

# Private Environmental Governance and the Trans-Pacific Partnership

STEPH TAI\*

## ABSTRACT

*Private environmental governance continues to gain legal environmental academic attention.<sup>1</sup> Newer bilateral and regional trade agreements increasingly encourage the use of private environmental governance as a counterpart to traditional environmental regulation.<sup>2</sup> The Trans-Pacific Partnership (“TPP”) followed this trend, but contained novel limits on the flexibility of the private governance mechanisms it encouraged. Although the TPP will not enter into force in its current form, it suggests how private environmental governance mechanisms may be addressed in future agreements. This Article examines the private governance provisions of earlier free trade agreements involving the United States. It then explores several of the ways in which the voluntary mechanisms provisions of the TPP differed. It concludes by highlighting potential areas of academic exploration related to these developments, and suggesting considerations that legal decisionmakers should keep in mind when working with these provisions.*

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\* Associate Professor of Law, University of Wisconsin Law School, © 2017, Steph Tai, and former editor-in-chief of the *Georgetown Environmental Law Review*! (Back when it was the *Georgetown International Environmental Law Review*.) Special thanks go to Alexia Brunet Marks, who helped strengthen this Article with some really fantastic suggestions on draft versions.

1. See, e.g., Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 146–61 (2013) (describing various collective standard-setting organizations and bilateral standard-setting organizations); see generally EUROPEAN ENV'T AGENCY, TECH. REPORT NO. 4/2011, GLOBAL GOVERNANCE—THE RISE OF NON-STATE ACTORS (2011), <http://www.eea.europa.eu/publications/global-governance>.

2. See, e.g., DALE COLYER, GREEN TRADE AGREEMENTS 85 (2011) (providing the U.S.-Chile Trade Agreement and the EC-Cariforum Economic Partnership Agreement as examples).

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## INTRODUCTION

Professor Michael Vandenbergh’s seminal law review article on private environmental governance defines it as “actions taken by non-governmental entities that are designed to achieve traditionally governmental ends such as managing the exploitation of common pool resources, increasing the provision of public goods, reducing environmental externalities, or more justly distributing environmental amenities.”<sup>3</sup> Private environmental governance mechanisms are “develop[ed] and enforce[d] by private parties . . . to achieve traditionally governmental ends.”<sup>4</sup>

Eco-labels and private standards are two examples of mechanisms that create market-based influence on the environmental behavior of private entities.<sup>5</sup> Scholars agree that one of the key features of private environmental governance is that the rules or standards it creates must have some degree of “binding effect.”<sup>6</sup> Mere claims of “sustainability” may not necessarily fall within the category of private environmental governance unless such claims are supported by private rules or standards regarding those claims, as well as some form of private “enforcement” (either by certifying bodies, by third-party verifiers, or even by other parties using the same label) behind them.

The use of private environmental mechanisms has been growing. In the area of eco-labels alone,<sup>7</sup> the number of single-standard eco-labels has risen from under 1000 to over 12,000 from 2007 to 2008.<sup>8</sup> Many factors have combined to drive the growth of private environmental governance. Consumer preference is one strong driver. “Consumers are increasingly demanding greener products and

3. Vandenbergh, *supra* note 1, at 146.

4. *Id.* at 147.

5. *Id.* at 146–47.

6. See, e.g., Scott Schang, *Private Environmental Governance*, in 3 L. OF ENVTL. PROT. § 25:4 (Envtl. Law Inst. ed., Oct. 2016).

7. The term “eco-label” generally refers to labels used to identify certain products as preferable based on environmental impact assessments of those products as compared to others in the same category. Jill J. McCluskey & Maria L. Loureiro, *Consumer Preferences and Willingness to Pay for Food Labeling: A Discussion of Empirical Studies*, 34 J. FOOD DISTRIBUTION RES. 95, 95 (2003).

8. CORP. SUSTAINABILITY INITIATIVE, DUKE UNIV., DOC. NO. 2010-10-1, AN OVERVIEW OF ECOLABELS AND SUSTAINABILITY CERTIFICATIONS IN THE GLOBAL MARKETPLACE 15 (Jay S. Golden ed., 2010), <https://center.sustainability.duke.edu/sites/default/files/documents/ecolabelsreport.pdf>.

services, delivered through responsible environmental practices.”<sup>9</sup> Nongovernmental organizations, as well, have played a role.<sup>10</sup> Other drivers include institutional buyers and regulatory requirements.<sup>11</sup>

Some scholars see private governance mechanisms as a promising nongovernmental way to incorporate sustainability into food production.<sup>12</sup> Critics, however, question the effectiveness of private mechanisms in shaping actual environmental behavior,<sup>13</sup> as well as the effectiveness of specific private mechanisms, such as labels, in conveying information about actual production processes.<sup>14</sup>

Multilateral and bilateral trade agreements have been increasingly encouraging the promotion of market-based mechanisms as potential counterparts to traditional environmental regulation.<sup>15</sup> This Article analyzes the novel approach of the Trans-Pacific Partnership Agreement (“TPP Agreement” or “TPP”) toward this important and growing field. This Article does not weigh the effectiveness of particular private environmental governance mechanisms, or even the use of private environmental governance overall. Instead, it approaches this topic from the perspective of recognizing the increasing scholarly attention in this area.

This Article argues that the language used in the TPP is notable because it contained prescriptive elements, whereas earlier agreements were mainly exhortatory. The TPP Agreement is novel in that it included normative descriptions of

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9. Deborah P. Majoras, *A Summit on Private Environmental Governance: Facing the Challenges of Voluntary Standards, Supply Chains, and Green Marketing*, 44 ENVTL. L. REP. 10120, 10120 (2014); see also CORP. SUSTAINABILITY INITIATIVE, *supra* note 8, at 10. A “standard,” in this context, refers to “a sub-category of the label. For example, Energy Star has standards for dishwashers, printers, air-conditioners etc.” *Id.* at 71. Thus, the number of “single-standard eco-labels” measures the number of different eco-standards developed for different product areas.

10. See, e.g., Philipp Pattberg, *Private Environmental Governance and the Sustainability Transition: Functions and Impacts of NGO-Business Partnerships*, in GOVERNANCE FOR INDUSTRIAL TRANSFORMATION 52–66 (Klaus Jacob et al. eds., 2004).

11. See CORP. SUSTAINABILITY INITIATIVE, *supra* note 8, at 10–11.

12. See, e.g., Tracey M. Roberts, *Innovations in Governance: A Functional Typology of Private Governance Institutions*, 22 DUKE ENVTL. L. & POL’Y F. 67, 76–134 (2011); Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 136–39 (2001); Tobias Hahn & Jonatan Pinkse, *Private Environmental Governance Through Cross-Sector Partnerships: Tensions Between Competition and Effectiveness*, 27 ORG. & ENV’T 140 (2014); Julie A. Caswell & Daniel I. Padberg, *Toward a More Comprehensive Theory of Food Labels*, 74 AM. J. AGRIC. ECON. 460 (1992); see also RENATA CLARKE, FOOD & AGRIC. ORG. OF THE U.N., PRIVATE FOOD SAFETY STANDARDS: THEIR ROLE IN FOOD SAFETY REGULATION AND THEIR IMPACT (2010), <http://www.fao.org/docrep/016/ap236e/ap236e.pdf>.

13. See, e.g., Megan S. Houston, Note, *Ecolabel Programs and Green Consumerism: Preserving A Hybrid Approach to Environmental Regulation*, 7 BROOK. J. CORP. FIN. & COM. L. 225 (2012); Jessica E. Fliegelman, Note, *The Next Generation of Greenwash: Diminishing Consumer Confusion Through a National Eco-Labeling Program*, 37 FORDHAM URB. L. J. 1001 (2010); Greg Northen, Comment, *Greenwashing the Organic Label: Abusive Green Marketing in an Increasingly Eco-Friendly Marketplace*, 7 J. FOOD L. & POL’Y 101 (2011); Stepan Wood, *Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law, and Private Authority in Canada*, in NEW PERSPECTIVES ON THE PUBLIC-PRIVATE DIVIDE 123–65 (2003).

14. See, e.g., Martijn W. Scheltema, *Assessing Effectiveness of International Private Regulation in the CSR Arena*, 13 RICH. J. GLOBAL L. & BUS. 263, 280–81 (2014).

15. See, e.g., COLYER, *supra* note 2, at 85.

what encouraged mechanisms should look like. The Article concludes by highlighting promising areas of academic research to explore as other trade agreements are considered in the future, and provides several considerations for legal decisionmakers if they encounter private environmental governance requirements similar to those contained in the TPP Agreement.

## I. BACKGROUND

### A. THE RISING SALIENCE OF PRIVATE ENVIRONMENTAL GOVERNANCE

Professor Mark Vandenberg's 2013 article, *Private Environmental Governance*, highlighted the increasing importance of private environmental governance in understanding environmental law.<sup>16</sup> He observed that, in the United States, "no major federal environmental statute has been enacted since the Clean Air Act Amendments of 1990."<sup>17</sup> Similarly, he pointed out that, "[d]espite a remarkable number of conferences, pronouncements, and treaties, few significant binding environmental requirements have emerged at the international level."<sup>18</sup>

But this lack of "traditional" government action on the environment does not necessarily reflect a lack of public support for environmental protection. Declining public attention towards traditional governmental environmental protection might instead suggest a shift toward the public expressing its demands for environmental protection through the private sphere. In fact, Vandenberg writes, "[p]rivate-private interactions now generate many of the environmental requirements that affect corporate and household behavior, and ultimately environmental quality."<sup>19</sup>

Professor Vandenberg called for academic focus on the emerging field of private environmental governance, defining it as "the development and enforcement by private parties of requirements designed to achieve traditionally governmental ends."<sup>20</sup> He noted that "[t]he common feature of both the public and private law views is that the source of coercive authority needed to address environmental problems is the government."<sup>21</sup> But, he argued, private actions are spurred by nongovernmental drivers as well.<sup>22</sup> These need not be the same public-oriented drivers by which governmental actions may be driven.<sup>23</sup> Such actions warrant legal scholarly attention so long as they "induce[] a private entity

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16. See Vandenberg, *supra* note 1.

17. See *id.* at 131.

18. See *id.* at 132.

19. See *id.* at 133.

20. *Id.* at 147.

21. See *id.* at 146.

22. *Id.* ("The actions taken by these non-governmental entities often include the traditional standard-setting, implementation, monitoring, enforcement, and adjudication functions of governments.")

23. See *id.* at 147.

to achieve a traditionally governmental objective.”<sup>24</sup>

In consonance with Professor Vandenberg’s approach of expanding traditional environmental legal analyses, he specifically calls for a focus on private environmental governance, defined as “the development and enforcement by private parties of requirements designed to achieve traditionally governmental ends.”<sup>25</sup> The idea is that an examination of private environmental governance entails an examination of the ways in which the private sphere responds to environmental concerns similar to those that scholars have focused on in the public sphere.

Professor Vandenberg identified several categories of private mechanisms. In group-based standards, private actors agree to take on certain “collective” environmental obligations,<sup>26</sup> perhaps due to consumer or institutional-purchaser demands. Such private collective approaches can involve the use (by private entities) of establishing certification or labeling standards.<sup>27</sup> An example of this is the Seafood Watch standard, which provides ratings for seafood based on “assessments . . . conducted using a rigorous, science-based process to ensure recommendations are based on the most relevant, up-to-date publicly available data and information.”<sup>28</sup>

Lending standards—such as the Equator Principles described by Vandenberg<sup>29</sup>—are another type of group-based mechanism. These may, for instance, require disclosure related to project lending similar to that required under the National Environmental Policy Act.<sup>30</sup>

Other approaches are more “bilateral,” rather than group-based, in the sense that they involve one-on-one agreements to establish environmental standards for supply-chain contracting, management, or even disclosure.<sup>31</sup> An example of this is the Whole Foods “Responsibly Grown” ratings standard, which Whole Foods describes as applying to its “farmer partners,” and works in conjunction with existing labels that are more group-based.<sup>32</sup>

Collective or bilateral, the common feature is that private entities are developing private-law based responses to demands for environmental protection. A scholarly focus on the dynamics of private environmental governance, in turn, provides “a new model of legal and extralegal influences on the environmentally

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24. *Id.*

25. *Id.*

26. *See id.* at 148.

27. *See id.* at 148–51.

28. *See Our Standards*, MONTEREY BAY AQUARIUM SEAFOOD WATCH, <https://www.seafoodwatch.org/seafood-recommendations/our-standards> (last visited Nov. 3, 2016).

29. *See Vandenberg*, *supra* note 1, at 151.

30. *Id.*

31. *See id.* at 156–61.

32. *See Get to Know Responsibly Grown*, WHOLE FOODS MARKET, <http://www.wholefoodsmarket.com/responsibly-grown> (last visited Dec. 26, 2016).

significant behavior of corporations and households.”<sup>33</sup> It is a complex model—acting both in competition and as complements to traditional public regulation.<sup>34</sup>

Vandenbergh provided three reasons for environmental law scholars to consider more deeply the dynamics of private environmental governance: (1) to develop additional ways to think about the dynamics of why actors may respond (or not respond) to environmental problems,<sup>35</sup> (2) to shift the approach towards a more comparative institutional evaluation of how to address environmental problems,<sup>36</sup> and (3) to spur scholars to think more broadly about potential solutions for the collective action issues that lead to environmental problems.<sup>37</sup>

Scholars have heeded this call in a number of ways.<sup>38</sup> Since Professor Vandenbergh published his work, a number of environmental law articles have examined private governance in contexts as varied as hydraulic fracking,<sup>39</sup> climate change,<sup>40</sup> fisheries,<sup>41</sup> and food sustainability.<sup>42</sup> Moreover, a number of legal scholarly articles have explored the phenomenon of private global governance as a general matter.<sup>43</sup> Also, one of the more recent international environmental law casebooks includes a section addressing private transnational codes.<sup>44</sup>

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33. Vandenbergh, *supra* note 1, at 133.

34. *Id.* at 135.

35. *Id.* at 138.

36. *Id.* (citing, among other sources, NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 28 (1994)).

37. *Id.* at 139.

38. This is not to suggest that scholars had not already been discussing this dynamic for some time, just that Professor Vandenbergh gave conceptual focus to some of the conversations that had already been ongoing in the legal literature. *See, e.g.*, Tracey M. Roberts, *The Rise of Rule Four Institutions: Voluntary Standards, Certification and Labeling Systems*, 40 *ECOLOGY L. Q.* 107 (2013); Cary Coglianese, *The Managerial Turn in Environmental Policy*, 17 *N.Y.U. ENVTL. L. J.* 54, 71 (2008); Wendy E. Wagner, *Imagining Corporate Sustainability as a Public Good Rather Than a Corporate Bad*, 46 *WAKE FOREST L. REV.* 561, 562 (2011); Douglas A. Kysar, *Sustainable Development and Private Global Governance*, 83 *TEX. L. REV.* 2109 (2005); Errol E. Meidinger, *Environmental Certification Programs and U.S. Environmental Law: Closer Than You May Think*, 31 *ENVTL. L. REP. NEWS & ANALYSIS* 10162, 10163–64 (2001).

39. *See, e.g.*, Amanda C. Leiter, *Fracking, Federalism, and Private Governance*, 39 *HARV. ENVTL. L. REV.* 107 (2015); Susan Packard LeGros, *The Critical Role of Voluntary Standards and Certification in the Hydraulic Fracturing Framework*, 45 *ENVTL. L. REP. NEWS & ANALYSIS* 10741 (2015).

40. *See, e.g.*, Michael P. Vandenbergh & Kaitlin T. Raimi, *Climate Change: Leveraging Legacy*, 42 *ECOLOGY L. Q.* 139 (2015).

41. *See, e.g.*, Zdravka Tzankova, *Interactions Between Private and Public Resource Governance: Key Insights from the Fisheries Case*, 6 *WM. & MARY POL’Y REV.* 1 (2015).

42. *See, e.g.*, Alexia Brunet Marks, *A New Governance Recipe for Food Safety Regulation*, 47 *LOY. U. CHI. L. J.* 907 (2016); Peter Oosterveer, *Sustainable Food Governance by Governments and Markets*, 6 *EUR. J. RISK REG.* 525 (2015).

43. *See, e.g.*, Jason J. Czarnecki & Katherine Fiedler, *The Neoliberal Turn in Environmental Regulation*, 2016 *UTAH L. REV.* 1 (2016); Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 *MICH. J. ENVTL. & ADMIN. L.* 1 (2015); Oren Perez, *The Hybrid Legal-Scientific Dynamic of Transnational Scientific Institutions*, 26 *EUR. J. INT’L L.* 391 (2015); Scott Schang et al., *Ending the Tyranny of the Status Quo: Building 21st Century Environmental Law*, 32 *PACE ENVTL. L. REV.* 524 (2015); Lesley K. McAllister, *Harnessing Private Regulation*, 3 *MICH. J. ENVTL. & ADMIN. L.* 291 (2014).

44. *See* EDITH BROWN WEISS ET AL., *INTERNATIONAL LAW FOR THE ENVIRONMENT* 1147–49, 1242–70 (2016).

This is only a small part of the growing academic trend (even outside of the legal academy) of examining private environmental governance.<sup>45</sup>

#### B. THE ENCOURAGEMENT OF PRIVATE ENVIRONMENTAL GOVERNANCE IN TRADE AGREEMENTS

The practical implications of private environmental governance are wide-ranging. Multilateral, regional, and bilateral trade agreements include language expressly encouraging (or at least addressing) the use of private mechanisms for environmental protection.<sup>46</sup> This section provides a basic introduction to the approaches that have been used in multilateral and bilateral free trade agreements to which the United States has been a party. It also briefly discusses some underlying World Trade Organization (“WTO”) considerations.

Free trade agreements are “arrangements among two or more countries under which they agree to eliminate tariffs and nontariff barriers on trade in goods among themselves.”<sup>47</sup> Trade agreements may also “contain rules on economic activities . . . including foreign investment, intellectual property rights protection, treatment of labor and environment, and trade in services.”<sup>48</sup>

A number of the more recent free trade agreements entered into by the United States not only create rules surrounding environmental activities applicable to the parties, but also contain provisions encouraging private environmental governance. Often—although not always—private environmental governance is referred to in these agreements as “voluntary mechanisms to enhance environmental performance.”<sup>49</sup> Scholarly commentary specific to these provisions has mostly taken the form of descriptive mentions.<sup>50</sup>

This section focuses on the language of these provisions, and how it has changed over time. As a general matter, these provisions have generally increased in detail with each subsequent agreement. For example, the United States-Chile Free Trade Agreement, signed on June 6, 2003, and entered into force on January 1, 2004, contains relatively simple language allowing for types of private environmental governance, without providing any specific encouragement for their use:

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45. See, e.g., Mai-Lan Ha, *Draft: Literature Review on Voluntary Social and Environmental Standards and Governance*, PAC. INST. (Sept. 24, 2012), <http://pacinst.org/app/uploads/2013/06/pacinst-standards-and-public-governance-lit-review-sept-2012.pdf>.

46. See COLYER, *supra* note 2, at 85; see also discussion *infra* in this section.

47. William H. Cooper, *Free Trade Agreements: Impact on U.S. Trade and Implications for U.S. Trade Policy*, CONG. RES. SERV., Summary (2014), [http://digitalcommons.ilr.cornell.edu/key\\_workplace/1245/](http://digitalcommons.ilr.cornell.edu/key_workplace/1245/).

48. *Id.* at 2.

49. See, e.g., Simon Lester, *The Role of the International Trade Regime in Global Governance*, 16 UCLA J. INT’L L. & FOREIGN AFF. 209, 237 (2011).

50. See, e.g., Thomas Werge, *Environmental Standards under the Peru FTA: A Template for the WTO?*, 23 GEO. INT’L ENVTL. L. REV. 71, 78 (2010).

3. Cooperation under the Cooperation Agreement may include work in the following fields of activity:
  - (a) improving capacity to achieve environmental compliance assurance, including enforcement and voluntary environmental stewardship;
  - (b) encouraging small- and medium-size enterprises to adopt sound environmental practices and technologies;
  - (c) developing public-private partnerships to achieve environmental objectives;
  - (d) promoting sustainable management of environmental resources, including wild fauna and flora, and protected wild areas;
  - (e) exploring environmental activities pertinent to trade and investment and the improvement of environmental performance;
  - (f) developing and implementing economic instruments for environmental management.<sup>51</sup>

The United States-Australia Free Trade Agreement, signed on May 18, 2004, and entered into force on January 1, 2005, however, does contain language expressly encouraging parties to promote the use of voluntary mechanisms. Not only does the Agreement use aspirational language regarding voluntary mechanisms, but it also gives more form to the types of voluntary mechanisms that fall under this category. Article 19.4 of the Agreement (Voluntary Mechanisms to Enhance Environmental Performance) states:

The Parties recognise that flexible, voluntary, and market-based mechanisms can contribute to the achievement and maintenance of high levels of environmental protection. As appropriate and in accordance with its law, each Party shall encourage the development of such mechanisms, which may include partnerships, sharing information, and market-based mechanisms that encourage the protection of natural resources and the environment.<sup>52</sup>

Later agreements provide more detail regarding voluntary mechanisms, although they take substantially similar form.<sup>53</sup> For the purposes of illustration, this Article will only reproduce provisions from a more recent agreement—the Free

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51. United States-Chile Free Trade Agreement annex 19.3(3)(a-f), June 6, 2003, 42 I.L.M. 1026.

52. United States-Australia Free Trade Agreement art. 19.4, May 18, 2004, 43 I.L.M. 1248.

53. See United States-Korea Free Trade Agreement art. 20.5, June 30, 2007, 46 I.L.M. 642 [hereinafter U.S.-Korea FTA] (Mechanisms to Enhance Environmental Performance); United States-Colombia Trade Promotion Agreement art. 18.5, Nov. 22, 2006 [hereinafter U.S.-Colombia TPA] (Mechanisms to Enhance Environmental Performance); United States-Peru Trade Promotion Agreement art. 18.5, Apr. 12, 2006 [hereinafter U.S.-Peru TPA] (Mechanisms to Enhance Environmental Performance); United States-Oman Free Trade Agreement art. 17.4, Jan. 19, 2006 [hereinafter U.S.-Oman FTA] (Voluntary Mechanisms to Enhance Environmental Performance); United States-Morocco Free Trade Agreement art. 17.5, June 15, 2004, 44 I.L.M. 544 [hereinafter U.S.-Morocco FTA] (Complementary Mechanisms to Enhance Environmental Performance); United States-Bahrain Free Trade Agreement art. 16.4, Sept. 14, 2004, 44 I.L.M. 544 [hereinafter U.S.-Bahrain FTA] (Voluntary Mechanisms to Enhance Environmental Performance); Dominican Republic-Central America-United States Free Trade Agreement art. 17.4, Sept. 14, 2004, 43 I.L.M. 514 [hereinafter CAFTA-DR] (Voluntary Mechanisms to Enhance Environmental Performance).

Trade Agreement between the United States and the Republic of Korea—and make reference in the footnotes to the relevant portion of similar provisions in other trade agreements.

Article 20.5 of the United States-Republic of Korea Free Trade Agreement (Mechanisms to Enhance Environmental Performance) is the provision addressing environmental governance. It provides substantially more description of the potential mechanisms that could be used in private governance—from business partnerships to voluntary guidelines to private information sharing.<sup>54</sup> It also contains specific incentive structures for private environmental protection, including market-based incentives.<sup>55</sup> Additionally, it urges the parties to encourage the development of goals and standards for these mechanisms,<sup>56</sup> and flexibility in achieving those goals and standards.<sup>57</sup> It states:

1. The Parties recognize that flexible, voluntary, and incentive-based mechanisms can contribute to the achievement and maintenance of high levels of environmental protection, complementing the procedures set out in Article 20.4. As appropriate and in accordance with its law, each Party shall encourage the development and use of such mechanisms, which may include:
  - (a) mechanisms that facilitate voluntary action to protect or enhance the environment, such as:
    - (i) partnerships involving businesses, local communities, non-governmental organizations, government agencies, or scientific organizations;
    - (ii) voluntary guidelines for environmental performance; or
    - (iii) voluntary sharing of information and expertise among authorities, interested parties, and the public concerning methods for achieving high levels of environmental protection, voluntary environmental auditing and reporting, ways to use resources more

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54. See U.S.-Korea FTA art. 20.5(1)(a)(i)–(iii); see also U.S.-Colombia TPA art. 18.5(1)(a)(i)–(iii); U.S.-Peru TPA, art. 18.5(1)(a)(i)–(iii); U.S.-Oman FTA, art. 17.4(1)(a)(i)–(iii); U.S.-Morocco FTA, art. 17.5(1)(a)(i)–(iii); U.S.-Bahrain FTA, art. 16.4(1)(a)(i)–(iii); CAFTA-DR, art. 17.4(1)(a)(i)–(iii).

55. See U.S.-Korea FTA art. 20.5(1)(b); see also U.S.-Colombia TPA art. 18.5(1)(b); U.S.-Peru TPA art. 18.5(1)(b); U.S.-Oman FTA art. 17.4(1)(b); U.S.-Morocco FTA art. 17.5(1)(b); U.S.-Bahrain FTA art. 16.4(1)(b); CAFTA-DR, art. 17.4(1)(b). In a side letter with respect to the U.S.-Oman FTA, the parties also clarified that “the list of incentives in subparagraph (b) of Article 17.4.1, including the development of programs for exchanging or trading permits, credits, or other instruments, is illustrative. The encouragement of the development of such incentives is at the discretion of each Party, as appropriate and in accordance with its law.” Letter from Rob Portman, U.S. Trade Rep., to H.E. Maqbool Bin Ali Sultan, Minister of Com. & Industry, Sultanate of Oman (Jan. 19, 2006), (Jan. 19, 2006), [https://ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset\\_upload\\_file440\\_8843.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/oman/asset_upload_file440_8843.pdf).

56. See U.S.-Korea FTA art. 20.5(2)(a); see also U.S.-Colombia TPA art. 18.5(2)(a); U.S.-Peru TPA art. 18.5(2)(a); U.S.-Oman FTA art. 17.4(2)(a); U.S.-Morocco FTA art. 17.5(2)(a); U.S.-Bahrain FTA art. 16.4(2)(a); CAFTA-DR art. 17.4(2).

57. See U.S.-Korea FTA art. 20.5(2)(b); see also U.S.-Colombia TPA art. 18.5(2)(b); U.S.-Peru TPA art. 18.5(2)(b); U.S.-Oman FTA art. 17.4(2)(b); U.S.-Morocco FTA art. 17.5(2)(b); U.S.-Bahrain FTA art. 16.4(2)(b); CAFTA-DR art. 17.4(2)(b).

- efficiently or reduce environmental impacts, environmental monitoring, and collection of baseline data; or
- (b) incentives, including market-based incentives where appropriate, to encourage conservation, restoration, and protection of natural resources and the environment, such as public recognition of facilities or enterprises that are superior environmental performers, or programs for trading permits or other instruments to help achieve environmental goals.
2. As appropriate and feasible and in accordance with its law, each Party shall encourage:
- (a) the maintenance, development, or improvement of performance goals and standards used in measuring environmental performance; and
  - (b) flexible means to achieve those goals and meet those standards, including through mechanisms identified in paragraph 1.<sup>58</sup>

### C. PRIVATE ENVIRONMENTAL GOVERNANCE AND THE WTO

Voluntary mechanism provisions, like those excerpted above, have a unique place in the ecosystem of international trade law generally, and the WTO in particular. It is apparent that voluntary mechanisms could depart from the general principle of non-discrimination defined in Article I of the General Agreement on Tariffs and Trade (“GATT”).<sup>59</sup> But agreements containing voluntary mechanisms, such as the ones described here, can be entered into with GATT approval under the GATT Article XXIV exception.<sup>60</sup> Most relevant is Subpart 5, stating that GATT members may create additional multilateral or bilateral free-trade agreements with new terms, provided that:

5(b) [T]he duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area . . . shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be . . .<sup>61</sup>

These restrictions, however, apply to states, not private entities—the relevant actors in private environmental governance. As the Food and Agriculture Organization explained:

[World Trade Organization] rules govern standards set by governments or government-related institutions. Private standards are set by non-governmental entities, including civil society organizations and private enterprises and their

58. U.S.-Korea FTA art. 20.5.

59. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. All, 55 U.N.T.S. 187, art. I.

60. *Id.* art. XXIV.

61. *Id.* art. XXIV(5).

coalitions, which may not be challenged directly before the WTO. While governmental standards are expected to be set within the framework of WTO rules, private standards (including not only food safety but also environmental and social standards) obviously have no single internationally recognized set of rules in which they should be based.<sup>62</sup>

Of course, private voluntary mechanisms that have the practical effect of “regulating” commerce in a “more restrictive” manner than previously existed could be viewed as an end-run around state agreements designed to promote free trade.<sup>63</sup> The fact that private environmental governance standards are utilized more by producers and marketers in developed states could be argued as supportive of this assessment.<sup>64</sup>

Perhaps anticipating this concern, two specific provisions of WTO Agreements explicitly caution against allowing nongovernmental bodies to subvert the basic principles of the WTO through private agreements. First, the Application of Sanitary and Phytosanitary Measures urges parties to “take reasonable measures” to ensure that nongovernmental bodies, such as those engaging in private environmental governance, act in accordance with the WTO regime.<sup>65</sup> This Agreement applies to “all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade,”<sup>66</sup> including many environmental measures—especially those involving natural materials, such as food.

Second, the Technical Barriers to Trade Agreement also states that “Members shall not take measures which require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with the provisions of Article 2.”<sup>67</sup> This Agreement pertains to “[g]eneral terms for standardization and procedures for assessment of conformity.”<sup>68</sup> It may reach private environmental governance measures to the extent that they are characterized as either “standardization” or “conformity” measures.

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62. FOOD & AGRIC. ORG. OF THE U.N., PRIVATE STANDARDS IN THE UNITED STATES AND EUROPEAN UNION MARKETS FOR FRUIT AND VEGETABLES: IMPLICATIONS FOR DEVELOPING COUNTRIES 4 (2007), <http://www.fao.org/3/a-a1245e.pdf>. See also Tomasz Włostowski, *Selected Observations on Regulation of Private Standards by the WTO*, 30 POLISH Y.B. INT’L L. 205, 217 (2010) (“To summarize, enforcement of WTO obligations on private entities within national jurisdiction is a battle that WTO Members are unlikely to pick, unless they are forced.”). Some developing countries have criticized, however, the absence of trade governance for such private standards, “reflecting the perception that in some cases private standards are acting de facto mandatory.” FOOD & AGRIC. ORG. OF THE U.N., *supra*, at 4.

63. Brunet Marks, *supra* note 42, at 966 (“The WTO and others have said that private standards are based on a ‘non-scientific, zero-risk, marketing approach’ and would therefore contravene international trade rules (in theory).”).

64. See *id.* at 926.

65. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Annex 1A, art. 13, 1867 U.N.T.S. 493, World Trade Organization.

66. *Id.* art. 1.1.

67. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Agreements on Trade in Goods, art. 3.4, 1868 U.N.T.S. 120.

68. *Id.* art. 1.1.1.

The conjunction of these two provisions may be argued to apply to even the private governance measures of WTO parties' free trade agreements, and limit the extent to which such agreements can encourage the unconstrained development of private environmental governance. It could also be argued to at least confine the interpretation of the private environmental governance measures of parties' free trade agreements to those consistent with the WTO regime.

## II. THE TRANS-PACIFIC PARTNERSHIP AND PRIVATE ENVIRONMENTAL GOVERNANCE

The Trans-Pacific Partnership Agreement was the latest of the free trade agreements negotiated by the United States.<sup>69</sup> The final form was signed on February 4, 2016, between twelve Pacific Rim countries: Australia, Canada, Japan, Malaysia, Mexico, Peru, United States, Vietnam, Chile, Brunei, Singapore, and New Zealand.<sup>70</sup> On January 23, 2017, President Donald J. Trump issued a Presidential Memorandum Regarding Withdrawal of the United States From the Trans-Pacific Partnership Negotiations and Agreement.<sup>71</sup> This effectively ended any chance that the TPP would enter into force without renegotiation.<sup>72</sup> Notwithstanding this, an examination of the private governance language of the TPP is still useful in understanding potential dynamics for future trade agreements. That is, President Trump's withdrawal from the TPP appears unrelated to any private governance elements of the TPP, and instead relates to concerns of the overall "fairness" of trade agreements,<sup>73</sup> and thus future trade agreements negotiated under the Trump Administration may still contain provisions relevant to private environmental governance.

Under President Obama, the Office of the U.S. Trade Representative heralded the TPP Agreement as "not only seek[ing] to provide new and meaningful market

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69. Trans-Pacific Partnership Agreement [hereinafter TPP Agreement], Feb. 4, 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

70. See *The Trans-Pacific Partnership*, OFF. OF THE U.S. TRADE. REP., <https://ustr.gov/tpp/#what-is-tpp> (last visited Nov. 30, 2016) (listing TPP countries). Following the TPP withdrawal, the Trump Administration removed much of the Obama Administration's TPP information from the USTR website. For an archived version of this webpage as it appeared prior to the TPP withdrawal, see <https://web.archive.org/web/20170122020220/https://ustr.gov/tpp/> (last visited Mar. 5, 2017).

71. Withdrawal of the United States From the Trans-Pacific Partnership Negotiations and Agreement, 82 Fed. Reg. 8497 (Jan. 25, 2017) (signed Jan. 23, 2017).

72. In order for the TPP to enter into force, Article 30.5 required ratification by at least six of the twelve signatories who collectively accounted for at least eighty-five percent of the combined Gross Domestic Product of all original signatories. Without ratification by the United States, this cannot occur. The remaining signatories could renegotiate only this provision, or attempt to negotiate other substantive changes to bring the United States back into the TPP Agreement. See Matthew P. Goodman & Daniel Remler, *President Trump Fulfills Day 1 Promise to Abandon TPP*, CTR. FOR STRATEGIC & INT'L STUD. (Jan. 23, 2017), <https://www.csis.org/analysis/president-trump-fulfills-day-1-promise-abandon-tpp>.

73. *Trump Withdraws U.S. from Trans-Pacific Partnership Deal*, AL JAZEERA (Jan. 23, 2017), <http://www.aljazeera.com/news/2017/01/trump-withdraws-trans-pacific-partnership-tpp-deal-170123170334145.html>.

access for American goods and services exports, but also set[ting] high-standard rules for trade, and address[ing] vital 21st-century issues within the global economy.”<sup>74</sup> With respect to the environment, the Office described the TPP Agreement as including “the most robust enforceable environment commitments of any trade agreement in history.”<sup>75</sup> Indeed, the Office touted how the Agreement will require parties to follow their obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) and the International Convention for the Prevention of Pollution from Ships, prohibit harmful fisheries subsidies, and combat wildlife trafficking and illegal logging.<sup>76</sup>

Environmental critics, however, had raised various concerns about the TPP Agreement. These included the weakness of its environmental enforcement provisions, its potential to allow significantly increased exports of liquefied natural gas without sufficient study or environmental protections,<sup>77</sup> the right of private parties to seek compensation from governments for domestic restrictions that violate the TPP Agreement,<sup>78</sup> and the creation of international legal protections for patents on plant and animal life.<sup>79</sup>

An evaluation of actual overall environmental effects of the TPP, or even its general environmental provisions, is well beyond the scope of this Article. Instead, this Article seeks to draw attention to the voluntary (environmental) mechanisms provision of the TPP Agreement in order to extend existing conversations about the developing dynamics of private environmental governance.

Many parts of Article 20.11, the provision on “Voluntary Mechanisms to Enhance Environmental Performance,” were similar to that of earlier United States free trade agreements. For example, the beginning of Subpart 1 closely

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74. *Trans-Pacific Partnership (TPP)*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership> (last visited Nov. 30, 2016). For an archived version of this webpage as it appeared prior to the TPP withdrawal, see <https://web.archive.org/web/20170126062525/https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership> (last visited Mar. 5, 2017).

75. *The Trans-Pacific Partnership: Preserving the Environment*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/sites/default/files/TPP-Preserving-the-Environment-Fact-Sheet.pdf> (last visited Mar. 5, 2017).

76. *Id.*; see also Alexia Brunet Marks, *The Right to Regulate (Cooperatively)*, 38 U. PA. J. INT’L L. 1 (2016) (describing potential benefits for cooperative food safety regulation); Howard F. Chang, *The Environment Chapter of the Trans-Pacific Partnership: An Environmental Agreement Within a Trade Agreement*, 47 ABA TRENDS, no. 5, May/June 2016, at 17 (describing, in a positive fashion, these provisions in more detail).

77. *Trans-Pacific Partnership*, SIERRA CLUB, <http://www.sierraclub.org/trade/trans-pacific-partnership> (last visited Nov. 30, 2016); see also Imrana Iqbal & Charles Pierson, *A North-South Struggle: Political and Economic Obstacles to Sustainable Development*, 16 SUSTAINABLE DEV. L. & POL’Y 16 (2016); Rafael Leal-Arcas, *Mega-Regionals and Sustainable Development: The Transatlantic Trade and Investment Partnership and the Trans-Pacific Partnership*, 4 RENEWABLE ENERGY L. & POL’Y REV. 248, 258 (2015) (“However, terms such as ‘voluntary’ and ‘avoidance of unnecessary barriers to trade’ dilute the entire process. Firstly, ‘voluntary’ mechanisms would lead to a regulatory race to the bottom. The voluntary mechanisms include auditing and reporting, information sharing, and sharing expertise.”).

78. See SIERRA CLUB, *supra* note 77.

79. See *Trans Pacific Partnership*, FRIENDS OF THE EARTH, <http://www.foe.org/projects/economics-for-the-earth/trade/trans-pacific-partnership> (last visited Nov. 30, 2016).

resembled portions of earlier United States free trade agreements, although it provides even more examples of actions that constitute voluntary mechanisms.<sup>80</sup> Likewise, Subpart 2 urged the use of flexible and voluntary mechanisms—as well as development of evaluative criteria—for environmental and natural resource protections<sup>81</sup> in a manner similar to those found in earlier United States free trade agreements.

But the TPP Agreement departed from earlier United States free trade agreements by adding language constraining the voluntary actions that parties should encourage. Subpart 1 of Article 20.11 specifically recognizes that the voluntary mechanisms to be encouraged should be “designed in a manner that maximises their environmental benefits and avoids the creation of unnecessary barriers to trade.”<sup>82</sup> Such language is absent from the earlier United States free trade agreements.<sup>83</sup>

Moreover, the TPP Agreement contained specific requirements for how parties should approach developments in environmental governance, even among their own private sector actors. That is, Subpart 3 stated:

3. Further, if private sector entities or non-governmental organisations develop voluntary mechanisms for the promotion of products based on their environmental qualities, each Party should encourage those entities and organisations to develop voluntary mechanisms that, among other things:
  - (a) are truthful, are not misleading and take into account scientific and technical information;
  - (b) if applicable and available, are based on relevant international standards, recommendations or guidelines, and best practices;
  - (c) promote competition and innovation; and
  - (d) do not treat a product less favourably on the basis of origin.<sup>84</sup>

This language was much more specific than that used in prior United States free trade agreements. It provided explicit factors that parties should promote, even in the context of entirely private standards/governance methods: truthfulness, scientific grounding, basis on international standards or best practices,

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80. TPP Agreement, *supra* note 69, art. 20.11(1) (“The Parties recognise that flexible, voluntary mechanisms, for example, voluntary auditing and reporting, market-based incentives, voluntary sharing of information and expertise, and public-private partnerships, can contribute to the achievement and maintenance of high levels of environmental protection and complement domestic regulatory measures.”).

81. *Id.* art. 20.11(2).

82. *Id.* art. 20.11(1).

83. The author can only speculate about the drivers behind these developments in the private governance terms contained in the TPP, given how “[t]he TPP process has also been criticized for being among the most opaque in the international arena.” Larry Catá Backer, *The Trans-Pacific Partnership: Japan, China, the U.S., and the Emerging Shape of a New World Trade Regulatory Order*, 13 WASH. U. GLOBAL STUD. L. REV. 49, 60 (2014). However, it is possible that the various critiques raised in the context of the WTO and private environmental governance may play a role in shaping these terms.

84. TPP Agreement, *supra* note 69, art. 20.11(3).

promotion of competition and innovation, and neutrality on country of origin.<sup>85</sup> This language in the TPP—and potential language in future trade agreements—provides an opportunity for scholars interested in private governance to observe the interactions between public law and future developments in private governance.

### III. FUTURE CONSIDERATIONS

What can we make of the additional suggestions for private governance contained in the TPP Agreement? To some extent, this question may be moot, given the withdrawal from the TPP by the Trump Administration and the Agreement's currently unratified status.<sup>86</sup> Moreover, there is little or no available scholarship examining whether free trade agreement signatory countries treat voluntary-mechanism language with any force. Nevertheless, in the light of the apparent trend in trade agreements towards structuring state approaches to private environmental governance, as well as the growing attention to private governance by legal academics, this Article presents some preliminary thoughts about future areas for research and analysis.

#### A. FUTURE AREAS OF STUDY FOR LEGAL ACADEMICS

##### 1. The Interaction Between Public Institutions and Private Actors

First, developments in the language relating to private environmental governance in free trade agreements are relevant to scholars who study the interaction between public institutions and private actors. For example, scholars such as Professor Fabrizio Cafaggi have been examining the private contractual incorporation of public standards, even in areas where the private actors are not required by law to adopt such standards.<sup>87</sup> Indeed, as Professor Cafaggi pointed out, “[i]ssues concerning (1) why different private regimes emerge, (2) how they spread, and (3) why they decline over time are still largely unexplored.”<sup>88</sup>

A future investigation of the effects of state agreements regarding promulgation of private environmental governance would lead to a stronger understanding of why and how private actors adopt private environmental governance standards. Moreover, because of the level of detail for forms of private governance

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85. *See id.*

86. *See* discussion *supra* Part II; *see also* Jackie Calmes, *What Is Lost by Burying the Trans-Pacific Partnership?*, N.Y. TIMES (Nov. 11, 2016), [http://www.nytimes.com/2016/11/12/business/economy/donald-trump-trade-tpp-trans-pacific-partnership.html?\\_r=0](http://www.nytimes.com/2016/11/12/business/economy/donald-trump-trade-tpp-trans-pacific-partnership.html?_r=0).

87. *See, e.g.*, Fabrizio Cafaggi, *The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Global Private Regulation*, 36 U. PA. J. INT'L L. 875, 884–89 (2015) [hereinafter Cafaggi, *Rule-Making*]; Fabrizio Cafaggi, *The Regulatory Functions of Transnational Commercial Contracts: New Architectures*, 36 FORDHAM INT'L L. J. 1557, 1583–1600 (2013) [hereinafter Cafaggi, *Contracts*].

88. *See* Cafaggi, *Rule-Making*, *supra* note 87, at 934.

specified in the TPP, and in potential future trade agreements, a study of the private governance effects of such private governance provisions would help scholars better comprehend the effects—if any—of public rules urging the adoption of particular forms that private governance should take.

Research questions could include the following: Does specifying that private governance standards must be “truthful” and “take into account scientific and technical information”<sup>89</sup> have any effect on the actions of private actors? That is, do private actors respond directly to such language in public prescriptions that do not (necessarily) pertain directly to them, as non-parties to the trade agreement?<sup>90</sup>

To the extent that private actors do respond, their responses could take various forms. Private actors could rely upon existing well-respected international institutions such as the International Organization for Standardization (“ISO”) to create guidance standards with arguably stronger technical weight,<sup>91</sup> as urged by the TPP Agreement, or future trade agreements containing similar private governance language.<sup>92</sup> This may already be occurring with respect to private environmental governance standards,<sup>93</sup> and it is possible that language such as that contained in the TPP Agreement—or in future trade agreements—could provide additional reasons for private actors to develop additional ISO standards for their private environmental governance goals.

Private actors could also continue to develop standards of their own, yet incorporate a greater degree of technical and scientific support for their governance methods.<sup>94</sup> Or they could work with existing public institutions with technical expertise in an area to develop governance methods with what would be viewed as having sufficient scientific support.<sup>95</sup> Examining these developments

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89. TPP Agreement, *supra* note 69, art. 20.11(3).

90. *See, e.g.*, Natasha Affolder, *The Market for Treaties*, 11 CHI. J. INT’L L. 159, 161 (2010) (investigating “how corporations use biodiversity treaties as sources of private environmental standards”); Cafaggi, *Contracts*, *supra* note 87, at 1583–1600.

91. *See, e.g.*, Janelle M. Diller, *Private Standardization in Public International Lawmaking*, 33 MICH. J. INT’L L. 481 (2012) (describing the development of an ISO standard for social responsibility).

92. Reliance on private international standard-setting bodies such as the ISO could arguably also be useful for following the goals of Article 20.11(3)(b) of the TPP Agreement, which urges that states encourage private entities to adopt standards that are “based on relevant international standards, recommendations or guidelines, and best practices.” *See* TPP Agreement, *supra* note 69, art. 20.11(3)(b).

93. *See, e.g.*, Sarah L. Stafford, *Private Policing of Environmental Performance: Does It Further Public Goals?*, 39 B.C. ENVTL. AFF. L. REV. 73 (2012); Errol E. Meidinger, “Private” Environmental Regulation, Human Rights, and Community, 7 BUFF. ENVTL. L. J. 123, 183–205 (2000); Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L. Q. 479 (1995).

94. *Cf.* Jody M. Endres, *Legitimacy, Innovation, and Harmonization: Precursors to Operationalizing Biofuels Sustainability Standards*, 37 S. ILL. U. L. J. 1 (2012) (describing the context of private environmental governance in the biofuels arena, stating, “[u]pstart private standards, therefore, must bridge the technological divide governments and industrial sectors cannot or will not tackle. Particularly challenging will be new, multi-level approaches to ‘shed’ level standards, as scientists have only begun to study how to integrate the complicated structure and function of ecosystems and rural communities into standards.”).

95. *Cf.* Cafaggi, *Contracts*, *supra* note 87, at 1583–1600 (describing actual adoption of state standards into

could provide scholars with useful insights into the ways in which public and private standards develop.

## 2. The Effect of International Obligations on State Actors

Relatedly, these developments are also relevant to scholars who study the effect that international obligations have on state actors, especially in the private governance context (both in the environmental arena and other arenas).<sup>96</sup> The TPP Agreement—and future trade agreements containing similar private environmental governance language—pose an important research question of whether state parties will alter their behavior based on the private governance suggestions contained in this agreement, or whether the choice of language is inconsequential.<sup>97</sup> And, if so, what are the responses? Will some parties work with private actors in a “soft” sense—attending trade fora, providing relevant expertise and guidance—to influence state actors?<sup>98</sup> Or will they engage in more traditional legal responses, such as adopting more formal methods of approval for private standards?<sup>99</sup> A fuller understanding of these dynamics could help scholars better understand how “hard” and “soft” legal responses could influence the development of private governance mechanisms.

## 3. The Influence of States on Private Actors

Finally, the developments in the TPP Agreement—or other future trade agreements containing similar private environmental governance language—are relevant to questions regarding state influence on private actors as a result of treaty language.<sup>100</sup> That is, if parties to the TPP Agreement—or other future trade agreements containing similar private environmental governance language—respond to its constraining language regarding voluntary mechanisms by engag-

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private contractual supply agreements).

96. Cf. Diller, *supra* note 91, at 522 (“Private standardization relating to public policy may not explicitly discriminate, for example, on the basis of race, sex, economic or social status, or other prohibited grounds. Nonetheless, where standards have that effect, such disparate impact would come within the proscription of international human rights law and, in particular, widely ratified treaties recognizing states’ obligations to ensure nondiscrimination in both public and private spheres.”).

97. Cf. Brunet Marks, *supra* note 76, at 56–60 (examining potential role that the TPP “harmonization” provisions have on state actors).

98. See, e.g., Tetty Havinga, *Private Regulation of Food Safety by Supermarkets*, 28 LAW & POL’Y 515 (2006) (describing informal state regulatory pressure on private food inspections).

99. See, e.g., Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171 (1995).

100. See, e.g., Melissa J. Durkee, *Persuasion Treaties*, 99 VA. L. REV. 63, 67 (2013) (investigating the “domestic implementation through regulation of private actors”); *id.* at 115–19 (describing the role that states have in persuading private actors to follow particular prescriptions contained in treaties); see Havinga, *supra* note 98; cf. Stephen M. Maurer, *Public Problems, Private Answers: Reforming Industry Self-Governance Law for the 21st Century*, 12 DEPAUL BUS. & COM. L. J. 297 (2014) (investigating “how U.S. law should manage the new self-governance.”).

ing in efforts to influence private environmental governance, researchers could further investigate the effects of those governmental responses on private actors.<sup>101</sup> Further exploration of these issues could help scholars better recognize the role that states have in influencing the direction of private governance developments.

#### B. CONSIDERATIONS FOR IMPLEMENTATION

So far, this Article has explored various promising research opportunities suggested by the TPP Agreement and similar agreements. But some suggestions for implementation are also warranted. As suggested in Part II of this Article, it is entirely possible that the additional constraints in the TPP Agreement—or other future trade agreements containing similar private environmental governance language—are attempts to reconcile developing concerns about the universality of private standards with the normative goals of free trade, and may therefore be treated that way by the parties. However, even with that context, potential difficulties arise regarding how legal decisionmakers—including state actors as well as dispute panels interpreting private environmental governance provisions similar to those contained in the TPP Agreement—should interpret such language, specifically its science and technical information language.<sup>102</sup>

For example, the TPP Agreement language urging states to encourage private environmental governance development that is “truthful . . . not misleading and take[s] into account scientific and technical information”<sup>103</sup> may implicate legal controversies involving what should legally count as “scientific” or “technical,” as well as what constitutes a sufficient scientific or technical basis necessary to support a particular environmental governance action.<sup>104</sup> These concerns regarding institutional gate-keeping for “science” have already been raised in the U.S. domestic context of the *Daubert* decision.<sup>105</sup> Scholars have described various problems associated with the application of the *Daubert* test, including unintended effects,<sup>106</sup> overly restrictive application,<sup>107</sup> and codification of scientific norms in a way that does not necessarily match with the practice of science.<sup>108</sup> Concerns have also been raised in the context of applying *Daubert* standards for

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101. See Maurer, *supra* note 100.

102. TPP Agreement, *supra* note 69, art. 20.11(3)(a).

103. *Id.*

104. For a broader discussion of the difficulties in scientific and legal interactions, see Deborah M. Hussey Freeland, *Speaking Science to Law*, 25 GEO. INT’L ENVTL. L. REV. 289 (2013).

105. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

106. See, e.g., Lisa Heinzerling, *Doubling Daubert*, 14 J. L. & POL’Y 65, 67–70, 78, 80–82 (2006) (describing various problems associated with the application of the *Daubert* test, including unintended effects, overly restrictive application, and codification of scientific norms in a way that does not necessarily match with the practice of science).

107. *Id.* at 78.

108. *Id.* at 80–82.

what constitutes “science” into the U.S. regulatory arena.<sup>109</sup> And similar concerns, regarding scientific gate-keeping, have been raised in the WTO panel context.<sup>110</sup>

Indeed, the application of science-based norms in the private environmental governance context may incentivize parties to fund scientific research to shape the development of private environmental governance mechanisms—or even to oppose them—a phenomenon already documented in the regulatory arena.<sup>111</sup> Legal decisionmakers should heed the concerns raised by other examples of legal scientific gate-keeping. Specifically, decisionmakers should be aware of the potential for overly restrictive interpretations of what constitutes “scientific” information to restrict private actors’ ability to freely create forms of private environmental governance via contract. Decisionmakers should be conscious of the risk of codifying legal requirements for scientific norms that depart from scientific practice or encouraging scientific research biased to shape the form of private environmental governance.

Additionally, to the extent that private actors may resort to institutional bodies to develop scientific and technical bases for their governance methods,<sup>112</sup> concerns may still arise regarding the nature and operation of those institutional bodies; the composition of their evaluative committees, the transparency of the evaluative process, and conflicts of interest within them.<sup>113</sup> Concerns may also arise regarding how legal decisionmakers should evaluate the legitimacy of those bodies themselves.<sup>114</sup> That is, should they be approached purely from the context of scientific-gatekeeping (and thus raise similar concerns as those raised in other

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109. See, e.g., Claire R. Kelly, *The Dangers of Daubert Creep in the Regulatory Realm*, 14 J. L. & POL’Y 165, 198–206 (2006).

110. See, e.g., David Winickoff et al., *Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law*, 30 YALE J. INT’L L. 81 (2005); Jeffery Atik & David A. Wirth, *Science and International Trade—Third Generation Scholarship*, 26 B.C. INT’L & COMP. L. REV. 171 (2003); Theofanis Christoforou, *Settlement of Science-Based Trade Disputes in the WTO: A Critical Review of the Developing Case Law in the Face of Scientific Uncertainty*, 8 N.Y.U. ENVTL. L. J. 622 (2000).

111. See Stephanie Tai, *Uncertainty About Uncertainty: The Impact of Judicial Decisions on Assessing Scientific Uncertainty*, 11 U. PA. J. CONST. L. 671, 682 (2009); see also David Michaels & Celeste Monforton, *Scientific Evidence in the Regulatory System: Manufacturing Uncertainty and the Demise of the Formal Regulatory System*, 13 J. L. & POL’Y 17, 17 (2005) (arguing that “[p]olluters and manufacturers of dangerous products have waged sophisticated campaigns to manufacture uncertainty about the scientific evidence used to support public health protection and victim compensation”); see also Wendy Wagner & David Michaels, *Equal Treatment for Regulatory Science: Extending the Controls Governing the Quality of Public Research to Private Research*, 30 AM. J. L. & MED. 119, 122 (2004) (describing how, where stakes are high, sponsors of scientific research “face strong incentives to design and report research in ways most favorable to their interests and to suppress adverse results provided they can do so without detection”).

112. See TPP Agreement, *supra* note 69, art. 20.11(3)(b).

113. Cf. Stephanie Tai, *Comparing Approaches Towards Governing Scientific Advisory Bodies on Food Safety in the United States and the European Union*, 2010 WIS. L. REV. 627 (2010) (describing and comparing different approaches to scientific expert bodies used by the United States and the European Union in the food regulatory context).

114. See, e.g., Brunet Marks, *supra* note 42, at 965–66.

contexts), or should they also be evaluated based on other considerations, such as transparency, democracy, or notions of fairness?<sup>115</sup>

#### CONCLUSION

This Article has attempted to draw attention to some potential dynamics that may arise with respect to a growing area of academic exploration: private environmental governance. My hope is that this Article will provoke additional discussion and exploration of a phenomenon that will likely only increase over time: the movement of free trade agreements into the realm of private environmental governance. Attention to this issue will help scholars better understand how and why private environmental governance mechanisms develop (or are constrained), as well as help policymakers refine their approaches towards private environmental governance in the future.

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115. *Cf. id.* at 966 (noting that “the private standard-setting procedures have been criticized for lacking transparency, being undemocratic, and for violating notions of fairness” and suggesting that “using an established co-regulator, drawing upon expertise in that community, and operating in a transparent, effective, timely, and fair manner” would counter concerns regarding legitimacy).