Voluntary Ecolabels in International Trade Law: A Case Study of the EU Ecolabel

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ABSTRACT

One category of voluntary approaches to environmental governance is ecolabels used to nudge consumers towards purchasing environmentally friendly products. The purpose of this article is to critically review the trade law implications of voluntary ecolabels, with special reference to the EU ecolabel. For a long time, the lack of trade disputes related to the Agreement on Technical Barriers to Trade (TBT Agreement) before the World Trade Organization (WTO) Dispute Settlement Body rendered research on the legality of voluntary ecolabels in trade law unavoidably speculative. Consequently, the existing scholarship has failed to inform the environment law community clearly how trade law views voluntary ecolabels. This article aims to fill the gap in the literature by evaluating the consistency of the EU ecolabel with the TBT rules. The article concludes that it is highly unlikely that the EU ecolabel may be found inconsistent with the TBT Agreement. Nevertheless, there remains some legal risks.

Key Words: EU ecolabel, voluntary standard, WTO, the TBT Agreement

It is a truism that one of the hallmarks of the modern regulation era has been the shift from state-centred, command-control approaches to new instruments, such as market-based approaches and voluntary agreements.[1] In contrast to the traditional command-control approach, which is frequently criticized for its economic inefficiency, regulatory ineffectiveness and democratic illegitimacy, proponents of voluntary approaches argue that they represent a more flexible and less costly alternative.[2] In addition, voluntary approaches to regulation promise to decrease regulatory capture and lend legitimacy to policymaking by substituting direct public involvement for command and control's infamous 'poacher and gamekeeper' relationship between industry and regulatory bodies.[3] Both in the European Union (EU) and elsewhere, the use of market-based voluntary approaches has become hugely popular as a move towards less-restrictive and lower-cost controls of behaviour.[4]

Environmental regulation is no exception to this regulatory turn. One category of voluntary approaches to environmental regulation is ecolabels used 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

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[1] Alfred C Aman, 'The Limits of Globalisation and the Future of Administrative Law: From Government to Governance' (2001) 8 Indianan Journal of Global Legal Studies 379, 380

[2] Donal McCarthy & Paul Morling, *Using Regulation as a Last Resort: Assessing the Performance of Voluntary Approaches* (Royal Society for the Protection of Birds, 2015) 17

[3] OECD, *Voluntary Approaches to Environmental Policy: An Assessment* (OECD Publishing, 2000) 24-30; Jonathan Golub (eds), *New Instruments for Environmental Policy in the EU* (Routledge, 1998) 3-6.

[4] Robert Baldwin, 'From Regulation to Behaviour Change: Giving Nudge the Third Degree' (2014) 77 The Modern Law Review 831; Peter Borkey and Francois Leveque, 'Voluntary Approaches for Environmental Protection in the European Union – A Survey' (2000) 10 European Environment 35, 53

products.[5] The federal government of Germany issued the first ever environmental label 'Blue Angel' in 1978 and today it is carried by around 12,000 products and services from around 1,600 companies.[6] There are now more than 400 ecolabels in 199 countries and 25 industry sectors in the world.[7]

With the increasing use of ecolabels by governments, industry and non-governmental organizations, the international trade implications of ecolabels have emerged as an often discussed issue in various international fora.[8] Although voluntary eco-labelling is generally seen as a 'trade friendly' approach compared to other regulatory measures,[9] there are still strong concerns that some labelling measures may be disguised non-tariff trade barriers.[10] Colombia' complaint at the World Trade Organization (WTO) relating to certain German ecolabels was a telling example. Unable to meet the voluntary label requirements in Germany, flower exports from Colombia to Germany declined markedly while global flower exports showed an upward trend during the same period.[11] Recognising the potential negative effects of voluntary product standards, including various labelling schemes, on international trade, the GATT/WTO Members have developed a sophisticated trade law framework for regulating such standards since the 1970s, culminating in the conclusion of the TBT Agreement, including the Annex 3 Code of Good Practice for the Preparation, Adoption and Application of Standards (CGP), which sets out substantive disciplines for all standardising bodies which are active within a WTO Member.[12] Labelling is part of an item 3(b) on the WTO Committee on Trade and Environment (CTE) work program. Paragraph 32 (iii) of the 2001 Doha Declaration tasked the CTE to focus on, *inter alia*, environmental labelling.[13] Ecolabelling is also regularly discussed in the Technical Barriers to Trade Committee (TBT Committee) under 'specific trade concerns'.[14]

From a trade law perspective, a WTO Member's domestic voluntary ecolabels may be roughly categorised as government-supported ecolabels and private ecolabels. It must be stressed that this distinction is not always clearly drawn as ecolabels are often either wholly public or wholly private, and neither are the entities that prepare them.[15] Since how the WTO regulates private ecolabels has been extensively discussed in the

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[5] Richard H. Thaler and Cass Sunstein, *Nudge* (Penguin, 2009) 8; Note by the Secretariat, 'Market Access Impact of Eco-Labelling Requirements', WT/CTE/W/79 (9 March 1998) para 4.

[6] <www.blauer-engel.de/en/our-label-environment> Accessed 20 August 2020.

[7] <www.ecolabelindex.com/> Accessed 20 August 2020.

[8] WTO, 'Eco-Labelling: Overview of Current Work in Various International Fora- Note by the Secretariat' (29 September 2010) JOB/TE/9.

[9] WTO, 'Report to the Fifth Session of the WTO Ministerial Conference in Cancun', WT/CTE/8 (11 July 2003) 8.

[10] WTO, 'Labelling and Requirements of the Agreement on Technical Barriers to Trade (TBT): Framework for Informal Structured Discussions, Communication from Canada', WT/CTE/W/229 (23 June 2003) para 2.

[11] WTO, 'Environmental Labels and Market Access: Case Study on the Colombian Flower-Growing Industry', G/TBT/W/60 (9 March 1998).

[12] Minjung Kim, 'The 'Standard' in the GATT/WTO TBT Agreements: Origin, Evolution and Application' (2018) 52 (5) Journal of World Trade 765, 765–788

[13] Doha Ministerial Declaration, WT/MIN (01)DEC/1 (14 November 2001).

[14] For example, Members raised concerns at the TBT Committee at its June 2011 meeting about the negative trade impact of France's Grenelle 2 Law which included provisions on product carbon footprint labelling and environmental lifecycle analysis.
<http://www.wto.org/english/news_e/news11_e/tbt_15jun11_e.htm> accessed 20 August 2020

[15] Axel Marx, 'The Public-Private Distinction in Global Governance: How Relevant is it in the Case of Voluntary Sustainability Standards' (2017) 3 (1) Chinese Journal of Global Governance 1, 14

literature,[16] only public, government-supported voluntary ecolabels are addressed in this article. A typical example of such labelling schemes is the EU ecolabel, a voluntary scheme established in 1992 by the European Commission to encourage businesses to produce and market products and services that are kinder to the environment.[17]

The purpose of this article is to critically review the trade law implications of voluntary ecolabels, with special reference to the EU ecolabel. This article is distinct from the existing research in three important aspects. Firstly, for a long time, the lack of WTO case law on key TBT disciplines rendered earlier research on the legality of ecolabels in trade law unavoidably tentative and speculative.[18] More recently, the TBT Agreement has moved to the fore of the WTO regime through a series of high-profile disputes.[19] The recently available WTO jurisprudence has provided us with a better understanding of the nature and scope of relevant trade law rules appliable to ecolabels. Because the US has blocked the appointment of new Appellate Body members, the WTO currently does not have a functioning Appellate Body. As a result, the precedential value of past adopted reports may be weakened.[20] Nevertheless, the EU and 22 other WTO Members have set up a formal 'Multi-party interim appeal arbitration arrangement' (MPIA) and appointed ten arbitrators who will hear appeals of WTO panel reports. The MPIA ensures that participant WTO members will continue to benefit from an appeal process in the WTO dispute settlement system.[21]

Secondly, whilst current trade law scholarship focuses on mandatory technical regulations or international standards with quasi-legislative authority,[22] only little work has been done on the trade law implications of voluntary standards, in particular national and regional ones. Thirdly, the existing research has fallen short of applying the WTO rules to *specific v*oluntary ecolabels and evaluating their consistency with the WTO law. As a result, international trade law scholarship has failed to inform the environment law community clearly how trade law views voluntary ecolabels. This article aims to fill this gap in the literature. The article begins by outlining in section 1 why ecolabels may have trade law implications, as well as an introduction of the EU ecolabel scheme. It then provides an overview of the the WTO legal framework of voluntary ecolabels in section 2. In section 3, the consistency of the EU ecolabel with the TBT Agreement is critically assessed. Finally, the article concludes in section 4 that although it is highly unlikely that the EU ecolabel may be considered as unnecessary trade barrier, there is a real legal risk that it may be inconsistent with some provisions of the CGP in the TBT Agreement.

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[16] Ming Du, 'WTO Regulation of Transnational Private Authority in Global Governance' (2018) 67 (4) International and Comparative Law Quarterly 867, 888-890.

[17] <https://ec.europa.eu/environment/ecolabel/> accessed 16 September 2020.

[18] Erich Vranes, 'Climate Labelling and the WTO: The 2010 EU Ecolabelling Programme as a Test Case under WTO Law' in Christoph Hermann and Jorg P. Terhechte (eds), *European Yearbook of International Economic Law* (Springer-Verlag Berlin and Heidelberg GmbH & Co. KG) 205; Manoj Joshi, 'Are Eco-labels Consistent with World Trade Organization Agreements?' (2004) 38(1) Journal of World Trade 69, 80.

[19] Gabrielle Marceau, 'The New TBT Jurisprudence in *US – Clove Cigarettes, US – II, and US – COOL*' (2014) 8 (1) Asian Journal of WTO and International Health Law and Policy 1

[20] Mariana Clara de Andrade, 'Precedent in the WTO: Retrospective and Prospective Dispute Settlement Mechanism' (2020) 11(2) Journal of International Dispute Settlement 262, 277.

[21] European Commission, 'The WTO Multi-party Interim Appeal Arrangements Gets Operational' (August 3, 2020) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2176> accessed 23 August 2020

[22] Andrea Villarreal, *International Standardisation and the Agreement on Technical Barriers to Trade* (CUP 2018); Christian Struck, *Product Regulation and Standards in WTO Law* (Wolters Kluwer 2013)

1. ECOLABELLING IN INTERNATIONAL TRADE: THE CASE OF EU ECOLABLE

1.1 The Role of Ecolabelling in International Trade

In parallel to the rising concerns with the state of the environment, consumers' awareness of the relationship between consumption patterns and sustainable or unsustainable production is growing.[23] Thus, consumers intending to actively contribute to sustainable production through their individual consumption demand information about the environmental impact of the product they purchase, allowing them to make an informed choice.[24] Armed with such information, the informed purchasers have the choice of opting for more environmentally-friendly products, providing incentives for manufacturers to increase production that meet consumer demand.[25] The 'right to know' has become a rallying cry for consumers who care about how products are produced. Ecolabelling is precisely a policy tool that serves this purpose. Ecolabels are usually designed to achieve four policy goals: (1) improve the sale or image of a labelled product; (2) raise the environmental awareness of consumer; (3) provide accurate and timely information for consumers to make informed judgments; and (4) direct manufacturers to account for the environmental impacts of their products.[26]

Ecolabelling schemes are usually voluntary in nature, ie, they use market incentives to promote 'green' products with the ultimate goal of influencing behaviour among both consumers and producers.[27] Increasingly, ecolabels are being based on an environmental policy-making tool known as life-cycle assessment (LCA).[28] According to the ISO, LCA considers the environmental impact along the continuum of a product's life (ie, cradle-to-grave) from raw materials acquisition to production, use and disposal.[29] The underlying assumption of LCA-based eco-labels runs counter to the political reality of the world trading system, an issue to be explored in detail in section 3.1 below.

In practice, it is difficult to estimate precisely the environmental effectiveness of eco-labelling programs. There is no easily accessible, independent body of data even on the most renowned ecolabels to support definitive claims for eco-labelling, positive or negative.[30] In addition, it is difficult to isolate the effects of eco-labelling from other

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[23] Des Gasper, Amod Shah and Sunil Tankha, 'The Framing of Sustainable Consumption in SDG 12' (2019) 10 (1) Global Policy 83.
[24] Submission by Switzerland, 'Labelling for Environment Purposes', WT/CTE/W/219 (14 October 2002) paras. 6-7.
[25] Daniel Melser and Peter E. Robertson, 'Eco-labelling and the Trade-Environment Debate' (2005) 28 (1) The World Economy 49, 51.
[26] CTE, 'Market Access Impact of Eco-Labelling Requirement', WT/CTE/W/79 (9 March 1998) para 5.
[27] Erik P Bartenhagen, 'The Intersection of Trade and the Environment: An Examination of the Impact of the TBT Agreement on Ecolabeling Programs' (1997) 17 Virginia Environmental Law Journal 51, 56.
[28] CTE (n 26) para 6.
[29] ISO/Technical Committee 207/ Sub-Committee 5 (1995), Environmental Management- Life Cycle Assessment- Principles and Guidelines.
[30] Peter Kellett, 'Securing High Levels of Business Compliance with Environmental Laws: What Works and What to Avoid' (2020) 32 (2) Journal of Environmental Law 179, 184; United Nations Environment

variables that could lead to more sustainable production and consumption, such as overall environmental awareness, the existence of national labels, and the economic situation of a country.[31] Nevertheless, it is generally accepted that many types of eco-labels are not likely to be successful in the absence of complementary public or private policies. The main value of eco-labels could lie in its ability to catalyse or operationalise other public or private policies. Also, the mere existence of ecolabels can stimulate a process of environmental awareness-raising in companies and the general public.[32]

Labelling tends to be less restrictive to trade than many other regulatory measures. The CTE summarises WTO Member's opinions on this issue:

> Most Members agreed that voluntary, participatory, market-based and transparent environmental labelling schemes were potentially efficient economic instruments in order to inform consumers about environmentally friendly products. As such they could help move consumption on to a more sustainable footing.[33]

Nevertheless, developing countries and industry representatives frequently criticise eco-labelling schemes as disguised non-tariff trade barriers. Among the common concerns about ecolabelling programs, one of the biggest challenges to developing countries is the great variety of divergent national or regional labelling requirements. Exporters have to obtain information to adjust to the requirements of different markets if they want to qualify for an ecolabel.[34] Compliance with the criteria laid down for environmental labels in some countries is extremely costly and those costs far exceed the potential benefits of compliance with the set requirements.[35] This is particularly the case for small and medium-sized enterprises (SMEs).[36] Other common concerns are, first, a lack of transparency in label development and subsequent requirements might *de facto* restrict market access.[37] Second, the process-related criteria, which tend to be based on environmental and technological conditions in the importing country, may make little environmental sense in the context of exporting country's local conditions.[38] Third, ecolabelling schemes may discriminate against imported products if local industry influences the selection of the products on which the ecolabel would apply, as

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Programme (UNEP), *The Trade and Environmental Effects of Ecolabels: Assessment and Response* (2005) 3.

[31] Renate Gertz, 'Eco-labelling- A Case for Deregulation?' (2005) 4 Law, Probability and Risk 127, 140-141.

[32] UNEP (n 30) 10–11.

[33] WTO, 'Report to the Fifth Session of the WTO Ministerial Conference in Cancun', WT/CTE/8 (11 July 2003) 8.

[34] WTO, 'Environmental Labels and Market Access: Case Study on the Colombian Flower-Growing Industry', WT/CTE/W/76 (9 March 1998).

[35] Donald H Schepers, 'Challenges to Legitimacy at the Forest Stewardship Council' (2010) 92 (2) Journal of Business Ethics 287.

[36] Background Note by the Secretariat, 'Technical Barriers to the Market Access of Developing Countries', WT/CTE/W/101 (25 January 1999) paras 9–15.

[37] Hajin Kim, 'An Argument for WTO Oversight of Ecolabels' (2014) 33 (3) Stanford Environmental Law Journal 421, 430.

[38] CUTS Centre for International Trade, Economics and Environment Discussion Paper, 'Eco-Labels: Trade Barriers or Trade Facilitators?' (2009) 1 <www.cuts-citee.org/pdf/DP-Eco-labels.pdf> Accessed 28 May 2020

well as the selection of criteria for the award of the eco-label.[39] Fourth, even well-designed eco-labelling schemes may discriminate against foreign producers in conformity assessment procedures if the exporters have to seek certification from the certification bodies in an importing country.[40] Finally, when it comes to standard-setting, developing countries tend to be 'standard-takers' rather than 'standard-setters'. Developing countries fear the labels developed by developed countries might entail them to adhere to values that they might not hold.[41]

On the other hand, ecolabels not only bring environmental benefits by influencing consumers' and producers' behaviour, they also offer potential trade opportunities to developing countries. [42] Initiated by the increasing environmental awareness in industrial countries, a new market for products from developing countries has emerged.[43] If exporters do gain access to these markets, the benefits in terms of long-term trade relations can be significant. More broadly, the challenges associated with compliance with strict ecolabelling programs can be fundamental catalysts for developing countries to processes of up-grading and capacity development, while providing opportunities to position themselves strategically in key export markets.[44] The key challenge for ecolabels from a trade law perspective is thus how to respond to consumers' information needs for environmentally friendly products without unduly burden international flow of goods.[45]

1.2. An Overview of the EU Ecolabel

The EU ecolabel was established in 1992. An impact assessment of the EU Ecolabel in 2008 showed that it didn't fully achieve its objectives because of the low awareness of the label and slow uptake by industry.[46] The European Commission then revised the EU ecolabel regulation in 2010, with the objective 'to promote products with a reduced environmental impact during their entire life cycle and to provide consumers with accurate, non-deceptive, science-based information on the environmental impacts of products'.[47] The EU ecolabel is also an integrated part of a wider package of product

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[39] Steven Bernstein & Erin Hannah, 'Non-State global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space' (2008) 11 Journal of International Economic Law 575, 603.
[40] Background Note by the Secretariat (n 36) para 4.
[41] Samir R. Gandhi, 'Regulating the Use of Voluntary Environmental Standards Within the World Trade Organization Legal Regime: Making a Case for Developing Countries' (2005) 39 (5) Journal of World Trade 855, 859-861.
[42] Submission from Switzerland, 'Marking and Labelling Requirements' WT/CTE/W/192 (19 June 2001) para 9.
[43] Niematallah E.A. Elamin and Santiago Fernandez de Cordoba, 'The Trade Impact of Voluntary Sustainability Standards: A Review of Empirical Evidence' (2020) UNCTAD Research Paper No.50, at 20; Liesbeth Colen, Miet Maertens and Johan Swinnen, 'Globalization, Private Standards and Poverty: Evidence from Senegal' in Axel Marx, Miet Maerrtens, Johan Swinnen and Jan Wouters (eds), *Private Standards and Global Governance: Economic, Legal and Political Perspectives* (Edward Elgar 2012) 172-187
[44] Steven Jaffee and Spencer Henson, 'Standards and Agri- food Exports from Developing Countries: Rebalancing the Debate', World Bank Policy Research Working Paper 3348 (June 2004) 37.
[45] Gwendolyn Bounds, 'As Eco-Seals Proliferate, So Do Doubts' *Wall Street Journal* (2 April 2009)
[46] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Community Ecolabel Scheme', COM (2008) 401 Final, 4.
[47] Recital (1) of Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EC Ecolabel

instruments to change current consumption and production patterns in efforts to achieve the transition to a circular economy.[48]

The legal framework of the EU ecolabel is set through a regulation of the European Parliament and of the Council.[49] It is managed by the European Commission in cooperation with the European Union Eco-Labelling Board (EUEB) and competent bodies of the Member States. At the EU level, the European Commission is responsible to ensure that the Ecolabel Regulation is implemented correctly. It is charged with preparing the final draft of the criteria documents and adopts EU ecolabel criteria for each product group as 'Commission Decisions'.[50] The Commission has established a common register of products awarded EU ecolabels and update it regularly. The Commission is also obliged to promote the use of the EU ecolabel.[51] The EUEB is composed of the representatives of the competent bodies of the all the EU Member States and of other interested parties such as the European Consumer Organization and European Environmental Bureau. The EUEB contributes to the development and revision of EU ecolabel criteria and to any review of the implementation of the EU ecolabel scheme. It also provides the Commission with advice and assistance and in particular, issues recommendations on minimum environmental performance requirements.[52] Competent bodies at national level are independent and impartial organisations designated by Member States within government ministries or outside the ministries. They are responsible for implementing the EU ecolabel scheme at the national level. They specifically assess applications and award the EU ecolabel to products that meet the criteria in a consistent, neutral and reliable manner.[53]

Following consultation with the EUEB, which considers it suitable to propose a new product/service group for the EU ecolabel, both public authorities, such as the Commission, Member States and competent bodies, and private bodies such as industrial consortiums may initiate and lead the development or revision of the EU ecolabel criteria. However, private stakeholders who are put in charge of leading the development of criteria must demonstrate both expertise in the product area and the ability to lead the process with neutrality.[54] In the development of the criteria, a balanced participation of all relevant interested parties concerned with a particular product group, such as industry and service providers, including SMEs, trade unions, retailers, importers, environmental and consumer organisations has to be guaranteed.[55] The development and revision of the EU ecolabel criteria follows the procedure laid down in Annex 1 of the Regulation.[56] Even if this process can be led by parties other than the Commission, the Commission is in any case responsible for preparing the final draft of the criteria documents and adopts EU ecolabel criteria for each product group as 'Commission Decisions'.[57]

The EU ecolabel is intended to promote those products which have a higher level of environmental performance during their entire life cycle than other similar products

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[48] European Commission, 'Closing the Loop- An EU Action Plan for the Circular Economy', COM (2015) 614 final.
[49] Regulation (EC) No 66/2010 (n 47).
[50] Art 8(2) and (3) of EU Ecolabel Regulation.
[51] ibid, Art 12.
[52] ibid, Art 5.
[53] ibid, Art 4.
[54] ibid, Art 7.1,
[55] ibid, Para A.2, Annex 1.
[56] ibid, Art 8 (1).
[57] ibid, Art 8 (2).

and services. The relevant criteria include 'the most significant environmental impacts', in particular the impact on climate change, the impact on nature and biodiversity, energy and resources consumption, generation of waste, emissions of environmental pollution, the substitution of hazardous substances by safer substances, the potential to reduce environmental impacts, and social and ethical implications. Only products that fulfil stringent environment requirements within a product group may be awarded the EU ecolabel.[58] Any operator who wishes to use the EU ecolabel shall apply to the national competent bodies for the award of the EU ecolabel. Even a product originating outside of the Community is eligible to apply for the label. Upon award of the label, the competent body shall conclude a contract with the operator covering the terms of use of the EU ecolabel.[59]

The EU ecolabel enjoys several distinct characteristics. To begin with, it is administered by public authorities including the European Commission, the EUEB and competent bodies of EU Member States, many of which are designated government ministries. Furthermore, it is voluntary by nature as market access is not dependent on the carrying of the EU ecolabel. Finally, it includes requirements based on non-product-related processes and product methods (NPR-PPMs) since it pursues a life-cycle approach. Therefore, the EU ecolabel is best described as a voluntary government-supported labelling scheme based on NPR-PPMs.[60] The fact that most existing ecolabelling programmes have some degree of government involvement is sometimes argued as evidence to support the proposition that government involvement would provide the necessary lever to ensure that these programmes conform to internationally agreed norms or disciplines.[61]

Under the EU Procurement Directives, ecolabels may be used to promote green public procurement (GPP), a process through which public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle when compared to like products and services with the same primary function that would otherwise be procured.[62] Contracting public authorities may even require a specific label as means of proof that the procured goods and services correspond to the required characteristics provided certain conditions are fulfilled. For example, the ecolabel requirements should be based on objectively verifiable and non-discriminatory criteria, established in an open and transparent procedure and accessible to all interested parties.[63] In addition, all labels that confirm that the works, supplies or services meet equivalent label requirements shall be accepted by contracting authorities.[64]

In its assessment of the function and performance of the EU ecolabel in 2017, the European Commission concluded that the scheme has contributed to reducing the environmental impact of consumption and production. However, this contribution was substantially limited by the low level of uptake of the EU ecolabel by producers and organisations. The low level of uptake was linked to limited awareness of the ecolabel by external stakeholder including business partners and consumers; limited market and administrative award for participation; lack of recognition in public policy and

[58] ibid, Art 6 (3).
[59] ibid, Art 9.
[60] Vranes (n 18) 212–213.
[61] Communication from Canada on Eco-labelling, G/TBT/W/9 (5 July 1995) 2.
[62] Anne Rainville, 'Standards in Green Public Procurement- A Framework to Enhance Innovation' (2017) 167 Journal of Cleaner Production 1029, 1030.
[63] Art 43 of Directive 2014/24/EU and Art 61 of Directive 2014/25/EU.
[64] Ibid.

significant compliance and verification costs.[65] Consequently, the EU ecolabel was not sufficient to achieve significant changes in overall consumption and production pattern and, through this, deliver significant environmental benefits beyond the companies and organisations deciding to be part of the schemes.[66] Without addressing some of these challenges, due to economic interests, the value of the EU ecolabel may decline. This inconvenient fact reminds us that we must understand the limitations of market-based voluntary ecolabels where more traditional 'command and control' mechanisms will still be required.[67] For example, the European Commission has highlighted that the voluntary nature of the EU ecolabel scheme explains its limited and uneven EU added value. Because of very limited uptake, some product groups such as flushing toilets and urinals, sanitary tapware and imaging equipment were discontinued.[68] It is also found that the effectiveness of the EU ecolabel scheme varies between the EU Member States with some achieving no or very low uptake while others - such as Germany and Spain- achieving better results. Again, the European Commission attributed such differences partly to whether initiatives were taken to integrate the EU ecolabel into the wider set of environmental law and policies such as Green Public Procurement.[69]

Similar to many other environmental instruments, the EU ecolabel is not immune from criticisms by the EU's trading partners. Since the 1990s, the US, Canada and Brazil have complained that the EU ecolabel was not transparent enough and only took into account environmental priorities and conditions in Europe, resulting in discrimination against foreign producers whose production processes and methods differed from those used in the EU while having comparable environmental impact. [70] The US and Brazil have been particularly upset over the EU's criteria for products such as toilet paper and kitchen rolls. Brazilian exporters claimed that the criteria favouring the use of recycled pulp penalised Brazilian manufacturers, which used virgin wood from sustainably managed forest plantations. In addition, the concept of 'consumption of renewable resources' was defined so as to exclude wood waste, sawdust, trimmings from saw mills, thinnings and, thin wood, thus exempting these materials from load points. This was discriminatory against planted forest and the Brazilian plantation forests have been particularly affected.[71] Moreover, it was claimed that the criteria did not take into account the fact that Brazilian producers largely used hydroelectricity and that the criteria concerning SO2 emissions were of less relevance in Brazil, where acid rain was not a problem.[72] These complaints have raised the important issue of whether

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[65] European Commission, 'Report from the Commission to the European Parliament and the Council', COM (2017) 355 Final 4–6; Fabio Iraldo and Michele Barberio, 'Drivers, Barriers and Benefits of the EU Ecolabel in European Companies' Perception' (2017) 9(5) *Sustainability* 751, 757.

[66] ibid, at 4.

[67] Daniel H Cole and Peter Z. Grossman, 'When is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection' (1999) Wisconsin Law Review 887, 889-892

[68] The European Commission, 'Circular Economy: New Chapter for European Green Products and Organizations' (30 June 2017) <https://ec.europa.eu/environment/pdf/30_06_2017_en.pdf> Accessed 16 September 2020

[69] European Commission (n 65) 5

[70] David Vogel, *Barriers or Benefits? Regulation in Transatlantic Trade* (Brookings Institute Press, 1997) 48

[71] ABECEL, 'Eco-Labelling of Tissue and Towel Paper Products in the EU: A Brazilian Perspective' in Simonetta Zarrilli, Veena Jha and Rene Vossenaar (eds) *Eco-Labelling and International Trade* (Palgrave Macmillan, 1997) 85.

[72] Ralph Piotrowski and Stefan Kratz, 'Eco-Labelling in the Globalised Economy' in Alfred Pfaller and Marika Lerch (eds), *Challenges of Globalization* (Transaction Publishers, 2005) 227

the European Commission has complied with the WTO rules in designing and implementing the EU ecolabel, to which we will turn in the next section.

2. THE WTO LEGAL FRAMEWORK OF VOLUNTARY ECOLABELS

Ever since the closing sessions of the Kennedy Round (1963–1967), the GATT Contracting Parties have recognised that 'standards involving import and domestic goods', including industrial standards, health and safety standards… *labelling* and container regulations, processing standards, marking requirements, and packaging requirements' may constitute non-tariff technical barriers and cause trade restrictiveness.[73] The following Tokyo Round (1973-1979) gave centre stage to the negotiation of improved and expanded rules on non-tariff measures. The main outcome was the conclusion of the 1979 Standards Code. Despite the conceptual distinction between 'technical regulations', the compliance to which is mandatory, and 'standards', the compliance to which is voluntary, Article 2 of the Standards Code made little difference to distinguish the two and combined under a single section the disciplines on technical regulations *and* standards applied by central government bodies because they have similar trade effects. Both types of measures, without differentiation, must be non-discriminatory, least-trade-restrictive, preferably based on performance rather than design, and based on international standards. These features remained unchanged in the current WTO TBT Agreement which was concluded during the Uruguay Round (1986-1994).[74]

The TBT Agreement covers both technical regulations and standards. Annex 1(2) of the TBT Agreement defines 'standard' as:

> A document approved by a recognised 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.

The TBT Agreement makes a clear distinction between a 'standard' and a 'technical regulation', with the latter defined as 'a document laying down product characteristics or their related processes and production methods with which compliance is *mandatory*'.[75] The voluntary/mandatory distinction, the main criterion differentiating a standard from a technical regulation, has been most contentious in cases involving labelling requirements.[76]

In *US – Tuna II*, the preference of US consumers for dolphin-friendly tuna was so overwhelming that all major American retailers did not sell tuna without the US 'dolphin-safe' label.[77]The issue before the panel was whether the US 'dolphin-safe'

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[73] GATT Doc. MTN/3B/3, Part 3 of the Inventory of Non-Tariff Measures: Standards Involving Imports and Domestic Goods (14 Feb. 1974) 11

[74] Article 2 of the Standards Code. RW Middleton, 'The GATT Standards Code' (1980) 14 Journal of World Trade 201, 211–212.

[75] Annex 1(1) of the TBT Agreement.

[76] Arwel Davies, 'Technical Regulations and Standards under the WTO Agreement on Technical Barriers to Trade' (2014) 41 (1*)* Legal Issues of Economic Integration 37, 47.

[77] WTO Panel Report, *US – Tuna II*, WT/DS381/R, para 7.352.

labelling provisions and its implementing regulations were voluntary or mandatory. The US and one dissenting panel member argued that a labelling requirement is mandatory only if its use is a prerequisite for market access. As nothing in the U.S. labelling requirement conditions the right to sell tuna in the US on the 'dolphin-safe' label, US importers retain the option of disregarding the label and marketing tuna without making any claim about dolphin safety. Thus, the US argued that the 'dolphin-safe' label must be considered voluntary.[78]

However, the WTO Appellate Body adopted a different analytical approach. Rather than focusing solely on whether compliance with the dolphin-safe labelling scheme is a necessary condition for market access, the Appellate Body emphasised that the characterisation must be made in the light of the characteristics of the label at issue and the circumstances of the case. In particular, it requires an analysis of whether the label consists of a law or a regulation enacted by a WTO Member; whether it prescribes or prohibits particular conduct; whether it sets out specific requirements that constitute the sole means of addressing a particular matter, and the nature of the matter addressed by the measure.[79] The Appellate Body then proceeded to highlight three distinctive features of the US 'dolphin-safe' labelling scheme that rendered it mandatory in nature. First, the US labelling scheme and its implementing regulations were legislative or regulatory acts of the US federal authorities.[80] Second, the US measures established *a single and legally mandated* set of requirements with respect to the broad subject of dolphin-safe tuna products in the US. Any producer, importer, exporter, distributor or seller of tuna products must comply with the criteria in order to make *any* 'dolphin-safe' claim.[81] Third, the US measure provided for specific enforcement mechanisms, which treat any statement on a tuna product regarding dolphin safety that does not meet the conditions of the US labelling scheme as a deceptive practice. In doing so, the US measure prescribed in a broad and exhaustive manner the conditions that apply for making any assertion on a tuna product as to its dolphin safety.[82]

The Appellate Body's characterization of the US 'dolphin-safe' label was heavily criticized. First, as the separate panel opinion pointed out, reading the definition of technical regulation in Annex 1 (1) of the TBT Agreement textually, it only requires that the compliance with the labelling requirement is mandatory for market access. This is clearly not the case in *US-Tuna II* as exporters had the option to disregard the label.[83] Second, there is nothing inappropriate for the US government to safeguard the veracity of the labelling requirement. If products not meeting the labelling criteria could freely use the label, then the label would be meaningless.[84] That a government takes measures to protect consumers from being misled or deceived by false labelling claims is very different from a government mandating a substantive norm concerning a product.[85] Despite the criticisms, the Appellate Body's nuanced approach to the

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[78] Ibid, para 7.146.
[79] WTO Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Product (US – Tuna II)*, WT/DS381/AB/R, adopted 13 June 2012, para 188.
[80] Ibid, para 191.
[81] Ibid, para 193.
[82] Ibid, para 199.
[83] Panel Report, *US-Tuna II* (n 77) para 7.146.
[84] Petros C Mavroidis, 'Driftin' too far from Shore- Why the Test for Compliance with the TBT Agreement Developed by the WTO Appellate Body is Wrong, and What Should the AB have Done Instead' (2013) 12 (3) *World Trade Review* 509, 522-523.
[85] Meredith A. Crowley and Robert Howse, 'Tuna-Dophin II: A Legal and Economic Analysis of the Appellate Body Report' (2014) 13 (2) World Trade Review 321, 325.

mandatory/voluntary distinction is compelling. The fundamental reason why the Appellate Body views the 'dolphin safe' label mandatory is that it was designed and implemented in an *overbroad and exclusive* manner. In effect, it covered the entire field of what 'dolphin-safe' means in relation to tuna products. Any other labels and statements regarding dolphin safe were, in themselves, a violation of law. Implicitly, the Appellate Body suggested that the functioning of the US labelling scheme in the real world was *de facto* mandatory. By contrast, the first and the third feature of the US labelling scheme described above, taken separately, were not distinctive features of a technical regulation. It is entirely possible for a government to promulgate a 'voluntary' labelling requirement and enforce general laws against deceptive practices, as long as it is not an 'exclusive' label in the sense that it is the only way to meet the requirement and outlaws all other competing labels.[86] This is precisely how the EU eco-label was designed. Neither the compliance with the EU eco-label is required to sell products in the EU market, nor does the EU ecolabel regulation prohibits any other existing or new ecolabels which are designed for the same purposes and make similar environmental claims. The EU ecolabel is therefore a voluntary scheme.

If a specific ecolabel falls within the definition of 'standard' rather than 'technical regulation' in the TBT Agreement, the Annex 3 CGP of the TBT Agreement further sets out the substantive disciplines that must be complied with by all standardising bodies which are active within a WTO Member when they prepare, adopt and apply standards. Article 4 of the TBT Agreement has imposed different levels of legal obligations on WTO Members depending on the nature of standardising bodies. For a central government standardising body, the WTO Member has the legal obligations to ensure that it accepts and complies with the CGP. By contrast, a WTO Member shall take 'reasonable measures' as may be available to it to ensure that local government and non-governmental bodies accept and comply with the CGP.

Up to this date, the CGP is somewhat a neglected component of the WTO Agreements. Neither its scope of application nor the extent of the obligation imposed on WTO Members has been the subject of interpretative guidance from WTO panels.[87] Nevertheless, two general observations of the CGP are in order. First, substantive obligations imposed on standards are similar to that apply to technical regulations. The CGP recognises that standards may be adopted to attain legitimate objectives such as the protection of human health or safety and the environment.[88] Paragraphs D imposes the most-favoured-nation and national treatment, requiring standardizing bodies to treat products originating in any other WTO Member no less favourable than that accorded to like products of national origin and to like products originating in any other country in respect of standards. Paragraph E prohibits standardizing bodies from using standards with a view to, or with the effect of, creating unnecessary obstacles to international trade. Paragraph F requires that the standardizing body shall use international standards where they exist or their completion is imminent, or the relevant

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[86] Harm Schepel, 'Between Standards and Regulation: On the Concept of 'de facto mandatory standards' after Tuna II and Fra.bo' in Panagiotis Delimatsis (ed), *The Law, Economics and Politics of International Standardization* 199 (CUP 2015) 211.

[87] Enrico 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 (4) Journal of International Economic Law 829, 831.

[88] The sixth recital of the preamble of the TBT Agreement expressly acknowledges that 'no country should be prevented from taking measures necessary… for the protection of human, animal or plant life or health, of the environment… at the levels it considers appropriate'.

parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate. These paragraphs of the CGP are closely comparable, although not identical, to their counterparts Article 2.1, 2.2 and 2.4 of the TBT Agreement respectively. It is widely agreed that the jurisprudence under the TBT is in principle applicable to the CGP.[89]

Second, Article 4.1 of the TBT Agreement provides that Members *shall* ensure that their central government standardizing bodies accept and comply with the CGP for the preparation, adoption, and application of standards. This provision converts the CGP into a fully enforceable instrument in respect of central government standards, similar to central government technical regulations.[90] By contrast, for local government and non-governmental bodies, WTO Members shall take '*reasonable measures as may be available to them*' to ensure that they accept and comply with the CGP. The scope of a WTO Member's obligations under this provision is ambiguous in the sense that it is member-specific and must take into account the legal and constitutional arrangements of a particular WTO Member.[91]

Under the GATT, standards are addressed in conjunction with other non-tariff internal regulations and subject to the same restrictions and exceptions.[92] The central provisions are non-discrimination principle prohibiting discrimination among trading partners (Article 1), between foreign producers and domestic like producers (Article III) and general exceptions (Article XX). Ecolabels, as non-fiscal domestic regulatory measures, are subject to Article III:4 which provides that 'the products… of any contracting party… shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of *all laws, regulations and requirements* …'. Thus, WTO Members are required to apply ecolabels in a non-discriminatory manner, precluding the application of more stringent requirements to imported like products than to domestic products. Mandatory technical regulations clearly fall within the scope of Article III:4. But WTO panels have consistently refused to read the phrase 'all laws, regulations and requirements' in a restrictive manner, preferring a functional approach instead. In *Canada-Autos*, the panel held that 'Article III:4 applies not only to mandatory measures, but also to conditions that an enterprise accepts in order to receive an advantage, including in cases where the advantage is in the form of a benefit with respect to the conditions of importation of a product'.[93] In other words, voluntary governmental measures are not exempt from the scrutiny of Article III:4, in particular if there are financial or regulatory advantages, such as tax rebate, from the government by complying with the standard.[94]

The WTO does not require its Members to observe non-discrimination and market access obligations all the time and under any circumstances. There are some important exceptions contained in Article XX of the GATT 1994. Article XX entitles WTO

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[89] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (4th edn, CUP 2017) 900–901.
[90] Davies (n 76) 43.
[91] Arkady Kudryavtsev, *Private-Sector Standards as Technical Barriers in International Trade in Goods: In Search of WTO Disciplines* (Wolf Legal Publishers 2015) 298-310.
[92] WTO Trade Report, *Trade and Public Policy: A Closer Look at Non-Tariff Measures in the 21st Century* (2012) 40.
[93] Panel Report, *Canada- Certain Measures Affecting the Automotive Industry*, WT/DS139/R (11 February 2000) para 10.73; Panel Report, *EEC - Regulation on Imports of Parts and Components*, BISD 37S/132, adopted on 16 May 1990, paras 5.20–21.
[94] Jessica Karbowski, 'Grocery Store Activism: A WTO-Compliant Means to Incentivise Social Responsibility' (2009) 49 (3) Virginia Journal of International Law 727, 762.

Members to utilise trade restrictive measures incompatible with the GATT to pursue overriding public policy goals, for example to protect public morals or to conserve exhaustible natural resources, to the extent such inconsistencies are unavoidable. In other words, even if ecolabels have afforded imported goods less favourable treatment in the marketplace compared with domestic like products, they may nevertheless be justified if ecolabels are necessary to environmental protection and they do not constitute arbitrary or unjustifiable discrimination. At first glance, Article XX has opened the door to all manners of trade restrictions in the name of protecting high-minded non-economic objectives. In practice, however, the scope of Article XX is much more restricted.[95]

In *EC – Asbestos*, the panel considered the order of application between the GATT and the TBT when both Agreements apply to a measure at issue. The panel concluded that if the measure at issue falls into the category of technical regulation, standard or CAPs, it should be dealt with under the TBT Agreement first because it deals 'specifically, and in detail' with such measures.[96] On the other hand, obligations under the GATT and the TBT are cumulative and WTO Members must comply with both agreements simultaneously.[97] A finding of consistency with the TBT Agreement would not automatically lead to the conclusion that it is consistent with the GATT. In *US – Tuna II*, the Appellate Body (AB) criticised the panel for engaging in an exercise of 'false judicial economy' by assuming that the obligations under TBT Article 2.1 and Article I:1 and Article III:4 of the GATT are substantially the same.[98] Still, it is highly unlikely that a measure consistent with the TBT can be found inconsistent with GATT.[99]

3. THE CONSISTENCY OF THE EU ECOLABLE WITH THE TBT AGREEMENT

This section will analyze four key legal issues concerning the consistency of the EU label with the TBT Agreement. First, does the TBT Agreement apply to the EU ecolabel, given that it is a voluntary labelling scheme based on NPR-PPMs? Second, does the EU label afford less favourable treatment to imported products from any WTO Member compared to EU domestic like products or like products from any other WTO Members? This question will determine whether the EU ecolabel is consistent with the national treatment and most-favoured-nation treatment requirements respectively. Third, does the EU ecolabel constitute unnecessary obstacles to international trade? Finally, is the EU label based on the relevant international standard?

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[95] Lorand Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATs Agreements: A Reconstruction' (2015) 109 American Journal of International Law 95.

[96] WTO Panel Report, EC – *Asbestos*, WT/DS135/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, paras 8.15–8.17.

[97] Appellate Body Report, *Korea - Definitive Safeguard Measures on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, para 81.

[98] Appellate Body Report, *US – Tuna II* (n 79) para 405.

[99] Ming Du, 'Treatment No Less Favourable and the Future of National Treatment Obligation in Article III:4 of the GATT 1994 after EC-Seal Products' (2016) 15 (1) World Trade Review 139, 150-155.

3.1 The Applicability of the TBT Agreement to the EU Label

The first legal issue to be examined is the applicability of the TBT Agreement to the EU ecolabel. A textual reading of Annex 1 (2) of the TBT Agreement makes it clear that all labelling requirements, fall within the regulatory scope of the TBT Agreement. However, there is a long-standing debate in the international trade law community on to what extent NPR-PPMs fall under the purview of the TBT Agreement. For a time, this debate cast some doubt on whether ecolabels based on the LCA, such as the EU ecolabel, are covered by the TBT Agreement.[100]

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.[101] In trade law, PPMs are usually divided into product- related PPMs (PR-PPMs) and NPR-PPMs.[102] 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. As PR-PPMs affect physical product characteristics, they are directly regulated by WTO law. NPR-PPMs, by contrast, do not affect or change the nature, properties, or qualities of (nor discernible traits in or on) a product, ie, not bearing on their physical characteristics.[103] Examples include the requirement that the furniture should have been made from wood sourced from a sustainably managed forest or the amount of CO2 generated in the process of producing a product must not exceed a certain limit.[104]

NPR-PPMs-based standards have presented some challenging questions for trade law. 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.[105] As production processes may be unique in each country and typically not traded, they are only indirectly relevant to the WTO system. This indirect nexus explains why two GATT panels found it difficult to deal with PPM standards, in particular the legality of extraterritorial application of NPR-PPM-based trade measures.[106]

Precisely because of these challenges, the Uruguay Round negotiating history shows that WTO Members meant to exclude NRP-PPMs from the coverage of the TBT

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[100] TBT Committee & CTE Committee, 'Eco- Labelling Programmes', WT/CTE/W/23 (19 March 1996) 17.

[101] Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27 Yale Journal of International Law 59, 64.

[102] OECD Secretariat, 'Processes and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM- Based Trade Measures' (1997) OECD/GD (97) 137, 10–11.

[103] Communication from Canada (n 61) para 14.

[104] OECD Secretariat (n 102) 11.

[105] Halina Ward, 'Trade and Environment Issues in Voluntary Eco- Labelling and Life Cycle Analysis' (1997) 6 RECIEL 139.

[106] For example, GATT Panel Report, *United States – Restrictions on Imports of Tuna (US – Tuna I)*, DS21/R, 3 September 1991 (unadopted) BISD 39S/155; GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994 (unadopted). The two panels held that trade measures based on NPR-PPMs as such were inconsistent with the GATT because of their unilateral and coercive nature.

Agreement.[107] It was therefore suggested that ecolabels based on NPR-PPMs also fell outside of the TBT Agreement.[108] However, the negotiating history is not entirely unambiguous and discussions of Item 3(b) on the agenda of CTE working program failed to reach any consensus.[109] At any rate, the TBT Committee clarified in the First Triennial Review of the TBT Agreement that voluntary labelling requirements based on NPR-PPMs are subject to the notification obligation under paragraph L of the CGP.[110] In practice, many Members notify the WTO their eco-labelling programs containing NPR- PPMs.[111] Moreover, the recent WTO case law has confirmed that labelling requirements, regardless of the information contained, should be scrutinised under the TBT Agreement.[112] In other words, the labelling scheme *as such* is covered by the TBT Agreement, even if it is based on NPR-PPMs. In sum, the voluntary EU ecolabel is treated as 'standard' in the TBT Agreement.

It is further submitted that voluntary eco-label schemes should be covered by the TBT Agreement from a normative perspective. To begin with, the position that eco-labels based on NPR-PPMs are *ipso facto* inconsistent with the WTO rules is neither normatively defensible nor politically practical. Eco-labels are widely endorsed by numerous multilateral environment treaties and at various international forums. For example, Agenda 21 recognizes the importance of eco-labelling as an environmental policy tool and recommends governments to promote environmental labelling to facilitate change in consumption patterns and thereby safeguard the environment for sustainable development.[113] International standards have been developed for eco-labelling schemes at the ISO.[114] Furthermore, the use of eco-labels based on NPR-PPMs to promote environmental objectives has increased considerably in recent years.[115] Their use is no longer confined solely to developed countries as developing countries have started to design such schemes themselves.[116] Some ecolabels have stablished an impressive track record and have enjoyed popular support.

Given the circumstances, the position that eco-labels based on NPR-PPMs are *ipso facto* in violation of the WTO law pits the WTO against environmental protection and agitate both WTO Members and some quarters of civil society. The WTO is a multilateral regime designed to facilitate reciprocal market access for goods and services by reducing tariff and non-tariff barriers.[117] It was not designed to trump

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[107] 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) para 146.
[108] Ibid, para 150.
[109] Report of the Committee on Trade and Environment, WT/CTE/1 (12 November 1996) 17-18.
[110] TBT Committee, 'First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade', G/TBT/5 (19 November 1997) para 12.
[111] The TBT Committee, 'Draft Minutes of the Meeting Held on 20 October 1995', G/TBT/W/15 (22 November 1995) para 31.
[112] Report of the Panel, *EC – Trade Marks and Geographical Indications*, WTO/DS290/R (20 April 2005) para 7.451; Appellate Body Report, *US – Tuna II* (n 79) para 199; Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, adopted 18 November 2011, para 7.212.
[113] CUTS Discussion Paper (n 38) 1
[114] WTO, 'Labelling for Environmental Purposes', Submission by the European Communities under Paragraph 32 (iii), WT/CTE/W/225 (6 March 2003) para 23
[115] Patrin Watanatada, 'Questioning and Evolving the Eco-label' *The Guardian* (10 March 2011).
[116] WTO (n 114) para. 3-4.
[117] Kyle Bagwell, Petros C. Mavroidis and Robert W. Staiger, 'It is a Question of Market Access' (2002) 96 American Journal of International Law 56, 59.

Members' environment protection goals. Indeed, the Ministers have long emphasized that 'there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other'.[118] The fierce public backlash against the trade system after the two GATT panels ruled against the US tuna embargo to protect dolphins back in the early 1990s remain in many people's minds.[119] As many have warned, unreasonable interference of the WTO with its members' environment protection objectives would put its legitimacy into serious jeopardy.[120]

One strong reason against the use of eco-labels based on NPR-PPMs is the perception of environmental imperialism, i.e., eco-labels are usually wielded by developed countries against the imports from developing countries.[121] Rejecting the application of the TBT Agreement to eco-labels based on NPR-PPMs, however, does developing countries a disservice. As the TBT Agreement imposes more stringent rules to discipline protectionism, the irony of excluding NPR-PPMs from its scope is that concerns over the protectionist or unilateralist abuse of NPR-PPMs might actually be allayed by subjecting them to the TBT Agreement because the TBT obligations would help ensure their consistency, accuracy, and transparency.[122] The threat of ecolabels being misused for protectionist purposes is far greater if there is a lack of clarity on the extent to which the TBT Agreement applies to such as labels.[123]

The conclusion that the EU ecolabel is a 'standard' has two legal implications. First, according to Article 4.1 of the TBT Agreement, the EU has a legal obligation to ensure that the standardising bodies which are responsible for the EU ecolabel accept and comply with the CGP. As described in section 1.2 above, the EU ecolabel is managed by the European Commission in cooperation with the EUEB and competent bodies of the Member States. Accordingly, either the EU Commission or the EUEB shall accept and comply with both the procedural and substantive obligations of the CGP. By June 2020, 192 standardizing organisations from 154 WTO Members have accepted the CGP, including four from the EU, but the EUEB or the Commission are not included.[124] One may argue that the EUEB is established for the sole purpose of managing the EU ecolabel and that both the Commission and the EUEB are not a normal standardising body. However, in *US – Tuna II*, the Appellate Body has made it clear that a body that develops a single standard could qualify as a standardising body. It is not necessary that the preparation and adoption of standards is a principal function of the body in question.[125] Second, the WTO legality of the EU ecolabel should be examined under the CGP first because it deals specifically, and in detail with voluntary ecolabels.[126] A finding of consistency with the CGP would not automatically lead to

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[118] The Decision on Trade and Environment adopted by ministers at the meeting of the Uruguay Round Trade Negotiations Committee in Marrakesh on 14 April 1994.
[119] GATT Panel Reports (n 106)
[120] Robert Howse, The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 (1) European Journal of International Law 9, 11.
[121] OECD Secretariat (n 102) 11.
[122] Jan McDonald, 'Domestic Regulation, International Standards, and Technical Barriers to Trade' (2005) 4 World Trade Review 249, 255
[123] Submission from Switzerland (n 24) para. 11.
[124] These four EU standardizing organizations are the CEN, CENELEC, ETSI and ASD-STAN <https://tbtcode.iso.org/sites/wto-tbt/list-of-standardizing-bodies.html> Accessed 20 August 2020.
[125] Appellate Body Report, *US-Tuna II* (n 79) para 394
[126] WTO Panel Report, EC – *Asbestos* (n 96) paras 8.15–8.17

the conclusion that it is consistent with the GATT 1994 but it is highly unlikely to find otherwise. Therefore, only the relevant CGP provisions are analysed in this article.

3.2. The MFN and NT Treatment

Paragraph D of the CGP embodies both a most-favoured nation (MFN) and national treatment (NT) obligation for standardising bodies. It provides that in respect of standards, the standardising body shall accord treatment to imported products no less favourable than that accorded to domestic like products and to like products from any other country. For both the MFN and the NT obligation, paragraph D of the CGP sets out a three-tier test: (1) the measure at issue must be a standard; (2) the imported products and domestic products in case of NT or products from other WTO Members in case of MFN are 'like products' and (3) the imported products are accorded 'treatment no less favourable' than domestic like products (NT) or than like products from any other WTO Member (MFN). [127] As the first point is analysed in section 3.1 above, I will focus on the other two inquiries in this section.

3.2.1 Like products

The EU Ecolabel is awarded to those products within a given product group that fulfil the labelling criteria defined by the EU. A product group is defined as 'a set of products that serve similar purposes and are similar in terms of use, or have similar functional properties, and are similar in terms of consumer perception'. [128] This raises an important legal issue: are products carrying the EU ecolabel and those products in the same product group not fulfilling the EU's ecolabel criteria 'like products'? The determination of 'like products' in paragraph D of the CGP, similar to TBT Article 2.1 and GATT Article III:4, is fundamentally a determination about the nature and extent of a competitive relationship between and among products in the marketplace.[129] To assess this competitive relationship, four factors must be examined, including the properties, nature and quality of products, the end-uses of the products, consumers' tastes and habits, and the international classification of the products for tariff purposes.[130] A WTO panel should have examined the evidence relating to *each* of those four criteria and then weighed all of that evidence in making an overall determination.

The key difference between products qualified for the EU ecolabel and those that are not so qualified is that the former group have a reduced environmental impact during their entire life cycle, which is mainly based on NPR-PPMs. Then, applying the Appellate Body's analytical approach to determining like products, is it possible to cite different environmental performance as a basis to conclude that two otherwise identical products are unlike? This depends on how flexible different factors will be used for the determination of 'like products', in particular whether the superior environmental performance and consumer tastes may be used to distinguish products with different

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[127] Appellate Body Report, *United States-Measures Affecting the Production and Sale of Clove Cigarettes* (*US – Clove Cigarettes*), WT/DS406/AB/R, adopted 24 April 2012, para 87

[128] Art 3(1) of the EU Ecolabel Regulation.

[129] Appellate Body Report, *US – Clove Cigarettes* (n 127) para 99

[130] WTO Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos)*, WT/DS135/AB/R, adopted 5 April 2001, para 101.

environmental implications that would otherwise be seen as like products.[131] It is true that some consumers may perceive products with higher environmental performance unlike similar products without such quality and that the government may have a legitimate concern of environmental degradation. However, it is one thing to argue that an increasing number of consumers are interested in, and sensitive to, environmental concerns embodied in a product, it is quite another to *demonstrate* that such concerns truly shape consumer preferences and habits and guide consumer choices in the market place. Some market research indicates that consumers are primarily guided by the price and quality of the products in their choice between products.[132] Moreover, the role of consumer tastes and habits as a factor in determining 'like products' seems to be minimal in WTO dispute settlement practice. In *Philippines- Spirits*, despite the evidence that only a small percent of Philippines population could afford imported distilled 'non-sugar-based' spirits and that local sari-sari stores, which accounted for approximately 85 percent of domestic "sugar-based" spirits sales, do not distribute imported distilled 'non-sugar-based' spirits, the AB held that imported and domestic distilled spirits are like products.[133] In *US – Tuna II*, neither party challenged the panel's finding that tuna caught by dolphin-friendly methods and tuna caught by dolphin-unfriendly methods were 'like products'. Finally, even if the consumer tastes factor were satisfied, it must be balanced with other relevant factors which may be in favour of like products determination as they have same end-uses and tariff classification. In short, it is highly unlikely that two otherwise like products will be rendered unlike simply because of their different environmental performance.

It is not clear whether the term 'product group', defined as 'a set of products that serve similar purposes and are similar in terms of use, or have similar functional properties, and are similar in terms of consumer perception' in the EU Ecolabel Regulation, covers the same scope as 'like products' in the CGP. In any case, as the determination of 'like products' in WTO law is a context-related value judgement,[134] it is highly probable that products not meeting the EU ecolabelling criteria may nevertheless be considered as like products as the products encompassed in the EU ecolabel scheme.[135]

3.2.2. No Less favourable treatment

Similar to TBT Article 2.1, the purpose of paragraph D of the CGP is not to prohibit *a priori* any obstacles to international trade. Rather, a WTO Member has the right to pursue legitimate regulatory objectives.[136] To find less favourable treatment under paragraph D of the CGP, a panel must follow a two-step analysis as the Appellate Body set out in *US - Clove Cigarettes*. First, a panel must find that the EU ecolabel modifies the conditions of competition in the relevant market to the detriment of imported

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[131] Enrico Partiti, 'The Appellate Body Report in *US – Tuna II* and Its Impact on Eco-Labelling and Standardization' (2013) 40 (1) *Legal Issues of Economic Integration* 73, 81.
[132] Van den Bossche and Zdouc (n 89) 393; Pieter Vlaeminck and Liesbet Vranken, 'Do Labels Capture Consumers' Actual Willingness to Pay for Fair Trade Characteristics?' (2015) University of Leuven Department of Earth and Environmental Sciences Bioeconomics Working Paper 2015/5, 19.
[133] WTO Appellate Body Report, *Philippines- Taxes on Distilled Spirits*, WT/DS396/AB/R, adopted on 21 December 2011, paras 151-157.
[134] WTO Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, adopted 1 November 1996, 20-21.
[135] Vranes (n 18) 223.
[136] Appellate Body Report, *US – Clove Cigarettes* (n 127) para 95.

products vis-à-vis domestic like products or like products from other WTO Members. In the second step, a panel must further analyse whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction.[137]

There is no evidence that the EU ecolabel might *de jure* discriminate against imported products from any WTO Member compared to EU domestic like products or like products from any other WTO Members. Article 9 of the EU Ecolabel Regulation does not explicitly differentiate between products on the basis of national origin and makes it clear that the EU ecolabel may be awarded to any foreign or domestic operator under the same conditions. However, as has been explained above, it is highly likely that products that are not eligible for the EU ecolabel and those that are awarded the ecolabel may nevertheless be 'like products'. The award of an EU ecolabel tends to provide products carrying the label competitive advantages. For example, Article 12 of the EU Ecolabelling regulation imposes a duty on Member States and the Commission, in cooperation with the EUEB, to agree on a specific action plan to promote the use of the EU label, and encourages Member States to consider the setting of targets for the purchasing of products meeting the EU label criteria. It is not clear what actions that the EU Commission has taken to promote the use of ecolabel. At any rate, any favourable treatment provided by either the EU, Member States, or the EUEB to products carrying the EU ecolabel may run the risk of affording less favourable treatment to like products that are not eligible for the EU ecolabel.

The existence of such a possible detrimental effect, by itself, is not sufficient to demonstrate less favourable treatment under paragraph D of the CGP. A panel must further analyse whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction. In interpreting 'legitimate regulatory distinction', the AB has extrapolated the arbitrary and unjustifiable discrimination test from GATT Article XX chapeau and applied it to the TBT Agreement .[138] If a regulatory distinction is not designed and applied in an even-handed manner because it constitutes a means of arbitrary or unjustifiable discrimination, that distinction cannot be considered 'legitimate'.[139] In assessing even-handedness, a WTO panel must scrutinise the design, architecture, revealing structure, operation and application of the measure at issue.[140] Essentially, a panel is required to ascertain the cause or the rationale put forward to explain the alleged discrimination against like products not eligible for the EU ecolabel. The alleged discrimination must reflect a reasonably legitimate regulatory objective.[141] Moreover, no reasonably available alternative measures exist that would achieve the legitimate objective in a less discriminatory manner.[142]

Applying the legitimate regulatory test to the EU ecolabel, the key question is whether the regulatory distinction between products, which are awarded an EU ecolabel and domestic or foreign like products, which do not qualify for the EU ecolabel,

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[137] Ibid, para 182.

[138] Fay Valinaki, 'Repairing the Defects of Article 2.1 of the WTO Barriers to Trade Agreement: An Amendment Proposal' (2016) 43 (1) Legal Issues of Economic Integration 65, 80.

[139] Appellate Body Report, *US – Cool* (n 112) para 271.

[140] Appellate Body Report, *US – Clove Cigarettes* (n 127) para 182.

[141] Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres* (*Brazil – Retreaded Tyres*), WT/DS332/AB/R, adopted 17 December 2007, paras 225-226.

[142] Petros C Mavroidis, 'Last Mile for Tuna (to a Safe Harbour): What is the TBT Agreement All About?' (2019) 30 (1) European Journal of International Law 279, 294; Gracia Marin Duran, 'Measures with Multiple Competing Purposes after EC-Seal Products: Avoiding a Conflict between GATT Article XX-Chapeau and Article 2.1 TBT Agreement' (2016) 19 Journal of International Economic Law 467, 487-488.

constitutes an arbitrary and unjustifiable discrimination. In normal circumstances, there is little risk for the EU ecolabel regulation to run afoul of the legitimate regulatory distinction test. because any discriminatory effects can be explained by the EU's pursuit of environment protection, a legitimate and important regulatory objective that the WTO must defer to and the uniform application of the EU ecolabel regulation to all domestic and foreign products. There does not seem to be any reasonably available alternative measures exist which would achieve the legitimate objective in a less discriminatory manner. However, the potential challenges are whether the EU has adequately considered different NPR-PPMs used to achieve similar environmental excellence and foreign unique circumstances in other non-EU WTO Members in designing and implementing the EU ecolabel regulation.

In *US – Shrimp*, the Appellate Body found that the US regulation constituted arbitrary and unjustifiable discrimination for several reasons.[143] First, the actual application of the US measure, in effect, required other WTO Members to adopt *essentially the same* policies and enforcement practices as the US. Methods *comparable in effectiveness* to those used in the US were not accepted solely because they have not been certified by the US.[144] Second, the US failed to engage in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements before enforcing the US law.[145] Third, the US offered different treatment to different countries desiring the US certification.[146] Finally, the US certification was so opaque and unpredictable that other WTO Members were effectively denied basis fairness and due process.[147] In *US – Tuna II*, the Appellate Body requires that the dolphin-safe labelling requirement must be *proportionately calibrated* to the risks arising from different fishing methods in different areas of the ocean.[148] After losing twice in the WTO, the Appellate Body finally upheld the US 2016 tuna measures as being consistent with the no less favourable treatment requirement, after the US places three types of conditions on the use of the dolphin-safe label targeting different fishing methods and different areas of the ocean.[149]

It must be highlighted what the EU's trading partners have complained about the EU ecolabel are the same as what India, Malaysia, and other WTO Members complained about in *US-Shrimp*.[150] In essence, the complaints about the EU ecolabel are that the scheme lacks transparency and that it only takes into account environmental priorities and conditions in Europe, without adequately considering foreign unique circumstances. These features were alleged to be supportive of local European industry and unfairly putting imported like products at a disadvantage.[151] If these allegations were well-grounded they must be taken seriously because they potentially constitute arbitrary or unjustifiable discrimination, and in turn render the regulatory distinction between products carrying the EU ecolabel and those like products which are not

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[143] WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (*US – Shrimp)*, WT/DS58/AB/R, adopted 6 November 1998, paras 161-186.
[144] Ibid, paras 164-165.
[145] Ibid, para 166.
[146] Ibid, paras 174-175.
[147] Ibid, para 181. ,
[148] Appellate Body Report, *US-Tuna II* (n 79) paras 293–297.
[149] Appellate Body Report, *US – Tuna II* (Second Recourse to Arti 21.5), WT/DS381/AB/RW2 (14 December 2018) paras 7.2–7.11.
[150] WTO Appellate Body Report (n 143)
[151] OECD, *Ecolabelling: Actual Effects of Selected Programmes*, OECD/GD/(97)105 (OECD, 1997); Golub (n 3) 18.

eligible for ecolabel illegitimate. In the light of *US- Shrimp*, the EU and Member States are expected to consider foreign unique circumstances when awarding EU ecolabels. For example, the EU should at least certify foreign like products using different PPMs comparable in effectiveness to those used in the EU ecolabel, keep the certification process transparent and fair and treat all foreign like products seeking to qualify for the EU ecolabel equally. The EU ecolabel regulation currently does not have any provisions directing relevant authorities how to deal with applications from foreign producers who claim foreign unique circumstances. But there is a clear risk that the EU ecolabel regulation may be found inconsistent with paragraph D if foreign unique circumstances were not adequately considered.

Even though the risk is real, it is submitted that it could be managed so long as the EU authorities follow some guidelines affording foreign producers certain procedural rights. In this regard, it is worth noting that the EU ecolabel criteria for specific products are revised from time to time considering stakeholders' input. The revision process offers opportunities for unjustifiable regulatory distinction to be dealt with.[152] It would be an exaggeration to claim that the obligations embodied in paragraph D of the CGP has drastically constrained the EU's freedom to pursue environment protection goals through ecolabels. As many WTO commentators have observed, the WTO jurisprudence has moved towards a more nuanced, even friendly attitude environmental protection measure.[153] The dominant trend has been toward deference to nationally enunciated objectives and the measures chosen to achieve them, even where those measures are trade restrictive, unilateral and with extraterritorial effect.[154] Therefore, even though the EU is expected to consider foreign unique circumstances and accept different methods comparable in effectiveness, the EU is not expected to lower its ecolabel criteria. Foreign producers must provide objective proof of its comparative effectiveness and the EU retains the final say on it. The point is that these obligations are largely procedural in nature and they will not unreasonably constrain the EU's legitimate regulatory objectives.

3.3 Unnecessary Obstacles to International Trade

In addition to the MFN and NT obligations in paragraph D of the CGP discussed above, Paragraph E of the CGP provides that the standardising body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles on international trade. To find whether the EU ecolabel is consistent with paragraph E, a number of analytical steps must be followed. First, it must be determined whether the EU ecolabel pursues a legitimate objective. The aim of the EU ecolabel is to protect the environment and to provide consumers with accurate information on the environmental impact of products.[155] Both are explicitly listed in TBT Article 2.2 and GATT Article XX as legitimate regulatory objectives. Second, it

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[152] European Commission JRC Technical Report: Revision of the EU Ecolabel Criteria for Paper Products, Final Technical Report (January 2019).
[153] Joel P. Trachtman, 'WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe' (2017) 58 (2) Harvard International Law Journal 273, 309.
[154] Aaron Cosby and Petros C. Mavroidis, 'Heavy Fuel: Trade and Environment in the GATT/WTO Case Law' (2014) 24 (3) RECIEL 288, 300; Margaret A. Young, 'Trade Measures to Address Environmental Concerns in Faraway Places: Jurisdictional Issues' (2014) 24 (3) RECIEL 302, 306-310.
[155] Regulation (EC) No 66/2010 (n 47).

is necessary to evaluate the degree to which the EU ecolabel 'fulfills' the objectives it pursues. On this inquiry, the Commission concluded in 2017 that the scheme was only partly effective in reducing the environmental impact of consumption and production.[156] Nevertheless, since the TBT Agreement does not impose a pre-determined threshold of contribution that the EU ecolabel must make. It suffices that the EU ecolabel has made some contribution to the pursued objectives.[157] Also one must take into account that the effectiveness of EU ecolabel may increase over time when it is combined with other policies.[158]

Finally, it must be determined whether the EU ecolabel is more trade-restrictive than necessary to fulfil the legitimate objectives. Such a determination requires considering factors that include the degree of contribution made by the ecolabel to the objectives pursued, the trade-restrictiveness of the EU ecolabel, the nature of the risks at issue and the existence of alternative measures which makes an equivalent contribution to the objective, less trade restrictive and reasonably available.[159] To begin with, as the EU Commission found, the EU ecolabel has made an important but limited contribution to the regulatory objectives.[160] Furthermore, the trade-restrictiveness of the EU scheme seems to be limited as voluntary labelling is commonly seen as the most suitable and least trade distorting of the instruments for pursuing environmental goals.[161] Next, the protection of environment is an important regulatory objective explicitly recognised by the WTO as well as numerous international treaties.[162] Lastly, on the possible alternative means to achieve the objective, there is some proposal on the privately sponsored ecolabelling scheme replacing state-administered voluntary labelling. However, it is not clear if privately sponsored schemes may be less trade restrictive than state-administered ones; state-administered schemes may be more effective in achieving their regulatory objectives.[163] Therefore, it is highly unlikely that the EU ecolabel would be found to be an unnecessary obstacle to international trade.

3.4 The Relevant International Standard as a Basis for Standard Development

One important objective of the TBT Agreement is to promote harmonization of heterogenous product standards through international standards.[164] Although ecolabels can provide information about a product in terms of its overall environmental benefits and positively influence consumer choices, the increasing proliferation of ecolabels has led to concerns of 'greenwashing' and exaggerated marketing claims.[165] International standards on ecolabelling are therefore needed to provide a credible and level playing

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[156] European Commission (n 65) 4.
[157] Ming Du, 'The Necessity Test in World Trade Law: What Now?' (2016) 15 Chinese Journal of International Law 817, 841.
[158] European Commission (n 65) 8.
[159] Appellate Body Report, *US- Tuna II* (n 79) para 322.
[160] European Commission (n 65) 4.
[161] Andrew Green, 'Climate Change, Regulatory Policy and the WTO: How Constraining are Trade Rules?' (2005) 8(1) Journal of International Economic Law 143, 186.
[162] Clive George, 'Environment and Regional Trade Agreements: Emerging Trends and Policy Drivers' (2014) OECD Trade and Environment Working Papers 2014/02, 7-8.
[163] Vranes (n 18) 240–241.
[164] Ming Du and Fei Deng, 'International Standards as Global Public Goods in the World Trading System' (2016) 43 (2) Legal Issues of Economic Integration 113, 114-5.
[165] Thomas P Lyon and A. Wren Montgomery, 'The Means and End of Greenwash' (2015) 28 (2) Organization & Environment 223.

field. Paragraph F of the CGP provides that where international standards exist, the standardising body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate.

The ISO 14020 series of standards provide an internationally recognised and agreed set of benchmarks against which environmental labels can be prepared.[166] For our purpose, the most relevant are ISO 14020, which outlines the guiding principles for the development and use of environmental labels that underpin all the other standards in the 14020 series[167], and ISO 14024, which outlines the requirements for developing Type 1 environmental labelling programmes.[168] Type 1 environmental labels is defined by the ISO as 'a voluntary, multiple-criteria based, third party programme that awards a license which authorises the use of environmental labels on products indicating overall environmental preferability of a product within a particular product category based on life cycle considerations'.[169] During the drafting of ISO 14024, there was express concern for disciplining the potential abuse of the environmental labels as unjustified barriers to international trade.[170] The EU ecolabel is one of the best known Type 1 environmental labels.[171]

ISO 14020 establishes guiding principles for the development and use of environmental labels and declarations. The overall goal of environmental labels is through communication of verifiable and accurate information on environmental aspects of products to encourage the demand for and supply of those products that cause less stress on the environment, thereby stimulating the potential for market-driven continuous environmental improvement. [172] These general principles include: environmental labels shall be accurate, relevant and not misleading; procedures and requirements for environmental labels shall not create unnecessary obstacles to international trade; based on scientific methodology; life cycle analysis; open, participatory consultation with interested parties; availability of relevant information on environmental labels to purchasers from the party making the environmental label.[173] ISO 14024 establishes more specific principles and procedures for developing Type 1 environmental labelling programmes, including the selection of product categories, product environmental criteria, product function characteristics, and for assessing and demonstrating compliance.[174] Key guiding principles of Type 1 labels include: voluntary nature of the programme; a third party sets the criteria and grants licenses to use the label; verifiable; criteria are set to enable products to be distinguished by measurable environmental impacts; consistent with the requirements of ISO 14020;

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[166] ISO Central Secretariat, 'Environmental Labels' (2019) 2.
[167] ISO 14020, *Environmental Labels and Declarations- General Principles* (15 September 2000).
[168] ISO 14024:2018, Environmental labels and declarations- Type 1 environmental labeling – Principles and procedures (2018-02).
[169] ibid, Art 3.1.
[170] David A Wirth, 'The International Organization for Standardization: Private Voluntary Standards as Swords and Shields' (2009) 36 Boston College Environmental Affairs Law Review 79, 98.
[171] Ogenis Brilhante and Julia M Skinner, 'Promoting Sustainable Construction in the EU: Green Labels, Certification Systems and Green Procurement' (Institute for Housing and Urban Development Studies Report, June 2015) 23.
[172] ISO 14020: 2001, Art 3.
[173] ibid, Art 4.
[174] ISO 14024:2018, Art 1.

transparency process; a product's fitness for purposes and general performance are considered; label certificate subject to regular review.[175]

Both ISO standards were approved by the European Committee for Standardization (CEN) as European Standards and CEN members are bound to comply with the CEN Internal Regulations which stipulates the conditions for giving this European Standard the status of a national standard without any alteration.[176] As a Type I ecolabel, the EU ecolabel makes it clear that it works in accordance with the ISO standard 14024.[177] Nevertheless, some problems have emerged from the European Commission Report on the review of implementation of the EU Ecolabel regulation. For example, according to ISO 14024, ecolabels must be 'accurate, verifiable, relevant and not misleading' and 'based on scientific methodology that is sufficiently thorough and comprehensive to support the claim'. The Commission report shows that the quantitative benchmark of the EU ecolabel's environmental excellence cannot be verified due to the lack of an agreed methodology for comparison. In some cases, when the validity of EU ecolabel criteria is extended without a thorough analysis of the evolution of the market situation, the EU ecolabel may no longer reflect environmental excellence.[178]

4. CONCLUSION

The EU ecolabel is intended to promote products which have a higher level of environmental performance during their entire life cycle than other similar products and services. As the features of the EU ecolabel meet the definition of 'standard', it falls within the regulatory scope of the TBT Agreement. The EU ecolabel claims that it is consistent with ISO standard 14024, the relevant international standard governing Type 1 ecolabels. As a voluntary scheme, the EU ecolabel is highly unlikely to be considered an unnecessary trade barrier. However, there is a strong probability that products qualified for the EU ecolabel and those that are not so qualified simply because of inferior environmental performance are nevertheless 'like products' in the WTO law. As a result, any governmental support and promotion of products carrying the EU ecolabel may run the risk of modifying the conditions of competition in the relevant marketplace to the detriment of like imported products without EU ecolabels. It is possible to argue that the EU ecolabel makes a legitimate regulatory distinction between like products with different environmental performance as reflected in the award of the ecolabel. However, the strength of this argument will be based on a number of factors such as the labelling criterion can be verified by scientific evidence; foreign PPMs and unique foreign circumstances were adequately and fairly considered in making decisions on whether the EU ecolabel may be awarded to foreign products etc. Given that the legitimate regulatory distinction is interpreted rather stringently in WTO case law, there is a real risk that the EU ecolabeling regulation may be found inconsistent with the CGP. Nevertheless, this risk could be managed so long as the EU authorities follow the guidelines considering the foreign unique circumstances and affording

[175] Ibid, Art 5–7.
[176] ISO 14024:2018 was approved by European Committee for Standardization (CEN) as EN ISO: 14024 on 21 March 2018.
[177] The EU Ecolabelling Regulation, Art 6(f), 7(2) and 11.
[178] European Commission (n 65) 4.

foreign producers certain procedural rights as the WTO Appellate Body outlined in *US-Shrimp* and *US-Tuna II*.

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