

An Argument for WTO Oversight of Ecolabels

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I. INTRODUCTION

Environmental marketing and the use of ecolabels—product marks that indicate that the labeled product meets some environmental standard—have exploded in recent years. As of May 2014, Ecolabel Index counted 448 ecolabels in 197 countries.¹ These labels theoretically enable the market to promote environmentally friendly production and consumption choices.² But they can also spawn “greenwashing” and “green protectionism.” Producers making misleading claims of environmental superiority taint the market as a whole, discouraging consumers who profess desires to purchase sustainable products from trusting green marketing.³ Countries employing ecolabels to protect domestic producers under the guise of environmental sustainability can distort trade without providing redeeming environmental benefits.⁴ For ecolabels to realize their full potential in encouraging sustainable production in a less trade-restrictive manner, they must be better policed.

International trade law under the World Trade Organization (WTO) can help police ecolabels for enhanced credibility and impact. To date, environmentalists have largely opposed WTO oversight, because the organization has struck down so many of the environmental regulations that it has considered and thus appears anti-environment. As a result, most of the relevant literature focuses

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1. ECOLABEL INDEX, www.ecolabelindex.com (last visited May 17, 2014).

2. While reducing consumption altogether might be a first best alternative, ecolabels allow consumers to choose between environmental impacts under the assumption that consumption will occur.

3. See, e.g., Nicole Darnall, Cerys Ponting & Diego A. Vazquez-Brust, *Why Consumers Buy Green* in GREEN-GROWTH: MANAGING THE TRANSITION TO SUSTAINABLE CAPITALISM 287, 288 (Diego A. Vazquez-Brust & Joseph Sarkis eds., 2012); Ibon Galarraga Gallastegui, *The Use of Eco-labels: A Review of the Literature*, 12 EUR. ENV'T 316, 318–20 (2002) (citing low trust in environmental marketing as one factor explaining the “green gap” between consumer professed desires and action). Trust is critical to environmental claims because they are “credence” attributes.

4. See, e.g., VANGELIS VITALIS, ORG. ECON. COOPERATION & DEV., ROUND TABLE ON SUSTAINABLE DEVELOPMENT, PRIVATE VOLUNTARY ECO-LABELS: TRADE DISTORTING, DISCRIMINATORY AND ENVIRONMENTALLY DISAPPOINTING 3, 5 (2002), available at <http://tinyurl.com/kxxdkhc> (citing a Dutch organic label for which only Dutch growers and traders were eligible and EU effluent standards that were inappropriate for seasonal variations in Asia and Africa, among other standards with potentially distortionary effects).

on how to evade, not exploit, WTO jurisdiction.⁵ But the WTO is not opposed to environmental regulation per se. Rather, WTO jurisprudence aims to preclude trade distortion that is not justified by legitimate regulatory motivations. Its resulting antipathy to green protectionism shares much in common with environmentalist aversion to greenwashing, as both recognize that ecolabels provide economic and environmental benefits only if truthful and trustworthy; environmentalists and free trade advocate interests are aligned. And because ecolabels are market-based tools, the WTO's experience in policing the free market can benefit labeling.

While a handful of voices also recognize the advantages of WTO oversight,⁶ I add to the dialogue updated analysis of recent jurisprudence further explaining the workings of the Agreement on the Technical Barriers to Trade (TBT Agreement) and an account of contemporary effects of such jurisprudence on domestic regulations.

This Note begins by discussing the context of ecolabeling and opposition to WTO involvement in Section II, then illustrates in Section III how WTO governance might play a role, including potential limitations. Section IV reviews prior WTO oversight in practice. Section V concludes.

II. CONTEXT

A. *Ecolabels and the Green Gap*

Ecolabeling is “the practice of marking products with a distinctive label so that consumers know that their manufacture conforms to recognized environmental standards.”⁷ Despite this

5. See *infra* notes 26-27 and accompanying text.

6. See, e.g., SIMI T B, CUTS CTR. FOR INT'L TRADE, ECON. & ENV'T, ECO-LABELS: TRADE BARRIERS OR TRADE FACILITATORS? 5 (Jan. 2009), available at <http://tinyurl.com/mwroaal> (“Eco-labels thus need to pass the test of both environmental effectiveness and WTO compatibility before being put into practice.”); VITALIS, *supra* note 4, at 11 (arguing that government involvement can allow countries to challenge voluntary ecolabels as protectionist, stating that “the linkage created between private voluntary schemes and Governments raises the prospects for a legal challenge against discriminatory programmes in the only forum where the international ‘rules of the game’ can be made to count”); Samir R. Gandhi, *Disciplining Voluntary Environmental Standards at the WTO: An Indian Legal Viewpoint* 6, 17, 35–36 (Indian Council for Research on Int'l Econ. Relations, Working Paper No. 181, 2006), available at http://www.icrier.org/pdf/WP_181.pdf (encouraging India to push for the Agreement on Technical Barriers to Trade to police voluntary NGO standards).

7. *Eco-labelling Definition*, OXFORD DICTIONARIES, <http://tinyurl.com/lo167dm> (last visited Apr. 23, 2014).

rather simple definition, ecolabel classification is complex.⁸ Ecolabels can be self-declared by the manufacturer, awarded by private third parties, or awarded by a government. Ecolabels can be voluntary, such that only those producers who choose to comply are granted the label, or mandatory, such that all producers must disclose the information the ecolabel mandates. Ecolabels can articulate anything from a single attribute—for example, whether dolphins were harmed in the tuna-fishing process—to the full life-cycle impact of a product. Most relevant for trade law, ecolabels can therefore discuss both product-related and non-product related (npr) production and processing methods (PPMs). Product-related PPMs are those production or processing methods that alter the final product. Consider, for example, a plastic cup made to be biodegradable versus one that will not deteriorate. Npr-PPMs are those that do not impact the final product. For example, illegally logged timber might be otherwise physically identical to legally logged wood, such that the legality of the logging process is an npr-PPM.⁹

Ecolabels are useful in part because they can help bring to light these npr-PPMs, especially as expansive and globalized supply chains have further obscured the impacts of production from developed country consumers. A shopper need only glance at product labels to choose responsibly-sourced timber or sustainably-fished seafood.¹⁰

But it is precisely because npr-PPMs are imperceptible that they constitute “credence attributes” that consumers cannot verify even

8. The International Standardization Organization (ISO) famously classifies three types of ecolabels:

- Type I is a multi-attribute label developed by a third party;
- Type II is a single-attribute label developed by the producer;
- Type III is an eco-label whose awarding is based on a full life-cycle assessment.

The ISO 14020 Series, INT’L INST. FOR SUSTAINABLE DEV., <http://tinyurl.com/mnvh3b7> (last visited June 11, 2014). These categories can be helpful but do not align with the characteristics most relevant to trade law.

9. U.N. ENV’T PROGRAM & INT’L INST. FOR SUSTAINABLE DEV., ENVIRONMENT AND TRADE: A HANDBOOK 54 (2d ed. 2005), available at <http://tinyurl.com/kt9nmmk>.

10. See, e.g., *Logo Use*, FOREST STEWARDSHIP COUNCIL, <https://us.fsc.org/logo-use.249.htm> (last visited May 2, 2014) (forest certification); MARINE STEWARDSHIP COUNCIL, <http://www.msc.org/cook-eat-enjoy/choose-msc-certified-seafood> (last visited May 2, 2014) (seafood certification).

post-purchase.¹¹ How can Joe Consumer determine whether the tuna he buys was actually caught without harming dolphins? This asymmetric information encourages “greenwash”—producers capitalize on consumer ignorance and declare their production environmentally friendly without making the often-costly adjustments required to support those claims.¹² These misleading claims can taint the market, potentially pushing even sincere producers into a green advertising race to the bottom.¹³ Why should Honest Producer A continue to invest in environmental improvements if Deceptive Producer B reaps the same marketing benefit without making the requisite investments?

Not surprisingly, consumers largely do not trust environmental marketing claims. A recent study found that only half of those consumers surveyed trust companies to tell the truth about their environmental impacts.¹⁴ Exacerbating the issue, the consumers most concerned about the environment—the probable target market for “green” products—are more skeptical than the average person about green claims.¹⁵

To remove misleading labels from the marketplace and hopefully gain consumer trust, ecolabels must be better policed.

11. Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68–69 (1973). The authors contrast “credence” attributes with “search” attributes that can be determined pre-purchase (e.g., price) and “experience” qualities that can be determined post-purchase (e.g., the taste of an apple). *Id.*

12. Of course, “win-win” situations exist too, such as 3M’s Pollution Prevention Pays, whereby 3M saved \$1.7 billion while reducing pollution by more than 3.8 billion pounds. *3P-Pollution Prevention Pays*, 3M, <http://tinyurl.com/lt6v3db> (last visited May 2, 2014). And ecolabels might very well have a role in rewarding the discovery of these solutions, since the market on its own, perhaps through organizational inertia, has not. Nonetheless, in recognition of potential consumer desire to pay more for environmentally friendly practices, ecolabels should also encourage those practices that are more environmentally friendly but entail higher production costs. Greenwash need not be outright deceit; for example, one producer might call his widgets “water-saving” because his production process requires slightly less water than that of his closest competitor, even if both consume more water than other competitors. For an extensive relevant discussion, see Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness In Commercial Speech Doctrine*, 41 LOY. L.A. L. REV. 227 (2007).

13. Hajin Kim, *Ecolabels and Competition: Eco-certification Effects on the Market For Environmental Quality Provision*, N.Y.U. ENVTL. L.J. (forthcoming 2014).

14. CONE COMM’NS, CONSUMERS TAKE RESPONSIBILITY FOR “GREEN” ACTIONS BUT AREN’T FOLLOWING THROUGH, ACCORDING TO LATEST CONE COMMUNICATIONS RESEARCH 6, (2013), available at <http://tinyurl.com/kc7uqor>.

15. Arminda Maria Finisterra do Paco & Rosa Reis, *Factors Affecting Skepticism Toward Green Advertising*, 41 J. ADVERTISING 147, 153 (2012). *But see* Barbara Bickart & Julie Ruth, *Green Eco-seals and Advertising Persuasion*, 41 J. ADVER. 51, 56 (2012) (finding that consumers with more care for the environment trust manufacturer claims more).

B. *Opposition to WTO Oversight*

Both environmentalists and developing countries have resisted WTO supervision of ecolabels, though better supervision could help address the concerns of both. I discuss the motivations of each group in turn.

1. *Environmentalists*

Environmentalists oppose WTO oversight because they consider the organization to be anti-environment.¹⁶ This wary attitude stems from the infamous *Tuna-Dolphin* dispute in 1992, then under the jurisdiction of the General Agreement on Tariffs and Trade (GATT, WTO's predecessor). Though the GATT Panel's *Tuna-Dolphin* report was never formally adopted, its reasoning was troubling. The dispute concerned tuna fishing in the Eastern Tropical Pacific (ETP), where dolphins and tuna associate strongly, not only sharing pelagic habitat but also swimming together.¹⁷ Fishermen exploited this inter-species association by encircling the dolphins to catch the tuna, a practice called "purse seine net" fishing.¹⁸ Dolphins caught in the process frequently died. In response, the United States' Marine Mammal Protection Act required domestic fishermen to employ specific techniques to minimize dolphin injuries ("take") and banned tuna imports from countries fishing in the ETP with an incidental dolphin take rate of more than 1.25 times that of U.S. fishermen.¹⁹

The GATT Panel's reasoning troubled environmentalists. First, it suggested that differences in production method—that led to differences in dolphin deaths—could not justify different treatment; the *tuna* was the same, even if one fishing method resulted in more

16. See, e.g., *Obama Administration Stands Firm on 'Dolphin-Safe' Tuna Labels; Will the WTO Authorize Trade Sanctions?*, PUB. CITIZEN (July 12, 2013), <http://tinyurl.com/mzld32y> (dubbing the WTO "anti-environment"); Press Release, Margrete Strand Rangnes, Sierra Club, World Trade Organization Rules Against Dolphin-Safe Standards (May 16, 2012), available at <http://tinyurl.com/kx2guc2> (criticizing the WTO for its "attacks" on environmental standards); *The 10 Misunderstandings: 4. Anti-green?*, WTO, <http://tinyurl.com/l8v93km> (last visited May 5, 2014) (listing the WTO's "anti-green" reputation as a common misunderstanding about the organization); *WTO and Environment, Health & Safety*, PUB. CITIZEN, <http://tinyurl.com/msf9as2> (last visited May 5, 2014) ("Nearly a decade and a half of the WTO's operation have produced ample evidence that the WTO has undermined health, safety and environmental standards.").

17. Panel Report, *United States-Restrictions on Imports of Tuna*, ¶ 2.2, WT/DS21/R (Sept. 3, 1991) [hereinafter *Tuna-Dolphin I*].

18. *Id.*

19. *Id.* ¶¶ 5.1–5.2.

deaths than another.²⁰ Thus, npr-PPM-based distinctions were not legitimate. Environmentalists protested that, as evident here, production methods can have significant environmental impacts and so should be a legitimate basis for distinguishing products.²¹ Second, the U.S.'s attempt to protect animal life outside of its jurisdiction precluded application of GATT's affirmative defenses, because extraterritorial regulation is inconsistent with GATT.²² This was troubling because the inability to regulate extraterritorially could encourage a race to the bottom in environmental regulations; U.S. fishermen, competing for American consumers along with the rest of the world, would not want to be hamstrung by regulations inapplicable to foreign competitors and might therefore lobby to remove dolphin protections. Third, the WTO articulated a high bar for application of GATT's affirmative defenses.²³ This made it difficult for countries to justify measures that superficially violate GATT as legitimate regulations, though GATT's affirmative defenses were intended to provide countries regulatory flexibility.

Environmentalists charged the trade organization with prioritizing free trade at the expense of environmental protection.²⁴ And the resolution of later disputes seemed to corroborate their protests, as the WTO struck down environmental regulation after regulation.²⁵ Environmentalists thus distrust WTO oversight. Those

20. *Id.* ¶ 5.14. Note, however, that the Panel technically did not consider national treatment obligations (unjustifiable "less favourable treatment") to apply at all, because the illegitimate npr-PPM-based differences resulted in a zero quota, violating Article XI's prohibition against quantitative restrictions on imports. *Id.* ¶¶ 5.18, 5.29, 5.34.

21. See, e.g., Steve Charnovitz, *The Law of Environmental 'PPMs' in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59, 70-71 (2002) (providing other examples of differing environmental impacts from differing PPMs).

22. Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 5.26, 5.31 WT/DS381/AB/R (May 16, 2012) [hereinafter *Tuna-Dolphin II*].

23. *Id.* ¶ 5.28 (reasoning that the U.S. must exhaust all other reasonably available options to show that its environmental measure was "necessary" to protect animal life).

24. See, e.g., PETER SINGER, ONE WORLD (2002).

25. See, e.g., Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ 6.1, WT/DS412/AB/R, WT/DS426/AB/R (May 6, 2013) [hereinafter *Canada—Renewable Energy*] (holding that Canada's renewable energy measures were inconsistent with Canada's WTO obligations); *Tuna-Dolphin II*, *supra* note 22, ¶ 407 (finding that the U.S. dolphin-safe tuna label, though upheld in the 1992 *Tuna-Dolphin* dispute, was found to violate national treatment obligations); Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 258, WT/DS332/AB/R (Dec. 3 2007) [hereinafter *Brazil—Tyres*] (concluding that a Brazilian measure banning the import of retreaded tires to reduce the quantity of waste tires also violated WTO rules); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 187, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle*] (finding that the U.S.'s

addressing ecolabels specifically have argued against WTO involvement,²⁶ or have explored how ecolabels might be designed to avoid WTO jurisdiction.²⁷ In other words, their focus is on how ecolabels can be upheld under WTO scrutiny, without consideration of how this same scrutiny can *improve* ecolabels.

But this anti-environment view of the WTO is outdated, as trade law is not as opposed to environmental regulation as critics claim.²⁸ First, npr-PPM distinctions in environmental regulations can be justified, provided that the measures are evenly applied.²⁹ Second, prohibitions on extraterritorial regulation have significantly relaxed, such that countries may regulate environmental processes outside their borders so long as they can claim a sufficient nexus to those activities.³⁰ The nexus required may be a low bar. For example, the U.S. desire to prevent its domestic market from “encourag[ing] fishing fleets to catch tuna in a manner that

import ban on shrimp from countries not certified to employ shrimping methods that reduce turtle bycatch and mortality similarly in violation of GATT, though this ban was later upheld after the U.S. ensured a more even playing field across countries); Appellate Body Report, *United States—for Reformulated and Conventional Gasoline*, at 28–29, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *U.S.—Gasoline*] (concluding that a Clean Air Act-related measure requiring gasoline to meet 1990 baseline quality measures violated GATT for being unfairly applied).

26. See, e.g., Steven Bernstein & Erin Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. INT’L ECON. L. 575, 604 (2008) (arguing that non-state market driven systems, which often rely on ecolabels to translate their impact, should have “regulatory space” and thus be “outside the direct purview of WTO disciplines.”); Marcy N. Moody, *Warning: May Cause Warming: Potential Trade Challenges to Private Environmental Labels*, 65 VAND. L. REV. 1401, 1442–45 (2013) (reasoning that the WTO should rarely exercise jurisdiction over private environmental labels because of its lack of expertise in environmental matters and because the WTO would “stymie [the] growth” of these labeling systems).

27. See, e.g., Mark A. Cohen & Michael P. Vandenberg, *The Potential Role of Carbon Labeling in a Green Economy* 19–20 (Resources for the Future, Discussion Paper No. 12-09, April 17, 2012) (arguing that voluntary private labels are least likely to be subject to a WTO challenge).

28. For a review, see Hajin Kim, *Do Trade Liberalization and International Trade Law Constrain Domestic Environmental Regulation?*, 43 ENVTL. L. REP. 10,823 (2013).

29. See, e.g., *Tuna-Dolphin II*, *supra* note 22, ¶ 297 (suggesting that difference in tuna fishing methods would be justifiable under the TBT Agreement if applied evenly); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 153, WT/DS58/AB/RW (Oct. 22, 2001) (blessing a PPM-based measure after the U.S. remedied its previously uneven application); Charnovitz, *supra* note 21 (discussing the PPM debate).

30. See, e.g., *Shrimp-Turtle*, *supra* note 25, ¶ 133 (noting that the U.S. measure could apply extraterritorially because turtles are migratory and might sometimes enter U.S. waters).

adversely affects dolphins” appeared sufficient to justify the extraterritorial impact of the U.S.’s dolphin-safe tuna-label.³¹

Third, most of the disputes that environmentalists cite as invalidating environmental regulations did so on the basis that the measures were unevenly applied or acted as disguised methods of protectionism.³² Once countries fix these issues of uneven application, the environmental measures at issue may be fully WTO-compliant and upheld. For example, the WTO eventually upheld a U.S. shrimp measure designed to reduce turtle bycatch after the U.S. gave all countries roughly equal time to comply with its restrictions.³³ While the WTO might sometimes be unnecessarily strict in what it considers uneven application,³⁴ this intent to ferret out distortions unjustified by legitimate regulatory objectives can also serve to improve the environmental impact of ecolabels by invalidating—and thus deterring—illegitimate labels. This effect is discussed in more detail below. Some have recognized the steps that the WTO has taken to improve its understanding of and position on environmental regulations since the original *Tuna-Dolphin* dispute.³⁵ But persistent myths abound.³⁶

2. *Developing countries*

Some developing countries³⁷ also oppose WTO oversight over ecolabels, but for an entirely different reason. While

31. *Tuna-Dolphin II*, *supra* note 22, ¶ 242.

32. *US—Gasoline*, *supra* note 25, at 4 (for being unfairly applied); *Shrimp-Turtle*, *supra* note 25 (for uneven application, though the U.S. later remedied this); *Brazil—Tyres*, *supra* note 25, ¶ 258 (for unjustifiable discrimination because some retreated tires were still allowed in when required by MERCOSUR or court order); *Tuna Dolphin II*, *supra* note 25 (for uneven application).

33. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 5–7, 134, 153, WT/DS58/AB/RW (Oct. 22, 2001).

34. *See infra* note 85.

35. *See, e.g.*, Steve Charnovitz, *The WTO’s Environmental Progress*, 10 J. INT’L ECON. L. 685, 696 (2007) (discussing Appellate Body decisions that “sent a signal to the public that the era of runaway panels [dismissing] environmental [regulations] was over”); John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 2–3 (2004) (arguing that the Appellate Body had “greened trade jurisprudence”).

36. *See supra* note 16.

37. Before the WTO, countries self-define themselves as “developing.” Because the title confers some leniency in the application of WTO rules, other Members may challenge a country’s self-declaration as “developing.” *Who Are Developing Countries in the WTO?*, WTO, <http://tinyurl.com/3wcl6> (last visited Jan. 26, 2014).

environmentalists fear that the WTO will strike down ecolabels, developing countries fear that WTO governance will legitimize these labels. Because these countries consider npr-PPM-based labels to constitute impermissible hidden barriers to trade, they worry that a WTO challenge to one npr-PPM-based label will imply that all other npr-PPM-based labels are legitimate, permissible instruments.³⁸ Thus, scholars make textual and political science-based arguments that the relevant WTO texts never intended to cover npr-PPM-based measures at all, such that these measures fall outside of the WTO's jurisdiction.³⁹

Much of this opposition stems from a concern that ecolabels can constitute hidden protectionism. First, a lack of transparency in label development and subsequent requirements might *de facto* restrict market access. Second, labels can institute environmental requirements that make little sense in other country environments. Third, local industry will often influence the product and environmental criteria selected for labels.⁴⁰ Moreover, developing countries fear the loss of sovereignty these labels might entail, as market access might require producers to adhere to values that the countries themselves might not hold. This fear is especially acute with regard to labor standards.⁴¹

But, as others have noted, these concerns militate in favor of WTO oversight to curb hidden protectionism, as discussed below.⁴² Indeed, despite general enthusiasm for ecolabels, trade proponents echo similar concerns, though phrased in terms of trade distortions. First, arbitrary environmental rationales might undermine comparative advantage. Second, one-size-fits-all standards might not account for differing environmental conditions. Third, domestically-developed labels might favor local producers. And fourth, producers may face exorbitant costs in adhering to the

38. Gandhi, *supra* note 6, at 32. But this author (Gandhi) himself argued against the wisdom of this approach and instead exhorted his compatriots to use the WTO to itself police against hidden protectionism, much as this Note argues.

39. Manoj Joshi, *Are Eco-labels Consistent with the World Trade Organization Agreements?*, 38 J. WORLD TRADE 69, 74-75 (2004). Note, however, that this article came out prior to the second *Tuna-Dolphin* dispute's resolution in the Appellate Body in 2012. In that report, the Appellate Body did not hesitate to consider the npr-PPM measure in dispute (the dolphin-safe tuna fish ecolabel), suggesting that npr-PPMs are indeed within the WTO's jurisdiction. *Tuna-Dolphin II*, *supra* note 22.

40. Bernstein & Hannah, *supra* note 26, at 603; Joshi, *supra* note 39, at 72.

41. Gandhi, *supra* note 6, at 5.

42. *Id.* at 33; Erich Vranes, *Climate Labelling and the WTO: The 2010 EU Ecolabelling Programme as a Test Case under WTO Law*, 2011 EUR. Y.B. INT'L ECON. L. 214, 236.

multiplicity of standards across geographies.⁴³

Developing country concerns thus roughly align with the WTO's liberal worldview against unjustified barriers to trade.⁴⁴ Environmentalists, developing countries, and the WTO might at least all agree on the deleterious effects of unjustified green protectionism.

III. WTO OVERSIGHT IN THEORY: BENEFITS AND LIMITATIONS

WTO oversight can help weed out illegitimate ecolabels: labels that are applied in a discriminatory fashion—such that some countries cannot access the label, without good environmental reason—or labels that distort trade without environmental benefit. Moreover, WTO oversight can motivate more thoughtful ecolabel design.

To understand how WTO jurisdiction might improve the ecolabel marketplace, I first lay the groundwork with (A) a brief introduction to WTO dispute resolution and (B) a discussion of which WTO agreement applies and to what types of ecolabels. I then review the strictures of that Agreement in part (C) to explain how it might police ecolabels, and discuss potential drawbacks in part (D).

A. *The WTO Generally*⁴⁵

The WTO serves both as a forum for making trade agreements and for resolving trade disputes. WTO oversight over ecolabels would arise through dispute resolution implementing trade agreement obligations. The dispute resolution system is reactionary, such that the WTO only adjudicates those disputes that Members bring to the dispute resolution system.⁴⁶

43. VITALIS, *supra* note 4, at 4; *Ecolabelling and International Trade Law Implications*, U.N.: FOOD & AGRIC. ORG., <http://tinyurl.com/p8tqds> (last visited May 29, 2014).

44. Of course, the WTO likely would not go so far as to consider all npr-PPM-based labels illegitimate, given that these measures are still less trade restrictive than others that countries might attempt to employ to encourage environmentally friendly production. *See, e.g.*, Joshi, *supra* note 39, at 90 (“Labelling is considered to be less trade restrictive than other environmental measures to achieve environmental objectives both in the country where the product is consumed as well as in the country of processing and manufacturing.”); SYVIENGXAY ORABOUNE, INT’L INST. FOR SUSTAINABLE DEV., INTERNATIONAL TRADE, ECOLABELLING AND STANDARDS: A CASE STUDY OF THE GREATER MEKONG SUBREGION 3 (2010), available at <http://tinyurl.com/of74vmb> (calling ecolabels a “trade-positive” tool).

45. For a more thorough explication of the WTO, see *Understanding the WTO*, WTO, <http://tinyurl.com/22cu5> (last visited June 11, 2014). This section only covers what is necessary to understand this Note.

46. Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 3, 6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex

The WTO oversees only a handful of disputes per year. On average, from 1995 to 2012, WTO Members brought twenty-seven complaints, Panels wrote eight to nine reports, and the Appellate Body wrote five to six reports per year.⁴⁷ These numbers have declined over time.⁴⁸ That so few disputes are directly decided by the WTO has two implications. First, much of the WTO's policing function may be through deterrence. Those disputes that make it to the Panel or Appellate Body stages are relatively high-profile, because so few disputes make it this far. The Panel and Appellate Body reports that result thus can help inform ecolabel design without the WTO actively reviewing every ecolabel a government implements.⁴⁹ Second, the WTO will likely directly oversee only those ecolabels that have a relatively large market impact, as Members have little incentive to muster the legal resources to bring disputes against ecolabels that do not matter.

B. *Legal Scope*

This Note focuses on the TBT Agreement as the most relevant text.⁵⁰ The TBT Agreement imposes requirements for “regulations” and “standards,” and this classification determines the body of law that applies. Roughly speaking, regulations are mandatory, whereas standards are voluntary.⁵¹ An ecolabel that constitutes a regulation

2, 1869 U.N.T.S. 401 [hereinafter *Dispute Settlement Understanding*].

47. Statistics calculated using data from Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995–2012—A Statistical Analysis*, 16 J. INT'L ECON. L. 257, 258, 262–63 (2013).

48. *Id.*

49. Of course, Members can lodge complaints against every ecolabel they disagree with, but resource constraints likely check this impulse.

50. I do not consider the General Agreement on Trade in Services (GATS), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), and GATT, all of which have additional implications for ecolabels. First, this Note focuses on trade in goods. Second, ecolabels are not always sanitary or phytosanitary measures. Third, TBT Agreement analysis here takes precedence to GATT analysis. An interpretive note to the Marrakesh agreement states that the TBT Agreement “shall prevail” over GATT in the case of conflict between the agreements. Marrakesh Agreement Establishing the World Trade Organization, General Interpretive Note to Annex 1A, Apr. 15, 1994, available at <http://tinyurl.com/memr6nw>. Further, Appellate Body Reports considering the potential application of both agreements have frequently conducted only a TBT Agreement analysis. See, e.g., Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 3, WT/DS406/AB/R (Apr. 4, 2012) [hereinafter *Clove Cigarettes*] (declining to rule in the alternative on Indonesia's GATT claim because the Panel had found a TBT Agreement violation).

51. Annex 1 of the Technical Barriers to Trade Agreement defines “technical regulation” as a “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology,

thus requires producer compliance, while a standard might only cover those producers who volunteer to meet its commitments. Most of the substantive obligations for regulations reside in article 2, while those for standards are largely found in Annex 3, in the Code of Good Practice.

Article 2's strictures regarding regulations are likely more relevant here. First, the WTO has interpreted regulations (and the term "mandatory") broadly to encompass even seemingly voluntary ecolabels.⁵² Second, much of the substantive requirements in the TBT Agreement and the Code of Good Practice overlap, though regulations face slightly stricter controls given the greater potential for trade distortion in mandatory measures.⁵³ Third, no WTO dispute has yet interpreted the Code of Good Practice. Nonetheless, the next subsection will briefly discuss where the two sets of requirements—for regulations and for standards—part ways.

symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, Annex 1, Legal Instruments—Results of the Uruguay Round, vol. 27 (1994), <http://tinyurl.com/llwtb2u> [hereinafter TBT Agreement]. In contrast, a "standard" is a

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

Id.

52. In the more recent *Tuna-Dolphin* dispute (*Tuna-Dolphin II*), the United States argued that its dolphin-safe label was voluntary because non-dolphin safe tuna could enter the market, albeit without the label. *Tuna-Dolphin II*, *supra* note 22, ¶ 196. The Appellate Body nonetheless found the label mandatory and thus a technical regulation because only fish meeting certain criteria could be so labeled and no other claims related to dolphin safety could be made. *Id.* ¶ 195. This distinction between mandatory and voluntary inevitably unravels at extremes. If a product bears an "earth-friendly" label and another product does not, if consumers take that second product to not be earth-friendly because of the absence of the label, the information disclosure is effectively mandatory. But, as discussed below, this may not matter much in application, given similar requirements across regulations and standards.

53. For example, both texts contain national treatment and MFN obligations, reprove "unnecessary obstacles to international trade," and favor performance over design requirements. The biggest differences appear to be procedural notice requirements. TBT Agreement, *supra* note 51, art. 2, Annex 3.

As for which standardizing bodies the WTO regulates, the TBT Agreement recognizes that private bodies might also create voluntary ecolabels (standards). However, the Agreement imposes requirements only on central government bodies.⁵⁴ With respect to local governments and non-governmental bodies, WTO Members need only “take such reasonable measures as may be available to them to ensure compliance” with the Agreement, both for regulations and for standards.⁵⁵ Of course, however, if a local government body or non-government organization proactively adopts the Code of Good Practice, then the provisions of that code will apply to that organization.⁵⁶

Nonetheless, some level of government involvement below actual creation of an ecolabel might suffice for the WTO to have effective jurisdiction over labels ostensibly created and managed by private organizations. As a baseline, WTO-adjudicated disputes must concern a government “measure,”⁵⁷ and only Members (and thus governments) are subject to WTO discipline.⁵⁸ But a government measure may be “any act or omission attributable to a WTO Member.”⁵⁹ A functionalist desire to capture governmental actions conducted through atypical means appears to motivate this broad definition.⁶⁰ This definition suggests that both (1) government action in support of ecolabels (but not necessarily rising to the level of ecolabel creation) and (2) private party ecolabel-related actions that can be attributed to the government

54. TBT Agreement, *supra* note 51, art. 2, Annex 3 (titled “Preparation, Adoption and Application of Technical Regulations by Central Government Bodies”).

55. *Id.* art. 3.1 (for regulations); *id.* art. 4.1 (for standards).

56. *Id.* Annex 3.

57. Dispute Settlement Understanding, *supra* note 46, art. 6.2, Annex 2, (noting that requests for Panels must “identify the specific measures at issue”); *id.* art. 3.3 (“The prompt settlement of 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.*”) (emphasis added).

58. Dispute Settlement Understanding, Annex 2, art. 1.1 (“The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes *between Members.*”) (emphasis added).

59. Appellate Body Report, *United States—Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ¶ 81, WT/DW244/AB/R (Dec. 15, 2003). For a more in-depth discussion, see Moody, *supra* note 26, at 1442–45.

60. For example, the Panel in *Japan—Film* noted that Japanese “administrative guidance” encouraging companies to take certain actions could constitute a “measure.” There, Japan conceded that such guidance “effectively substitutes for formal governmental action.” Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.44, WT/DS44/R (Mar. 31, 1998) [hereinafter *Japan—Film*].

may constitute “measures” under WTO jurisdiction.⁶¹

First, government action in support of ecolabels, which might comprise financial support or advice to ecolabel organizations,⁶² almost certainly falls under WTO jurisdiction. Both the broad definition of “measure” described above, and the TBT Agreement itself, suggest WTO jurisdiction. Specifically, the Agreement regulates the “preparation, adoption and application” of regulations and standards by central government bodies.⁶³ Thus, a central government body’s involvement in “preparation” of an ecolabel through financial support, for example, is likely subject to the TBT Agreement. More generally, the TBT Agreement’s jurisdiction may extend beyond government actions in “preparation, adoption, and application” of ecolabels, as the Agreement states that “Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging [] standardizing bodies to act in a manner inconsistent with the Code of Good Practice.”⁶⁴ WTO discipline of governmental support might create effective jurisdiction over private ecolabel organizations themselves if they must comply with TBT Agreement requirements to receive continued government benefits.

Note, however, that government procurement, a potentially powerful source of influence over the private market,⁶⁵ falls under the Agreement on Government Procurement (GPA), not the TBT Agreement.⁶⁶ Because only fourteen Members have acceded to the

61. Note that jurisdiction over the private party itself is unnecessary because the WTO has jurisdiction over the government to which the action is attributed.

62. For example, the Electronic Product Environmental Assessment Tool (EPEAT) was created by a non-profit in Oregon, but received grant money from the U.S. Environmental Protection Agency (EPA). *Electronic Product Environmental Assessment Tool*, U.S. EPA (Apr. 23, 2010), <http://tinyurl.com/c55akuu>. Note that the extension of WTO jurisdiction over such ecolabels is not a judgment of the action—the WTO does not have jurisdiction over these ecolabels because it is “bad” for the government to fund them. Rather, the WTO has jurisdiction because its rules give it jurisdiction over government “measures,” and “measures” include financial support. The underlying principle is that government actions can distort trade, and the WTO is meant to reduce those distortions, subject of course to sovereign rights to regulate.

63. TBT Agreement, *supra* note 51, art. 2, art. 4.

64. *Id.* art. 4.1 (emphasis added).

65. For example, Executive Order 13,514 requires 95% of U.S. federal government electronic purchases to be registered with the Electronic Product Environmental Assessment Tool. Exec. Order No. 13,514, 3 C.F.R. 13,514 (2009).

66. TBT Agreement, *supra* note 51, art. 1.4 (“Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement.”).

GPA, its reach is somewhat limited,⁶⁷ but both the European Union and the United States, with their immense procurement budgets, are signatories.⁶⁸ While the GPA does not duplicate the TBT Agreement, Article III includes familiar non-discrimination principles and Article VI lays down abbreviated technical specification requirements that mimic the TBT Agreement.⁶⁹

Second, private party actions can be attributed to WTO Members if there is “sufficient government involvement,”⁷⁰ suggesting that the WTO might reach even a private ecolabel organization’s actions itself. The level of government involvement required to justify WTO discipline is evaluated on a case-by-case basis.⁷¹ While WTO Reports have not yet specified a test, one scholar⁷² parsing the disputes has suggested that attribution analyses consider whether the private organization: (1) is authorized by a government delegation;⁷³ (2) is funded by the government;⁷⁴ (3) conducts governmental functions, such as imposing taxes;⁷⁵ and (4) is supported by government enforcement.⁷⁶

67. *Parties and Observers to the GPA*, WTO, <http://tinyurl.com/knofwu2> (last visited Dec. 29, 2013).

68. *Id.*

69. Agreement on Government Procurement, Apr. 15, 1994, WTO Agreement, Annex 4(b), Legal Instruments—Results of the Uruguay Round vol. 31 (1994), <http://tinyurl.com/m2v3zw6>.

70. *Japan—Film*, *supra* note 60, ¶ 10.56 (“[That] an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement.”).

71. *Id.*

72. Moody, *supra* note 26, at 1442–45. The following synopsis ties largely to Moody’s analysis, but relies on the original source materials.

73. Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, ¶ 99–100, WT/DS103/AB/R WT/DS113/AB/R (Oct. 13, 1999) (concluding that the provincial milk marketing boards were governmental because they rely on authority explicitly delegated by the federal or provincial government and because they perform governmental functions by “regulating” the economy).

74. Panel Report, *European Economic Community—Restrictions on Imports of Dessert Apples*, ¶ 12.9, L/6491 (Jun. 22, 1989) (finding an apple withdrawal program “governmental” where it was established by regulation and financed by the government, though Chile had argued that the producer organizations participating had established themselves voluntarily and no government regulation required producers to limit their marketing).

75. Appellate Body Report, *Canada—Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, ¶ 99–100, WT/DS103/AB/R WT/DS113/AB/R (Oct. 13, 1999) (concluding that the provincial milk marketing boards were governmental because they rely on authority explicitly delegated by the federal or provincial government and because they perform governmental functions by “regulating” the economy).

76. Panel Report, *European Economic Community—Restrictions on Imports of Dessert Apples*, ¶ 12.9, L/6491 (Jun. 22, 1989) (concluding that government helped enforce the

C. TBT Agreement Application in Theory

The benefits of WTO regulation extend beyond the prohibition of pretextual use of ecolabels for protectionist purposes. Five general principles embedded in the agreement would, if followed, advance the goals underlying ecolabel development: (1) no discrimination unless justified by legitimate regulatory motivations; (2) no more trade-restrictive measures than necessary; (3) minimization of the number of standards and regulations; (4) the use of performance over design requirements; and (5) transparency. These principles apply to both regulations and standards, though slight differences in implementation exist.

1. *No discrimination unless justified by legitimate regulatory motivations*

A bedrock principle of the WTO is that like products must be treated alike.⁷⁷ As such, a like product from another Member country cannot be subject to conditions of competition less favorable than the conditions provided for a like product from the importing country (national treatment principle) or for a like product from any other country (most favoured nation principle).⁷⁸ A broad definition of discrimination also addresses the concern that ecolabels will impose identical requirements where local environments may differ (thereby changing the calculus for what may be environmentally sustainable). The Appellate Body in *Shrimp-Turtle* concluded that discrimination can arise “not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.”⁷⁹ While this expansive interpretation of discrimination stems from GATT jurisprudence, the Appellate Body has noted that the TBT Agreement and GATT “overlap in scope and have similar objectives” and so should be interpreted in a “coherent and

private organization’s marketing restrictions by establishing regulations for how to dispose of withdrawn apples).

77. TBT Agreement, *supra* note 51, art. 2.1 (national treatment and most-favored-nation [MFN] requirements for regulations); *id.* Annex 3(D) (the same for standards).

78. *Id.* art. 2.1, Annex 3(D).

79. *Shrimp-Turtle*, *supra* note 25, ¶ 165 (interpreting discrimination in the context of GATT).

consistent manner.”⁸⁰ Thus, the TBT Agreement likely will be interpreted to discourage discrimination across like products and to discourage identical treatment where differing conditions call for adjustments. This precludes greenwashing, because a label cannot falsely praise products on environmental grounds when the products are not actually more environmentally friendly than others.

But such discrimination can be justified if legitimate environmental differences exist. The TBT Agreement recognizes a “balance . . . between, on the one hand, the pursuit of trade liberalization and, on the other hand, the recognition of Members’ right to regulate.”⁸¹ Though the TBT Agreement lacks the explicit affirmative defenses found in Article XX of GATT, Appellate Body reports have interpreted the sixth recital of the TBT Agreement’s preamble to perform a similar function. The sixth recital to the preamble⁸² reads:

Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.⁸³

Much like GATT affirmative defenses, this preamble’s interpretation justifies discrimination “necessary to fulfill certain legitimate policy objectives . . . provided that [it is] not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”⁸⁴ As a result, discrimination across like products is allowed if it is justified by legitimate policy objectives and is not a disguised

80. *Clove Cigarettes*, *supra* note 50, ¶ 91.

81. *Id.* ¶ 109.

82. Note that WTO jurisprudence accords significant meaning to preambles in WTO Agreements. The sixth recital to the preamble to the TBT Agreement, for example, is heavily cited and discussed in detail in *Clove Cigarettes*. *Id.* ¶¶ 89–96.

83. TBT Agreement, *supra* note 51, preamble.

84. *Clove Cigarettes*, *supra* note 50, ¶ 95. For more analysis on the similarity of interpretation across the preamble of the TBT Agreement and article XX affirmative defenses in GATT, see Kim, *supra* note 28.

restriction on trade.⁸⁵

What does this all mean for ecolabels? An ecolabel could theoretically treat illegally chopped timber differently from legally chopped timber, even if the wood itself is considered “like,”⁸⁶ if the ecolabel was adequately justified by environmental concerns and applied fairly. The TBT Agreement would weed out ecolabels that might discriminate unfairly. For example, assume that Label A is awarded to wood from country B, but not wood from country C that is harvested just as sustainably. The distinction cannot be justified by environmental concerns, so this practice would violate the TBT Agreement. More broadly, this test would help flush out protectionist labels, and the broad definition of discrimination can push countries to consider differing local environments in designing their ecolabels.

2. *No more trade-restrictive than necessary*

The TBT Agreement also requires that both technical regulations and standards not be “prepared, adopted, or applied with a view to or with the effect of creating unnecessary obstacles to international trade.”⁸⁷ But the further requirement that these measures not be “more trade-restrictive than necessary to fulfill a legitimate objective” only appears in text relating to technical regulations in article 2.2, not in the Code of Good Conduct for standards.⁸⁸ Nonetheless, while the Code of Good Conduct has yet to be interpreted by the Appellate Body, it would not be difficult to import

85. Note that the utility of this requirement is only as strong as its interpretation. The WTO has been rather erratic—and perhaps too strict in attempting to preclude protectionism—in its interpretation of the *chapeau* of Article XX of GATT, which is similar to and helps inform the interpretation of article 2.1 of the TBT Agreement. For example, the Appellate Body found unjustified discrimination when Brazil employed an import ban on retreaded tires but allowed in a small quantity of retreaded tires as required under a trade agreement and court orders. *Brazil—Tyres*, *supra* note 25, ¶ 211–12. But recent jurisprudence under the TBT Agreement has been more reasonable. For a more extensive discussion, see generally Kim, *supra* note 28.

86. To determine whether products are “like,” most rely on the Working Party Border Tax’s three factors in likeness determinations, along with a fourth factor since added: (1) physical characteristics; (2) end uses; (3) consumer attitudes; and (4) tariff classifications. See, e.g., Appellate Body Report, *Philippines—Taxes on Distilled Spirits*, ¶ 118, WT/DS396/AB/R, WT/DS403/AB/R (Dec. 21, 2011). If consumers find illegally and legally sourced timber very different, these attitudes might suggest that the two are not “like.” However, the physical characteristics and end uses would likely be identical, suggesting that the two types of wood would be considered “like.”

87. TBT Agreement, *supra* note 51, art. 2.2 (for regulations); *id.* Annex 3(E) (for standards).

88. *Id.* art. 2.2, Annex 3(E).

this requirement for standards by arguing that the “no more trade-restrictive than necessary” test interprets the “no unnecessary obstacles to trade” test.⁸⁹ Thus, I analyze what article 2.2’s “no more trade-restrictive than necessary” test might imply for ecolabels generally.

At first blush, it might appear that the “no more trade-restrictive than necessary” test overlaps significantly with the national treatment and MFN obligations just discussed. But the two are treated separately, and the aims of the provisions differ.⁹⁰ National treatment and MFN obligations target unjustified discrimination across products. In contrast, this test considers trade-restrictiveness, which might apply evenly across all products, and the necessity of such restrictions to begin with.

To explore what this requires, a full reading of article 2.2 is instructive:

Members shall ensure that technical regulations are not prepared, adopted, or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks,

89. The argument that the trade restrictiveness test applies to standards (not just regulations) is simple. The trade restrictiveness test in article 2.2 is explicitly written as an interpretation of the unnecessary obstacles to trade test. TBT Agreement art 2.2 (“Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. *For this purpose*, technical regulations shall not be more trade-restrictive than necessary . . .”) (emphasis added); Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 369, WT/DS386/AB/R (June 29, 2012) [hereinafter *US—COOL*] (“The words ‘[f]or this purpose’ linking the first and second sentences suggest that the second sentence [about trade-restrictiveness] informs the scope and meaning of the obligation contained in the first sentence [about unnecessary obstacles to trade].”). The unnecessary obstacles test applies to both regulations and standards. TBT Agreement, *supra* note 51, art. 2.2 (for regulations); *id.* Annex 3 (E) (for standards). Thus, the explanation of the unnecessary obstacles test, requiring no more trade-restrictiveness than necessary, also applies to both regulations and standards. The contrary argument is that the drafters made explicit the trade restrictiveness test for regulations, but did not do so for standards, such that the test only applies to regulations. But it may be that the drafters simply considered it unnecessary to specify this level of detail for voluntary standards because voluntary standards are already considered to be relatively less trade-restrictive.

90. See, e.g., *US—COOL*, *supra* note 89, ¶¶ 254, 351 (analyzing article 2.1 and article 2.2 claims separately).

relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.⁹¹

The burden of proof falls on the complaining country, which must first demonstrate “that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objective, taking account of the risks non-fulfillment would create.”⁹² Complainants must demonstrate that the measure is trade-restrictive, can argue that the objective is not legitimate, and can argue that the measure is more restrictive than necessary by enumerating less restrictive alternatives that are available and contribute similarly to the defendant Member’s objective.⁹³ The defending Member can then rebut those contentions.

The interpretation of these requirements can help police ecolabels. First, in evaluating whether a Member’s objective in its measure is “legitimate,” Panels are to consider how Members characterize their objectives but are also to examine the totality of the evidence provided so as to determine the actual purposes.⁹⁴ For example, a Member might argue that its ecolabel is meant to protect the environment, though the operation of the label suggests a purely protectionist purpose; this might preclude a finding of legitimacy. The domain of “legitimate objectives” is broader than those listed in article 2.2 (e.g., national security, protection of the environment), providing flexibility, but objectives on that list are automatically legitimate, preventing “second-guessing” of objectives such as environmental protection.⁹⁵

Second, Members have discretion in the levels at which they want to fulfill a particular objective.⁹⁶ This gives greater latitude to countries in determining how strictly they hope to regulate, and should allay environmentalist fears that the WTO will unnecessarily interfere when countries opt for stricter levels of protection.⁹⁷ For analytical purposes, however, Panels need only determine the level

91. TBT Agreement, *supra* note 51, art. 2.2.

92. *US—COOL*, *supra* note 89, ¶ 379.

93. *Id.*

94. *Id.* ¶ 371.

95. *Id.* ¶¶ 370, 372.

96. *Id.* ¶ 373 (“[A] Member shall not be prevented from taking measures necessary to achieve its legitimate objectives at the levels it considers appropriate.”) (internal quotations omitted).

97. But see *infra* section III.D for a discussion of the precautionary principle, which is not found within the TBT Agreement’s text.

of actual, not intended, level of fulfillment, obviating a difficult subjective inquiry.⁹⁸ For example, suppose Country X wants to protect eagles and implements an ecolabel that turns out to benefit eagles much more than expected. A reviewing Panel would consider that more stringent level of protection to be the degree of fulfillment applicable in Country X. To determine that an alternative measure is available, the alternative would have to be just as protective. Third, to determine if a measure is more trade-restrictive than necessary, Panels are to consider the following factors, among others:

- (i) the degree of contribution made by the measure to the legitimate objective at issue;
- (ii) the trade restrictiveness of the measure; and
- (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfillment of the objective(s) pursued by the Member through the measure.⁹⁹

Typically, complainants will put forth alternative measures that they allege are reasonably available and less trade restrictive than the measure in dispute. However, if those measures do not make at least equivalent contributions to the desired objective, they will not suffice for an article 2.2 violation.¹⁰⁰ This test pushes Members to consider how effective an ecolabel might be, how much it might restrict trade, and whether creative alternatives exist that could improve the efficacy or reduce the trade restrictiveness of a proposed label. Careful consideration of these factors should improve ecolabel design, without threatening achievement of Member objectives.

To date, article 2.2 has had little force in Appellate Body reports because few violations are found, even where article 2.1 non-discrimination violations exist.¹⁰¹ But Panels have found

98. *US—COOL*, *supra* note 89, ¶ 390. Note that the determination of the measure's objective also is not purely subjective, as the examination entails a consideration of the totality of the circumstances, including the effects of the measure's operation.

99. *Tuna-Dolphin II*, *supra* note 22, ¶ 322.

100. *Id.*

101. *See, e.g., Clove Cigarettes*, *supra* note 50, ¶¶ 5, 9, 298 (finding an article 2.1 violation but not exploring the Panel's finding that article 2.2 was not violated because Indonesia did not raise the issue on appeal); *Tuna-Dolphin II*, *supra* note 22, ¶ 407 (finding an article 2.1 violation but not an article 2.2 violation); *US—COOL*, *supra* note 89, ¶ 496 (finding an article 2.1 violation but not completing the article 2.2 analysis for lack of sufficient undisputed facts). The recent Panel Report on seal hunting similarly did not find an article 2.2 violation, because the more stringent proposed alternatives that would

violations,¹⁰² suggesting that the rule is not without influence, and the mere existence of the rule could itself encourage compliance.

Together, non-discrimination and article 2.2's "no more trade-restrictive than necessary" requirements police ecolabel design to preclude pretextual and unjustified labels. The remaining principles add specific considerations that can improve ecolabel design.

3. *Minimization of the number of standards and regulations*

Multiple overlapping standards and regulations around the world can hinder trade, given the costs involved in understanding and implementing different requirements. If objectives are aligned, then standards and regulations can similarly align to facilitate trade and market access, as this principle promotes.

Three types of requirements embody this principle. First, Members must rely on relevant international standards as the bases for their own regulations and standards, if appropriate and effective.¹⁰³ Second, Members must try to help harmonize regulations and standards by participating in international standardization activities.¹⁰⁴ Third, Members must "give positive consideration to accepting as equivalent technical regulations of other Members . . . provided they are satisfied that these regulations adequately fulfill the objectives of their own regulations."¹⁰⁵ Likewise, standardizing bodies must "make every effort" to avoid duplication or overlap with other standards.¹⁰⁶

These requirements reduce ecolabel adoption transaction costs by encouraging Members to create and adopt similar standards and regulations. Ecolabels can also benefit from scale effects when adopting more widely applicable standards and regulations, as consumers will be more familiar with the more frequently used labels and fewer labels will compete and confuse consumers. And Members still have flexibility, as consideration of other regulations and standards is only required to the extent that those measures can reach the same goals that each Member targets. A potential

adequately fulfill the EU's objectives were not reasonably available. Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 8.2, WT/DS400/R, WT/DS401/R (Nov. 25, 2013).

102. See, e.g., Panel Report, *United States—Certain Country of Origin Labeling (COOL) Requirements*, ¶ 8.3, WT/DS384/R, WT/DS386/R (Nov. 18, 2011).

103. TBT Agreement, *supra* note 51, art. 2.4 (for regulations); *id.* Annex 3(F) (for standards).

104. *Id.* art. 2.6 (for regulations); *id.* annex 3(G) (for standards).

105. *Id.* art. 2.7.

106. *Id.* Annex 3(H).

drawback of this approach, if followed strictly, is that less experimentation in ecolabel creation might result where international standards exist.¹⁰⁷ But experimentation across ecolabels addressing different objectives could continue to inform label design. And ecolabels at experimental stages are unlikely to spur a Member complaint, as Members have little incentive to invest in the legal resources required to bring complaints unless an ecolabel has made a significant impact on the market.

4. *The use of performance over design requirements*

Performance attributes evaluate how well a product achieves a particular end; design attributes dictate how a product performs. For example, specifying that packaging be recyclable would be a performance requirement, while specifying the particular material from which the packaging is made would be a design requirement. Performance specifications allow more flexibility in how producers achieve the desired ends, without sacrificing the achievement of those ends, and thus are less trade-restrictive than the specification of a design attribute. Further, performance measures are technology-forcing, incentivizing producers to develop better technology so as to meet performance standards through the most cost-effective means.

As a result, Members must, “wherever appropriate,” design technical regulations and standards based on performance rather than design attributes.¹⁰⁸ However, complaining parties bear the burden of showing that it is “appropriate” for other Members to specify their measures in performance terms, providing some leeway for Members who choose to adopt design-based measures.¹⁰⁹

A drawback of performance specifications is the difficulty in monitoring achievement; it is easier to ascertain that a product is recyclable if you have required it to be made of a particular material that you already know to be recyclable.¹¹⁰ If too difficult to monitor,

107. See *infra* Section III.D for further discussion of the potential drawbacks from harmonization.

108. TBT Agreement, *supra* note 51, art. 2.8 (for regulations); *id.* Annex 3(I) (for standards).

109. Panel Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 7.490, WT/DS406/R (Sept. 2, 2011).

110. Of course, this is an antecedent question to whether theoretically “recyclable” materials can practically be recycled. See, e.g., *Why Can't Some Things Be Recycled at the Curb?*, TOWN OF CONCORD, MASS., <http://tinyurl.com/kzzych86> (last visited May 7, 2014) (one town’s website explaining why some materials cannot be recycled at the curb).

however, Members can argue that specification in performance terms is not “appropriate.” Thus, the TBT Agreement encourages Members to adopt more trade-friendly performance metrics, without mandating their use in every circumstance.

5. *Transparency*

Finally, a key developing country complaint against the use of ecolabels is that the development of and subsequent access to labels is opaque. The TBT Agreement addresses this critique by requiring notice and comment opportunities in technical regulation and standard development.¹¹¹ Ecolabel development would benefit from input by other stakeholders and from robust debate, and ecolabels will be viewed as more legitimate if more stakeholders feel that their concerns have been considered. Further, early notice requirements and reasonable time delays before enforcement can help producers adapt to new standards and regulations, again reducing ecolabel transaction costs.

In sum, the TBT Agreement’s various requirements can help push governments to be more thoughtful in ecolabel development and can deter the pretextual use of ecolabels. But WTO oversight is not without problems.

D. *Limitations of WTO Discipline*

Here, I first (1) discuss limitations of the TBT Agreement specifically, then discuss three broader concerns regarding WTO jurisdiction over ecolabels: (2) potential harm to developing country access to markets, (3) encouragement of private (over government supported) labels, and (4) potentially nonsensical decision-making given the WTO’s relative lack of environmental and scientific expertise.

1. *Limitations of the TBT Agreement*

Three immediate concerns in application of the TBT Agreement come to mind.

First, the TBT Agreement may be quite adept at policing individual ecolabels to ensure that they are not inherently discriminatory or unnecessarily trade-restrictive. But the TBT Agreement does not have a consistency requirement, so the choice

111. TBT Agreement, *supra* note 51, arts. 2.5, 2.9–11 (for regulations); *id.* Annex 3(J, L–P) (for standards).

of *when* to employ ecolabels at all might result in *de facto* discrimination across different environmental concerns. Country flexibility in deciding the level of protection they desire exacerbates this issue.

To illustrate, the dolphin-safe tuna label is quite famous, not only because of the long-running trade dispute, but also because the label and accompanying campaign has been exceptionally successful.¹¹² But, as it turns out, dolphin-safe tuna fishing methods dramatically increase other bycatch, including sharks, rays, other tuna, and sea turtles.¹¹³ Which species matters most is of course a political decision in which the WTO cannot and should not intervene, but this seeming inconsistency in environmental protection seems problematic.

A potential solution could be to require the use of Life Cycle Analysis to incorporate a fuller vision of environmental impacts. But part of the success of dolphin-safe tuna was likely based in part on the appeal of Flipper and the simplicity of the label, as compared to a rather more abstract and complicated scientific quantification of environmental improvement. And even if other impacts are considered, someone must eventually still assign relative weights to the different harms; how much is one shark worth as compared to a dolphin? This is unfortunately not a concern that the TBT Agreement can easily address.

Second, some worry that the TBT Agreement's emphasis on the use of international standards might create inertia in standards development once standards are set.¹¹⁴ Standards could be set too low, as countries aiming for consensus cater to the lowest common denominator, or could be set too high, denying developing countries effective access to markets.¹¹⁵ The TBT Agreement tries to address these concerns by excusing countries from adopting international standards where

112. The three major U.S. tuna brands buy only dolphin-safe tuna, and dolphin mortality has fallen in the Eastern Tropical Pacific. *See, e.g.*, PAUL ROBBINS, JOHN HINTZ & SARAH A. MOORE, *ENVIRONMENT AND SOCIETY: A CRITICAL INTRODUCTION* 212–13 (2011).

113. Martin Hall, *An Ecological View of the Tuna-Dolphin Problem: Impacts and Trade-offs*, 8 REVS. IN FISH BIOLOGY & FISHERIES 1, 25 (1998).

114. *See, e.g.*, Bernstein & Hannah, *supra* note 26, at 587 (“[The harmonization of standards] provision has prompted concern that a standard, once established and accepted, would prevent the future adoption of more stringent standards, especially concerning social or environmental issues.”); Halina Ward, *Trade and Environment Issues in Voluntary Eco-Labeling and Life-Cycle Analysis*, 6 RECIEL 139, 145 (1997).

115. Ward, *supra* note 114, at 145.

they are ineffective or inappropriate.¹¹⁶ A balance must be struck, because both too many and too few (dominating) standards can act as trade barriers. But WTO oversight likely would not prevent countries from experimenting to get to the right level, as only those labels that have a large market impact will likely induce another Member to complain.

Third, the TBT Agreement, unlike the SPS Agreement, does not explicitly discuss (and therefore potentially allow) application of the precautionary principle.¹¹⁷ While Members have discretion in the level of protection they choose to adopt,¹¹⁸ Members might not have such discretion in the level of risk that they tolerate. For example, imagine that there is a Chemical A that some believe causes the death of honeybees. Members can choose to protect all honeybee lives (the level of protection desired). But if there is not yet firm scientific evidence that Chemical A does harm honeybees, then an ecolabel that bans the use of Chemical A might be considered more trade-restrictive than necessary, because it is not clear that preventing the use of Chemical A contributes to saving honeybees.

The precautionary principle has inspired much debate, the intricacies of which are beyond the scope of this Note.¹¹⁹ Nonetheless, to prevent potentially irreversible harms, application of the principle might be justified with ecolabels, given that ecolabels are less trade-restrictive than other methods of environmental regulation. One might rebut that allowing countries to invoke measures where little scientific evidence exists as to their efficacy will invite pretextual application of the principle. But the TBT Agreement could be amended to allow provisional measures for which scientific research is on-going,¹²⁰

116. TBT Agreement, art. 2.4 (for regulations); *id.* Annex 3(F) (for standards).

117. Agreement on the Application of Sanitary and Phytosanitary Measures, art. 5.7, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS Agreement] (allowing Members to take provisional measures where “relevant scientific information is insufficient”). However, examples of the precautionary principle do not override specific obligations in the SPS Agreement. See Appellate Body Report, *EC Measures Concerning Meat and Meat Product (Hormones)*, ¶¶ 124–25, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC—Hormones*].

118. *US—COOL*, *supra* note 89, ¶ 373 (“[A] Member shall not be prevented from taking measures necessary to achieve its legitimate objectives at the levels it considers appropriate.”) (citation omitted) (internal quotation marks omitted).

119. See generally INTERPRETING THE PRECAUTIONARY PRINCIPLE (Timothy O’Riordan & James Cameron eds., 1994) (for an overview of the principle); Cass Sunstein, *The Paralyzing Principle*, REGULATION, Winter 2002–2003, available at <http://tinyurl.com/pompm8q> (arguing that the Precautionary Principle does not provide guidance, as one can be cautious in any direction).

120. Much as the SPS Agreement does, though the precautionary principle in that

and create some system of accountability to deter pretextual use.

Beyond these concerns, three broader issues with WTO oversight should be considered.

2. *Developing country market access*

WTO-sanctioned ecolabels might harm developing country access to developed country markets through protectionist ploys, as discussed above in Section II.B.2. But even in the absence of protectionist intent, ecolabels might disadvantage poorer countries.

First, developing countries might lack the technology or know-how required to achieve ecolabel requirements. While article 2.12 of the TBT Agreement acknowledges this possibility in asking that Members consider the time developing countries might require to adapt to new technical regulations, no other provision requires assistance or knowledge-sharing to facilitate the process. But ecolabels do not differ from the myriad of other *de facto* trade barriers in this regard; the cost of financing, for example, is also often higher in developing countries.¹²¹

Second, developing countries might lack the resources to lodge effective complaints with the WTO, as scholarship suggests.¹²² This danger might be somewhat ameliorated by potential complaints from other WTO Members similarly affected, though settlements might solve issues only for litigating parties. To address these cases, environmental and social non-profits that traditionally recoil from WTO disputes might consider whether gaining international trade law fluency could help them provide support to just such developing nations. These disputes could help prevent the creation of distortionary ecolabels while remedying injustice.

Third, a broader form of inequity arises from historical patterns of development. Imagine an ecolabel that requires only that no more than some number of endangered species is harmed in the production process. Because developed countries have already scavenged their forests, developing countries now host much more of the biodiversity left in the world and thus might find it more difficult to avoid harming those resources. In other words, the

agreement, too, has been weakened. *See, e.g., EC—Hormones, supra* note 117, ¶¶ 124–25.

121. *See, e.g.,* DALBERG, REPORT ON SUPPORT TO SMES IN DEVELOPING COUNTRIES THROUGH FINANCIAL INTERMEDIARIES 3 (2011), available at <http://tinyurl.com/mofpnhk> (“[D]eveloping countries are often hampered by an inability to obtain financial capital for growth and expansion.”).

122. Chad P. Brown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders*, 19 WORLD BANK ECON. REV. 287, 308 (2005).

countries that have done the least to harm the natural world might be subjected to the strictest standards. Aside from perhaps facilitating a system to pay for ecosystem services, ecolabels do not provide a clear solution to this issue. But precluding WTO governance of ecolabels also would not resolve the inequity.

3. *Avoidance of government-sponsored labels*

If industry cannot erect protectionist ecolabels with government support because of WTO governance, they might instead try to erect private labels. While article 3 of the TBT Agreement asks that Members take “reasonable measures” to ensure that non-government bodies comply with the TBT Agreement dictates, no dispute to date has yet clarified how the WTO might police this requirement. Indeed, as discussed above, private action is not within the WTO’s jurisdiction unless it can be attributed to a Member.

But this does not necessarily weigh against WTO governance. If the choice is between no governance at all and governance of only government-sponsored labels, adding some regulation over none at all seems desirable. One might argue that government-sponsored labels are inherently less protectionist than industry-crafted ones, such that the rise of industry-crafted labels will further distort the ecolabel market. But rent-seeking with government support might in fact be more problematic. Studies have found that government support can increase ecolabel credibility, provide stability and financing, and result in higher market penetration, in relation to other standards.¹²³ In other words, government-sponsored labels are both more credible and have more force in the market, arguing in favor of targeting these labels for enforcement. Further, government participation might shield labels from antitrust liability; the rise of private labels might facilitate this other avenue of regulation. Similarly, brands might be more sensitive to activist pressure on private labels than on government-sponsored ones (where the government might be more likely to take the heat). Finally, as discussed in Section III.A, the WTO has liberally

123. Ralph Horne, *Limits to Labels: The Role of Eco-Labels in the Assessment of Product Sustainability and Routes to Sustainable Consumption*, 33 INT’L J. OF CONSUMER STUD. 175, 179 (2009); Mario F. Teisl, et al., *Consumer Reactions to Environmental Labels for Forest Products: A Preliminary Look*, 52 FOREST PRODUCTS J. 44, 48 (2002) (finding that government-endorsed labels are considered more credible even when participants did not find government agencies themselves that trustworthy); Jay S. Golden, *An Overview of Ecolabels and Sustainability Certifications in the Global Marketplace* (Nicholas Institute for Environmental Policy Solutions, Duke University, Interim Report #2010-10-1, Oct. 2010), available at <http://tinyurl.com/mn9ssr9>. (considering ecolabels in the personal electronics space).

interpreted what constitutes a government measure, such that even in a private label-dominated ecolabel market, many labels might still qualify for WTO oversight.¹²⁴

4. *WTO lack of scientific and environmental expertise*

Scholars note that “[e]nvironmental and social policies are simply outside [the WTO’s] competency,” and so argue that the WTO should not intervene.¹²⁵

But the WTO’s competency does include finding unjustified distortions to trade, and it is these unjustified distortions that threaten to derail the benefits of ecolabels. If a label is pretext for domestic protectionism such that it does not confer the environmental benefits that it claims or could confer those same benefits in a more even-handed manner, consumers may lose faith in environmental marketing altogether, creating a market for lemons. The WTO’s interest aligns with environmentalists in ensuring that such trade distortions and market for lemons does not occur.

That WTO Panels are staffed with trade experts does not detract from these motivations. One might argue that even if trade advocates and environmentalists are aligned in hoping for more credible ecolabels, environmentalists would err on the side of keeping environmental measures in place (even if discriminatory), while trade advocates might not. But this is exactly why trade experts are well-suited to this task, because they present a credible threat to discriminatory labels. Not every ecolabel *should* be on the market.¹²⁶ And some labels are helpful, but would be more so if they were available more widely.¹²⁷

To the extent that environmental and scientific expertise is required, parties to the dispute have every incentive to furnish the necessary explanations. “[C]oncrete adverseness [] sharpens the presentation upon which” courts depend.¹²⁸ Moreover, the WTO’s

124. For a review, see generally Moody, *supra* note 26.

125. Bernstein & Hannah, *supra* note 26, at 606, 607.

126. For an especially egregious private example, consider the company “Tested Green,” subject to an FTC settlement because the company sold fake environmental certifications. Press Release, Federal Trade Commission, FTC Settlement Ends “Tested Green” Certifications That Were Neither Tested Nor Green (Jan. 11, 2011), <http://tinyurl.com/4akp64r>.

127. For example, the industry-led Dutch butterfly logo for organics that was available only to Dutch growers. VITALIS, *supra* note 4, at 3.

128. Baker v. Carr, 369 U.S. 186, 204 (1962) (discussing the benefits of the adverseness in standing analysis in the context of deciding difficult constitutional

hybrid adversarial-inquisitorial system allows Panels “to seek information and technical advice from any individual or body which it deems appropriate.”¹²⁹ Where its scientific understanding of a matter is lacking, Panels can thus proactively request support from experts.¹³⁰ And it is in a Panel’s interest to get the science right to protect the WTO’s legitimacy, particularly in environmental disputes where WTO decisions are subject to heavy scrutiny.

In addition, some might argue that the WTO lacks transparency.¹³¹ Part of the perceived lack of transparency is inherent to the WTO’s institutional design. As with U.S. Article III courts, Panels and Appellate Bodies do not divulge their reasoning prior to issuing their decisions. But Panel and Appellate Body reports are extensive, documenting each party position and judicial reasoning exhaustively.¹³² And significant expansion of the WTO website provides comprehensive guidance regarding WTO jurisprudence.¹³³ Nonetheless, the WTO can improve. For example, the WTO currently channels formal input from non-governmental organizations (NGO) through WTO Members, though many NGOs attend Ministerial Conferences and informally meet with Secretariat staff.¹³⁴ Because NGO interests might not align with the positions of

questions).

129. Dispute Settlement Understanding, *supra* note 46, art. 13.

130. Note that *seeking* information is different from accepting *unsolicited* amicus briefs, a controversial but permitted practice. Perhaps because of the controversial nature of such “judicial lobbying,” few Panels and Appellate Bodies have accepted unsolicited amicus briefs. *See, e.g.,* Gabrielle Marceau & Mikella Hurley, *Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms*, 4 TRADE L. & DEV. 19, 28 (2012) (discussing the history of amicus brief submissions at the WTO and suggesting that even when Panels consider amicus briefs, they do so because the parties themselves made the briefs part of their own submissions); *Dispute Settlement System Training Module: Chapter 9: Participation in Dispute Settlement Proceedings*, WTO, available at <http://tinyurl.com/lbtzbea> (noting the controversial nature of amicus briefs at the WTO and that few panels have accepted and considered unsolicited briefs). As an example, the *Tuna-Dolphin II* Panel made note of an unsolicited amicus brief that it found “relevant and useful.” Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 4.182, WT/DS381/R (Sept. 15, 2011). But the Appellate Body reviewing the same dispute did not “find it necessary to rely on [] amicus curiae briefs.” *Tuna-Dolphin II*, *supra* note 22, ¶ 8.

131. *See, e.g.,* Steve Charnovitz, *Transparency and Participation in the World Trade Organization*, 56 RUTGERS L. REV. 927, 928 (2004) (arguing that the WTO is “deficient with respect to its openness”).

132. Consider, for example, the recent *Tuna-Dolphin II* Appellate Body report, running 173 pages. *See generally* *Tuna-Dolphin II*, *supra* note 22.

133. For an extensive discussion on the WTO’s relatively strong measures of transparency and future improvements the WTO might implement, see Marceau & Hurley, *supra* note 131.

134. The Guidelines for arrangements on relations with Non-Governmental

their national governments, allowing NGOs to participate more directly could both increase transparency and faith in the WTO's ability to appropriately handle scientific and environmental issues.

Nonetheless, the WTO's institutional focus on removing unnecessary obstacles to trade can be an *asset*, not a liability, to its ability to police ecolabels, as the following section illustrates has already occurred.

IV. WTO OVERSIGHT IN PRACTICE

Ironically, the benefits from WTO regulation of ecolabels are most evident from the aftermath of two Appellate Body reports decried by environmentalists: *Tuna-Dolphin II* and *U.S.—Certain Country of Origin Labeling Requirements (COOL)*. After the Appellate Body struck down the contested U.S. regulations in both, federal agencies drafted new rules with enhanced environmental and consumer benefit.

In *Tuna-Dolphin II*, the Appellate Body concluded that the U.S.'s "dolphin-safe" tuna labeling program violated its obligations under the TBT Agreement.¹³⁵ The U.S. measure prevented tuna caught by encircling dolphins from access to the label, and prohibited any mention of dolphin safety on tuna cans if the product did not meet the "dolphin-safe" label requirements.¹³⁶ The measure was inconsistent with the TBT Agreement because it addressed only purse seine net fishing in the Eastern Tropical Pacific, ignoring the risk posed to dolphins by other methods of tuna fishing outside of that region.¹³⁷ Tellingly, U.S. fishermen employed those other methods outside of the ETP, while many Mexican fishermen (Mexico was the complainant) continued to use purse seine net fishing in the ETP.¹³⁸ The Appellate Body suggested that the U.S. measure could be WTO-compliant if the label required ship captains to certify no serious injury to dolphins in all regions.¹³⁹

In 2013, the National Oceanic and Atmospheric Administration

Organizations urges increased transparency with NGOs but also states that NGOs are not "to be to be directly involved in the work of the WTO." Instead, national governments can represent NGO interests. *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, WTO (July 23, 1996), <http://tinyurl.com/bxa8ol9>. Similarly, when Panels or Appellate Bodies do consider unsolicited amicus brief arguments, they do so because Members have echoed those arguments in their own briefs. See Charnovitz, *supra* note 131.

135. *Tuna-Dolphin II*, *supra* note 22, ¶ 407.

136. *Id.* ¶ 172.

137. *Id.* ¶ 297.

138. *Id.* ¶ 284.

139. *Id.* ¶ 296.

issued a final rule implementing the Appellate Body's suggested solution and thus expanding dolphin protections.¹⁴⁰ The revamped dolphin safe label requirements now require certification of dolphin safety for all tuna fishing methods, in all areas of the world.¹⁴¹ Environmentalists and politicians praised the more protective rule.¹⁴²

The resolution of the 2012 *U.S.—Certain Country of Origin Labeling (COOL)* dispute is similar. The measure in dispute required meat retailers within the U.S. to provide country of origin labels on their products.¹⁴³ For retailers to accurately label their products, upstream suppliers had to maintain and provide information on the country of origin for each production step: birth, raising, slaughter.¹⁴⁴ However, the resulting labels conveyed little of this detail; though the labels listed countries of origin, the information did not tie specific production steps to specific countries, and countries could be listed in any order.¹⁴⁵ Moreover, meat incorporated into processed food or sold at restaurants had no label at all.¹⁴⁶ The costs of tracking these undisclosed details were lower for meat from a single country of origin, and lower still for exclusively domestic meat.¹⁴⁷ The higher costs for imported, as opposed to domestic, meat could not be justified by a legitimate regulatory motivation, because consumers saw so little of the many details that suppliers had to track and report.¹⁴⁸

In response to the dispute, the U.S. Agricultural Marketing Service and the U.S. Department of Agriculture (USDA) issued a new rule requiring labels to specify the country of origin by production step and expanding the category of retailers to which the labels apply.¹⁴⁹ While producers are now suing the USDA over the new

140. Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 50 C.F.R. § 216 (2013).

141. *Id.*

142. Mark J. Palmer, *New US Fisheries Rule Will Help Resolve Dolphin Safe Label Dispute with Mexico*, EARTH ISLAND J., Jul. 11, 2013, <http://tinyurl.com/lugz5ow>; Press Release, U.S. Senator Barbara Boxer, Boxer Praises Rule to Preserve the Integrity of the U.S. Dolphin-Safe Tuna Label (Jul. 9, 2013), available at <http://tinyurl.com/lz6b75e>.

143. *US—COOL*, *supra* note 89, ¶ 239.

144. *Id.* ¶ 249.

145. *Id.* ¶ 343.

146. *Id.* ¶ 344.

147. *Id.* ¶ 345.

148. *Id.* ¶ 347.

149. Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 7 C.F.R. § 60, 65 (2013).

rule,¹⁵⁰ consumer food safety organizations applauded the move for providing consumers with more information.¹⁵¹

These disputes resulted in more even-handedness and disclosure from the measures at issue, and illustrate what WTO governance can provide for the ecolabel space. First, the WTO's non-discrimination requirement ensures that governments cannot use ecolabels as a pretext for domestic protection. However, this does not prohibit the use of ecolabels altogether. Ecolabels might de facto violate national treatment or most-favored-nation obligations, but escape WTO censure if they are justified by a legitimate regulatory objective and are applied evenly.¹⁵² This constraint can increase consumer confidence in ecolabels.¹⁵³ Second, the Appellate Body in *Tuna-Dolphin II* did not mention the TBT Agreement's preference for performance over design measures specifically, but suggested that the dolphin-safe label require ship captains to certify no dolphin injury from each catch (a performance measure) as opposed to specifying particular fishing techniques (design).¹⁵⁴ As discussed in Section III.C.4, this preference for performance measures enhances transparency and constrains ecolabels from setting opaque design requirements that benefit specific parties with questionable environmental impacts.

V. CONCLUSION

The WTO's competence in discerning unjustified barriers to trade is exactly what the ecolabel market needs to weed out illegitimate labels that reduce consumer confidence in environmental marketing. Indeed, WTO intervention has already improved the dolphin-safe tuna and country-of-origin meat labels in the United States. The WTO's anti-environment reputation is no longer deserved, and environmental NGOs can further their cause by

150. Susanna Kim, *Meat Industry Sues USDA, Saying Country-of-Origin Label Leads to Higher Costs*, ABC NEWS, Jul. 11, 2013, <http://tinyurl.com/l8bar7u>.

151. Press Release, Executive Director Wenonah Hauter, Food & Water Watch, USDA's Proposed Country of Origin Labeling Rule Will Benefit Consumers (Mar. 8, 2013), *available at* <http://tinyurl.com/n7wu9jq>.

152. *See, e.g., Tuna-Dolphin II*, *supra* note 22.

153. Indeed, Johannes Urpelainen theorized that domestic environmental regulations can increase with international trade, because citizens are less wary of hidden protectionism. Johannes Urpelainen, *Environmental Regulation in the Shadow of International Trade Law: Does Democratic Accountability Work?* 3-4 (2010) (unpublished manuscript), *available at* <http://tinyurl.com/lf43aef>.

154. *Tuna-Dolphin II*, *supra* note 22, ¶ 296.

taking advantage of the WTO's free-trade expertise to police what is inherently a market-based tool for environmental improvement.

But WTO regulation is not a panacea, and the organization can improve still more for further environmental and trade benefit. Addressing developing country concerns about access to WTO litigation and possible disparities in environmental standards, and further opening WTO doors to NGO participation, could improve both the organization's legitimacy and its internal processes. NGOs with better relations with the organization can add the scientific and environmental expertise that fall outside of the WTO's core competency. And recognition of the WTO's advantages could motivate others to help remedy inadequate developing country access by facilitating country litigation.

Free trade advocates and environmentalists can gain significantly from working together, both to police ecolabels and to improve the processes underlying this regulation. The first step is to recognize these potential benefits.