

Clearing the fog: Forest Stewardship Council labelling and the World Trade Organization

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This article aims to clarify three long-standing puzzles concerning the place of private standards in the World Trade Organization (WTO) through the lens of FSC labelling. The first question is whether the FSC label falls within the regulatory scope of the Agreement on Technical Barriers to Trade (TBT Agreement). The second question is the extent of WTO member States' obligations under the TBT Agreement if the FSC is an active standardizing body in their territories. The third question asks whether the FSC standard may qualify as an 'international standard' as defined in the TBT Agreement and thus may exert quasi-legislative effects on WTO members' national forest conservation laws and regulations. A detailed case study of the relationship between the FSC labelling and the TBT Agreement shows that the answers to these questions are much more nuanced than the existing scholarship suggests.

1 INTRODUCTION

As processes of globalization have increasingly laid bare the fact that national governments cannot effectively address on their own significant challenges of coordination and regulation in the transnational sphere, one of the hallmarks of the modern regulation era has been a 'Cambrian explosion' of new governance initiatives, such as market-based private standards adopted by non-governmental entities.¹ As a new regulatory form, the goal of private standards is to promote sustainable development by setting social and environmental standards for transnational production, and certification programmes are often operated to verify compliance with the private standards in global value chains. Increasingly popular as a tool for sustainable supply chain management, reputational risk mitigation, and the promotion of competitiveness, private standards are adopted by more and more leading firms in global value chains, making their purchase decisions dependent on suppliers' compliance with them.² An example of private standards for environmental governance is the Forest Stewardship Council (FSC) label, a private voluntary certification and labelling programme for forest products from sustainably harvested and verified sources. Established in 1993, the FSC is the most globally distributed certification system worldwide and its market impact is constantly growing. By 3 December 2018, more than 200 million hectares of forest, distributed in 85 countries worldwide, were certified to FSC standards. This is an area roughly corresponding to 14 percent of the world's managed forests. In addition, there are almost 35,772 chain-of-custody certificates, which tracks FSC certified material and products from the forest to the consumer, issued in 123 countries.³

It has long been claimed that the rapid proliferation of private standards could have a positive direct and indirect impact on sustainable development.⁴ Directly, private standards can modify the decisions of economic actors – producers, consumers and distributors – in a way that results in

¹ KW Abbott, 'Engaging the Public and the Private in Global Sustainability Governance' (2012) 88 *International Affairs* 543, 555; B Cashore, 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority' (2002) 15 *Governance* 503.

² J Lee, G Gereffi and J Beauvais, 'Global Value Chains and Agifood Standards: Challenges and Possibilities for Smallholders in Developing Countries' (2012) 109 *Proceedings of the National Academy of Sciences of the United States of America* 12326.

³ FSC, 'FSC Annual Report 2018' (2019) 52–53.

⁴ United Nations Forum on Sustainability Standards, 'Voluntary Sustainability Standards, Trade and Sustainable Development' (2018) <https://unctad.org/en/PublicationsLibrary/unfss_3rd_2018_en.pdf> 18.

outcomes that enhance sustainability. For example, a label may be used by producers as a medium of distinguishing between products based on their relative impact on the environment in an attempt to nudge consumers towards purchasing environmentally friendly products.⁵ This may create market incentives for the use of more sustainable production techniques. Indirectly, private standards can also have positive spillover effects into the domestic market that go beyond their direct effect on production processes. For example, some commentators argue that private standards can act as catalysts for developing countries to upgrade infrastructure, build capacity and modernize export supply chains, which in turn boost international trade.⁶ As an important engine for inclusive economic growth and poverty reduction, trade is an important instrument to achieve sustainable development.⁷

However, empirical evidence of private standards on sustainable development remains heavily contested. While some see great potential for private standards to play an important role in sustainable development, a strong opposing view argues that private standards can be significant trade barriers, especially for small-scale producers or exporters in developing countries.⁸ The trade-impeding effects of private standards may arise from their highly restrictive content, high compliance costs, lack of transparency and participation, the duplication of private standards and the lack of harmonization among them.⁹ Consequently, private standards are often seen as impeding rather than enabling sustainable development and trade. More broadly, critics cast doubt on the effectiveness of private standards as a mode of sustainability governance itself, in view of their structural and regulatory problems as well as the market competition from industry-led labelling schemes.¹⁰

Whilst there is wide recognition that the FSC certification is accepted by States and consumers internationally, there has been much uncertainty about the relationship between the FSC and international trade law embodied in the World Trade Organization (WTO) Agreements.¹¹ In particular, there are three long-standing puzzles. First, does the FSC label fall within the regulatory scope of the WTO TBT Agreement? Second, if the FSC label falls within the ambit of the TBT Agreement, what is the extent of a WTO member State's obligation to regulate it? Third, does the FSC labelling qualify as an 'international standard' as defined in the TBT Agreement and thus exert quasi legislative effects on WTO members' national forest preservation labelling programmes?

The purpose of the article is precisely to clarify the relationship between the FSC labelling and the TBT Agreement. This article differs from existing scholarship on the topic in two important respects. First, even though recent WTO jurisprudence has provided us with a better understanding of the nature and scope of relevant TBT rules, international trade law experts still hold opposite views on whether, and to what extent, private standards may be regulated by the TBT Agreement. This article seeks to address this confusion. Second, the existing literature has rarely applied the TBT rules to any *specific* private standards, such as the FSC label, in evaluating their relationship with the WTO law. This article seeks to fill this gap in the literature.

⁵ RH Thaler and C Sunstein, *Nudge* (Penguin, 2009) 8.

⁶ International Trade Centre, 'The Impact of Private Standards on Producers in Developing Countries: Literature Review Series on the Impact of Private Standards – Part II' (2011) 23–24.

⁷ UNGA 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development' UN Doc A/RES/69/313 (17 August 2015) Annex, 37.

⁸ DH Schepers, 'Challenges to Legitimacy at the Forest Stewardship Council' (2009) 92 *Journal of Business Ethics* 279, 287; WTO Secretariat, 'Effects of SPS-Related Private Standards- Compilation of Replies' G/SPS/GEN/932/Rev.1 (10 December 2009) 2.

⁹ M Du, 'WTO Regulation of Transnational Private Authority in Global Governance' (2018) 67 *International and Comparative Law Quarterly* 867, 878-879.

¹⁰ EA Bennet, 'Voluntary Sustainability Standards: A Squandered Opportunity to Improve Workers' Wages' (2018) 26 *Sustainability* 65, 76–77.

¹¹ J Klabbers, 'Forest Certification and the WTO' (European Forest Institute 1999); AE Appleton, 'Private Climate Change Standards and Labelling Schemes under the WTO Agreement on Technical Barriers to Trade' in T Cottier, O Nartova and SZ Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change* (Cambridge University Press 2009) 137, 144.

Section 2 provides an overview of the FSC certification and labelling programme, including the background, governance structure and the standard development process. Section 3 discusses whether the FSC label falls within the regulatory scope of the TBT Agreement; the extent of WTO Member States' obligation if the FSC is an active standardising body in their territories, and whether the FSC standard is the relevant 'international standard' in forest preservation. Section 4 concludes the article.

2 AN OVERVIEW OF THE FSC

For centuries, foresters have used their sustainable management skills to balance competing demands on the forest, ensuring its ability to produce wood and deliver other forest products without infringing on the resilience of ecosystems. More recently, the critical role of forests as carbon sinks and sources of renewable materials and energy has been widely recognized. The significance of deforestation worldwide as one of the main contributors to greenhouse gas emissions, exceeding the impact of all other sectors, has become common knowledge.¹²

Against this background, the FSC was established in 1993 as a follow-up to the United Nations Conference on Environment and Development at Rio de Janeiro in 1992, with the mission to promote environmentally appropriate, socially beneficial, and economically viable management of the world's forests through a system of certification and labelling.¹³ Although the Rio Summit adopted Agenda 21, a United Nations (UN) resolution that suggests ways for governments and nongovernmental organizations (NGOs) to promote sustainable development, it failed to produce a legally binding commitment on forest management. Disillusioned with the effectiveness of government regulation and legislation to address forest sustainability challenges, a group of NGOs concerned with the sustainability of forest came together to create the FSC, an international NGO that develops and approves a voluntary certification and labelling programme for forest products.¹⁴

The FSC was established as a multi-stakeholder membership organization with both individuals and organizations as members, including private enterprises, NGOs, international organizations, indigenous groups and educational institutions.¹⁵ Although State-owned or State-controlled companies can participate in the FSC (in the economic chamber only) as members and the FSC collaborates with States and intergovernmental organizations, it is considered a private body because countries cannot participate as such, nor governmental agencies.¹⁶ The FSC membership has been steadily growing since its inception. At the end of December 2018, the FSC membership stood at 1,087.

FSC members are divided into three chambers – environmental, economic and social. Each chamber has one-third of the voting power (i.e. 33.3 percent). In addition, the voting power is divided equally (i.e. 50 percent) between developed (referred to as 'Northern') and developing ('Southern') country members in each chamber.¹⁷ The governance structure of the FSC consists of a general assembly, the highest decision-making body in which the members are represented, a nine-member Board of Directors, elected by the general assembly and comprising three members from each of the three chambers, and an executive director.¹⁸ The FSC thus makes room for both business interests (the economic chamber), social (e.g. labour unions and representatives of local communities and indigenous groups) and environmental NGOs. The purpose of the chamber structure is to maintain

¹² EPA, 'Greenhouse GAS Emissions' <<https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data>>.

¹³ FSC Statutes (2017) art 4.

¹⁴ G Auld and B Cashore, 'Forest Stewardship Council' in A Mukherjee Reed, D Reed and P Utting (eds), *Business Regulation and Non-State Actors: Whose Standards? Whose Development?* (Routledge 2012) 134.

¹⁵ FSC Statutes (n 13) art 11.

¹⁶ AB Villarreal, *International Standardization and the Agreement on Technical Barriers to Trade* (Cambridge University Press 2018) 24.

¹⁷ FSC Statutes (n 13) art 12.

¹⁸ FSC Statutes (n 13) art 13.

the balance of voting power between different interests without having to limit the number of members.¹⁹

The basic FSC standards are developed on the basis of the FSC Principles and Criteria which are generally formulated on an abstract level. The FSC framework has 10 principles, and each principle is coupled with a number of criteria.²⁰ Specific standards must be worked out in more concrete regional or national processes of standard setting and certification, and reviewed internationally via a two-tier consultation process. The FSC has developed two sets of standards. *Forest management standards* set rules for forest operators to comply with responsible forest management practices. By contrast, *chain of custody (CoC) standards* track FSC certified material and products through the production process from forest to consumer, including all successive stages of processing, transformation, manufacturing and distribution.²¹ The FSC label thus provides the link between responsible production and consumption and enables the consumer to make socially and environmentally responsible purchasing decisions. The FSC label involves a certification process carried out by an accredited third-party certifier, which can use either a national/regional adjusted FSC standard or the FSC's Principles and Criteria directly in countries lacking such locally adjusted standards. Through chain-of-custody certification, the products that come from certified forests are given the FSC label.²²

3 THE RELATIONSHIP BETWEEN THE FSC LABEL AND THE TBT AGREEMENT

Recognizing the potential negative effects of voluntary product standards on international trade, the members of the General Agreement on Tariffs and Trade (GATT) and WTO have developed a sophisticated trade law framework for regulating such standards since the 1970s. Their efforts culminated in the conclusion of the Agreement on Technical Barriers to Trade, in particular the Annex 3 Code of Good Practice for the Preparation, Adoption and Application of Standards (CGP) during the Uruguay Round (1986–1993), which sets out substantive disciplines for all standardising bodies which are active within a WTO Member.²³ Article 4.1 of the TBT Agreement imposes different levels of legal obligations on WTO Members depending on the nature of standardizing bodies. For central government standardizing bodies, WTO members have mandatory obligations to ensure that they accept and comply with the CGP for the preparation, adoption and application of standards. By contrast, for local government and nongovernmental bodies, WTO members shall take ‘reasonable measures’ as may be available to them to ensure that they accept and comply with the CGP.²⁴ To date, the CGP is somewhat a neglected component of the WTO Agreements. Neither its personal scope of application, nor the extent of the obligation imposed on WTO members, let alone its substantive obligations, has been the subject of interpretative guidance from WTO adjudicatory organs.²⁵ Nevertheless, two general observations of the CGP are in order. First, the use of ‘shall’ in Article 4.1 has converted the CGP into a fully enforceable instrument in respect of voluntary

¹⁹ FSC International Centre, ‘FSC’s Unique Governance Structure’ (July 2011).

²⁰ FSC, ‘FSC Principles and Criteria for Forest Stewardship’, FSC-STD-01-001 V5-2 EN (22 July 2015) 6.

²¹ FSC, ‘Report on the Structure of the FSC Certification System’ (Version 3, March 2019).

²² FSC, ‘Forest Management – Fact Sheet’ (5 March 2018) 1.

²³ M Kim, ‘The ‘Standard’ in the GATT/WTO TBT Agreements: Origin, Evolution and Application’ (2018) 52 *Journal of World Trade* 765.

²⁴ Agreement on Technical Barriers to Trade (adopted 15 April 1994, entered into force 1 January 1995) 1868 UNTS 120 (TBT Agreement) art 4.1.

²⁵ E Partiti, ‘What Use is an Unloaded Gun? The Substantive Disciplines of the WTO TBT Code of Good Practice and its Application to Private Standards Pursuing Public Objectives’ (2017) 20 *Journal of International Economic Law* 829, 831.

standards. Second, substantive CGP obligations that apply to voluntary standards are the same rules that apply to technical regulations.²⁶

3. 1. Is the FSC label covered by the TBT Agreement?

Annex 1(2) of the TBT Agreement defines ‘standard’ as:

*A document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related process 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.*²⁷

As the WTO Appellate Body (AB) observed in *US – Tuna II*, the definition of ‘standard’ is textually very similar to that of ‘technical regulation’, and the main criterion differentiating the two terms is that the compliance with a standard is not mandatory.²⁸ Following *EC – Asbestos*, three elements must be fulfilled to meet the definition of ‘standard’.²⁹ First, a standard must provide rules, guidelines or characteristics for products or related process and production methods (PPMs). Second, a standard must be approved by a ‘recognized body’. Third, the compliance with a standard must not be mandatory. The criteria are cumulative, and there is no particular order of analysis that a panel needs to follow in assessing whether a measure at issue is a standard.

The FSC is a private global multi-stakeholder standard setter and the FSC certification and labelling is entirely voluntary. In *US – Tuna II*, the AB rejected the idea that a label is mandatory only when the compliance with it is a necessary condition for market access. Instead, the AB emphasized that the characterization must be made in the light of the characteristics of the label at issue and the circumstances of the case. The AB found that the United States (US) dolphin-safe labelling scheme and its implementing regulations were legislative or regulatory acts of the US federal authorities which established a single and legally mandated set of requirements with respect to the broad subject of dolphin-safe tuna products in the US. In addition, they were enforced by specific US government mechanisms. Therefore, the AB considered the US dolphin-safe label mandatory.³⁰ In the case of the FSC label, it is not necessary for forest products to carry the FSC label to access the market of any WTO members, nor is it approved by any WTO member as the sole means to meet a mandatory requirement enforced by the governmental power.³¹ It is possible that the FSC label may be incorporated into governmental regulations or procurement policies, which make compliance with the FSC label a part of, or a presumption of, compliance with a public regulation.³² But that does not change the general voluntary nature of the FSC label. Therefore, this part will only focus on the other two elements of a standard.

²⁶ A Davies, ‘Technical Regulations and Standards under the WTO Agreement on Technical Barriers to Trade’ (2014) 41 *Legal Issues of Economic Integration* 37, 43.

²⁷ TBT Agreement (n 24) Annex 1(2).

²⁸ *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Product* (Appellate Body Report) WT/DS381/AB/R (13 June 2012) (*US – Tuna II*) para 187.

²⁹ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (Appellate Body Report) WT/DS135/AB/R (5 April 2001) (*EC – Asbestos*) paras 66–70.

³⁰ *US – Tuna II* (n 28) paras 188–199.

³¹ H Schepel, ‘Between Standards and Regulation: On the Concept of “de Facto Mandatory Standards” after Tuna II and Fra.bo’ in P Delimatsis (ed), *The Law, Economics and Politics of International Standardization* (Cambridge University Press, 2015) 199, 211.

³² Committee on Technical Barriers to Trade (TBT Committee), ‘Eighth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade under Article 15.4’ G/TBT/41 (19 November 2018) 14.

3.1.1 Does the FSC label provide any product characteristics or ‘related PPMs’?

For the first element, product characteristics include not only any objectively definable features and qualities *intrinsic* to the product, such as a product’s composition, size, hardness, flammability and density, but also ‘distinguishing marks’ of a product, such as the means of identification, the presentation and the appearance of a product.³³ Terminology, symbols, packaging, marking or labelling requirements are good examples of the latter category. Therefore, a textual reading of Annex 1(2) of the TBT Agreement will lead to the conclusion that all labelling programmes fall within the definition of ‘standard’ in the TBT Agreement. However, there is a long-standing confusion about to what extent non-product-related PPMs (NPR-PPMs) fall under the purview of the TBT Agreement. This confusion has further cast doubt on whether labels incorporating NPR-PPMs are covered by the TBT Agreement.³⁴

The term ‘PPMs’ originated in the GATT Standards Code in 1979 and it referred to product standards based on production methods rather than product characteristics.³⁵ In international trade law, PPMs are usually divided into product-related PPMs (PR-PPMs) and NPR-PPMs.³⁶ PR-PPMs have an impact on the physical characteristics of the goods in question. The use of pesticides in agriculture, as long as it leaves residues on the final product, can be defined as a PR-PPM. NPR-PPMs, by contrast, do not affect or change the nature, properties, or qualities of (nor discernible traits in or on) a product, i.e. not bearing on their physical characteristics.³⁷ Examples include the requirement that the furniture should have been made from wood sourced from a sustainably managed forest or the amount of carbon dioxide generated in the process of producing a product must not exceed a certain limit.³⁸ PPM-based standards have presented some challenging questions to the trade law community. The GATT/WTO rules operate on the basis that the world is divided up according to the territorial boundaries of its parties, and hence according to territorially defined regulatory measures. This political reality tends to suggest that environmental impacts of a product should be assessed at two stages. The first one is from ‘cradle to export border’ and these impacts should be primarily the concern of the exporting country. The second part is from ‘import border to grave’, the impacts of which being the responsibility of the importing country.³⁹ As production processes may be unique in each country and typically not traded, they are only indirectly relevant to the WTO trading system. This indirect nexus explains why a WTO panel finds it difficult to deal with NPR-PPMs.⁴⁰

The confusion originated from how to interpret ‘related PPMs’ in the definition of ‘standard’. The prevailing view is that the GATT parties used the phrase ‘related’ intentionally to restrict the scope of PPMs to PR-PPMs only.⁴¹ During the Uruguay Round, Mexico proposed to insert ‘their related’ before PPMs in the definition of technical regulation to exclude NPR-PPMs from the

³³ *EC – Asbestos* (n 29) para 67.

³⁴ TBT Committee and Committee on Trade and Environment, ‘Eco- Labelling Programmes’ WT/CTE/W/23 (19 March 1996) 17.

³⁵ S Charnovitz, ‘The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality’ (2002) 27 *Yale Journal of International Law* 59, 64.

³⁶ Organisation for Economic Co-operation and Development (OECD) Secretariat, ‘Processes and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM- Based Trade Measures’ (OECD 1997) 10–11.

³⁷ Communication from Canada, ‘Labelling and Requirements of the Agreement on Technical Barriers to Trade: Framework for Informal, Structured Discussions’ WT/CTE/W/229 (2003) para 14.

³⁸ OECD Secretariat (n 36) 11.

³⁹ H Ward, ‘Trade and Environment Issues in Voluntary Eco-Labeling and Life Cycle Analysis’ (1997) 6 *Review of European Community and International Environmental Law* 139.

⁴⁰ GATT Panel Report, *United States – Restrictions on Imports of Tuna* (GATT Panel Report) DS21/R (3 September 1991) (unadopted) BISD 39S/155 (*US – Tuna I*); *United States – Restrictions on Imports of Tuna* (GATT Panel Report) DS29/R (16 June 1994) (unadopted).

⁴¹ WTO Secretariat, *Trade and Environment at the WTO* (2004) 17; CR Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge University Press 2011) 381.

coverage of the TBT Agreement. Mexico's proposal was adopted in the final TBT text.⁴² By contrast, only the word 'related' was inserted before PPMs in the definition of 'standard'. Some argue that the lack of the word 'their' renders the scope of a standard broader than that of a technical regulation, in so far it also encompasses measures defining PPMs which do not refer to product characteristics.⁴³ But the negotiating history shows that the omission of 'their' does not imply an expansion of measures covered by the definition of standard. Mexico proposed to align the definition of standard with that of technical regulation towards the end of Uruguay Round. All but one of the delegations involved that expressed an opinion stated that they were prepared to accept Mexico's proposal as an improvement to the text.⁴⁴ Therefore, the omission of the possessive noun 'their' in the definition of standard does not seem to imply a different meaning.⁴⁵ In line with this understanding, a requirement that products should be harvested in a certain way to meet environmental standards would not be a 'standard' since it has no impact on physical qualities or performance of the product.

In *EC – Seal Products*, the AB interpreted the term 'their related' as indicating that a panel needs to examine whether the PPM at issue has a *sufficient nexus* to the characteristics of a product.⁴⁶ Even though the AB realized that 'the line between PPMs that fall, and those that do not fall, within the scope of the TBT Agreement raises important systemic issues', the AB refused to consider the issue because the panel had made no findings on it.⁴⁷ It remains to be seen how broad this 'sufficient nexus' between PPMs and product characteristics might be interpreted in future disputes. The 'sufficient nexus' test is relevant to the status of NPR-PPMs in the definition of standard as well. Crucially, in *EC – Seal Products*, the AB did not indicate that such 'nexus' must be a physical one. Many commentators understood the AB's interpretation as an indication that the WTO case law is evolving towards the recognition that both PR-PPMs and NPR-PPMs fall within the regulatory scope of the TBT Agreement.⁴⁸

The uncertain scope of 'related PPMs' further led to divergent interpretations of the second sentence of Annex 1.2 dealing with labelling requirements. One view holds that the second sentence is only illustrative of the first sentence of Annex 1.2, and NPR-PPMs are excluded from both the first and the second sentences.⁴⁹ This interpretation is contested by an opposite view that the TBT Agreement applies to all labelling requirements, without regard to the nature of the PPMs. The second sentence is additional to the first sentence and not merely illustrative.⁵⁰ However, this debate has become increasingly irrelevant in practice. The WTO AB has confirmed in recent cases that labelling requirements *as such*, regardless of the information contained, should be scrutinized under the TBT Agreement. In *US – Tuna II*, the US dolphin-safe labelling requirements were based on the NPR-PPM criteria of fishing processes. However, the AB supported the panel's evaluation that the US labelling scheme fell within the scope of the TBT Agreement.⁵¹ In *US – COOL*, country of origin labelling requirements that did not bear any connection with physical characteristics or PPMs were also considered as falling under the TBT Agreement.⁵²

⁴² WTO Secretariat, 'Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics' WT/CTE/W/10 (29 August 1995) paras 146–150.

⁴³ Partiti (n 25) 833.

⁴⁴ WTO Secretariat (n 41) para 150.

⁴⁵ Conrad (n 41) 378.

⁴⁶ *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (Appellate Body Report) WT/DS400/AB/R (18 June 2014) (*EC – Seal Products*) para 5.12.

⁴⁷ *ibid* para 5.69.

⁴⁸ D Sifonios, *Environmental Process and Production Methods (PPMs) in WTO Law* (Springer 2018) 258–259.

⁴⁹ EP Bartenhagen, 'The Intersection of Trade and the Environment: An Examination of the Impact of the TBT Agreement on Ecolabelling Programs' (1997) 17 *Virginia Environmental Law Journal* 51, 74.

⁵⁰ Communication from Canada (n 37) para 6.

⁵¹ *US – Tuna II* (n 28) para 199.

⁵² *United States – Certain Country of Origin Labelling (COOL) Requirements* (Panel Report) WT/DS384/R (18 November 2011) para 7.212.

As introduced in Section 2, an award of the FSC label is based on NPR-PPMs, as it sets requirements for the verification of FSC certified materials and products along the production chain from the forest through the whole production process to the consumer. Since it is well settled in WTO law that a labelling requirement *as such* constitutes a product characteristic and is covered by the TBT Agreement, the FSC certification and labelling cannot be ruled out of the TBT regulatory scope simply because it is based on NPR-PPMs.

3.1.2 Is the FSC a ‘recognized body’?

The ISO/IEC Guide 2 defines ‘body’ as a ‘legal or administrative entity that has specific tasks and composition’.⁵³ There is no doubt that the FSC is a ‘body’ as it is a properly incorporated legal entity under Mexican law that has specific tasks of promoting environmentally appropriate, socially beneficial, and economically viable management of the world’s forests.⁵⁴ The FSC also has a specific composition that includes Members, the General Assembly, the Board of Directors and the Executive Director.⁵⁵ But is the FSC a ‘*recognized* body’ for the purpose of the TBT Agreement? In particular, *who* must recognize the FSC? *How* to determine whether or not the FSC is ‘recognized’? Is it even possible for the FSC, an NGO with no governmental involvement whatsoever, to be a ‘recognized body’?

The TBT Agreement does not define the term ‘recognized body’. Nevertheless, useful references may be drawn from the AB’s interpretation of ‘recognized activities’ in *US – Tuna II*. First, the AB clarified that evidence of recognition by either WTO members or national standardizing bodies would be relevant.⁵⁶ Thus, the high level of recognition of the standard by the market and industry, by itself, is not enough.⁵⁷ Second, the meaning of the term ‘recognize’, as the AB reasoned, ranges from factual to normative.⁵⁸ The factual and normative recognition constitute cumulative requirements.⁵⁹ The factual dimension of recognition would appear to require, at a minimum, that a WTO member is aware, or has reason to expect, that the body in question is engaged in standardization activities.⁶⁰ For the normative dimension of the concept, evidence such as a WTO member’s participation in a body’s standardizing activities or the recognition of the resulting standard could suggest that a body is a ‘recognized body’. This does not mean that only a standardizing body whose activities are widely engaged in and standards widely used is a recognized body.⁶¹ Nevertheless, the AB stated that the larger the number of countries that participate in the development or accept the validity of a standard, the more likely it might be a ‘recognized body’.⁶² Third, the evidence that this body follows the CGP and the TBT Committee Decision on Principles for the Development of International Standards, Guides, and Recommendations with Relation to Articles 2, 5 and Annex 3 to the Agreement (TBT Committee Decision) in standard development may be relevant to determine whether it is a ‘recognized body’.⁶³ Finally, both governmental bodies and a non-governmental bodies could be a

⁵³ Article 4.1 of ISO/IEC Guide 2 (1991). Explanatory Note to Annex 1 of the TBT Agreement provides that the terms used in the TBT Agreement shall have the same meaning as given in the sixth edition of the ISO/IEC Guide 2: 1991.

⁵⁴ FSC Statutes (n 13) arts 2 and 6. The domicile of the FSC is Oaxaca, Mexico.

⁵⁵ *ibid* art 7.

⁵⁶ *US – Tuna II* (n 28) para 363.

⁵⁷ HZ Schroder, ‘Definition of the Concept ‘International Standard’ in the TBT Agreement’ (2009) 43 *Journal of World Trade* 1223, 1254.

⁵⁸ *US – Tuna II* (n 28) para 361.

⁵⁹ E Partiti, ‘The Appellate Body Report in *US – Tuna II* and Its Impact on Eco-Labeling and Standardisation’ (2013) 40 *Legal Issues of Economic Integration* 73, 90.

⁶⁰ *US – Tuna II* (n 28) para 362.

⁶¹ *ibid* para 392.

⁶² *ibid* para 390.

⁶³ *ibid* para 376.

‘recognized body’.⁶⁴ However, for a nongovernmental body such as the FSC, the recognition of its standards by a considerable number of governments or national standardizing bodies is essential.⁶⁵

A strong argument could be made that the FSC is a ‘recognized body’ in the TBT Agreement. To begin with, there is strong evidence demonstrating that not only WTO members are generally aware of the standardization activity at the FSC, at least some WTO members also recognize its normative validity. First, a number of countries, particularly in Europe, have incorporated FSC standards into their national technical regulations or procurement policies. For example, the United Kingdom (UK) government Timber Procurement Policy (TPP) requires that only timber and wood-derived products originating from an independently verifiable legal and sustainable source will be demanded for use on the government estate. To demonstrate compliance with the TPP requirements, the FSC certification is recognized by the UK government as meeting the criteria and delivering requirements for both legality and sustainability.⁶⁶ Some countries, like Mexico, have based their national technical regulations on FSC standards, and others, like South Africa, have committed to have their forests certified according to FSC standards.⁶⁷ Second, some WTO Members explicitly seek FSC certification and pay fees to the FSC. This is a common practice in some eastern European countries with large State-owned forests, including Estonia, Latvia and Poland.⁶⁸ Other WTO members, including Austria, Germany, UK, Switzerland, Denmark and the Netherlands, have provided funding for the FSC through donations.⁶⁹ Third, the FSC standard is often incorporated in government regulations and serves to support governmental authorities. For example, a growing number of countries and regions – including the EU, US and Australia – have legislation banning the trade and use of illegally harvested timber and derived products. The FSC certification can be used as part of a due diligence system to meet the mandatory European Timber Regulation.⁷⁰ When the Bolivian New Forest Law was adopted, Bolivia passed a requirement that forest concessionaries met certain sustainability standards and the FSC was identified as the only certification body that met those standards. The FSC became the *de facto* auditor for Bolivia while the government worked toward developing its own auditing scheme.⁷¹

Moreover, the FSC has comprehensively revised its principles and criteria in developing standards and made it clear that they are developed in compliance with the CGP of the WTO TBT Agreement.⁷² There seems to be a disassociation of the scope of a WTO member’s legal obligation and who may accept the CGP. The TBT Annex 3(B) provides that the CGP is open to *any standardizing body*. In practice, a few purely private firms have accepted the CGP, such as Calconnect in the US and Seafood Services Australia Ltd.⁷³ This is also encouraged by the TBT Committee,

⁶⁴ J Pauwelyn, ‘Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties’ (2014) 17 *Journal of International Economic Law* 739, 750.

⁶⁵ M Du and F Deng, ‘International Standards as Global Public Goods in the World Trading System’ (2016) 43 *Legal Issues of Economic Integration* 113, 132.

⁶⁶ Department for Environment Food and Rural Affairs, ‘Results of the Evaluation of Category A Evidence: Forest Certification Schemes’ (October 2015).

⁶⁷ K Dingwerth, ‘North-South Parity in Global Governance: The Affirmative Procedures of the Forest Stewardship Council’ (2008) 14 *Global Governance* 53, 59.

⁶⁸ E Meidinger, ‘The Administrative Law of Global Private-Public Regulation: The Case of Forestry’ (2006) 17 *European Journal of International Law* 47, 59.

⁶⁹ MN Moody, ‘Warning: May Cause Warming Potential Trade Challenges to Private Environmental Labels’ (2012) 65 *Vanderbilt Law Review* 1401, 1436.

⁷⁰ NEPCon, ‘How Forest Certification Systems Meet the EUTR Requirements’ (Version 2.0, January 2019) 13–14.

⁷¹ Rainforest Alliance, ‘Toward Sustainability: The Roles and Limitations of Certification’ (June 2012) 33. The Bolivian practice raises the question of whether the FSC standard is ‘voluntary’ or ‘mandatory’. This depends on a number of factors such as whether the law permits other competing labels to make claims about forest sustainability, the possibility of other labels being recognized if they meet equivalent label requirements, and how the requirement is enforced. The point is that it is possible for the FSC standard to be categorized as mandatory when it is incorporated in government regulations, depending on how the regulation is designed.

⁷² FSC (n 20) 5.

⁷³ ‘WTO ISO Standards Information Gateway’ <www.tbtcodes.iso.org>.

which has expressly called on WTO members to ensure compliance with the CGP's provisions from 'bodies which are not commonly considered as standardising bodies and which have not accepted the CGP'.⁷⁴

The remaining question is whether the FSC complies with the TBT Committee Decision. As will be explored in detail in Section 3.3, the FSC standard-setting procedures are best described as meeting only parts of requirements of the TBT Committee Decision. However, it is important to note that only 'international standard', which is afforded a special status in the TBT Agreement, is expected to comply with the TBT Committee Decision. This criterion does not apply to regular standards, to which a much lower threshold should apply.⁷⁵ Otherwise all standards which are not international standards would not be recognized. To conclude, the FSC standard meets the criteria of 'standard' as defined in Annex 1(2) of the TBT Agreement.

3.2 The extent of WTO members' obligation under WTO law

Article 4.1 of the TBT Agreement obliges WTO members to take '*such reasonable measures*' as may be available to them to ensure that nongovernmental standardizing bodies within their territories accept and comply with the CGP. It is important to note that Article 4.1 imposes an enforceable obligation on WTO members, not on standardizing bodies or the standards. If relevant standardizing bodies do not accept or comply with the CGP, WTO members are nevertheless responsible for their breach of the CGP. Standardizing bodies that accept the CGP assume a range of trade law obligations including transparency and stakeholder participation, most-favoured-nation and national treatment, prohibition from using standards as unnecessary obstacles to international trade, the use of relevant international standard as a basis for the standard to be developed, and avoidance of duplication or overlap with the work of other national and international standardizing bodies. These are international good practices in standard setting and are particularly useful for private standards developers to refer to. However, what constitute 'non-governmental standardizing bodies' and 'reasonable measures' are undefined in Article 4.1 of the TBT Agreement. Then, is the FSC a 'non-governmental standardizing body'? If the answer were positive, what reasonable measures might a WTO member then be obliged to take to ensure that the FSC accept and comply with the CGP?

Annex 1(8) of the TBT Agreement defines 'non-governmental body' as a '[b]ody other than a central government body or a local government body, *including* a non-governmental body which has legal power to enforce a technical regulation'.⁷⁶ A textual reading of Annex 1(8) may indicate that the term 'non-governmental body' includes *any* standardizing body other than a central government body or a local government body. The use of the word 'including' seems to suggest that the provision only provides an example of what may constitute a 'non-governmental body'. Therefore, it may be argued that 'non-governmental body' includes private standardizing bodies such as the FSC that are not entrusted by government but operate or are established within the territories of a Member.⁷⁷

By contrast, a narrower, and arguably more plausible, reading of Annex 1(8) insists that the term 'non-governmental standardizing bodies' in Article 4.1 does not include *any* private standardizing body. Rather, the existence of an appropriate nexus between a nongovernmental entity (and/or its measure) and a WTO member is required. Such a nexus may be reflected in governmental

⁷⁴ TBT Committee, 'Third Triennial Review on the Implementation and Operation of the TBT Agreement' G/TBT/13 (11 November 2003) para 25.

⁷⁵ Partiti (n 25) 835.

⁷⁶ TBT Agreement (n 24) Annex 1(8).

⁷⁷ C Vidal-Leon, 'Corporate Social Responsibility, Human Rights, and the World Trade Organization' (2013) 16 *Journal of International Economic Law* 893, 905; D Casey, 'Private Food Safety and Quality Standards and the WTO' (2007) 7 *University College Dublin Law Review* 65, 81–82; SR Gandhi, 'Regulating the Use of Voluntary Environmental Standards within the World Trade Organization's Legal Regime: Making a Case for Developing Countries' (2005) 39 *Journal of World Trade* 867–868; Partiti (n 25) 836.

involvement, or support or incentives provided to a nongovernmental measure at issue.⁷⁸ As Pauwelyn commented:

Although this definition is rather vague and open-ended, it is possible to argue that, in the light of the context and purpose of the TBT Agreements, ‘non-governmental entities’ are not individual economic operators (or their associations) but rather private entities which have been entrusted by government with the performance of certain tasks or which have otherwise a special status as regards the development and implementation of TBT rules.⁷⁹

This narrow reading of ‘non-governmental body’ is not only consistent with the definition of standard as discussed in Section 3.1.2, but also echoes the traditional view that WTO law does not regulate private market behaviour with no governmental interference. More importantly, it is congruent with the negotiating history of the TBT Agreement and the CGP. Private standards were rare in the 1980s and the WTO negotiators never anticipated the application of the TBT Agreement to private standards during the Uruguay Round.⁸⁰ They were more concerned with the evasion of the TBT disciplines through independent agencies or regional networks of regulators, such as the American National Standards Institute in the US and the British Standards Institute in the UK that operate independently of government in many WTO members.⁸¹ Obviously, if the nongovernmental body status of national standardizing bodies would allow some WTO member to circumvent the disciplines of the TBT Agreement, that would be unfair to other WTO members.⁸² Therefore, the term ‘non-governmental body’ in the TBT Agreement is better interpreted as covering those nongovernmental entities which have some government links or have been delegated with certain government function.⁸³ If this interpretation is correct, then the FSC is not the type of ‘non-governmental body’ that the TBT Agreement was designed to regulate, and a WTO member does not have legal obligation to take reasonable measures to make the FSC comply with the CGP.

Assuming that the FSC is a ‘non-governmental body’ for the purpose of the TBT Agreement, a WTO member’s obligation is limited to ‘take reasonable measures as available’ to it. This is less stringent than the obligation to ensure compliance with regard to central government standardizing bodies. It also indicates that Article 4.1 restricts the obligations of a WTO member to avoid the WTO’s interference with a WTO member’s internal legal system. For example, if the central government body of a WTO member is unable to direct or influence the standardizing body at stake for factual or legal reasons, then there are no available measures to it and the WTO member has not breached its obligations. Similarly, ‘reasonable’ implies ‘a degree of flexibility that involves

⁷⁸ PC Mavroidis and R Wolfe, ‘Private Standards and the WTO: Reclusive no More’ (2017) 16 *World Trade Review* 1, 9–10; A Kudryavtsev, *Private-Sector Standards as Technical Barriers in International Trade in Goods: In Search of WTO Disciplines* (Wolf Legal Publishers 2015) 290; Appleton (n 11) 147–148.

⁷⁹ J Pauwelyn, ‘Non-Traditional Patterns of Global Regulation: Is the WTO Missing the Boat?’ in C Joerges and EU Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart 2006) 210.

⁸⁰ Submission by the UK, ‘Private Voluntary Standards within the WTO Multilateral Framework’ G/SPS/GEN/802 (9 October 2007) 78.

⁸¹ S Bernstein and E Hannah, ‘Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space’ (2008) 11 *Journal of International Economic Law* 575, 578.

⁸² Revised Proposal by the European Economic Community, ‘A Code of Good Practice for Non-Governmental Bodies in the Agreement on Technical Barriers to Trade’ MTN/GNC/NG8/W/71 (20 February 1990).

⁸³ If standard-setting activities of a ‘public body’ under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) cannot be attributed to a WTO member, this ‘public body’ will meet the definition of ‘non-governmental body’ in Annex 1(8) of the TBT Agreement. However, the threshold of ‘non-governmental body’ in the TBT Agreement is *much lower* than that of public body in the SCM Agreement as the latter must be a body that ‘possesses, exercises or is vested with governmental authority’, see *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (Appellate Body Report) WT/DS379/AB/R (11 March 2011), para 317.

consideration of all of the circumstances of a particular case'.⁸⁴ By implication, this means that the precise scope of a WTO member's obligation with regard to 'non-governmental body' is member-specific and must take into account the domestic legal and constitutional arrangements of a particular WTO member. Yet any broad understanding of unreasonableness would result in disadvantaging some WTO members with few internal legal impediments to take measures against a nongovernmental body.⁸⁵

The standard of 'reasonable' and 'available' measures does not entail any obligation of result but, far from being hortatory, imposes an obligation of conduct on the side of the State to actively attempt to address in good faith possible deviations by standardizing bodies from the CGP.⁸⁶ Some scholars suggested that more specific inspirations may be drawn from the GATT/WTO case law.⁸⁷ The first relevant example is Article XXIV:12 of the GATT 1994 which imposes a similar obligation on WTO members to ensure compliance with the GATT by regional and local governments and other authorities within its territories. In *Canada – Gold Coins*, the GATT panel held that the basic principle in determining which measures are reasonable in Article XXIV:12 GATT is that the consequences of the non-observance of the provisions of the GATT by local government for trade relations with other contracting parties 'are to be weighed against the domestic difficulties of securing compliance'.⁸⁸ The GATT panel in *Canada – Alcoholic Drinks* further held that to examine whether Canada had demonstrated that it had taken all reasonable measures available to it, Canada would have to show that it had made 'a serious, persistent and convincing effort' to ensure compliance with the provisions of the GATT Agreement.⁸⁹ However, it is not clear to what extent the GATT panels' findings on 'reasonable measures' as embodying an onerous positive duty in Article XXIV:12 GATT are relevant to the interpretation of Article 4.1. The key difference between these two provisions is clear: while Article XXIV:12 GATT addresses a GATT member's obligation regarding *regional and local governments* which exercise governmental authority, Article 4.1, second sentence, deals with nongovernmental standardizing bodies with no public authority. It may be assumed that a higher level of central government intervention may be inappropriate in the case of nongovernmental entities without government links. Otherwise, it would put voluntary private standards in the same position as mandatory governmental technical regulations, an outcome which seems to be contrary to the requirement of WTO members taking only 'reasonable measures' to ensure compliance with the CGP.⁹⁰

More recently, Partiti explores more scenarios where measures may be found 'reasonably available'. A measure would not be available if it entails substantial costs or technical difficulties in its implementation and enforcement. Reasonability of a measure is also related to the seriousness of the breach which is to be addressed. Reasonable measures include 'preventive' measures which aim at familiarizing standardizing bodies with the provisions of the CGP, such as information provision, training, the development of policies concerning TBT compliance, and the provision of incentives. Ad hoc measures for the correction of breaches from standardizing bodies may not be excluded from

⁸⁴ *Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (Appellate Body Report) WT/DS184/AB/R (24 July 2001) para 84.

⁸⁵ M Koebele and G LaFortune, 'Article 4 TBT' in R Wolfrum et al (eds), *Max Planck Commentaries on World Trade Law: Technical Barriers and SPS Measures* (Brill 2007) 257.

⁸⁶ J Bohanes and I Sandford, 'The (Untapped) Potential of WTO Rules to Discipline Private Trade Restrictive Conduct', Paper presented at the Society of International Economic Law Inaugural Conference (Geneva, 15–17 July 2008) 35–36.

⁸⁷ Kudryavtsev (n 78) 298–310.

⁸⁸ *Canada – Measures Affecting the Sale of Gold Coins* (GATT Panel Report) L/5863 (17 September 1985) (unadopted) paras 68–69.

⁸⁹ *Canada – Import Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies* (GATT Panel Report) DS17/R (18 February 1992) para 5. 37.

⁹⁰ D Prevost, 'Private Sector Food Safety Standards and the SPS Agreement: Challenges and Possibilities' (2008) *South African Yearbook of International Law* 1, 23.

being ‘reasonably available’. For the more developed WTO members such as the EU, even competition law enforcement could be included as reasonably available measures.⁹¹

Applying the analytical framework to the FSC, it seems reasonable for all WTO members to adopt measures which aim at familiarizing and encouraging the FSC to comply with the provisions of the CGP. In the event that the FSC has acted grossly inconsistently with the CGP, it also seems reasonable to expect a WTO member to consider withdrawing or reducing subsidies, donations or support to the FSC. On the more specific regulatory actions, it is worth highlighting that the scope of a WTO member’s obligation is member-specific and must take into account the domestic legal and constitutional arrangements of a particular WTO member.

3.3 Is the FSC standard an ‘international standard’?

Similar to Article 2.4 on technical regulations, paragraph F of the CGP provides that all standardizing bodies shall use relevant international standards as a basis for the standards they develop, except where such international standards or relevant parts would be ineffective or inappropriate. As Howse points out, the provision represents an extraordinary mechanism for the creation of new international legal norms because it enables a very broad range of normative materials, which are mostly of a voluntary nature, may be converted or transformed into international legal obligation.⁹² Precisely because international standards have normative value in international trade law, what constitutes a relevant international standard is an important threshold question before we move to analyse whether the FSC standard is an ‘international standard’ for the purpose of the TBT Agreement.

3.3.1 What is an ‘international standard’ in the TBT Agreement?

There is no explicit definition of ‘international standard’ in the TBT Agreement. In *US – Tuna II*, the AB for the first time concluded that an international standard is ‘a standard adopted by an international standardizing body’.⁹³ This definition suggests that it is primarily the characteristics of the international standardizing body (ISB) that lends a standard its international character.⁹⁴ The AB further concluded that an ISB must have *recognized activities* in standardization and whose membership is open to the *relevant bodies* of at least all WTO members.⁹⁵ Extraordinarily, the AB also held that the TBT Committee Decision on international standard is a ‘subsequent agreement’ between the WTO members within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties. As such, a WTO panel is obliged to take it into account when interpreting whether a standard at issue is an international standard.⁹⁶ The TBT Committee Decision has enunciated six principles for the development of international standards:

*[T]here was a need to develop principles concerning transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and developing country interests that would clarify and strengthen the concept of international standards under the Agreement.*⁹⁷

⁹¹ Partiti (n 25) 837–838.

⁹² R Howse, ‘A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and ‘International Standards’ in Joerges and Petersmann (n 79) 393.

⁹³ *US – Tuna II* (n 28) para 356.

⁹⁴ *ibid* para 353.

⁹⁵ *ibid* para 359.

⁹⁶ *United States – Measures Affecting the Production and Sale of Clove Cigarettes* (Appellate Body Report) WT/DS406/AB/R (24 April 2012) para 258.

⁹⁷ WTO, ‘Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade’ G/TBT/9 (13 November 2000) Annex 4, para 20.

In Section 3.1.2, I argued that the FSC is a recognized body and that it has recognized activities in standardization. This conclusion is partly based on the finding that the FSC has made it clear that its standards are developed in compliance with the CGP. Since the AB concluded that (i) an ISB must have recognized activities in standardization and (ii) whether the standardizing body in question follows the CGP in standard development is relevant to determine whether it has recognized activities,⁹⁸ a logical conclusion must be that the development of international standards at ISBs must follow the CGP. This explains why ISBs aspiring to make their standards elevated to ‘international standards’ status insist that their standard development processes are consistent with the CGP.⁹⁹

To meet the definition of an ISB, it must also be shown that (i) the membership of the FSC is ‘open’ to all relevant bodies of at least all WTO members and (ii) the FSC standard setting is consistent with the TBT Committee Decision on the development of international standards. For the openness requirement in the definition of an ISB, the AB reasoned that the accession provision of the ISB should not disadvantage the relevant bodies of some Members, either *de jure* or *de facto*, and if there are procedures or requirements, they should be a mere formality. Also, an ISB should be open at all stages of the standards-development process.¹⁰⁰ As will be illustrated below, this requirement is identical to the openness principle in the TBT Committee Decision. Thus, the following discussion will focus on whether the FSC complies with the TBT Committee Decision.

3.3.2 Is the FSC standard an ‘international standard’?

In *US – Tuna II*, the AB held that an examination of the procedural and substantive guarantees of the ISB at issue is necessary if its output is to be recognized as a relevant international standard. This finding essentially demands scrutiny of mechanics through which standards are adopted within particular ISBs. In this respect, it should be noted that although the FSC claims that its standard development procedure is in compliance with the CGP, it has never made reference to the TBT Committee Decision.¹⁰¹ A rigorous investigation of whether the standards development process at the FSC is consistent with the TBT Committee Decision is in order.

First, transparency. The TBT Committee Decision requires that all essential information regarding current work programmes, on proposals for standards and on the final results should be made easily accessible to all interested parties of all WTO members. Procedures should be established so that adequate time and opportunities be provided for written comments. The FSC is highly transparent with regard to its standardization activities. The FSC informs all the draft standards and standards that are under review through its publication in the FSC newsletters and website. All the interested parties are provided with 30 days to make comments in writing, which are taken into consideration. Meetings are open to all interested parties and the final standards are publicly available.¹⁰²

Second, openness. The openness principle requires that membership of an ISB should be open on a non-discriminatory basis to relevant bodies of at least all WTO members, including participation at the policy development level and at every stage of standards development, such as new work item proposal, technical discussion, submission of comments, reviewing existing standards, voting and adoption of standards and dissemination. To begin with, the FSC is open to individuals and legal entities of all WTO members who share the FSC’s goals and vision. The accession provision in the

⁹⁸ *US – Tuna II* (n 28) para 376.

⁹⁹ ISO/IEC Guide 59:2019 <<https://www.iso.org/standard/71917.html>>; FSC, ‘Principles and Criteria for Forest Stewardship’ (22 July 2015); ISEAL Code of Good Practice (December 2014), <https://www.isealalliance.org/sites/default/files/resource/2017-11/ISEAL_Standard_Setting_Code_v6_Dec_2014.pdf>.

¹⁰⁰ *US – Tuna II* (n 28) para 359.

¹⁰¹ FSC, ‘International Standards: FSC Principles and Criteria for Forest Stewardship’ (22 July 2015) 5.

¹⁰² FSC, ‘The Development and Revision of FSC Normative Documents’ (25 March 2015).

FSC is largely a mere formality as in practice almost all applications are accepted.¹⁰³ This in practice results in a number of bodies from one single WTO member participating in the FSC activities. However, the FSC excludes governments and governmental agencies from its membership and only State-owned or State-controlled companies can participate in the Economic Chamber.¹⁰⁴ This exclusion may raise questions as to whether the FSC is open to all the *relevant bodies* of WTO members, in particular if the relevant body of a WTO member is a government agency. It may be argued that WTO members can still make their way into participating through State-owned and State-controlled companies and therefore the FSC complies with the definition of ISB in the TBT Agreement.¹⁰⁵ One good example is the joint stock company ‘Latvia’s State Forests’, whose stakeholder is the State represented by the Ministry of Agriculture of the Republic of Latvia. But this argument sounds tenuous at best, as not all WTO members have State-owned or State-controlled companies interested in forest sustainable management.

Moreover, any interested party can participate in the FSC standardization process and submit comments. By joining the FSC, individuals and organizations can play a significant role in its governance. All members of the FSC can participate in the FSC general assembly meeting as well as all the subsidiary bodies. They can elect individuals to the board of directors. They can formulate and submit policy motions and participate in the development process of each standard at any step they decide to.¹⁰⁶ One exception is that at the policy level, certification bodies, industry associations and government-owned or controlled companies cannot be elected to the Board of Directors.¹⁰⁷ This exclusion might be explained as an attempt to help safeguard the credibility of FSC standard because certification bodies and industry are actual users of the standard so they may have a conflict of interest problem. The exclusion of State-owned or State-controlled firms may be explained by the lack of trust toward governments who failed to reach international agreements and national policies to protect the forests.¹⁰⁸

Third, impartiality and consensus. The principle of impartiality requires that all relevant bodies of WTO members should be provided with meaningful opportunities to contribute to the elaboration of an international standard so that the standard development process will not privilege any particular interests, suppliers, countries or regions. Impartiality should be accorded throughout all the standards development processes. Consensus procedures should be established that seek to take into account the views of all parties concerned and to reconcile any conflicting arguments.

The FSC was created with the aim of providing a voice for all stakeholders that should be included in the development of a particular standard, including those that are normally underrepresented or excluded from the debate, such as social and environmental stakeholders.¹⁰⁹ For this purpose, the FSC has set up a tripartite chamber system and allocated equal voting power across all three chambers and six sub-chambers to ensure a balanced representation of all affected interests and values, including the divergent interests between North and South. With this elaborate membership structure, the FSC appears to be an impartial organization as it ensures no single set of interests dominate the decision-making within the general assembly and that policy decisions adequately reflect the core values associated with sustainable forest management.¹¹⁰ Nevertheless, despite the FSC’s unique governance structure, it has struggled to achieve a genuinely balanced representation of members from the different chambers. For example, there is still less representation

¹⁰³ F Gale and M Haward, *Global Commodity Governance: State Response to Sustainable Forest and Fisheries Certification* (Palgrave 2011) 53.

¹⁰⁴ FSC Statutes (n 13) art 12.

¹⁰⁵ Villarreal (n 16) 196.

¹⁰⁶ Dingwerth (n 67) 66.

¹⁰⁷ FSC Statutes (n 13) art 24.

¹⁰⁸ Villarreal (n 16) 247.

¹⁰⁹ FSC, ‘Global Strategic Plan 2015–2020’ (2015) 15.

¹¹⁰ F Gale and M Haward, ‘Public Accountability in Private Regulation: Contrasting Models of the Forest Stewardship Council (FSC) and Marine Stewardship Council (MSC)’ (University of Tasmania School of Government 2004).

of social stakeholders at the FSC.¹¹¹ Moreover, the majority of the FSC members come from European and North American countries; stakeholders from African and Asian countries are underrepresented, as are smallholders.¹¹²

FSC standards are developed through a sophisticated consultation process that includes all interested parties. Most rules and standards are developed through extensive deliberative proceedings involving stakeholder consultation, formal public notice and comment procedures and public explanations of decisions.¹¹³ The coordinator shall plan for two rounds of public consultation and a public consultation round shall consist of a period of at least 60 days, which may be reduced to 30 days in exceptional circumstances. All valid comments received should be made publicly available and be answered with an indication of how the issues raised were addressed.¹¹⁴ The working group makes recommendation for approval of FSC standards through consensus. The main issues and concerns raised during the consultation process should be explained and addressed in the report for the FSC Board of Directors. Lack of consensus on a specific issue should also be recorded in the report.¹¹⁵ However, there is no requirement in the FSC that the Board of Directors can only approve a standard adopted on consensus.¹¹⁶

It must be noted that the consensus requirement in the TBT Committee Decision is a ‘best effort’ obligation in the sense that it only requires that *consensus procedures* be established to take into account the views of all parties and no particular interests should be favoured. There is nothing in the TBT Committee Decision requiring that international standards must be adopted by consensus.¹¹⁷ Therefore, it may be argued that the FSC standard development procedures fulfil the consensus requirement.

Fourth, effectiveness and relevance. The principle of effectiveness and relevance is essentially about international standards being fit for purpose. International standards need to be relevant and to effectively respond to regulatory and market needs, as well as scientific and technological developments. They should not distort the global market, have adverse effects on fair competition, stifle innovation and technological development, or give preference to the characteristics or requirements of specific countries when different needs or interests exist in other countries. For this purpose, the TBT Committee Decision requires that ISBs: (i) take into account relevant regulatory or market needs, and scientific and technological developments; (ii) put in place procedures aimed at identifying and reviewing standards that have become obsolete, inappropriate or ineffective; and (iii) establish or maintain communication channels with the WTO.

Several studies provide partial evidence that FSC certification has contributed to sustainable forest management and generated an ecological impact in certified forests in terms of reduced degradation, enhancing biodiversity, social improvements and economic benefits.¹¹⁸ However, most existing studies rely on only one or a few case studies, and the methodologies of the assessments have

¹¹¹ M Bostrom and KT Hallstrom, ‘Global Multi-Stakeholder Standard Setters: How Fragile Are They?’ (2013) 9 *Journal of Global Ethics* 93, 95.

¹¹² FSC, ‘FSC Annual Report 2018’, 24; T Cadman, *Quality and Legitimacy of Global Governance: Case Lessons from Forestry* (Palgrave 2011) 61.

¹¹³ E Meidinger, ‘Forest Certification and Democracy’ (2011) 130 *European Journal of Forest Research* 407, 419.

¹¹⁴ FSC (n 20) arts 5.5–5.12. A coordinator shall be appointed to manage each development and revision process of FSC standards. The coordinator shall be responsible for managing the Working Group, the Consultative Forum and drafting the normative document, see FSC (n 20) Art 3.1.

¹¹⁵ *ibid* art 7.2.

¹¹⁶ *ibid* art 8.

¹¹⁷ Du and Deng (n 65) 135.

¹¹⁸ A Tikina and J Innes, ‘A Framework for Assessing the Effectiveness of Forest Certification’ (2008) 38 *Canadian Journal of Forest Resources* 1357, 1365; J Blumroeder, ‘Towards the Evaluation of the Ecological Effectiveness of the Principles, Criteria and Indicators of the Forest Stewardship Council (FSC): Case Study in the Arkhangelsk Region in the Russian Federation’ (2018) 6 *Challenges in Sustainability* 20, 50–51; Z Burivalova et al, ‘A Critical Comparison of Conventional, Certified, and Community Management of Tropical Forests for Timber in Terms of Environmental, Economic, and Social Variables’ (2017) 10 *Conservation Letters* 4, 14.

been questioned.¹¹⁹ Other rigorously designed studies have identified some contradictory results, indicating that the FSC certification has had only minimal impact on sustainable management of forest. Consequently, it is impossible to draw any general definitive conclusion based on the existing evidence.¹²⁰

Moreover, strong criticisms from even the FSC's own stakeholder organizations and public FSC label scandals have cast doubt on the effectiveness of the FSC label. Facing intense competition from rival, industry-led forest certification schemes such as the Programme for the Endorsement of Forest Certification (PEFC), the FSC sought to regain its position as a market leader by increasingly the supply of FSC-labelled products. However, some of the strategies that the FSC has used have proven controversial.¹²¹ The FSC mix label, which allows products with a certain percentage of non-FSC certified wood (30 percent) from 'controlled sources' to carry an FSC label, is a typical example. The rationale for the practice of allowing the FSC mix label is that FSC forest management certification requirements are demanding for forest managers to implement. The supply of certified wood is often not sufficiently available to meet demand. Allowing businesses to source controlled wood to make up a limited percentage of the total manufactured product provides for an acceptable option for those businesses that cannot procure themselves enough FSC-certified material and still offer consumers the possibility of purchasing products from certified and controlled sources.¹²² In practice, however, it has been difficult for the FSC to verify whether the mixed wood is from the controlled source. Some public scandals revealed that the FSC label at times has served only to provide a cover for trafficking in illegal timber in some countries.¹²³ It is highly likely that the FSC label functions well in certain regions whilst not so well in others. Up to now, most of the certified forests are located in Western Europe and North America (83 percent), while developing countries only account for 17 percent. The lack of interest in FSC certification in developing countries reflects a deep North-South divide due to expensive FSC certification, false expectations regarding price premium for certified timber, and difficulty in accessing Northern markets.¹²⁴

FSC standards are periodically reviewed after their publication to ensure their relevance.¹²⁵ In addition, the FSC has put in place detailed guidelines and procedures for any individual or organization to lodge a complaint against the FSC certification scheme. There is no evidence that the FSC has set up any formal communication channels with the WTO. Although the FSC claims that its standard development is consistent with the substantive and procedural requirements of the CGP, the FSC has not yet accepted the CGP, despite the fact that the CGP is open to acceptance by any standardizing body and a notification to the WTO ISO Standards Information Gateway is all required to accept the CGP.¹²⁶

Fifth, coherence. The principle of coherence is not concerned with the standard-setting processes *within* a single ISB. It instead requires that ISBs cooperate and coordinate with other relevant ISBs to avoid the development of duplicative or conflicting international standards. At the FSC, the proposal for new work at FSC requires considering what other standards exist or are in the process of development which meet all or part of the expressed need.¹²⁷ However, it is not clear how the FSC

¹¹⁹ A Marx, E Becault and J Wouters, 'Private Standards in Forestry: Assessing the Legitimacy and Effectiveness of the Forest Stewardship Council' in A Marx et al (eds), *Private Standards and Global Governance: Economic, Legal and Political Perspectives* (Edward Elgar 2012) 60, 82–83.

¹²⁰ *ibid.*

¹²¹ S Moog et al, 'The Politics of Multi-Stakeholder Initiatives: The Crisis of the Forest Stewardship Council' (2015) *Journal of Business Ethics* 469, 479.

¹²² FSC, 'Controlled Wood and FSC Mix' <<https://fsc.org/en/controlled-wood-FSC-MIX>>.

¹²³ R Conniff, 'Greenwashed Timber: How Sustainable Forest Certification Has Failed' (Yale Environment 360, 20 February 2018).

¹²⁴ F Carrera et al, 'Forest Certification in Guatemala', in B Cashore et al (eds), *Confronting Sustainability: Forest Certification in Developed and Transitional Countries* (Yale School of Forestry & Environmental Studies 2006) 406.

¹²⁵ FSC (n 20) arts 9–11.

¹²⁶ WTO ISO Standards Information Gateway <<https://tbtcode.iso.org/sites/wto-tbt/home.html>>.

¹²⁷ FSC (n 20) art 2.2.

will consider the existence of other similar standards to avoid overlap and duplication. There is evidence that the FSC work may in some cases be duplicative or overlapping with other ISBs such as the ISO.¹²⁸ The FSC's principal competitor is PEFC, another major global forestry certification scheme created mainly by industry with a mission similar to that of the FSC. Compared with the PEFC, FSC members represent more countries and are more inclusive. It has also been claimed that FSC standards are stricter and offer a higher level of assurance.¹²⁹ However, there are no clear procedures on how the two competing bodies may cooperate and coordinate their activities.

Sixth, the development dimension. The last principle that the TBT Committee Decision identifies is addressing the concerns of developing countries. Because of limited resources, developing countries continue to struggle to participate in the development of international standards and to participate in governance structures of ISBs. However, participation of developing countries in international standardization is essential to ensure the global relevance of international standards and to contribute to developing countries' access to world markets, technical progress and sustainable development.¹³⁰ The FSC has given some consideration to facilitating developing countries' participation in standards development. For example, the FSC has a structure in which stakeholders from developing and developed countries are differentiated. Stakeholders from the South pay lower fees while enjoying the same rights as Northerners. The Southern stakeholders also have their own sub-chamber in each chamber. When developing standards, the working groups need to have a balanced stakeholder representation. The FSC also provides some financial assistance to stakeholders from developing countries to participate in its standardization activities.¹³¹

Overall, there is some evidence that the FSC has complied with the six principles embodied in the TBT Committee Decision on the development of international standards. Indeed, the FSC's standard-setting structure has long been praised for its inclusiveness, participation, transparency and deliberation compared to other transnational standardizing organizations.¹³² Even though the FSC may not fulfil all six TBT principles, it may be argued that other well-known ISBs, such as the ISO, have also fallen short of meeting all the requirements.¹³³ Still, the evidence is not strong enough to firm up the conclusion that the FSC standard is the relevant international standard in forest conservation in the eyes of the WTO. To begin with, since the national governments and national standardizing bodies are excluded from membership and only a limited number of governments are involved in the FSC activities, it is doubtful whether the FSC is 'open' to relevant bodies of the WTO members and whether the WTO members recognise the validity of the FSC standard. Furthermore, there is strong evidence that the FSC standard is not as effective in reducing deforestation as originally intended. Finally, there are competing standards in forest conservation, and there is no evidence that the FSC has cooperated and coordinated with other relevant international bodies to avoid duplicative and conflicting international standards. Therefore, to be recognized as a relevant 'international standard', it is essential for the FSC to secure recognition of a substantial number of WTO members, and to accept and comply with both the CGP and the TBT Committee Decision.

The requirements of 'international standard' are challenging for the FSC, given that it explicitly excludes States from its membership, and that the market competition from rival labelling programmes has forced the FSC to develop controversial standards. Most importantly, if the FSC standard were qualified as the relevant international standard in forest management and conservation for the purpose of the TBT Agreement, then all WTO members would be obliged to base their national laws, regulations and standards relating to forest preservation on the FSC standard. It is legally

¹²⁸ Cadman (n 112) 59.

¹²⁹ NEPCo, 'Comparative Analysis of the PEFC System with FSC Controlled Wood Requirements' (May 2012) 17.

¹³⁰ ISO, 'ISO Action Plan for Developing Countries 2016–2020' (2016) 2.

¹³¹ Villarreal (n 16) 243.

¹³² H Garrelts and M Flitner, 'Government Issues in the Ecosystem Approach: What Lessons from the Forest Stewardship Council?' (2011) 130 *European Journal of Forest Research* 395, 396–397; Meidinger (n 68) 70–75.

¹³³ P Delimatsis, 'Global Standard-Setting 2.0: How the WTO Spotlights ISO and Impacts the Transnational Standard-Setting Process' (2018) 28 *Duke Journal of Comparative & International Law* 273, 306–310.

possible for a purely private standard to gain ‘international standard’ status under the TBT Agreement.¹³⁴ However, given the profound implications that an ‘international standard’ carries, it is assured that a WTO panel will hold a private standard such as the FSC to a high standard when evaluating whether the legal criteria are met. In view of the analysis above, the best legal conclusion must be that the FSC is not an ‘international standard’ for the purpose of the TBT Agreement and that WTO members have no international legal obligation to consider the FSC standard when preparing their own national forest preservation standards.

4 CONCLUSION

There is a lot of uncertainty concerning the status of private standards in the WTO law. Over the years, trade law experts have given opposite views on whether, and to what extent, such standards may be regulated by the TBT Agreement. This article has sought to clear the fog and provide definitive answers to the long-standing puzzles through a detailed case study of FSC standards in WTO law. The article draws the following conclusions. First, an argument can be made that the FSC label falls within the regulatory scope of the TBT Agreement because the FSC is a ‘recognized body’ and the FSC label is a ‘standard’. Second, even though the FSC label falls within the ambit of the TBT Agreement, the extent of a WTO member’s obligation to take such reasonable measures as may be available to it to ensure that the FSC accept and comply with the CGP is not clear. In practice it is unlikely to be enforced. Contrary to what others have argued,¹³⁵ the FSC as a private entity may not be a ‘non-governmental body’ for the purpose of the TBT Agreement. Even assuming that the FSC were a nongovernmental body, what reasonable measures that a WTO member may take must be determined on a case-by-case basis. However, this debate may be less relevant now as even though the FSC has not formally accepted the CGP, it has expressly stated that its principles and criteria in developing standards are in compliance with the CGP. Third, contrary to what other scholars have argued,¹³⁶ it is still too early to conclude that the FSC standard is the relevant international standard in forest conservation, since there is strong evidence that the FSC standard development process may not be consistent with the TBT Committee Decision. Consequently, WTO members have no international legal obligation to consider the FSC standard when preparing their own national forest preservation standards. Although these conclusions only apply to the FSC, the analytical framework provided in this article is also relevant to the assessment of the relationship between other private standards developed by nongovernmental entities, such as Fairtrade and the PEFC label, and the WTO.¹³⁷

Even though a positive analysis may indicate that WTO law has little to say about the FSC label, one may wonder whether it is desirable, as a normative matter, for the WTO to intervene given the fast proliferation of private standards and their role in international trade. Some have argued that the WTO and its members should leave ‘transnational regulatory space’ for private standards to avoid putting the WTO’s legitimacy at risk.¹³⁸ Notwithstanding this legitimate concern, it is submitted that the WTO can play a useful role in supporting and steering private standards without excessive legalization. First, despite their private nature, some private standards enjoy a significant regulatory role in the global sphere. Their acts may not be much different in kind from many public regulations and may often be more effective.¹³⁹ In view of their profound impact, it is appropriate for these

¹³⁴ Pauwelyn (n 79) 750.

¹³⁵ Partiti (n 25) 835.

¹³⁶ Villarreal (n 16) 244.

¹³⁷ For competitors of the FSC, such as the PEFC, the same analytical framework introduced in this article is applicable. Similar to the FSC, it is unlikely that the PEFC label would be recognized as an international standard for the purpose of the TBT Agreement. See NEPcon (n 129).

¹³⁸ Bernstein and Hannah (n 81) 608.

¹³⁹ B Kingsbury, N Krisch and RB Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 1, 23.

private standards to be gauged according to public law controls, such as participation, transparency, reasoned decisions, proportionality, means–ends rationality and avoidance of unnecessary obstacles to international trade embodied in the TBT Agreement. Second, compliance with WTO disciplines will bring advantages and help boost the legitimacy of private standards.¹⁴⁰ Due to the absence of enforcement power by way of a hierarchical relationship, legitimacy is crucial to private standards because they depend on voluntary cooperation of others to be effective. One strategy used by private actors to facilitate such recognition is to demonstrate adherence to accepted procedural norms of standard setting in international institutions.¹⁴¹ In this sense, WTO disciplines may be regarded as ‘meta-regulation’ for all private standard-setting schemes, providing guidelines on best practices and lending them legitimacy to achieve their regulatory objectives.¹⁴²

Nevertheless, giving the WTO a clearer role in regulating private standards is a highly controversial issue. The experience in the Committee on Sanitary and Phytosanitary Measures (SPS Committee) is telling. In response to widespread concerns raised by WTO members regarding private standards in the agri-food trade sector, an ad hoc working group was established in 2008 to identify possible actions for the SPS Committee regarding SPS related private standards, including developing guidelines on the terms ‘non-governmental entities’ and ‘reasonable measures as may be available to Members’. The initiative did not go very far because of fundamental divergences among WTO members on even the definition of private standards. To be sure, there is little hope that the current TBT rules and their associated ambiguity will be clarified in the near future by WTO members.

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¹⁴⁰ Abbott (n 1) 554–560.

¹⁴¹ Bernstein and Hannah (n 81) 588.

¹⁴² J Bomhoff and A Meuwese, ‘The Mega-Regulation of Transnational Private Regulation’ (2011) 38 *Journal of Law and Society* 139, 159.