A CASE OF DOUBLE STANDARDS: THE WORLD TRADE ORGANISATION AND THE PRIVATE SECTOR

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ABSTRACT

The trade power held by private entities is analogous to that of the public sector. However, the rules and regulations governing them are not. Private entities currently operate outside the framework of the World Trade Organisation's (WTO's) covered agreements. Therefore, when responding to consumers' ethical concerns, they enjoy freedoms that WTO Member States do not. Private entities can act in a way that undermines the founding principles of the WTO. The private sector is becoming increasingly powerful, which has resulted in their policy decisions creating incontestable effective barriers to trade when responding to consumer preferences. Member States could respond to consumers' ethical concerns in accordance with the WTO's covered agreements, however often they fail to do so. In such cases, private entities are left to fill the ethical gaps left open by Member State governments. This dissertation critically examines the relationships between the public sector, the private sector, and the ethics of production. It explores the positive and negative ramifications of these relationships, and how to improve them.

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ABBREVIATIONS

CER	Australia-New Zealand Closer Economic Relations Trade Agreement
DSB	Dispute Settlement Body
DPCI Act	The Dolphin Protection Consumer Information Act
DSU	Dispute Settlement Understanding
EC	European Community
EEC	European Economic Community
EU	European Union
FLO	Fairtrade Labelling Organisations International
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
ICSID	International Centre for the Settlement of Investment Disputes
ILO	International Labour Organisation
Marks	Marks & Spencer
MFN	Most-Favoured-Nation
MMP Act	The Marine Mammal Protection Act 1972
NGO	Non-governmental Organisation
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
UK	The United Kingdom
UEP	United Egg Producers
UN	The United Nations
United States	The United States of America
USDA	United States Department of Agriculture
WTO	World Trade Organisation
WWFN	Worldwide Fund for Nature

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Introduction

Private entities currently operate outside of the framework of the World Trade Organisation's (WTO) covered agreements. Therefore, when responding to consumers' ethical concerns they enjoy freedoms that WTO Member States (Member States) do not. Because private entities are not restricted by the principles and rules of the WTO's covered agreements, their actions can create incontestable effective barriers to trade. This dissertation will evaluate the ability of private entities to put restrictions on what they sell based on consumer preferences, critically examine the ramifications of this, and propose changes that could be made to the current situation.

Chapter I focuses on the WTO and its covered agreements. It will explore the framework under which Member States must act in relation to trade measures. It emphasises that while Member States could effectively respond to consumers' ethical concerns while still acting in accordance with the principles and rules provided by the WTO's covered agreements, there is no regulation obliging them to do so.

Chapter II explores the relationship private entities have with consumers, and the way that the combination of trade freedom and technology has allowed that relationship to become more proximate and dynamic than the relationship between State and citizen. It will then examine the ramifications, both positive and negative, of the freedom that private entities enjoy when responding to consumers' ethical concerns.

Chapter III concludes by asserting that private entities should be brought within the scope of the WTO's regulatory reach. In the years since the creation of the WTO, the line between the consequences of trade measures taken by private sector, in comparaison to the public sector, has become increasingly blurred. But in its current form, the WTO is not systemically or procedurally equipped for such radical change. Multiple barriers would need to be overcome to widen the scope of the WTO, and further problems would follow any reform. Therefore, change may have to come in the form of rules and regulations established by States outside of the WTO.

The private sector has been discussed at various WTO negations and in WTO Dispute Panel reports, but this has not manifested in any plan of action. The blurred line between the private and the public sectors is a pressing issue that needs to be addressed. It is an inconvenient indication that aspects of the WTO are anachronistic and need to be updated.

Chapter I: The World Trade Organisation

The WTO is the single institutional framework governing international trade. It is a Member driven organisation, which as of June 2014 is comprised of 160 WTO Member States.[1] The WTO enables its Members to: come together to negotiate and administer trade agreements, deal with disputes, monitor national trade policies, provide developing countries with technical assistance and training, and cooperate with other international organisations.[2]

The WTO provides the framework under which Member States must act when responding to ethical concerns of their citizens. The WTO is not concerned with what ethical concerns Member States are responding to, but rather the effect that their response has on trade. Many cases heard before the WTO's Dispute Body illustrate that while the WTO's covered agreements allow for discrimination on the grounds of ethical concerns, often Member States fail to do so in accordance with their WTO obligations. It then becomes clear that the onus is put on the private sector to prioritise ethical production, not because of the failings of the WTO's covered agreements, but rather the decisions made by Member States.

A. International trade law

The branch of international economic law referred to as 'international trade law' can be divided into four categories:

(i) unilateral measures: how a country's domestic law deals with international trade;

(ii) bilateral relationships: relationships between two countries;

(iii) plurilateral agreements: WTO agreements that are not a pre-condition for WTO Membership, and so are between some but not all Member States;[3] and

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[1] "Yemen Brings WTO Membership to 160" *World Trade Organisation* (online ed, 26 June 2014).

[2] "Understanding the WTO - Principles of the Trading System" (2014) World Trade Organisation <www.wto.org> at 9.

[3] Walter Goode *Dictionary of Trade Policy Terms* (5th edition, Cambridge University Press, Cambridge, 2007) at 274.

(iv) multilateral arrangements: agreements between many countries, and are governed by the WTO through its covered agreements.[4]

This dissertation is primarily concerned with the fourth category, as it is through its covered agreements that the WTO governs the way that Member States can respond to consumer concerns via trade.

B. Consumer concerns

The concerns that consumers have when purchasing products can be divided into three main categories: ethical concerns, health concerns, and quality concerns. This dissertation deals primarily with ethical concerns, but many of the issues discussed are also be relevant to health and quality concerns.

When one consumes, an influx of ethical decisions arise. To consume goes beyond an individual act to become one with a myriad of far-reaching ramifications. Ethical concerns include the desire for transparency, fairness, humanity, and social responsibility.[5] These pertain to animal welfare, the environment, and human rights. When responding to such concerns in a manner that affects international trade, countries must act in accordance with the principles of the WTO. On the contrary, private entities can act without consideration of the implications that their actions may have on international trade.

C. Background to the WTO

The WTO was established in 1995. Prior to this, the rules governing international trade were provided solely by the General Agreement on Tariffs and Trade 1947 (GATT 1947). This agreement was the first of its kind in that it attempted to bring nations together to make a concerted effort to regulate international trade. The functions, procedures and rules of this agreement were expanding to such an extent that the signatories became a *de facto* organisation, known as GATT. Notably, it

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[4] "International Trade Law Research Guide" (2012) Georgetown Law Library <www.law.georgetown.edu.cfm>.

[5] Peter Singer and Jim Mason *The Ethics of What We Eat* (Text Pub, Melbourne, 2006) at 247-248.

established ‘trade rounds’, which are ongoing trade negotiations. In the GATT years, these mainly focused on the reduction of tariffs.[6] The negotiations at the Uruguay Round, which lasted from 1986–1994, led to the creation of the WTO.

The WTO is made up of the agreements that were born out of the Uruguay Round negotiations. The WTO’s covered agreements include the General Agreement on Tariffs and Trade (GATT 1994) (which encompasses the provisions of the GATT 1947), the Agreement on Technical Barriers to Trade (TBT Agreement), and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

D. Fundamental Principles and Rules of the WTO Agreements

The WTO’s founding principles have been captured in binding rules that govern international trade. These principles and rules are not shared by the private sector and so it can disregard and undermine them in their quest to act in accordance with consumer preferences.

1. Trade without discrimination

The cornerstone of the WTO’s covered agreements is non-discrimination. The two principles underpinning non-discrimination are: the most-favoured-nation (MFN) principle and the national treatment principle. These principles have a place in the three main areas of trade that are governed by the WTO: tariffs and trade; trade in services; and trade-related aspects of intellectual property rights.[7]

a. The most-favoured-nation principle

The MFN principle is the idea that each of a country’s trading partners must be treated as though they are the most-favoured-nation.[8] In practice, this means that Members must treat all other Members as favourably as each other, and must not discriminate against any other Member. For

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[6] World Trade Organisation “Understanding the WTO”, above n 2, at 56.

[7] See for example World Trade Organisation “Understanding the WTO”, above n 2, at 10.

[8] Goode, above n 3, at 228.

example, if Country A lowers the customs duty rate on Country B's bananas, they must do the same for every other Member State's banana exports.

b. The national treatment principle

The national treatment principle provides that after a foreign product has entered a country's market, it must be treated in the same way as 'like' domestic products. It prevents countries from protecting domestic products by subjecting imported goods to discriminatory measures, thereby essentially creating a tariff through non-tariff measures.[9] Breaches of the national treatment principle are more common than breaches of the MFN principle, as Member States are more likely to want to treat their own products favourably than treat products from other countries differently from each other.[10]

c. Trade without discrimination in the GATT 1994

Articles I, III, and XI of the GATT 1994 set out the principles of non-discrimination as follows.

i) Article I: General Most-Favoured-Nation Treatment

Article I expressly subjects Member States to act in accordance with the MFN principle. Any trade concession granted to one Member must then be granted immediately and unconditionally to all other Members in respect to 'like' products.[11]

ii) Article III: National Treatment on Internal Taxation and Regulation

Article III provides that imports are to be given national treatment. Internal taxes and charges can only be applied to imported goods to the extent that they are applied to 'like' domestic products.[12] It seeks to avoid protectionism by preventing the circumvention of tariff concessions through the application of discriminatory internal measures. For example, if Country A agreed to lower the tariff rate of Country B's bananas from 12 per cent to 10 per cent, they could not then impose a 2 per cent domestic consumption tax on those bananas, as to do so would counterbalance the tariff cut. The

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[9] Goode, above n 3, at 242.

[10] See Simon Lester and Bryan Mercurio *World Trade Law* (2nd ed, Hart Publishing, Oxford, 2008) at 279.

[11] GATT 1994, art I.

[12] Goode, above n 3, at 404.

scope of what is considered a "measure" is broad. Article III:1 identifies measures as internal taxes and other internal charges, and laws, regulations and requirements.

Article III obliges Members to provide equality of competitive conditions for imported products in relation to domestic products.[13] In *Korea – Various Measures on Beef,* Korea required all imported beef to be sold at specialised beef stores that bore a sign labelling them as such.[14] Purchasers of imported beef had to meet much more stringent record-keeping requirement than domestic meat purchasers. The Panel and the Appellate Body held that the requirements were an unjustifiable contravention of art III.[15]

iii) Article XI (General Elimination of Quantitative Restrictions)

Article XI provides that all new trade measures must be in the form of tariffs. Imports shall not be subjected to prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures.[16] The Panel in *Turkey – Textiles* explained that "The prohibition against quantitative restrictions is a reflection that tariffs are GATT's border protection 'of choice'".[17] Quantitative restrictions impose absolute limits on imports, while tariffs do not.[18] For example, California law has made the production and commercial sale of *foie gras*[19] illegal.[20] If the State of California had prohibited solely the importation of foreign *foie gras*, it would be a breach of art XI. However because the prohibition includes the production and sale of Californian *foie gras* it is not a breach.

iv) Article XX (General Exceptions)

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[13] GATT 1994, art III:4.

[14] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef.*

[15] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I at [186].

[16] GATT 1994, art XI.

[17] *Turkey – Restrictions on Imports of Textile and Clothing Products;*
Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R, DSR 1999:VI, at 2363, at [9.63].

[18] At [9.65].

[19] *Foie gras* is French for 'fat liver'. It is a food product made from the diseased liver of force-fed ducks and geese.

[20] Norimitsu Onishi "Some in California Skirt a Ban on Foie Gras" *The New York Times* (online ed. 12 August 2012).

Article XX provides ten exceptions to the rules of the GATT 1994, including those governing non-discrimination. The exceptions that are most relevant to this dissertation are those measures taken:[21]

> …
>
> (b) necessary to protect human, animal or plant life or health;
>
> …
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including ...;
>
> …
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; …

The *chapeau* of this article provides that while Members may take discriminatory measures on the grounds provided by the exceptions, those measures must not have been applied in an arbitrary or unjustifiably discriminatory manner.[22]

d. Trade without discrimination in the TBT Agreement

The TBT Agreement builds on the GATT 1994, with the aim of ensuring that technical regulations and standards designed and applied by Member States do not create unnecessary and unjustified barriers to international trade.[23] A technical regulation differs from a standard in that it is mandatory; if a product does not comply with a technical regulation it cannot be sold.[24] A technical regulation must not be discriminatory (art 2.1), it must be necessary to fulfil a legitimate objective (art 2.2), there must not be a less trade-restrictive alternative available (art 2.2), and international standards must be used except when it would be an ineffective or inappropriate means for the

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[21] GATT 1994, art XX (b) and (g).

[22] Lester and Mercurio above n 13, at 382;
Chapeau is the french word for 'hat'. It is used to describe an introductory clause of Art XX because of its positioning above the specific exceptions set out under sub-paras (a)-(j).

[23] Goode, above n 3, at 12.

[24] "Technical Barriers To Trade: Technical Explanation" (2014) World Trade Organisation <www.wto.org>.

fulfilment of the legitimate objectives pursued (art 2.4). Article 2 also provides rules to enhance notification and transparency when Member States adopt regulatory measures.[25]

The sixth recital of the Preamble of the TBT Agreement provides:

> … no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate …

As provided by the Vienna Convention, the purpose of the Preamble is to provide a supplementary means of guidance in the interpretation of the TBT Agreement. The Preamble suggests that Member States can discriminate on the basis of citizens' strong ethical standards, as long as it fills the aforementioned criteria under art 2.

Unlike the GATT 1994, the TBT Agreement does not provide exceptions to the non-discrimination obligations. As a result, WTO Dispute Panels and Appellate Bodies have interpreted art 2.1 to allow measures contrary to the MFN principle that can be explained by a legitimate regulatory distinction, as not being a violation.

It has not been resolved to what extent the TBT Agreement applies to non-governmental bodies. Article 3.4 provides that Members shall not take measures which require or encourage local government or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of art 2.[26] Also, Annex 3 of the TBT Agreement sets out the TBT Code of Good Practices for the Preparation, Adoption and Application of Standards, which is open to acceptance by all governments and para-governmental agencies.[27] Article 4.1 provides that Members shall take such reasonable measures as may be available to them to ensure that non-governmental standardising bodies within their territories accept and comply with the Code of Good Practices.

While arts 3 and 4 both make reference to non-governmental bodies, governments are showing little initiative in regulating effective trade measures taken by private entities. The narrow scope of the obligations owed by private entities will be discussed further in this chapter under *Significant WTO Cases* and throughout *Chapter II: The Private Sector*. Despite uncertainty surrounding private

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See "Trade and Environment: A Handbook" (2005) International Institute for Sustainable Development <http://www.iisd.org> at ch 3.4.2.

[26] TBT Agreement, art 3.

[27] TBT Agreement, art 4.

entities, there is no uncertainty surrounding governmental bodies. They sit firmly within the scope of the TBT Agreement.

e. Trade without discrimination in the SPS Agreement

The SPS Agreement provides basic rules for food safety and animal and plant health standards. While it allows countries to set their own standards, they:

(i) should only be applied to the extent necessary to protect human, animal or plant life or health;[28]

(ii) must be based on science;[29] and

(iii) should not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail.[30]

The SPS Agreement encourages the use of international standards, guidelines and recommendations, but allows for the adoption of higher standards where there is scientific justification, or where they are based on appropriate assessment of risks provided that they are consistent and not arbitrary.[31]

The SPS Agreement will not be a major focus of this dissertation as it adresses health and safety concerns rather than ethical concerns. SPS Agreement measures have the specific purpose of protecting: human or animal health from food-borne risks; human health from animal or plant-carried diseases; and animals and plants from pests or diseases.[32] Thus, health and safety concerns are themselves limited to those arising from certain types of risks.

2. *Predictability*

[28] SPS Agreement, art 2.3.

[29] SPS Agreement, art 2.2.

[30] SPS Agreement, art 2.3.

[31] SPS Agreement, art 5.

[32] "Understanding the WTO Agreement on Sanitary and Phytosanitary Measures" (1998) World Trade Organisation <www.wto.org>.

A central element of the WTO Disputes Settlement Understanding (DSU) is to ensure the multilateral trade system is secure and predictable.[33] Such characteristics are desirable as they encourage a stable business environment, which in turn facilitates trade and investment.[34] WTO Members are bound by regulations that promote predictability and the consequences thereof.

When Member States allow foreign goods to enter their domestic market, an upper limit is put on the tariffs for those goods.[35] In order for a Member State to tax imports at a higher rate than that by which they are bound, they must negotiate their bindings with their trading partners, which can result in compensation for lost trade.[36] The WTO also encourages transparency of national policies and discourages quotas and limitations on the quantity of imports. There are no equivalent mechanisms in place to encourage private entities act in the same way. While many non-government organisations (NGO) and retailers do prioritise predictability, without any mandatory requirements, it is not safeguarded. For example, a large retailer could suddenly enforce a new policy, such as one providing that they are to only buy and sell fresh produce that is certified organic. As long as they respect their contractual obligations, they would not have to give their supplier any warning of their policy, or allow them a phase-in period to change their practice. Effectively a suppliers product could be cleared off the shelf overnight.

3. Freer Trade

The WTO operates on the premise that freer trade will result in greater benefits for Member States. Since the end of World War II, countries have progressively decreased their tariffs.[37] This has increased the international availability of a greater variety of products. The theory underpinning the WTO's position is that of comparative advantage, which was first developed by David Ricardo in 1817.[38] It provides that a country is more likely to export goods that it can produce relatively efficiently.[39] It compares the production costs of different goods in each country rather than the cost of the same goods in different countries. This is the relative efficiency measure. This theory

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[33] "Understanding on Rules and Procedures Governing the Settlement of Disputes" (2014) World Trade Organisation <www.wto.org>.

[34] World Trade Organisation "Understanding the WTO", above n 2, at 11.

[35] GATT 1994, art II.

[36] GATT 1994, art XXVIII.

[37] World Trade Organisation "Understanding the WTO", above n 2, at 13.

[38] World Trade Organisation "Understanding the WTO", above n 2, at 14.

[39] Goode, above n 3, at 74.

purports that even if a country is worse at making everything than other countries, it is still beneficial for all countries to trade with them.[40] The 18th Century economist Adam Smith captured comparative advantage in the following terms:[41]

> What is prudence in the conduct of every private family can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry employed in a way in which we have some advantage. The general industry of the country, being always in proportion to the capital which employs it, will not thereby be diminished, no more than that of the above-mentioned artificers; but only left to find out the way in which it can be employed with the greatest advantage…

For example, if Country A is better at making everything than Country B, both Countries A and B will still benefit from trading with one another. If A is significantly superior at producing coffee beans and only slightly more superior at producing bananas, Country A should invest in that which it has a comparative advantage is (coffee beans) and export that to Country B. Country B should invest in the production of its comparative advantage (bananas) and export that to Country A.

For many developing countries, comparative advantage is the ability to produce goods in a way that may be considered contrary to what is considered ethical, for example through low wages and poor working conditions. Applying this to the previous example, if Country A were to require Country B to produce their bananas in a way that they considered more ethical, they may be taking away Country B's comparative advantage because Country B may not be able to, for example, pay its workers what Country A considers to be an "ethical wage".

While Member States' trade policies aim to promote freer trade, as with predictability, there are no mandatory requirements for private entities to do the same. Often they seek to do the opposite and combat globalisation and promote localisation. This point will be discussed in *Chapter II: The Private Sector.*

E. The WTO dispute settlement system

[40] Goode, above n 3, at 74.

[41] Adam Smith and D D Raphael *The Wealth of Nations* (Knopf, New York, 1991). Book IV, ch II at [12].

When one Member State considers that another is acting in contravention of any of the WTO's covered agreements they can bring a claim before the WTO's DSB. First the Members that the dispute concerns must enter into consultations. If they do not reach a settlement after 60 days or if consultations are denied, the complaining party may request a Dispute Panel. A Panel is formed, and after hearing from both parties issues a report of its findings. Either party can appeal the decision, in which case an Appellate Body is established to make a report. The report is automatically adopted and becomes the ruling or recommendation of the DSB within 60 days unless there is a consensus among all Member States to reject it.[42] The DSB uses the WTO framework to make rulings or recommendations with the intention of settling disputes, preferably through negotiations, rather than to pass judgment.[43]

If a responding party does not accept the DSB's decision, both parties must enter negotiations in an effort to agree on how the complainant should be compensated. If Members cannot reach an agreement then in order to encourage compliance the complaining party can retaliate with the DSB's permission. This means the complainant can suspend concessions or other obligations owed to the respondent.[44]

F. Significant WTO Cases

1. The pre-Uruguay Tuna – Dolphin cases

Seine haul fishing is a method of harvesting yellowfin tuna. It involves using dolphins to catch the schools of fish swimming below them. Dolphins are chased by speed boats and enclosed in an area by a seine purse net where tuna fishing takes place. In doing so, dolphins are killed as a result of drowning, as bi-catch, and from stress.[45] The technique is prevalent in the Eastern Tropical Pacific Ocean, and is common among Mexican fishing boats.

The United States recognises the importance of marine mammals and the threats posed to them in the Marine Mammal Protection Act 1972 (MMP Act). The Act seeks to protect marine mammals

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[42] World Trade Organisation "Understanding the WTO", above n 2, at 60.

[43] At 58.

[44] At 62.

[45] Elizabeth Edwards "Fishery effects on dolphins targeted by tuna purse-seiners in the Eastern Tropical Pacific Ocean." (2007) 20(2) International Journal of Comparative Psychology 217 at 217-227.

and develop knowledge about them. It aims to do this on both a national and international scale.[46] In 1990, the United States imposed an embargo on yellowfin tuna caught via purse-seine netting in the Eastern Tropical Pacific Ocean as required by the MMP Act.

In 1991, Mexico brought the case before a GATT Dispute Settlement Panel, asserting that the United States was acting in contravention of the GATT 1947.[47] This dispute is referred to as *Tuna – Dolphin I*. Mexico argued that the measures were imposing an illegal non-tariff restriction, inconsistent with art XI (General Elimination of Quantitative Restrictions) and art XIII (Non-discriminatory Administration of Quantitative Restrictions); and that the United States was acting in contravention of its national treatment obligation and therefore inconsistent with art III (National Treatment on Internal Taxation and Regulation). The United States argued that it was acting in a manner consistent with art III, or in the alternative, was justified by the exceptions under art XX (b), (d), and (g).[48]

First, the Panel found that while a Member State can take trade action on the grounds of the quality or content of goods, it cannot do so on the grounds of process and production methods as the United States embargo had done. To do so would open the floodgates to trade polices based on the ethics of process and production methods.[49]

Second, the Panel concluded that a Member State cannot use art XX as justification to take trade action in order to enforce their national environmental standards extraterritorially.[50] Although the GATT 1947 does not expressly provide for this, to interpret it any other way would allow countries to impose their own standards on other countries which could trigger protectionism under the guise of enhancing ethical production.[51] To do so would constitute an illegal non-tariff restriction (arts XI and XIII).

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[46] The Marine Mammal Protection Act, Sec 2.

[47] This case occurred before the creation of the WTO.

[48] "Mexico etc versus US: 'Tuna-dolphin'" (2014) World Trade Organisation <www.wto.org>.

[49] Above n 48.

[50] Above n 48.

[51] Above n 48.

[52] Above n 48.

The Panel suggested that Mexico and the United States should undertake negotiations in attempt to come to an agreement in the spirit of the GATT 1947.[52] However, the Panel's report was never adopted.[53] Mexico and the United States entered into their own bilateral negotiations.[54]

Mexico also raised the issue of the United States Dolphin Protection Consumer Information Act (DPCI Act), which required 'dolphin-safe' tuna to be labelled as such. The Panel emphasised that their role was not to make a ruling about how Members should treat the environment, but rather how the GATT 1947 rules applied to their treatment. The Panel held that the United States policy provided by the DPCI Act did not violate the GATT 1947 because the measure was aimed at preventing deceptive or misleading advertising, regardless of the country from where it was sourced. It was not an effective market restriction because it did not exclude products from the market, and also did not confer any governmental advantage. It was a policy concerned with allowing consumers to make ethical decisions when purchasing tuna.[55]

The United States' embargo did not only affect countries harvesting tuna, but also those further down the supply chain, as it included tuna processed by intermediary nations. The MMP Act defines an "intermediary nation" as one that exports yellowfin tuna or yellowfin tuna products to the United States, and that receives imports, in its country, of yellowfin tuna or yellowfin tuna products.[56] In 1994, the European Economic Community (EEC) and the Netherlands as intermediary nations brought a claim against the United States before the GATT Dispute Panel. This gave rise to the case of *Tuna – Dolphin II,* which is often referred to as the *'Son of Dolphin – Tuna Case'*.[57] Their claim was in relation to the same measures that Mexico had challenged.

The Panel ruled in favour of the EEC and the Netherlands on every issue before it. As in *Tuna – Dolphin I,* the Panel found that both the primary and intermediary embargoes of the United States were inconsistent with arts III and XI, and were not justified by the exceptions provided by arts XX (b), (g) or (d).[58]

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[53] Unlike current WTO Panel Reports, GATT Panel Reports were not automatically adopted: World Trade Organisation "Understanding the WTO", above n 2, at Ch 3.

[54] Above n 48.

[55] World Trade Organisation "Mexico etc versus US: 'Tuna-dolphin'" above n 48.

[56] The United States Marine Mammal Protection Act, Sec 3(5).

[57] "EU versus US: 'son of dolphin-tuna" (2014) World Trade Organisation <www.wto.org>.

[58] Above n 57.

Contrary to the demands of the EU,[59] as in *Tuna – Dolphin I,* the Panel's report was never adopted. Therefore both reports are not precedent and hold limited significance. However they are useful examples of the Panel's approach to the framework that Member States must act in accordance with when taking ethical action. The Panel makes it clear that environmental regulations are prohibited unless applied legitimately.[60] They are some of the first major disputes to deal with a trade embargo that was inspired by ethical concerns. This signifies that the differences in environmental norms between developing and developed countries can spark trade disputes.

2. *United States – Tuna II (Mexico)*

The case *United States – Tuna II (Mexico)*[61] arose in 2008 when Mexico claimed that the United States legislation and case law surrounding the use of a 'dolphin-safe' label were inconsistent with arts I:1 and III:4 of the GATT 1994 and arts 2.1, 2.2 and 2.4 of the TBT Agreement.[62] Mexico argued that although the United States did not require that tuna that was imported into and sold on the United States market to have a 'dolphin-friendly' label, their labelling conditions were discriminatory and unnecessary.[63] The conditions varied depending on the area where the tuna was harvested, the type of vessel used, and the method of harvesting. In 2009 Mexico requested a Dispute Settlement Panel. The Panel released a report, which both Mexico and the United States appealed.

The Appellate Body held that the labelling was in contravention of the MFN principle and national treatment rules as provided under art 2.1 of the TBT Agreement.[64] The Appellate Body first established that the labelling requirements were mandatory and therefore were a "technical

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[59] In 1993 the EU replaced the EC. It took over all its rights and obligations. The EC originally referred to the EEC, European Atomic Energy Community (Euratom), and the European Coal and Steel Community (ECSC): "FAQ: European Union - European Community - European Communities" (2014) Council of the European Union <consilium.europa.eu>.

[60] Michael Weinstein and Steve Charnovitz "The Greening of the WTO" (2001) 80 Foreign Affairs at 147.

[61] *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products.*

[62] See generally, Dolphin Protection Consumer Information Act 16 USC §1385;
Dolphin−safe labelling standards 50CFR § 2.16.9; Dolphin−safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels 50CFR § 216.92; *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

[63] Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, at [407].

[64] At [181].

regulation" under the TBT Agreement.[65] It held that imported and domestic tuna were "like" products, and that the requirements resulted in "less favourable" treatment of imported products.[66]

Having established that the United States was in breach of the non-discrimination obligation in art 2.1, the Appellate Body held that the labelling requirements were more restrictive than necessary in their quest to protect dolphins, and that they were not applied in an even-handed manner.[67] The Appellate Body established that technical regulations cannot be enforced in a way that will modify the conditions of competition. Their report makes it clear that it was not the objective of the United States that was objectionable, but rather the discriminatory means by which they were pursuing it.

The trilogy of the *Tuna – Dolphin* cases demonstrates that it is difficult for countries to encapsulate concerns of consumers in trade actions. This may not be a shortcoming of the WTO's covered agreements, but rather a consequence of governmental policies failing to foster ethical concerns in a way that is in line with their WTO obligations. It is clear that the WTO does not aim to eliminate ethical considerations from the realm of trade. It provides relatively clear pathways for Member States who wish to discriminate on the grounds of ethics to follow. However Member States, the United States in these cases, do not seem to be following the guidance provided in the WTO's covered agreements. Often where the WTO appears to be an obstacle to ethical trade, it is in fact an issue of Member States either failing to take any ethical action, or, as in the *Tuna – Dolphin* cases, doing so in way that is inconsistent with the WTO's covered agreements.

3. Shrimp – Turtle

Turtles are often a bi-catch of fishing. The United States Endangered Species Act of 1971 provides that United States shrimp trawlers must use turtle excluder devices in their nets when they are used in areas where it is significantly likely that there will be turtles.[68] In an attempt to encourage the global protection of turtles, in 1989 the requirements of the Endangered Species Act were extended to prohibit the importation of commercially harvested shrimp and shrimp products in a way that may adversely affect sea turtles.[69]

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[65] Appellate Body Report, *US – Tuna II,* above n 63, at [194–95].

[66] At [231].

[67] Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, at [292-293].

[68] The US Endangered Species Act of 1971, s 609.

[69] s 609(b).

The case of *Shrimp – Turtle*[70] arose in 1997 when India, Malaysia, Pakistan and Thailand claimed that the United States was acting in contravention of arts XI and III(4) of the GATT 1994, and that its measures were not justified under art XX.[71]

Contrary to the Panel, the Appellate Body held that the requirements under s 609 were a measure concerning "the conservation of exhaustible natural resources" and thus the United States measure was within the scope of art XX (g).[72] However, although they qualified for provisional justification under art XX(g), the measure failed to meet the requirements of the *chapeau*.[73]

The *chapeau* provides that measures may not be applied to allow "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", or "a disguised restriction on international trade."[74] An analysis of art XX requires a two-tiered approach. In *US–Gasoline* the Appellate Body outlined this approach:[75]

> … In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterisation of the measure under [one of the exceptions]; second, further appraisal of the same measure under the introductory clauses of Article XX.

The Appellate Body held that the ban was applied in a manner that was inconsistent with the *chapeau*.[76] The reasons for this were:

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[70] *United States – Import Prohibition of Certain Shrimp and Shrimp Products.*

[71] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, at [1-11].

[72] At [187(b)].

[73] At [187(c)].

[74] World Trade Organisation Committee on Trade and Environment, (2002) GATT/WTO Dispute Settlement Practice Relating to GARR Article XX, Paragraphs (b), (d) and (g). WT/CTE/W/203 Note by the Secretariat, at 56.

[75] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at [728].

[76] Appellate Body Report, *US – Shrimp,* above n 72, at [187].

(i) Section 609 had been applied without a serious attempt to reach a cooperative multilateral solution;[77]

(ii) the United States had entered negotiations on an agreement concerning sea turtles with some WTO Members before others;[78]

(iii) the phase in period for the use of TEDs was dependent on the countries location, varying between under four months for some Members and three years for others;[79] and

(iv) Section 609 discriminates on non-product-related processes and production methods.[80] The Appellate Body reiterated the Panel's ruling in *United States–Gasoline,* that the *chapeau*, by its express terms, addresses the manner in which a measure is applied rather than its specific contents.[81]

This case emphasised two important points that are often overlooked or misunderstood because the Appellate Body ruled against the United States. First, that countries have a right to protect the environment without it automatically being a contravention of the GATT 1994. Second, that the protection of an animal species can be brought within the scope of art XX. The onus is on Member States to implement such a measure legitimately, that is, in accordance with the *chapeau*.

4. EC – Seal Products

The case of *EC – Seal Products* may radically change the relationship between global animal welfare and international trade law.[82] It is the first case where a Member State has justified discrimination in relation to animal welfare on the grounds of public morality. In fact, it is only the third time that the WTO has dealt with a public morality case. Prior to this case, it has been private entities that have opposed the global abuse of animals for human consumption rather than Member States.

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[77] Appellate Body Report, *US – Shrimp,* above n 72, at [171].

[78] At [172].

[79] At [173-175].

[80] At [115].

[81] Appellate Body Report *United States – Gasoline* above n 75, at [56].

[82] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products.*

Since 1983, the European Union (EU) has expressed concern with the way that seals are killed, and consequently banned certain seal products from entering European markets.[83] In 2010, the EU extended the ban to include all EU seal products, except for those killed in indigenous hunts.[84] In 2012, Canada and Norway challenged the ban on the basis that it breached art I:1 (MFN) and III:4 (national treatment).[85] Surprisingly, the EU did not argue that the ban was justified under art XX as necessary to protect human, animal or plant life or health,[86] or relating to the conservation of exhaustible natural resources.[87] Instead they treated it as a public morality case, claiming that the ban was necessary to protect public morals.[88]

The Appellate Body upheld the Panel's decision, that although the ban was justified under art XX(a), it did not satisfy the *chapeau* of art XX.[89] They ruled that the ban exempted produce from Inuit Communities in an ambiguous way.[90] The exception required modification so that it would not operate in a way that amounts to "arbitrary or unjustifiable discrimination".[91]

This ruling has seen the WTO embrace moral pluralism.[92] Emily Rees from the World Society for the Protection of Animals stated that *EC – Seal Products* marks the first time where "the WTO has sent a clear message to governments around the world that moral values on the protection of animals are taken seriously in international trade law".[93] This reflects the idea that it is now more likely that Member States will establish trade embargoes on products that are produced in inhumane conditions, such as most chicken, beef, veal and pork, as well as eggs, dairy products and *foie gras*, on the grounds that it is contrary to public morality. This is because there is now precedent for

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[83] "What the WTO victory means for animal welfare beyond the international seal trade" (10 June 2014) International Fund for Animal Welfare.

[84] Alexander Gillespie *Conservation, Biodiversity and International Law* (Edward Elgar Publishing Limited, Cheltenham, 2011) at 151.

[85] Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, at [1].

[86] GATT 1994, art XX para b.

[87] GATT 1994, art XX para g.

[88] GATT 1994, art XX para a; Appellate Body Reports *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* at [5.167].

[89] At [5.328].

[90] At [5.337].

[91] At [5.328].

[92] Roger Alford "Morality Play at the WTO" (5 December 2013) Opinio Juris <opiniojuris.org>.

[93] "Animal Welfare Not a Trade Barrier says WTO in EU Seal Case" *International Fund for Animal Welfare* (online ed, 25 November 2013).

justification under art XX(a). It will also be easier to discriminate on the grounds of animal welfare as under Article XX(a) as there is no requirement to prove risk associated with the measure, unlike arts XX(b) and (g).[94]

There are some import restrictions made on the grounds of public morals that go uncontested. These include the ban on pork in Pakistan, beef in Nepal, and bikini swimsuit calendars in Vietnam.[95] These bans are uncontested because they reflect a deeply entrenched moral opposition to the products subjected to the ban. Other countries also recognise that these objections are genuine and ought not to be the subject of trade disputes. This differs from the inhumane killing of animals such as seals, because much of society is not aware of the involved atrocities, and thus opposition has not had a chance to become deeply entrenched in society. Other animal welfare cases may be even less well-known than seals, and therefore increasingly difficult to justify as contrary to public morals. On the other hand animal welfare atrocities may be far more well known, like the treatment of battery hens, but considered not averse to public morals as they are consumers' poultry of choice.

Now that it has been established that Member States *can* in certain situations restrict trade on the grounds of promoting animal welfare without contravening international trade law, it is a question of *will* Member States use this ruling to remedy animal welfare. If Member States do exercise their new ability, then private entities will have less of a gap to fill in regard to protecting animal welfare. If they do not, it is likely their position will carry on much the same, and that WTO will be accused of neglecting animal welfare.

5. Summary

Although it may appear at first glance that the WTO is striking down environmentalism and animal welfare, as Professor John Jackson of the Georgetown University Law Centre said in regard to environmentalists, they may have "lost the battles but [have] won the war".[96] The WTO provides a framework that allows Member States to pursue the protection of the environment and animals, and Panel and Appellate Body decisions have made it explicit that the WTO supports environmental advances made in accordance with this framework. However Member States are failing to do so,

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[94] Duane W. Layton and others "WTO Appellate Body Finds "Public Morals" Exception for Trade Restrictions Includes Animal Welfare" (2014) Mayer Brown <mayerbrown.com>.

[95] Kevin Amirehsani "EU seal case adds new protectionism to WTO" Global Risk Insights (8 June 2014) <www.globalriskinsights.com>.

[96] Weinstein and Charnovitz, above n 60, at 147.

and their failings are misunderstood by most consumers to be the failings of the WTO.[97] The actions of Member States suggest that they are primarily concerned with their own national welfare and how to maximise it.[98]

G. Ethical areas that have not been the subject of WTO disputes

1. Human Rights

When it comes to the promotion of human rights in the supply of foodstuffs, the WTO has been termed a "veritable nightmare".[99] In accordance with the Universal Declaration of Human Rights, human rights encompass both civil and political rights, and economic, social and cultural rights. In seeking ethical products in regard to labour rights, consumers demand products that have been made that uphold those rights.

Labour rights are almost absent from the WTO; there are only a limited number of instances where they have been acknowledged. First, art XX(e) of the GATT 1994 provides a general exception for measures taken that exclude imports of the products of prison labour, however this originates from a United States law drafted in 1890 and so is somewhat out of date.[100]

Second, in Singapore in 1996, WTO Members addressed the issue of labour rights, at their first ministerial meeting in art 4 of the Ministerial Declaration.[101] Article 4 provides:[102]

> … We renew our commitment to the observance of internationally recognised core labour standards. The International Labour Organisation (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalisation contribute to the promotion of these standards. We reject the use of

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[97] Weinstein and Charnovitz, above n 60, at 147.

[98] Tracey Epps and Andrew James Green *Reconciling trade and climate: How the WTO can help address climate change*. (Edward Elgar Publishing Limited, Cheltenham 2010) at 22.

[99] See for example, Oloka-Onyango and Deepika Udagama *Globalisation and its impact on the full enjoyment of human rights*, ESCOR, 52, E/CN.4/sub.2/2000/13 (2000) (preliminary report submitted in accordance with Sub-Commission Resolution 1999/8) at [15].

[100] Craig VanGrasstek *The History and Future of the World Trade Organisation.* (Atar Roto Presse SA, Geneva, 2013) at 557.

[101] Singapore Ministerial Declaration (Adopted on 13 December 1996) World Trade Organisation, at [4].

[102] At [4].

> labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration …

However, the use of the terms "observance" and "recognition" do not impose any meaningful duty for Member States to further labour standards, causing the art 4 to lack any real strength. And given it is a Ministerial Declaration, it is not a binding agreement. It can therefore be concluded that labour rights are *effectively* excluded from the WTO's covered agreements.

Since the Ministerial Conference of the GATT in Marrakesh in April 1994, where Member States signed the Agreement Establishing the World Trade Organisation, there has been some attempt to initiate a labour rights movement within the WTO. In May 1998 at the second Ministerial Conference in Geneva, the then United States President Bill Clinton put forward the idea of a forum to allow business, labour, environmental and consumer groups to advise the WTO. Then, in 1999 at the third ministerial conference in Seattle, the United States and EU suggested a WTO-ILO forum. Since the 1994 conference neither have come to fruition.

The WTO appears to seek the enhancement of labour rights through the effects of liberalisation of trade, rather than through its covered agreements. The WTO operates on the premise that the freedom to trade is a fundamental right that will lead to greater financial prosperity. Heightened prosperity will enable respect of the rights of people at all stages of the supply-chain.[103] James Bacchus, who held the position of Chairman of the Appellate Body of the WTO from 2001–2003, captures the correlation between liberalised trade and the greater human rights:[104]

> … Trade is a means to all the many ends of human freedom. Trade is a means of making more choices available to more people so that they can make more personal choices about how they wish to live. Freedom is about choice. Freedom is about choosing. The equation between trade and freedom is this. More trade equals more choices equals more freedom … By dividing our labour, by creating an ever-widening and ever deepening *international* division of labour through world trade, we are establishing an economic foundation for uniting all the world in the deliberate life of freedom …

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[103] Robert D. Anderson and Hannu Wager "Human Rights, Development, And The WTO: The Cases Of Intellectual Property And Competition Policy" (2006) 9(3) Journal of International Economic Law 707.

[104] James Bacchus "Thoreau's Pencil: Sharpening Our Understanding of World Trade" (2003) 30 Fla. St. U. L. Rev. 911 at 917.

It is important to note that while the WTO has taken the angle of liberalisation of trade as opposed setting human rights standards, the WTO's covered agreements do not prevent voluntary labelling schemes indicating to customers that certain labour rights have been adhered to. Considering that the *EU – Seal Products* has shown that measures taken to protect animal welfare can be necessary to protect public morals, it is possible that trade measures based on human rights, including mandatory standards, could also be justified under art XX(a). However, such a case has not yet been brought before a WTO Dispute Panel. The reason for this could be that while animal suffering is universal, poor working conditions are more typical in developing countries, and comprise part of their comparative advantage. If a measure based on labour rights took away the comparative advantage of some States, despite satisfying art XX(a), it is likely to be considered unjustifiably discriminatory and fail a *chapeau* analysis.

Another reason for the lack of WTO disputes on the grounds of labour rights could be that Member States simply do not want to attempt to respond to consumer concerns regarding human rights regardless of international trade law. Despite this being a more distressing reason, the outcome is the same. The private sector rather than the WTO responds to consumer preferences for the production of goods that uphold 'ethical' labour rights.

Chapter II: The Private Sector

The private sector falls outside of the scope of the WTO's covered agreements, and thus operates in an effective power vacuum. The way private entities use this freedom can result in the creation of effective trade barriers, and leaves aggrieved parties with no available avenue for redress.

The separation of the private sector and the WTO has some positive effects. Private entities often fill gaps left open by Member States in a bid to respond to consumers' ethical concerns. They play a large role in fostering human rights, environmental protection and animal welfare, which have already been established as the cornerstones of ethical production. However, because of the lack of legal regulation, private entities also have a negative effect on trade and ethical production, other than that of creating effective trade barriers. Because of its negative ramifications, action needs to be taken to regulate the private sector's seemingly unfettered power.

A. Private entities

A private entity is any entity that is not a part of any government. This includes corporations, and nonprofit organisations that will be referred to as NGOs. This dissertation will focus mainly on retailers, namely supermarkets, and their relationship with consumers; companies who are involved in the supply of foodstuffs; and NGOs and their lobbying power.

B. Private standards

The WTO has not yet defined private standards. The Sanitary and Phytosanitary (SPS) Measures Committee has sought to negotiate a working definition without success.[105] A private standard is generally understood as a standard set by an organisation other than a public body. Unlike public standards, private standards are voluntary. They are not legally required to be met. However when a private entity such as a retailer requires suppliers to fulfil certain private standards to supply their product, they become effectively mandatory.

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[105] See "Members take first steps on private standards in food safety, animal-plant health" *World Trade Organisation* (online ed, 30 and 31 March 2011), see also, "Members to try new approach for defining private sanitary-phytosanitary standards" *World Trade Organisation* (online ed, 25 and 26 March 2014).

Private standards can be individual company or collective private-sector standards, and can be national, regional or international.[106] Because there is no international agreement regarding private standard schemes, there is nothing legally limiting their creation, which has resulted in a proliferation of schemes.

There are three ways to verify that a standard has been met. The Food and Agriculture Organisation of the United Nations defines these as:[107]

- first-party certification: by which a single company or stakeholder group develops its own standards, analyses its own performance, and reports on its compliance, which is therefore self-declared;
- second-party certification: where an industry or trade association or NGO develops standards. Compliance is verified through internal audit procedures or by engaging external certifiers to audit and report on compliance; and
- third-party certification: where an accredited external, independent, certification body, which is not involved in standards setting or has any other conflict of interest, analyses the performance of involved parties, and reports on compliance.

Third party verification is known as certification. Certification demonstrates to the buyer that the supplier complies with certain standards, free from the risk of internal bias, which can be more convincing than if the supplier itself provided the assurance.

Globalisation has caused many supply chains to become longer and more complex, which has increased demands for certification. Foodstuffs may be harvested or farmed at one location, transported to various different sites to be processed and packaged, before reaching a retailer. This chain involves a myriad of people and thus a multitude of ethical elements to be considered and respected.

C. The laws applicable to private entities

[106] Sally Washington and Lahsen Ababouch *Private Standards and Certification in Fisheries and Aquaculture* (Rome, Food and Agriculture Organisation of the United Nations, 2011) at 139.

[107] At 10.

While Member States are both empowered and limited by the WTO's covered agreements, private entities are not. They are not required to respect the principles or rules set out in its covered agreements, nor can they seek redress through its dispute resolution mechanisms. Thus, private entities largely fall outside the scope of international trade law. This allows them to take actions that, if taken by Member States, would violate international trade rules. The lack of legal regulation allow private entities to control the shelf access of products on the grounds of the how they were produced. The exponential growth and power of private entities means that a private entity's buying policy can effectively create barriers to trade. Where an entity's buying power is significant enough, it can effectively restrict market access to a country for a particular product, thus potentially having as much power as a Member State and therefore as large an effect as a State enforcing a trade restriction. For example, in France in 2012, five supermarket companies held 74.7 per cent of the market share.[108] If these supermarkets were to require that all wine was certified 'bio', it would create an effective trade barrier for countries exporting uncertified wine. Similarly, if they were to require all cheeses to be sourced domestically, this would create an effective trade barrier for all other countries exporting cheese.

A private entity's 'freedom' from international trade law is not absolute. Although the WTO's covered agreements do not define the scope of acts and admissions attributable to Member States, recommendations and rulings of the DSB provide some guidance.[109] WTO and GATT panels have referred to the International Law Commission Articles on State Responsibility of which Article 4 provides that the conduct of governmental organs, persons or entities is attributable to the State when they are acting as an agent of the State. That is, acting under its direction, instigation, or control.[110] Also, in the case of *Japan – Film* the Panel recognised that the WTO's covered agreements do not deem all acts of private parties as non-governmental and thus outside of the scope of the GATT 1994.[111] In *Korea – Various Measures on Beef* the actions of retailers were

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[108] "French Market (2013) Access 6 Food & Drink Programme < http://www.access6.eu/>.

[109] Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998 (*Japan – Film*) at [10.56], see also [10.54 – 10.55].

[110] *State Responsibility; Draft articles on responsibility of States for internationally wrongful acts* [2001], vol 2, pt 1 YILC 26 at [76]

[111] Panel Report, *Japan – Film* above n 109, at [10.56].

attributed to the Korean government as through domestic law the government had encouraged retailers to act in a way that was inconsistent with WTO obligations.[112]

In the case of *Argentina–Hides and Leather* the panel affirmed that each case turns on its own facts, but it is possible that if there is sufficient governmental involvement or incentives in the conduct of a private entity, then it may be attributable to a Member State.[113] The Panel held that art XI:I should extend to restrictions that are of a *de facto* nature. However, the Panel held that Member States were not required under Article XI:I to prevent private cartels or other trade restrictive behaviour of private entities.[114]

In circumstances where a private entity's act or omission is attributable to a State, it will still be the Member State rather than private entity that will be the brought before a WTO Dispute Settlement Body. Thus private entities can still operate without the concern of international legal ramifications.

1. Saint Vincent and Grenadines, and EUREGAP

This dispute not only demonstrates that private entities can affect trade in an analogous way to Member States, but also that often they may be acting as a *de facto* governmental-entity. In 2005, supermarket chains in the UK decided to only stock fresh produce that had been certified by EUREGAP.[115] For countries whose producers did not have EUREGAP certification, this private standard became an effective barrier to trade as it restricted shelf access.

Saint Vincent and Grenadines, who were supported by Jamaica, Peru, Ecuador, and Argentina, expressed concern before the WTO about the detrimental effect the requirement was having on their banana exports. The EC argued that EUREGAP was a private entity and not a body of the EC, and therefore the measures it was taking were outside its control. Peru and Mexico raised the issue of

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[112] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, above n 15, at [16], [17]; See also, Samir R. Gandhi "Voluntary Environmental Standards: The Interplay Between Private Initiatives, Trade Rules and The Global Decision-Making Processes" (paper presented at the 3rd Global Administrative Law Seminar, Institute for International Law and Justice, New York School of Law, June 2007) at 14.

[113] *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather;* Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, at [11.18].

[114] At [11.18], [11.19].

[115] EUREGAP is now called GLOBALG.A.P. It is a private consortium that sets voluntary standards for the certification of agricultural products, with the aim of encouraging safe, and sustainable agriculture: "Who We Are" (2014) GlobalGAP <www.globalgap.org/uk>.

the interpretation of the WTO's covered agreements, primarily the SPS Agreement. Consequentially in 2005 the SPS committee discussed private standards.

Article 13 of the SPS Agreement provides that "non-governmental entities" must comply with the Agreement. However what constitutes as a "non-governmental entity" is not defined by the Agreement nor has it been defined by any WTO body. This is analogous to the TBT Agreement which includes non-governmental entities without defining the term. Therefore, a conclusive definition under one of the Agreements would likely be used to interpret the other in order to achieve consistency. This would bring radical change within the private sector.

In the course of SPS discussions, Argentina stated:[116]

> If the private sector was going to have unnecessarily restrictive standards affecting trade and countries had no forum where to advocate some rationalisation of these standards, twenty years of discussions in international fora would have been wasted.

This emphasises the view of some Member States that under the SPS Agreement governments should be somewhat responsible for the actions of their private entities. However Member States have also acknowledged that private standards can encourage improvement that can lead producers to gain access to high-quality markets.[117]

Despite the negotiations that ensued the EUREGAP controversy, the matter has not been resolved. The debate is still a live issue in WTO negotiations, as well as in other organisations such as the Organisation for Economic Co-operation and Development, the World Bank, the United Nations Conference on Trade and Development and the EC.[118]If negotiations result in governments having responsibility for private entities under the SPS Agreement, it would be an anomaly for them not to have an equivalent responsibility under the GATT 1994 and TBT Agreement. The confusion surrounding the SPS Agreement is true of the others. A change of the scope of one Agreement is likely to result in change for all.

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[116] World Trade Organsiation, Note by the Secretariat G/SPS/R/37/Rev.11 (18 August 2005) (05-3684) Committee on Sanitary and Phytosanitary Measures "Summary of the meeting held on 29-30 June 2005" at [20].

[117] Christiane Wolff "Private standards and the WTO Committee on sanitary and phytosanitary measures." 2008 Conf. OIE (paper presented at the OIE (World Organisation for Animal Health) Conference, 2008) at 89.

[118] "WTO/SPS Private Standards" (2009) European Union <www.ec.europa.eu>.

D. The relationship between consumers and private entities

The relationship between retailers and consumers has become increasingly proximate as a result of the technological boom that has occurred during the 21st Century. The creation of 'applications' has revolutionised how businesses operate.[119] Instead of catching taxis, people cut out the middle man and 'uber' or 'lyft'. When seeking accommodation, holiday makers avoid paying a premium and use 'airbnb' over traditional hotels and motels. These startups demonstrate the way in which retailers can provide consumers with exactly what they want and need. Technology also allows a consumer's *individual* preferences to be accommodated, for example businesses send personalised alerts and messages to customers. It is simple: more is expected from retailers, and more can be provided by them. More power is in the control of the consumer than in the past, when retailers were in the position of dominance and governed pricing and distribution. In a quest to survive in the technological world, where social media provides instantaneous feedback to retailers, retailers seek to fulfil consumer concerns. Regarding consumerism, the primary power relationship has shifted from being between the State and its citizens, to between retailers and its consumers.[120]

E. What private entities are doing that States are not

Private entities are responding to consumers' ethical concerns because Member States are either not able to, or are not willing to. NGOs have developed certification schemes to allow retailers and consumers to distinguish products on the grounds of how they were produced. There are many instances where private entities have been successful in encouraging ethical production.

1. Human Rights

Many private entities discriminate against goods produced in disregard of human rights. NGOs have developed certification schemes to allow retailers and consumers to do so.

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[119] Charles Arthur "The History of Smartphones: Timeline." *The Guardian* (online ed, 24 January 2012).

[120] "Retail Trends and Predictions 2014 | 12 Retail Trends And Predictions To Watch For" (2014) Vend <vendhq.com>.

Fairtrade Labelling Organisation International (FLO) is the main certification programme that deals with the labour rights of workers at the beginning of the supply chain of a product. To obtain FLO certification, organisations need to fulfil an array of criteria at different stages along the supply chain. Criteria cover farm size, democracy for all workers, management of the Fairtrade premium, freedom of association and collective bargaining, and working conditions.[121] The WTO's covered agreements do not require Member States to fulfil such detailed criteria.

The SA8000 standard is another certification standard that is establishing its place in the market.[122] SA8000 is the central document of Social Accountability International. It sets standards based on the Universal Declaration of Human Rights, conventions of the ILO, UN and national law.[123] The SA8000 advisory board is diverse, comprising of representatives from and array of NGOs including Amnesty International, Care International, international trade unions, and corporations such as Dole and Coop Italia.[124] Under the standard, a company must meet criteria in nine areas to obtain SA8000 certification. Like FLO, the extent to which this NGO goes in an effort to further human rights far exceeds that of the WTO.

An example of the success of SA8000 has had in promoting human rights is that of Chiquita, one of the largest international banana brands. In 2008, it obtained SA8000 certification for all of its plantations.[125] Chiquita's stance is revolutionary for the industry, given that banana growing is renowned for its poor labour standards. It illustrates the power private entities have, and the change they can facilitate.

2. Environmental and Animal Protection

The Appellate Body in the *Shrimp – Turtle* made it clear that environmental protection is a legitimate pursuit under the GATT 1994. Despite this and the myriad of environmental agreements between countries, there will always be gaps in the pursuit of environmental protection. Private entities have emerged in the realm of environmental and animal protection to fill these gaps.

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[121] "Our Standards" (2011) Fairtrade International <fairtrade.net>.

[122] Singer and Mason, above n 5, at 145-146.

[123] "SA8000 Standard" (2014) Social Accountability International <www.sa-intl.org>.

[124] Singer and Mason, above n 4, at 145-146.

[125] At 146.

A predominant private standard is the Marine Stewardship Council which was founded by the 'World Wide Fund for Nature' (WWFN) and Unilever. It is a private non-profit organisation that promotes sustainable fishing practice. It certifies groups at different parts of the supply chain, from fisheries to producers to retailers.[126]

Sainsbury's is the leading UK retailer chain of canned tuna. In 2010 they decided to sell only pole and line caught skipjack or Marine Stewardship Council certified tuna. It experienced a 15 per cent growth of canned tuna sales in the fourth quarter of 2010, which it attributed to the ethical change. Sainsbury's is one of the four main retailers in the UK, each of which are highly competitive. Somewhat predictably, following the success of Sainsbury's, competitors Tesco, Asda and Morrison's followed their lead, and have committed to phasing out tuna caught by purse seine. Slightly smaller, but still significant, retailers Marks & Spencer (Marks) and Waitrose have also done so.[127] Sainsbury's alone has enormous trading power, in 2013 its annual underlying profit before tax was GBP 756M.[128] This level of concentrated power and the 'copy-cat' behaviour that follows, enables retailers like Sainsbury's and NGOs like the Marine Stewardship Council to combine forces to create significant ethical change and concurrently affect trade.

3. Reformulating business policies

For a government to align *all* of their trade policies with consumers' ethical concerns, would be impossible. On the other hand, retailers can completely reformulate their business policies in a way that can have a significant effect on trade. Some retailers have completely changed their business policies, raising awareness that holistic ethical production is attainable and feasible.

For example the British retailer Marks is renowned for ethical discrimination. In 2007, Marks launched 'Plan A', which set out 100 commitments it aimed to achieve in 5 years, covering climate change, the protection of natural resources, health and wellbeing, waste management, and fair management. In 2014 it released 'Plan A 2020', which has the overarching goal of becoming the most sustainable major retailer internationally.[129] Mike Barry, the director of Plan A, states that

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[126] "What We Do" (2014) Marine Stewardship Council <www.msc.org>.

[127] Green Peace International "Changing Tuna: How The Global Tuna Industry Is In Transition To Sustainable Supply" (2012) Amsterdam: Green Peace International, at 1-44.

[128] J Sainsbury plc, (2013). Annual Report and Financial Statements 2013, at 1.

[129] Marks & Spencers, (2014). Plan A Report 2014, at 3.

Marks has developed their plans because they believe it is what consumers want. He is justified in saying so; in 2007 Marks had received over 190 awards for their 'ethical efforts'.[130]

Marks has 1,253 stores worldwide, 3000 suppliers, 33.6 million British customers and 85,831 employees worldwide.[131] In 2013 the British chain held 3.5 per cent share of the British grocery market.[132] Because of their concentration of power, and their aim to inspire other businesses to respond to their consumers and to develop ethically, Marks's radical and progressive policies impact on trade. Goods that do not meet their ethical criteria are excluded from the market, and consequently suffer from a lack of shelf space.[133]

F. Problems with the private sector

The growth of ethically motivated standards and policies in the private sector reflects the drive of private entities to respond to consumer preferences. This appears to be a positive trend, however there is a plethora of issues with the freedom they currently enjoy. As established, measures taken by private entities are having an exclusionary effect on certain products. There are also legitimacy issues surrounding the way in which private entities have employed the use of certification.

1. Certification

Certification is a tool that should provide transparency along the supply chain, enabling consumers to make educated assumptions as to how a product has been produced before purchasing it. However, the reliance consumers put on certification can be dangerous. Certification can be deceptive and misleading.

i. Inconsistencies

The certification process itself is often disjointed, and can be as fragmented as the supply chain it is certifying. For example the United States Department of Agriculture (USDA) sets the standards for its certification scheme but does not carry out the certification. Certifiers differ from state to state,

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[130] Marks & Spencers, (2014). Plan A Report 2014, at 40.

[131] At 2.

[132] Alex Lawson "Marks & Spencer records rise in food sales" (25 September, 2013) <retail-week.com>.

[133] See for example, Marks & Spencers, above n 114, at 12.

which results in different interpretations of the standards and thus a huge variety in what is being certified as meeting the same standards.[134]

There are cases where producers are certified for standards they simply do not meet. In an interview with a USDA certified cage-free organic hen farmer, the farmer openly admitted that his farming no longer fits the requisite standards. He had not lost his certification as the certification inspectors simply did not seem to mind.[135] Financial considerations may contribute to this situation, as to become a certified producer, one must pay a premium. The cost of becoming USDA Certified costs anywhere from a few hundred to several thousand USD.[136] If the inspectors were not so nonchalant about his breaches of standards, this farmer would likely look elsewhere for certification, meaning the USDA would suffer a financial loss. Therefore, to purchase certified products can sometimes fund corrupt businesses and incompetent systems, rather than support ethical production.

ii. Ambiguity

Some certification schemes are so ambiguous that they appear to lack legitimacy. Take, for example, the United States certification programme 'United Egg Producers' (UEP). In 2002 UEP set standards it claimed were for animal welfare. These standards allowed barren battery cages, beak searing and forced moulting through starvation.[137] They made no improvement to the well being of hens, but instead certified the atrocities that were occurring as animal friendly. Faced with the threat of legal action for misleading conduct, the UEP eventually changed their 'United Egg Care Certified' label to read 'United Egg Certified'. Literally their certification is accurate, the eggs they certify are eggs. However, such a certification is trivial, and it is likely consumers would interpret the label as meaning that their eggs have been produced with some respect being paid to animal welfare, especially given that UEP is known to be in charge of setting animal welfare standards. Furthermore, it is unlikely that consumers will notice the slight change in wording when visually the label is unchanged. Hurried shoppers generally reach for what they recognise, without examining products to see if they have undergone any slight change, or keeping up to date with any change in criteria. The UEP demonstrates that some certification schemes are not furthering ethical production but still survive in the market.

iii. Incompleteness

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[134] Singer and Mason, above n 5, at 92.

[135] At 93.

[136] "Farmers Market Growth" (8 May 2013) United States Department of Agriculture, Agricultural Marketing Service <ams.usda.gov>.

[137] Singer and Mason, above n 5, at 94.

Many certification schemes do not set standards that cover all of the production process. This effectively certifies the entire process, including whatever happens outside of the given standards. For example, certifying eggs as free range, does not take into consideration a hen's life after she stops producing. Regardless of whether hens have lived 'free range' or 'battery' lives, they need to be killed. This process falls outside certification schemes. In most cases, the process is indisputably cruel.[138] Another part of the egg producing process is disposing of male chickens. This too falls outside of the certification scheme. The male chicks do not make it to a slaughterhouse. In general, producers get rid of the live birds by throwing them in dumpsters, gassing them, or putting them through a grinder.[139] This level of inhumanity is unlikely to be what consumers are imagining as they buy their free-range eggs. Lack of detail in the certification process thus detracts from its transparency, and hinders consumers from promoting the ethical production they desire.

While certain aspects of the certification process are not detailed enough, others are the opposite. Some aspects are so exact that many producers are excluded from certification despite fulfilling other elements of the certification scheme and adhering to the overall purpose. Some certifiers seem to have lost sight of the purpose of ethical production. Take for example, FLO. Despite being heralded as a success story, it has its shortcomings.[140] Only small growers who do not rely on permanent hired labor and belong to democratically run cooperatives qualify for certification. Private estate farmers and multinational companies cannot obtain FLO certification, even if they meet the ethical criteria, such as providing workers with fair wages and working conditions, helping develop environmentally sustainable and organic produce, and helping strengthen the facilities in the communities of their farmers.[141] This does not encourage companies to expand their ethical actions or encourage others to do the same. Nor does it provide consumers with fair or accurate information. FLO, amongst others, is shifting the focus from outcome to process, showing a lack of perception that the same outcomes are often met through different means.

iv. Enforcement

Private entities will often make decisions in response to consumer concerns without consulting outside their organisation. The voices of those ignored or dismissed are generally those whose mode of production will be affected the most by decisions. For example, when a supermarket decides it

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[138] See for example L. Parascandola "Poultry Slaughter: The Need for Legislation" (2011) United Poultry Concerns <http://www.upc-online.org> at 1-8.

[139] At 5.

[140] Partnerships Resource Centre" (2011) Partnerships Resource Centre <partnershipsresourcecentre.org>.

[141] Colleen Haight "The Problem with Fairtrade Coffee" Stanford Social Innovation Review (online ed, Summer 2011).

will only stock sustainably sourced seafood, their suppliers may not be consulted first. Therefore the retailer may not accurately ascertain how much time suppliers will need to change their practice. Other suppliers who may not be able to comply with the standards may not be given a reasonable amount of time to look for alternative outlets. Such a situation is analogous to the measures taken by the United States in the *Shrimp-turtle case*. However, given it concerns private entities not Member States, it is not legally actionable.

v. Costs

The costs of certification are two fold. First, the requirements that private entities demand of producers may require greater expenditure from them. Producers from developing countries will often not be able to afford the costs to change their method of producing. On top of this, there is the cost of the certification itself. Even if producers would be likely to make their money back through the certification scheme over time, the startup costs can be unaffordable or simply daunting. To become FLO certified, the initial certification fee ranges from EUR 1,430.00 for producers with under 50 Members to EUR 3,470.00 for producers with over 1000 Members. In addition to this there is a EUR 535 application fee. This cost needs to be paid before the initial audit, which gives the application an element of risk. Once a producer is certified, annual fees of between EUR 1,170.00 and EUR 2,770.00 follow. These are the basic costs, and additional costs are required should a producer have a secondary product, or additional entities. [142] Because of the high costs that can come with certification, many producers from developing companies are excluded from the market. Not only is this discriminatory with the effect of creating effective trade barriers, but it also distorts market competition.[143]

There is a multitude of analogous certification schemes. Different certifications are required by different retailers. Take for example sugar. In 2010 there were over 50 global, transnational, public and private certification schemes and standards.[144] There are not always umbrella schemes that recognise that different certifications ensure corresponding production. Thus producers may be required to pay for different certifications with equivalent standards in order to supply their products to various retailers.

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[142] "Fee System Small Producer Organisation, Explanatory Document"(2014) FLO <www.flo-cert.net>.

[143] Arkady Kudryavtsev "Private Standardisation and International Trade in Goods: Any WTO Law Implications for Domestic Regulation?" (paper presented to the Society of International Economic Law (SIEL), 3rd Biennial Global Conference, June 11, 2012).

[144] Veiga, J.P. and Rodrigues, P.C. Certificação social e ambiental: arranjos institucionais e impactos sobre as commodities brasileiras, Breves Cindes 34, August 2010. (translation: Social and Environmental Certification: institutional arrangements and impacts on Brazilian commodities).

vi. Buy Local

In response to globalisation and a lack of transparency in the food sector, there is currently a movement towards buying locally. In 2013 there were 8,144 listed farmers markets in the United States, a rapid increase since 1994 where there were only 1,755.[145] Buying locally supports ethical concerns by strengthening the local economy, supporting endangered family farms, and protecting the environment.[146] However the consequences of buying locally do not stop there.

Private entities are tapping into this consumer concern to compete with smaller startups and markets. In doing so, they can cause effective trade restrictions. For example, in February 2014, the initiative 'Buy Australia' was adopted by private retailers. The campaign was started by the not-for-profit *public* company Australian Made Campaign Limited, promoting consumers to purchase Australian-made goods. However, it was Australian *private* retailers that were responsible for the effective trade barriers that ensued.

New Zealand stockists claimed that Australian supermarkets Coles and Woolworths were endorsing the campaign to such an extent that foreign tenders were excluded from the market.[147] The New Zealand producer Talleys had 50 products removed from shelves, of which 40 were replaced by Australian products.[148]

Coles and Woolworths comprise 80 per cent of the Australian retail market, thus New Zealand exporters faced a severe blow to their exports.[149] However, their actions were not 'illegal' under the WTO's covered agreements, nor were they a breach of the Closer Economic Relations (CER) Agreement between New Zealand and Australia. New Zealand Prime Minister John Key stated:[150]

> Even if it's legally not [a breach of CER], it's arguably a breach of the spirit of CER… The whole spirit of CER is an integrated Australasian market, and we feel that the big companies in Australia should actually observe that.

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[145] "Farmers Market Growth" (8 May 2013) United States Department of Agriculture, Agricultural Marketing Service <ams.usda.gov>.

[146] Singer and Mason, above n 5, at 130.

[147] Greg Ansley, Isaac Davison "Australian patriotism alarms NZ exporters" The New Zealand Herald (online ed, Feb 8, 2014).

[148] Jamie Ball "Buy NZ Made hits out at Australian supermarket stance" The National Business Review (online ed, February 5, 2014).

[149] Above n 132.

[150] "Key to address aggressive 'Buy Australia' campaign with Abbott" 3 News/RadioLIVE (online ed, New Zealand, February 6, 2014).

Whether there was a breach in spirit and whether the retailers *should* not have restricted their produce, is irrelevant. The effective trade barrier was a consequence of retailers acting within their rights. The actions of Coles and Woolworths are comparable to those of the Korean government in *Korea – Various Measures on Beef*. Both had the affect of limiting the shelf space available to international produce. However, although the Appellate Body in *Korea – Various Measures on Beef* found that Korea's dual retail system under which imported beef could only be sold in specialised stores was in contravention of the GATT 1994, in the case of the Australian supermarkets there was no legal redress available to New Zealand producers.[151]

[151] "Korea – Measures Affecting the Importation of Bovine Meat and Meat Products from Canada" (2014) World Trade Organisation <www.wto.org>.

Chapter III: The future of private entities, private standards and the WTO

The future of the private sector in relation to the WTO is unclear. The inconsistencies in the way that Member States and the private sector can respond to consumer preferences needs to be dealt with. The question is how.

A. What should be done?

1. Bring private entities under the framework of the WTO

Since the GATT 1994 and the TBT and SPS Agreements were drafted, both the market power held by private entities and the ethical concerns of societies have changed. The WTO's covered agreements need to respond to this change. Change needs to come in two forms. First, provisions such as the exceptions provided by art XX of the GATT 1994, which have not changed since 1947, need to be updated.[152] Secondly, in response to analogous trade power held by private and public entities, the private sector should be brought within the scope of the WTO.

The inconsistent treatment of trade measures taken by the government and those taken by private entities is unsatisfactory. Private entities are filling the gaps that are left open by Member States, not because the WTO prohibits Member States from responding to consumer concerns but because Member States are allowing them to exist. Given that the WTO's covered agreements provide for respect and responses to ethical concerns, private entities could still fulfil their objectives if they were brought within the realm of the WTO. However they would have to do so in a way that would not hinder the free and fair flow of trade between nations.

The TBT Agreement's Code of Good Practice provides a potential pathway for Member States to bring claims against other Members for the actions of private entities in specific circumstances through the inclusion of "Non-Governmental Bodies".[153] However this Code has not been successfully utilised to seek redress for non-compliance. It seems that radical and explicit changes to all of the WTO's covered agreements are needed to overcome the ideology that the WTO is exclusive to actions taken by Member States.

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[152] VanGrasstek, above n 100, at 557.

[153] TBT Agreement, Annex 3.

2. Maintain the desirable aspects of the private entities

The private sector is dynamic and progressive. Private entities have the capacity to promote better practices among producers that lead to higher productivity. This in turn leads to improved market access as producers learn how to satisfy the demands of retailers and customers. Private entities are driven by the desire to respond to consumer preferences, whether it be economically or morally inspired. It is desirable to maintain these characteristics while concurrently bringing them under the WTO.

B. How the actions of private entities could be brought within the scope of the WTO

Two predominant ways to bring the actions of private entities within the scope of the WTO are:

(i) To amend the GATT 1994 and the TBT and SPS Agreements to bring private entities into the same position of public entities. Governments would be required to ensure private entities follow certain rules to enable this to happen.

(ii) For governments to sign an agreement, separate from the current rules, requiring them to use their best endeavours to ensure that private entities follow the relevant rules of the WTO covered agreements.

Regardless of which option is taken, it would need to be decided whether governments would be responsible for:

(i) Entities in their territory; or

(ii) Entities that are owned or controlled by nationals of that country.

The first would allow for situations where for example, the Chinese government would be responsible for the trade polices of a Carrefour in China, despite it being a French owned franchise. The second would make France responsible for the trade policies of a Carrefour Supermarket in China. Both options hold the potential to bring about injustices as different businesses will give countries where their branch is located different levels of control over an entity's trade policies. Governments will always have a certain level of control over entities on their territory as they are subject to domestic laws. For this reason, it is more logical for governments to assume responsibility over entities in their own territory.

C. Preliminary changes

Before changing the scope of the WTO, some pre-existing barriers would need to broken down.

1. The WTO's legislative and judicial functions

Currently, there is a focus on the judicial function of the WTO rather than the legislative function. Member States need to ensure they do not see the WTO solely as a shield or sword, that is, something to defend itself against claims from other Members, or attack other Members' trade action. The WTO provides the forum at which Members can negotiate new agreements or make amendments to existing ones. Members will need to change their perception of the WTO, and focusing on maximising its legislative potential.

2. The WTO's decision-making process

The ever increasing number of WTO members and their diverse nature has not led to a balanced and efficient decision-making process but instead an almost unworkable one.

In recent years there has been a power shift within the WTO. In the years of the GATT, which led up to the creation of the WTO, negotiations were mainly driven by the EU, the United States, Canada and Japan (the Quad).[154] In recent years, Brazil, China, India and Russia (the BRICs[155]) have asserted themselves as active Members in the WTO decision-making process.[156] African countries have also become more engaged in negotiations than in previous years. This spread of power may signal greater equality between Members, but it also makes it hard for any decisions to be made.

The change in power dynamics within the WTO membership has caused the EU and the United States, the BRICs, and the remaining developing countries to express discontent with the WTO. As a consequence, the EU and United States are disengaging from decision-making, the BRICs are

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[154] Amrita Narlikar "New Powers in the Club: The Challenges of Global Trade Governance" (2010) 86 (3) International Affairs 717, at 717.

[155] This term was first used by Goldman Sachs in 'Dreaming with the BRICs: the path to 2050, Global Economics paper no. 99 (New York: Goldman Sachs, Oct. 2003)': Narlikar, above n 154, at 717.

[156] At 717.

adopting a stubborn approach to negotiations, and the developing countries are complaining of marginalisation.[157] These attitudes are fuelling the deadlock of WTO negotiations.

WTO Member States are divided into developed and developing countries. This division is often reflective of their different interests. For example, developing countries such as the BRICs and African countries may find it hard to meet the standards that consumers from developed countries such as the Quad require. Even within the BRICs, there is significant diversity. As a group their interests are far more varied than those of the Quad. Their differences range from their respective economies, cultures, goals, and how they seek to achieve their goals.[158]

The WTO system of decision-making has been described as a "cocktail of rigid rules".[159] One of the fatal ingredients is the WTO's consensus-based system. It does not compliment the current dynamics of the WTO, and is resulting in an incredibly lengthy decision-making process. The most recent round of WTO negotiations, the Doha Development Agenda, was launched in 2001 and has not yet been concluded.[160]

In trade round negotiations, Members do not make decisions on each issue in isolation; instead a package approach is taken.[161] This can result in an agreement that is more beneficial for Members, as they have room to make concessions in some areas, and secure advantages in others. However, it adds to the problem regarding the time taken to complete an agreement.

The decision-making process is riddled with problems, thus it would be useful to revise the processes before attempting to expand the scope of what will come before it. However, this too would take a great deal of time. The dynamics within the WTO's membership have changed without the framework governing decision-making doing the same. The WTO has trapped itself within its own framework in a way that is hindering progression in trade rounds.

D. The problems that would arise and how to deal with them

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[157] Narlikar, above n 154, at 721.

[158] At 721.

[159] Daniel Drache and d Marc D. Froese "Deadlock in the Doha Round: The Long Decline of Trade Multilateralism" (2007) WorldTradeLaw.net <www.worldtradelaw.net>.

[160] "The Doha Round" (2014) World Trade Organisation <www.wto.org>.

[161] World Trade Organisation "Understanding the WTO", above n 2, at 17.

1. A radical change of practice

If the private sector was brought into the realm of the WTO, retailers and certification organisations would need to change their practices. Retailers would need to change the way they select products to sell, and certification organisations would need to change their schemes to cater to the need of retailers not to act contrary to the WTO framework governing non-discrimination. Because of the requisite change, private entities would need legal advice to understand the WTO framework and how to act in accordance with it. There would need to be a lengthy phase-in period to allow private entities to deal with the major changes that would be required of them.

2. An increase in litigation

It is inevitable that there would be an increase of litigation following any change to the WTO's scope. Increased litigation can be seen as a sign of a well-functioning system.[162] However, without engaging in discussion of the veracity of this view, the reality is that the WTO may not be equipped to deal with a potentially drastic increase in the number of disputes.

In dealing with disputes, the General Council delegates responsibility to the Councils for Trade in Goods, Trade in Services and Trade-Related Aspects of Intellectual Property.[163] The Structure of the WTO, as set out under art IV of the Agreement Establishing the World Trade Organisation (the Marrakech Agreement), could be modified to include a sub-body to the Council in Trade in Goods, that deals solely with claims involving governmental responsibility for trade measure taken by private entities. The establishment of a specialised body would counterbalance the increased litigation. It could also deal with publications to educate private entities as to how to abide by their new obligations.

3. Costs for private entities

An increase of litigation results in an increase of costs. To bring a dispute of medium complexity before the WTO costs around USD 500,000.[164] The prospect of paying such costs may encourage governments to discourage private entities to take *any* discriminatory action. Furthermore, it is

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[162] VanGrasstek, above n 100, at 230-231.

[163] World Trade Organisation "Understanding the WTO", above n 2, at 59.

[164] Gregory Shaffer and Hakan Nordstrom "Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure?" (2007) 7(4) World Trade Review 587, at 600.

likely that private entities would be obliged to contribute to litigation costs, otherwise they would have no incentive to fulfil any of their WTO requirements. This would again discourage private entities to respond to consumers' ethical concerns.

The Advisory Centre was established in 2001 to provide legal support for developing countries in order to mitigate the adverse effects litigation costs have on developing countries. The Advisory Centre could be expanded to provide for the increased litigation involving private entities.[165] Awareness that there is a less costly path to litigation could encourage private entities to respond to consumer concerns by discriminating in accordance with the WTO framework. Thus, they would be encouraged to keep their desirable characteristics of being dynamic and progressive.

4. The inclusion of small retailers

Small retailers with an insignificant market share would also be subjected to the WTO framework. This would create anomalies as retailers that source 'ethical' goods, such as the New Zealand organisation 'Trade Aid', would prima facie be acting in contravention of rules of non-discrimination. It is vital that the rules concerning private entities set clear thresholds in order to prevent cases where discrimination does not result in effective trade barriers from being brought before the WTO.

5. Decision-making under the WTO

It would contravene natural justice to bring private entities within the scope of the WTO but to exclude them from the decision-making process. The WTO is a Member driven organisation, and from a statist perspective, it would completely undermine the system to introduce private entities into its fora.[166] To respect natural justice, the General Council would need to take an active approach to art V:2 of the Marrakech Agreement, which provides that the General Council may make appropriate arrangements for consultation and cooperation with NGOs concerned with matters related to those of the WTO. For the WTO to work closely with private entities would be an indirect way of bringing them into the scope of decision-making so that they were not just being affected by its rules.

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[165] Shaffer and Nordstrom, above n 164, at 599.

[166] See, Steve Charnovitz "Opening the WTO to Non-Governmental Interests" (2000) 24(1) Fordham International Law Journal 173 at 13-15.

E. Alternative Options

1. Plurilateral agreements

Plurilateral agreements are a viable option to deal with a deadlock in negotiations. Plurilateral agreements are where a subset of Members negotiate an agreement that, once negotiated, will only apply to that subset of Members. Plurilateralism often occurs in the wake of failed multilateralism. In the Tokyo Round, which lasted from 1973–1979, Member States failed to reach consensus on issues concerning farm trade and emergency import measures, which led to the creation of codes.[167] Codes are plurilateral agreements inside of the WTO. The Tokyo Round saw the creation of eight codes,[168] of which four developed into multilateral commitments accepted by all WTO Members at the subsequent Uruguay Round.[169]

Given the difficulties associated with decision-making, it is more likely that agreements regarding the private sector would result from negotiations between small, select groups of Members, rather than negotiations between all members. Although this undermines multilateral principles explored in *Chapter I, para D: Fundamental Principles and Rules of the WTO Agreements*, paradoxically, plurilateralism can also support international free trade as an agreement between some may be better than no agreement at all.

2. An alternative dispute resolution mechanism

A parallel dispute resolution mechanism to the Council in Trade in Goods could be established to deal with disputes concerning the private sector. The mechanism could be structured to be more compatible with private entities. For example it could be more informal than the Council in Trade and Goods, and solutions could involve conciliation and mediation rather than reports and retaliation. If Member States viewed this as lacking vigour, it could be a precursory step before being heard by the DSB.

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[167] World Trade Organisation "Understanding the WTO", above n 2, at 16.

[168] The Tokyo codes were: Subsidies and countervailing measures — interpreting Articles 6, 16 and 23 of GATT; Technical barriers to trade — sometimes called the Standards Code; Import licensing procedures; Government procurement; Customs valuation — interpreting Article 7; Anti-dumping — interpreting Article 6; Bovine Meat Arrangement; International Dairy Arrangement; Trade in Civil Aircraft; World Trade Organisation "Understanding the WTO", above n 6, at 16.

[169] World Trade Organisation "Understanding the WTO", above n 6, at 16-17.

3. Regulate certification schemes

A major problem of the private sector is certification. If dealing with the private sector by way of the WTO proved to be too difficult, the problem of certification could be tackled separate from the WTO. If certification schemes were improved, the private sector would not be subjected to WTO related problems. They would be empowered to respond to consumer concerns in a way that countries are failing to.

Certification schemes require international benchmarking. This would require international regulations to achieve synchronisation and legitimisation. This could be achieved through a code of good practice. A code could set standards and minimal requirements to regulate the certification schemes. It would aim to reduce discrepancies between standards and mitigate their shortcomings. As mentioned earlier, art V of the Marrakech Agreement provides that the WTO General Council shall make appropriate arrangements for the cooperation with governmental organisations and cooperation and consultation with NGO's, concerned with matters related to those of the WTO. In accordance with art V, the WTO could cooperate with certification schemes to establish a workable code of good practice. The code would need to focus on the legitimacy and harmonisation of standards, and also on the consequences of standards rather than being a 'box-ticking' exercise.

Conclusion

The WTO is not, and does not claim to be, an environmental or humanitarian organisation. However social commentators and the public at large often expect it to act as one. The WTO deals with the trade between nations, and thus will only deal with ethics when the two overlap. When this happens, the WTO provides a framework that Member States must act in accordance with. Although Member States can respond to the ethical concerns of consumers under this framework, they must balance a variety of competing interests when making decisions involving trade, and will not always prioritise responding to consumer concerns. Often their prioritisation is overlooked and the WTO is perceived as the problem.

As a result of globalisation private entities hold such a high level of purchasing power that policies they adopt are analogous in effect to a trade measure imposed by a government. NGOs create certification schemes for retailers to use in order to ethically shape their policies. In doing so, private entities are under no legal obligation to act in a way that is non-discriminatory, or that promotes freer trade and predictability. Their actions focus on responding to consumer preferences, rather than effects they may have on trade. Consequently their policy decisions can cause effective incontestable trade barriers.

The actions of private entities can impact trade in the same way as a State acting in contravention of the WTO's covered agreements, therefore their legal status should also be the same, or comparable. If private entities were obliged to act in accordance with the WTO's covered agreements, they could still respond to consumers, but without the negative effects their actions can currently have. To take such radical action is fraught with difficulties. The provisions of the Marrakech Agreement and the power dynamics within the WTO make it extremely difficult to amend and create WTO Agreements. Furthermore, regulating the private sector would result in an increase in WTO litigation. Not only would this create administrative problems, but financial ones as well. The costs associated with litigation would mean that daring to discriminate on the grounds of ethics would require private entities to take a financial risk.

To bring private entities under the exact same framework as Member States is ambitious. A more feasible option would be to bring private entities into a separate but equal position. This could be achieved by the creation of a plurilateral agreement, which may eventuate in a multilateral agreement. In addition, an alternative dispute mechanism process could be created to deal with the increase in litigation and the distinct nature of cases involving private entities rather than

overwhelming the DSB. If it proved to be unachievable to regulate private entities, Member States could focus on remedying the problems provided by certification alone. While this would not eliminate effective incontestable trade barriers caused by private entities, it would deal with many of the current problems concerning the private sector.

The myriad of issues surrounding the private sector is evidence that the WTO requires updating. Although change is an ambitious project, it is a necessary one. If the problems resulting from the different treatment of the actions of Member States and those of private entities are not addressed, the problems will not self-regulate but will intensify. It is time to revisit and revise international trade law, and use it in the manner that it was intended to be used. That is, as a tool enabling Member States to trade in accordance with the WTO's founding principles in order to reap the benefits that international trade has to offer.

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