likeness

The rationale of non-discrimination disciplines under WTO law is to secure the competitive opportunities for products that compete in the marketplace. The test of likeness serves to define the scope of products that should be compared when establishing whether discrimination occurs. In core, it is a determination about the nature and extent of the competitive relationship between the products under scrutiny.[240] The 'traditional' criteria of likeness, as established in the Report of the Working Party on *Border Tax Adjustments,* consist of (i) the properties, nature and quality; (ii) the end-uses; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behavior – in respect of the products; and (iv) the product's tariff classification.[241] 165

In cases where origin is the sole distinguishing criterion between products, these may be treated as 'like' without further examining various likeness criteria.[242] At the same time, taking into account a distinction based on the regulatory objective of a technical regulation or standard would be misplaced in determining likeness.[243] Such considerations shall form part of the less favourable treatment analysis. Nevertheless, regulatory concerns may be relevant for 166

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240 Appellate Body Report, *US – Clove Cigarettes*, paras 111 and 116; as the concept of treatment no less favourable is expressed with the same words in Article III:4 GATT and Article 2.1 TBT Agreement, the likeness analysis under the TBT Agreement is informed by GATT jurisprudence. *See*: *ibid*, para. 111.

241 Working Party Report, Border Tax Adjustments, L/3464, BISD18S/97. The fourth criterion, tariff classification, was not mentioned by the Working Party on *Border Tax Adjustments*, but was included by subsequent panels. *See for instance*: GATT Panel Report, *EEC – Animal Proteins*, para. 4.2; and GATT Panel Report, *Japan – Alcoholic Beverages I*, para. 5.6; Appellate Body Report, *EC – Asbestos*, paras 101-103.

242 Panel Report, *India - Autos*, para. 7.174; Panel Report, *Canada – Wheat Exports and Grain Imports,* fn. 246 to para. 6.164.

243 "*If products that are in a sufficiently strong competitive relationship to be considered like are excluded from the group of like products on the basis of a measure's regulatory purposes, such products would not be compared in order to ascertain whether less favourable treatment has been accorded to imported products.*" Appellate Body Report, *US –Clove Cigarettes*, para.116.

the purposes of likeness to the extent they have an impact on the competitive relationship between and among the products.[244]

167 The likeness of two products may only be determined in a case-by-case analysis, tied to the marketplace of a specific Member. Also the scope of 'likeness' depends on the specific provision applied.[245] Still, one can draw the general conclusion that in most cases, (certified) products that comply with the requirements of a private sustainability standard are 'like' their conventional counterparts.[246]

b Less favourable treatment

168 Less favourable treatment refers to a *de jure* or *de facto* detrimental impact on the competitive opportunities of like products. In line with this, Article 2.1 TBT Agreement encompasses not only 'origin-based' measures (for example, a sustainability standard that certifies only domestic products), but also measures which, on their face, appear origin-neutral but in practice or in fact are discriminatory (for example, a standard that requires certain fishing techniques applied by country A to demonstrate compliance, while fishing techniques applied by country B that achieve equal 'sustainability outcomes' are not accepted). At the same time, a mere formal difference in treatment is not sufficient to establish discrimination, as long as the conditions of competition

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244 Appellate Body Report, *US – Clove Cigarettes*, paras 116 and 119.

245 With the words of the Appellate Body, "*[t]he accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determines by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply*." *See*: Appellate Body Report, *Japan-Alcoholic Beverages*, para. 114.

246 The end use and tariff classification of products prepared with different production methods (for example, organic and conventional) will not differ in any given market. While depending on the specific requirements of the standard, physical characteristics may (pesticides residues in conventionally produced agricultural products) or may not (bird-friendly coffee) differ, in most cases this will not affect the products' quality or nature as such, nor is it reasonable to assume that consumer preferences (attached to products certified with voluntary sustainability standards) will change the outcome of the likeness analysis.

between two groups of like products are not affected.[247] Conversely, a measure's detrimental impact may be established without analyzing its actual trade effects.[248]

As Van den Bossche and Zdouc note, "*[…] ever more sophisticated legislators and/or regulators of WTO Members are more likely to adopt measures that constitute de facto discrimination*"[249], rather than to apply origin-based measures that would constitute clear cases of protectionist discrimination. On the other hand, 'private' standards in themselves may fulfil the same function. Members may be tempted to curtain breaches of the WTO Agreements by supporting, incentivizing or instructing private or privately organized standard-setters to adopt schemes that favour domestic products – even in an open, (otherwise) unacceptable manner.[250] 169

By their very nature, technical regulations and standards establish distinctions between products according to their characteristics or (related) processes and production methods. Keeping in mind the TBT Agreement's objective to strike a balance between trade liberalization and Member's right to regulate, Article 2.1 TBT Agreement and paragraph D of the CGP are not to be read as a general prohibition of less favourable treatment.[251] Rather, they permit a detrimental impact to occur if it stems exclusively from a legitimate policy distinction.[252] This reading is also supported by the context of Article 2.2 TBT Agreement, which suggests that 'obstacles to international trade' may be permitted insofar as they are not 'more trade-restrictive than necessary to fulfil a legitimate objective'.[253] There is no jurisprudence on Article 5.1.1 TBT Agreement. How- 170

247 Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16, with reference to Panel Report, *US – Superfund*, para. 5.1.9 and Panel Report, *US – Section 337*, para. 5.11).

248 Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 134.

249 Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 309.

250 For a Swiss example *see, for instance*: *infra* n. 303.

251 Appellate Body Report, *US – Clove Cigarettes*, para. 175. For a comparison with the non-discrimination obligation under the GATT, *see*: *infra* n. 208 ff.

252 Appellate Body Report, *US – Clove Cigarettes*, paras. 120, 174 and 94-95; Paragraph D and E of the CGP contain no authorization for standards to aim at legitimate policy objectives, nor a list similar to the one contained in Article 2.2 TBT. Still, in line with the sixth recital of the preamble to the TBT Agreement, the same considerations apply to standards.

253 Appellate Body Report, *US – Clove Cigarettes*, para. 171. It is worth to note that a single TBT measure may pursue, both as a factual and as a legal matter, more than one policy objective. *See*: Appellate Body Report, *US – Tuna II (Mexico)*, para. 7.407.

ever, in light of the sixth recital which counterbalances Members' right to regulate and the desire to avoid unnecessary obstacles to international trade, the provision shall be interpreted to the same end.[254]

171 Article 2.2 TBT Agreement provides a non-exhaustive list of legitimate policy goals. The list includes the protection of human, animal and plant life and health, the protection of the environment and the prevention of deceptive practices. For instance, the objective of preventing consumers of tuna products from being deceived by false dolphin-safe allegations is a legitimate policy objective. Similarly, a measure aimed at the protection of dolphins, even if not an endangered species, may be understood to protect animal life or health or the environment.[255] Also consumer information on origin is recognized as a legitimate objective. Therefore discriminating (or otherwise trade-restrictive) sustainability schemes that certify compliance with environmental-friendly production methods, or are concerned with animal welfare, may be 'justified'.

172 A prerequisite to this end is that the scheme is designed and applied in an even-handed manner.[256] The focus of this wholesome examination is on the regulatory distinctions causing the detrimental impact on imports.[257] Unless these distinctions are rationally related to the measure's stated goal, the act is likely to be found in violation of Article 2.1 TBT Agreement.

173 In the context of sustainability standards this means that certification must contribute to the achievement of the sustainability claims promulgated by the standard.[258] Similarly, in the context of labelling schemes, the requirements to retain the label must be proportionate to the information consumers receive: the burden of compliance put on foreign producers and processors must be appropriately connected to the level of information actually communicated.[259] Further, the requirements to access the scheme must take into account (lower

254 Appellate Body Report, *US – Clove Cigarettes*, paras 92 ff.

255 Panel Report, *US – Tuna II (Mexico)*, para. 7.437.

256 To this end, adjudicators shall examine "*the particular circumstances of the case, including the design, architecture, revealing structure, operation and application of the measure*". Appellate Body Reports, *US – COOL*, paras 271 and 340.

257 Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)* (2015) para. 5.93.

258 Panel Report, *US –Tuna II (Mexico – Article 21.5)*, para. 7.91.

259 Appellate Body Reports, *US – COOL*, para. 347.

or higher) risks associated with different production techniques or risk profiles in different regions of production.[260]

Against this background, sustainability schemes that lay down more onerous certification requirements or foresee more frequent inspections for products that originate in countries with *e.g.* lenient environmental legislation, may be found even-handed. Conversely, a scheme that disqualifies foreign products that achieve the same sustainability outcomes, but fail to fulfil the standard's (rigid) criteria would be found to set arbitrary distinctions. 174

1.2 Least-trade-restrictiveness

The prohibition of unnecessary obstacles to international trade, set out in Articles 2.2 and 5.1.2 TBT Agreement, respectively paragraph E of the CGP complement the prohibition of discrimination. These provisions require the measures subject to the TBT Agreement to opt for the least trade-restrictive set of rules to achieve a legitimate objective. Accordingly, TBT measures must firstly aim at a legitimate policy objective.[261] Secondly, measures must not be more trade-restrictive than necessary, taking into account the risks non-fulfilment (meaning that the legitimate policy aim the Member strives to achieve will not be reached, or will not be reached to the same extent).[262] To examine whether a measure is necessary, its trade-restrictiveness and its degree of contribution to the legitimate objective – as opposed to fulfilment – will be compared with that of possible alternative measures.[263] The nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member must also be taken into account in this balancing exercise.[264] 175

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260 *Panel Report, US – Tuna II (Mexico – Article 21.5),* paras 7.95 and 7.126.

261 *See*: *supra*, n.171 ff.

262 Article 5.1.2 TBT Agreement appears somewhat weaker than the obligation enshrined in Article 2.2. Arguably, it grants certain discretion to the testing state with respect to whether a particular conformity assessment procedure gives *adequate* confidence of conformity with a technical regulation or standard. *Cf.*: The second sentence of Article 5.1.2 TBT Agreement; *See*: Appleton, "Conformity Assessment Procedures," 92.

263 The Appellate Body explained that, as is the case when determining the contribution of a measure to the achievement of a particular objective in the context of Article XX of the GATT 1994, "*a panel must assess the contribution to the legitimate objective actually achieved by the measure at issue.*" *See:* Appellate Body Report, *US – Tuna II (Mexico)*, para. 317; Appellate Body Reports, *US – COOL*, para. 373.

264 Appellate Body Report, *US – Tuna II (Mexico)*, para. 320;

176 Alternative measures have to fulfil three requirements. Firstly, "*they must 'preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued'*".[265] Further, they must be less trade restrictive than the measure challenged and shall be reasonably available to the Member concerned. This highlights that the level of protection sought is directly connected to the question of least-trade-restrictiveness: a proposed alternative measure which entails a greater risk of non-fulfilment may not be found to make an 'equivalent' contribution to the policy goal.[266]

1.3 Use of relevant international standards as a basis where appropriate

177 Harmonization with international standards is a core principle of the TBT Agreement. Article 2.4 TBT Agreement and paragraph F CGP require Members to use relevant international standards or their relevant parts as a basis for their TBT measures. This obligation extends to international standards that currently exist or whose completion is imminent. Pursuant to Article 5.4 TBT Agreement the harmonization requirement also applies to conformity assessment procedures whenever a Member requires a positive assurance that products conform with technical regulations or standards.[267] These obligations entail that in case a relevant international standard exists, the standard (or its relevant parts) must serve as 'the principal constituent' or 'fundamental principle for enacting' the TBT measure at stake.[268] Harmonization of product regulations and conformity assessment procedures around international standards is set to diminish the trade-restrictive effect of technical barriers, as it minimizes the variety of requirements exporters face in different markets.[269] This

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265 Appellate Body Report, *Brazil – Retreaded Tires*, para. 156; Appellate Body Report, *US – Gambling*, para. 308. Panel Report, *US – Clove Cigarettes*, para. 7.370.

266 The burden of proof lies with the complaining party, with the possibility for the respondent to rebut the claims. *See*: Appellate Body Reports, *US – COOL*, para. 379.

267 Article 5.4 TBT Agreement refers to 'guides' or 'recommendations' issued by an international standardizing body.

268 Appellate Body Report, *EC – Sardines*, paras 244-245. A rational relationship between the relevant international standard and a Member's TBT measure would not suffice to meet this threshold. On the other hand, a contradiction between a TBT measure and the relevant international standard leads to the conclusion that the domestic regulation is not based on it. *See*: Appellate Body Report, *EC – Sardines*, paras 247-249.

269 Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization*, Cambridge University Press (2015) p. 921.

approach also ensures that TBT measures do not work as unnecessary obstacles to international trade.[270]

All three provision provide for an exception. In case the relevant (parts of an) international standard "*would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems*", Members are not required to use them as a basis for their TBT measures. This makes clear that in instances where the relevant international standard lacks the function to accomplish the legitimate objective pursued, Members may deviate from it in order to strive at their chosen level of protection.[271] 178

International standards are adopted by 'international standardizing bodies'.[272] This – the nature of the body preparing and adopting them – is what distinguishes them from other (sustainability) schemes subject to the TBT Agreement.[273] The standard-setting activity of an international standardizing body is *by definition* recognized by Members and their national standardizing bodies.[274] Further, its membership must be "*open on a non-discriminatory basis to relevant bodies of at least all WTO Members*"[275] at every stage of the standard(s') development.[276] In case accession to the standardizing body is invitation-only, the requirement of openness cannot be met unless invitation happens automatically once a Member or its relevant bodies expressed their intent to accede.[277] 179

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270 The rebuttable presumption of Article 2.5 TBT underlines this logical conclusion.

271 Panel Report, *EC – Sardines*, para. 7.116; The relevant context to determine the notion of legitimate objectives is Article 2.2 TBT. Appellate Body Report, *EC – Sardines*, para. 286. To show that the international standard in question is an effective and appropriate means to fulfil the legitimate objective is on the complainant. Appellate Body Report, *EC – Sardines*, paras. 274-5 and 278.

272 These considerations also apply to guides and recommendations in the sense of Article 5.4 TBT.

273 The subject matter of the standard is not part of the determination whether an international standard exists. Van den Bossche and Zdouc (2015), supra fn. 269, at p. 922.

274 Appellate Body Report, *US – Tuna II (Mexico)*, para. 363.

275 WTO, TBT Committee, 'Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement', G/TBT/9, 13 November 2000, hereafter: TBT Committee Decision.

276 Appellate Body Report, *US – Tuna II (Mexico)*, para. 374.

277 Appellate Body Report, *US – Tuna II (Mexico)*, para. 386.

Not required is, however, that the (international) standard is adopted by consensus.[278]

180 The element of 'relevance' means that the international standard must be pertinent, or bearing upon or relating to the matter at hand.[279] Corresponding product coverage and the inclusion of similar types of product requirements are indicators to this end.[280] As regards the date of adoption, international standards created before the entry into force of the TBT Agreement could be relevant as well, provided that the state of the art has not changed since, *e.g.* by the adoption of a new international standard.[281]

181 At the time the WTO was established international standardization used to be a matter of a few bodies with long and virtually unchallenged reputation. Although the TBT Agreement contains no list of international standardizing bodies, the drafters had most likely the ISO – alongside with the International Telecommunications Union and the International Electrotechnical Commission, which appear of limited relevance for private sustainability standards – in mind.[282] ISO is an international consortium of national standardizing bodies, primarily (although not sole) consisting of representatives of private industry.[283] Its principal task is to produce consensus-based standards, and it plays an important role in developing 'international standards' in the sense of Article 2.4 TBT Agreement.[284] While ISO standards are not legally binding under international law, pursuant to the harmonization obligations under the

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278 In line with the TBT Agreement's definition of a standard, as opposed to that of the ISO Guide. Panel Report, *EC – Sardines*, para. 7.90.

279 Panel Report, *EC – Sardines*, para. 7.68.

280 Panel Report, *EC – Sardines*, paras 7.69-7.70.

281 Appellate Body Report, *EC – Sardines*, para. 205.

282 Delimatsis (2015), p. 168.

283 Delimatsis (2015), p. 168, with reference to Michael Gerrard (ed*), Environmental Law and Practice Guide: State and Federal Law*, Matthew Bender (2008) §6A.01.

284 However, the hortatory nature of ISO standards in no way excludes their qualification as a technical regulation. *See*: *supra,* n. 130. Further, it must be emphasized that ISO standards do not qualify automatically as 'international standards'. Whether a particular ISO standard fulfils the requirements to qualify as an international standards shall be assessed on a case-by-case basis, considering effective participation in the respective standard's development. *See*: Janelle M Diller, "Private Standardization in Public International Lawmaking," *Michigan Journal of International Law* 33, no. 3 (n.d.): 481–536.

TBT Agreement these voluntary instruments become quasi-mandatory, serving as a benchmark for compliance with WTO law.[285]

In the context of private sustainability standards, a number of ISO standards appear as relevant. The ISO 1400 series of standards, titled 'Environmental Management' provides specifications and guidelines for various environmental management disciplines. Notably, 'ISO 14020: Environmental labels and declarations – General principles' lays down guiding principles for the development of environmental labels and declarations.[286] These requirements are of procedural nature, to a great extent specifying the TBT Agreement's principles for different types of ecolabels.[287] 182

Compared to the times when the WTO was created, (international) standardization is perceived as less hierarchical. Today the world of international standards is not limited to documents adopted by international organizations whose main field of activity lies in standard-setting. Standards adopted by actors which qualify as an 'international standardizing body' constitute 'international standards' in the sense of Article 2.4 TBT Agreement – independent of the body's main focus of activities.[288] The example of the ISEAL Alliance depicts this phenomenon well.[289] 183

285 Delimatsis (2015), p. 168.

286 ISO 14020:2000, 'Environmental Labels and Declarations – General Principles' International Organization for Standardization, Geneva, Switzerland.

287 *Cf.*: *supra* n. 58. *See also*: ISO 14024:2004, 'Environmental Labels and Declarations – Type 1 Environmental Labelling – Principles and Procedures' International Organization for Standardization, Geneva, Switzerland; ISO 14021:2016, 'Environmental Labels and Declarations – Self-Declared Environmental Claims (Type II Environmental Labelling)' International Organization for Standardization, Geneva, Switzerland; ISO 14025:2006. 'Environmental Labels and Declarations—Type III Environmental Declarations – Principles and Procedures' International Organization for Standardization, Geneva, Switzerland.

288 In this case, one of the legal question before the adjudicators concerned whether two resolutions passed under the Agreement on International Dolphin Conservation Program (AIDCP) qualified as an international standard. While (only) the Appellate Body denied such qualification, it was for its difference in interpreting whether the AIDCP was open to all Members. *Appellate Body Report, US – Tuna II (Mexico)* paragraphs 399–401. *See also*: Wagner, "International Standards," 259.

289 *See*: *supra*, n. 70 ff.

1.4 Equivalence and mutual recognition

184 Equivalence and mutual recognition are important instruments to facilitate market access.[290] Article 2.7 TBT Agreement sets out a best effort obligation of Members to recognize foreign technical regulations as equivalent if they adequately fulfil the objectives aimed at by the corresponding domestic technical regulations.[291]

185 Similarly, Article 6.1 TBT Agreement requires Members to "*ensure, whenever possible*" that results of conformity assessment attained in other Members are accepted by central government bodies, even if the procedures differ. The provision appears to grant certain deference to importing Members: the second sentence provides that the obligation only applies if the importing Member is 'satisfied' with the assurance of conformity offered by the foreign (and differing) procedures.[292] In this context Article 6.1.1 TBT Agreement emphasizes the importance of verified compliance with relevant guides and recommendations issued by international standardizing bodies and mentions accreditation as an example of verified compliance. These factors shall be taken into account when determining (in prior consultations) whether a conformity assessment body has 'adequate and enduring technical competence'.

186 Articles 2.7 and 6.1 TBT Agreement remain without a counterpart for standards; paragraph H CGP merely calls upon standardizing bodies within the territory of WTO Members to avoid duplication or overlap of their work with other domestic, regional and international standardizing bodies. Already in 1998, New Zealand proposed to include a provision similar to Article 2.7 TBT Agreement in the CGP. In response the TBT Committee recognized the benefits of equivalence at the standards level and expressed its encouragement for the increased use of equivalence and mutual recognition as an interim measure

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290 Equivalence means that the importing country, despite prevailing differences, recognizes the objectives and the enforcement of product requirements and their enfocement as equally functional in achieving the regulatory purposes aimed at by its own technical regulations and standards. In contrast, mutual recognition refers to situations where the results of product testing performed by accredited assessment bodies of the exporting country dome – and vice versa. *See*: Thomas Cottier, "Equivalence and Mutual Recognition," 2017, 61 ff.

291 Please note that the equivalence recognition of technical regulations and standards does not in itself imply the recognition of conformity assessment procedures.

292 Appleton, "Conformity Assessment Procedures," 100.

to facilitate trade in the absence of relevant international standards.[293] However, it rejected any potential amendment of the CGP.

Nevertheless, attempts to increase mutual recognition and the interoperability of private sustainability standards have been launched. For instance, the ISEAL Standard-Setting Code calls upon private standard-setters to increase the consistency between standards, *i.e.* by actively exploring possibilities for unilateral or mutual recognition for parts or all of system requirements.[294] Another prominent example is the UNCTAD – FAO – IFOAM International Task Force on Harmonization and Equivalence in Organic Agriculture (ITF-HEOA). This initiative seeks to bring together the wide range of actors involved in the certification of organic agriculture[295], to develop practical equivalence tools with the view to reduce barriers and confusion.[296] However, progress is still fairly limited and the number of new standards coming into the marketplace outpaces efforts of harmonization.[297] 187

1.5 Product requirements in terms of performance

Article 2.8 TBT Agreement and paragraph I CGP require that, wherever appropriate, product requirements will be specified in terms of performance rather than by reference to design or descriptive characteristics.[298] Performance- 188

293 *See*: TBT Committee Decision, *supra* n. 275; H. Z. Schroeder (2011), p. 124.

294 Clause 4.2 of the ISEAL Standard-Setting Code.

295 Namely "hundreds of private sector standards and governmental regulations, two international standards for organic agriculture (Codex Alimentarius and IFOAM) and many certification and accreditation systems". UNCTAD, FAO, and IFOAM, eds., "Harmonization and Equivalence in Organic Agriculture - Volume 5," *Background Papers of TheInternational Task Force on Harmonization and Equivalence in Organic Agriculture* UNCTAD/DITC/TED/2008/3 (n.d.): iii.

296 IFOAM implemented these tools in the organic sector to recognize equivalent standards and conformity assessment systems. Furthermore, it adjusted its organic accreditation program to promote equivalence among standards schemes. Currently, however, there is little uptake of this recognition at the level of certification and thus, little impact on reducing barriers to trade. UNFSS, "3rd Flagship Report of the United Nations Forum on Sustainability Standards, 'Voluntary Sustainability Standards, Trade and Sustainable Development' 2018," 5. *See also*: UNCTAD, FAO, and IFOAM, "Harmonization and Equivalence in Organic Agriculture - Volume 5."

297 UNFSS, "3rd Flagship Report of the United Nations Forum on Sustainability Standards, 'Voluntary Sustainability Standards, Trade and Sustainable Development' 2018," 5.

298 Given their different nature, no corresponding obligation exists for conformity assessment procedures.

based requirements are typically less trade-restrictive[299] and ease the recognition of foreign product regulations. Still, these provisions by themselves do not require that product regulations reflect a certain level of specificity. These obligations only apply when 'appropriate', meaning it is proper, fitting, and suitable to formulate the product regulation in terms of 'performance."[300]

189 Therefore, the regulatory role of Article 2.8 TBT and paragraph I CGP appears as limited. Up until now, no violations of these obligations have been found in the WTO dispute settlement practice. The call upon Members and standardizing bodies to express product characteristics in functional terms is nonetheless important. The approach espoused by these provisions facilitates technical development and global competition. Further, compliance would indicate a challenged measure's flexibility – as opposed to measures applied in a rigid and inflexible manner – and thus support its successful justification.

1.6 Transparency requirements

190 Transparency requirements are an important, yet often underestimated pillar of the TBT Agreement. The TBT Agreement's transparency requirements go beyond those enshrined in the GATT: in addition to the prompt publication of adopted measures, they require the advance notification of draft measures. These *ex ante* transparency requirements allow affected exporters to voice their concerns through their governments with respect to proposed new or amended TBT measures at the draft stage. Moreover, exporters can adapt products, packaging or production processes to the new requirements without temporary loss of market access during this period. The prompt publication of TBT measures also reduces the cost of obtaining information and is essential in enabling Members to exercise their rights under the TBT Agreement.[301] Lastly, the TBT Committee provides a fora to discuss specific trade concerns relating to the preparation or the implementation of TBT measures, and plays

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299 Van den Bossche and Zdouc (2015), *supra* n. 269, at p. 926.

300 Panel Report, *US – Clove Cigarettes*, para. 7.491.

301 Further provisions of the TBT Agreement deal with, for example, the required transparency infrastructure and on voluntary information exchange on technical assistance and special and differential treatment. For more information, *see*: Denise Prévost, "Transparency Obligations under the TBT Agreement," in *Research Handbook on the WTO and Technical Barriers to Trade*, ed. Tracey Epps and M. J. Trebilcock, Research Handbooks on the WTO (Cheltenham, UK: Edward Elgar, 2013), 123.

a vital role in ensuring transparency, consultations among Members and, ultimately, avoiding disputes.

a Ex ante transparency requirements

The obligation to notify draft TBT measures in advance is set out in Articles 2.9-2.10 and Articles 5.8-5.9 TBT Agreement with regard to technical regulations and conformity assessment procedures. The obligation is limited to cases where i) no relevant international standard exists, or the technical content of the measure deviates from that; and ii) the measure may have a significant effect on international trade.[302] To achieve the above mentioned objectives of *ex ante* notification, the following requirements apply: 191

- A notice of the proposed measure must be published at an early appropriate stage when amendments still can be made and comments can be taken into account. In 2000, the TBT Committee agreed that the normal time limit for the comment period would be 60 days (like the one explicitly specified for standards), but Members are encouraged to adhere to a longer period of 90 days if available to them.[303] Developed countries are in particular encouraged to provide a time period exceeding 90 days in order to improve the ability of developing countries to comment on notifications.[304] In addition, comments (made in writing) shall be discussed upon another Member's request and be taken into account.
- The notice must be published in a manner that enables interested parties to become acquainted with it and include the product coverage, objective and rationale of the measure.

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302 The advance notification of TBT measures that follow relevant international standards does not appear, at the first sight, as strictly necessary. However, a number of developing Members lack the capacity to participate in international standard-setting (although open to all Members). Against this background some Members choose to notify draft measures that follow international standards. *See*: WTO, Committee on Technical Barriers to Trade, Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, G/TBT/9 (November 13, 2000), para. 36.

303 WTO, Committee on Technical Barriers to Trade, "Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, G/TBT/9," November 2000, para. 13.

304 WTO, Committee on Technical Barriers to Trade, Third Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, G/TBT/13 (November 11, 2003), para. 26.

– Copies of the draft measure must be provided to other Members upon request, where possible indicating any deviations from relevant international standards.

192 The corresponding obligation for standards is laid down in paragraphs J and L to N CGP. The CGP's *ex ante* transparency requirements, in contrast to those applicable to technical regulations and conformity assessment procedures, are not conditional on a deviation from relevant international standards, trade effect, or any other criteria. However, the CGP does not require advance notification of draft standards to other Members through the WTO Secretariat, but:

– A biannual publication of the work programme including draft standards under preparation, and their notification to the ISO/IES Centre.[305]
– Indication of the relevant product group, the stage of standard development and references to international standards used as a basis.
– A comment period of minimum 60 days on the draft standard for interested parties, notified not later than its commencement. It shall be indicated, where possible, whether the standard deviates from relevant international standards. Also, comments (made in writing) must be taken into account in the further development of the standard.
– Copies of the draft standard must be provided to interested parties upon request.

193 The steps of the advance notification procedure may be omitted where urgent problems of safety, health, environmental protection arise or threaten to arise.[306] This exception allows Members to act promptly where important societal values are at stake.

b Ex post transparency requirements

194 Full and timely information on TBT measures applied in the destination country is essential for traders. The TBT Agreement's *ex-post* transparency obligations are enshrined in Articles 2.5 and 2.11 – 2.12 TBT Agreement for technical regulations, paragraph O and P CGP for standards, and Articles 5.8 – 5.9 TBT Agreement for conformity assessment procedures. The mentioned provisions set out the following main requirements:

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[305] Prévost, "Transparency Obligations under the TBT Agreement," n. 16.

[306] By virtue of Articles 2.10, 5.7 TBT Agreement and paragraph L CGP. The use of the exception is subject to specific procedural obligations.

- Adopted measures (referring to measures finalized by the entity responsible for their creation[307]) must be published promptly.
- The publication must be made in a manner that enables interested parties to become acquainted with it; upon request copies must be provided to other Members, respectively to interested parties (as regards standards).
- With regard to technical regulations and conformity assessment procedures, a reasonable interval of normally not less than six months[308] must be provided between the measure' publication and its entry into force.
- With regard to technical regulations, upon request from another Member, Members shall explain the justification of the measure in terms of Article 2.2-2.4 TBT.

The obligation to allow a reasonable interval between a measure's publication and entry into force is set to grant exporters an adaptation period, particularly in developing country Members, to meet the new requirements. Furthermore, it shall provide a degree of certainty when the measure 'can reasonably be expected to enter into force'.[309] 195

In contrast, no reasonable adaptation period is required upon the adaptation of standards. This may be explained by their, in principle, voluntary nature. One may presume that given standards' hortatory nature, producers can decide for themselves when they will comply – without losing market access.[310] Yet, given standards' strong impact on market access, their different treatment seems to be misplaced. 196

1.7 Technical assistance and special and differential treatment

Article 12 TBT Agreement explicitly recognizes the difficulties developing country Member may face in implementing the TBT Agreement's obligations. These Members shall receive more favourable treatment, taking into account 197

307 Prévost, "Transparency Obligations under the TBT Agreement," 141.

308 *See*: Paragraph 5.2 Doha Ministerial Decision on Implementation-Related Concerns, WT/MIN(01)/17 (November 14, 2001). The Appellate Body recognized the Doha Ministerial Decision as a subsequent agreement between Members in the sense of Article 31.3(a) VCLT. Thus, its terms must be read into the Agreement. In cases of urgent problems of safety, health, environmental protection or national security, or when exporters can adapt to the new requirements in less time, the regulating Member may deviate from this precept. *See*: Appellate Body Report, *US – Clove Cigarettes*, para. 269.

309 Appellate Body Report, *US – Clove Cigarettes*, para. 287.

310 Prévost, "Transparency Obligations under the TBT Agreement," 142.

their special development, financial and trade needs in the implementation of the Agreement and the preparation and application of TBT measures.[311] However, these obligations do not imply an explicit obligation, enforceable in WTO dispute settlement, to reach out and collect the concerned developing country Members' views during the preparation of TBT measures. Article 12.3 TBT Agreement merely requires that an active and meaningful consideration of such needs.[312]

198 Against the background of developing country Members' often limited capacity to partake in international standard-setting, Article 12.4 TBT Agreement allows them to deviate from international standards if those are not appropriate to their development or financial and trade needs. In addition, Article 12.6 TBT Agreement calls upon Members to take such reasonable measures as available to them to ensure that international standardizing bodies, upon request of developing country Members, examine the possibility of, and if practicable prepare international standards on products of special interest to developing country Members.

199 Further, Members shall provide technical assistance and advice to developing country Members upon request. In doing so, they shall take into account the respective Members' stage of development and prioritize the needs of least-developed Members.[313] This way Articles 11 and 12.7 TBT Agreement aim to ensure that TBT measures do not create unnecessary obstacles to the expansion and diversification of developing country Members' exports.

200 While the TBT Agreement recognizes developing country Members' special needs, existing jurisprudence illustrates the limited reach of these obligations.[314] Articles 11 and 12 TBT Agreement are formulated in broad terms. Notwithstanding their mandatory language, these obligations are not actionable. Rather, the amount and kind of technical assistance and consideration

311 Article 12.1-12.3 TBT Agreement.

312 Panel Reports, *US – COOL*, para. 7.790.; Panel Report, *US – Clove Cigarettes*, paras 7.634-7.648.

313 Articles 11 and 12.7 TBT Agreement.

314 Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 929. With reference to Panel Reports, *US – COOL*, para. 7.790.; Panel Report, *US – Clove Cigarettes*, paras 7.634-7.648.

given to development needs depends, to a large extent, on developed country Members' goodwill.[315]

Another difficulty is the 'blanket application' of special and differential treatment requirements. Firstly, this concept shall be revitalized by focusing on institution-building. Secondly, today's approach lacks sufficient flexibilities that would take into account the different needs of developing countries.[316] As Michalopoulos points out: 201

"*Developed countries cannot be reasonably expected to provide trade-related assistance to developing countries that do not truly need it. The problem is compounded by the fact that preferential market access or other preferential treatment is supposed to be extended indiscriminately and include even advanced developing economies whose capacity to compete in international markets is not in doubt […]*"[317]

Against this background it appears that the implementation of the TBT Agreement's special and differential treatment obligations could be improved by a higher degree of differentiation, which takes into account the ability of developing country Members to compete in foreign markets, as well as their ability to participate in international standard-setting, and the level of technical and financial support they need. [318]

315 G. Mayeda, "Developing Disharmony? The SPS and TBT Agreements and the Impact of Harmonization on Developing Countries," *Journal of International Economic Law* 7, no. 4 (December 2004): 760, doi:10.1093/jiel/7.4.737. Kudryavtsev, *Private-Sector Standards as Technical Barriers in International Trade in Goods*, 338–341.

316 Mayeda, "Developing Disharmony?," 748–749.

317 Constantine Michalopoulos, *Developing Countries in the WTO* (Houndmills: Palgrave, 2001), 203.

318 Mayeda, "Developing Disharmony?," 748–749.

Chapter 4: Disciplines of the GATT

I. Scope of application

The GATT establishes the general legal framework for measures affecting international trade in goods. The Agreement is structured around five pillars which form its core obligations. These are tariff bindings, the elimination of quantitative restrictions, unconditional MFN-treatment and NT, as well as transparency requirements.[319] In the context of private sustainability standards the non-discrimination and transparency provisions are of primary relevance. 202

These obligations have their own scope of application and encompass a broader set of measures than their counterparts under the TBT Agreement. Thus, standards that fall outside of the TBT Agreement's scope of application may be subject to the GATT disciplines.[320] However, in contrast to the TBT Agreement[321] the GATT contains no provisions that would directly require Members to take measures with respect to non-governmental entities.[322] Therefore a prerequisite to the GATT's applicability to private sustainability standards is that the private action shows a close nexus to the government. Furthermore, the content of obligations imposed under the TBT Agreement and the GATT are not the same.[323] For example, a GATT-consistent standard could still run counter to the TBT Agreement's principles if it were found to be more trade-restrictive than necessary to achieve legitimate policy goal.

This explains the rationale behind the Agreements' cumulative applicability and the order of examination. WTO adjudicating bodies shall revise a measure's consistency with the TBT Agreement first, as it deals specifically and in detail with technical barriers to trade.[324] In case a violation has been found, it is possible to exercise judicial economy. However, if investigations under the GATT are continued, the first threshold question to be answered is whether 203

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319 Patrick F. J. Macrory, *The World Trade Organization : Legal, Economic and Political Analysis*, vol. 1 (New York: Springer, 2005), 99 f.

320 This might be the case when a private sustainability standard concerns NPR-PPMs (but not labelling).

321 *See*: *supra* n. 284 ff.

322 Except in regard of STEs.

323 Appellate Body Report, *US – Tuna II (Mexico)*, para. 405.

324 Appellate Body Report, *EC – Asbestos*, para. 80.

the private action at scrutiny shows a sufficient link to the government. Only if answered in the affirmative will the Agreement be applicable.

204 Therefore the present chapter starts with analyzing the conditions of attribution under the GATT. This is followed by an overview of the most relevant GATT obligations affecting private sustainability standards, namely the principles of non-discrimination, the prohibition of quantitative restrictions, transparency requirements, and provisions on special and differential treatment. At last, Article XX GATT is discussed, which allows Members to adopt or maintain otherwise GATT-inconsistent measures in order to pursue important societal values.

205 The TBT Agreement deals specifically and in detail with technical regulations, standards and conformity assessment procedures. In contrast, the GATT applies to a broader set of measures including technical regulations, standards and conformity assessment procedures.

206 The Agreements overlap not only in their scope, but also with regard to their substantive provisions. The wording of Article 2.1 TBT Agreement relies on that of Articles I:1 and III:4 GATT (containing the GATT's basic non-discrimination provisions) and its transparency obligations further those laid down in Article X:3 GATT.[325]

207 Given that the balance between international trade liberalization and domestic regulatory autonomy under the TBT Agreement "*is not, in principle, different from the balance set out in the GATT*", the two agreements "*should be interpreted in a coherent and consistent manner*".[326] On this ground for a measure consistent with the TBT Agreement in most cases justification shall be available under the GATT as well.[327] It is nevertheless worthwhile to examine the GATT provisions relevant in the context of private sustainability standards – not least

325 *See, for instance*: Appellate Body Report, *US – Clove Cigarettes*, para. 100.

326 However, the principle of coherent and consistent interpretation does not mean that "*the legal standards for* similar *obligations –such as Articles I:1 and III:4 [GATT], on the one hand, and Article 2.1 [TBT Agreement], on the other hand– must be given identical meanings*". *Appellate Body Report, EC – Seal Products* paragraph 5.121-122.

327 *See, for instance*: Garcia Marín Durán, "Measures with Multiple Competing Purposes after EC – Seal Products: Avoiding a Conflict between GATT Article XX-Chapeau and Article 2.1 TBT Agreement," *Journal of International Economic Law* 19, no. 2 (June 2016): 467–495, doi:10.1093/jiel/jgw015.

because in some cases they apply to measures that fall outside of the TBT Agreement's scope of application.

II. Main obligations under the GATT

1. Non-discriminatory treatment of like products with respect to internal regulations

Non-discriminatory treatment of like products from different Members is one of the core principles of WTO law. Under the GATT, the MFN and the NT obligations are laid down separately in Articles I:1 and III:4 GATT. Article I:1 GATT provides, in the relevant part, that 208

"*[…] with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any 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.*" [328]

In contrast, Article III:4 GATT calls upon Members to accord imports from any contracting party

" *[…] treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.*"

Notwithstanding their textual differences, the relevant part of both GATT provisions and Article 2.1 TBT Agreement require that like products are granted equal competitive opportunities in Members' markets, irrespective of their origin.[329] Therefore, in assessing whether a measure affects competitive conditions under Article I:1 and/or Article III:4 GATT, relevant findings under

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328 The wording of Article I:1 GATT refers to a broad range of measures, namely "*customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III*". In contrast, Article III:2 GATT deals with internal taxes or charges.

329 Appellate Body Report, *EC – Seal Products*, para. 5.82.

Article 2.1 TBT Agreement shall be taken into account.[330] An important difference is that the GATT's non-discrimination provisions, unlike Article 2.1 TBT Agreement, also prohibit less favourable treatment that stems exclusively from a legitimate policy distinction. However, in such cases Article XX GATT may be invoked to justify a measure found inconsistent with another GATT provision.

1.1 The material scope of Articles I:1 and III:4 GATT

209 Internal regulations is the group of measures Articles I:1 and III:4 GATT both apply to. The notion of internal measures covers all laws, regulations and requirements that may affect the internal sale, marketing, distribution or use of products, including "*government action involving a demand, request or the imposition of a condition*". Furthermore, internal measures include situations that involve actions by private parties, influenced by (a broad variety of forms of) government action.[331] Against this background private sustainability standards, insofar a sufficient nexus to the government exists, would be encompassed by either of the provisions.

1.2 Likeness under Articles I:1 and III:4 GATT

210 The term 'like products' appears – besides the TBT Agreement's non-discrimination obligations – in a number of different GATT provisions. Its meaning is likely to vary across the articles[332], as differences in the policy context of the various provisions imply certain diversions in the range of meaning accorded to the term.[333]

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330 Panel Report, *US – Tuna II (Mexico – Article 21.5)*, para. 7.338.

331 The Panel noted in particular that „*in applying the concept of "requirements" in Article III:4 to situations involving actions by private parties, it is necessary to take into account that there is a broad variety of forms of government action that can be effective in influencing the conduct of private parties*". Panel Report, *Canada – Autos*, paras 10.106 f. See also the conclusions of the Appellate Body and the GATT Panel with respect to the dual distribution system for beef in Korea and voluntary export restraints on semi-conductors in Japan: Appellate Body Report, *Korea – Various Measures on Beef*, para. 1 49; GATT Panel Report, *Japan – Semi-Conductors*, para. 117.

332 *See*: *supra* fn. 245.

333 Robert Hudec, "'Like Product': The Differences in Meaning in GATT Articles I and III," ed. Cottier, Thomas and Mavroidis, Pteros, *Regulatory Barriers and the Principle of Non-Discriminaiton in World Trade Law* (University of Michigan Press, 2000), 1.

Article I:1 GATT encompasses a range of measures to which Members attach different policy considerations. As Hudec points out, GATT policy towards tariffs and tariff negotiations justifies a narrow interpretation of 'like products' in relation to claims of tariff discrimination. The rationale for this lies in the nature of tariff negotiations, characterized by a significant number of tariff distinctions: a narrow interpretation in this context appears as an unconcealed and accepted effort to discriminate against non-contributing third parties. In contrast, the term is to be given a broader meaning – one that prohibits product distinctions between directly competitive products – in relation to internal measures.[334] This competition-oriented approach likewise applies to internal regulations under Article III:4 GATT and in the context of the TBT Agreement.[335] Against this background, the scope of like products under the different provisions applicable to private standards is substantially the same.[336]

1.3 Most-favoured-nation treatment

Article I:1 GATT requires in the relevant part that any advantage concerning all rules and formalities of importation and exportation is granted immediately and unconditionally to all like products, irrespective of their origin.[337] In other words, it prohibits discrimination, be it in law or in fact, between competing products originating in, or destined for different countries.[338] At the same time, 212

334 Hudec, 11.

335 With the words of the Appellate Body, "*the very concept of 'treatment no less favourable', which is expressed in the same words in Article III:4 of the GATT 1994 and in Article 2.1 of the TBT Agreement, informs the determination of likeness, suggesting that likeness is about the 'nature and extent of a competitive relationship between and among products'. Indeed, the concept of 'treatment no less favourable' links the products to the marketplace, because it is only in the marketplace that it can be determined how the measure treats like imported and domestic products.*" Appellate Body Report, *US – Clove Cigarettes*, para. 111.

336 For the scope of 'likeness' and the specifics of the likeness test, *see*: *supra*, n. 165.

337 Please note that Article XXIV GATT allows Members to provide preferential treatment to trading partners upon the establishment of costums unions or regional trade agreements (RTAs). While such arrangements proliferated in the last two decades, the MFN treatment remains a principal obligation for WTO Members. *See*: Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 308.

338 Appellate Body Report, *Canada – Autos*, para. 78. For the concept of *de jure* and *de facto* discrimination *see*: *supra*, n. 168. and Appellate Body Report, *Canada – Autos*, para. 84.

it permits regulatory distinctions that do not result in a detrimental impact on the competitive opportunities of like imports.[339]

213 The exact meaning of 'conditionality' is as an open question. Jurisprudence traditionally took the position that advantages under Article I:1 GATT „*cannot be made conditional on any criteria that is not related to the imported [or exported] product itself*" or on any private contractual obligations.[340] On these premises, different treatment of products based on non-product-related PPMs would run counter to the principle of non-discrimination. However, in *Canada – Certain Measures Affecting the Automobile Industry*, the Panel opined that „*making an advantage conditional on criteria not related to the imported product itself is per se [not] inconsistent with Article I:1, irrespective of whether and how such criteria relate to the origin of the imported products.*"[341] This more flexible test may open a door for more preferential treatment of products produced in compliance with origin-neutral sustainability requirements.[342] However, no conclusion can be drawn with certainty, given that the decision directly contradicts previous panels and has not been ruled on by the Appellate Body.[343]

214 The concept of 'advantage' refers to any measure that creates more favourable competitive opportunities or affects the commercial relationship of products of different origin.[344] Access to certification with a sustainability scheme that has considerable commercial value in a given market is a relevant example. Therefore, any hurdle that products of one Member must face *in access* when compared to products of different origin are covered by Article I:1 GATT and must be extended to all like products without delay.[345]

1.4 National treatment

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339 Appellate Body Report, *EC – Seal Products*, para. 5.88.

340 GATT Panel Report, *Belgium – Family Allowances (allocations familiales)*, para. 59 and Panel Report, *Indonesia – Autos*, paras 14.143 f.

341 Panel Report, *Canda – Autos*, para. 10.24

342 *Cf.*: Peter Van den Bossche et al., *Unilateral Measures Addressing Non-Trade Concerns: A Study on WTO Consistency, Relevance of Other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures Concerning Non-Product-Related Processes and Production Methods*, 2007, 27.

343 Jason Potts and International Institute for Sustainable Development, *The Legality of PPMs under the GATT.* (Winnipeg, Man.: International Institute for Sustainable Development, 2008), 20.

344 Appellate Body Report, *EC – Bananas III*, para. 206.

345 Panel Report, *US – Tuna II (Mexico)*, paras 7.289 and 7.291. *See also*: Panel Report, *US – Tuna II (Mexico – Article 21.5)*, para. 7.236.

Article III GATT concerns the competitive opportunities of imports in a Member's domestic market. Its paragraph 4, the most relevant provision in the context of standards, requires that imported like products are accorded no less favourable treatment than products of national origin in respect of all internal regulations. It prohibits regulatory measures which – by their design or application – impede the competitive opportunities of imports and afford protection to domestic products.[346] This benchmark implies that formal difference in the treatment of foreign products is neither necessary, nor sufficient to establish discrimination in the sense of Article III:4 GATT.[347] Equally, identical regulatory requirements may be found to violate Article III:4 GATT insofar they modify the conditions of competition in the marketplace, *e.g.* by imposing additional processes and costs to imported products and/or rendering imports less appealing to consumers.[348] Therefore, in line with jurisprudence distinctions between products based on non-products-related PPMs would run counter to the NT principle if they disadvantage products of other Members.[349] 215

Measures enacted by Members rarely discriminate against imports in an open manner.[350] However, a number of private schemes include requirements on domestic origin coupled with (more or less ambitious) sustainability criteria.[351] This approach is likely to render the labeled products more appealing to consumers and goes against the NT principle. In case the underlying private standard-setting activity shows a sufficient connection to government action, it would be inconsistent with WTO law. 216

346 Appellate Body Report, *EC – Asbestos*, para. 98. As Article III GATT not merely requires the equality of competitive opportunities, but also protects the expectation of 'equal competitive relationships', a proof of actual trade affects is not dispositive for a finding of inconsistency. *See*: Van den Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 345. with reference to WTO, Japan: Taxes on Alcholic Beverages, No. WT/DS8/AB/R ; WT/DS10/AB/R ; WT/DS11/AB/R (WTO Appellate Body Report October 4, 1996).

347 Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

348 Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras 7.196 f.

349 *See also*: *supra* fn. 243.

350 *See*: *supra* n. 169.

351 *Cf.*: *infra* n. 302 ff.

2. Limits of differential tariff treatment

217 The MFN obligation under Article I:1 GATT also applies to customs duties. Therefore, in principle, Members shall not condition the granting of more preferential tariff rates on compliance with conditions not related to the products themselves.[352] Still, exceptions from the MFN treatment obligation provide an opportunity to grant more favourable tariff treatment to sustainably produced goods, as it is reflected in developed-country Members' Generalised Systems of Preferences (GSP) and recent regional trade agreements (RTAs). Traditionally, private sustainability standards have not been relied on in these contexts, but recent developments indicate an increasing role of such schemes.

2.1 Enabling clause

218 The Enabling Clause allows and encourages developed-country Members to grant enhanced market access to products from developing countries.[353] This waiver from the MFN obligation is meant to promote economic growth and development. To successfully invoke the exception, GSP preferences shall be granted on a non-reciprocal basis and on equal terms.[354] Yet, a consistent interpretation should allow for preferences to be conditioned on compliance with origin-neutral sustainability and/or other public policy criteria that respond to receiving Members' development, financial *or* trade needs.[355]

219 In *EC – Tariff Preferences* the Appellate Body recognized the legality of this approach. In response to the beneficiaries' different needs – determined in reference to an objective standard "*set out in the WTO Agreement or in multilateral instruments adopted by international organizations*" – preference-giving Members

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352 The considerations under *supra* n. 212-214 apply also with regard to customs duties.

353 GATT Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, GATT Document L/4903, 28 November 1979, BISD 26S/203.

354 The footnote to paragraph 2(a) of the Enabling Clause provides that preferential tariff treatment shall be "*generalized, non-reciprocal and non-discriminatory*" as well as "*beneficial to the developing countries*". Further substantive requirements to invoke the Enabling Clause are set out in its paragraph 3.

355 While the wording of paragraph 3(c) refers to „development, financial and trade needs". the Appellate Body interpreted the conditions to apply in the alternative. *See*: Tracey Epps and Andrew Green, *Reconciling Trade and Climate : How the WTO Can Help Address Climate Change*, Elgar International Economic Law (Cheltenham: Edward Elgar, 2010), 183. *See also*: Appellate Body Report, *EC – Tariff Preferences*, para. 164.

may apply conditions that lead to their different treatment.[356] This interpretation could open the way for conditional tariff preferences involving product-specific requirements.[357] For example, certification with the standards of the Roundtable on Sustainable Palm Oil or the Alliance for Water Stewardship could contribute to 'development needs'. These private schemes enjoy broad recognition and follow the CGP's principles. Moreover, they appear as suitable means to address certain core 'development needs' (a holistic term that shall be understood to include sustainable development[358]) of groups of similarly situated countries. Yet, given the high costs of compliance, restricting enhanced market access to certified products may not be reconcilable with the Enabling Clause's development objectives.

At current, merely two Members condition their (additional) GSP preferences on compliance with sustainability requirements.[359] In the EU's scheme, 'vulnerable' economies are granted additional preferences if they fulfil a number of 'sustainable development criteria'. These consist of the ratification and compliance with fifteen conventions relating to core human and labour rights, and twelve conventions relating to environment protection, good governance and the fight against drug production and trafficking.[360] 220

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356 Further, tariff preferences (taken together with the condition) must be an effective means to address the identified needs. Lastly, identical treatment must be available to all similarly-situated GSP beneficiaries. Epps and Green, 180–182. with reference to: Appellate Body Report, *EC – Tariff Preferences*, paras 162-164 and 173.

357 Some authors argue that, given their complementarity, private sustainability standards could well be integrated into GSP schemes. *See, for instance*: Axel Marx, "Integrating Voluntary Sustainability Standards in Trade Policy: The Case of the European Union's GSP Scheme," *Sustainability* 10, no. 12 (November 2018): 4364, doi:10.3390/su10124364.

358 Lorand Bartels, "The WTO Legality of the EU's GSP Arrangement," *Journal of International Economic Law* 10, no. 4 (December 2007): 875–876, doi:10.1093/jiel/jgm035.

359 Namely the US and the EU. The US uses a negative form of conditionality, listing grounds of ineligibility (such as the failure to take steps to afford internationally recognized worker rights). In contrast, the EU maintains a basic GSP scheme available to all developing countries; conditional are ‚only' the additional benefits offered to a (closed) group of vulnerable economies. The author does not argue that either of these schemes were in line with the Enabling Clause.

360 Commission Delegated Regulation (EU) No 155/2013 of 18 December 2012 establishing rules related to the procedure for granting the special incentive arrangement for sustainable development and good governance under Regulation (EU) No 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences, *OJ L 48, 21.2.2013, p. 5–7.*

221 As Bartels points out in relation to the EU's additional GSP preferences, the financial burden of ratifying and implementing certain conventions might impose costs on developing-country Members that offset the benefits of preferential market access. This raises the question whether such approach, even if it addresses objectively identified development needs, can be considered as a *positive response*.[361] These considerations hold even more true in relation to certification with (private) sustainability standards. Therefore, while it is conceivable to address 'development needs' – like rainforest degradation or sustainable water management – by conditioning tariff preferences on compliance with private sustainability standards, such approach may come short of a 'positive response'.

2.2 Regional Trade Agreements

222 The WTO Agreements allow Members to pursue a close economic integration. If the conditions of Article XXIV GATT are met, RTAs may be established, leaving Members a considerable leeway to define the rules applicable to their internal trade.[362] Within these trade blocks, parties might agree to couple tariff preferences with criteria relating to non-product-related-PPMs. Since the early 1990s, RTAs have mushroomed. In the last two decades, this trend was coupled with a growing awareness of sustainable development concerns. Explicit sustainability provisions have been incorporated in an increasing number of trade agreements, and, over time, more comprehensive approaches appeared. To date a great number of RTAs include separate sustainability chapters with commitments on labour and environment protection that mostly refer to the core ILO Conventions and multilateral environmental conventions.[363]

223 Monitoring and enforcing compliance with these obligations is a topic that receives increasing attention. One central challenge is addressing the 'compliance gap', referring to the situation where countries ratify, but (for lack of

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361 Bartels, "The WTO Legality of the EU's GSP Arrangement," 881.

362 Article XXIV GATT allows Members to derogate from the MFN principle and form a customs union or a free trade area. In both cases, all tariffs and other trade-restrictive measures shall be eliminated on substantially all trade between the Parties, without increasing trade barriers faced by other Members.

363 Peter Draper, Faith Tigere, and Nkululeko Khumalo, "E15 Initiative | Sustainability Provisions in Regional Trade Agreements: Can They Be Multilateralised?," *E15 Initiative* (blog), accessed August 20, 2020, http://e15initiative.org/publications/sustainability-provisions-in-regional-trade-agreements-can-they-be-multilateralised/. Marín Durán, "Measures with Multiple Competing Purposes AfterEC – Seal Products."

capacity) do not implement the enumerated conventions.[364] RTAs, to some extent, stipulate methods to assess and enforce compliance, but their potential is limited.[365] Insofar private standard-setting bodies develop schemes that aim at the same or overlapping goals as stipulated in the relevant conventions, and develop a comprehensive institutional framework for monitoring compliance, their integration into RTAs might offer a solution to this challenge.[366]

This new approach may come to application in relation to palm oil under the Comprehensive Economic Partnership Agreement (CEPA) between the EFTA States and Indonesia.[367] The RTA grants tariff preferences to palm oil imports 224

364 Emilie M. Hafner-Burton, *Making Human Rights a Reality* (Princeton University Press, 2013).

365 Monitoring and sanctioning mechanisms in RTAs are, in general, weak. For example, the sustainability chapter in the recent EU – Colombia RTA does not provide for sanctioning measures (such as withdrawal of trade preferences, as it applied to Colombia under the EU's GSP scheme in respect of additional preferences), nor does it provide a binding mechanism for dispute settlement. Some authors argue that the "lack of provisions for sanctions makes the number of standards included in the sustainability chapter irrelevant". *See, for instance*: Axel Marx, Nicolás Brando, and Brecht Lein, "Strengthening Labour Rights Provisions in Bilateral Trade Agreements: Making the Case for Voluntary Sustainability Standards," *Global Policy* 8 (May 2017): 82, doi:10.1111/1758-5899.12397. with reference to Thomas Frirz, *The Second Conquest: The EU Free Trade Agreement with Colombia and Peru* (Berlin: Center for Research and Documentation Chile-Latin America - FDCL, 2010).
However, given that most 'sustainability breaches' result from a lack of capacity, strong enforcement-type mechanisms may be inappropriate to deal with non-implementation of, or non-compliance. Against this background extensive consultative mechanisms, meaningful facilities for public submissions and other facilitative provisions might better supplement dispute settlement mechanisms. *See*: International Institute for Sustainable Development, A Sustainability Toolkit for Trade Negotiators, Chapter 3.8.

366 Marx, Brando, and Lein, "Strengthening Labour Rights Provisions in Bilateral Trade Agreements: Making the Case for Voluntary Sustainability Standards," 79.

367 Comprehensive Economic Partnership Agreement between The Republic of Indonesia and the EFTA States.

from Indonesia on the condition that the products comply with the sustainability chapter's relevant requirements.[368] Article 8.10, titled 'Sustainable Management of the Vegetable Oil Sector and Associated Trade' spells out the Parties' commitment to

"*effectively apply laws, policies and practices aiming at protecting primary forests, peatlands, and related ecosystems, halting deforestation, peat drainage and fire clearing in land preparation, reducing air and water pollution, and respecting rights of local and indigenous communities and workers;*
support the dissemination and use of sustainability standards, practices and guidelines for sustainably produced vegetable oils […]"

The provision is formulated in a broad manner, leaving much scope for interpretation. But the term 'practices' appears as an (implicit, yet) unambiguous reference to the Roundtable of Sustainable Palm Oil standard (RSPO) and the Indonesian Sustainable Palm Oil standards.[369] Conditioning enhanced market access on certification with these schemes could contribute to the effective implementation of the aforementioned palm oil provisions'[370], and serve as a benchmark for future RTAs in closing the 'compliance gap'.

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368 Elisabeth Bürgi Bonanomi, "Die Nachhaltigkeit im Handelsabkommen mit Indonesien - Mit besonderem Fokus auf die Regulierung des Palmöl-Imports," info:eu-repo/semantics/report, *Bürgi Bonanomi, Elisabeth (2019). Die Nachhaltigkeit im Handelsabkommen mit Indonesien - Mit besonderem Fokus auf die Regulierung des Palmöl-Imports Bern, Switzerland: Centre for Development and Environment, University of Bern* (Bern, Switzerland: Centre for Development and Environment, University of Bern, 2019), 7, doi:10.7892/boris.132880. With reference to the Swiss concessions listed in Annex V, HS heading 15.11 CEPA and Article 8.10 CEPA.

369 Bürgi Bonanomi, 8. The Roundtable on Sustainable Palm Oil is a global multistakeholder organization developing and implementing a voluntary standard for sustainable palm oil production. The Indonesian Sustainable Palm Oil is a competing government-backed initiative, mandatory for all domestic palm-oil plantations and mills except smallholders. The standards' material requirements overlap to a great extent – however, the RSPO enjoys a higher level of trust and recognition, while the government faces severe difficulties to implement its standard. Greetje Schouten and Otto Hospes, "Public and Private Governance in Interaction: Changing Interpretations of Sovereignty in the Field of Sustainable Palm Oil," *Sustainability* 10, no. 12 (December 2018): 4811, doi:10.3390/su10124811.

370 The CEPA includes traceability and dispute settlement mechanism, but does not specify how to control compliance with the production principles. *See*: Bürgi Bonanomi, "Die Nachhaltigkeit im Handelsabkommen mit Indonesien - Mit besonderem Fokus auf die Regulierung des Palmöl-Imports," 8. *See also*: Botschaft zur Genehmigung des umfassenden Wirtschaftspartnerschaftsabkommens zwischen den EFTA-Staaten und Indonesien, p. 46.

3. Prohibition of Quantitative Restrictions

Article XI:1 GATT sets out a general prohibition on quantitative restrictions. It applies, in principle, to any 'border measure'[371] that foresees or results in an actual or potential limiting effect on the quantity of a product being imported or exported.[372] It only covers acts that deal with the quantity, rather than the quality of imports. Nevertheless, it is relevant in the context of TBT measures. Qualitative requirements laid down in standards or technical regulations can limit the volume of trade, and thus result in quantitative restrictions encompassed by Article XI:1 GATT. For example, a US ban on the importation of shrimp products harvested without the use of a specific turtle exclusion device was found in violation of the prohibition of quantitative restrictions.[373] 225

In line with this, import-restrictive elements of measures regulating product characteristics are to be considered under the TBT Agreement in the first place.[374] But product specifications may also be successfully challenged under Article XI:1 GATT if they qualify as a 'quantitative restriction'. For example, a set of measures "*containing both prohibitive and permissive aspects*", *e.g.* a ban 226

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371 GATT jurisprudence traditionally distinguishes between 'internal measures' and 'border measures', governed by Article III and Article XI GATT, respectively. Internal measures regulate the conditions of marketing after the product entered the market. In contrast, border measures affect importation or exportation itself. Not decisive for a measure's qualification is its point of implementation (internal measures are, in some cases, implemented at the border) or whether it also affects domestic products. Note *Ad* Article III GATT specifies that internal measures are subject to Article III, but it leaves unclear whether Article XI:1 GATT could as well come to application. The Panel in *India – Autos* opined that different aspects of the same measure may affect the competitive opportunities of imports in different ways, so that they would fall within the scope of either Article III or Article XI GATT, or, in exceptional circumstances, there may be a potential overlap between the two provisions. This is most relevant in respect of measures that do not fall under the TBT Agreement's scope of application, and thus would be subject either to the non-discrimination provision, or to Article XI:1 GATT. *Cf.*: Panel Report, *India – Autos*, paras 7.306 and 7.224.

372 Article XI:1 GATT covers minimum import or export price requirements, discretionary non-automatic licensing systems, and any other measures that have 'the very potential' to have a limiting effect on importation or exportation. *See*: Appellate Body Reports, *China –Raw Materials*, paras 319 f.

373 Panel Report, *US – Shrimp*, para. 8.1.

374 Decision on Notification Procedures for Quantitative Restrictions, G/L/59/Rev.1 (June 22, 2012), para. 9.

and exceptions, may be challenged as a whole under both agreements.[375] Accordingly, a successful claim under Article XI:1 GATT does not presuppose that the act at scrutiny imposes a ban or a quantitative ceiling. It also covers situations where products are allowed to enter the market, but are subject to disincentives that affect the conditions of importation or exportation.[376]

227 The provision is applicable irrespective of the challenged measures' legal status. Non-mandatory measures are equally encompassed if sufficient government incentives exist for the measure to take effect, and its operation essentially depends on government action or intervention.[377] In line with this, private standards might be subject to Article XI:1 GATT if they restrict the volume of imports – for instance because domestic retailers rely on trade-restrictive schemes.[378] It must be emphasized, however, that the private behavior must be induced and essentially dependent on government acts so that it would fall under the GATT's scope of application.

4. Transparency and due process obligations

228 Article X GATT is an important predecessor to the TBT Agreement's transparency provisions. It incorporates general transparency obligations with respect to the publication of trade regulations. In addition, it lays down minimum standards of transparency and procedural fairness in the administration of trade laws. This way it ensures a reasonable opportunity for Members and traders to acquire authentic information about measures that impose restraints, requirements or other burdens, and allows them to adjust their activities or to seek the measures' modification.[379]

4.1 Publication of trade measures of general application

229 Article X:1 GATT requires that laws and regulations are published promptly and in a manner that enables "*governments and traders to become acquainted with*

375 Panel Reports, *EC –Seal Products*, paras7.660-7.663.
376 Panel Report, *India – Autos*, para. 7.270.
377 GATT Panel Report, *Japan – Semi-Conductors*, paras 104–117.
378 *Cf.*: *infra* n. 302 ff.
379 Appellate Body Report, *US – Underwear*, p. 29.

them". In line with this Members shall make any trade measure of general application accessible on their official website without undue delay.[380] In addition, Article X:2 GATT requires an official publication of any measure that leads to new or higher trade barriers in advance, before the act takes effect.

The obligations apply to a wide range of measures of general application (meaning that they are addressed to an unidentified number of economic operators) and potentially affect trade and traders.[381] This broad definition covers acts that are not legally binding, but have a degree of authoritativeness.[382] For example, labelling requirements and valuations conducted by (semi-)private institutions may be encompassed if they will be taken into account in the determination of applicable customs duties, or show a sufficient nexus to the government and affect market access or marketing conditions.[383] 230

The GATT's transparency provisions thus apply to a broader set of measures than the TBT Agreement's corresponding obligations.[384] For example, they extend to (official) declarations concerning the implementation of covered (TBT) measures.[385] But Article X GATT significantly differs from the TBT Agreement's transparency obligations insofar as it creates no obligation and opportunities for dialogue between Members, and it establishes no central in- 231

380 Panel Reports, *EC – IT Products*, para. 7.1027.

381 Article X:1 GATT lists laws, regulations, judicial decisions and administrative rulings made effective by any contracting party. Not covered are individual decisions, such as licenses issued to a specific company or shipments – unless they establish or revise principles or criteria applicable in future cases. Appellate Body Report, *US – Underwear*, p. 29 and Panel Report, *Japan – Film*, para. 10.388.

382 Panel Reports, *EC – IT Products*, paras 7.1026 f.

383 Panel Reports, *US – COOL*, paras 7.814 f. and Panel Report, *Dominican Republic – Importation and Sale of Cigarettes*, paras 7.404-7.408.

384 *See*: *supra* n. 190.

385 In the *US–COOL* case a letter by US Secretary of Agriculture Thomas J. Vilsack, providing recommendations on the implementation of the disputed country of origin labelling scheme, was found to fall within the scope of Article X GATT – but to constitute no technical regulation in the sense of Article 2.1 TBT Agreement. *See*: Petros C Mavroidis, "The Regulation of International Trade: The WTO Agreements on Trade in Goods," n.d., 679. *See also*: Panel Report, *US – COOL*, paras 7.179 and 7.864.

formation system. Yet, it coined the general understanding of transparency under the WTO Agreements, structured around the prompt and appropriate publication of new or revised trade regulations.[386]

4.2 Transparency in the administration of trade measures

232 Article X:3 GATT "establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations".[387] Paragraph (a) obliges Members to *administer* all their trade laws and regulations in a uniform, impartial and reasonable manner. While the provision is not concerned with the legal instruments' substantive content, measures which regulate the application or implementation of an act of general application may still be challenged.[388] The obligation is, in principle, without counterpart under the TBT Agreement and appears as a useful tool to challenge serious procedural bias in standards' administration.[389]

233 'Uniformity', like other non-discrimination obligations under the GATT, refers to uniform treatment accorded to persons similarly situated (as opposed to necessarily identical procedures).[390] But given the nature of Article X:3(a), unlike other GATT rules, the test of compliance under this provision focuses on the treatment provided to individual traders, rather than on that afforded to products of different origin. Further, an assessment of violation shall include an examination of real trade effects possibly caused by the lack of uniformity, impartiality or reasonableness.[391] Lastly, given the serious nature of allegations, no claim should be brought lightly, or in a subsidiary fashion under Article X:3(a) GATT.[392] Only a significant impact on the overall administration of the law, and not simply on the outcome in the single case in question can support a finding of violation.[393]

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386 Marianna B. Karttunen, *Transparency in the WTO SPS and TBT Agreements : The Real Jewel in the Crown*, Cambridge International Trade and Economic Law (Cambridge, United Kingdom, New York, NY, USA: Cambridge University Press, 2020), 14.

387 Appellate Body Report*, US – Shrimp*, para. 183. In addition, to review customs matters Members shall establish judicial, arbitral or administrative review tribunals that are independent from the first instance. *See*: Article X.3(b) GATT.

388 Appellate Body Report*, EC – Selected Customs Matters*, para. 200.

389 *See*: *supra* n. 385.

390 Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.

391 Panel Report, *Argentina – Hides and Leather*, paras 11.76 f.

392 Appellate Body Report, *US – Oil Country Tubular Goods Sunset* Reviews, para. 217.

393 Panel Report, *US – Hot Rolled Steel*, para. 7.268.

5. General exceptions

With a view to balance Members' right to protect important societal values and the rights of other Members under basic trade disciplines, the general exceptions permit the adoption of otherwise GATT-inconsistent measures. The exceptions are 'limited and conditional': successful justification requires that the otherwise GATT-inconsistent measure (i) can be provisionally justified under one of the paragraphs of Article XX GATT and ii) meet the requirements of the Article's introductory clause, or in short chapeau.[394] 234

The closed list of legitimate policy goals includes measures necessary for the protection of human, animal and plant life and health[395], measures related to the conservation of natural resources[396], as well as measures necessary for the protection of public morals.[397] These exceptions appear of primary relevance in relation to environmental sustainability standards and are discussed in detail below. It is an accepted principle of treaty interpretation that exceptions shall be construed narrowly.[398] However, finding the equilibrium between the various interests Article XX GATT is called to balance requires a case-by-case consideration and careful scrutiny of the factual and legal context in each dispute.[399] This led WTO adjudicators to read the specific exceptions in a comprehensive, or even 'evolutionary' manner, accommodating a wide range of legitimate policy objectives. At the same time, a careful scrutiny under the provisions' introductory clause is called to dismantle attempts to misuse the exceptions for protectionist purposes. 235

5.1 Provisional justification

Provisional justification under one of the subparagraphs of Article XX GATT involves a two-tier test: the measure at scrutiny must be *i)* designed to address the interest specified in the invoked paragraph, and *ii)* show a sufficient nexus

394 GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.9

395 Article XX (b) GATT, *See: infra* n. 236.

396 Article XX (g) GATT, *See: infra* n. 239.

397 Article XX (a) GATT, *See: infra* n. 244.

398 Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 547. *See also*: Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer Science & Business Media, 2007), 286.

399 *Cf.*: Appellate Body Report, *US – Gasoline*, p. 18.

to this interest. Article XX(a) and (b) GATT require the measure to be 'necessary' for achivieng the specified interest, namely the protection of 'public morals' and 'human, animal or plant life or health', respectively. Under Article XX(g) GATT a different relation is required. Under this subparagraph, measures 'relating' to the 'conservation of exhaustible natural resources' may be provisionally justified if they are 'made effective in conjunction with restrictions on domestic production or consumption'.

a Measures necessary to protect human, animal or plant life or health

236 The two-tier test of Article XX(b) GATT requires that *i)* the measure is *designed* to protect human, animal or plant life or health, and *ii)* is *necessary* to this end. The first step is a determination about whether the measure is capable to protect the specified values, taking into account its design and structure. This threshold test is, in most cases, not particularly demanding. Merely a rational relationship between the measure and the protected values must be shown.[400] In line with this, Article XX(b) GATT covers a broad range of measures capable to protect human, animal or plant life or health. Besides public health measures, the provision might as well encompass environmental ones, provided that a risk not just to the environment in general, but to animal or plant life or health in particular exists.[401]

237 The necessity test is a more complex, holistic examination. It involves the weighing and balancing of a series of factors, including the importance of the protected values, the measure's contribution to their achievement and the measure's trade-restrictiveness.[402] Protecting human beings from health risks is one of the most vital interests, and protecting the environment is no less important.[403] In some cases, severe restrictions on international trade must be condoned to preserve these fundamental values. However, the measure's (anticipated) contribution to the objective, demonstrated in quantitative or qualitative terms, must be taken into account when deciding whether the act can be provisionally justified.[404] If the balancing exercise suggests the challenged

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400 In the context of Article XX(a) GATT, *see*: Appellate Body Reports, *Colombia – Textiles*, paras 5.67-5.70.

401 Panel Report, *Brazil – Retreated Tyres*, para. 7.46.

402 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

403 Appellate Body Report, *Brazil – Retreaded Tyres*, para. 144.

404 Appellate Body Report, *Brazil –Retreaded Tyres*, para. 151.

measure to be necessary, it still must be compared with alternatives. The purpose of the comparison is to ensure that the provisionally justified measure is the least trade-restrictive among those reasonably available[405] to reach the regulating Member's chosen level of protection.[406]

A number of private sustainability standards in place aim at objectives covered by Article XX(b) GATT. For instance, the Dolphin Safe label is granted to tuna caught without the intentional killing of dolphins.[407] Another relevant example is the Simthsonian bird friendly standard, which promotes biodiverse shade in coffee plantation as a critical habitat for migratory songbirds and other wildlife.[408] Standards that prohibit animal testing in cosmetics production might as well be covered by this exception.[409] Since governments increasingly rely on private sustainability standards, it is an important question whether the trade-restrictive elements of such schemes can be provisionally justified.[410] The answer can only be given on a case-by-case basis. However, jurisprudence suggests that in the context of Article XX(b) GATT a 'sufficient nexus' between the regulated matter and the invoking Member's territory must exists. This arguably excludes the provisional justification of issues limited to the confines of another Member or Members.[411] Therefore, that lanclocked countries may not rely on Article XX(b) GATT to protect the life of marine animals, but it could be invoked by any Member to justify trade restrictions that protect domestic species or living beings within its territory. Further, in the context of the necessity test, a demonstration of the measure's material 238

405 The concept of "reasonably available" alternatives refers to measures that the responding Member is capable to take and are therefore not merely theoretical in their nature. In particular, they do not impose an undue burden on the responding Member, such as prohibitive costs or substantial technical difficulties. *See*: Appellate Body Reports, *US – Gambling*, para. 308.

406 Appellate Body Report, *Brazil –Retreaded Tyres*, para. 156. On the requirements of alternative measures, *see also*: *supra* n. 176.

407 Similarly, MSC-certified fisheries must refrain from the deadly practice of shark finning. *See*: <http://savedolphins.eii.org/campaigns/dsf>; https://www.msc.org/docs/default-source/default-document-library/for-business/program-documents/fisheries-program-documents/msc-fisheries-certification-process-2-2-summary-of-changes.pdf?sfvrsn=148ae214_6.

408 *See*: https://nationalzoo.si.edu/migratory-birds/bird-friendly-coffee

409 *See, for instance*: https://www.leapingbunny.org/about/the-standard

410 For example in public procurement tenders, or by conditioning tariff preferences on compliance with private schemes. *Cf.*: *supra* n. 224.

411 On the question of 'exxtraterritoriality' in the context of Article XX GATT *see: infra* n. 250.

contirubtion to its stated objectives – supported by an objective impact analysis – could be helpful, while it is important to formulate sustainability requirements in terms of performance, rather than requiring compliance with a single private sustainability standard.

b Measures relating to the conservation of exhaustible natural resources

239 Provisional justification under Article XX(g) GATT is available if the challenged measure *i)* concerns 'exhaustible natural resources'; *ii)* relates to their conservation; and *iii)* is made effective in conjunction with restrictions on domestic production or consumption. In line with jurisprudence, this provisions refers to the 'preservation of the environment, especially of natural resources'.[412] In the light of contemporary concerns, the generic term 'exhaustible natural resources' was read in an evolutionary manner to encompass not only mineral or non-living resources, but living species as well. In an 1998 decision, the Appellate Body underlined that while Article XX GATT was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy.[413] In line with this, the Appellate Body emphasized that, while capable of reproduction, in certain cases living resources are susceptible of depletion or extinction, and appear just as finite as non-living ones.[414]

240 The test's second step focuses on the challenged measure's design and structure.[415] Required is that the act shows a real, substantial relationship to its stated goal. Measures that limit or halt the extraction of mineral resources, or reduce the threat of extinction faced by endangered species would fulfil this criterion.[416] At last, the third element is an inquiry about whether restrictions on domestic and imported products have been imposed in an even-handed manner. In line with this, provisional justification does not presuppose that the burden of conservation is evenly distributed between domestic and foreign products, respectively between producers and consumers.[417] To comply with

412 Appellate Body Reports, *China –Raw Materials*, para. 355.
413 Appellate Body Report, *US – Shrimp*, paras. 128-131.
414 Appellate Body Report, *US – Shrimp*, paras 128 – 130.
415 As compared to its actual effects, which might be taken into account. Appellate Body Reports, *China – Rare Earths*, paras 7.290 and 7.379.
416 *Cf.*: Appellate Body Reports, *China – Rare Earths*, para. 5.89.
417 Appellate Body Report, *US – Gasoline*, p. 21.

the 'made effective' requirement, it suffices if Members "*impose a real restriction on domestic production or consumption that reinforces and complements the restriction on international trade*".[418]

The exception under Article XX(g) can accommodate a wide range of environmental sustainability standards. For instance, measures aimed at the protection of sea turtles as endangered species and the preservation of clean air have been provisionally justified under Article XX(g) GATT.[419] However, this subparagraph may also encompass standards set to prevent deforestation, or to otherwise limit the environmental consequences of climate change. As relevant examples appear, for instance, the Rainforest Alliance standard requiring the identification, protection, conservation and restoration of natural water or terrestrial ecosystems, or the FSC standard.[420] A number of organic production standards which lay down criteria on sustainable water, land and energy use may as well qualify for provisional justification under Article XX(g) GATT.[421] The RSPO standard also appears eligible, as one of its core aims is to prevent forest degradation and thus relates to the conservation of natural resources.[422] 241

If such standards are attributed to the government, successful provisional justification further requires that the burden of conservation and/or climate action likewise affects domestic products and/or producers. This condition could be fulfilled for example by extending the obligations foreseen by the standard to domestic producers – be that by requiring certification with the private standard or by embedding them in domestic legislation.[423] However, if 242

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418 Appellate Body Reports, *China – Rare Earths*, para. 5.92.

419 *See*: Appellate Body Report, *US – Shrimp*; Appellate Body Report, *US – Gasoline*.

420 *See*: Rainforest Alliance, Sustainable Agriculture Standard, available at: <https://www.rainforest-alliance.org/business/wp-content/uploads/2017/11/03_rainforest-alliance-sustainable-agriculture-standard_en.pdf> and Forest Stewardship Council, Forest Management Certification, available at: <https://fsc.org/en/forest-management-certification>.

421 See, for instance: Bio Suisse, Standards and Directives, available at : <https://www.bio-suisse.ch/en/downloads.php>.

422 On the RSPO standard and conditional tariff preferences (in the context of an RTA), *see*: *supra*, n. 224.

423 For instance, in government procurement tenders compliance with onerous domestic laws may substitute certification with a sustainability standards. However, this opportunity shall be open for all foreign products with equivalent domestic regulation in place. *See*: *infra* n. 307.

"*no restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products alone, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods*".[424]

243 Against this background, governments may encounter significant obstacles if they wish to condition market access or other marketing privileges on compliance with a sustainability standard that only cover imports. For instance, conditioning market access for palm oil on compliance with a sustainability standard *without imposing any burden on the domestic oilseed production* may not pass this test. It appears that provisional justification would only be available if the requirements affecting imports are part of a comprehensive policy framework which introduces comparable obligations on competing domestic products.

424 *Cf.*: Appellate Body Report, *US – Gasoline*, p. 21.

c Measures necessary to protect public morals

Public morals denote "*standards of right and wrong conduct maintained by or on behalf of a community or nation*".[425] The content of this concept might vary between Members, as it is influenced by a range of factors, such as social, cultural, ethical and religious values.[426] Therefore, as the Appellate Body held, Members "*should be given some scope to define and apply for themselves the concepts of "public morals" […] in their respective territories, according to their own systems and scales of values*".[427] 244

This above citations highlight the broad notion of public morals in the context of Article XX(a) GATT. Beyond public-morality type concerns, the provision may also encompass a wider range of public order measures, and can be "*understood as a catch-all term that should be used whenever more specific terms (such as "human life" or "health") are ill suited to address a social concern.*"[428] This reading, although not reflected in the GATT's preparatory work, allows for the justification of non-protectionist policies that otherwise do not fit under the exhaustive list of exceptions.[429] To date the 'public morals exception' was invoked in four GATT cases. The decisions confirm a comprehensive reading, 245

425 The term was first interpreted in *US – Gambling*, in the context of Article XIV(a) GATS, the provision corresponding to Article XX(a) GATT . Subsequent panels adopted this interpretation in the context of Article XX(a) GATT. *See*: Panel Report, *US – Gambling*, para. 6.465; Appellate Body Report, *US – Gambling*, para. 299; Panel Report, *China – Publications and Audiovisual Products*, para. 7.759.

426 Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 581.

427 Panel Report, *US – Gambling*, para. 6.461; Panel Report, *China – Publications and Audiovisual Products*, para. 7.759. *See also*: Appellate Body Reports, *EC – Seal Products*, para. 5.199.
However, this "does not excuse a responding party in dispute settlement from its burden of establishing that the alleged public policy objective at issue is indeed a public moral objective according to its value system". Panel Report, *Brazil –Taxation*, para. 7.558.

428 Mavroidis, "The Regulation of International Trade: The WTO Agreements on Trade in Goods," 428.

429 Mavroidis, 427–428. With reference to Christoph Feddersen, "Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and Conventional Rules of Interpretation," *Minnesota Journal of International Law*, January 1998, https://scholarship.law.umn.edu/mjil/133. and Steve Charnovitz, "The Moral Exception in Trade Policy," n.d., 49.

and indicate that the range of policy goals strived at by private sustainability standards are mostly covered by the exception.[430]

246 Article XX(a) GATT allows for the provisional justification of measures i) *designed* and ii) *necessary* for the protection of public morals. The first step is an examination about whether the challenged measure is 'capable' of protecting public morals.[431] It is not particularly demanding: it neither requires that a risk to public morals is identified, nor is it necessary to define the exact content of the public moral standard at hand.[432] In this threshold examination the regulating Member must merely show that the alleged public policy objective is indeed a public moral objective according to its value system[433], and that the measure relates to its protection – taking into account its design, context, structure and expected operation.[434] The second, more demanding examination concerns whether the measure is the least trade-restrictive and reasonably available approach to achieve the invoking Member's chosen level of protection.[435]

247 Against this background, the 'public morals exception' lends itself for the justification of private sustainability schemes attributed to the government. Notably, Article XX(a) GATT allows Members to address extraterritorial concerns which – in the absence of a 'nexus' – would not be covered under paragraphs (b) or (g). At the same time, the necessity test requires Members to resort to the least trade-restrictive measure to pursue their policy aim.

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430 Namely in relation to animal welfare, social inclusion, the fight against money laundering and threats posed to public morality by publications and audiovisual products with inappropriate content.

431 Appellate Body Report, *Colombia – Textiles*, para. 6.21.

432 The word 'protection' appears in both Article XX(a) and (b) GATT, but carries different meanings in line with jurisprudence. Under paragraph (b) it may imply a focus on certain dangers or risks to public health that are to be countered by the measure. However, in the context of paragraph (a) 'scientific or other methods' of risk assessment appear ill-suited as they would be of little assistance in identifying and assessing public morals. Appellate Body Reports, *EC – Seal Products*, paras. 5.199 – 5.200.

433 Panel Report, *Brazil –Taxation*, para. 7.558.

434 This approach allows the respondent to present its defence relating to the measure's necessity. Appellate Body Report, *Colombia – Textiles*, paras.6.22, 6.42-6.45 and 6.51.

435 This second step of the legal assessment under Article XX(a) and (b) have been interpreted in a coherent manner. On the 'necessity' tests *see*: *supra* n. 236 ff.

d Measures necessary to secure compliance with GATT-consistent domestic legislation

Article XX(d) GATT provides an exception with respect to the measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions" of the Agreement. In line with jurisprudence, for a measure to be provisionally justified under this exception, it must two requirements. First, the measure must be one "*designed to "secure compliance" with laws or regulations that are not themselves inconsistent with some provision of the GATT*" and second, it must be necessary to this end.[436] 248

The Appellate Body explained that as a rule, measures 'designed' to secure compliance must constitute "an enforcement mechanism"[437] for GATT consistent domestic laws and regulations. Not required is that the measure guarantees "*to achieve its result with absolute certainty*".[438] However, Article XX(d) GATT may not be relied on to implement Members' international obligations.[439] The second requirement considering the necessity of the measure has largely been interpreted in the same way as under Article XX(b) GATT. 249

Private sustainability standards can serve as a tool for securing compliance with domestic laws or regulations – such as binding requirements on the sustainable production of timber, palm oil and further agricultural products or on the protection of dolphins and other protected species. Article XX(d) GATT allows for the justification of such measures attributable to the government – under the conditions that the domestic legislation itself is in line with the provisions of the GATT and the chosen standard(s) are the least trade-restrictive way to implement it.

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436 Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.
437 Panel Report, *US – Gasoline*, para. 6.33.
438 Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 74.
439 Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 69.

5.2 Addressing extraterritorial concerns

250 In line with jurisprudence it is clear that environmental measures or acts that protect human, animal or plant life or health within a Member's territory are eligible for justification under Article XX(b) and/or (g) GATT. But it remains an open question whether the general exceptions can also be invoked to protect societal values outside of the regulating Member's territorial jurisdiction.[440] Article XX GATT includes no explicit jurisdictional limitation, and in the *US – Shrimp* case the Appellate Body refused to decide whether Article XX(g) contains an implied jurisdictional limitation. Yet, it felt compelled to emphasize that a 'sufficient nexus' between the US and endangered migratory turtle populations did exist, as the ban on shrimp harvested through certain fishing methods aimed to protect these marine reptiles.[441] However, the panel in *EC – Tariff Preferences* explicitly rejected that Article XX(b) GATT could be invoked in relation to a measure designed to protect human life or health outside the Respondent's territory.[442] Against this background it seems that the provisional justification of sustainability standards requires the existence of a 'sufficient link' between the regulating Member's *territory* and and the concern addressed.

251 Yet, in certain circumstances, the management of a state's domestic environment appears "*as a matter of common concern independently of any transboundary effects.*"[443] Given its unprecedented scale and character, contemporary climate change appears as a 'common concern of mankind'. As it affects each Member, the WTO Agreements shall be read to authorize unilateral measures adopted to tackle global warming – on the prerequisite that all further requirements of Article XX GATT are met.[444] This is also reflected in the conclusions of the ILA Committee on the Role of International Law in Sustainable Natural

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440 Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 553–554.

441 Appellate Body Report, *US – Shrimp*, para. 133 and Appellate Body Reports, *EC – Seal Products*, para. 5173.

442 Panel Report, *EC – Tariff Preferences*, para. 7.210.

443 Thomas Cottier and Sofya Matteotti-Berkutova, "International Environmental Law and the Evolving Concept of 'Common Concern of Mankind,'" in *International Trade Regulation and the Mitigation of Climate Change*, ed. Thomas Cottier, Olga Nartova, and Sadeq Z. Bigdeli (Cambridge: Cambridge University Press, 2009), 33–34, doi:10.1017/CBO9780511757396.004.

444 In line with this, provisional justification shall be available under both Article XX(b) and (g) GATT, provided that the measure is 'necessary' and/or is imposed in an even-handed manner on domestic and imported products.

Resource Management for Development. It opines that the question whether states' sovereignty prevails with regard to natural resources development, or be balanced with duties, may vary depending on whether the resources in question are truly of common global concern, of clearly transboundary nature, or limited to the confines and interests of a single state.[445]

As opposed to Articles XX(b) and (g) GATT, Article XX(a) GATT can, by its nature, justify trade restrictions in response to extraterritorial actions. While the exception requires that the measure's 'principal objective'[446] is the protection of public morals within the Member's territory, it may be invoked to restrict the importation of products harvested or produced in a morally condemned manner. This feature makes the exception fit for addressing genuine concerns of an importing country related to animal welfare, and arguably, unsustainable production practices leading to forest degradation or other morally disapproved environmental harm. From a practical point of view, it is worth mentioning that it is the importing country's burden to establish that the public policy objective at issue is indeed a public moral objective according to its value system.[447] Comprehensive polls or the results of a public referncum are possible means to support such argument. 252

5.3 Even-handed application in line with the chapeau

A measure provisionally justified under one of the paragraphs of Article XX GATT must comply with the provision's introductory clause. This second part of the analysis, commonly referred to as the 'chapeau test', no longer deals with the objective or specific contents of the measure, but asks whether it is applied and implemented in a reasonable manner and in good faith. This concerns both substantive and procedural elements and serves to prevent the abuse or illegitimate use of the general exceptions.[448] To this end the chapeau pro- 253

445 *See*: ILA, Second Report of the Committee on the Role of International Law in Sustainable Natural Resource Management for Development, Sidney Conference (2018), *supra* fn. 112.

446 Appellate Body Reports, *EC – Seal Products*, paras 5.145 f.

447 Panel Report, *US – Tariff Measures*, para. 7.140.

448 Gabrielle Marceau, "The Interface Between the Trade Rules and Climate Change Actions," in *Legal Issues on Climate Change and International Trade Law*, ed. Deok-Young Park (Cham: Springer International Publishing, 2016), 3–39, doi:10.1007/978-3-319-29322-6_1., pp. 15 and 19. *See also*: Appellate Body Report, *US – Gasoline*, p. 22; Appellate Body Report, *US – Shrimp*, paras 158 f.

hibits measures which result in 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail', or pose 'disguised restriction on international trade'.

254 The chapeau proscribes discrimination which lacks a rational connection to the policy objective in respect to which it has been provisionally justified.[449] Whether unjustifiable discrimination exists is an inquiry about the cause or rationale of less favourable treatment. A measure which, *as a whole*, cannot be reconciled with the policy objective it invokes may not be justified under Article XX GATT.[450]

255 The chapeau likewise prohibits arbitrary discrimination. Arbitrary discrimination occurs when Members fail to consider different conditions between countries which are relevant in the context of the policy objective at hand.[451] Rigid and inflexible standards could run afoul of this requirement. As the Appellate body emphasized, in international trade relations it is not acceptable for one WTO Member "*to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.*"[452] In line with this, discrimination may also be found when the same measure is applied to different situations. Therefore, Members shall rely on standards that allow for the certification of products that are comparable in effectiveness. This approach, which is also reflected in the TBT Agreement[453], ensures sufficient flexibility in the application of standards and encourages equivalency recognition.[454]

256 Transparency and procedural fairness is another relevant aspect under the chapeau. The lack of a transparent and predictable certification process is a signal of arbitrary or unjustifiable discrimination. For instance, in the *US – Shrimp* case the Appellate Body found that the "*lack of a formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it in the certification process*", and the lack of "*formal written, reasoned decision,*

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449 Appellate Body Report, *US – Gasoline*, p. 23; Appellate Body Report, *Brazil – Retreaded Tyres*, paras 227 and 302.

450 Appellate Body Reports, *EC – Seal Products*, paras. 5.192-5.193.

451 Appellate Body Reports, *EC – Seal Products*, para. 5.317.

452 Appellate Body Report, *US – Shrimp*, paras. 163 – 164. *See also*: Appellate Body Reports, *EC – Seal Products*, para. 5.305.

453 *Cf.*: Articles 2.7-2.8 TBT Agreement and paragraph I CGP.

454 Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 596–597.

whether of acceptance or rejection" constituted arbitrary or unjustifiable discrimination. Further, it emphasized that such informal and casual certification process denies basic fairness and due process, and discriminates against exporting Members whose applications are rejected, vis-à-vis those Members which are granted certification.[455]

Another consideration under the chapeau is whether the regulating Member, before resorting to unilateral action, has made serious efforts to conclude bilateral, plurilateral or multilateral agreements, engaging *all* affected Members *on a non-discriminatory basis*.[456] Such efforts are an expression of good faith and indicate compliance with the introductory clause – especially in instances where the achievement of the legitimate policy objective requires international cooperation.[457] However, the chapeau shall not be read to include a general duty to negotiate. A duty to cooperate may only be found in cases which involve transboundary or global environmental issues, and require a cross-border effort given Members' interdependencies to effectively contribute to the common and related policy aim. But also in these cases, a duty to negotiate can only be grounded in the text of the chapeau if its incorporation is linked to the issue of discrimination, as it was the case in *US—Shrimp* and *US—Gasoline*.[458] 257

The ordinary meaning of the verb 'disguised' implies an intention. Accordingly, a measure will constitute a 'disguised restriction on international trade' 258

455 Appellate Body Report, *US – Shrimp*, paras 180 f.

456 Negotiation behavior can represent a specific instance of discriminatory conduct, which could fail the test of the chapeau. Appellate Body Report, *US – Shrimp*, paras. 166 ff.

457 Appellate Body Report, *US – Shrimp*, para. 168.

458 Bradly J. Condon, "Does International Economic Law Impose a Duty to Negotiate?," *Chinese Journal of International Law* 17, no. 1 (March 2018): 85 ff, doi:10.1093/chinesejil/jmy003., with reference to Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement*, *Panizzon, Marion (2006). Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement. Studies in International Trade Law: Vol. 4. Oxford: Hart*, vol. 4 (Oxford: Hart, 2006), https://boris.unibe.ch/30147/. Gabrielle Marceau, "Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties," *Journal of World Trade (Law-Economics-Public Policy)* 35, no. 6 (December 2001): 1081. and Robert L. Howse, "The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environmental Debate," *Columbia Journal of Environmental Law* 27, no. 2 (March 2002): 491.

if it in fact conceals the pursuit of trade-restrictiveness.[459] This last condition has been read side-by-side with the concepts of 'arbitrary and unjustifiable discrimination'. With the words of the Appellate Body,

"[…] the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination', may also be taken into account in determining the presence of a 'disguised restriction' on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."[460]

259 The requirements of the chapeau are highly relevant in dispute settlement. Therefore, even-handed application is a key consideration in examining whether the discriminatory or otherwise trade-restrictive elements of private sustainability standards, if attributed to the government, can be justified. Transparency, sufficient flexibility, good faith efforts of negotiation and equivalence recognition are relevant aspects to be taken into account in this holistic test. Measures adopted or applied with elements that lead to origin-based discrminitation will, in most cases, will not fulfil these requirements. Therefore, it is important to lay down requirements in an origin-netural manner and in terms of performance – which might imply that governments must, in a first step, formulate general sustainability requirements. Subsequently, in implementing these requirements govenrments may identify private standards that can (also) be relied on to prove compliance. This approach also allows for taking into account relevant differences[461] between Members, especially those that are pertinent to the fulfilment of the envisaged policy goal.

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459 Panel Report, *EC – Asbestos*, para. 8.236.

460 Appellate Body Report, *US –Gasoline*, p. 25.

461 Appellate Body Reports, *EC – Seal Products*, paras. 5.299-5.301.

6. Non-violation and situation complaints

Most cases adjudicated at the WTO concern violations of the covered agreements. In such instances it is presumed that the WTO-inconsistent measure results in the nullification or impairment of benefits accruing to other Members. However, it is conceivable that government actions impair other Members' legitimate expectations from tariff negotiations or impede the achievement of an objective strived at by the covered agreements *without contravening WTO rules*.[462] Article XXIII:1(b) GATT addresses this possibility and allows Members to file claims in respect of measures that are not in conflict with, or not regulated by GATT rules. Further, Article XXIII:1(c) GATT makes way for complaints "in any other situation" when benefits are nullified or impaired.[463] This way the provisions protect Members' legitimate expectations of enhanced market access – meaning fair conditions of competition, rather than expectations for a certain trade volume.[464] Article XXIII GATT is incorporated by reference into the TBT Agreement and applies *mutatis mutandis*.[465] 260

In line with jurisprudence, a successful non-violation complaint requires the claimant to demonstrate that *i)* the imported products in question are subject to and benefit from a relevant market access concession; *ii)* their competitive position is nullified or impaired; *iii)* which is a result of the application of a measure not reasonably anticipated.[466] The notion of 'measure' "*refers only to policies or actions of governments, not those of private parties.*"[467] However, it encompasses a broad range of government actions, including non-binding ones, if those involve sufficient incentives or disincentives for private parties to act in a particular manner, and can adversely affect the competitive conditions of market access.[468] 261

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462 In the context of the GATT, 'benefits accruing to Members' refers to improved market-access opportunities arising out of relevant tariff concessions. Panel Report, *Japan – Film*, para. 10.57.

463 Article XXIII:1(b) and (c) GATT. *See also:* Article 26 DSU.

464 Iur Markus Bockenforde, "Der Non-Violation Complaint Im System Der WTO: Neue Perspektiven Im Konflikt Um Handel Und Umwelt?," *Archiv Des Völkerrechts* 43, no. 1 (March 2005): 72, doi:10.1628/0003892053967134.

465 The TBT Agreement, like most other covered agreements, incorporates, by reference, Articles XXIII GATT. *Cf.*: Article 14.1 TBT Agreement.

466 Panel Report, *Japan – Film*, para. 10.41.

467 Panel Report, *Japan – Film*, para. 10.52.

468 Panel Report, *Japan – Film*, para. 10.49.

262 Yet, the remedy in Article XXIII:1(b) "*should be approached with caution and should remain an exceptional remedy*".[469] "The reason for this caution is straightforward. Members negotiate the rules they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules". The practical significance of non-violation complaints is therefore limited. To date, only a handful of (unsuccessful) claims have been raised, always accompanying (mostly successful) 'violation complaints'.[470] In line with this, a detrimental impact of government-induced private standards on the competitive opportunities of foreign products could theoretically be challenged in a non-violation complaint. However, it is difficult to think of a constellation where private sustainability standards, which are in line with the principles of WTO law, result in trade restricitons. Therefore, non-violation complaints in relation to private sustainability standards most likely remain a theoretical remedy.

263 Situation complaints are, in contrast to non-violation complaints, not attached to government action. GATT practice suggests that Article XXIII:1(c) GATT could be invoked in situations involving serious macroeconomic or employment factors.[471] . However, no situation complaint has been adjudicated so far. In 1983 the European Communities submitted a claim against Japan based on a series of factors peculiar to the Japanese economy which resulted in lower level of imports, especially of manufactured products. Ultimately, the claim has not been pursued.[472] This indicates that Article XXIII:1(c) GATT, as an exceptional remedy, does not encompass constellations related to the peculiarities of a market, including consumer preferences. With regard to private sustainability standards, this implies that competitive disadvantages of (un)certified products may not be addressed in situation complaints.

469 Appellate Body Report, *EC – Asbestos*, para. 186; Panel Report, *Japan – Film*, para. 10.37.

470 Bossche and Zdouc, *The Law and Policy of the World Trade Organization*, 181.

471 GATT Analytical Index, p. 668-671.

472 GATT Analytical Index, p. 670 f.

Chapter 5: Private conduct under WTO law

III. Attribution under the GATT

Only "*situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member*" may be subject to dispute settlement in the WTO system.[473] In line with this, the impairment of benefits by private action is not encompassed by the covered agreements; the disciplines of the GATT apply only to measures adopted by Members. However, in some instances private behavior only reveals hidden government action.[474] Therefore adjudicators shall carefully examine whether what seems on its face as a private action shall nonetheless be attributed[475] to the government because of a close governmental connection to or endorsement of those actions.[476] 264

The Appellate Body's jurisprudence endows the term 'measure' with a wide notion. It comprises "*any act or omission attributable to a WTO Member*".[477] This broad definition would allow for a finding of breach on behalf of a Member already in case it fails to prevent other (private) agents from causing impairment.[478] However, as it will appear from the next subsections, jurisprudence seems to require a higher threshold – namely a demonstrable government involvement. Provisions that allow for the attribution of omissions to regulate 265

473 Article 3.3 DSU (emphasis added).

474 Santiago M. Villalpando, "Attribution of Conduct to the State: How the Rules of State Responsibility May Be Applied Within the WTO Dispute Settlement System," *Journal of International Economic Law* 5, no. 2 (June 2002): 416, doi:10.1093/jiel/5.2.393.

475 According to the Oxford Dictionary the verb "attribute" means "regard something as being caused by something" (Oxford Dictionaries online). Similarly, in the context of state responsibility an act is "attributable" to a state if, by applying the relevant criteria, it is demonstrated that the act was caused by it. Attribution implies (only) that the behavior in question will be regarded as that of the state; its legality is to be assessed separately.

476 *Cf.*: Panel Report, *Japan – Film*, para. 10.52.

477 Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 5.109.

478 Geraldo Vidigal, "Attribution in the WTO: The Limites of 'Sufficient Government Involvment';," *Journal of International Trade and Arbitration Law* 6 (January 2017): 136.

private conduct have rarely been applied, and if so, generally not without any affirmative government action.[479]

1. Conduct induced by governmental measures

266 The WTO Agreements do not contain general rules on attribution,[480] and the dispute settlement bodies rarely elaborate on this (distinct) conceptual issue when dealing with a claim under the GATT. Rather, panels and the Appellate Body examine attribution together with the existence of a breach. [481] This approach links attribution to the provision(s) under which the disputed measure was challenged and requires a case-by-case analysis.[482] Nevertheless, there is a constant line of jurisprudence on the factors leading to attribution.

267 The Panel in *Japan –Semiconductors*[483] established that the behavior voluntarily[484] adopted by private agents is to be regarded as that of the Member if two conditions are met. First, 'sufficient incentives or disincentives' must exist for the action to take effect. Second, the operation of the GATT-inconsistent (private) behavior must essentially be dependent on government action or intervention. This approach was followed by later panels and the Appellate Body.[485]

268 In this assessment the legal qualification of the governmental act is not conclusive. On the contrary, the first criterion calls for an assessment of governmental incentives or disincentives which affect the private behavior. Relevant

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479 In line with this, the Panel in *Argentina – Hides and Leather* refused to read a positive due diligence obligation into Article XI:I GATT (Panel Report, *Argentina – Hides and Leather*, para. 11.19.with reference to Panel Report, *Japan – Film*, para. 10.56.). This finding supports a restrictive reading of Article 4.1 TBT Agreement. *See*: *supra*, n.292

480 However, special rules of attribution are enshrined for instance with regard to state-trading enterprises and under the SCM-Agreement concerning the existence of a subsidy. *See*: *Ad note* to Articles XI, XII, XIII, XIV and XVII GATT and Article 1.1 SCM-Agreement.

481 Despite that "attribution" is, according to Article 2.2 of the ILC Articles, to be examined separate from the second conceptual element of "breach".

482 See similar Villalpando, "Attribution of Conduct to the State," 396 f. with reference to Panel Report, *Japan – Film*, para. 10.16.

483 GATT Panel Report, *Japan – Semi-Conductors*.

484 Meaning without legal obligation.

485 GATT Panel Report, *Japan – Semi-Conductors*. para. 109.

are any forms of government action which can influence the conduct of privates, and all circumstances which help to shape incentives in the particular society.[486]

In line with the above, 'sufficient incentives' may exist even if the action adversely affecting imported goods is, to some extent, the result of privates' decisions. If the impediment of competitive opportunities is an 'effect' of a governmental measure, "*the intervention of some element of private choice*" does not relieve a Member of its obligations under the GATT.[487] Rather, in case the legal necessity of making a choice is imposed by a governmental measure, attribution is to be answered in the affirmative.[488] Similarly, a competitive advantage granted by the government to undertakings made by private parties is likely to qualify as a 'sufficient incentive'.[489] 269

Under the second criteria, adjudicators need to answer whether a sufficient level of government involvement in the private action exists. In the lack of a bright-line definition of 'sufficient', delimitation must be carried out on a case-by-case basis.[490] The provision of organizational assistance, including initial 270

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[486] Panel Reports, *Canada – Autos*, para. 10.106.; GATT Panel Report, *Japan – Agricultural Products I*, para. 5.4.1.1. *See also*: Ming Du, "The Regulation of Private Standards in the World Trade Organization," *Food and Drug Law Institute (FDLI)* 73, no. 3 (September 2018): 448, https://www.fdli.org/2018/09/the-regulation-of-private-standards-in-the-world-trade-organization/.

[487] Appellate Body Reports, *Korea – Beef*, para. 146.

[488] In *Korea – Beef* disputed was the legal necessity of distributors to make a choice whether to sell only domestic beef or only imported one.

[489] GATT Panel Report, *Canada – FIRA*, paras 5.4 ff. As the GATT Panel in *EEC – Parts and components* put it, "*not only requirements which an enterprise is legally bound to carry out […] but also those which an enterprise voluntarily accepts in order to obtain an advantage from the government constitute „requirements" within the meaning of [Article III:4 GATT]*". *See*: GATT Panel Report, *EEC – Parts and Components,* para. 5.21.

[490] Panel Report, *Japan – Film*, paras 10.52 and 10.56.

start-up funds, is unlikely to meet the threshold of 'sufficient' government involvement.[491] A different conclusion could be drawn if the government collaborates with private interest groups in formulating certain guidelines and then endorses those GATT-inconsistent practices.[492]

271 Applying the above principles to private sustainability standards, attribution requires a case-by-case analysis. The examination shall take into account, first, whether sufficient incentives or disincentives did exist for the privates to take up the behavior in question. Thereby any form of competitive (dis)advantage can be relevant. Second, it must be unveiled whether 'sufficient' government involvement has been in place. This could be the case if the government has provided incentives for the privates to take up the GATT-inconsistent behavior, or if it contributed to the creation of the GATT-inconsistent standard, accompanied by (subsequent) expressions of approval and support.[493]

272 Attribution thus requires an active involvement of the Member. Two deviations from this principle are conceivable.[494] On the one hand, attribution may be based on an express obligation of Members to ensure that certain private conduct does not take place. On the other hand, Members may be held liable

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491 This conclusion is based on the Panel's findings in *Japan – Film*. In that case one of the challenged measures was prepared by an advisory center, established and initially funded by the government. However, nothing suggested that the center employed government officials, or that the government participated in the preparation of the guidelines. On the other hand, the guideline's content and the mandate for its preparation suggested a linkage to governmental policy. However, while the foreword of the guidelines included a statement expressing that their development is part of the government's policy and the center's hope for the widespread adoption of the guidelines. Also, no evidence existed that the government in fact endorsed the guidelines. On balance the Panel denied "sufficient government involvement". *See*: Panel Report, *Japan – Film*, paras 10.190-10.194.

492 This was the case with regard to another measure challenged in *Japan – Film*. In this instance, the government created and commissioned an advisory board to create a plan. "*[U]pon its publication senior [government] officials endorsed the plan and stated that [they] would work with the private sector to ensure implementation of the plan's recommendations.*" On this basis the measure was attributed to the government. *See*: Panel Report, *Japan – Film*, paras 10.176-10.180.

493 *See similar*: Du, "The Regulation of Private Standards in the World Trade Organization," 448.; referring to R. J. Zedalis, "When Do the Activities of Private Parties Trigger WTO Rules?," *Journal of International Economic Law* 10, no. 2 (May 2007): 346, doi:10.1093/jiel/jgm010.

494 Vidigal, "Attribution in the WTO," 153.

for their omission, meaning failures to discipline private trade-restrictive behavior without any demonstrable link to government intervention.[495] The teachings of WTO jurisprudence on these possible exceptions is dealt with below.

2. Attribution based on express provisions

2.1 Import monopolies under Article II:4 GATT

273 Article II:4 GATT covers monopolies on importation of goods established, maintained or authorized by Members. These shall not operate 'so as to afford protection' beyond what the Member has declared in its schedule of concessions. By its wording the provision applies to both *de jure* and *de facto* establishment, maintenance and authorization. Yet, to date the provision has been invoked only in connection with legal monopolies (still under the GATT 1947[496]), and it is generally assumed to refer only to state-trading enterprises.[497]

274 For the sake of argument, a broad reading of Article II:4 GATT could encompass import monopolies merely permitted by the government. Such reading

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495 Which is a case of 'responsibility' rather than 'attribution'.-This is because the violation does not lie in the Member's conduct, but in its failure to prevent nullification or impairment caused by private action. *See*: Bohanes and Sandford, "The (Untapped) Potential of WTO Rules to Discipline Private Trade-Restrictive Conduct," 27 f. *See also*: *infra* n. 280 ff.

496 In *Canada – Liquor Board* the parties agreed that the Canadian measure "*authorized a monopoly of the importation of alcoholic beverages*". *See*: GATT Panel Report, *Canada – Provincial Liquor Boards*, paras 4.3-4.4. In *Korea – Beef (US)*, the measure "*was a beef import monopoly [...] with exclusive privileges for the administration of both the beef import quota set by the Korean Government and the resale of the imported beef to wholesalers or in certain cases directly to end users such as hotels*" *See*: GATT Panel Report, *Korea – Beef (US)*, para. 124. However, in lack of a causal link between the monopoly and the trade restriction, the Panel did not apply Article II:4 GATT, but decided the case based on Article XI:I GATT.

497 William J. Davey, *Enforcing World Trade Rules: Essays on WTO Dispute Settlement and GATT Obligations* (Cameron May, 2006), 256.

would require Members to subject private enterprises to the strict[498] rules imposed on legal monopolies. However, in light of the standing jurisprudence on attribution this interpretation appears most unlikely.[499]

2.2 State-trading enterprises under Article XVII GATT

275 Article XVII GATT requires that state-trading enterprises (STEs) act in a manner consistent with the general principles of non-discriminatory treatment as regards imports or exports by private traders. Further, these transactions shall be undertaken solely in accordance with commercial considerations.[500]

276 STEs are often closely related to governments or perform certain governmental functions. In such instances their conduct – arguably including the development and application of standards affecting imports or exports of private traders – is beyond doubt attributable to the government.[501]

277 But the language of Article XVII GATT suggests that the provision may be applied to a wider range of enterprises, including entirely private ones which are granted with 'exclusive or special privileges' by the government. This would mean that Members may be held liable for discriminatory conduct by privates solely on the ground that 'exclusive or special privileges' existed. This opinion is represented by Bohanes and Sanford[502], while Villlalpando observes that such reading would result in a lower threshold of attribution in the context of Article XVII:1 as under the Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles).[503]

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498 Namely to abide to the disciplines of GATT – which would *inter alia* require monopolies to have a 'reasonable margin of profit' corresponding to what would be obtained 'under normal conditions of competition'. This margin should be on average the same for both domestic and imported like products. *See*: GATT Panel Report, *Canada – Provincial Liquor Boards*, para. 4.16.

499 *See similar*: Vidigal, "Attribution in the WTO," 154.

500 Article XVII:1(b) GATT.

501 In line with Articles 4 and 5 of the ILC Articles.

502 Bohanes and Sandford, "The (Untapped) Potential of WTO Rules to Discipline Private Trade-Restrictive Conduct," para. 51. For a different conclusion, *see:* Kudryavtsev, *Private-Sector Standards as Technical Barriers in International Trade in Goods*, 167.

503 In this case, attribution is based on the entity having adopted the conduct rather than on the exercise of governmental authority. Villalpando, "Attribution of Conduct to the State," 406.

Conversely, the scope of potential trade-distorting actions encompassed by the provision appears quite limited. With the words of the Appellate Body, there is "*no basis for interpreting [Article XVII GATT] as imposing comprehensive competition-law-type obligations on STEs*".[504] Rather, Members' responsibility under Article XVII GATT is limited to give effect to the basic principles of non-discrimination. Other trade-distorting conduct of STEs are not disciplined by this provision.[505]

In sum, Members may be held liable for the development or application of discriminatory private sustainability standards under Article XVII GATT. A prerequisite to this end is that the non-governmental entity was granted with 'exclusive or special privileges' by the government. 279

3. Obligation to curtail private conduct?

In some cases, nullification or impairment of benefits are caused by actions carried out entirely by and on the deliberation of private actors. Such cases are, as Vidigal points out, rarely brought to the WTO.[506] This is (at least in part) due to the general understanding that a claimant with such complaint is unlikely to succeed. 280

Jurisprudence reaffirms Members' restraint.[507] In line with the precept established in *Argentina – Hides and Leather*, the mere toleration of trade-restricting practices exercised by privates does not suffice for finding a Member in violation of its obligations.[508] Rather, it is on the claimant to show that "*private* 281

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504 Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 145.

505 This is consistent with the understanding that Article XVII GATT is aimed primarily at preventing circumvention of obligations by Members through the use of STEs. *See*: Bohanes and Sandford, "The (Untapped) Potential of WTO Rules to Discipline Private Trade-Restrictive Conduct," para. 57.

506 Vidigal, "Attribution in the WTO," 153.

507 Panel Report, *Canada – Autos*, para. 10.107.

508 The here relevant aspect of the case concerned a measure of Argentine which allowed representatives of the tanning industry to be present during custom's clearance procedures of bovine hides. In the view of the Claimant, this authorization practice amounted to a *de facto* export restriction, enforced by the private cartel. Importantly, the Panel did not decide whether the authorization sufficed for a finding of attribution – since the initial factual point, namely a causal link between the representative's presence at customs clearance and the export restriction, was not established by the EU. *See*: Panel Report, *Argentina – Hides and Leather*, para. 11.17.

action (is) attributable to the […] government under the doctrine of state responsibility".[509] In line with this, the GATT poses no positive obligation on Members to curtail private conduct – even if the provision at stake would allow an (arguably extensive) reading which requires action against the persistent private conduct.

282 In conclusion, jurisprudence suggests that Member's duty is limited to abstain from establishing, concurring in, or inducing private conduct incongruous with the GATT. A Member's mere omission to discipline private standardizing activity may not trigger its responsibility under the Agreement.

IV. Attribution under the TBT Agreement

283 The GATT jurisprudence on attribution is also reflected under the TBT Agreement. As the Panel put it in the *US – COOL* case, "*while detrimental effects caused solely by the decisions of private actors cannot support a finding of inconsistency with Article 2.1 [TBT Agreement], the fact that private actors are free to make various decisions in order to comply with a measure does not preclude a finding of inconsistency. Rather, where private actors are induced or encouraged to take certain decisions because of the incentives created by a measure, those decisions are not "independent" of that measure*."[510]

284 The citation highlights that in cases where the private action is triggered or incentivized by government intervention – so that "sufficient" government involvement exists – the private action is attributable to the govenremnt. However, the TBT Agreement contains in Article 4.1 a provision calling upon Members to take such 'reasonable measures' as may be 'available to them' to ensure that non-governmental standardizing bodies within their territory comply with the CGP. In line with the same provision, they also shall refrain from conduct that would have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent the CGP.

285 The corresponding obligation concerning conformity assessment procedures of non-governmental bodies is contained in Article 8 TBT Agreement. The provision meets the wording of Article 4.1 TBT Agreement when it requires Members to take the measures reasonably available to them to ensure that non-

[509] Panel Report, *Argentina – Hides and Leather*, note 342.
[510] Appellate Body Reports, *US – COOL*, para. 291.

governmental bodies' comply with, in this case, Articles 5 and 6 TBT Agreement[511] and refrain from conduct that would encourage such bodies to act in a manner inconsistent with the TBT Agreement's principles. Further, Article 8.2 TBT Agreement prohibits central government bodies to rely on conformity assessment procedures operated by non-governmental bodies which do not comply with Articles 5 and 6 TBT Agreement.[512] By virtue of Article 9 TBT Agreement these obligations also apply to regional and international conformity assessment systems.[513] Article 9 TBT Agreement is of particular relevance within regional trade blocks with deep cooperation on conformity assessment, such as the EU. Notably, any conformity assessment body within member states' territory will fall within the responsibility of the EU, which has a general competence over common commercial policy.[514]

Aritcle 4.1 TBT Agreement is 'additional' to GATT disciplines: The GATT contains no special provision dealing with non-governmental entities. Therefore, the question arises whether Article 4.1 TBT Agreement lays down an 'obligation to act' with respect to non-govenrmental standard setter – meaning a legal basis to hold the government responsible for its omission with respect to the conduct of non-govenrmental standard-setters and thus going beyond GATT discilines on attribution. To answer this question, first the notion of a 'recognized' non-governmental standardizing body and second, the meaning of 'reasonbaly available measures' must be interpreted.

1. Recognized non-governmental standardizing body

'Recognition' is a defining element of a standardizing body under the TBT Agreement: In line with Annex 1.2 TBT Agreement a standard is a document 286

511 Except the obligation to notify proposed conformity assessment procedures. This obligation is neither included in the CGP. *See*: *supra* n. 192.

512 Again, the obligation to notify is exempted. Some contradiction appears between Articles 8.1 and 8.2 TBT Agreement. As Appleton notes, the possibility that local and international bodies rely on the results of conformity assessment procedures of non-complying non-governmental bodies may disperse the redundancy. Appleton, "Conformity Assessment Procedures," 105.

513 For the definition of regional and international bodies, *see*: *supra* n. 159 and fn. 231.

514 *Cf.*: Article 207 Treaty on the Functioning of the European Union (TFEU). Appleton, "Conformity Assessment Procedures," 106.

enacted by a 'recognized' standardizing body.[515] Therefore, for any (non-govenrmental) standard to fall under the Agreement's scope, it must be enacted by a 'recognized' standardizing body. However, the Agreement does not provide who or how can recognize such bodies. To define the meaning of this key term, the Appellate Body first consulted the verb's dictionary definition: "*[a]cknowledge the existence, legality, or validity of, [especially] by formal approval or sanction; accord notice or attention to; treat as worthy of consideration*".[516] Thus, recognition comprises a factual (acknowledgement of the existence of something) and a normative (acknowledgement of the validity or legality of something) dimension – whereas the factual dimension requires, at minimum, that the Member is aware, or has reason to expect, that the body in question is engaged in standardization activities.[517]

287 With respect to the question of who shall recognize a standardizing body, evidence of recognition by Members, as well as evidence of recognition by national standardizing bodies appear to be relevant.[518] While financial contributions taken alone might not constitute exhaustive evidence of 'recognition', jurisprudence concerning attribution suggests that participation in the standard-setting process, authorization, respectively support or incentives for the standard's application – especially by reference in governmental normative acts – would imply a finding of 'recognition'.[519]

288 As Bohanes and Sandford note, requiring *Members*' recognition provides for "*a certain symmetry between the state's obligations, and the ambit of the state's control*". This interpretation may not be the one which best gives effect to the TBT

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515 In addition, as the Appellate Body remarked: "*The definition of the ISO/IEC Guide 2: 1991 adds to and complements the definition in the TBT Agreement, specifying that a body must be "recognized" with respect to its "activities in standardization"*Appellate Body Report, *US – Tuna II (Mexico)*, para. 357.

516 Appellate Body Report, *US – Tuna II (Mexico)*, para. 361. with reference to A. Stevenson, ed., "Recognize," *Shorter Oxford English Dictionary*, 6 (Oxford University Press, 2007), 2489.

517 Appellate Body Report, *US – Tuna II (Mexico)*, paras 361 f.

518 In the context of Articles 2.6, 11.2, and 12.6, respectively Article 12.5, Annex 3.G, and Annex 1.4 "Agreement on Technical Barriers to Trade (TBT Agreement), Part of the Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 154, 33 ILM 1144" (1994).; Appellate Body Report, *US – Tuna II (Mexico)*, para. 363.

519 *See also*: Kudryavtsev, *Private-Sector Standards as Technical Barriers in International Trade in Goods*, 50 f. For the application of this test to a sample of Switzerland-based private sustainability standards, *see*: *infra* n. 311 ff.

Agreement's objectives[520]: from the perspective of traders, private standards devoid of government involvement or incentives are as much a part of the trading system as any other measure affecting participation in international commerce.[521] Attempts have been undertaken to include – or at least to define the notion of – private standards under the applicable WTO Agreements. Still, this regulatory challenge remains one to be solved.

2. Reasonable measures under Article 4.1 TBT Agreement

The TBT Agreement does not define 'reasonable measures', but we find a similar obligation in Article XXIV:12 GATT. The GATT obligation calls upon Members to take 'reasonable measures' to ensure that regional and local governments' and other authorities' comply with other GATT provisions. Keeping in mind that 'recognition' is a prerequisite to trigger Members' obligation under Article 4.1 TBT Agreement, an analogue interpretation does not seem inappropriate. In the context of Article XXIV:12 GATT the concept of 'reasonable measures' adapts Members' obligation to the limits posed by their singular features. Therefore in the determination of what is 'reasonable' the legal and constitutional arrangements of the particular Member must be taken into account,[522] and the consequences of non-observance must be weighed against domestic difficulties of securing compliance.[523] However, 'reasonable measures' is not to be read as a justification which might protect Members from being found in violation of their obligations. Article XXIV:12 GATT requires not less than a serious, persistent and convincing effort to ensure compliance.[524] Further, in line with jurisprudence the provisions relating to com- 289

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520 Jan Bohanes and Iain D Sandford, "The (Untapped) Potential of WTO Rules to Discipline Private Trade-Restrictive Conduct," *Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper*, 2008, para. 122, doi:10.2139/ssrn.1166623. While the TBT Agreement's wording does not provide which actor may recognize a standardizing body, the Appellate Body's jurisprudence and Article 3.3 of the Understanding on the rules and procedures governing the settlement of disputes (DSU) do not allow an interpretation which sorts out this function to market actors.

521 Mavroidis and Wolfe, "Private Standards and the WTO," 17.

522 Ming Du, 'The Regulation of Private Standards in the World Trade Organization', 73 Food and Drug Law Journal (2018), p. 452; with reference to Jan Wouters and Dylan Geraets, 'Private Food Standards and the World Trade Organization: Some Legal Considerations', 11 World Trade Review (2012), p. 486.

523 GATT Panel Report, *Canada – Measures Affecting the Sale of Gold Coins* (unadopted).

524 GATT Panel Report, *Canada – Provincial Liquor Boards (US)*.

pensation and suspension of concessions may apply when it has not been possible to secure the observance of obligations as required by Article XXIV:12 GATT.[525].

290 Similarly, the concept of 'availability' in Article 4.1, second sentence TBT Agreement limits Members' obligation to instances where the central government is in the position to direct or at least to influence the standardizing body at stake. On this assumption any legal means available to a Member to force its standardizing bodies into compliance with the CGP appear as reasonable and shall be resorted to.[526] Further, the word 'shall' in Article 4.1 TBT Agreement indicates a positive obligation of Members to take all available measures to ensure their non-governmental standardizing bodies' compliance with the CGP; analogue to Article XXIV:12 GATT, provisions relating to compensation and suspension of concessions may apply when it has not been possible to secure the observance of the obligations in question.

291 In the context of Article 4.1 TBT Agreement the argument could be made that with respect to private standardizing bodies inherent federal difficulties in implementing international law do not appear, since these non-governmental actors could be required to comply with the CGP more easily. Still, the provision does not differentiate between various standardizing bodies enumerated in the second sentence.[527] This omission reflects the difficulties of implementation in relation to private bodies, in particular regional standardizing bodies, already envisaged by the negotiators of the Uruguay Round.[528]

292 Lastly, it is important to take into account that Article XXIV:12 GATT imposes obligations only with respect to public entities such as regional and local

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525 Panel Report, *EC – Selected Customs Matters*, paras 7.144-7.145. Some authors argue that this obligation similarly applies to non-governmental standardizing bodies under Article 4.1 TBT. *See*: Rüdiger Wolfrum, Peter-Tobias Stoll, and Anja Seibert-Fohr, *WTO - Technical Barriers and SPS Measures* (BRILL, 2007), 256.

526 This means that Members shall take any measures which is not unavailable to them on the grounds of factual or legal reasons. Wolfrum, Stoll, and Seibert-Fohr, 257.

527 Namely local government and non-governmental standardizing bodies within their territories and regional standardizing bodies of which they or one or more bodies within their territories are members.

528 Attempts of the European Communities to impose stricter responsibility at least with respect to local government bodies have failed. Wolfrum, Stoll, and Seibert-Fohr, *WTO - Technical Barriers and SPS Measures*, 257. with reference to Terence P. Stewart, *The GATT Uruguay Round : A Negotiating History (1986-1992)* (Deventer, Boston: Kluwer law and taxation publishers, 1993), 1098.

authorities, while Article 4.1 TBT Agreement also encompasses non-governmental bodies. On the presumption that the overall goal of trade agreements is to preserve market access by regulating the way states attempt to manipulate the terms of international trade, private action that lacks (sufficient) state involvement would fall outside the scope of the multilateral trade agreements.[529]

The jurisprudence on attribution of private behavior reinforces this interpretation. Although, in principle, WTO adjudicators may attribute private behavior to Members upon their omission to regulate their behavior, existing decisions indicate (without exception) a higher threshold.[530] Against this background 'recognition', a key term that defines the reach of Article 4.1 TBT Agreement[531], must refer to active endorsement by the government, for example by its participation in the non-governmental body's (standard-setting) activity or its support for the private standards' implementation. Only this approach provides for the appropriate symmetry between Members' obligations and the ambit of the states' control.[532] 293

[529] This conclusion is in line with the general rules of international law concerning state responsibility, in particular with the premise that the states, as such, are not responsible for private acts in their territory. Rüdiger Wolfrum, "State Responsibility for Private Actors: An Old Problem of Renewed Relevance," ed. Maurizio Ragazzi, *International Responsibility Today* (BRILL, January 2005), 423–424. This, in itself, does not exclude the possibility for Article 4.1 TBT to encompass any private action: the provision could be seen as a *lex specialis* rule that imposes a separate and distinct obligation on Members to interfere. Wolfrum, Stoll, and Seibert-Fohr, *WTO - Technical Barriers and SPS Measures*, 256.

[530] *See: supra* n. 280 ff. *See also*: Mavroidis and Wolfe, "Private Standards and the WTO," 12.

[531] *See: supra* n. 286 ff.

[532] Bohanes and Sandford, "The (Untapped) Potential of WTO Rules to Discipline Private Trade-Restrictive Conduct," para. 122. While the TBT Agreement's wording does not provide which actor is to recognize a standardizing body, it is submitted that the Appellate Body's jurisprudence – and already Article 3.3 DSU – does not allow an interpretation which sorts out this function to market actors.

Conclusion

294 The WTO Agreements establish a legal framework set to discipline Members' trade-restrictive measures. For the regulation of (private) sustainability standards the TBT Agreement and the GATT are of key importance. If applicable, their rules can mend important shortcomings of sustainability standards, such as discrimination between products of different origin, lack of transparency and rigid or unnecessary requirements to achieve sustainability goals. These Agreements also encourage Members to grant technical assistance and special and differential treatment to developing country Members, thus facilitating their participation in global trade, which can increase global food security and economic development. In addition, the TBT Agreement sets strengthened incentives for harmonization around international standards and equivalence recognition. This way it responds to the financial and technical challenge that multiple standards pose on producers.

295 The applicability of these rules will be triggered whenever a 'sufficient nexus' between the WTO-inconsistent private behavior and the government exists, meaning that the private conduct is endorsed by the government or incentivized by a trade-restrictive government act. In addition, the TBT Agreement calls upon Members to observe their 'recognized' non-governmental standardizing bodies' compliance with the Agreement's principles. This approach provides a certain symmetry between Members' obligations and the ambit of their control over private action: jurisprudence suggests that a finding of 'recognition' requires the government's acknowledgment of, support for, or participation in the private activity. However, no bright-line rules have been defined in jurisprudence so far.

296 What appears clear is that private standards, in and of themselves, are not subject to WTO rules. Addressing the trade-restrictive effect of these schemes is a regulatory challenge recognized by Members. Part III presents past and ongoing efforts to this end, than proceeds with a case study on governments' role in private standard-setting. Lastly, it presents plurilateral negotiations and possible regulatory approaches towards a more transparent and less discriminatory sustainability standards' landscape on a global scale.

Part III Regulatory challenges ahead

Introduction

Part III starts with a case study on Switzerland-based private sustainability standards, putting into practice the findings on the applicability of WTO disciplines to private action. The two-pronged qualitative analysis in Chapter 6 aims to shed light on the nature and extent of government involvement behind trade-restrictive private sustainability standards, for the purposes of determining the applicability of existing WTO rules. The case study indicates that Members' are involved in trade-restrictive non-governmental standard-setting, which could pose a major restraint to the regulation of private standards. 297

This conclusion is reiterated in Chapter 7, which starts with an analysis of Members' discussions in the relevant WTO Committees. Recognizing that urgent action shall be taken to prevent that private norms undermine market access commitments and hinder the achievement of sustainable development objectives, Members have undertaken considerable efforts at the WTO to address the shortcomings of private (sustainability) standards. Since 2005, discussions on their definition and possible regulatory approaches have inhabited multiple committees. Yet, various multilateral discussions remained unsuccessful: until today, Members have not been able to define "private standards" or to agree on applicable rules. 298

Against this background, Chapter 7 presents two proposals for improved rules to counter the negative side-effectes of private sustainability standards: the adoption of a plurilateral Reference Paper for private standards as put forward by Mavroidis and Wolfe and the creation of a joint TBT-SPS transparency mechanism, suggested by Meliadò. These proposals, foreseeing rules inscribed into willing Members' schedules and the early announcement of private standards, could bring about a substantial contribution towards a less discriminating and more transaparent standards landscape. 299

Acknowledging that trade-restrictive schemes induced by Members are already subject to WTO rules – as the Swiss case study indicates – could facilitate further negotiations and revive co-operation among Members. The ongoing plurilateral negotiations within and outside of the WTO carry the potential to overcome the current stall, for instance by creating voluntary guidelines for eco-label. Importantly, the success of these initatives largely depends on Participants' commitment and other Members' willingness to join. 300

Chapter 6: Case study from Switzerland: more state than we think

301 Existing studies on private standards and WTO law focus on the creation of new, or on the explicit extension of existing rules to private standards.[533] A hands-on examination of standards' landscapes with the aim of dissecting any ascertainable nexus with government measures is absent, despite that the attribution of private behavior it is commonly accepted to trigger Members' responsibility under WTO law. The analysis presented here is a starting point to fill this gap. It delivers a case study on Switzerland-based private sustainability standards, examining whether they are captured by current WTO rules based on a two-fold analysis: (1) a qualitative analysis of WTO law compatibility; (2) an examination of whether government incentives to or participation in the adoption and implementation of non-compliant standards' substantiate attribution. Importantly, the case study indicates Members' involvement in trade-restrictive non-governmental standard-setting, which could pose a major restraint to the regulation of private standards.

I. The landscape of Switzerland-based private sustainability standards

302 The landscape of Switzerland-based private sustainability standards is quite varied across sectors, having regard to both the number and the design of the standards in place. Switzerland's and Liechtenstein's 2017 trade policy review begins as follows: "*The trade regimes of Switzerland and Liechtenstein remain generally open, except in agriculture, which continues to be protected with high import tariffs levied on sensitive products.*"[534] Against this background it does not surprise that the sector of agriculture is characterized by a large number of private

[533] For instance, Mavroidis and Wolfe propose that willing Members draft a 'Reference Paper' with commitments on the treatment of private standard-setting bodies in participating Members' territories, while Wouters and Greaets call for a 'CGP' under the SPS Agreement. *See*: Mavroidis and Wolfe, "Private Standards and the WTO."; Jan Wouters and Dylan Geraets, "Private Food Standards and the World Trade Organization: Some Legal Considerations," *World Trade Review* 11, no. 3 (July 2012): 479–489, doi:10.1017/S1474745612000237.

[534] Trade Policy Review, Report by the Secretariat, Switzerland and Liechtenstein, WT/TPR/S/355 (11 April 2017), para. 1.

sustainability standards, in principle granting priority to domestic products or excluding foreign ones from certification.

The sectors of cosmetics, cleaning and forestry have fewer standards, yet with a similar design. In contrast, in the sectors of electronics and textiles only a limited number of non-discriminating private sustainability standards are in place, whereas no Switzerland-based private sustainability standards are applied to paper products, machinery or vehicles.

1. Agriculture and Viticulture

A great majority of Swiss farmers are IP-SUISSE (IPS) or Bio Suisse (BS) members and comply with the sustainability standards promulgated by the associations. Both standards *combine* information on Swiss origin and sustainability. However, while IPS excludes foreign products from certification, BS allows for importation and grants its logo to compliant products if Swiss products are not available in sufficient quality or quantity to cover domestic demand. Fully processed products may not be imported with a view to protect domestic processing operations, especially mills. Among imports, priority is given to products from Europe and the Mediterranean Rim.[535] The trade-restrictive effect of these standards is amplified as major retailers in the duopolistic Swiss market declare to source key product lines from IPS and BS certified products.[536] 303

Certification is reserved for domestic goods under various further Switzerland-based private sustainability standards for meat and dairy products. The same holds true for the 'Vinatura' label[537] for wine and for retailers' 'mountain' and 304

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535 IP-SUISSE, Richtlinien Grundanforderungen Gesamtbetrieb (2020), available at: <https://www.ipsuisse.ch/richtlinien-grundanforderungen-gesamtbetrieb/>, p. 9; Bio Suisse, Standards for the production, processing and trade of "Bud" products (2021), available at: < https://www.bio-suisse.ch/en/downloads.php>, p. 297 ff.

536 Approximately 70% of all food products are sold in Migros and Coop, Switzerland's two major retailers; their long term purchase agreements with the two major farmers' associations reciprocally ensure supply (which is limited with respect to some sensitive products, given the system of border protection) and demand. *See*: Federal Department of Foreign Affairs, Overview on the Swiss retail sector, available at: <https://www.eda.admin.ch/aboutswitzerland/en/home/wirtschaft/taetigkeitsgebiete/detailhandel.html>; Bio Suisse Standards for the production, processing and trade of "Bud" products (2021), p. 44.

537 Vinatura's webpage and the VITISWISS guidelines for sustainable development are available at: <https://swisswine.ch/fr/professionels/vinatura-qui-sommes-nous>.

'alp' product standards.[538] In sum, most Swiss-based private sustainability standards in the sector of agriculture exclude foreign products, while the BS standard grants priority to domestic products and discriminates amongst foreign ones.

Figure 6: Overview of Switzerland-based private sustainability standards in the sector of agriculture

Standard	**Market relevance**	**Requirements**
Bio Suisse **Products comprised:** **Milk, meat, fruits and vegetables, eggs, cereals, processed agricultural products**	Approximately 60% market share amongst organic products. Distributed under e.g. • Coop Naturaplan (95% of the product range) • Migros Bio (domestic products in all cases; imported ones may only comply with the EU organic directive) • Aldi Nature Suisse Bio • Manor Bio Nature plus	**Sustainability requirements:** Environmental: Provisions on sustainable resources use, use of pesticides and animal husbandry – going beyond the requirements of the EU/Swiss organic ordinance. Social: Regarding non-Swiss producers, compliance with the ILO fundamental rights at work; "fair trade" provisions for Swiss producers to agree on (non-binding) price and volume targets with retailers. **Origin requirements:** Priority for domestic products /products from Europe/the Mediterranean Rim. Prohibition to import entirely processed products.

[538] For a detailed analysis, *see*: Ilaria Espa and Brigitta Imeli, 'The Swiss landscape of private sustainability standards', WTI Policybrief (forthcoming).

IP-Suisse/ Vinatura **Products comprised:** **Milk, meat, fruits and vegetables, eggs, cereals /** **Grapes and wine**	Up to 26% market share, depending on the product category. Distributed under e.g. • Migros Terra Suisse • Migros Weide Beef • Aldi Suisse Garantie • Naturel • Agri Natura	**Sustainability requirements**: Environmental: Material requirements on animal husbandry (only IPS), land use, use of pesticides and biodiversity based on the Ecological Performance Criteria (additional requirements are of limited commitment). Vinatura wines must pass a degustation. Declaration of intent on sustainable resources use. Social: Declaration of intent on social aspects. **Origin requirements**: Swiss origin
Mountain/alp labels **Products comprised:** **Milk, meat, cereals, herbs**	Standards in this category include: • Coop ProMontagna • Migors Heidi • Spar Schellen-Ursli • Schweizer Bergkräuter • Schweizer Bergprodukt/Schweizer Alpprodukt (official labels)	**Sustainability requirements**: Products must stem from the Swiss mountain or alp region as defined in federal legislation. **Origin requirements**: Swiss origin
Local origin standards with exceptions **Products comprised:**	Standards in this category include: • Migros Aus der Region. Für die Region • Coop Miini Region	**Sustainability requirements**: Noncompound products: In principle max. 30km distance between place of production and distribution. Compound products: 60-80% of the ingredients must come from

Milk, meat, fruits and vegetables, eggs, cereals	• Manor lokal • Regio.Garantie (with arguably the most problematic exceptions) • Alpinavera	the region defined by the standards. **Origin requirements**: Noncompound products: Swiss origin. Compound products: priority to Swiss products (even if more distant) in case an ingredient is not available in the defined region.

2. Cosmetics and cleaning

305 Most sustainability standards applied in these sectors are not Switzerland-based. A single Switzerland-based private sustainability standard is in place for cosmetics. 'Coop Natutraline Swiss Cosmetics' strongly resembles the schemes in the agricultural sector, as it requires Swiss origin *and* compliance with sustainability criteria.[539]

306 With respect to cleaning products the two major retailers apply origin-neutral sustainability standards, which appear to conform to the TBT Agreements' principles. However, Steinfels Swiss' standard 'Maya' for cleaning and washing agents combines requirement on Swiss origin and eco-friendliness.[540]

3. Forestry

307 A single Swiss-based private certificate of origin appears in the sector of forestry. 'Schweizer Holz' is held by the umbrella organization of the Swiss forestry and timber industry. Although it makes no reference to sustainability criteria, it is recognized as a proof of sustainable timber production for the purposes of Swiss government procurement.[541] This practice relies on the argument that Swiss forest law is one of the strictest worldwide and guarantees,

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[539] *See*: <https://www.naturalinecosmetics.com/en.html>.

[540] The standard is available at: <https://www.steinfels-swiss.ch/de/professional-care/maya-oekologisch-rein/>.

[541] *See*: Guidelines for sustainable public procurement of wood, available at: <http://www.nachhaltige-beschaffung.ch/pdf/FlyerA5_HSH-Leitfaden_d.pdf>; *see also*: *supra* fn. 592.

thanks to the high requirements and comprehensive implementation by the cantonal forestry services, sustainable forest use.[542]

4. Electronics

The sector of electronics is dominated by governmental standards. Main household appliances and electric lamps are subject to mandatory governmental electricity consumption and labelling requirements. The obligations are origin-neutral and are based on the applicable EU legislation.[543] 308

Also apart from the mandatory energy label, voluntary governmental certifications have a predominant role in the sector. There are only a few Switzerland-based private sustainability standards in place: 'topten.ch' is the Swiss branch of an international program, and Coop's 'Oecoplan' standard, which is based on governmental requirements and/or the topten standard.[544] 309

5. Textiles

The sector of textiles is dominated by international sustainability schemes. Merely two Switzerland-based private sustainability standards, the brand labels of Coop and Migros, are in place. The 'Coop Naturaline – Bio Cotton' and the 'Migros Eco / Bio Cotton' standards are based on other (private) sustainability standards, such as the Global Organic Textile Standard, BS or the Bluesign System, ensuring the uniform appearance of products in the retailers' product range.[545] 310

542 *See*: Ibidem.

543 See the website of the Swiss Federal Office of Energy, available at: <https://www.bfe.admin.ch/bfe/de/home/effizienz/energieetiketten-und-effizienzanforderungen.html>.

544 *See*: <https://www.coop.ch/en/inspiration-gifts/labels/oecoplan/philosophy-and-standards.html> and <https://www.topten.ch/>.

545 *See*: <https://generation-m.migros.ch/de/nachhaltige-migros/hintergruende/rohstoffesortiment/textil.html> and <https://www.actions-not-words.ch/en/sustainability-topics/agriculture-and-processing/raw-materials/textiles/organic-cotton.html>.

II. Attribution analysis

311 As elaborated in Part II, private sustainability standards, in themselves, are not subject to WTO law.[546] Only 'attribution' can substantiate governments' responsibility for private conduct. Firstly, private action may be treated as Members' own if a sufficiently close nexus exist. This can be assumed when Members provide incentives for the privates to take up WTO-inconsistent conduct, or participate in the development and implementation of the trade-restrictive standard. Secondly, Members may be held responsible for private standard-setting activity which they have endorsed, meaning that they recognized it in a normative and factual manner. However, in this second case the Member's responsibility is triggered only to the extent caused by its incentives for CGP-inconsistent private measures.[547]

312 An in-depth analysis of the Swiss landscape of private sustainability standards identified various government measures directly linked to discriminating private sustainability standards. Overall, the results indicate that the majority of trade-restrictive local private sustainability standards fall under the WTO agreements' scope of application. To illustrate this, a selection of measures grouped by the type of government involvement is presented below.

1. Participation in the standards' development / Provision of financial benefits upon compliance

313 Government participation in, or a mandate for the development of discriminating or otherwise trade-restrictive private standards is likely to qualify as a sufficient nexus for attribution – although it must be examined on a case-by-case basis. In Switzerland, the IPS standard and the Vinatura label are based on the Ecological Performance Criteria (EPC).[548] The EPC is a minimum standard for environmentally friendly agricultural production in Switzerland, and a prerequisite for farmers to receive direct payments.[549] Vinatura's holder, the Swiss Association for Sustainable Development in Viticulture (VITISWISS), was mandated by the Federal Office for Agriculture (FOAG) to

546 *See*: *supra* n. 140 ff.

547 Against the provision's wording, omissions are not likely to be covered. *See*: *supra* n. 292

548 Additional requirements laid down in the IPS standard are of limited commitment; to attain the Vinatura label no certification beyond compliance with EPC is required and controls take place together.

549 Article 11 Ordinance on Direct Payments (SR 910.13).

elaborate the EPC for viticulture[550], while IPS cooperates with FOAG and the Federal Office for the Environment[551] in developing its standard and monitoring compliance. Against this background it stands to reason that farmers receive financial benefits upon/associated with their compliance with the private sustainability standards.

Based on this nexus, the private behavior may be attributed to the government. A finding of attribution would trigger the government's responsibility for non-compliance with the NT principle as enshrined in Article 2.1 TBT Agreement and Article III:4 GATT, as both standards exclude foreign products from certification. 314

2. Defining provenance

Origin labels are on the rise and Members responding to this call are recognized to follow a legitimate policy objective: providing information to consumers on the origin of products is seen as a response to current social norms.[552] Similarly, Members are free to lay down requirements with respect to other important quality terms, such as 'mountain provenance', for the purposes of labelling. However, it matters in which way origin or 'mountain provenance' is defined – trade-restrictive measures can only be justified if designed and implemented in an even-handed manner. 315

2.1 Domestic provenance

In Switzerland, the 'Swissness' legislation defines criteria on the use of the Swiss indication of source on product labels and in advertisement.[553] Numerous private sustainability standards are based on this act. For instance, in the sectors of agriculture, viticulture, forestry and cosmetics, nearly all Switzerland-based private sustainability standards use the Swiss indication of source 316

550 *See* : <https://swisswine.ch/de/node/510>.

551 *See* : <https://www.ipsuisse.ch/konsumenten-2/engagement/messbarkeit/>.

552 Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, para. 7.651; Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, para. 7.437.

553 For an overview on 'Swissness' *see*: < https://www.ige.ch/en/law-and-policy/national-ip-law/indications-of-source/swiss-indications-of-source/swissness.html>.

on their labels, as a sign of compliance with the 'Swissness' legislation. Under the 'Swissness' legislation, origin criteria are defined per product group (*i.e.* for natural products, foodstuffs and industrial products) and are structured as a basic rule with sets of exceptions. Below, the rules applicable to processed foodstuffs is analyzed. The legislation's stated aim is to fight deceptive practices and to provide origin information to consumers. A closer look on the product-specific rules and exceptions suggests, however, that the protection of domestic products has also been taken into account. All this said, it is likely that the private trade-restrictive behavior, induced by the 'Swissness' legislation, would be attributed to the government and fall under the WTO Agreements' scope of application.

317 To label foodstuffs as 'Swiss', 80% of the raw materials' weight and 100% of milk must come from Switzerland. In addition, essential processing must take place within Swiss territory. However, there are several exceptions to this basic rule. Raw materials (temporarily) not available in Switzerland are not counted towards the 80% threshold, while raw materials with a self-sufficiency grade below 50% are only counted to half or not at all.[554] The applicable self-sufficiency grades and the exception lists are determined by FOAG, but clear-cut rules on its approach are not available to the public. As an example, for the purposes of 'Swissness', tomato concentrate is not available in Switzerland, since domestic tomatoes are destined for fresh consumption. Also exempted are *e.g.* purees and concentrates of apricot and blackcurrant for ice cream and bonbon production, and special rules apply to coffee and chocolate.[555]

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554 Raw materials for which Switzerland has at least 50 percent self-sufficiency must be taken into account; raw materials for which the degree of self-sufficiency is 20-49.9 percent shall be counted only to half. Raw materials for which the degree of self-sufficiency is less than 20 percent can be excluded from the calculation (Article 48*b* Federal Act on the Protection of Trade Marks and Indications of Source, (SR. 232.11). For the self-sufficiency grade *see* Annex I Ordinance on the use of the Swiss Indications of Source for Foodstuffs (SR 232.112.1); for the list of exceptions *see* Annex I and Annex II Ordinance of the Federal Department of Economic Affairs, Education and Research on the use of Swiss Indications of Source for Foodstuffs (SR 232.112.11).

555 Article 5.4 Ordinance on the use of the Swiss Indications of Source for Foodstuffs.

Switzerland submitted that it does not expect the Swissness legislation to restrict international trade.[556] At the same time, it estimates the additional value of 'Swissness' to amount to at least 20% of the retail price, which sets an incentive for manufacturers to comply with the legislation and to source raw materials domestically – unless those are deemed not to be available and thus, do not count towards the 80% threshold. Therefore, the 'Swissness' legislation (already by its design) is likely to restrict international trade and affect the competitive opportunities of imports to the detriment. For this reason, the legislation appears to be in an initial conflict with the NT principle. 318

As elaborated in Part II, an initial conflict with Article 2.1 TBT Agreement, as well as an inconsistency with Article III:4 GATT can be justified if the detrimental impact on imports stems exclusively from a legitimate regulatory distinction. But the contrary must be concluded if the measure constitutes arbitrary or unjustifiable discrimination. Whether origin information is delivered as defined under the legislation, respectively as the consumer can be expected to understand it are of particular relevance in this context.[557] 319

The legislation draws a distinction between 'domestic' and other products. To label a product as 'Swiss', it requires that at least 80% of the raw material's weight and all milk is of Swiss provenance and that essential processing takes place in Switzerland. Yet, a number of raw materials that were eligible to come within the 80% requirement are counted to half or not at all, depending on Switzerland's self-sufficiency grade as determined by FOAG. These exceptions arguably distort the information consumers receive with regard to the 80% threshold. 320

In sum, the legislation appears to balance the interests of domestic producers and manufacturers. It enables producers to sell their products fresh at a higher 321

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556 *See*: WTO, Trade Policy Review, Switzerland and Liechtenstein, Minutes of the Meeting, WT/TPR/M/355/Add.1 (16 and 18 May 2017),, p. 40. The EU's question concerned i.e. i) how Switzerland assesses the impact of the new Swissness rules on imports of inputs and on the level of prices; ii) what prompted the decision to issue two sectoral regulations on watches and cosmetics; iii) what is the role of representatives of sectoral organizations under the new Swissness rules and how does Switzerland make sure that this role is not exercised to the detriment of competitors not represented by the organizations.

557 Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, para. 7.695 ff.

price (*e.g.* tomatoes and apricots), while manufacturers can import non-competing components (*e.g.* tomato concentrate and apricot pulp) at a lower price and label their products as 'Swiss'. This questions the legislation's even-handedness and thus its compliance with WTO law. Shall the exceptions inhibit successful justification, the government could be held responsible not only for the trade-restrictive act, but also for the NT-inconsistent private standards which would likely fall under the WTO Agreements' scope of application.

2.2 Defining mountain provenance

322 Traditional agriculture in mountain areas is of particular importance in Europe. In Switzerland the Mountain and Alp Ordinance lays down the requirements to use the terms 'mountain' and 'alp' on Swiss products, with a view to support farmers in marketing their products and to reduce the risk of consumers confusion.[558] In line with the ordinance the terms 'mountain' and 'alp' can only be used for the purposes of labelling and advertisement if the product or the ingredient concerned stems from the Swiss mountain region. In principle, processing must also take place in there.[559]

323 The ordinance only applies to domestic products and does not affect the labelling of imports. However, it fails to provide for the *possibility* to recognize foreign standards or products as equivalent.[560] The schematic exclusion of foreign goods is arguably in conflict with the NT principle.

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[558] Ordinance on the use of the designations 'mountain' and 'alp' for agricultural products and foodstuffs made therefrom (SR 910.19).

[559] As defined in the Agricultural Zoning Ordinance (SR 912.1). Article 8 TBT Agreement provides that, wherever appropriate, the requirements of mandatory government standards shall be specified in terms of performance. The ordinance might be seen in conflict with this provision, as it defines 'mountain' and 'alp' regions in reference to the Agricultural Zoning Ordinance, instead of specifying *e.g.* the required altitude and slope steeps.
Excepted is the use of the term 'alp' in cases when reference is obviously made to a geographical region. The exception does not cover milk and meat products. Qualifying products are entitled to use the official labels.

[560] For instance, the respective EU regulation provides that "[f]or third-country products, mountain areas include areas officially designated as mountain areas by the third country or that meet criteria equivalent to those set out in Article 18(1) of Regulation (EC) No 1257/1999." *See*: Article 31(2) Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, OJ L 343, 14.12.2012, p. 1–29.

Importantly, the ordinance is used as a basis for numerous private standards, including Coop's and Migros' mountain product lines.[561] Given the lack of equivalence recognition for foreign mountain products under the government act, these are also excluded from retailers' respective product ranges. Since the private standards make explicit reference to the federal legislation, attribution is likely to be answered in the affirmative. In result, the private standards based on the Mountain and Alp Ordinance are likely to fall under the WTO agreements' scope of application. 324

3. TRQ administration: priority for sensitive domestic products

The Swiss border protection for agricultural products establishes a priority for certain domestic meat products and for certain groups of fresh fruits and vegetables. This arises as a cumulative effect of the following factors: 325

1. High out-of-quota duties: As regards agricultural products, a two-fold tariff system applies. Tariff rate quotas (TRQs) with a lower "in-quota" rate are opened per product category. Beyond the in-quota volume, importation is often unprofitable given the manifolds higher out-of-quota rate.[562]
2. Narrow and targeted definition of quotas: Switzerland's list of concession declared to the WTO was transposed into domestic law[563], which involved splitting up the notified concessions into quotas and sub-quotas.

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561 *Cf.*: Coop Pro Montagna standard, available at: <https://www.coop.ch/de/inspiration-geschenke/labels/pro-montagna/philosophie-standards.html>.

562 TRQs are applied by many countries and their legalty is uncontested. However, high out-of-quota duties that render importation unfeasible on competitive terms might enable Members to maintain *de facto* quantitative restriction. Switzerland applies, for instance, a maximum out-of-quota rate of 2212 Swiss Francs on 100 kilogramm fresh calve meat. *See*: HS 0201.30 in the Swiss Customs Tariff – Tares, available at: <https://www.ezv.admin.ch/ezv/de/home/information-firmen/zolltarif---tares.html>.

563 Swiss Federal Council, Botschaft zu den für die Ratifizierung der GATT/WTO Übereinkommen (Uruguay-Runde) notwendigen Rechtsanpassungen, BBl 94.080 (19 September 1994), p. 1012.

This allows Switzerland to steer import quantities per product category.[564]

3. Allocation methods: Import quotas are allocated to Swiss resident holders of a general import licence. The allocation of quotas to licence holders is subject to different allocation regimes: 'Global quotas' apply to wine products, sorts of egg products, animals of the horse genus and cereals for bread.[565] Global quotas are allocated on a first come – first served basis in the order customs declarations are accepted. 'Individual quotas' apply to all remaining agricultural products, and are allocated to licence holders (however, the import rights can be traded). The allocation is conducted in line with one, or a combination of the following allocation methods, depending on the product concerned:

    a. Auction sale: The quota volume is distributed in decreasing order starting from the highest price offered. The results of the auction are published in each case.

    b. Domestic performance: Quotas are distributed either in proportion of the imports or the purchase quantity of domestic products by the licence holder in previous years. This allocation method is considered by the US as discriminatory, because it puts companies that principally source imports at a disadvantage. The US considers beef, sheep meat and offal as particularly affected.[566]

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564 For instance, separate quotas are in place for frozen cherries destined for yoghurt production and cereals for bread production. For on overview of the exact product groups included *see*: <https://www.ezv.admin.ch/ezv/de/home/dokumentation/rechtsgrundlagen/nichtzollrechtliche-aufgaben/zollkontingente.html>.

565 No general import licence is required for the importation of a number of natural wine sorts, up to yearly 100 liter wine from the own vineyard as well for sweet wines, wine specialties and mistelles; Articles 43 and 46, Ordinance on Viticulture and the Importation of Wine (SR 916.140).

566 In the course of Switzerland's trade policy review in 2017 the US noted that *"[t]he Secretariat states that the allocation of some tariff quotas use a 'discriminatory system whereby the allocation of the tariff quota is contingent upon local purchase.' This is particularly true for beef, sheep meat, and offal where 50% of the quota is allocated on the basis of a contribution to Swiss production. This provision is disadvantageous to companies that principally source product through imports. Will Switzerland explain why it considers this system to be in compliance with its WTO commitments?*" *See*: WT/TPR/M/355/Add.1, p. 16.

4. Temporal division of quotas and adjustment of in-quota quantities to domestic supply: Tariff quotas and subquotas are divided over the year and opened, depending on the product concerned, e.g. every four weeks, four times a year, or two times a year. In the case of fresh fruits and vegetables, no tariff quotas are opened if the domestic supply meets the estimated weekly demand.
   With regard to both meat products and fresh fruits and vegetables, FOAG determines the quantities released in each period of (sub)quota opening. To this end, it cooperates with the parties interested, respectively opens quotas only to the extent domestic supply does not meet the estimated weekly demand.

The temporal division of tariff quotas and the adjustment of in-quota quantities to domestic supply establish the priority of certain domestic products. Particularly affected are fresh fruits, vegetables and meat products. This system of priority predicates BS's NT inconsistency, as importation to the out-of-quota duty is not economically feasible. Thus, in case import quotas are insufficient (which depends on the ratio of domestic supply and demand) standard-compliant foreign products will not be imported, nor will they receive the Bud logo. In this respect – under the subtitle 'Priority for Swiss production' – the BS standard explicitly refers to statutory import provisions.[567] Based on this nexus the discriminating private behavior may be attributed to the government, implying the WTO Agreements' applicability . 326

Furthermore, the priority of domestic products and the allocation of tariff quotas based on domestic performance incentivize retailers to enter into long-term supply contracts with domestic producers' collectives: without such vertical integration retailers may not be able to ensure the supply of sensitive agricultural products. Corresponding obligations of 'cooperation' also apply to producers.[568] 327

This vertical integration facilitates the emergence of discriminating private sustainability standards. Examples include Coop's Naturaplan product line, sourced to at least 95% from BS certified products and Migros' Terra Suisse 328

[567] Bio Suisse Standards for the production, processing and trade of "Bud" products (2021), p. 298.

[568] See the provisions on 'Volume planning' and 'Setting fair prices' in Bio Suisse – Standards for the production, processing and trade of 'Bud' products Part I: Common standards – 5 Fair trade relations, p 44.

product line, sourced from IP certified products.[569] Against this background it stands to reason that the government encourages recognized standardizing bodies to act inconsistently with the TBT Agreement's principles, opening Article 4.1 TBT Agreement's scope of application.

4. Recognition in government procurement

329 The Switzerland-based private certificate of origin 'Schweizer Holz' is recognized as a proof of sustainable timber production for the purposes of government procurement, although it makes no reference to sustainability criteria. This practice is based on the argument that Swiss forest law is one of the strictest worldwide and guarantees sustainable forest use, given the high requirements and comprehensive implementation by the cantonal forestry services.[570]

330 Compliance with statutory requirements can be sufficient proof of sustainability. However, it is noted that the application of purely origin-related criteria in procurement tenders goes against the principle of non-discrimination and the obligation to define technical specifications, where appropriate, in terms of performance and functional requirements. These obligations are also enshrined in Arts IV:1 and X:2(a) Government Procurement Agreement.[571]

331 The private certificate of origin 'Schweizer Holz' is based on the 'Swissness' legislation.[572] Different rules come to application depending on the product concerned. Even-handed rules for natural products govern the 'Swissness' of log wood, leaving no room for trade law concerns. However, the rules and exceptions for processed agricultural products apply *i.e.* to sawmill products, and a similar set of rules to *i.e.* fiberboards and pellets for production facilities.

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569 *See*: <https://www.coop.ch/content/unternehmen/de/unternehmen/naturaplan/philosophie/leitbild.html>.

570 Coordination conference of the public building and real estate bodies, 'Procuring sustainably produced wood', available at: <www.kbob.admin.ch/kbob/de/home/publikationen/nachhaltiges-bauen.html>, with reference to the Federal Council's response to interpellation 09.4026 'Ecological Criteria in Wood Procurement', available at: <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20094026>.

571 Rolf H. Weber and Christine Kaufmann, 'Rechtsgutachten zur Verwendung von Schweizer Holz in Bauten mit öffentlicher Finanzierung', Universität Zürich 2015, available at: <https://www.bafu.admin.ch/bafu/de/home/themen/wald/recht/rechtsgutachten.html> p.4.

572 *See*: <https://www.holz-bois-legno.ch/lignum/downloads/reglement-label-zwischenversion-290519.pdf>.

This evokes the same considerations expressed in the context of processed agricultural products. That the private certification of origin is recognized in government procurement (as a proof of sustainability) and the fact that it is based on the 'Swissness' legislation substantiate attribution. Therefore, it stands to reason that the private act falls under the WTO Agreements' scope of application.

III. Relevance of the case study

The Swiss case study alerts us that there might be 'more state' behind trade- 332
restrictive private sustainability standards than we have assumed. For instance, in 2007 Appleton wrote that "*[p]rivate labeling schemes – including supermarket labeling schemes – exist for legitimate objectives such as environmental protection, but also to further protectionism*". However, after he identified protectionism as a motivation for enacting private sustainability standards – using examples such as retailers' schemes and the Bio Suisse standard – he concluded that in the lack of government recognition, these schemes fall outside of the WTO agreements' scope of application.[573] A decade later Mavroidis and Wolfe argued that more light should be shed on the process of developing and implementing private standards, not least because some 'private' standards might be attributable to WTO Members.[574]

The Swiss case study delivers data that can support and shape these discus- 333
sions. Discriminating or otherwise trade-restrictive local private sustainability standards – ranging from retailers' schemes to standards of producer associations –are in most cases linked to the government. Examples of government involvement include participation in the standards' development, preconditioning subsidies or other benefits upon compliance, as well as factual or financial assistance with the schemes' implementation. The results point to a level of state involvement in private standard-setting that could, in many instances, substantiate attribution. The sector of agriculture stands out in several aspects: it is characterized by a large number of standards, most of them disadvantage or exclude foreign products, and the government is not only aware of, but also in support of this practice.

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[573] Appleton, "Supermarket Labels and the TBT Agreement: 'Mind the Gap,'" 10–12.
[574] Mavroidis, "The Regulation of International Trade: The WTO Agreements on Trade in Goods," 12.

The finding raises the question whether the 'Swiss practice' is prevalent among other (developed country) Members (refusing any discussion on the regulation of private standards). Further research is needed to understand Member's involvement in private standard-setting, especially with respect to domestic and regional schemes. This is of particular importance, since Members' involvement in non-governmental standard-setting could be a third, and arguably the most important reason for their restraint to move along with discussions on the regulation of private standards.[575] Acknowledging that trade-restrictive private standards induced by Members are already subject to WTO law could remove a major obstacle in the way of further negotiations.

[575] *See*: *supra* n 348.

Chapter 7: Regulatory challenges ahead

In the last two decades, Members have undertaken considerable efforts at the WTO to address the shortcomings of private (sustainability) standards. Since 2005, discussions on their definition and possible regulatory approaches have inhabited multiple committees. Yet, various multilateral discussions remained unsuccessful: until today, Members have not been able to define "private standards" or to agree on applicable rules. 335

The second part of Chapter 6 presents two proposals for improved rules capable to counter the negative side-effectes of private sustainability standards. Mavroidis and Wolfe suggest the adoption of a plurilateral Reference Paper for private standards, based on the approach of the 1998 Telecoms Reference Paper. By contrast, Meliadò recommends the creation of a joint TBT-SPS transparency mechanism. While more limited in ambition, it would already bring about a substantial contribution. The early announcement of private standards would allow exporters to comment on and to adapt to new requirements, while increased transparency in itself is expected to reduce discriminating and otherwise trade-restrictive practices. 336

Lastly, acknowledging that trade-restrictive schemes induced by Members are already subject to WTO rules – as the Swiss case study indicates – could facilitate further negotiations. This is important, since the success of the ongoing negotiations on (private) sustainability standards largely depends on Participants' commitment and other Members' willingness to join. Against this background, the two ongoing plurilateral negotiations on (private) sustainability standards are discussed. 337

~~I.~~ Definitional struggle in the WTO

Private standards have been at the center of WTO discussions over decades. A now-famous complaint by Saint-Vincent and the Grenadines from 2005 is referred to as their starting point. The small island state raised its voice in the Committee on Sanitary and Phytosanitary Measures (SPS Committee) to underline the challenges faced by small-case farmers in small economies.[576] 338

[576] Agriculture is an important source of income in the Caribbean, a number of products are traditionally supplied to the EU. While no health or food safety concerns have been

While the SPS Agreement's rules are are not applicable to sustainability standards in most cases,[577] the discussions in the SPS Committee on the notion of "private standards" are relevant context for interpreting the term.

339 The communication further notes that, while private standards have an important role to play, especially in promulgating sustainable agricultural practices, "*[…] the proliferation of standards developed by private interest groups without any reference to the SPS Agreement or consultation with national authorities is a matter of concern and presents numerous challenges to small vulnerable economies. These standards are perceived as being in conflict with the letter and spirit of the SPS Agreement, veritable barriers to trade (which the very SPS Agreement discourages) and having the potential to cause confusion, inequity and lack of transparency*." [578] The immediate trigger for the complaint was the EurepGAP standard[579] and its requirements on pesticides use for bananas destined for imports in the EU. Its broader goal was, however, to raise attention to the general concern that "*these standards are in conflict with the letter and spirit of the WTO agreements*".[580]

340 In response to the trade concern, the EU declared that the EurepGAP standard was neither adopted by an EU body, nor by an EU member state, but by a private sector entity representing the interests of major retailers. Further, it declared that "*[e]ven if these standards, in certain cases, exceeded the requirements of EC SPS standards, the EC could not object to them as they did not conflict with EC legislation.*"[581]

341 The key line of reasoning presented by Saint-Vincent and the Grenadines (and other developing countries) was that SPS requirements ought to be introduced

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raised, the contention is that "*in recent times these exports have been subjected to a range of private standards that are affecting small farmers adversely.*" *See*: Committee on Sanitary and Phytosanitary Measures, Communication from Saint Vincent and the Grenadines, G/SPS/GEN/766 (27 February 2007).

577 *See*: *supra* n. 110.

578 Committee on Sanitary and Phytosanitary Measures, Communication from Saint Vincent and the Grenadines, G/SPS/GEN/766 (27 February 2007).

579 On the EurepGAP standard and its effects on small-scale farmers' participation on supply chains *see*: *supra* fn. 92 and fn. 94.

580 Mavroidis and Wolfe, "Private Standards and the WTO," 4.

581 WTO, Committee on Sanitary and Phytosanitary Measures, Summary of the Meeting held on 29-30 June 2005, Note by the Secretariat, G/SPS/R/37/Rev.1 (18 August 2005), para. 18. *See also*: Christiane Wolff, "Private Standards and the WTO Committee on Sanitary and Phytosanitary Measures," *OIE - World Organization for Animal Health, 2008, 87-93* 2008, 87–93 (2008): 1.

by governments, not by private entities. The reason for this lies in the nature of SPS measures, which can only be introduced to protect human, animal and plant life and health – regulatory issues often perceived to be reserved for governments.[582] This may not be brought forward with respect to private sustainability standards, since they operate outside of the Agreement on Sanitary and Phytosanitary Measures' (SPS Agreement) scope of application. However, there is a question relevant to both SPS-related private standards and private sustainability standards: Are these private norms attributable to the government?[583] Against this background, it is worthwhile to cast an eye on further discussions in the SPS Committee.

In October 2008, the SPS Committee decided to request an ad hoc working group on SPS-related private standards. The group's mandate was to present concrete actions on how to reduce SPS-related private standards' detrimental impact on international trade, especially with a view to developing country Members' participation.[584] As a result, six actions have been put forward and the following five were adopted by the Committee:[585] 342

"*Action 1: The SPS Committee should develop a working definition of SPS-related private standards and limit any discussions to these.*

Action 2: The SPS Committee should regularly inform the Codex, OIE and IPPC regarding relevant developments in its consideration of SPS-related private standards,

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582 In addition, measures that fall under the SPS Agreement's scope of application must be based on a risk assessment and sufficient scientific evidence. In addition, they shall not be more trade-restrictive than necessary. In meeting these strict conditions, international standards play an important role. However, governments may rely on more demanding standards than those enacted by the World Organisation for Animal Health (OIE), the Codex Alimentarius Commission (Codex) and the International Plant Protection Convention (IPPC) – on the prerequisite that they are justified by scientific evidence or are temporary measures to protect from risks that could not be sufficiently evaluated , but are based on the pertinent information to and remain under investigation.

583 The legal benchmark for attributing private standards to Members – whether SPS-related or not – appear to be the same. The jurisprudence on attribution in the strict sense applies in the same way, while Article 13 SPS Agreement (the counterpart of Article 4.1 TBT Agreement) contains the legal basis for attribution by endorsement.

584 Committee on Sanitary and Phytosanitary Measures, Actions Regarding SPS-Related Private Standards, G/SPS/55 (6 April 2011)

585 Report of the Ad Hoc Working Group on SPS-Related Private Standards to the SPS Committee, G/SPS/W/256 (3 March 2011); Committee on Sanitary and Phytosanitary Measures, Actions Regarding SPS-Related Private Standards, G/SPS/55 (6 April 2011).

and should invite these organizations to likewise regularly inform the SPS Committee of relevant developments in their respective bodies.

Action 3: The SPS Committee invites the Secretariat to inform the Committee on developments in other WTO fora which could be of relevance for its discussions on SPS-related private standards.

Action 4: Members are encouraged to communicate with entities involved in SPS-related private standards in their territories to sensitize them to the issues raised in the SPS Committee and underline the importance of international standards established by the Codex, OIE and IPPC.

Action 5: The SPS Committee should explore the possibility of working with the Codex, OIE and IPPC to support the development and/or dissemination of informative materials underlining the importance of international SPS standards."

The working group's last proposal meant to encourage Members "to exchange relevant information regarding SPS-related private standards to enhance understanding and awareness on how these compare or relate to international standards and governmental regulations, without prejudice to the different views of Members regarding the scope of the SPS Agreement."[586] This action proposed, in other words, that Members collect and exchange information on SPS-related private standards (as defined in the outcome of Action 1) within their territories. Rejecting such low level of commitment – but with a slight potential of uncovering connections between private standard-setters and the government – is quite telling.

343 Further discussions focused on adopting a working definition of SPS-related private standards. In October 2013 an electronic working group (e-WG) was established under the co-stewardship of New Zealand and China. As no consensus was reached, in 2014 the co-stewards jointly proposed to define SPS-related private standards as "written requirements" or a set thereof, used in "commercial transactions", applied by a "non-governmental entity that is not exercising governmental authority", related to SPS matters. In an optional footnote, the draft definition explicitly states that it is "without prejudice to the rights and obligations of Members" under the SPS Agreement.[587] Further ef-

586 Report of the Ad Hoc Working Group on SPS-Related Private Standards to the SPS Committee, G/SPS/W/256 (3 March 2011).

587 *See*: Report of the Co-Stewards of the Private Standards E-Working Group on Action 1 (G/SPS/55), G/SPS/W/276 (18 March 2014); *see also*: Second Report of the Co-

forts included a report on existing definitions of private standards in other international organizations.[588] Yet, no meaningful progress towards a common position could be achieved.

Members' comments on the 2014 draft definition reflect their disagreement. 344
On the one hand, the EU and the United States (US) suggested to replace 'non-governmental entity' – which echoes the wording of Article 13 SPS Agreement, the SPS counterpart of Article 4.1 TBT Agreement and could imply that private standards are already covered – with 'private body' and to delete the term 'requirement'. On the other hand, Members such as Argentina, Belize, Brazil and China attached particular importance to including these terms within the definition.[589] In response, the co-stewards emphasized that the terms originate in the mandate included in Action 1. Moreover, they are generic and not specific to the SPS Agreement. Therefore, China and New Zealand considered it necessary to maintain them.[590] In sum, the lack of progress unveils difficulties that go beyond 'a mere drafting problem'. Despite his estimation, the SPS Committee's Chair noted that since Members agreed to develop a definition of SPS related private standards, Action 1 shall remain on the agenda until they succeed.[591]

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Stewards of the Private Standards E-Working Group on Action 1, Submission by the Co-Stewards of the E-Working Group, G/SPS/W/281 (29 September 2014).

588 Committee on Sanitary and Phytosanitary Measures, Existing Definitions of Private Standards in Other International Organizations, Note by the Secretariat, G/SPS/GEN/1334 (18 June 2014).

589 *See*: Committee on Sanitary and Phytosanitary Measures, Report of the Co-Stewards of the Private Standards E-Working Group to the March 2015 Meeting of the SPS Committee on Action 1 (G/SPS/55), Submission by the Co-Stewards of the E-Working Group, G/SPS/W/283 (17 March 2015), para. 9.

590 Committee on Sanitary and Phytosanitary Measures, Report of the Co-Stewards of the Private Standards E-Working Group to the March 2015 Meeting of the SPS Committee on Action 1 (G/SPS/55), Submission by the Co-Stewards of the E-Working Group, G/SPS/W/283 (17 March 2015), para. 12.

591 Committee on Sanitary and Phytosanitary Measures, Summary of the Meeting of 15-16 July 2015, Note by the Secretariat, G/SPS/R/79 (4 September 2015). *See also*: Mavroidis and Wolfe, "Private Standards and the WTO," 14.

Discussions on private standards likewise inhabited a number of other WTO committees.[592] In 2009, during the TBT Agreement's fifth triennial review, a number of Members expressed their concern about the proliferation of private standards. However, other Members argued that "*that the term lacks clarity and that its relevance to the implementation of the TBT Agreement has not been established.*"[593] With a view to avoid the definitional problem (that blocked discussions in the SPS Committee), in the TBT Committee Members agreed to focus on acts of cooperation. These included the exchange of information and experiences on how to ensure that local non-governmental standardizing bodies comply with the CGP. Further, Members agreed to discuss "how relevant bodies involved in the development of standards – whether at the national, regional or international level – provide opportunity for public comment".[594].

346 During the sixth and the seventh triennial reviews Members could not reach any (further) progress. Therefore, China proposed to create 'Best Practice Guidelines regarding Private Standards' to "*encourage private standard setters and Members hosting such bodies to follow internationally recognized best practices in the preparation, adoption, application, certification, usage and supervision of private standards*".[595] China added that the drafting of this paper and the participation in the exercise would be without prejudice to Members' rights and obligations. Egypt, Brazil and the Russian Federation, amongst other Members, supported the Chinese attempt. However, the US and Japan strongly opposed it. The EU's 'well-known' position also remained unchanged: "*private standards, whatever their definition or meaning (there was no agreement in this regard, as discussions in the SPS Committee demonstrated), were documents which did not meet*

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592 For instance, the Committee on Government Procurement requested the Secretariat to organize a symposium dedicated to sustainable procurement practices. Private sustainability standards have been an important topic. It is worthwhile to note that one of the Swiss speakers presented the domestic practice according to which certification with the FSC, the PEFC or with a 'specially established standard' is acknowledged as proof of sustainability. Committee on Government Procurement, Key Take-aways from the Committee's Symposium on Sustainable Procurement, GPA/W/341 (22 February 2017); on peculiarities of the Swiss measure *see*: n. 307.

593 Committee on Technical Barriers to Trade, Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4', G/TBT/26 (13 November 2009).

594 Committee on Technical Barriers to Trade, Sixth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4', G/TBT/32 (29 November 2012).

595 Committee on Technical Barriers to Trade, Minutes of the Meeting on 15-16 June 2016, Note by the Secretariat, G/TBT/M/69 (22 September 2016), para. 3.372.

the definition of standards under the TBT Agreement, and, as such, were outside the scope of the Agreement and, hence, of the Committee's work".[596] Against this backdrop, the agenda has not been pursued further.

The Committee on Trade and Environment (CTE) inherited the topic of private sustainability standards from its predecessor under the GATT system, and the Doha Development Agenda turned a regular topic into a formal mandate – commissioning the CTE to address 'labelling for environmental purposes'.[597] Yet, not much progress could be achieved. As Mavroidis and Wolfe put it, developing countries kept on expressing concerns over the proliferation of private sustainability standards, while other Members, especially the US, maintained the same position as in the TBT Committee, namely that the discussion should be limited to government environmental measures.[598] 347

It appears that WTO discussions on private standards have been hindered by legalistic and terminological arguments. However, definitions matter. In *US – Tuna II*, the Appellate Body relied on the 2000 TBT Committee Decision[599] to determine whether an internationally recognized standard did exist – assuming that the decision qualifies as a 'subsequent agreement' in the sense of Article 31(3)(a) VCLT.[600] The decision is seen to set a precedent for interpreting 348

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596 TBT Committee, Minutes of the Meeting of 15-16 June 2016, Note by the Secretariat, G/TBT/M/69, paras 3.379-3.381.

597 Doha Ministerial Decision on Implementation-Related Concerns, WT/MIN(01)/17 (20 November 2001), para 32(iii); Archna Negi, "The World Trade Organization and Sustainability Standards," in *Sustainability Standards and Global Governance: Experiences of Emerging Economies*, ed. Archna Negi, Jorge Antonio Pérez-Pineda, and Johannes Blankenbach (Singapore: Springer, 2020), 39–59, doi:10.1007/978-981-15-3473-7_3.

598 Mavroidis and Wolfe, "Private Standards and the WTO," 15. This citation illustrates well the challenges in the CTE under para. 32(iii): "*Members debated a number of issues, including the lack of harmonization across schemes; the lack of scientific basis; the actual contribution of such schemes to environmental objectives; and the relevance of the TBT Agreement to CTE discussions of eco-labelling under Paragraph 32(iii).*" Committee on Trade and Environment, Summary Report of the Information Session on Product Carbon Footprint and Labelling Schemes, Note by the Secretariat, WT/CTE/M/49/Add.1 (28 May 2010), para. 12.

599 Committee on Technical Barriers to Trade, Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, G/TBT/9 (13 November 2000), para. 20 and Annex 4; *see also*: *supra* fn. 51.

600 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 371.

the covered agreements in line with WTO committee decisions, and to strengthen Members' circumspection to progress further committee decisions 'that could be turned against them in dispute settlement'.[601] Lastly, that (despite the lingering tension) no dispute in relation to private standards has been brought to the WTO so far might strengthens Members' reluctance to engage in meaningful negotiations.[602]

349 In sum, urgent action shall be taken to prevent that private norms can (serve to) undermine Members' market access commitments. Yet, various multilateral discussions remained unsuccessful: agreement on the definition of private standards and applicable rules is distant. Against this background, multiple ideas have been proposed to overcome this stall. Below, two of them are presented.

II. Regulatory challenges ahead

350 Private sustainability standards can foster environmental, social and economic sustainability, but further action is needed to realize their potential. Firstly, their limiting effect on international trade shall be countered, with a view to enabling inclusive economic growth and sustainable development. Secondly, concerns relating to standards' transparency and ambitiousness shall be addressed, ensuring that the information conveyed to consumers on certified products' sustainability impact is comprehensive. Recent studies indicate that subjecting private sustainability standards to the TBT Agreement's principles could counter their detrimental side effects. However, multilateral discussions at the WTO reached an impasse. This section reviews further actions – complementary or alternative to the ongoing plurilateral efforts – that could help to overcome the current stall.

1. Plurilateral Reference Paper for private standards

351 With a view to their 'too great' governance role in the international trading system and in domestic regulation, Mavroidis and Wolfe argue that private standards shall not be allowed to remain 'reclusive'. As these 'private forms of social order can conflict with the fundamental norms of transparency and

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601 Fabrizio Meliadò, "Private Standards, Trade and Sustainable Development: Policy Options for Collective Action" (ICTSD, 2017), 28.Fabrizio Meliado, Private Standards, Trade, and Sustainable Development: Policy Options for Collective Action, International Centre for Trade and Sustainable Development, 2017.

602 Meliadò, 28.

non-discrimination', Members shall bring more of them within the trade regime's normative framework. They do not propose more formally binding WTO rules subject to the dispute settlement system: such decision clearly lies with Members, and their lack of willingness to pursue this path is obvious. Rather, they suggest that willing Members enact a system of meta-regulation to control (some of) their private standard-setters.

352 The authors propose the adoption of a Reference Paper for private standards based on the approach of the 1998' 'Telecoms Reference Paper'.[603] The 'Telecoms Reference Paper' was adopted in full or in part by 69 signatories to the basic telecommunications agreement as additional commitments, and contains specific commitments on market access and national treatment from participating Members in the field of basic telecommunications.[604] In addition, it lays down a set of common guidelines for a regulatory framework – including competition safeguards, interconnection guarantees, transparent licensing processes and the independence of regulators – that participating Members should follow to support the telecommunications sector's transition to a competitive marketplace and to guarantee effective market access and foreign investment commitments.[605]

353 Following this pattern, a Reference Paper for private standards could encompass commitments on how each Member would treat private standardizing bodies within its territory, and how they would keep other Members informed.[606] In short, the authors plead for discipline through transparency: standardizing bodies which fall under the Reference Paper's scope of application shall be obliged to publish their work program and to notify their standards in advance, providing other participating Members the possibility for comments. In addition, Members could include the actions proposed by the

603 Mavroidis and Wolfe, "Private Standards and the WTO," 18.

604 Note that Article XVIII General Agreement on Trade in Services explicitly allows additional commitments to be scheduled, but the GATT contains no parallel provision. Therefore, the adoption of 'Annex 4 plurilateral agreements0 requires consensus, unless these are extended to all Members on MFN-basis. *See*: *supra* fn. 631 and Hoekman and Mavroidis, "MFN Clubs and Scheduling Additional Commitments in the GATT," 388 f and 397 ff.

605 *See*: Boutheina Guermazi, 'Exploring the Reference Paper on Regulatory principles' available at: <https://www.wto.org/english/tratop_e/serv_e/telecom_e/workshop_dec04_e/guermazi_referencepaper.doc>.

606 Mavroidis and Wolfe, "Private Standards and the WTO," 18.

ad-hoc working group in the SPS Committee[607], although these proved to be sensible topics.[608]

354 One virtue of this approach is that it could be inscribed in the schedules of participating Members and enter into force when a pre-defined critical mass is reached.[609] This way there would be no need for consensus among all Members, or formal ratification at home.[610] One difficulty is, however, that the Reference Paper would have to specify its own domain, meaning that a definition of 'private standards' shall be agreed on – at least for the purposes of this instrument. To facilitate the process, participating Members could incorporate an indicative list of standards or standardizing bodies.[611] Also, Members could clarify that they would not be accountable for private action, but merely required to show due diligence and enforce the agreed principles on the covered entities within their territories. Thus, their responsibility would be similar to that under Article 4.1 TBT Agreement, but arguably go beyond it insofar as it is suggested to cover omissions as well.[612]

2. Transparency mechanism for private standards

355 Meliadò developed a comprehensive set of "*non-hierarchical, mutually reinforcing options for international concerted action on private standards*". One of the options he proposes – irrespective of whether Members developed 'globally agreed meta-guidelines' for private standards – is the creation of a transparency mechanism for private standards.[613] Indeed, TBT (and SPS) measures are subject to comprehensive transparency requirements, including advance notification and a 60 days comment period.[614] However, these obligations are not applied to private standards given Members' disagreement on whether they are covered by the Agreements' scope of application.

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607 *See*: *supra* n. 342.
608 *Cf.*: paragraph J and L CGP. *See also*: *supra* n. 191f.
609 Mavroidis and Wolfe, "Private Standards and the WTO," 18.
610 *See*: *supra* fn. 604.
611 Mavroidis and Wolfe, "Private Standards and the WTO," 18.
612 Mavroidis and Wolfe, 18.
613 Meliadò, "Private Standards, Trade and Sustainable Development: Policy Options for Collective Action," 32–33.
614 *See*: *supra* n 191 f.

Against this background Meliadò recommends the creation of a joint TBT-SPS transparency mechanism, for instance by a WTO General Council Decision, building on the positive experience with the Transparency Mechanism for Regional Trade Agreements.[615] In 2001, Members agreed to initiate negotiations "*aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to RTAs*", taking into account "*developmental aspects*".[616] The 2006 Transparency Mechanism for Regional Trade Agreements is the outcome of these negotiations. It foresees the early announcement of new RTAs (or changes to existing RTAs) and their notification to the WTO.[617] Based on participating Members' submission and any further data collected in cooperation with them, the WTO Secretariat prepares a factual presentation of the notified RTA. This information is circulated among Members, allowing them to formulate questions or comments in preparation for a formal meeting devoted to the RTA.[618] In addition, Members may submit counter-notifications if they consider that relevant information has been withheld by the parties, this way discouraging the practice of non-notifications.[619]

The mechanism operates "*without affecting Members' rights and obligations under the WTO agreements*", introducing a shift from RTAs 'legal examination' to their 'consideration'.[620] The Committee on Regional Trade Agreements, the body in charge of implementing the Transparency Mechanism, now refrains from examining whether notified RTAs are consistent with WTO rules.[621] One 357

615 Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006, WT/L/671 (18 December 2006); Meliadò, "Private Standards, Trade and Sustainable Development: Policy Options for Collective Action," 32.

616 Doha Ministerial Declaration, WT/MIN(01)/DEC/1 (20 November 2001), para. 29.

617 Transparency Mechanism for Regional Trade Agreements, Decision of 14 December 2006, WT/L/671 (18 December 2006), paras 1-3.

618 *See*: <https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm>.

619 Sherzod Shadikhodjaev, "Checking RTA Compatibility with Global Trade Rules: WTO Litigation Practice and Implications from the Transparency Mechanism for RTAs," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2011), 538, https://papers.ssrn.com/abstract=2825732.

620 WTO, General Council, Transparency Mechanism for Regional Trade Agreements, Decision of 14 Dec. 2006 (18 December 2006), para 6.

621 Shadikhodjaev, "Checking RTA Compatibility with Global Trade Rules," 378. Referring to Jo-Ann Crawford, "A New Transparency Mechanism for Regional Trade Agreements," *Singapore Year Book of International Law and Contributors* 2007, no. 11 (n.d.).

reason for this is the non-application of rules prior to 2006. As Fiorentino *et al.* explain:

"*The emphasis in the [transparency mechanism] on 'consideration' rather than 'examination' stems from the fact that in the ten years of the CRTA's existence not a single examination report of an RTA was approved by members. This was owing to various factors including differing interpretations of key provisions of the existing legal texts, members' inability (or, in some cases, unwillingness) to provide adequate statistics, and political difficulties stemming from the need to produce a consensual report acceptable to all members, including the RTA parties under review.*"[622]

358 The transparency mechanism for RTAs, not least on account of this turn, proved to be a success. It has "*contributed immensely to our understanding of the contents of RTAs*" and is now implemented on a permanent basis.[623] Given the numerous parallels between RTAs and private (sustainability) standards – their proliferation, the need for increased transparency and developing country Members' technical and financial constraints – suggests that a similar mechanism could be applied to private (sustainability) standards as well.

359 With a view to facilitate adoption, Members could clarify – similar to the transparency mechanism for RTAs – that 'factual presentations shall not be used as a basis for dispute settlement procedures'. This would mean that Members' notifications on private standards, or any report prepared by the Secretariat, may not be used to launch a dispute and may not serve as evidence to substantiate legal findings.[624] In contrast to the 'Voluntary Best Practice Guidelines

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[622] Roberto V. Fiorentino, Jo-Ann Crawford, and Christelle Toqueboeuf, "The Landscape of Regional Trade Agreements and WTO Surveillance," in *Multilateralizing Regionalism: Challenges for the Global Trading System*, ed. Patrick Low and Richard Baldwin, WTO Internal Only (Cambridge: Cambridge University Press, 2009), 28–76, doi:10.1017/CBO9781139162111.004.

[623] Strengthening the WTO, Communication from India in the General Council, WT/GC/W/605 (3 July 2009), para. 16.

[624] This is because paragraph 10 of the 2006 Decision establishing the Transparency Mechanism for Regional Trade Agreements largely reiterates section A(i) of the Trade Policy Review Mechanism, which states that the mechanism "is not...intended to serve as a basis for the enforcement of specific obligations under the [WTO] Agreements or for dispute settlement procedures". On this ground the panel explicitly refused to take account of Trade Policy Review reports cited by the complainant the *Chile-Price Band System* and *Canada-Aircraft* cases. *See*: Shadikhodjaev, "Checking RTA Compatibility with Global Trade Rules," 545.; Panel Report, *Chile-Price Band System*, para. 7.95; Panel Report, *Canada-Aircraft*, paras 8.14 and 9.274.

regarding Private Standards' or a 'Reference Paper', which serve the purpose of regulation, 'consideration' may represent a common denominator among Members. The early announcement of private (sustainability) standards would allow exporters to comment on and to adapt to upcoming requirements, while increased transparency might, in itself, reduce discriminating and otherwise trade-restrictive practices.

3. Identifying attribution to revive co-operation

Meliadò identifies two reasons for Members' restrain to pursue an agenda on private standards at the WTO. Firstly, their circumspection of creating a precedent that could be used against them in dispute settlement and secondly the fact that no dispute has been initiated so far in relation to private standards.[625] In addition, the Swiss case study indicates Members' involvement in private standard-setting (arguably, in some cases aimed at the protection of domestic producers) as a third motive. Is there a way to turn this into a chance? 360

Existing projects that collect data on private sustainability standards focus on market data and/or the schemes' material and institutional requirements.[626] This work argues that more transparency is needed with respect to Members' involvement in private standard-setting. Comprehensive data on 'attribution' and 'endorsement' – especially in heavy users of private (sustainability) standards – would enable informed discussions among Members and could help to remove a major obstacle in the way of further meaningful negotiations.[627] This is because, arguably, a major reason for Members' restraint to address the adverse impacts of truly private schemes is to protect government-induced ones from scrutiny. The awareness that these schemes are already subject to trade rules could facilitate *e.g.* accession to the ongoing plurilateral negotiations by 361

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625 Meliadò, "Private Standards, Trade and Sustainable Development: Policy Options for Collective Action," 28.Fabrizio Meliado, Private Standards, Trade, and Sustainable Development: Policy Options for Collective Action, International Centre for Trade and Sustainable Development, 2017.

626 For instance, the project Global Survey on Voluntary Sustainability Standards (VSS), founded by the Swiss State Secretariat for Economic Affairs, collects market data on the global landscape of voluntary sustainability standards to facilitate policy and investment decisions. The ITC Standards Map and the Ecolabel Index databases schemes' market data and/or material and institutional requirements. *See*: *supra* fn. 21.

627 Initiating a dispute in relation to a Member's responsibility for trade-restrictive private (sustainability) standard(s) could bring about a chilling effect with respect to Members' involvement in and support for reclusive schemes.

other Members. Important is that Members agree to apply the CGP's core provisions – especially on transparency and non-discrimination – to private standard-setters within their territory. Ideally, this would be complemented by strengthened provisions on technical assistance, inspired by Article 11 TBT Agreement.[628]

III. Prospects of purilateral negotiations

362 Plurilateral agreements within the WTO are increasingly seen as a possibility to overcome the stall on the multilateral level.[629] They enable a subset of interested Members to progress on a single or a limited range of topics – and to decide whether to extend preferences to the entire WTO membership, or only to those Members that ratify the plurilateral agreement.[630] Which of the two options is chosen affects the plurilateral agreement's formal process of incorporation into the WTO legal order. In case the preferences are not extended to all Members, incorporation requires consensus in the Ministerial Conference.[631] By contrast, an 'inclusive' treaty can be adopted by a WTO Ministerial Decision, passed by the majority of the membership.[632] In the latter case, participating Members may see fit that the agreement only enters into force when a 'critical mass' of Members ratified it, this way reducing the risk of freeriding behavior.[633] In either case, for a plurilateral agreement to enter into force, the parties to the agreement must aim for a broad support. Outside of the WTO, however, Members may conclude an agreement without complying with these requirements – on the prerequisite that all preferences all extended on an MFN-basis.

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628 *See*: *supra* n. 197 ff.

629 Rudolf Adlung and Hamid Mamdouh, "Plurilateral Trade Agreements: An Escape Route for the WTO?," n.d., 23.

630 Adlung and Mamdouh.

631 This means that the agreement can be blocked by a single Member. *See*: Article X:9 Marrakesh Agreement Establishing the World Trade Organization.

632 However, decision-making without consensus is contested by some Members, seen to undermine the 'fundamental principles at the WTO'. *Cf.:* The Legal Status of 'Joint Statement Initiatives' and their Negotiated Outcomes, WT/GC/W/819 (19 February 2021).

633 This normally implies that approximately 80-90% of the respective global market is covered, Mark Wu, "The WTO Environmental Goods Agreement: From Multilateralism to Plurilateralism," *Research Handbook on Climate Change and Trade Law*, December 2016, 283, https://www.elgaronline.com/view/edcoll/9781783478439/9781783478439.00023.xml.

Plurilateral negotiations towards the Environmental Goods Agreement (EGA) were launched in 2014, and took place between Australia, Canada, China, Costa Rica, the EU, Hong Kong, China, Iceland, Israel, Japan, Korea, New Zealand, Norway, Singapore, Switzerland and Liechtenstein, Chinese Taipei, Turkey and the US.[634] The participating Members' intent was to negotiate an agreement that eliminates tariffs on 'environmental goods', and extend the benefits to all WTO Members.[635] It was not intended to address standards, yet it delivers useful insights for the ongoing plurilateral negotiations. 363

The EGA was foreseen to enter into force after a critical mass of Members joined it. However, only a few developing countries participated, arguably because of the limited gains the agreement would have brought to this group of Members: on the one hand, developed countries already have very low tariffs in place for the (industrial) environmental goods they proposed to be included; on the other hand, a broader list incorporating agricultural products, in which many developing countries have a comparative advantage, would call for differentiation among 'like' products. However, developing countries are concerned that this approach would lead to discrimination based on *e.g.* social sustainability considerations.[636] The negotiations are, at the time of writing, still inconclusive. 364

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634 *See*: <https://www.wto.org/english/tratop_e/envir_e/ega_e.htm>.

635 Multilateral negotiations on the reduction or elimination of trade barriers on environmental goods and services in line with the Doha Development Agenda foundered, as Members failed to conduct these negotiations in a balanced and mutually beneficial manner. In short, technology exporting countries emphasized tariff reductions on environmental goods, while technology importing countries feared that results on tariff reductions will not bring about a proper balance and favored project-based or integrated approaches. Thomas Cottier and Donah Sharon Baracol Pinhao, "WTO Negotiations on Environmental Goods and Services: A Potential Contribution to the Millennium Development Goals," info:eu-repo/semantics/report, *Cottier, Thomas; Baracol Pinhao, Donah Sharon (2009). WTO Negotiations on Environmental Goods and Services: A Potential Contribution to the Millennium Development Goals Genf: United Nations Publications* (Genf: United Nations publications, 2009), http://www.unctad.org/trade_env/test1/publications/UNCTAD_DITC_TED_2008_4.pdf.

636 Jaime de Melo and Jean-Marc Solleder, "Barriers to Trade in Environmental Goods: How Important They Are and What Should Developing Countries Expect from Their Removal," *World Development* 130 (June 2020): 104910, doi:10.1016/j.worlddev.2020.104910.

In response to this stall and with a view to addressing 21th century challenges, plurilateral initiatives have been launched within and outside of the WTO – amongst other concerning trade and environmental sustainability, also addressing environment-related (private) sustainability standards.

1. Joint Statement Initiatives in the WTO framework

The desirability and legtimimacy of the ongoing plurilateral negotiations within the WTO, referred to as Joint Statement Initiatives (JSIs), is contested by some Members and scholars. They argue that JSIs undermine the multilateral trading system and insist that negotiations involve all WTO Members.[637] The negotiations are, however, open to all interested Members, enabling them to negotiate *with success*.[638] Such progress would not be possible if subject to a consensus requirement among all Members. Given the number and diversity of participating Members, JSIs can strengthen the multilateral trading system, bringing about progress on important challenges of our time. Therefore, "*to allow for negotiations within the WTO to be initated and succeed, different approaches to such negotiations must be available*".[639]

366 Considering the legalty of these initiatives, the opponents argue that a mandate by the Ministerial Conference (taken by consensus) is necessary in order to *start* negotiations.[640] However, Article III:2 Marrakesh Agreement, the provision dealing with the process and outcome of WTO negotiations, includes no

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637 *See*: *supra* fn. 632 and *infra* fn. 640.
Proponents of JSIs, such as Canada, put forward in response that "*[w]hile no WTO Member should be expected to take on obligations to which it did not consent, likewise, no Member should expect to be able to prevent others from moving forward in various configurations in areas where they are willing to make greater commitments.*" Communication from Canada, Strenghtening and Modernizing the WTO: Discussion Paper, JOB/GC/201 (21 September 2018).

638 The first JSI on services domestic regulation has been successfully concluded amongst 67 WTO Members in December 2021. *See*: <https://www.wto.org/english/news_e/news21_e/jssdr_02dec21_e.htm>.

639 Peter Van den Bossche and Werner Zdouc, The Law and Policy of the World Trade Organization: Text, Cases and Materials (Cambridge University Press 2021) 107.

640 For instance, Kelsey opines that the "second sentence of Article III:2 Marrakesh Agreement gives the Ministerial Conference the discretion to provide a forum for negotiations 'among its Members concerning their multilateral trade relations' on other issues *and* a framework for implementing the outcomes." Jane Kelsey, 'The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO', *Journal of International Economic Law* 25, no. 1 (March 2022) 2-24.

such requirement.[641] A decision by the Ministerial Conference is only required for the implementation of negotiation outcomes on matters not yet dealt with by the existing covered agreements, as revealed by the second sentence of Article III:2 Marrakesh Agreement.

This ensures that the integration of new negotiation outcomes do not prejudice the rights of non-participants. The legal infrastructure established in the GATS and the GATT – the existing multilateral agreements which can accommodate plurilateral negotiation outcomes by means of scheduling – provides appropriate guarantees to this end.[642] In contrast, no such guarantees exist with respect to matters going beyond existing agreements. Therefore, on the incorporation of such negotiation outcomes the Ministerial Conference must decide. As Mamdouh points out, such decision could conceivably relate to an amendment to the WTO Agreement itself, since as of today, no Annex exists for plurilateral agreements which create rights for all Members.[643] Such new category could also accommodate novel outcomes under the Structured Discurrions on Trade and Environmental Sustainability (TESSD). 367

2. Structured Discussions on Trade and Environmental Sustainability

The TESSD is an open plurilateral initative launched in November 2020 by 53 Members. It is intended to complement the existing work of the CTE and other relevant WTO committees and bodies by working on deliverables for environ- 368

641 Mamdouh shows convincingly that plurilateral negotiations have not only been a "standard feature of the functioning of the Multilateral Trading System" but also that the language of Article III:2 Marrakesh Agreement requires no consensus-based decision for conducting negotiations. Hamid Mamdouh, 'Plurilateral Negotiations and Outcomes in the WTO, King&Spalding Working Paper (16 April 2021) para. 13, available at: < https://fmg-geneva.org/7-plurilateral-negotiations-and-outcomes-in-the-wto/>.

642 Members' schedules are integral part of both the GATT and the GATS. Accordingly, new commitments consolidated in GATT and GATS schedules would have to comply with all other relevant provisions of these agreements, including the MFN-principle. Thus, the results of JSIs integrated into the participating Members' schedules would have to be extended to the whole WTO Membership.
On the question what kinds of obligations can be scheduled (especially under the GATT), *see*: Bernard Hoekman and Petros C. Mavroidis, "MFN Clubs and Scheduling Additional Commitments in the GATT: Learning from the GATS," *European Journal of International Law* 28, no. 2 (May 2017): 388 f and 397 ff, doi:10.1093/ejil/chx022.

643 *Ibid* para. 18. and 37.

mental sustainability. The initative also seeks to promote transparency and information sharing and to support technical assistance and capacity building needs, particularly for least-developed countries.[644]

369 The number of participating Members grew constantly, the iniative now counts 71 Members as co-sponsors. In line with the Ministerial Statement launched in December 2021, the co-sponsors wish to address, among others the promotion of "sustainable supply chains and addressing challenges and opportunities arising from the use of sustainability standards and related measures, in particular for developing members".[645]

370 At the time of writing it is not yet clear whether the term "sustainability standards" in the work plan encompasses private sustainability standards or is restricted to governmental ones. But given that the majority of 'voluntary sustainability standards' are private ones, the fact that the reach of this item is not explicitly limited to governmental ones signalizes that the co-sponsors are ready to discuss the opportunities and (even) the challenges related to private sustainability standards. Having said this, the discussions are at their start, so that their outcome cannot be estimated yet. However, it is possible that they take inspiration from the Agreement on Climate Change, Trade and Sustainability (ACCTS), which is expected to be concluded in 2023.

3. Agreement on Climate Change, Trade and Sustainability

371 Outside of the WTO, another plurilateral initative on trade and environment has been launched in September 2019.[646] By negotiating the ACCTS, New Zealand, Switzerland, Costa Rica, Fiji, Iceland and Norway wish to respond to the "urgent challenge in relation to climate change, economic stability and the sustainable development objectives".[647] The ACCTS is envisaged to in-

644 *See*: <https://www.wto.org/english/news_e/news21_e/tessd_21sep21_e.htm>.

645 *See*: <https://www.wto.org/english/news_e/news22_e/tessd_07feb22_e.htm>.

646 Switzerland joined the negotiations in Spring 2020; other Members, such as the UK, expressed their interest in participating. *See*: House of Lords, Agreement on Climate Change, Trade and Sustainability, Volume 809 (11 January 2021), available at: <https://hansard.parliament.uk/lords/2021-01-11/debates/EB7AC813-0961-48D3-B3C3-453D7AE89FCB/AgreementOnClimateChangeTradeAndSustainability>.

647 Joint Trade Ministers' Statement on the 'Agreement on Climate Change, Trade and Sustainability' Initiative from 24 January 2020, available at <https://www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/internationale_organisationen/WTO/laufende-verhandlungen-.html>

clude – besides tariff reductions on environmental goods and service*s* and disciplines on harmful fossil fuel subsidies – guidelines to inform the development and implementation of voluntary eco-labels.

Like the TESSD, this initative is also limited to the environmental dimension of sustainabilty. But here the communications of the Parties (a small group of Members in comparison to TESSD) already indicate the ACCTS to include guidelines addressed to private standard-setters. It would appear practical to base such guidelines on existing instruments such as the CGP, the ISEAL Codes of Good Practice or ISO norms – however, at the time of writing there is no information is available on the Participants' intent. 372

Regarding the question of legalty, the ACCTS is negotiated outside of the WTO. Therefore, the questions on mandate (by the Ministerial Conference) and incorporation into the multilateral trading system do not arise. Important is, however, that the Participants comply with the MFN-obligation.[648] In line with this, the Participants agreed to extend their concessions to all Members and to dispense with the critical-mass requirement.[649] If the Participants can agree on meaningful outcomes at the interface of trade and the environment, the ACCTS could serve as a 'trailblazer agreement' that other Members could join when they are ready to meet the required commitments and disciplines, "*providing a pathway to multilateralism over time*".[650] While the agreement carries the potential for global impact, whether this potential will be realized largely depends on other Members' willingness to join.[651] 373

[648] Since an exception is only available for customs unions and regional trade agreements covering substantially all trade between the parties. *See:* Article XXIV:4 GATT and Article V:4 GATS.

[649] Joint Trade Ministers' Statement on the 'Agreement on Climate Change, Trade and Sustainability' Initiative from 24 January 2020.

[650] Ibidem.

[651] International Institute for Sustainable Development, 'Time to ACCTS?', available at: <https://www.iisd.org/articles/time-accts-five-countries-announce-new-initiative-trade-and-climate-change>.

Conclusion

Members have undertaken considerable efforts to discipline private standards. However, fundamental differences in their conceptions about the WTO's role in the governance of private standards prevented meaningful progress. Despite their decade-long exchange in various committees, agreement on the notion of private standards and the applicable rules to such standards is distant. 374

The ongoing plurilateral negotiations may overcome this stall. While the outcome of the TESSD can not be predeicted at this point, it may takes inspiration from ACCTS, where Participants committed to adopting guidelines for the development and implementation of voluntary eco-labels. These guidelines might be based on existing instruments, for instance the CGP or the ISEAL Codes of Good Practice. Such meaningful outcome at the interface of trade and the environment could serve as a 'trailblazer agreement' that other Members join when they are ready to meet the required commitments. Importantly, these will applied on an MFN-basis, to the benefit of all Members under both the TESSD and the ACCTS. This feature and the balanced negotiation agenda of both initatives will foreseeably support the agreements' successful propagation. However, the success of both the plurilateral and the multilateral agenda will largely depend on other Members' willingness to cooperate. As long as a group of Members continue to line up behind the conception that 'private standards, whatever their definition or meaning, are outside of the (otherwise) relevant WTO committees' work', a multilateral agreement will remain distant, and plurilateral efforts will not enfold their full potential. 375

Given the urgent need to regulate private sustainability standards, Members shall step up their efforts – first on the domestic level. The case study on Switzerland-based private sustainability standards indicates that trade-restrictive domestic (and regional) standard landscapes, as well as Members' involvement in their development and implementation, pose major obstacles to successful negotiations. Acknowledging that trade-restrictive private standards induced by Members are already subject to WTO rules could be an important step towards an ambitious agreement with broad participation. In itself, it will not solve the regulatory challenges ahead. However, it could shift Members' focus from attempts to excuse trade-restrictive private standards – whether or not they conflict with their internal laws – towards regulation. 376

Concluding remarks

Private sustainability standards play an important role in the governance of international trade and production. Since the 1990's, their number and coverage has expanded: as to date more than 450 schemes exist, while the share of certified products in some cases surpasses the 20% mark. As a new regulatory form, private sustainability standards operate at the intersection of market-based instruments, regulation by information and voluntary private governance. They enable producers, manufacturers and retailers to set credible signals for their products' sustainability features and allow consumers to allocate their expenses according to their sustainability preferences. 377

But the effects of private sustainability standards are not always beneficial. The nature and ambitiousness of material requirements they enshrine, alongside with the institutional design chosen by standard-setters, crucially shape sustainability impacts. Despite dedicated private-sector responses, substantial uncertainties remain regarding the direct effects of many private sustainability standards. While some schemes assess the full range of sustainability impacts throughout the certified products' lifecycle, the majority of private sustainability standards focuses on a limited range of aspects – risking to provide an uncomprehensive picture of products' sustainability impact. This lack of transparency seems to affect – in some cases even turn into the negative – standards' contribution to their stated sustainability goals. In addition, the lack of technical and financial assistance and the great variation and intersection between schemes reportedly impacts market access to the detriment and limits standards' contribution to sustainability objectives through indirect channels. 378

Subjecting private sustainability standards to rules based on the TBT Agreement's principles would strengthen their contribution to sustainable development both through direct and indirect channels. Applying rules based on the CGP's core provisions – especially on transparency and non-discrimination – to private standard-setters within Members' territory would help to ensure transparent material requirements and to induce more informed consumer choices. In addition, strengthened provisions on technical assistance and cost-sharing arrangements between supply-chain actors could increase small-holders' participation and enable more informed consumer choices. 379

380 However, multilateral agreement on rules applicable to private standards is not in sight. Discussions on the definition of private standards and possible regulatory approaches have inhabited multiple WTO committees since 2005 – recognizing that urgent action shall be taken to prevent that private norms undermine market access commitments and hinder the achievement of sustainable development objectives. Yet, various discussions remained unsuccessful: fundamental differences in Memebrs' conceptions about the WTO's role in the governance of private standards prevented meaningful progress.

381 The ongoing plurilateral negotiations may overcome this stall. While the outcome of the TESSD can not be predicted at this point, it may takes inspiration from ACCTS. Here Participants committed to adopting guidelines for the development and implementation of voluntary eco-labels, which might be based on existing instruments such as the CGP or the ISEAL Codes of Good Practice. However, both the plurilateral and the multilateral agenda's success largely depends on Members' willingness to cooperate. As long as a group of Members continues to line up behind the conception that 'private standards, whatever their definition or meaning, are outside of the (otherwise) relevant WTO committees' work', a multilateral agreement will remain distant, and plurilateral efforts will be stifled.

382 Given the urgent need to regulate private sustainability standards, Members shall step up their efforts – first on the domestic level. The case study on Switzerland-based private sustainability standards indicates that trade-restrictive domestic (and regional) standard landscapes, as well as Members' involvement in their development and implementation, pose major obstacles to successful negotiations. Acknowledging that trade-restrictive private standards induced by Members are already subject to WTO rules could be an important step towards an ambitious agreement with broad participation. In itself, it will not solve the regulatory challenges ahead. However, it could shift Members' focus from attempts to excuse trade-restrictive private standards – whether or not they conflict with their internal laws – towards regulation.