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gribeiro@umail.iu.edu

Navigating Turbulent Waters Connecting the World Trade Organization (WTO) and Corporate Social Responsibility (CSR)

Gustavo Ferreira Ribeiro*

ABSTRACT: this paper uses the metaphor of a fisherman's journey into the World Trade Organization (WTO) and Corporate Social Responsibility (CSR) "seas" to explore the relation between them. It is intended to be an introductory paper to the reader seeking a basic understanding of this relationship. An argument can be made that the WTO and CSR waters are not connected at all: the WTO is an intergovernmental organization regulating rights and duties of members (mainly states), while CSR concerns non-governmental initiatives dealing with corporate behavior, such as voluntary codes of conduct and certification processes of social and environmental standards. However, this paper explores the existence of potential straits connecting the seas and provides encounters with the sea creatures that represent the relevant jurisprudence informing the debate.

Keywords: World Trade Organization (WTO), Corporate Social Responsibility (CSR), Voluntary Codes, Certification, Private Standards, GATT, TBT, SPS, GPA.

* S.J.D. Candidate 2008, Indiana University Bloomington (IUB). Capes/Fulbright grantee (gribeiro@indiana.edu).
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Introduction

A fisherman has been seen navigating two different seas for many years: that of the World Trade Organization (WTO) and that of Corporate Social Responsibility (CSR). He has to build two different vessels, because he never figured out a way to cross from one sea to the other. He finally envisioned a strait that could provide the necessary connection. However, the myth of monsters along the way has terrorized those who dared into the strait for decades. He climbed aloft.

He could see the strait and he thought that, in due course, he would be able to feed on the many species said to be found on those waters: tuna, turtles, shrimps, sardines, and salmons, to say some of them. He began the journey looking for lights of the beacon on the other side. Some say that his quest will be endless; his vessel likely to go down.

If you can immediately grasp the sense of the story above, you may find another port to be your best departure point.[1] If you are still wondering what this story is all about, you are in the right place. This paper is an introductory essay for those interested in the debate linking the WTO with CSR. If this is first your journey into this topic, this paper aims to provide your compass; welcome to the vessel, and prepare to meet sea creatures forming the relevant jurisprudence, and to seek the lights of the beacon.[2]

[1] Three recent papers addressing WTO-CSR issues have been recently published and are an excellent point of departure. *See* Steven Bernstein & Erin Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, J. INT'L ECON. L. 1 (2008); Caroline E. Foster, *Public Opinion and the Interpretation of the World Trade Organization's Agreement on Sanitary and Phytosanitary Measures*, 11 J. INT'L ECON L. 427 (2008); *Susan Aaronson, A Match Made in the Corporate and Public Interest: Marrying Voluntary CSR Initiatives and the WTO*, 41(3) J. WORLD TRADE 629 (2007). I will react to these recent accounts on Section V.

[2] Using my best efforts in this research, I have not found a metaphor of a fisherman navigating two different seas, looking for a strait connecting the issues, and "fishing" the WTO jurisprudence. The closest metaphor that I found is narrated by Michael Lennard*, Navigating by the Stars: Interpreting the WTO Agreements*, 5 J. INT'L ECON. L. 17 (2002)(comparing the process of interpretation of WTO agreements with the first voyagers of early navigators and suggesting that the WTO institutions must look for reliable reference points in the known legal "cosmology").

Your journey will be divided into five short trips. The first two correspond to the overview of the WTO and CSR separately. The third and fourth parts steer the vessel to possible confluence of the topics and the relevant law involved. Finally, the fifth part presents reactions to recent accounts on the topic. An appendix with the list of acronyms found in the discussion is provided for purposes of orientation. You may find it a useful map, since more than 30 acronyms emerge in this short discussion.

I. The World Trade Organization (WTO)

A. Background

Your initial course is in the sea of WTO. While embarking on the vessel, you should realize that the WTO is an inter-governmental organization created at the end of the Uruguay Round (1986-1993), after almost five decades of operation of the General Agreement on Tariff and Trade (GATT 1947).[3] The signatories of the GATT 1947 are referred as Contracting Parties, while the WTO's, as members.[4]

The GATT 1947 is one of the chapters of the so-called "Havana Charter." The charter was meant to establish an intergovernmental organization back at that time - the International Trade Organization (ITO), which, for many reasons never came into existence.[5] Instead the GATT 1947 was applied provisionally and, for some commentators it became *de facto* an international organization along decades of operation.

The GATT 1947 is said to be part of the Bretton Woods system, which comprises the International Monetary Fund (IMF) and the World Bank. The WTO, as it successor, is not part of

[3] A "round" means the period in which the Contracting Parties of the GATT 1947 convene to agree (or not) on some issue related to trade. The GATT 1947 had eight rounds. The WTO has also this dynamic and the WTO is currently under the so-called Doha Development Round (DDR), which began on September of 2001.

[4] I use the terminology "members" to refer only to WTO members. Whenever I refer to any other membership, I will precede the term with the correspondent organization; e.g. UN members.

[5] For those interested in the GATT 1947 history and the explanations of the political context that led to the failure of the ITO, see JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 31-43 (2d ed. 1997). *See also* DOUGLAS A. IRWIN ET AL., THE GENESIS OF THE GATT (2008).

the United Nations (UN) system in any formal way, the points of contact being institutional cooperation, joint studies and other activities among the WTO and UN-related bodies. As of July of 2008, the membership of the WTO comprised 153 members.[6]

B. Trade Barriers

Overall, the whole apparatus of the WTO aims at trade liberalization through the elimination of trade barriers among the members. The WTO sits on the premise that trade liberalization generates economic growth and better standards of living worldwide.[7] Trade barriers exist for many reasons. There are, indeed, legitimate (genuine) barriers. The problem, on the other hand, is that trade barriers may simply serve protectionist purposes. And this is a lot of what the WTO is about: distinguishing, by agreed rules, when a member might engage in discriminatory behavior from situations of illegitimate protectionism.

Trade barriers are implemented in many ways and are often part of legislation, resolution or decrees that emanates from governmental bodies. It is said that trade barriers are inserted in "trade measures" or simply "measures" which are adopted by governments. A traditional trade barrier is a tariff (a tax on the importation of a good), but currently, many other non-tariff barriers (NTB) exist, as it will become clear.

The WTO has at least three main features to deal with trade barriers: (i) it contains a set of rules (treaties) that amounts to a substantial number of texts pages referred as the "covered agreements."[8] These norms are the main rules concerning multilateral rules of liberalization of

[6] For the membership list, *see* http://www.wto.org/english/theWTO_e/whatis_e/tif_e/org6_e.htm.
[7] This paper does not enter on criticisms on that premise. It merely reproduces the preamble of the GATT 1947 that recognizes that "trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income."
[8] The so-called Marrakesh Protocol is only the Final Act signed by the founder members of the WTO; it is like a cover note. Attached to the Final Act is the Agreement Establishing the WTO (the WTO Agreement), an umbrella agreement, and four annexes providing substantial rules on trade. Technically, the list of the "covered agreements" is found in the Annex 2, Appendix 1.

grounded in principles of non-discrimination in effect to the WTO membership. Two of the central clauses are the National Treatment (NT) and the Most-Favored Nation (MFN) found in the GATT 1994 Articles III and I, respectively;[9] (ii) the WTO is also a forum of negotiations where members, through their diplomats, get together to negotiate, among other things, on enhanced market access; in addition, (iii) the WTO provides a "tribunal" for member-to-member disputes in a two level proceedings: first, disputes are analyzed by panels of experts and, secondly, the findings of the panels can be appealed to the Appellate Body (AB) of the WTO. The idea of a two-tier proceedings (panels and the AB) are similar to the notion of level of jurisdictions in domestic courts. The Dispute Settlement Body (DSB) is the administrative organ of the disputes, and has the authority to establish the disputes upon request and maintain the overall surveillance of the proceedings.[10] The decisions of the disputes are expected to be complied with by members and the WTO can authorize trade retaliation in case the decisions are not.

Annex 1A contains the Multilateral Agreements on Trade in Goods (such as the GATT 1994 which is read together with the GATT 1947, the Sanitary and Phytosanitary Measures (SPS), and the Technical Barriers to Trade, among others);
Annex 1B - General Agreement on Trade in Services (GATS);
Annex 1C - Trade-Related Aspects of Intellectual Property Rights (TRIPS);
Annex 2 - the Dispute Settlement Understanding (DSU);
Annex 3 - Trade Policy Review Mechanism (TPRM); and
Annex 4 - Plurilateral Trade Agreements (such as the Annex 4(b): Agreement on Government Procurement).

[9] In trade in goods, the NT clause obliges Members to accord treatment no less favorable than that accorded to "like products" of national origin. Take as an example, Members "A", "B" and product "P." Member "A" will accord national treatment to product "P" imported from Member "B", if, in relation to "P", Member "A" applies treatment no less favorable than that applied to like national product "P". The clause aims at preventing domestic policies, such as taxation and regulatory practices, to nullify the benefits obtained in relation to customs.
In trade of goods, the MFN clause is a basic element of non-discrimination among the parties. The clause obliges a Member to treat other Members in a non-discriminatory way. For instance, if the Member "A" applies a tariff "X" on the product "P" coming from Member "B", Member "A" must apply the same tariff "X" on like products "P" imported from Member "C", "D", and so-forth.

[10] Just for the sake of clarity, tribunal in quotation marks just means that there has been debate about the legal nature o the WTO dispute settlement. A commentator refers to it as a mechanism of "judicial supervision" rather than "dispute settlement", though this point is of less consequence in this paper's topic. *See* Yuji Iwasawa, *WTO Dispute Settlement as Judicial Supervision*, 5(2) J. INT'L. ECON. L. 287 (2002).

C. Relevant Covered Agreements: the GATT 1994, the TBT, the SPS, and the GPA

Among the WTO covered agreement, four of them are of special relevance for your journey, for reasons that will become understandable along your trip: the GATT 1994, the Agreement on Technical Barriers to Trade (TBT), the Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures, and the Governmental Procurement Agreement (GPA).

The GATT 1994 is the cornerstone of the multilateral trade system. It is basically a two page treaty incorporating the text of the GATT 1947 with necessary modifications. For instance, the references to "Contracting Party" in the provisions of the GATT 1947 are read as "member" in the GATT 1994.[11]

The SPS and TBT have their origin in the Standards Code (1979). As Marceau and Trachtman explain, after the Kennedy Round (1964-1967), the Contracting Parties expressed their concern that the "increasing multiplicity of standards was seen as a potential barrier to trade and [the Contracted Parties] pointed towards a need to consider harmonization of standards."[12] The concern was twofold: (i) if a standard exists, exchange is facilitated since incompatibility of products can be reduced. In addition, standards can be harmonized by many countries facilitating trade even more; (ii) at the same time, the Contracting Parties called the attention that anything to be agreed should not interfere with the "responsibility of governments for safety, health and welfare of their people or for the protection of the environment in which they live."[13] With those two sets of concerns in mind, in the Tokyo Round (1973-1979), the Standard Code was signed among 43 Contracting Parties. It covered mandatory and voluntary technical specifications, mandatory technical regulations and voluntary standards for industrial and agricultural goods. In

[11] GATT 1994 art. 2(a).
[12] Marceau & Trachtman, *The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: Map of the World Trade Organization Law of Domestic Regulation of Goods*, 36(5) J. WORLD TRADE 811, 813-14 (2002).
[13] *Id.* at 814.

the 1980s, nonetheless, a consensus emerged that the Standards Code did not avoid protectionism related to the proliferation of technical regulations. Furthermore, it appears that technical specifities on agricultural issues required the Contracting Parties to establish different disciplines for agriculture and general standards. Thus, during the Uruguay Round, the Standard Codes served as the basis for two "new" agreements: the TBT and the SPS.[14]

The GPA, on the other hand, deals with procurement of products and services by governments (and their respective agencies).[15] Procurement generally accounts for important share of government expenditures and many governments impose requirements that the supplier of products and services to be a domestic corporation.[16] Similarly to the history of the TBT and SPS, the roots of the GPA precede the establishment of the WTO. Blank and Marceau, in fact, acknowledge that attempts to negotiate an agreement of procurement appeared back on the 1940s.[17] However, government procurement provisions were explicitly excluded from the GATT 1947 framework and an agreement was possible only during Tokyo Round: the 1979 GPA.[18]

[14] *Id.* at 814-15.

[15] The creation of an agreement on procurement aimed at enhancing transparency and reduce governmental discrimination among suppliers (e.g. to treat a potential domestic supplier in the same way as a foreign one by the effects of a national treatment clause).

[16] See Christopher R. Yukins & Steven L. Schooner, *Incrementalism: Eroding The Impediments To A Global Public Procurement Market*, 38(3) GEO. J. INT'L L. 529, 533, 535 (2007)(analyzing the size of the procurement market and how a variety of international organization, such as the WTO, can work to promote free trade on government procurement).

[17] Annet Blank & Gabrielle Marceau (1996), *A History of Multilateral Negotiations on Procurement: from ITO to WTO, in* 31 LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT (Hoekman & Mavroidis eds., 1997).

[18] During the ITO negotiations, it seems that the delegations were at odds about the meaning of government procurement, state trading and government contracts awards. At the end, government procurement was explicitly excluded from the obligation of National Treatment (Article III of GATT) and the state-trading clause (Article XVII of GATT) contained only a soft obligation of "fair and equitable treatment" concerning government procurement. The authors, nevertheless, argue that the MFN clause could possibly apply to government procurement. *Id.* at 32-37. They also comment that, to a very large extent, the logic and wording of the 1979 GPA draws from the draft developed by the OECD during the 1960s and 1970s. *Id.* at 37-41.

With the establishment of the WTO, a revised GPA was proposed and entered into force in 1996. Currently, it is a binding treaty for 39 Members.[19]

D. Recent Trends

Thirteen years have passed since the WTO was established. At least three major trends that are significant to the discussion of this paper have been occurring. First, because the establishment of the WTO resulted in a much more comprehensive range of topics covered by the organization, the WTO became more visible to civil society and often a target of anti-globalization voices; the traditional example being the Seattle manifestations in 1999, where NGOs and civil society unleashed harsh criticisms against the WTO, blaming the organization as the culprit for the downsides of globalization.

Second, because of the high profile trade interests involved (and, one could say, for the enhancement on its litigation proceedings), the DSB have been frequently called forth by its members - not only by developed, but also developing and, less effusively, by the least-developed countries.[20] Here, an important aspect: formally, as an intergovernmental organization, the WTO provides a dispute forum to members (in order words, state-to-state litigation). However, it is hard to deny that governmental interests can be entangled with corporations' interests. Some disputes at the WTO are even referenced by their corporate nick names. In a more obvious example, because it involved governmental subsidies to the air industry, Brazil and Canada litigated at the WTO against each other over supports to their respective air industries. The case became notorious as the *Embraer-Bombardier* dispute, an

[19] For an updated list of the signatories of the GPA, *see* http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm. As mentioned, while the SPS and the TBT are part of integral part of the WTO Agreement, binding on all Members, the GPA is a multilateral treaty; the GPA binds only Members who expressly adopts it and Members can opt in or out. In the literature, you may also hear that the TBT and SPS were entered into as part of a "single undertaking" of the WTO, while the GPA is a "plurilateral" agreement.

[20] For statistics on this, *see* Kara Leitner & Simon Lester, *WTO Dispute Settlement from 1995 to 2007: a Statistical Analysis*, 11 J. INT'L. ECON. L. 179 (2008).

allusion to their respective mid-jet industries;[21] In another example, in the context of the food industry and genetically modified products, the *EC-Biotech* case has revealed *Monsanto's* interest in the outcome, since at stake was Monsanto's interest in having market access to its genetically modified corn in the European market.[22] In addition, it has been commented elsewhere that the *Banana War* dispute involving the United States (US) as complainant and the European Communities (EC) as defendant has been backed up by *Chiquita*, *Dole* and *Del Monte*. It seems interesting to observe that the US brought the dispute despite the fact that it does not export any bananas to the European market. However, the US multinationals mentioned supported the dispute since they are engaged in exports to the European market from their Latin American platforms of production.[23]

Finally, as explained by Cottier, the GATT traditional *modus operandi* (negotiation of tariff concessions) evolved to a much challenging one. In a process that started in the Kennedy round, the international trade regime faces a myriad of NTB; for instance, technical standards, sanitary and phytosanitary standards, and intellectual property issues.[24] While tariff barriers have been discussed customarily in the circles of governments and large industries, NTBs involve a great number of stakeholders (such as standardization organizations, consumers, NGOs, and civil

[21] These disputes took place from 1996 to 2003. For the respective reports, see http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#aircraft. Similarly, the US is currently challenging subsidies paid to Europe's Airbus (and vice-versa, Europe is going after subsidies paid to the American manufacturer Boeing).The US and the EC began consultations in 2004. A panel was established but a final report has not been circulated yet.

[22] This dispute was amply accompanied by the media and the public. Besides the controversy itself, the confidential interim rulings of the panel leaked and caused further reactions. The final report is more than 1,000 pages long and can be accessed at the WTO website. *See* Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products,* WT/DS291, WT/DS292, WT/DS293 (Sep. 29, 2006)(*adopted* Nov 21, 2006).

[23] *EU Banana Regime Condemned Again*, 12(1) WTO CASES, (International Centre for Trade and Sustainable Development - ICTSD, Geneva), Feb. 2008. http://ictsd.net/i/news/bridges/3133/.

[24] Thomas Cottier, *Preparing for Structural Reform in the WTO*, 10(3) J. INT'L ECON. L. 497, 500-05 (2007). The WTO Secretariat has prepared a format for members notifications of NTBs., *See* Negotiating Group on Market Access, *Table of Contents of The Inventory o Non-Tariff Measures*, TN/MA/S/5/Rev.1 (Nov. 28, 2003).

society in general) on topics of ethical consumption, development of standards, food safety, among others.

At this point, you are ready to throw the anchor and stop the vessel. Let's stick with the basic ideas here developed: the WTO is an intergovernmental organization. It regulates the conduct of states. Disputes can be initiated by the formal solicitation of states and involve a mix of governmental and corporations' interests. Moreover, with the enlargement of the multilateral trade regime and the proliferation of NTBs, the number of stakeholders involved in WTO issues increased, along with the oversight over the organization activities. The sea of the WTO is deeper than one could have ever imagined.

II. Corporate Social Responsibility (CSR)

A. Overview

You now begin the journey on the sea of CSR. Do not feel adrift as you navigate on different waters, and do not look ahead to the strait connecting them. The third part of your journey is meant to provide the necessary links and encounters.

Generally speaking, CSR embodies numerous initiatives aimed at tackling negative aspects associated with the operation of corporations; for instance, exploitative social practices of corporations - such as the use of forced labor - and environmental degradation.[25] A pattern of negative aspects of corporation's operations found in the literature often comprises cases involving multinational corporations operating in developing countries. Though downsides of multinational corporation' operations can be addressed by state regulation, CSR is understood to belong to a broader system of governance, in which non-governmental actors are involved,

[25] For a definition, see JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW 32 (2006)(indicating the definition dilemmas of CSR, but proposing that CSR "refers to the notion that each business enterprise, as a member of the society, has a responsibility to *operate ethically and in accordance with its legal obligation and strive to minimise any adverse effects of its operations and activities on the environment, society and human health."*(emphasis in original)).

voluntary codes of behavior are adopted by corporations, and certification of social and environmental standards come into play.

It probably takes a combination of factors to explain the fast growing pace of CSR initiatives: the inertia of governments to tackle corporate related problems; NGOs participation and involvement; consumer movements; and, in some cases, the role of business leaders committed with CSR principles. More than elaborating on those reasons, you need to understand that the sea of CSR has, as well, many ramifications. By ramification, I suggest two things. First, CSR appears under various nomenclatures. In accordance with Bernstein and Hannah, CSR appears under the terminology of transnational regulatory systems, non-state market driven (NSMD) governance systems, civil regulation, private authority etc.[26] Second, CSR manifests trough different initiatives. For instance, at the level of sponsorship, there are CSR initiatives sponsored by non-profit organizations, business entities, global chains of production, international organizations, religious groups, among others. There are also hybrid structures, in which more than one type of entity is involved in the initiative, including some level of governmental participation. Moreover, as already highlighted, CSR initiatives can be implemented through different mechanisms such as voluntary codes, reporting systems and labeling/certification procedures.

It is not the objective of this paper to present a comprehensive list and details of CSR initiatives, but rather, at this point, simply to introduce them and show some of their features. Let me focus in three very well known CSR initiatives to illustrate the above point: the International Social and Environmental Accreditation and Labeling Alliance (ISEAL), the United Nations

[26] Bernstein & Hannah, *supra* note 1, at 2. The authors adopt NSMD along their work justifying that it has been widely cited and has generated the most detailed and distinct categorization of these mechanisms. *Id.* at 2.

Global Compact (UN-GC), and the Organisation for Economic Co-Operation and Development (OECD) Guidelines.

B. CSR Initiatives

The ISEAL is an organization convening organizations such as the Fairtrade Labeling Organization International (FLO), the Forest Stwerdship Council (FSC), the International Organic Accreditation Service (IOAS), plus five others. These set of eight organizations, under the coordination of the ISEAL, aim at setting social and environmental standards in sectors ranging from forestry and agriculture to fisheries, manufacturing and textiles.[27] Bernstein and Hannah acknowledge the ISEAL as one of the "most relevant examples of NSMD systems" that offers, furthermore, a "Code of Good Practice for Setting Social and Environmental Standards" to its members. Just to have an idea of the many tentacles of the ISEAL, the FLO - mentioned above – convenes itself another 23 organizations dealing with labeling initiatives. The FLO itself covers labeling of 16 types of products, such as bananas, cocoa, coffee, cotton, and flowers.[28]

On the other hand, the UN-GC corresponds to a CSR initiative created by an intergovernmental organization (the UN), as first endeavored by its former Secretary General Kofi Annan, in 1999. The UN-GC acknowledges itself as "the world's largest, global corporate citizenship initiative" and it basically provides a framework for businesses that are committed to align their operations and strategies with ten universally accepted principles in the areas of human rights, labor, the environment and anti-corruption, by mainstreaming these principles in business activities around the world.[29]

[27] The ISEAL has its own Code of Good Practice for Setting Social and Environmental standards. *See* www.isealalliance.org.
[28] http://www.fairtrade.net/.
[29] For an overall description of the UN-GC, *see* http://www.unglobalcompact.org/AboutTheGC/index.html.

Finally, in another example, the OECD revised and adopted new guidelines for the operation of multinational enterprises in 2000.[30] The so-called OECD Guidelines provide voluntary recommendations touching human rights, responsible supply chain management, labor relations, environment, consumer protection, and bribery issues. The OECD Guidelines is probably a good example of an initiative that I elsewhere referred to as a hybrid mechanism because it is supported by governments through National Contact Points (NCP). These points have responsibility for implementing and promoting the Guidelines and are usually comprised by governmental offices that "gather . . . information on national experiences with the Guidelines, handles enquiries, discusses matters related to the Guidelines and assists in solving problems that may arise in this connection."[31]

CSR is not a sea of quiet waters. Criticisms exist towards these initiatives. In 2006, *The Economist* published an article criticizing the economic basis of fair trade schemes, such as the fairtrade label run by the FLO. The British magazine, despite acknowledging that "such food [labeled fair] allows shoppers to express their political opinions, from concern for the environment to support for poor farmers,"[32] pointed out that fair-trade is bad because by encouraging even more supply of coffee, fair trade makes the world price to decrease further. It follows that, overall, artificial high prices would make the majority of coffee producers worse off.[33]

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[30] The OECD is an international organization established in 1961 and currently comprises a membership of 30 countries committed to democracy and the market economy from around the world. For more information on the organization, see http://www.oecd.org/. The Guidelines are part of the OECD Declaration on International Investment and Multinational.

[31] http://www.oecd.org/document/60/0,3343,en_2649_34889_1933116_1_1_1_1,00.html.

[32] *Special Report: Voting with your trolley - Food politics*, THE ECONOMIST, Dec. 9, 2006, at 81.

[33] Arguments from the FLO responding to *The Economist* can be found on http://p20126.typo3server.info/single_view.html?&L=1&cHash=0276a7fe6e&tx_ttnews[backPid]=104&tx_ttnews[tt_news]=11

The UN-GC has also been target of criticism.[34] One commentator, despite acknowledging that the initiative "paved the way for the UN engagement with key non-state actors to tackle pressing challenges of the 21st Century," identified that the UN-GC principles are general and vague. There is also a need for better quality control by assuring that the corporations that join the initiative fulfill their responsibilities both in letter and spirit.[35]

Finally, regarding the OECD Guidelines, in June of 2008 the UN Special Representative of the Secretary General, John Ruggie - who is in charge with the relation of human rights and transnational corporations and other business enterprises - submitted his final report to the Human Rights Council. In the report, Ruggie recommended that the OECD Guidelines be revised, since "their current human rights provisions not only lack specificity, but in key respects have fallen behind the voluntary standards of many companies and business organizations."[36]

As said, more than presenting a detailed review of CSR initiatives and their respective criticisms, this section aimed only at giving a broad sense of these initiatives. You are now ready to throw the anchor again and recall some points.

CSR concerns non-governmental actors and their struggle to develop "regulation" on corporations. CSR initiatives and tasks have been proliferating in number and content: voluntary codes; labeling; certification process; reporting of abuses and, though not explored here, technical assistance. They also vary in sponsorship and the level of involvement of government.

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[34] Surya Deva, *Global Compact: A Critique of the U.N.'s Public-Private Partnership for Promoting Corporate Citizenship*, 34 SYRACUSE J. INT'L L. & COM. 107 (2006-2007). *See* also Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 FLA. J. INT'L L. 1 (2007) (arguing that the initiative offers only a "moral suasion" to the business community).

[35] Deva, *supra* note 34, at 149-50.

[36] *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5 (April 7, 2008), π 46. Available at http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf. For a summary of the Ruggie's report, see Christiana Ochoa, *The 2008 Ruggie Report: A Framework for Business and Human Rights*, ASIL INSIGHT, June 18, 2008, http://www.asil.org/insights/2008/06/insights080618.html.

III. Confluence of Seas

A. A Quasi-Confluence, a Quasi-WTO, and a Quasi-CSR

Thus far, you navigated in two distinct seas. Importantly, it was possible to find a route on each without acknowledging the other. Aaronson illustrates the reasons for the separation of the courses: "some might ask why governments or international institutions such as the WTO should play any role in promoting CSR in global markets [since] market forces (consumers, producers and other stakeholders) are clearly demanding ethical behavior [from corporations]."[37] The reality, nonetheless, is that these seas are connected by troubled waters and what seems to be a contemporaneous discussion has actually older roots. This observation leads us to the first encounters with sea creatures.

Recall that before the GATT 1947 entered into force, the creation of the ITO was proposed. Less noted in the literatue, Chapter 2 of the proposed ITO dealt with employment and economic activity. Specifically, Article 7 of Chapter 2 disposed on "fair labour standards." Arguably, had that provision been adopted, the multilateral trade system could have had, since its creation, a closer connection with CSR, at least to aspects related to minimum labor standards.[38]

In a broader picture it is also relevant to keep in mind why this first potential confluence of seas has been kept apart from mixing their waters. This actually reinforces the perception of the GATT 1947 (and now the WTO) as an intergovernmental organization polarized by different group of interests among its membership: developed and developing countries. An argument historically put forward by developed countries is that the introduction of a social clause (the other name for minimum labor standards in a trade regime) was a way to ensure that the

[37] Aaronson, *supra* note 1, at 633.

[38] It is hard to speculate, though, how such a mechanism could have evolved or operationalized along the system. It is possible even to deny such approximation: one could merely argue that such clause would only provide a link to other international conventions concerning labor and, still, the GATT 1947 would have nothing to do with regulation of corporations.

competitiveness would not be based on systematic violation of workers' rights. On the other hand, developing countries feared that labor standards would simply serve to justify protectionist intentions. For developing countries, moreover, labor standards of countries were a valid comparative advantage; and, because a country was expected to grow economically, its labor conditions would gradually enhance. Such irreconcilable stands have produced enduring consequences. A social clause was never introduced along the almost 50 years of history of the GATT 1947 (nor at the WTO), despite many attempts made in this respect.[39]

While I suggested a quasi-confluence of the multilateral trade regime and labor standards, the intersections of the regime with environmental issues occupied the global agenda more recently. Bhagwati identifies the 1990s as a key moment of the debate with the convening of the United Nations Conference on Environment and Development (UNCED-1992) in Rio de Janeiro and the growing voices of the environmental NGOs.[40]

The so-called *Tuna-Dolphin* emerged in that period.[41] Briefly, Mexico brought a case against the US challenging the statute (the Marine Mammal Protection Act - MMPA) which regulated, *inter alia*, the harvesting of tuna. The MMPA required that the US government banned the importation of commercial fish or products caught with commercial fishing technology which results in the incidental killings (or incidental serious injury) of ocean mammals in excess of US standards. Mexico contested the validity of the MMPA under the GATT 1947 rules. The panel, after interpreting the GATT 1947, ruled in favor of Mexico. Because of the outcome of

[39] See ROBERT HOWSE ET AL, *The World Trade Organization and Labour Rights: Man Bites Dog*, *in* Social ISSUES, GLOBALIZATION AND INTERNATIONAL INSTITUTIONS 157, 174-97 (Leary & Warner eds., 2006)(describing the historical context of trade and social rights from 1919 up to the first five years of the WTO).

[40] Jagdish Bhagwati, *Trade and the Environment: The False Conflict?, in* TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 159, 159-60 (Durwood Zaelke et al. eds., 1993).

[41] There are actually two related cases *US - Tuna I* (1991) and *US-Tuna II* (1994). The respective reports are: Panel Report, *United States - Restrictions On Imports Of Tuna,* DS21/R - 39S/155 (Sep. 3, 1991)(*unadopted*) and *United States - Restrictions On Imports Of Tuna,* DS29/R (Jun. 16, 1994)(*unadopted*). To be "unadopted" means that the report did not bind the litigants on the dispute.

the case, environmentalist's pictured the system as the GATTzilla, though Bhagwati points out that the allusion and the conflict of trade and environmental protection was a "greatly exaggerated" one.[42]

As you encounter GATTzilla, tunas, and dolphins, two additional observations are to be made. First, in a broader picture, similarly to the labor standards discussions, there has been a split over the positions of developing and developed countries concerning trade and environmental issues, with the latter group of countries fearing that environmental standards could serve protectionist purposes. Second, the *Tuna-Dolphin* cases popularized the nomenclature and literature of process and production methods (PPM), which is still a pivot point regarding contemporaneous CSR issues.[43]

Worth noting at this point, the first confluence of the seas does not entirely bring up what I have identified as CSR; i.e., initiatives such as voluntary codes of conduct and certification of standards. This explains the "quasi" adjectives used in the section title. The first confluence is largely about the tension among government regulation on issues of labor and environmental standards and the goal of liberalization. One could simply acknowledge this confluence as a chapter of the trade and non-trade debate. Still, even if, strictly speaking, no CSR was involved, the first confluence paves the way and provides the contextualization for the analysis of the second confluence. Now, the debate is carried over to its full extent, taking in account the multitude of CSR initiatives.

[42] Bhagwati, *supra* note 40, at 161. For more on the Gattzilla allusion and even a picture of it, *see* DANIEL C. ESTY, GREENING THE GATT, TRADE, ENVIRONMENT, AND THE FUTURE 34-35 (1994).

[43] *See* Section 4(B) on PPMs. For references on this discussion, *see US-Tuna I*, π 3.17-18, 3.21, 4.2; and *US-Tuna II*, π 4.4-6; 4.44.

B. Second Confluence of Seas

I introduced the CSR initiatives with examples concerning the ISEAL certification, the OECD Guidelines and the UN Global Impact. I distinguished between pure private initiatives (ISEAL) and hybrid sponsorships (the latter two). It is time to explore more on the dynamic phenomenon by which CSR initiatives manifest and think about the impact of the WTO on them.

A recent trend of CSR initiatives is that they can permeate governmental action. Aaronson points that in industrialized countries this process of intersection was initiated in 2001. She mentions, for instance, that the EC issued a green paper on promoting a European framework for CSR; Canada hosted the third summit of the Americas in Quebec City and inserted language promoting CSR into the Summit's Plan of Action; the US placed exhortative language to encourage CSR in the Singapore, Chile and Central America Free Trade Agreement (CAFTA) free trade agreements; and the EC, following the US approach, began to put CSR languages in its cooperation agreement.[44] Aaronson also identifies specific country initiatives: the Dutch leadership on CSR; the *Proudly South Africa*, a partnership of the South African government with organized labor, business, government and community that certificates companies meeting certain fair labor, employment and sound environmental standards; the Costa Rican government partnership in the tourism sector certificating the eco-friendly hotels; the Colombian government partnership with the US government providing financial support for environmentally responsible production of goods such as cacao, rubber, forest products and coffee; the Belgian law promoting socially accountable production by introducing a voluntary social label and a certification process given by the Ministry of Economic Affairs.[45]

[44] Aaronson, *supra* note 1, at 637-38. *See* also SUSAN ARIEL AARONSON AND JAMIE M. ZIMMERMAN, TRADE IMBALANCE: THE STRUGGLE TO WEIGH HUMAN RIGHTS CONCERNS IN TRADE POLICYMAKING (Cambridge, 2008)(describing study cases about policymaking initiatives of human rights in trade from South Africa, Brazil, the European Union, and the US).
[45] *Id.* at 639-41. See also Appendix B with other examples of government-led CSR initiatives.

The point to make here is that CSR initiatives that are eventually adopted by governments in statutes can be subject to the traditional paraphernalia of the WTO, including a trade dispute. This is not to contend that the initiatives above evolved to be embedded in trade measures: such affirmation would require a detailed analysis of each initiative separately, which is not the case. This is to contend that the vessel can enter obscure waters where the dyads voluntary/mandatory, governmental/non-governmental are not so clear. This is a point where one can see, more obviously perhaps, the impact of the WTO on CSR issues.

Other examples clarify the point. A report of the European Commission illustrates CSR elements in trade instruments in the EU. [46] For instance, the enactment of two directives in 2004 dealing with social and environmental criteria that can be used in public procurements and the fact that some EC members have linked the attribution of export credits or guarantees to the respect of social or environmental criteria. In a more alarmist tone, in the context of the Chinese industry, the *Ethical Behavior* magazine pointed out that "a rumour that the SA8000 labour accreditation was going to become a standard set by importers of Chinese goods has caused panic in business circles . . . [and] manufacturers [were] complaining that the West was using SA8000 as a 'big stick'".[47] In another example, a German legislation requiring all federal government agencies to buy timber from sustainably managed forests has been identified as a way to integrate environmental standards in government policies.[48]

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[46] European Commission, *Note To 133 Committee, Subject: Corporate Social Responsibility and Trade policy – Implementing CSR practices and the OECD Guidelines for Multinational Enterprises in developing countries* (June 7, 2004); *See* also Andrew Clapham & Joanna Martignoni, *'Are We There Yet?' In Search of a Coherent EU Strategy on Labour Rights and External Trade*, *in* Social ISSUES, GLOBALIZATION AND INTERNATIONAL INSTITUTIONS 233, 239, 269, 272 (Leary & Warner eds., 2006)(identifying the avenue of choices that the EU can use on labour rights issues and trade, including Regulations with binding and direct applicability within the national law of EU members, through the support for social labeling initiatives or CSR).

[47] *China and the Corporate Responsibility 'Trade Barrier'*, EC NEWSDESK (Ethical Corporation), Sep. 16, 2004. http://www.ethicalcorp.com/content.asp?ContentID=2779.

[48] http://www.trade-environment.org/page/southernagenda/RB_2-16.htm.

Aside from the political and legal question of whether any of these initiatives would ever be brought to a dispute and considered a measure under a covered agreement, they have prompted stakeholders to figure out the likelihood and possible tests that CSR initiatives are subject to, in accordance with trade law. The pertinent questions being: (i) can one member demand how other members process their product and impose a trade barrier if they are not produced as such (this is where the PPM comes into play)? (ii) who has the authority to set international standards on social and environmental areas? (iii) can one member adopt more stringent standards than those accepted in the multilateral framework?

It is the moment to anchor the vessel one more time. To answer these questions, we required encounters on the route: shrimps, sardines, and salmon needed to be loaded on your deck. Before you catch your loads, some observations about WTO disputes will give you the necessary coordinates.

IV. Loading the Deck: a Little bit of Shrimps, Sardines and Salmons

A. Remarks about WTO Disputes

US-Shrimp,[49] *EC-Sardines*,[50] and *Australia-Salmons*[51] are three of the more than 350 cases that have been initiated under the dispute proceedings of the WTO.[52] The reports of the disputes are long analysis of the arguments raised by the complainant(s) and defendant member. As mentioned before, one single case as the *EC-Biotech* generated a decision lengthier than one thousand pages long. Academics have equally written tons of pages analyzing and criticizing

[49] Appellate Body Report*, United States – Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimp),* WT/DS58/AB/R (Oct. 12, 1998)*, adopted* Nov. 6, 1998.
[50] Appellate Body Report*, European Communities - Trade Description of Sardines (EC-Sardines)*, WT/DS231/AB/R (Sep. 26, 2002), *adopted* Oct. 23, 2002.
[51] Appellate Body Report, *Australia – Measures Affecting the Importation of Salmon* (Australia – Salmon), WT/DS18/AB/R, *adopted* Nov. 6, 1998.
[52] Notice that the reference of the member name in the case serves to point out the "defendant party". A case may involve multiple complainants as parties. Though the DSU uses the term "complainant party," "defendant member" is not an official terminology. I use it here just to avoid the longer terminology: "member against whom the complaint has been brought." Third party members may also join the disputes, which occur frequently.

panels and AB reports. This part of the journey is thus a brief effort to summarize key dispute issues, and relate them to CSR issues.

To begin with, it is known that many provisions of the covered agreements contain ambiguity or are unclear. This should not in fact come as a surprise. Treaties, such as the covered agreements, are the substance of negotiated wordings. If ambiguity happens pretty much in situations of two people negotiating a contract in private relationships, one can imagine the potentiality for ambiguity in international instruments when multiple parties are drafting texts in languages that, for many, are not even their official ones. Add to this difficulty, the fact that new topics were been incorporated in the negotiations and you will have a picture of what was going on during the draft of the covered agreements.

Disputes among members have been, to some extent, clarifying the meaning of the text and also become guidance for future interpretation. Importantly, the DSU, which contains the procedural rules of the disputes, contains no rule of *stare decisis* in itself, but earlier rulings of the panels and the AB are taken into account in later proceedings, which provides for security and predictability.[53] The reliance on previous cases is an important component of the multilateral trade system.

A second point about the disputes is that, as the covered agreements are treaties under international law, panels and the AB use the rules of interpretation of international law contained

[53] S*tare decisis* is a Latin expression used in common law jurisdictions to mean the obligation of courts to abide by decided cases; generally speaking (and incurring in all the criticisms of generalizations), civil law jurisdictions apply the principle of "judicial precedent" in different degrees. Interestingly, at the WTO, there has been a recent meeting of the DSB to discuss the application of the principle in WTO disputes. *See* Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/250 (July 1, 2008). One commentator has summarized the minute, "briefly and very roughly" as he says, pointing out that: The U.S. thinks prior AB (and panel) reports should create "legitimate expections[sic]" but not be binding; the EC seems to approve of AB reports being something close to binding; Japan, Hong Kong, India and Mexico seem to agree with the AB's concerns about panels departing from AB jurisprudence; Chile expresses some concerns about the AB's statements on this issue; and Colombia seems to be worried that the AB overreached a bit. Posting of Simon Lester to International Economic Law and Policy Blog, http://worldtradelaw.typepad.com/ (Sept. 1, 2008, 06:23 AM).

in the Vienna Convention on the Law of the Treaties (VCLT).[54] In sum, the VCLT stipulates that a treaty shall be interpreted in good faith, in accordance with the ordinary meaning in their context (e.g. preambles and annexes), in the light of its object and purpose.[55] One characteristic noted about the application of those rules by the AB is the heavy reliance in the textual approach of the texts.[56] References to the ordinary meaning of the words found in dictionaries are frequently done.

A final point to make is about the scope of the agreements. Different disciplines are covered by distinct treaties (the GATT 1994, the TBT, the GPA, and the SPS are the most important ones for issues related to CSR). Clauses found in those agreements defines the scope of their application.

The GATT 1994 covers trade in goods. It is the cornerstone of the multilateral trade regime since it "took over" the GATT 1947. The TBT also apply to goods, including industrial and agricultural products,[57] but on matters of technical regulations (mandatory) and standards (voluntary).[58] The TBT does not apply to government procurement and SPS measures.[59]

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[54] Nowadays, the VCLT is considered, without major objections by the international community, the instrument containing the customary rules of treaty interpretation. As Jackson comments, "[a]lthough this convention does not technically apply in some situations, and would not technically apply in a controversy involving a nation – such as the United States – that has not yet ratified [it, the VCLT] is considered by many nations, including the United States, to codify generally accepted rules of customary international law, and thus is a definitive text describing those rules." JACKSON, *supra* note 5, at 120-21.

[55] VCLT art. 31 and 32.

[56] Lennard*, supra* note 2, at 87. See also Donald McRae, *Treaty Interpretation and the Development of international Trade by the WTO Appellate Body*, *In* 360, 364 THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM (Sacerdoti et al eds., 2006)(criticizing the inconsistency of dictionary use by the AB and observing that "anyone who has pleaded a case knows that you can usually find a dictionary meaning to support the meaning that your client prefers").

[57] TBT, Art. 1.3.

[58] In accordance with the definition found in the TBT, as to their compliance, standards and technical regulations are different because compliance with the first is voluntary while with the second is mandatory. *See* TBT, Annex 1, Article 1: "Technical regulation: Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." *See* also TBT Annex 1, art. 2: "Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or

The GPA, as already mentioned, has a limitation in scope regarding its membership (plurilateral agreement). Furthermore, it applies to any law, regulation, procedure or practice regarding procurement.

Finally, the SPS covers four big categories of measures taken within the territory of the Member. In sum, it covers (i) the protection of animal or plant life from pests and diseases; (ii) the protection of human or animal life from risks arising from additives, contaminants, toxins generally found in foods and drinks; (iii) the protection of human life from zoonoses; and (iv) the protection of a country from establishment of pests. [60]

Though one may infer a bright line to distinguish the scope of the agreements, this is a simplification and possible overlays may occur between them. As Marceau and Trachtman point out, "the applicable WTO law is itself determined by the specific aspects of the measures challenged [by the complainant member], the nature of the disciplines imposed by each provision, and the relationship between these provisions."[61]

You are now prepared for the final encounters.

B. Shrimps (and Turtles) on the Boat: PR-PPMs and npr-PPMs

The *US-Shrimp* (or *Shrimp-Turtle*) is a landmark case found at the WTO dock. It provides insights, among other things, about PPMs. In a nutshell, the issue on that case was whether the US (state regulating the importation of shrimps) could regulate the process by which

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related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." The TBT also covers conformity assessment procedures, as defined in Article 3 of Annex 1.

[59] TBT art. 1.4-1.5.

[60] SPS Annex A, art. 1(a)-(d). The four categories are: (i) to protect animal or plant life or health from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (ii) to protect human or animal life or health from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs, (iii) to protect human life or health from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; (iv) or to prevent or limit other damage from the entry, establishment or spread of pests

[61] Marceau & Trachtman, *supra* note 12, at 815.

shrimps were harvested outside US waters (in India, Malaysia, Pakistan, and Thailand). The US alleged that harvesting of shrimps on those Asian countries harmed turtles. Worth observing, the case is a close re-edition of *Tuna-Dolphin*, although with different sea creatures.

The case relates to CSR because it involves the discussion of PPMs. But what are PPMs, exactly? One has to observe a fundamental distinction between "product-related" processes and production methods (PR-PPMs) and "non-product-related" processes and production methods (npr-PPMs).[62] As Van den Bosch explains, on one hand, PR-PPMs refers to measures that prescribe processes and production methods that affect the characteristics of products; on the other hand, npr-PPM entails measures that prescribe processes and production methods that do not, or in a negligible manner only, affect the characteristics of the products.[63] For instance, while a hypothetical measure prohibiting the use of certain antibiotics on shrimps farming is a PR-PPM, a measure requiring that fishing vessels to use turtle friendly nets is a npr-PPM.[64] In the first case (PR-PPMs), the final products are different because shrimps not treated with antibiotics are "antibiotics free", while those shrimps treated with antibiotics can carry residues of it. In the second case (npr-PPMs), regardless of whether the shrimps were harvested or not with turtle friendly nets, the final product is the same: shrimps.

The controversy in the trade context has been historically about the validity (or invalidity) of npr-PPMs (PR-PPMs are not a problematic topic). This happens because the GATT 1994, and other covered agreements, imposes the obligation to treat, for instance, "like products"

[62] I use "npr" and "PR" in low and high caps just to give a graphical effect in the text and facilitate the reading.
[63] Van Den Bossche et all, *Unilateral Measures Addressing Non-Trade Concerns*, The Ministry of Foreign Affairs of The Netherlands, 2007. See also, WALTER GOODE, DICTIONARY OF POLICY TRADE TERMS 282 (2006). Sometimes, the acronym PPM is used loosely in the literature but, most of the times, the controversies involving PPMs are about npr-PPMs.
[64] This is just a point to distinguish PR-PPMs from npr-PPMs. I am not stating which covered agreement applies to the dispute. For instance, in the case of the prohibition of imported shrimps farmed with certain antibiotics, the SPS agreement, dealing with food safety, is likely to be the relevant one.

equally.[65] If shrimps harvested with nets that harm turtles are to be considered "like" shrimps harvested with turtle friendly nets, members would not be able to impose npr-PPMs. In other words, to discriminate among the processes by which shrimps were harvested. By analogy, in the labor context, if a product "P" produced using child labor is to be considered "like" a product "P" produced with adult labor, members would not be able to impose npr-PPMs; i.e., treat them differently. Among the many technicalities that *Shrimp-Turtle* contains, the overall conclusion of is that the GATT 1994 does not prohibit npr-PPMs.

As CSR initiatives, such as certification of social and environmental standards, involve the differentiation of products by social and environmental criteria (e.g., a "green label" or a "social label"), CSR stakeholders have been watching for further developments of trade disciplines on npr-PPMs. They fear that if the WTO outlaws npr-PPMs, the legality of related CSR initiatives could be in danger. Moreover, while *Shrimp-Turtle* offers some guidance on npr-PPMs in the context of the GATT 1994, an unanswered question is whether the same understanding should apply to the TBT agreement. Indeed, technically speaking, standards found in CSR initiatives meet the definition of the TBT, which covers not only mandatory regulations but also voluntary ones.[66]

C. Fishing Sardines: Who defines Standards?

Your second fishing exercise involves sardines. The *EC-Sardines* case provides insights about the meaning of "relevant international standards." Differently from *Shrimps-Turtle*, this case involves the direct interpretation of the TBT agreement.

[65] GATT 1994 art. III. National treatment and "like product" is just one aspect of the discussion, since the possible interpretation of Article XX (general exceptions) to accommodate npr-PPMs in case of a potential violation of Article III would be necessary to be developed. This issue is not discussed here, but only acknowledged.

[66] As has been acknowledged by Bernstein and Hannah, in both definition of technical regulation and standards in the TBT, there is a reference explicitly to "related processes and production methods" (emphasis added) in their initial parts, but to a "product, process or production method" at their respective ends. As a consequence, a widely accepted view is that npr-PPM, such as social and environmental standards, are not in the scope of the TBT Agreement International Standards and Technical Barriers to Trade, and GATT 1994 would apply.

In short, in *EC-Sardines*, Peru challenged a European regulation providing that only one specie of sardine caught in European waters could be sold in the European market under the name of sardines.[67] Peru alleged that the EC should have used a standard developed by the Codex Commission called *Codex Stan 94*.[68] If that standard were used, exports of sardines from Peru could be sold under the name of sardines in the European market.

This case relates to an interesting aspect of CSR: who sets standards? Two major concerns arises: (i) from the point of view of standardization institutions, they want to be among the recognized bodies that set them; (ii) from the point of view of members, there has been a growing concern that social and environmental standards are essentially demands coming from developed countries and, furthermore, developing countries have not been actively engaged in the mechanisms where these standards are set.

From the case itself, among other things, the interpretation of "international relevant standards" came into play, since the TBT provides that "[w]here technical regulations [such as the EC Regulation] are required and *relevant international standards* exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations (emphasis added)."[69] Furthermore, a standard is defined in the TBT as a "document approved by a *recognized body*"[70] and an explanatory note provides that "[s]tandards prepared by the international standardization community are *based on consensus*. This Agreement covers also documents that are *not based on consensus*."

Considering all these elements together, (i) the AB did not touch on the meaning of recognized body, since the EC did not contest that the Codex Commission was an international

[67] The measure at issue is Council Regulation (EEC) 2136/89, which entered into force on January 1, 1990.
[68] The international standard is Codex Stan 94–1981, Rev.1–1995, which covers preserved sardines or sardine-type products prepared from 21 fish species.
[69] TBT art. 2.4.
[70] TBT Annex I, arts. 2, 4.

standardization body;[71] (ii) the AB uphold the panel decision that found "that even if not adopted by consensus, an international standard can constitute a relevant international standard";[72] (iii) the AB corroborated the panel's decision that for a standard to be relevant, it has to "to bear upon, relate to, or be pertinent to" to the measure at stake;[73]

In sum, *EC-Sardines* does not go too far in establishing further rules about standards. The case leaves open the issue of who is a "recognized body" to set standards. It only indicates that consensus is not an essential element for an international standard to constitute a relevant international standard.

D. Yet, Some Room for Salmons: Stringent Levels of Protection

Finally, you may need to find room on your deck for a load of salmons. The *Australia-Salmon* provides more insights about standardization issues. Differently from the *US-Shrimps* and *EC-Sardines*, however, this case involves the interpretation of the SPS agreement. Shortly, in this case Canada claimed that Australia's ban on the importation of fresh, chilled or frozen salmon violated WTO rules. A central point in the case was the extent to which members could apply stringent measures of protection concerning SPS measures involving food safety.

Overall, the SPS imposes the obligation on members to adopt SPS measure based on scientific principles.[74] The relation with science is thus a foundational basis of the SPS, though provisional measures are possible in cases where relevant scientific evidence is insufficient.[75]

Most likely, the case relates to CSR obliquely.[76] But it reveals additional aspects concerning the debate on standards. First, the SPS incentives members to base their SPS measure

[71] *EC-Sardines*, *supra* note 51, at 221.
[72] *EC-Sardines*, *supra* note 51, at 222-227.
[73] *EC-Sardines*, *supra* note 51, at 229-233.
[74] SPS art. 2.2.
[75] SPS art. 5.7.
[76] The relationship between the SPS and voluntary standards developed by the food industry is a topic in discussion among members and the Secretariat of the WTO. Generally, food industry standards are present in transactions

on as wide as basis as possible on international standards,[77] leaving space, however, for members to use measures in a higher level (stringent measures).[78] Another aspect of the agreement is that, differently from the TBT, the SPS enumerates what relevant international organizations are for the purposes of international standards.[79]

Thus, while CSR initiatives, such as social and environmental standards, are likely to bear a closer relation with the interpretation of the GATT 1994 and the TBT, the SPS seems to reinforce an overall framework of incentives of the trade regime for members to use international standards as the basis of their trade measures.

V. Where the Beacons Will Turn their Lights to?

After the introduction of potential issues found in the covered agreement and the WTO jurisprudence on issues of CSRs (npr-PPMs and international relevant standards being two of them), let us steer the vessel to recent proposals on future linkages. This is your last part of the journey.

As I noted in the very beginning of this paper, at least three recent papers have addressed these issues. Bernstein and Hannah focus on NSMD and, building on the concept of policy space, they propose that the WTO should leave transnational regulatory space for social and environmental standards, rather than trying to create additional rules on what to accept.[80] They

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between large buyers and small suppliers, which have to follow a certain standard often related to food safety. By not complying with these standards, suppliers are, in practice out of business. In March of 2007, the Committee on Sanitary and Phytosanitary SPS discussed this issue. The ICTSD report on the issue: *WTO Body Debates Public, Private Food Safety Standards*, 7(5) BRIDGES TRADE BIORES, (International Centre for Trade and Sustainable Development - ICTSD, Geneva), Mar. 16, 2007. http://ictsd.net/i/news/biores/9324/.

[77] SPS art. 3.1.

[78] SPS art. 3.3.

[79] SPS Annex A, art. 3. The recognized bodies are : (a) the Codex Alimentarius Commission for food safety; (b) the International Office of Epizootics (OIE, from the French acronym), for animal health and zoonoses; (c) the offices of the International Plant Protection Convention (IPPC), for plant health. The SPS also provides the possibility of other relevant international organizations to be identified by the SPS Committee for matters not covered by the above organizations though so far none has been identified as such.

[80] Bernstein and Hannah, *supra* note 1, at 4.

notice that NSMD are gaining more legitimacy and support in the society and trade arena and that the WTO should simply carve out "negative" space rather than take "positive action" that will require active policy making and high-level political consensus. They favor, in their own words, a non-interventionist approach since a more overt action would be unlikely to succeed.[81] More specifically, they recommend that the WTO should avoid establishing rules on npr-PPMs or privilege any standardization bodies.[82] Their proposal recognizes the political sensitiveness of those issues in a very accurate manner. However, I think that a totally non-interventionist approach tends to off-set the fact that private standards are normally a demand of groups coming from developed countries. In this way, at least keeping the relevant WTO committees as a place to debate the issue does not seem to be improper, as commentators from Brazil have already suggested.[83]

Aaronson approaches CSR and the WTO by describing many initiatives that national policymakers are doing to link CSR to trade policies and agreements (not only in the WTO context). She identifies six areas of contention where WTO rules may undermine responsible corporate behavior, including government procurement and social and eco-labelling.[84] Since many members are struggling to find a way to encourage both trade and CSR, but CSR is neither under the WTO mandate nor is subject to current negotiation, she suggests that the WTO establish a research agenda, possibly in concert with other international organizations. I have two observations about her proposal. First, it seems that the verb "undermine" is a somewhat strong one to assess the impact of the WTO over CSR. Most likely, CSR initiatives are out of scope of

[81] *Id.* at 32.
[82] *Id.* at 33.
[83] Rodrigo Lima & Welber Barral, *Barreiras não-Tarifárias ao Comércio: o Papel Regulatório da OMC, Controvérsias e Novas Restrições* [NTBs: the Regulatory Role of the WTO, Controversies and New Barriers], 93 REVISTA BRASILEIRA DE COMÉRCIO EXTERIOR [Brazilian J. of Foreign Trade] 73; 83 (Out-Dez. 2007). http://www.funcex.com.br/rbce.asp.
[84] Aaronson acknowledges six areas: (a) TRIPS and access to affordable medicines; (b) TRIPS and traditional knowledge; (c) export processing zones and labor rights; (d) business in conflicting areas; (e) procurement rules and CSR; and (f) social and eco-labelling. Aaronson, *supra* note 1, at 644-651.

the WTO realm and even hybrid initiatives are in waters of significant tide variations: members' opposite stands are more to keep the WTO out of the CSR business than to decide something on that (it is true, nonetheless, that as CSR initiatives permeates governmental action a hypothetical case may be subject to trade rules scrutiny). Second, though a formal agenda of CSR under the WTO secretariat has not thus far been established, some cross issues have already been going on: on February 2007, for instance, the International Labour Organization and the WTO Secretariat issued a "Trade and Employment: Challenges for Policy Research".[85] In its third edition, the WTO will hold a public forum in which concerns out of the mandate or the organization, such as CSR, are addressed.[86] The WTO Secretariat also employs a staff that has been actively publishing, in their personal quality, issues related to trade and non-trade concerns.[87]

Finally, Foster's point of departure is on democracy, more specifically on the role of public opinion in the interpretation of the SPS. In her approach, members should be able to defend SPS measures on the basis that their population just does not want to run a given risk.[88] She advances her claim that disproportionate measures could possibly be a result of a population genuinely held views and that the SPS must accommodate such positions. Additionally, Foster suggests that in practice "risk assessments" required by the SPS would eventually involve a close

[85] MARION JANSEN & EDDY LEE, WTO SECRETARIAT AND INTERNATIONAL LABOUR OFFICE, TRADE AND EMPLOYMENT: CHALLENGES FOR POLICY RESEARCH (2007). http://www.wto.org/english/news_e/news07_e/ilo_feb07_e.htm. Surely, I am referring here to a cross-institutional cooperation example rather than a trade-CSR research agenda itself.

[86] The 2007 forum had a specific discussion on global governance, including social standards, see http://www.wto.org/english/forums_e/public_forum2007_e/topics_e.htm . *See* also WTO Secretariat, *WTO Public Forum 2006: What WTO for the XXIst Century?* (Sep. 25-26, 2006) at 71 (reproducing the presentation on CSR and the Doha Round: Are there win win opportunities for the private sector and developing countries?, organized by the Geneva Social Observatory and the Quaker United Nations Office). http://www.wto.org/english/res_e/booksp_e/public_forum06_e.pdf.

[87] Three examples: Gabrielle Marceau, *A Call for Coherence in International Law*, 33(5) J. WORLD TRADE 87 (1999). Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13(4) EUR. J. INT'L L. 753 (2002). Robert D. Anderson & Hannu Wager, *Human Rights, Development, and the WTO: the Cases of Intellectual Property and Competition Policy*, 9(3) J. INT'L ECON. L. 707 (2006).

[88] Foster, *supra* note 1, at 432

examination of the internal consultation processes carried out with those populations.[89] What may sound paradoxical on her proposal is that the point of departure (democratic deficit and illegitimacy of the WTO) is accompanied by a solution that may worsen that issue (i.e., to involve panels and the AB in closer analysis of internal consultation processes carried out by members' populations may backfire even more on questions of legitimacy).

Overall, these recent analysis suggest more or less interventionist approaches on future matter of CSR under the WTO. This paper aimed at providing the background for the discussion and presented some reactions to them.

Conclusion

The waters in the WTO and CSR seas are different. The WTO is an intergovernmental organization disciplining members' rights and obligations on multilateral trade; CSR, though not uniquely defined, entails - for example - voluntary codes of conduct and certification initiatives tackling corporation behavior in areas of social and environmental standards. As our fisherman's journey has shown us, however, a strait may exist between those waters. This is demonstrated perhaps most obviously by the fact that whenever a member adopts a CSR initiative under its law, a trade measure may be challenged and the interpretation of the covered agreements, particularly the GATT 1994, the TBT, the SPS, and the GPA may come into play. Aside from this dynamic, it has been argued that the WTO touches CSR issues indirectly. Furthermore, the WTO jurisprudence has not advanced interpretations of npr-PPMs or international relevant standards that could impinge on CSR initiatives.

[89] *Id.* at 452. She finally suggests that such an approach is in consistency with international human rights law by surveying relevant human rights law. *Id.* at 453-455. In the context of the role of public opinion on the formation of customary international law, *see* Christiana Ochoa, *The Individual and Customary International*, 48(1) VA. J. INT. L. 119, 182-184 (2007) (discussing, among other things, two examples of projects that illustrate the viability and potential utility of large scale polling for the purpose of assessing beliefs, expectations, and practices: Eurobarometer and Afrobarometer).

Appendix 1 – Acronyms

Acronyms referred more than one time:

AB	Appellate Body
CSR	Corporate Social Responsibility
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
EU	European Union
FLO	Fairtrade Labeling Organization International
GATT	General Agreement on Tariff and Trades
GPA	Governmental Procurement Agreement
ICTSD	International Centre for Trade and Sustainable Development
ISEAL	International Social and Environmental Accreditation and Labeling Alliance
ITO	International Trade Organization
MMPA	Marine Mammal Protection Act
MFN	Most-Favored Nation
NGO	Non-Governmental organization
npr-PPM	Non-Product-Related Processes and Production Method
NSMD	Non-State Market Driven
NT	National Treatment
NTB	Non-Tariff Barrier
OECD	Organisation for Economic Co-operation and Development
PR-PPM	Product-Related Processes and Production Method
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UN-GC	United Nations Global Compact
US	United States
WTO	World Trade Organization

One time referred acronyms:

CAFTA	Central America Free Trade Agreement
FSC	Forest Stwerdship Council
GATS	General Agreement on Trade in Services
ILO	International Labour Organization
IOAS	the International Organic Accreditation Service
TPRM	Trade Policy Review Mechanism