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## **Cover Page Footnote**

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# **Consumer Power to Change the Food System? A Critical Reading of Food Labels as Governance Spaces: The Case of Açai Berry Superfoods**

Christine Parker,<sup>\*</sup> Hope Johnson<sup>\*\*</sup> and Janine Curll<sup>\*\*\*</sup>

## *Abstract:*

This article argues that the marketing claims on food labels are a governance space worthy of critical examination. We use a case study of superfood açai berry products to illustrate how marketing claims on food labels encapsulate dominant neoliberal constructions of global food systems. These marketing claims implicitly promise that by making careful choices consumers can resist and redress the ravages of unbridled global capitalism. Food labels suggest that consumers can use market signals to simultaneously govern our own selves and the market to ensure sustainable, fair, and healthy consumption. In response, this article develops, justifies and applies a socio-legal approach to researching food chain governance which uses the food label as its unit of analysis and traces from the micro level of what the everyday consumer is exposed to on a food label to the broader governance processes that the food label both symbolizes and effects. We demonstrate our approach through a “label and chain governance analysis” of açai berry marketing claims to deconstruct both the regulatory governance of the chain behind the food choices available to the consumer evident from the label and the way in which labels seek to govern consumer choices. Our analysis unpacks the nutritionist, primitivist undertones to the health claims made on these products, the neo-colonial and racist dimensions in their claims regarding fair trade and rural socio-economic development, and, the use of green-washing claims about biodiversity conservation and ecological sustainability. Through our application of this approach to the case study of açai berry product labels, we show how food labels can legitimize the market-based governance of globalized food chains and misleadingly suggest that capitalist production can be adequately restrained by self-regulation, market-based governance and reflexive consumer choices alone. We conclude by suggesting the need for both greater deconstruction of the governance assumptions behind food labels and to possibilities for collective,

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public interest oriented regulatory governance of both labelling and the food system.

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## I. Introduction

To read the marketing claims on the label of an exotic superfood sold in Western countries like the United States and Australia, such as the Amazonian açai berry, is to be promised a “healthier you,”<sup>1</sup> a more sustainable food system and a kinder, gentler capitalism. One brand of açai berry product, for example, tells us that, “for countless centuries, the people of the Amazon have revered this unique fruit for its nutritional content and prized it as a source of health and vitality.”<sup>2</sup> Another promises that “now you can unlock the energy of the Amazon and better health everyday.”<sup>3</sup> A third assures us that, despite its healthfulness and exoticness, açai

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<sup>1</sup> This emphasis on individual health, and personal control over bodily health, is consistent with neoliberal approaches to regulating health. See, e.g., Casimir MacGregor, Alan Petersen & Christine Parker, *Hyping the market for ‘anti-ageing’ in the news: From medical failure to success in self-transformation*, 13 *BIOsocieties* 64 (2018).

<sup>2</sup> HOPE JOHNSON, ET AL., *Consumer Choice as a Pathway to Food Diversity: A Case Study of Açai Berry Product Labeling*, in *FOOD DIVERSITY BETWEEN RIGHTS, DUTIES AND AUTONOMIES: LEGAL PERSPECTIVES FOR A SCIENTIFIC, CULTURAL AND SOCIAL DEBATE ON THE RIGHT TO FOOD AND AGROECOLOGY* 307, 315 (Alessandro Isoni, et al eds., 2018).

<sup>3</sup> *Id.* at 316.

berries taste delicious and familiar like “a fruit sorbet with hints of dark chocolate and red wine.”<sup>4</sup>

These claims encapsulate dominant neoliberal constructions of global food systems as capable of providing ethical, healthy products through supply chains significantly governed and arranged by market signals. These marketing claims implicitly task consumers with sending the “right” market signals to shape food supply chains and reinforce the positioning of consumers as regulators of our own consumption and the ultimate determiners of our own bodily health. Açai berry marketing suggests that if we consumers govern our choices “correctly” by eating these “utopian edibles,”<sup>5</sup> we can protect ourselves from cancer, aging and heart disease.<sup>6</sup> Moreover, we can simultaneously alleviate poverty and related inequalities experienced by the indigenous inhabitants of the Amazon while preserving biodiverse ecologies. In short, we are told that by making careful choices based on the marketing and information on food labels we can resist and redress the ravages of unbridled global capitalism, while simultaneously governing our own selves and the market to ensure sustainable, fair, and healthy consumption.

The second part of this article argues that the food label is itself a governance space worthy of critical examination. We define the food “label” broadly, in line with legal definitions, as including all the tags, brands, marks, statements, representations, designs and descriptions on food and its packaging and made or displayed to consumers when it is sold.<sup>7</sup> Collectively, we consider these aspects

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<sup>4</sup> Daniela Dunde-Brown, *Kiss the Berry Creek Street*, CONCRETE PLAYGROUND (June 7, 2016), <https://concreteplayground.com/brisbane/restaurants/kiss-the-berry-creek-street>.

<sup>5</sup> Jessica Loyer, *What Makes a Superfoods “Super”?* *The Discursive Construction of Utopian Edibles*, 21<sup>ST</sup> SYMPOSIUM OF AUSTRALIAN GASTRONOMY: UTOPIAN APPETITES (2017).

<sup>6</sup> Jen Miller, *15 Health Benefits of Açai Berries, According to Science (7 Delicious Recipes)*, JENS REVIEWS, <https://www.jenreviews.com/açai-berries/> (last visited Feb. 23, 2019).

<sup>7</sup> This wording is based on the definition of “label” in Standard 1.1.2 of Australia New Zealand Food Standards Code. Broad definitions of food labels are common across jurisdictions consistent with the definition provided by the Codex Alimentarius which is the source for international food standards. Codex Alimentarius, CODEX STAN 1-1985[2] (Rev. 1-1991) defines a label as “any tag, brand, mark, pictorial or other descriptive matter, written, printed, stenciled, marked, embossed or impressed on, or attached to, a container of food.” The US, for instance, defines “label” as “a display, written, printed or graphic matter upon the immediate container of any article.” Federal Food, Drug, and Cosmetic Act, 21 U.S.C § 321(k) (2012); while labelling means “all labels and other written, printed or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such an article.” Federal Food, Drug, and Cosmetic Act, 21 U.S.C § 321(m) (2012).

of the food label to visibly manifest a series of (contestable) governance processes that influence both the choices presented to us as consumers, and also how we understand what we do when we choose one or another food.

Our approach draws on Dorothy Smith's "sociology for people" to unpack the complex social and institutional arrangements within which everyday experience is embedded.<sup>8</sup> We also draw on the insights of regulatory studies scholarship for our understanding of food labels as governance spaces. This scholarship understands regulation as emerging from the interactions, stories and power contests between government, industry and civil society organizations and individuals in any particular domain.<sup>9</sup> Food labelling is a governance space, we posit, because the information, stories and images provided (and what they leave out, simplify or exaggerate)<sup>10</sup> reflect the outcomes of those contests. Practices and decisions concerning the sourcing, processing and transporting of produce, and the contractual, legislative and voluntary certification conditions under which these activities occur, illuminates where regulatory power lies in food chains and for what purposes it is being exercised.

Food labelling is also a governance space in the sense that it is a forward attempt to influence the choices of individual consumers. People make choices about what to consume based on their self-identity, and construct consumption as a form of self-expression and status signaling.<sup>11</sup> Consumer choices are, therefore, performative. They shape and reinforce our agency, identity, subjectivities, and intentions, including our conceptions of the responsibilities

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<sup>8</sup> See DOROTHY E. SMITH, *INSTITUTIONAL ETHNOGRAPHY: A SOCIOLOGY FOR PEOPLE* 29 (2005).

<sup>9</sup> See PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 17 (1998); see also Burkard Eberlein et al., *Transnational business governance interactions: Conceptualization and framework for analysis*, 8 *REG. & GOVERNANCE* 1 (2014); see also LEIGH HANCHER & MICHAEL MORAN, *ORGANIZING REGULATORY SPACE* (1998); see also Colin Scott, *Analysing Regulatory Space: Fragmented Resources and Institutional Design*, *PUB. L.* 283 (2001).

<sup>10</sup> See CAROL BACCHI, *WOMEN, POLICY AND POLITICS: THE CONSTRUCTION OF POLICY PROBLEMS* (1999).

<sup>11</sup> See Pierre Bourdieu, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* (1984); see also C. Fischler, *Food, Self and Identity*, 27 *Soc. Sci. Info.* 275 (1988); see also Margaret K. Hogg & Paul C. N. Mitchell, *Identity, self and consumption: A conceptual framework*, 12 *J. MKTG. MGMT.* 629 (1996); see also Janet Borgerson, *Materiality, Agency, and the Constitution of Consuming Subjects: Insights For Consumer Research*, NA-32 *ACR N. AM. ADVANCES* (2005), <http://acrwebsite.org/volumes/9116/volumes/v32/NA-32> (last visited Feb. 15, 2019); see also RUSSELL KEAT, *THE AUTHORITY OF THE CONSUMER* (1994).

consumers have to govern themselves and the market.<sup>12</sup> Neoliberal governance thus enlists the consumer as a governance agent of themselves and of broader social change.<sup>13</sup> We, therefore, suggest the need for a “label and chain governance analysis” for deconstructing both (a) the regulatory governance of the chain behind the food choices available to the consumer evident from the label and, relatedly, (b) the way in which labels seek to govern consumer choices.<sup>14</sup>

The third part of the article introduces our case study of açai berry “superfood” product labelling in Australia. The remainder of the article uses this case study to illustrate how our approach to deconstructing food labels as governance spaces can draw out the multiple, varied and complex politics of the global food system starting from the standpoint of the everyday consumer and uncovering the institutions and governance arrangements that support the supply chain as a whole.

We show that misleading claims on labels go beyond simply attracting customers via meaningless puffery. Rather, these claims reinforce the neoliberal ideology, and related governance trajectory, that consumer power and markets are the optimal regulatory instrument for food systems. Through a close inspection, we unpack the nutritionist, primitivist undertones to the health claims (Part IV), the neo-colonial and racist dimensions in the description of the traditional groups behind açai production connected to claims regarding fair trade and rural socio-economic development (Part V), and, finally, the use of green-washing claims about biodiversity conservation and ecological sustainability (Part VI). By depicting açai as a product that can address a multitude of food system issues

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<sup>12</sup> See Josee Johnston, Michelle Szabo & Alexandra Rodney, *Good food, good people: Understanding the cultural repertoire of ethical eating*, 11 J. CONSUMER CULTURE 293 (2011); see also Dr Mara Miele & Adrian Evans, *When foods become animals: Ruminations on Ethics and Responsibility in Care-full practices of consumption*, 13 ETHICS, PLACE & ENV'T 171 (2010).

<sup>13</sup> See Jane Dixon & Cathy Banwell, *Re-embedding trust: unravelling the construction of modern diets*, 14 CRITICAL PUB. HEALTH 117 (2004).

<sup>14</sup> This article furthers the socio-legal analysis of food label first developed by Parker: see Christine Parker, *The Food Label as Governance Space: Free-Range Eggs and the Fallacy of Consumer Choice*, 35 RECHT DER WERKELIJKHEID, 101 (2014); see also Christine Parker & Josephine De Costa, *Misleading the Ethical Consumer: The Regulation of Free-Range Egg Labelling*, 39 MELB. U. L. REV. 895 (2015); see also Christine Parker et al., *Can the Hidden Hand of the Market be an Effective and Legitimate Regulator? The Case of Animal Welfare Under a Labeling for Consumer Choice Policy Approach*, 11 REG. & GOVERNANCE 368 (2017); see also Christine Parker, Rachel Carey & Gyorgy Scrinis, *The Meat in the Sandwich: Welfare Labelling and the Governance of Meat-Chicken Production in Australia*, 45 J. L. & SOC'Y 341 (2018). See also further discussion *infra* at Part II C.



while still being a globally traded commodity, the need for collective, public-interested responses to global and local issues are obscured such as public health, social justice, rural development, conservation and ecological limits. Moreover, claims on food labels can contribute, as will be seen in the case of açaí, to recreating the types of food chains the claims purport the product to transform.

The final part of this article (Part VII) turns to the implications the analysis has for the (de)construction of the chains binding consumer governance choices. We suggest an urgent need for scholars and activists to tease out the implications of analyses like these in terms of what choices consumers do and do not have, and what possibilities there are for friction and contestation in the governance chain for an emancipatory politics of the label. Critically examining the label as a (market) governance space points to the places where holistic food policy interventions at the national and international level are urgently needed to both empower citizens and create healthier, fairer and environmentally regenerative food systems.

## II. Background and Methodological Approach

### A. Consumer choice governance and global food chains

As food supply chains expand globally, and food-processing technologies develop, consumers have more available options than ever before. Historically, colonial empires organized and controlled global food supply chains, and later food supply chains were organized around nation-states.<sup>15</sup> Today, global food supply chains are arranged largely through networks of actors that operate somewhere “between arm’s length markets, on the one hand, and large vertically integrated corporations, on the other.”<sup>16</sup> The actors within food supply chains develop, monitor or comply with varying regulatory instruments, such as corporate or international institutional codes of practices, guidelines, and standards, domestic and international laws, and contractual agreements. Meanwhile, state interventions in global supply chains are limited and shaped by, among other constraints, international trade and investment treaties.<sup>17</sup>

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<sup>15</sup> Harriet Friedmann & Philip McMichael, *Agriculture and the State System: The rise and decline of national agricultures, 1870 to the present*, 29 *SOCIOLOGIA RURALIS* 93, 96 (1989).

<sup>16</sup> Gary Gereffi, John Humphrey & Timothy Sturgeon, *The governance of global value chains*, 12 *REV. OF INT’L POL. ECON.* 78, 79 (2005).

<sup>17</sup> See, e.g., Anne Marie Thow et al., *Will the next generation of preferential trade and investment agreements undermine prevention of noncommunicable diseases? A*

With reduced state intervention, and notably high levels of corporate concentration, global food chains represent a neoliberal approach to governance in which private regulation and consumer choice are key organizing principles for food systems.<sup>18</sup> Underpinning these principles is the rationale that consumer choices send market signals through supply chains to the actors that influence where and how the supply chain functions, and under what conditions. When consumer choices are understood as holding the power to transform food value chains, then it falls heavily on each individual to make choices that contribute to food systems consistent with commonly shared values such as fairness and environmental stewardship. Given this positioning, consumer choice and individual responsibility can be understood as “a regulatory regime based on voluntarism, market solutions and the state acting at a distance.”<sup>19</sup>

In this context, food labelling takes on a broader and deeper significance than solely a written descriptor of contents. Rather, food labels play a central role in framing the implications of food choices for the individual in terms of their identity, health status and social relationships, and with regard to signaling that consumer choices influence decisions made in supply chains.<sup>20</sup>

Three separate bodies of work question the framing of consumer choice as a solution to health, environmental and justice issues in food systems. The first body of work centers on critically reviewing the dominant construction of individuals as responsible for their food choices and diet-related health outcomes.<sup>21</sup> Scholars

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*prospective policy analysis of the Trans Pacific Partnership Agreement*, 119 HEALTH POL’Y 88, 89 (2015).

<sup>18</sup> David Burch & Geoffrey Lawrence, *Towards a third food regime: behind the transformation*, 26 AGRIC. & HUM. VALUES 267, 268 (2009); Kiah Smith, Geoffrey Lawrence & Carol Richards, *Supermarkets’ Governance of the Agri-food Supply Chain: Is the “Corporate-Environmental” Food Regime Evident in Australia*, 17 INT’L J. SOC. AGRIC. & FOOD 140, 141 (2010).

<sup>19</sup> Unni Kjørnes, *Ethics and Action: A Relational Perspective on Consumer Choice in the European Politics of Food*, 25 J. AGRIC. ENVTL. ETHICS 145, 147 (2012).

<sup>20</sup> BOURDIEU, *supra* note 11; SIDNEY WILFRED MINTZ, *TASTING FOOD, TASTING FREEDOM: EXCURSIONS INTO EATING, CULTURE, AND THE PAST* (1997); Carole A. Bisogni et al., *Who We Are and How We Eat: A Qualitative Study of Identities in Food Choice*, 34 J. OF NUTRITION EDUC. AND BEHAV. 128–139 (2002).

<sup>21</sup> *See generally*, Steven Shapin, *Expertise, Common Sense, and the Atkins Diet*, in EXPERTISE, COMMON SENSE, AND THE ATKINS DIET 174 (J Porter & PWB Phillips eds., 2007), <https://dash.harvard.edu/handle/1/3425897> (finding that people are inclined to follow government food pyramids or privately researched diet plans); Robert Crawford, *Health as a Meaningful Social Practice*, 10 HEALTH 401, 402 (2006) (stating that “personal responsibility for health is widely considered the sine qua non of individual autonomy and good citizenship.”); *see also*, JONATHAN M. METZL & ANNA KIRKLAND, *AGAINST HEALTH: HOW HEALTH BECAME THE NEW MORALITY* 9 (2010) (claiming that “individuals striving for health, are in some

acknowledge that individuals are, to an extent, personally responsible for their food choices and related health outcomes. Critically, though, environmental factors are significant determinants for the overconsumption of unhealthy foods. As Roberto et al. explains:

A series of environmental factors are exploiting biological, psychological, social, and economic vulnerabilities of people in ways that undermine their ability to act in their long-term self-interest. The high profits that come from the successful exploitation of vulnerabilities are often the driving force behind environmental changes that promote overconsumption of food.<sup>22</sup>

Researchers have examined the various strategies used to exploit these vulnerabilities. For instance, Scrinis<sup>23</sup> and Nestle<sup>24</sup> show how the reductive emphasis on individual nutrients suits the commercial interests of food manufacturers. Similarly, Dixon and Banwell<sup>25</sup> and Penders and Nellis<sup>26</sup> critically investigate how interactions between food corporations, diet-disease researchers and other groupings of professionals (e.g. dietitians, chefs, personal trainers) construct credibility for food marketing claims, which in turn influences the scientific evidence on which regulators base their responses to product claims.

The second body of work has focused on public regulation and private accreditation of particular ethical and political claims on food labels such as fair trade, organic, higher animal welfare and various quality and terroir claims.<sup>27</sup> This line of research illuminates

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instances, rendered more difficult by the ways in which health are culturally configured and socially sustained.”) *see also*, Janne Huovila & Sampsa Saikkonen, *Establishing credibility, constructing understanding: The epistemic struggle over healthy eating in the Finnish dietetic blogosphere*, 20 *HEALTH* 383–400 (2016).

<sup>22</sup> Christina A. Roberto, et al., *Patchy Progress on Obesity Prevention: Emerging Examples, Entrenched Barriers, and New Thinking*, 385 *LANCET* 2400, 2404 (2015).

<sup>23</sup> GYORGY SCRINIS, *NUTRITIONISM: THE SCIENCE AND POLITICS OF DIETARY ADVICE* 49 (2013).

<sup>24</sup> MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 41 (2007).

<sup>25</sup> Dixon and Banwell, *supra* note 13, at 1.

<sup>26</sup> Pat Benders & Annemiek P. Nelis, *Credibility Engineering in the Food Industry: Linking Science, Regulation, and Marketing in a Corporate Context*, 24 *SCIENCE IN CONTEXT* 487, 487 (2011).

<sup>27</sup> *See generally*, Julie Guthman, *The Polanyian Way? Voluntary Food Labels as Neoliberal Governance*, 39 *ANTIPODE* 456, 456 (2007) (stating “[w]e expand upon the notion of the ‘credibility cycle’ through a study of credibility engineering by the food industry.”); *see also*, Brian Ilbery et al., *Product, Process and Place: An*

how consumer anxieties about, and distrust of, industrially produced, processed and distributed foods have created demand for niche markets and related schemes for verifying ethical claims. Consumer choices are constructed as performances of moral and political acts such as ethical or sustainable consumption,<sup>28</sup> political consumerism<sup>29</sup> and developmental consumption.<sup>30</sup> Evan and Miele observe, “ethical food labels reflect a socio-political environment in which consumption is deemed to be an appropriate, if not a preeminent, field through which to exert influence over the ethics of the entire food system.”<sup>31</sup> Yet much of this work shows that voluntary food label schemes create, at best, incremental and contingent change, and generally fail to create the space for deeper transformations of industrial food systems. Indeed, these ethical and political claims tend to legitimize, green-wash and reinforce confidence in the ability of market mechanisms to address food system issues.<sup>32</sup>

The final key body of work connects the normative claims made through advertisements with cultures and societal structures that not only encourage but also depend on the over-consumption of

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*Examination of Food Marketing and Labelling Schemes in Europe and North America*, 12 EUR. URBAN & REGIONAL STUD. 116, 117 (2005) (discussing the importance of proper food labelling); HENRY BULLER & EMMA ROE, *FOOD AND ANIMAL WELFARE* (2018) (stating “[t]he central argument of this original book... is that the concern for the welfare of farm animals... constitutes a significant and vital linkage between the processes and the acts of consumption and production.”); TIM BARTLEY ET AL., *LOOKING BEHIND THE LABEL: GLOBAL INDUSTRIES AND THE CONSCIENTIOUS CONSUMER* (2015) (exploring the link between consumption and production processes in global industries).

<sup>28</sup> CLIVE BARNETT ET AL., *GLOBALIZING RESPONSIBILITY: THE POLITICAL RATIONALITIES OF ETHICAL CONSUMPTION* 15 (2010).

<sup>29</sup> MICHELLE MICHELETTI, *POLITICAL VIRTUE AND SHOPPING INDIVIDUALS, CONSUMERISM, AND COLLECTIVE ACTION 2* (2003).

<sup>30</sup> Michael K. Goodman, *The Mirror of Consumption: Celebrityization, Developmental Consumption and the Shifting Cultural Politics of Fair Trade*, 41 GEOFORUM 104, 105 (2010).

<sup>31</sup> Adrian Evans & Mara Miele, *Food Labelling as a Response to Political Consumption*, in *ROUTLEDGE HANDBOOK ON CONSUMPTION* 191 (Margit Keller et al. eds., 2017).

<sup>32</sup> Julie Guthman, *Neoliberalism and the making of food politics in California*, 39 GEOFORUM 1171, 1173 (2008); Angela Tregear, *Progressing knowledge in alternative and local food networks: Critical reflections and a research agenda*, 27 J. RURAL STUD. 419 (2011); Alison Hope Alkon & Teresa Marie Mares, *Food sovereignty in US food movements: radical visions and neoliberal constraints*, 29 AGRICULTURE AND HUMAN VALUES 347, 347 (2012); Vaughan Higgins, Jacqui Dibden & Chris Cocklin, *Neoliberalism and natural resource management: Agri-environmental standards and the governing of farming practices*, 39 GEOFORUM 1776, 1777 (2008); cf. Edmund Harris, *Neoliberal subjectivities or a politics of the possible? Reading for difference in alternative food networks*, 41 AREA 55, 55 (2009).

food. The term “consumptogenic” environments refer to the varied factors that encourage individuals to excessively consume unhealthy products such as a societal emphasis on economic growth, marketing that fosters personal insecurity, and a culture that values fulfilling wants.<sup>33</sup> The extreme emphasis on individualism within capitalist societies, *inter alia*, encourages individuals to construct their self-identity and communicate their status to others through their consumption choices.<sup>34</sup> In the case of food, the global trend away from consuming traditional foods based on distinct food cultures and ecosystems towards “Westernised” diets has diluted previously clear social rules around consumption.<sup>35</sup> Consumers now depend heavily on food marketing including food labels (broadly defined) to construct their own value system for making food choices, which in turn informs their views of self.<sup>36</sup> In our analysis of açai berry labels below, we draw particularly on Warde’s argument that four sets of contradictory advice were commonly used to structure food choice in advertisements in British women’s magazines.<sup>37</sup> These are (1) novelty and tradition; (2) health and indulgence; (3) convenience and care; and (4) economy and extravagance.<sup>38</sup> Consistent with Bourdieu’s conceptualizations of the feedback loops between consumer choices, social position, and lifestyle, Warde argues that these “antinomies of taste” are far more than mere marketing devices.<sup>39</sup> Rather, he suggests they are aimed at allaying consumer anxieties in relation to “real, contradictory appeals, representing social pressures that operate on food choice.”<sup>40</sup> Similarly, Schneider and Davis’ content analysis of several decades of the Australian Women’s Weekly (Australia’s most popular magazine) shows how food advertisements purposely exploit these “antinomies of taste” to

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<sup>33</sup> Jane Dixon & Cathy Banwell, *Choice Editing for the Environment: Managing Corporate Risks*, in *RISK AND SOCIAL THEORY IN ENVIRONMENTAL MANAGEMENT* 180 (Thomas Measham & Stewart Lockie eds., 2012) (arguing that, “consumption moved from simply fulfilling the basic needs of shelter, food, clothing and mobility and acquired nationalistic, social and moral overtones.”); JOHN COVENEY, *FOOD* 49–50 (2014).

<sup>34</sup> See SÉBASTIEN CHARLES, *PARADOXICAL INDIVIDUALISM: AN INTRODUCTION TO GILLES LIPOVETSKY*, *HYPERMODERN TIMES* 1, 15 (ANDREW BROWN TRANS., 2005).

<sup>35</sup> This trend is termed the “nutrition transition” and is associated with the “double burden of malnutrition” which refers to the converging malnutrition-related issues within societies and populations, that is, the prominence of diet-related NCDs associated with obesity and the continuation of undernutrition (i.e. hunger). See Barry M. Popkin, et al, *NOW AND THEN: The Global Nutrition Transition: The Pandemic of Obesity in Developing Countries*, 70 *NUTR. REV.* 3, 6–7 (2012).

<sup>36</sup> Fischler, *supra* note 11, at 277, 290–291.

<sup>37</sup> ALAN WARDE, *CONSUMPTION, FOOD AND TASTE* 49 (1997).

<sup>38</sup> *Id.* at 3.

<sup>39</sup> *Id.* at 55–56.

<sup>40</sup> *Id.* at 49.

create or trigger consumer feelings of risk and anxiety, which can then be immediately resolved by choosing the branded product.<sup>41</sup>

Drawing on these three bodies of work, we connect and extend these analyses to show how a range of claims and representations (including implicit appeals to the four antinomies) on food labels reinforce the value of consumption and systematically undermine institutional resources and capacity to consider other ways food systems could function.

### *B. The Food Label as a Governance Space*

At the nexus of the various dimensions explored in the previous section lies our argument that the food label is a governance space. Recalling the broad definition of food labels outlined in the introduction, we consider the term “food labels” to encompass all the packaging, stories, and visual images made or displayed to consumers when food is sold.<sup>42</sup> Besides their materiality, we consider food labels to be, firstly, representations of the decisions made in the value chain that influence its operation. The food label encapsulates “a particular socio-economic ordering of the food system.” Indeed, the distance between producers and consumers requires a narrative about the item’s qualities and value chain that fosters trust and attracts consumers.<sup>43</sup> The label communicates that narrative.

Secondly, we consider food labels to be performative or, as Evans and Miele put it, “devices.”<sup>44</sup> Food labels hold potential to bring about material consequences by influencing supply chains and by contouring societal understandings of food system issues and solutions, thus channeling “our ethics and politics along certain pre-set paths.”<sup>45</sup> The food label is, therefore, a very small piece of “valuable real estate”<sup>46</sup> on which larger contests over ecologies, markets and consumer bodies are all played out.

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<sup>41</sup> Tanja Schneider & Teresa Davis, *Advertising food in Australia: Between antinomies and gastro-anomy*, 13 CONSUMPTION MARKETS & CULTURE 31, 39 (2010).

<sup>42</sup> As mentioned in the introduction we define the food “label” broadly, in line with legal definitions, as including all the tags, brands, marks, statements, representations, designs and descriptions made on a food and its packaging and made or displayed to consumers when it is sold. *See* note 10.

<sup>43</sup> Evans and Miele, *supra* note 31, at 191.

<sup>44</sup> *Id.* at 192.

<sup>45</sup> *Id.* at 191.

<sup>46</sup> Paula O’Brien, *Marginalising Health Information: Implications of the Trans-Pacific Partnership Agreement for Alcohol Labelling*, 41 MELB. U. L. REV. 341, 341 (2017).

Corresponding with this understanding of food labels, our analysis specifically focuses on how food labels implicitly and explicitly represent and act on the governance systems that support and construct food chains. As mentioned in the introduction, we draw here on the insight of regulatory studies where scholars show that regulation is not a top-down state-centric imposition of rules. Rather, regulation emerges from ongoing interactions (e.g. conflicts, alliances, modelling and mimicking) among multiple actors (including government, industry and civil society), with each actor seeking to exercise power legitimately and effectively at specific or multiple levels from local and national to regional and global.<sup>47</sup>

The significance of these interactions goes beyond setting rules and monitoring compliance. These interactions determine what products are available, who produces them, how they are produced, and under what conditions. They determine the methods and materials used in processing, packaging and trading and, crucially for this analysis, how a product is available for sale and marketed. Finally, these interactions determine the contractual, legislative and certification conditions that shape how actors carry out supply chain activities and communicate to consumers.

### *C. Methodology for Deconstructing Food Labels as Governance Spaces*

The growth of processed and packaged food, supermarket concentration, and quality claims on food makes human interaction with food labelling an everyday experience. We suggest, inspired by Dorothy Smith's "sociology for people,"<sup>48</sup> that it is possible and important to start a socio-legal analysis of food labels as governance spaces from the standpoint of a person going about their daily life. From this standpoint, Smith suggests that scholars can use "institutional ethnography" to unpack the complex social and institutional arrangements within which everyday experience is embedded. Smith shows how this approach can "enlarge the scope of what becomes visible from that site, mapping the relations that connect one local site to others" (emphasis added).<sup>49</sup>

Smith describes the purpose of this "institutional ethnography" as twofold:

One is to produce for people what might be called 'maps' of the ruling relations and specifically the

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<sup>47</sup> EWICK & SILBEY, *supra* note 9, at 17; Colin Scott, *Analysing regulatory space: fragmented resources and institutional design*, PUBLIC LAW 329, 330 (2001).

<sup>48</sup> SMITH, *supra* note 8.

<sup>49</sup> *Id.* at 29.

institutional complexes in which they participate in whatever fashion. People's knowledge of their everyday world is thereby expanded beyond the scope of what can be learned in the ordinary ways they go about their everyday activities . . . The second aim is to build knowledge and methods of discovering the institutions and, more generally, the ruling relations of contemporary Western society.<sup>50</sup>

In this case, we use what the consumer sees on food labels as our starting point from which to illuminate the broader regulatory and institutional complexes that frame consumers' food choices. Following Smith, we start with what a consumer sees when they wander down food aisles of supermarkets, scroll through online food stores, or peruse a café menu. We then map and evaluate the relations, institutions and governance processes, mediated through food labelling, that influence individual consumers and how food systems function. Besides Smith, our focus is inspired by the emphasis that new materialism in food studies places on the importance of geographies, objects and non-human living beings in understanding the food system.<sup>51</sup>

This approach to deconstructing food labels was previously suggested and applied by Parker.<sup>52</sup> While Parker preliminarily termed the method “backwards mapping,” in this article we develop the methodology further and refer to the approach as a “label and chain governance analysis” for “deconstructing food labels as a governance space.” We prefer this terminology because it better encapsulates our understanding of the food label as both representative and performative in the relationship between the consumer and the food chain.<sup>53</sup> That is, we suggest the need for deconstructing both (a) the regulatory governance of the chain behind the food choices available to the consumer evident from the

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<sup>50</sup> *Id.* at 51.

<sup>51</sup> Ilbery et al., *supra* note 27; Julian Agyeman et al., *Trends and Directions in Environmental Justice: From Inequity to Everyday Life, Community, and Just Sustainability*, 41 ANNUAL REV. ENV'T & RES. 321, 330-331 (2016); David Goodman, *Ontology Matters: The Relational Materiality of Nature and Agro-Food Studies*, 41 SOCIOLOGIA RURALIS 182, 183 (2001).

<sup>52</sup> See, e.g., Christine Parker, *The food label as a governance space: free-range eggs and the fallacy of consumer choice*, 35 RECHT DER WERKELIJKHEID 101, 101 (2014) (“Investigating how the choices presented to consumers on [their] labels have been constructed.”).

<sup>53</sup> Evans and Miele adopted a similar framing of the food label as both an icon (symbolic) and a device (capable of bringing about material change). See, Evans & Miele, *supra* note 31.



label and, relatedly, (b) the way in which labels govern consumer choices.

The methodology for deconstructing food labels is based on visual sociology. It derives from the notion that “valid scientific insight in society can be acquired by observing, analyzing and theorizing its visual manifestations: behavior of people and material products of culture.”<sup>54</sup> In the context of complex, globalized supply chains, the methodology of visual sociology offers opportunities to “bridge some of the disconnections in the contemporary food web.”<sup>55</sup> The food label can be, literally, seen as a visual embodiment of supply chain actors interacting with the consumer. In practice, deconstructing food labels requires the researcher to consider the food label as an everyday “found” object and engage with the combined effect of a label’s visuals and text on the claims and stories it provides.<sup>56</sup>

Deconstructing food labels combines visual sociology and regulatory network analyses with supply chain mapping, ethnographic and geographic research. Chain mapping entails mapping the product and information flows as well as relationships between the actors along the supply chain. This entails identification of key chain actors, a mapping of the functions of the actors, consideration of the various actors’ goals, and identification of where the most value is added to the product.<sup>57</sup> The chain mapping aspect to the methodology allows the researcher to understand the material arrangements that connect consumers at the end of the value chain to the producers and ecologies at the start of the chain without lapsing into sentimentalism or sensationalism. Additionally, deconstructing food labels also requires an examination of the regimes developed to regulate the value chain, the interactions among these regimes (or lack thereof), and their interactions with state-based regulation.<sup>58</sup> Throughout the analysis, geographic and anthropological research provides context for the value chain and its drivers and impacts, as well as relevant empirical evidence for the label’s claims. In sum, the aim is for a sober assessment of socio-economic governance

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<sup>54</sup> LUC PAUWELS, REFRAMING VISUAL SOCIAL SCIENCE: TOWARDS A MORE VISUAL SOCIOLOGY AND ANTHROPOLOGY 3 (2015).

<sup>55</sup> Gilbert W. Gillespie, *Visual Sociology and Food*, 6 J. FOR THE STUDY OF FOOD AND SOC’Y 7, 7 (2003).

<sup>56</sup> Carol Richards, Geoffrey Lawrence & David Burch, *Supermarkets and Agro-industrial Foods*, 14 FOOD, CULTURE & SOC’Y 29, 38–39 (2011).

<sup>57</sup> See, e.g., Simon Bolwig et al., *A Methodology for Integrating Developmental Concerns into Value Chain Analysis and Interventions*, in MARKETS AND RURAL POVERTY: UPGRADING IN VALUE CHAINS 21, 23 (Jonathan Mitchell & Christopher Coles eds., 2011).

<sup>58</sup> Eberlein et al., *supra* note 9, at 3.

arrangements that create particular value chains to inform understandings of what these processes mean for the potential to change the food chain specifically and food systems more generally.

#### *D. Label and Chain Governance Analysis*

Following initial observations, the researcher begins systematically collecting data on each product available for sale. The core of this stage involves a segment by segment observation and documentation of the label's textual content and tone, certification marks, trademarks and other visuals, as well as a collective look and feel of the label including branding, color and font choices. At the end of this stage, the researcher should be able to make quantitative conclusions about the main messages communicated to the consumer via the product label and have an idea of the governance practices and governmentality emerging.

For the second stage, the researcher maps out the value chain that brings the products to market with an emphasis on the various formal and informal governance arrangements influencing supply chain activities. This entails identification of the key stages a product moves through from production to consumption and of the main actors involved in the supply chain in terms of their role, information and resources.

Proceeding to the third step, the researcher delves deeper into the analysis by critically examining the actors, their interests and values, interactions between actors, and the form or nature of these interactions.<sup>59</sup> Here, the researcher uses a variety of data collection methods to more deeply delineate the governance relations implicated by the label. This includes empirical research methods (e.g. interviews, fieldwork, desktop review) and an examination of secondary scholarly and activist research.

Finally, the researcher returns to what the consumer sees to make visible the meaning and significance of the inferred governance relations. At this stage, the researcher interrogates what the label includes and excludes from its communication with the consumer, and considers the interests and values served by providing or not providing information or by portraying an aspect of the value chain in a particular way. Questions relevant to this aspect include: How have those who have sought to unsettle and change dominant food chains used regulation to do so? How have the dominant players used regulation in their responses? What values and interest (that is, what rationalities of governance) do the regulatory options chosen

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<sup>59</sup> *Id.*

represent? What alternative regulatory options and associated values and interests have been sidelined or occluded? Which are still available or might be available in the future? To what extent have choices already made constricted or co-opted the potential for further critique and contestation, or to what extent have they opened up possibilities for further dialogue and change? What supply chain actors are mentioned on the label, which actors are not, and how are they depicted? What activities in the supply chain are communicated and which activities are not?

### III. Case Study: Açai Berries

#### A. Origins, Practices and Popularity

Açai berries originate from two types of palms that grow along the Amazon river from Bolivia to Brazil.<sup>60</sup> Originally consumed largely by rural, floodplain groups called Amazonian *ribeirinhos*, açai became popular throughout Brazil by the early 1990s due to internal migration of these people to provincial cities.<sup>61</sup> Western tourists exported the berry to Los Angeles in the later 1990s.<sup>62</sup> The two most common açai products on the market are frozen smoothie packs and açai powders, which are both used in various beverages or, for the powders, in baking.

When first imported into the US, açai was a niche product described as “[a] cult phenomenon, popular mostly among young, male extreme-sport enthusiasts... skaters, surfers, snowboarders.”<sup>63</sup> It became widely popular after Dr. Nicholas Perricone, a New York dermatologist and “anti-ageing expert,” presented açai as a “superfood” for its “anti-ageing properties” in his book that was featured on the Oprah Winfrey Show in 2003 and 2004.<sup>64</sup> By 2013, “açai-laced products grossed nearly \$200 million in the United States.”<sup>65</sup> Açai followed a highly similar trajectory in Australia when

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<sup>60</sup> Jie Kang, et al., *Bioactivities of açai (Euterpe precatoria Mart.) fruit pulp, superior antioxidant and anti-inflammatory properties to Euterpe oleracea Mart.*, 133 *FOOD CHEMISTRY* 671, 671 (2012).

<sup>61</sup> John Colapinto, *Strange Fruit: The rise and fall of açai*, *NEW YORKER* (May 30, 2011), <https://www.newyorker.com/magazine/2011/05/30/strange-fruit-john-colapinto>.

<sup>62</sup> Michael Heinrich, Tasleem Dhanji & Ivan Casselman, *Açai (Euterpe oleracea Mart.)—A phytochemical and pharmacological assessment of the species’ health claims*, 4 *PHYTOCHEMISTRY LETTERS* 10–21 (2011).

<sup>63</sup> Colapinto, *supra* note 61.

<sup>64</sup> Susan Donaldson James, “*Superfood*” Açai May Not Be Worth Price, *ABC NEWS* (DEC. 12, 2018), <http://abcnews.go.com/Health/Diet/story?id=6434350&page=1>.

<sup>65</sup> Tom Philpott, *Are Quinoa, Chia Seeds, and Other “Superfoods” a Scam?*, *MOTHER JONES*, <http://www.motherjones.com/environment/2013/06/are-superfoods-quinoa-chia-goji-good-for-you/> (last visited Mar. 5, 2019).

it was first imported in the early 2000s. Similar to açai's original market in LA, açai began being distributed in Australia through stalls and cafes in beachside health conscious areas such as the Gold Coast and Bondi beach.<sup>66</sup> Freeze-dried açai powder, capsules and tonics began to be sold in retail and health stores in the mid to late 2000s.<sup>67</sup>

Because açai berries begin to spoil within 24 hours of being harvested, export of the berries to a broader consumer base was only made possible by advances in food processing, preservation and transportation technologies. They are 1 to 2 cm in diameter and contain a large seed that makes up about 80 to 90% of the fruit in both size and weight.<sup>68</sup> The seeds are covered in a thin, oily coat, which is the edible pulp layer, and tough, fibrous outer layers.<sup>69</sup> Generally, the manufacturing of açai juice entails the açai berries being soaked in (often, hot and/or chlorinated followed by potable) water, added to a rotation device that separates the seeds, pulped and sieved in a machine, mixed with citric acid, pasteurized and then frozen for and throughout transportation.<sup>70</sup> The juice produced is then subject to further processing to make either smoothie or powder packs. Both products require costly and complex machinery to create the right kind of environment, texture and color.<sup>71</sup>

The changing role of açai from mainly traditional diets in the place of production to a high value Western “superfood” spruiked by

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<sup>66</sup> Jacquie Hayes, *Berried treasure*, AUSTRALIAN (Aug 19, 2011), <http://www.theaustralian.com.au/business/the-deal-magazine/berried-treasure/news-story/6c03ef17df23992527a633b07a3f4f4e>; Cornelia Voigt et al., *Health tourism in Australia: supply, demand and opportunities* (2011), [http://search.ror.unisa.edu.au/record/UNISA\\_ALMA51138625960001831](http://search.ror.unisa.edu.au/record/UNISA_ALMA51138625960001831)).

<sup>67</sup> Emily Crane, *Meet the University Dropout who Started Importing Açai Berries for a Juice Bar at 22 and Now Makes One Million Dollars a Month*, DAILY MAIL AUSTRAL. (May 1, 2015), <http://www.dailymail.co.uk/news/article-3063723/University-dropout-started-importing-açai-berries-business-makes-one-million-dollars-month-sleeps-tepee.html>.

<sup>68</sup> Lisbeth A. Pacheco-Palencia, Christopher E. Duncan & Stephen T. Talcott, *Phytochemical composition and thermal stability of two commercial açai species, Euterpe oleracea and Euterpe precatoria*, 115 FOOD CHEMISTRY 1199, 1199 (2009).

<sup>69</sup> *Id.*

<sup>70</sup> Rosanna Iris Ayala, *Fermentation and Supercritical Extraction Studies of Açai Berry* 9–10 (Jan. 2012) (unpublished M.S.C.H. thesis, University of South Florida), <https://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=5157&context=etd>.

<sup>71</sup> Karin Nordström Dyvelkov & Jakob Sloth, *Chapter 6 - New Advances in Spray-Drying Processes*, in MICROENCAPSULATION IN THE FOOD INDUSTRY 57, 57 (2014), <https://www.sciencedirect.com/science/article/pii/B9780124045682000066> (last visited Feb 27, 2018); Mariana A. Pavan, Shelly J. Schmidt & Hao Feng, *Water sorption behavior and thermal analysis of freeze-dried, Refractance Window-dried and hot-air dried açai (Euterpe oleracea Martius) juice*, 48 LWT - FOOD SCIENCE & TECH. 75, 75 (2012).

Oprah and sold as far away as Bondi Beach is a good example of the creation of global food chains and the way they are represented to consumers. In Australia, like the US, açai products are sold in a variety of forms and retail locations (as shown below) and have become an established niche in the market – thus allowing for observation of a variety of marketing claims on the labels. Yet, it is a small enough niche to enable data collection that covers the whole market thus allowing us to take a snapshot of the whole market for a relatively new product and the way it tries to establish itself to consumers.

### *B. Data*

Following the approach described above to critically examine the food label as governance space, we identified 49 açai berry products on sale in Australia as of September 2017, which were sold through 41 Australian businesses. Most of these products are either: a) frozen açai berry pulp and açai berry powders and capsules for individual consumption or b) frozen açai berry pulp sold in cafés (in ready to eat bowls and smoothies) and health store retailers. These products were identified through multiple searches over various public and private databases for companies, trademarks or products that used the word “açai.”<sup>72</sup> Following the initial database searches, the researchers conducted online or physical site visits.

Upon identifying an açai product advertised for sale in Australia, all information regarding each product visible to the consumer was recorded, compiled, and thematically coded. Relevant sources of information included written online product descriptions, pictures, signs or symbols in the product description or on the packaging, other information on labels (e.g. slogans), and pamphlets at point-of-sale. Five common themes, or product claims, were identified:<sup>73</sup>

1. Açai berries are uniquely nutritious;
2. Açai berry consumption is rooted in traditional knowledges and practices;

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<sup>72</sup> In order of search: all trademarks registered in Australia with the terms ‘açai’ or ‘amazon’ on IP Australia; all business names with the term ‘açai’ on ASIC business and company names database; products with the keyword ‘açai’ in a product name search in the Australian Certified Organics (ACO) database; products of Australian sellers on ebay.com.au. Specialist açai cafes were only included if they do not source through a wholesaler or if they do not appear to source through a wholesaler and were marketed as specialist açai cafes. A full list of the brands included in our sample is available from the first author upon request.

<sup>73</sup> A table showing the products and types of claim made on each product is available from the first author upon request.

3. Purchasing açai berries contributes to poverty reduction and facilitates sustainable livelihoods;
4. Açai berries are organic; and
5. Açai berry production preserves the Amazon.

These claims are often on the same label and, as we will show, reinforce each other. Accordingly, we have further grouped them into three meta-claims: those claims focused on the health benefits of consumption of the açai berry (claims 1 and 2), those claims relating to how purchasing açai berries contributes to poverty reduction and facilitates sustainable livelihoods (claim 3), and finally those claims that açai berries are produced in an environmentally sustainable manner (claims 4 and 5). The remainder of the paper analyzes the results for each of these meta-claims in turn.

#### **IV. Health: Nutritionism and Primitivism**

##### *A. Nutritionism*

Of the 49 açai products identified in the Australian market place, all labels referred to the large concentration of ‘antioxidants’ and other chemical compounds in the açai berry. About a third of the products claimed that açai berries could help with serious diseases like cancer or heart disease, and a third claimed that açai berry products have anti-ageing properties. This is frequently explained in highly scientific terminology. For example, “Kiss the Berry” cafes in Brisbane claim that açai:

...contains high levels of essential fatty acids (omega 3’s in particular) known for their cardio and neuro-protective and anti-inflammatory effect. It is super rich in antioxidants to reduce cholesterol, contains 19 different amino acids to optimize brain signaling pathways, and is rich in minerals and vitamins (especially calcium and vitamin E) for healthy hair, skin and nails.

At the same time, however, “Kiss the Berry” goes on to neatly juxtapose the health benefits of açai with pleasure:

So now you’re probably thinking ‘Surely something that good for me, can’t possibly taste good.’ Well, eating your own words has never been so delicious. When the berries are blended, we describe it as a fruit sorbet with hints of dark chocolate and red wine. What’s not to like?

This common juxtaposition speaks to consumer anxiety regarding the need to continuously choose between hedonism and health or, in Warde's terms,<sup>74</sup> the antinomie of health and indulgence. The antinomie is resolved in a gendered way. In her critical discourse analysis of superfood marketing, Sikka<sup>75</sup> notes that the great majority of superfood advertisements are targeted at women and marketed as "a solution to the highly confusing message women are given with respect to the need to maintain a thin body at the same time as giving in to junk food." We found that attention is increasingly being given to youthful, muscular male gendered bodies in açai advertising consistent with idealized images of male bodies, and exemplified by, for instance, a newer brand ("Açai Brothers") focused on health and fitness.

The previous work of Curll et al<sup>76</sup> comprehensively examined the research findings behind these health claims. Curll et al found no evidence to support the unique health and anti-ageing claims made for açai berry products over many other nutrient-dense foods. Rather, the labelling of these products conflates the well-accepted health benefits of antioxidants and other nutrients found in a variety of "normal" fresh, unbranded fruits and vegetables with claims exaggerating the unproven benefits of particular phytochemicals apparently found in higher concentrations in açai berries.<sup>77</sup> This is a form of "nutritionism", a reductionist emphasis on micro-nutrients.<sup>78</sup>

### B. Primitivism

Açai is heavily promoted to western consumers as a "traditional food." All 49 of the products in our survey directly made claims regarding the traditional role of açai in the diets of those on the Amazonian floodplains. For example, one line of products point

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<sup>74</sup> Warde, *supra* note 37, at 70.

<sup>75</sup> Sikka focused on how the marketing for many sweeter superfoods like açai centres on the sweetness and decadence of the food, which is consistent with the traditional connection drawn in Western societies between the consumption of sweets by women as related to pleasure, sex, desire and lust, and the cultural expectation that these wants should be policed. See *Contemporary Superfood Cults: Nutritionism, Neoliberalism and Gender*, in *FOOD CULTS: HOW FADS, DOGMA, AND DOCTRINE INFLUENCE DIET* 87, 93, 95 (Kima Cargill ed., 2017).

<sup>76</sup> Curll et al., *Unlocking the Energy of the Amazon: The Need for a Food Fraud Policy Approach to the Regulation of Anti-Ageing Health Claims on Superfood Labelling*, 44 *FED. L. REV.* 419, 448 (2016). This study was based on an earlier version of the same product survey as the research in the current article – but focused only on the health claims on the products.

<sup>77</sup> *Id.* at 435.

<sup>78</sup> Dana Sturtevant & Hilary Kinavey, *Nutritionism*, *BE NOURISHED* (OCT. 10, 2016), <https://benourished.org/nutritionism/>.

out that açai was a “staple of Amazon natives for hundreds of years.”<sup>79</sup> Another assures the consumer that açai, and the other superfoods in the range, “have been fueling indigenous people around the world for thousands of years.”<sup>80</sup>

These exotic superfoods are thus marketed at the intersection of scientific nutritionism and nutritional primitivism.<sup>81</sup> They tell the consumer that the product is verified by both Western science and indigenous tradition. This is appealing because it transcends the antinomie between novelty and traditional foods.<sup>82</sup> Nutritional primitivism “privileges ancient or indigenous knowledge and ‘natural’ production practices in a nostalgic search for authenticity in the diet and its related health outcomes, in contrast to those food and health cultures and regimes seen as ‘tainted’ by complex modern technologies.”<sup>83</sup> The marketing of açai berries invokes novel nutritionist discourse while still appealing to those who might eschew non-traditional foods based on novel technologies (such as fortification and genetic manipulation) that produce functional foods with higher nutrients.<sup>84</sup>

Nevertheless, the way açai is processed and consumed today is far removed from traditional practices. Indigenous Amazonians domesticated the palm for use in construction over 8000 years ago.<sup>85</sup> They did consume, but did not rely on, açai berries before colonization. During European colonization (roughly 1494 to 1815) açai became a staple for Amazonian peasants in riverine areas (i.e. Amazonian *ribeirinhos*).<sup>86</sup> Since this time, açai has been consumed after being soaked in water, pulped, strained and then drunk, added to grains or served with fish or meats. Brazil’s dietary guidelines

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<sup>79</sup> JOHNSON, ET AL., *supra* note 2, at 316.

<sup>80</sup> *About Us*, LA KULT, <https://www.la-kult.com.au/pages/about-us> (last visited Mar. 13, 2019).

<sup>81</sup> Loyer, *supra* note 5, at 1, 4.

<sup>82</sup> WARDE, *supra* note 37 at 55.

<sup>83</sup> Loyer, *supra* note 5, at 3.

<sup>84</sup> See Jessica Loyer, *Communicating Superfoods: A Case Study of Maca Packaging*, in *FOOD AND COMMUNICATION: PROCEEDINGS OF THE OXFORD SYMPOSIUM ON FOOD AND COOKERY* 236, 241 (Mark McWilliams ed. 2015).

<sup>85</sup> The Myth of the Pristine Amazon Rainforest, MAX-PLANCK-GESELLSCHAFT (March 08, 2017), <https://www.mpg.de/11147178/amazon-rainforest-pre-columbian> (last visited Feb 15, 2019).

<sup>86</sup> Eduardo S. Brondizio, *Agriculture Intensification, Economic Identity, and Shared Invisibility in Amazonian Peasantry: Caboclos and Colonists in Comparative Perspective*, 26 *CULTURE & AGRIC.* 1, 6 (2004).



continue to recommend eating açaí with cassava flour or grits and fish.<sup>87</sup>

By contrast, Western consumers eat frozen açaí as a dessert, smoothie or breakfast item, combined with fruits. Contrary to some products' claims to be "teaching Australians how to eat and prepare Açaí as the locals do in the streets of Brazil,"<sup>88</sup> Fajan observed that the Western way of eating açaí is commonly viewed within the key açaí production region as disrespectful and inappropriate.<sup>89</sup> According to traditional beliefs, açaí has a reputation for being "a heavy food that weighs you down and makes you lethargic."<sup>90</sup> Traditional beliefs in Brazil also associate the inter-mixing of açaí with other vegetables and fruits with indigestion.<sup>91</sup> Yet, western marketing claims that açaí is a "natural energy boost," an "energizing superfood," a "sustained energy boost." This representation is what MacCannell<sup>92</sup> refers to as "staged authenticity," that is, a product is presented as authentic, but the representation of the product for western consumers displaces the cultural meaning of the product for those who traditionally produce and consume it.

This cultural displacement in the western market place reflects a more literal displacement of açaí in diets in the Amazon. For Amazon *ribeirinhos* today, while açaí is still an accompaniment to the staple foods of fish and manioc, there have recently been significant declines in açaí consumption. Açaí is increasingly replaced by the global commodities of soy oil, meat<sup>93</sup> and sugar.<sup>94</sup> This is the neocolonial flip side of the globalization of the food supply that has brought açaí to western consumers. While western consumers are sold açaí as a disease-preventing solution to unhealthy western lifestyles,<sup>95</sup> the Amazonian *ribeirinhos* are joining the global nutrition transition and the associated rise in the prevalence of diet-

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<sup>87</sup> *Dietary Guidelines for the Brazilian Population*, MINISTRY OF HEALTH OF BRAZIL, 1, 71 (2014), [http://bvsms.saude.gov.br/bvs/publicacoes/dietary\\_guidelines\\_brazilian\\_population.pdf](http://bvsms.saude.gov.br/bvs/publicacoes/dietary_guidelines_brazilian_population.pdf).

<sup>88</sup> *About Amazon Power*, AMAZON POWER, <https://www.amazonpower.com.au/about-us.asp> (last visited Mar. 13, 2019).

<sup>89</sup> JANE FAJANS, *BRAZILIAN FOOD: RACE, CLASS AND IDENTITY IN REGIONAL CUISINES* 64 (2013).

<sup>90</sup> *Id.* at 65.

<sup>91</sup> *Id.* at 64.

<sup>92</sup> Dean MacCannell, *Staged Authenticity: Arrangements of Social Space in Tourist Settings*, 79 *AMERICAN J. SOCIOLOGY* 589, 602 (1973).

<sup>93</sup> Rui Sérgio Sereni Murrieta et al., *Food consumption and ecology of riparian populations in two Amazonian ecosystems: a comparative study*, 21 *REVISTA DE NUTRIÇÃO* 123, 128 (2008).

<sup>94</sup> *Id.*

<sup>95</sup> Curll et al., *supra* note 76, at 420; MacGregor, Petersen, and Parker, *supra* note 1.

related non-communicable diseases. We return to the neocolonial implications of açai marketing in Part V.

### C. Market-based Governance of Health Claims

As Frohlich has shown in the US context, health claims and nutritional labelling were largely prohibited on food items throughout the western world prior to the 1970s on the basis that such information would confuse consumers by conflating the properties of pharmaceuticals and foods.<sup>96</sup> Nutrition labelling emerged in the 1970s as a form of consumer empowerment and now reflects the “belief that it is better to manage markets indirectly through information than directly through product bans and standards.”<sup>97</sup> This approach reinforces the market by suggesting that consumers can govern the market via businesses’ self-regulatory responses to consumer choices.

The regulation of health claims on food in Australia is broadly similar to the US and likewise tends to reinforce this neoliberal approach. Food Standards Australia and New Zealand (FSANZ) take an equivalent role to that of the US Food and Drug Administration (FDA). Both FSANZ and the FDA set standards for food labelling,<sup>98</sup> and prohibit health claims that cannot be substantiated by evidence.<sup>99</sup> In the US, the FDA is guided by the principle of “significant scientific agreement”<sup>100</sup> among qualified experts when deciding whether to allow a proposed health claim on a food product. The FDA applies this standard as part of a systematic review of evidence regarding the causal link between a food and a health effect. FSANZ also requires “systematic scientific reviews of the evidence to establish causal links between a food and health

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<sup>96</sup> Xaq Frohlich, *The Informational Turn in Food Politics: The US FDA’s Nutrition Label as Information Infrastructure*, 47 Soc. STUD. SCI. 145, (2017).

<sup>97</sup> *Id.* at 147.

<sup>98</sup> *Australia New Zealand Food Standards Regulations 1994* (FSANZ Code); see Standards 1.2.1 and 1.2.7. (reflecting internationally agreed principles for food regulation set out in Codex Alimentarius 1991: principle 1.2, Codex General Guidelines on Claims); see Curll et al., *supra* note 76, at 445 (“In the US, ‘health claims’ on food that expressly, or by implication, characterise a relationship between any substance and a disease, or health related-condition, must be approved by the US Food and Drug Administration (FDA) before market”).

<sup>99</sup> Nutrition Labelling and Education Act of 1990, Pub. L. No. 101-535, 101 Stat. 2353 (codified as amended at 21 U.S.C. § 301).

<sup>100</sup> *Guidance for Industry: Evidence-Based Review System for the Scientific Evaluation of Health Claims—Final*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Labeling/Nutrition/ucm073332.htm> (last visited Mar. 16, 2019).

effect before a health claim can be made” on food.<sup>101</sup> Neither the FDA nor FSANZ requires particular kinds of scientific evidence, and both institutions can authorize the full version of a health claim or a qualified version of the health claim.<sup>102</sup>

Many general level health claims, such as those health claims on açai product labels that do not mention a specific disease or claim a specific health effect, can be made in the US, Australia and New Zealand without pre-market approval. Rather, Australia and New Zealand use a self-substantiated procedure that allows the food business to determine whether a general health claim is supported by manufacturer evidence.<sup>103</sup> Similarly, the US adopts a lower threshold for general health claims that requires only notification from the food manufacturer with an authoritative statement of support from a list of legislatively approved scientific bodies.<sup>104</sup> In practice, then, the monitoring and compliance of health claims in Australia and New Zealand, similar to the US, is left largely to business self-regulation. Even where the regulator has to pre-approve claims, it generally relies largely on evidence provided by the food business. There is little or no proactive monitoring of what claims are actually made on products, whether they have been pre-approved or self-substantiated, or what overall message is being provided in the market place.<sup>105</sup>

This means that exaggerated health claims flourish, as do representations that reinforce highly gendered understandings of desirable body types and attitudes as well as inaccurate claims about traditional uses of the food. The EU, in contrast to the US, Australia and New Zealand, demands a higher level of scientific evidence (randomized control trials) and requires regulatory pre-approval of all health claims.<sup>106</sup> This means that superfood health claims such as

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<sup>101</sup> Curll et al., *supra* note 76, at 426; see Food Standards Australia New Zealand, *Food Standards Code Standard 1.2.7*, s 18(3)(b) (prescribing the elements of a systematic review).

<sup>102</sup> See Curll et al., *supra* note 76, at 426; Richard Nowak, *DSHEA'S Failure: Why a Proactive Approach to Dietary Supplement Regulation Is Needed to Effectively Protect Consumers*, 3 U. ILL. L. REV. 1045, 1056–57 (2010).

<sup>103</sup> Curll et al., *supra* note 76, at 426.

<sup>104</sup> Food & Drug Admin. Modernization Act of 1997, Pub. L. No. 105-115, 105 Stat. 1677 (1997) (codified as amended 21 U.S.C. § 379).

<sup>105</sup> Curll et al., *supra* note 76, at 426–27 (discussing the general lack of oversight and pre-approval requirements under the regulatory system).

<sup>106</sup> Only European Food Safety Authority (EFSA)-approved food-health relationships and their authorized health and nutrition claims determined by the European Commission (EC) are permitted for use in the sale of food. *Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on Nutrition and Health Claims Made on Foods* [2006] OJ L 404/9, art 1(3) ('Health Claims Regulation (EC) 1924/2006'). The EU register on nutrition and health claims permitted for use in the sale of foods can be

those found on açai products in Australia and the US are absent from the European marketplace.<sup>107</sup>

In Australia, the monitoring and enforcement of misleading health and other marketing claims are left to the consumer regulator, the Australian Competition and Consumer Commission (ACCC). The ACCC, like the Federal Trade Commission (FTC) in the US, enforces the general legal prohibition on false, misleading or deceptive conduct in trade and commerce. US law also grants specific powers to the FDA to take enforcement action in relation to deceptive food labels and labelling (broadly defined). This creates some overlap between the powers of the FDA and the FTC but the FTC tends to hold the primary enforcement role.<sup>108</sup> In relation to açai berry non-food products, the FTC has taken enforcement action by seeking and receiving injunctions over the websites of particular açai berry products marketed as dietary supplements.<sup>109</sup> Yet, as scholars observed the “deceptive practices on the part of companies not party to the FTC action have continued.”<sup>110</sup>

Enforcement often relies on the ability of consumers and food system advocates to successfully notice misleading claims, bring them to the attention of the appropriate regulator, and persuade the regulator that the issue is significant enough for the regulator to take enforcement action out of the other thousands of potential actions available to it. However, misleading representations of açai on açai food labels, as identified later in this article, have not so far prompted action in either jurisdiction. After all, Western consumers are unlikely to know and complain about details about Amazonian

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accessed: <<http://ec.europa.eu/nuhclaims/?event=register.home>>.

<sup>107</sup> The EFSA Scientific NDA Panel has rejected the vast majority of food business health claim substantiation dossiers submitted to it. See European Food Safety Authority Panel on Dietetic Products, Nutrition and Allergies, *General Guidance for Stakeholders on the Evaluation of Article 13.1, 13.5 and 14 Health Claims*, 9 EUR. FOOD SAFETY AUTHORITY J. 2135 (2011). Based on the submitted, assessed evidence, EFSA has since 2010 rejected all 149 attempts to substantiate food health relationships involving the word ‘antioxidant’, and accepted only one out of 19 industry submissions regarding ‘polyphenols’. See Aalt Bast et al., *Scientism, Legalism and Precaution—Contending with Regulating Nutrition and Health Claims in Europe*, 6 EUR. FOOD & FEED L. REV. 401 (2013) (reviewing the European approach to health claims on food); see also Curll et al., *supra* note 76, at 443–44 (providing a more detailed discussion of the European approach in comparison with the Australian and US approach).

<sup>108</sup> Federal Food, Drug, & Cosmetic Act, 21 U.S.C. §§ 378(a), (b) (1938).

<sup>109</sup> See, e.g., Complaint at 23, Fed. Trade Comm’n v Cent Coast Neutrecules Inc., 10 Cv. 04931 (E.D. Ill. 2012).

<sup>110</sup> A. Bryan Endres & Nicholas R. Johnson, *United States Food Law Update: The FDA Food Safety Modernization Act, Obesity and Deceptive Labeling Enforcement Recent Developments*, 7 J. FOOD L. & POL’Y 135, 155 (2011).

*ribeirinhos'* traditional consumption of açai'. Nor have Amazonian *ribeirinhos* complained nor pushed for rules that require tradition and culture be accurately portrayed at the other end of the value chain. We argue in the next section that these inaccurate claims are not just trivial marketing puff. They help reinforce a food system in which those in the Amazon where the açai was grown and eaten can be exploited.

## V. Fair Trade: Racism and Neo-colonialism

### A. Rural Socio-economic Development Claims

After health claims, the next most common claims on açai products concerned the benefits of açai production and sale in reducing poverty and facilitating sustainable livelihoods for the rural communities of the Amazon. Twenty of the açai products made claims regarding how the purchases of açai benefit Amazon communities through increased incomes. Three products even went as far as to proclaim that “[t]he manual harvesting of the berries also provides hundreds of jobs for the indigenous tribes around Brazil and helps minimize the human trafficking and deforestation that these tribes would otherwise partake in to make ends meet.”<sup>111</sup>

Açai's international popularity has created economic opportunities for those Amazonian *ribeirinhos* involved in cultivating the palms, harvesting the berries and/or operating the boats to transport the berries to processing facilities as well as for those employed in the associated industries for açai processing and export.<sup>112</sup> Indeed, Brondizio, a leading anthropologist on rural populations in the Amazon, claimed that “[t]here may be no better example of an economic prospect for overcoming underdevelopment in rural Amazonia than the case of açai palm fruit production system.”<sup>113</sup>

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<sup>111</sup> AMAZON POWER PTY LTD., <https://www.amazonpower.com.au/what-is-açai.asp> (last visited Mar. 16, 2019) (marketing the “Amazon Power Açai Smoothie Packs”, “Amazon Power Pure Açai Pulp” and “Organic Açai Capsules” products).

<sup>112</sup> Leonora Genya Pepper & Livia De Freitas Navegantes Alves, *Small-Scale Açai in the Global Market: Adding Value to Ensure Sustained Income for Forrest Farmers in the Amazon Estuary*, in INTEGRATING LANDSCAPES: AGROFORESTRY FOR BIODIVERSITY CONSERVATION AND FOOD SOVEREIGNTY 211, 211–20 (Florenca Montagnini ed., 12th ed. 2017).

<sup>113</sup> Eduardo S. Brondizio, *From Stape to Fashion Food: Shifting Cycles and Shifting Opportunities in the Development of the Açai Palm Fruit Economy in the Amazon Estuary*, in WORKING FORESTS IN THE NEOTROPICS: CONSERVATION THROUGH SUSTAINABLE MANAGEMENT 399, 339 (Daniel J. Zarin et al. eds., 2004).

Empirical research shows, to an extent, that the economic opportunities Brondizio refers to have been leveraged. Pegler conducted in-depth interviews with over twenty açai-producing households and found that since gaining popularity açai has become an important source of income.<sup>114</sup> These households collected around 150 sacks of açai per year, and earn R\$40 per sack, which is roughly US\$11.69 (or AU\$15) and equals a monthly income of between R\$4800 and R\$6000. Similarly, another study reported that a *ribeirinhos* family will make an average of 2300 euros, or US\$2640, during each month of the harvesting season for açai.<sup>115</sup> These figures are significantly higher than the average monthly income in Brazil over the last two years, which at its highest was R\$2186.<sup>116</sup>

Yet, this does not necessarily mean that Amazonian *ribeirinhos* have received a fair proportion of the profits generated from açai production. Similar dynamics that exist in cocoa and coffee value chains are evident in açai supply chains.<sup>117</sup> Amazonian *ribeirinhos* cultivate the palms and provide the berries, but significant market value is added through the processing, export and retail of açai. Additionally, the reliance of Amazonian *ribeirinhos* on a single raw commodity for the majority of their income leaves them especially vulnerable to fluctuations in market prices.<sup>118</sup> The existence of a market opportunity due to the popularity of açai with some western consumers does not necessarily equate to a sustainable fair-trade opportunity. Moreover, the racist and neo-colonial representation of Amazonian people in açai marketing raises suspicion that their contribution to global supply chains will be undervalued.

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<sup>114</sup> Lee Pegler, *Peasant inclusion in global value chains: economic upgrading but social downgrading in labour processes?*, 42 J. PEASANT STUDIES 929, 945 (2015).

<sup>115</sup> Luciana Batista Pereira, *From the Amazon Forest to the World: Gender Divisions of Labour in an emerging Value Chain 28* (unpublished M.A. Thesis, International Institute of Social Studies, The Hague).

<sup>116</sup> *Brazil Real Average Monthly Income 2012-2018*, TRADING ECONOMICS, <https://tradingeconomics.com/brazil/wages> (last visited Mar. 11, 2019).

<sup>117</sup> See, e.g., Peter Leigh Taylor, Douglas L. Murray & Laura T. Raynolds, *Keeping Trade Fair: Governance Challenges in the Fair Trade Coffee Initiative*, 13 SUSTAINABLE DEV. 199, 200–01 (2005) (considering global commodity chain governance in relation to coffee trade).

<sup>118</sup> Monique Barenboim Salles Vanni, *Brazilian Açai Berry and Non-Timber Forest Product Value Chains as Determinants of Development from a Global Perspective* 118 (Aug. 2018) (unpublished Ph.D. Dissertation, The London School of Economics) (on file with the Department of Social Policy of the London School of Economics).

### B. *Racist and Neocolonial Representations*

Generally, Amazonian *ribeirinhos* (also referred to as caboclo)<sup>119</sup> have mixed ancestry (Latin American, European and African descent) and live a semi-subsistent life based on fishing, small-scale farming and agroforestry,<sup>120</sup> and tend to govern their communities with relative autonomy.<sup>121</sup> Lima-Ayres explains that:

Forced cultural transformation and intense miscegenation with whites resulted in the dilution of specific tribal identities, and led to the formation of the caboclo population who considered themselves as part of the national society.<sup>122</sup>

This history has led to native, non-Indigenous populations, like the Amazonian *ribeirinhos*, as often being described as a relatively invisible group in both the Amazon and in the broader world.<sup>123</sup> Nowadays, *ribeirinhos* live either in cities or along the river of the Amazon, but mostly they move periodically between both.<sup>124</sup>

A food label cannot convey the history or current marginalization of Amazonian *ribeirinhos* nor would such accounts be an appealing marketing strategy. Yet, the widespread popularity of açaí presented an opportunity to raise the profile of the significant disadvantages experienced by and contributions made from Amazonian *ribeirinhos*. Given their “invisibility,” it would be

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<sup>119</sup> Richard Pace, *The Amazon Caboclo: What's in a Name?*, 34 LUSO-BRAZILIAN REV. 81, 84 (1997) (explaining how the term caboclos is colloquially used to describe Amazonian *ribeirinhos* and other rural populations in the Amazon. However, this term is contested, and for some this term carries prejudicial connotations about the groups mixed ancestry and class).

<sup>120</sup> James A. Fraser, *Caboclo Horticulture and Amazonian Dark Earths along the Middle Madeira River, Brazil*, 38 HUMAN ECOLOGY 651, 653 (2010).

<sup>121</sup> HEATHER F. ROLLER, *AMAZONIAN ROUTES: INDIGENOUS MOBILITY AND COLONIAL COMMUNITIES IN NORTHERN BRAZIL* 210 (2014); Barbara A. Piperata, *Nutritional status of Ribeirinhos in Brazil and the nutrition transition*, 133 AM. J. PHYSICAL ANTHROPOLOGY 868, 869–70 (2007).

<sup>122</sup> Deborah de Magalhaes Lima-Ayres, *The Social Category Caboclo: History, Social Organization, Identity and Outsider's Social Classification of the Rural Population of an Amazonian Region (The Middle Solimoes)* 90 (Jan. 1992) (unpublished Ph.D. dissertation, King's College Cambridge) (on file with the Department of Social Anthropology, King's College Cambridge).

<sup>123</sup> Jacqueline M. Vadjunc & Marianne Schmink, *New Amazonian Geographies: Emerging Identities and Landscapes*, 28 J. Cultural Geography 1, 2–6 (2014).

<sup>124</sup> CRISTINA ADAMS ET AL., *AMAZON PEASANT SOCIETIES IN A CHANGING ENVIRONMENT: POLITICAL ECOLOGY, INVISIBILITY AND MODERNITY IN THE RAINFOREST* 14 (Cristina Adams et al. eds., 1st ed. 2006).

socially beneficial for this group to receive recognition as a distinct and diverse cultural entity.

Yet, none of the labels examined referred to Amazonian *ribeirinhos*. Instead, several labels describe Amazon *ribeirinhos* as either indigenous, traditional or native. Such references have the potential to be true, untrue or half-true given the heterogeneity of Amazonian *ribeirinhos*.<sup>125</sup> What is of significance is the decision to omit referring to Amazonian *ribeirinhos* as a distinct group with their own history and culture. Referring to Amazonian *ribeirinhos* broadly as indigenous or native sanitizes difficult aspects of history. For instance, it removes the effects of colonization by making it seem as if this social category of people were undisturbed by its processes.<sup>126</sup> Consistent with the “nutritional primitivism” of the health claims on açai products mentioned above, the food label acts as a constructed window into the history and identity of Amazonian *ribeirinhos*.

Like other “superfoods,” açai labels commonly use warrior imagery and references to warriors to depict Amazon *ribeirinhos*. Warrior imagery is often a component of the “noble savage” stereotype, which stems from colonial ideology and theology. This long-standing stereotype casts non-white ethnic groups as pure, wise stewards of the land that are removed from capitalist processes and urban societies.<sup>127</sup> Likewise, on some online açai sites, consumers are invited to “join the tribe,” i.e. sign up to their mailing list or loyalty program.<sup>128</sup> Other labels feature what appears to be a man with a dramatically protruding bottom lip, a slanted forehead, and tribal jewelry as a logo (*Amazon Power Açai Smoothie Packs*, *Amazon Power Pure Açai Pulp* and *Organic Açai Capsules*, Amazon Power Pty Ltd.) Protruding lips are a facial feature focused upon in racist pseudo-science to assign inferiority to certain races.<sup>129</sup> As

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<sup>125</sup> Lima-Ayres, *supra* note 122, at 119; Pace, *supra* note 119, at 84; ROLLER, *supra* note 121, at 205.

<sup>126</sup> M. J. Rowland, *Return of the “Noble Savage”*: Misrepresenting the Past, Present and Future, AUSTRALIAN ABORIGINAL STUDIES 2, 6–9 (2004).

<sup>127</sup> TER ELLINGSON, THE MYTH OF THE NOBLE SAVAGE 211–12 (2001).

<sup>128</sup> See, e.g., CLEAN TEA, <https://cleantea.com.au/> (last visited Mar. 13, 2019) (asking website visitors to “JOIN THE CLEAN TEA TRIBE” by subscribing to their email list); LA KULT, <https://www.la-kult.com.au/> (last visited Mar. 13, 2019) (asking website visitors to “Be Part Of Our Tribe – Become the Best Version of Yourself”); OHANA AÇAÍ, <http://ohanaaçai.com.au/> (last visited Mar. 13, 2019) (asking website visitors to “Join the tribe” by downloading the “Ohana App”); SAMBAZON, <https://www.sambazon.com/> (last visited Mar. 13, 2019) (asking website visitors to “Join our TRIBE NEWSLETTER!”).

<sup>129</sup> Alexander Edmonds, *Triumphphant Miscegenation: Reflections on Beauty and Race in Brazil*, 28 J. Intercultural Stud. 83, 85 (2007).



O'Toole observed, "in the language of racism, thick lips speak volumes."<sup>130</sup>

This "noble savage" caricature is at best culturally insensitive. It can also incidentally serve a racist agenda.<sup>131</sup> Stearman<sup>132</sup> has shown how an ecological version of the noble savage stereotype in the Amazonia has undermined efforts for land tenure security. She argues that policies that grant land entitlements on the condition that a native group exhibits conservationist qualities distracts from the fact that rights to remain on traditional lands is supported by human rights law.<sup>133</sup> The subsuming of the contemporary Amazonian *ribeirinhos* into the identity of primitive "Amazon natives" 'casts remote producers as "Others" who exist in a timeless, imaginary geography, when in reality they are real people in real places faced with a range of "contemporary challenges."<sup>134</sup>

Açaí products claim that açaí berry "naturally grows" and is "wild-harvested" to ensure that "the delicate environment of the Amazon is protected and the ancient traditions of indigenous people from this region are respected and preserved."<sup>135</sup> These claims overlook the role of Amazonian *ribeirinhos* as stewards of the açaí palm. Amazonian *ribeirinhos* employ skill and labor to manage the palm, "including through thinning, weeding, pruning, inter-cropping techniques and the development of seedlings."<sup>136</sup> Arguably then, the land and crop management by Amazonian peasants may fit some definitions of 'agroforestry,' and is certainly an example of small-scale production systems which tend to use less intensive harvesting methods."<sup>137</sup> By not mentioning their role as forest managers, açaí

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<sup>130</sup> Fintan O'Toole, *Racism rears its ugly head*, IRISH TIMES (May 6, 2003), <https://www.irishtimes.com/opinion/racism-rears-its-ugly-head-1.358021>.

<sup>131</sup> ELLINGSON, *supra* note 127, at 297.

<sup>132</sup> Allyn MacLean Stearman, *Revisiting the Myth of the Ecologically Noble Savage in Amazonia: Implications for Indigenous Land Rights*, 14 CULTURE & AGRICULTURE 2 (1994).

<sup>133</sup> *Id.*

<sup>134</sup> Jessica Loyer, *Superfoods*, in ENCYCLOPEDIA OF FOOD AND AGRICULTURAL ETHICS 1, 2 (David M. Kaplan ed. 2016).

<sup>135</sup> Hope Johnson, Christine Parker & Rowena Maguire, *Consumer Choice as a Pathway to Food Diversity: A Case Study of Açaí Berry Product Labelling*, in FOOD DIVERSITY BETWEEN RIGHTS, DUTIES AND AUTONOMIES 307, 314 (Alessandro Isoni et al. eds., 2018).

<sup>136</sup> *Id.* at 313–14 (citing Eduardo S. Brondízio & A.D Siqueira, *From Extractivists to Forest Farmers: Changing Concepts of Caboclo Agroforestry in the Amazon Estuary*, 18 *Res. in Econ. Anthropology* 233, 258 (1997)).

<sup>137</sup> *Id.* (citing Clark L. Erickson, *Amazonia: The Historical Ecology of a Domesticated Landscape*, in *The Social Lives of Forests: Past, Present, and Future of Woodland Resurgence* (Susanna B. Hecht, Kathleen D. Morrison, & Christine Padoch eds., 2014)).

berry claims have perpetuated on a global scale the prejudicial views in Brazil about Amazonian peasants as “low-skill” and “lazy,” due to their subsistence, rural lifestyle.<sup>138</sup> Yet Amazonian *ribeirinhos*, in the initial period of açaí boom, did manage to increase the production of açaí without leading to deforestation or monoculture farming. Brondizio and Siqueria explain:

Agroforestry systems that mimic native forests are ‘invisible’ in the analysis of most researchers who employ conventional measures of [agricultural] intensification. The result is agroforestry’s characterization as extensive, partially extractivist and non-dependent on labor and energy input other than for ‘gathering.’ [In other words,] conventional ideas of what farming involves, [which stem from colonial processes,] combined with the marginalization of Amazonian *ribeirinhos* have fed into the claims that açaí is passively ‘gathered’ and undervalue the contribution of Amazonian people to the production and sustainable management of açaí.<sup>139</sup>

The agricultural activities of other colonized peoples around the world, including Australian Aboriginal groups, have also been constructed in this way, which has provided a narrative that has assisted in justifying the taking of their (supposedly unmanaged and uncared for, yet potentially agriculturally productive) land for industrial, export-oriented agriculture.<sup>140</sup>

### *C. Voluntary Fair-trade Certification and Other Schemes for a Just Distribution of Benefits and Burdens*

The dominant governance method for addressing the equitable inclusion of poor producers in developing countries into global supply chains that serve markets of developed countries<sup>141</sup> is

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<sup>138</sup> See *id.* at 313 (citing Mark Harris, *Nature Makes them Lazy: Contested Perceptions of Place and Knowledge in the Lower Amazon Floodplain of Brazil, 3 Conservation and Society* 461 (2005)).

<sup>139</sup> *Id.* at 313.

<sup>140</sup> CHRISTOPHER MAYES, UNSETTLING FOOD POLITICS: AGRICULTURE, DISPOSSESSION AND SOVEREIGNTY IN AUSTRALIA 19–48 (2018); see generally BRUCE PASCOE, DARK EMU: BLACK SEEDS: AGRICULTURE OR ACCIDENT? (2014) (discussing how the colonizing Europeans mistakenly believed that Australian Aboriginals did not use agriculture to develop the land).

<sup>141</sup> See Laura T. Reynolds, *Fair Trade: Social regulation in global food markets*, 28 J. RURAL STUD. 276, 279 (2012) (“Fair Trade operates at the intersection of market

the fair trade movement. Fair trade aims to create supply chains based on adequate working and trading conditions to alleviate poverty and enable sustainable development.<sup>142</sup> From the 1960s onwards, fair trade spawned various formalized non-governmental bodies who create and administer, *inter alia*, third-party certification schemes.<sup>143</sup>

Third-party fair trade certification entails independent non-governmental organizations (NGOs) or private companies auditing aspects of a supply chain against specified criteria including, for instance, that cooperatives in the chain are democratic, that farm workers are, at least, being paid the minimum wage for their work, and that small-scale farmers are receiving at least a fair trade floor price (i.e. profits cover the costs of production, savings and the living costs for an average family).<sup>144</sup> The results of such audits may be sent back to a parent company or head NGO for review. If the audit reveals that fair trade requirements are being met, then the manufacturer, in the case of açai, is licensed a certification mark to feature on the product's label. The mark alerts consumers that a third-party has verified the product's claims of being from a "fair," equitable supply chain, differentiates the product and attracts price premiums.<sup>145</sup>

Only two açai products in our survey (both from Sambazon, a US-based wholesaler) displayed a third-party fair trade certification. The remaining 18 açai products that made claims regarding the fairness of the supply chain had not been subject to any third-party oversight.<sup>146</sup> For instance, one product explained: "[t]he Açai berries used in this product have been harvested by local families, which also means rural community and grower

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critique and reregulation, challenging dominant 'unfair' trade practices and promoting alternative 'fair' trade norms in global arenas.").

<sup>142</sup> ANNA HUTCHENS, CHANGING BIG BUSINESS: THE GLOBALISATION OF THE FAIR TRADE MOVEMENT 58 (2009).

<sup>143</sup> Matthew Anderson, *NGOs and Fair Trade: The Social Movement Behind the Label*, in *NGOs in CONTEMPORARY BRITAIN* 222–41 (Nock Crowson et al., 2009).

<sup>144</sup> See, e.g., WORLD FAIR TRADE ORGANIZATION, WTO FAIR TRADE STANDARD 17 (2017), <https://wfto.com/standard-and-guarantee-system/fair-trade-standard> (last visited Mar. 13, 2019) (explaining compliance criteria used by the World Fair Trade Organization).

<sup>145</sup> See Marie-Christine Renard, *Quality Certification, Regulation and Power in Fair Trade*, 21 J. RURAL STUD. 419, 423–24 (2005).

<sup>146</sup> Because fair trade is a broader concept than third-part certification schemes, supply chain actors can also assess their own value chains against set social and environmental standards and make product claims regarding how the supply chain follows fair trade principles in a broad sense.

cooperatives are empowered through fair trade pricing.”<sup>147</sup> Another uncertified claim was that “[e]very step of our supply chain is closely monitored to ensure sustainable and fair trade practices are followed.”<sup>148</sup> These claims are difficult, if not impossible, for a consumer, regulator or another third party to verify.

Even where fair trade certification was obtained, it was the company, Sambazon, that manufactured the product that was certified, as opposed to the açai product themselves or, at the time of writing, the cooperatives that bought açai from Amazonian *ribeirinhos*.<sup>149</sup> The certifying body was “ECOCERT” a private company based in France. The certification would have involved a review of mainly documentary evidence including Sambazon’s corporate social responsibility policy, the clauses in contracts between Sambazon and cooperatives and the cooperatives to the individual producers (e.g. prices paid to producer must be at least 10% higher than standard price determined annually), the fair trade policies of the cooperatives Sambazon works with, and other documentary evidence such as delivery notes and invoices. The auditor would also have carried out a specified number of interviews between the auditor and individual producers, cooperatives and Sambazon staff and management to verify the documentary evidence.

However, the working conditions for açai harvesting seem inconsistent with the ECOCERT audit criteria regarding working conditions. Açai harvesting involves climbing near the top of a tall palm while carrying a machete to cut down palm fronds that grow the berries. Once on the ground, people hand-strip the berries from their stalks. Raffles describes it as:

[R]ough, dangerous work, hard on hands and feet, made worse by the relentless insects... The emphasis is on speed and volume. On a good day – if it does not rain, if no one gets injured, if there are big bunches and short trees– two people might

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<sup>147</sup> *Açai berry blend powder*, NUTRA ORGANICS, <https://nutraorganics.com.au/products/açai-berry-blend> (last visited Mar. 13, 2019).

<sup>148</sup> *RioLife 100% Organic Free-dried Açai Powder*, RIO LIFE, <http://www.riolife.com.au/> (last visited Mar. 13, 2019).

<sup>149</sup> Amazonian *ribeirinhos* engaged in forest farming of açai do not apply for third-party fair trade certification. The fees and administrative work involved can be considerable. Further, processing companies will obtain fair trade certification that requires them to work with farming cooperatives that in turn meet fair trade standards such as minimum price requirements. For exported açai, Amazonian *ribeirinhos* tend to engage with cooperatives that on-sell the berries to a processor.

collect four sacks, each holding fruit from seven or eight bunches. But to do that, collectors have to cut corners...<sup>150</sup>

Yet ECOCERT criterion 3.4.4.2 requires that the cooperatives Sambazon engages with do not allow the use of equipment that presents a danger to users and that adequate protective equipment is provided at the producer level. To safely use a machete, equipment required includes appropriate gloves, protective eyewear and a lanyard around the machete to prevent against slippage.<sup>151</sup> Images of Amazonian *ribeirinhos* provided by Sambazon do not appear to be wearing safety equipment, and no mention is made of the measures Sambazon takes as part of ensuring the safety of people harvesting açai.

The evidence is lacking regarding whether açai producers involved in fair trade certified supply chains are better placed than those producers who are not. Generally, case studies investigating the impact of cooperatives meeting fair trade standards have found modest benefits accrue to small-scale farmers that are members of the cooperative.<sup>152</sup> Nevertheless, a range of contextual and geographical factors significantly determine whether small-scale farmers and/or farm workers benefit from participation in fair trade certification schemes, and so it is difficult to make sweeping claims about the benefits of fair trade beyond particular contexts.<sup>153</sup> Beyond the household level, a large body of work critiquing fair trade suggests that the scheme itself is neither novel<sup>154</sup> nor a challenge to

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<sup>150</sup> HUGH RAFFLES IN AMAZONIA: A NATURAL HISTORY 202 (2002).

<sup>151</sup> See, e.g., R.A. Munoz et al., *Sugar Cane Cultivation and Processing*, in ENCYCLOPAEDIA OF OCCUPATIONAL HEALTH & SAFETY 64.36 (Jeanne Mager Stellman ed., 1998) (discussing recommended safety precautions to be taken when using a machete).

<sup>152</sup> See Christopher Bacon, *Confronting the Coffee Crisis: Can Fair Trade, Organic, and Specialty Coffees Reduce Small-Scale Farmer Vulnerability in Northern Nicaragua?*, 33 WORLD DEV. 497, 506 (2005); V. Ernesto Méndez et al., *Effects of Fair Trade and organic certifications on small-scale coffee farmer households in Central America and Mexico*, 25 RENEWABLE AGR. & FOOD SYSTEMS 236, 239 (2010); Erin Smith & William M. Loker, *"We Know Our Worth": Lessons from a Fair Trade Coffee Cooperative in Honduras*, 71 HUMAN ORG. 87, 94 (2012); Eric J Arnould et al., *Does Fair Trade Deliver on Its Core Value Proposition? Effects on Income, Educational Attainment, and Health in Three Countries*, 28 J. PUB. POL. & MARKETING 186, 198–99 (2009); Ruerd Ruben & Ricardo Fort, *The Impact of Fair Trade Certification for Coffee Farmers in Peru*, 40 WORLD DEV. 570 (2012).

<sup>153</sup> See, e.g., Joni Valkila & Anja Nygren, *Impacts of Fair Trade certification on coffee farmers, cooperatives, and laborers in Nicaragua*, 27 AGR. & HUMAN VALUES 321, 322 (2010).

<sup>154</sup> See, e.g., Frank Trentmann, *Before "fair trade": empire, free Trade, and the moral economies of food in the modern world*, 25 ENV'T & PLANNING SOC. & SPACE

neocolonial trade relations typified by human and natural resources being significantly exploited in less wealthy areas while the benefits and outputs from this exploitation flow to wealthier countries and groups.<sup>155</sup>

Consistent with the critiques of fair trade as unsuited to bringing about systematic change, açai is increasingly being grown on plantations, i.e. large, privately held, largely corporate-managed farms that employ economies of scale and specialize in cash crops.<sup>156</sup> The intensified scale of açai production is, arguably, a natural trajectory of relatively unregulated market dynamics that seek ever-increasing levels of production and consumption enabled via existing wealth inequalities which provide a cheap labor pool for plantation agriculture. This trend is not evident on açai product labels examined, which are either silent as to its specific production methods or claim to originate from wild-harvesting. Nevertheless, the shift to plantations in the case of açai is threatening the small-scale production of açai in the estuary, which model of production has been and generally is the most suited to addressing social and economic inequalities in rural communities.<sup>157</sup>

The move towards plantations reflects an inherent contradiction within the popularity of açai; that is, its popularity is facilitated by claims that purchasing açai benefits the Amazonian communities, while its increasing popularity beyond a niche undermines its potential to benefit such communities in the long-term. Fair trade schemes rather than challenging such capitalist dynamics in the context of açai reinforces them by allowing plantations to be incorporated into fair trade certified supply

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1079, 1090–92 (2007) (analyzing the changing moral geography of trade and consumption over time).

<sup>155</sup> See generally Suzanne Freidberg, *Cleaning Up Down South: Supermarkets, Ethical Trade and African Horticulture*, 4 *SOCIAL AND CULTURAL GEOGRAPHY* 27, 34–35 (2003); Anandi Ramamurthy, *Absences and Silences: The Representation of the Tea Picker in Colonial and Fair Trade Advertising*, 13 *VISUAL CULTURE IN BRITAIN* 367, 391–92 (2012); Daniel Jaffee & Philip H. Howard, *Corporate cooptation of organic and fair trade standards*, 27 *AGRICULTURE AND HUMAN VALUES* 387–399 (2010); Ian Hussey & Joe Curnow, *Fair Trade, neocolonial developmentalism, and racialized power relations*, 5 *INTERFACE* 40–68 (2013); Trentmann, *supra* note 155; LAURA T. RAYNOLDS & ELIZABETH A. BENNETT, *HANDBOOK OF RESEARCH ON FAIR TRADE* (2015).

<sup>156</sup> Nathalie Cialdella & Livia Navegantes Alves, *La ruée vers l'« açai » (Euterpe oleracea Mart.): trajectoires d'un fruit emblématique d'Amazonie [The rush to the "açai" (Euterpe oleracea Mart.): Trajectories of an emblematic fruit of the Amazonia]*, 4 *REVUE TIERS MONDE (THIRD WORLD REVIEW)* 119 (2014).

<sup>157</sup> Olivier De Schutter, *How not to think of land-grabbing: three critiques of large-scale investments in farmland*, 38 *J. PEASANT STUD.* 249, 258–59 (2011).

chains.<sup>158</sup> Moreover, açai product labels, through their misrepresentation of Amazonian *ribeirinhos*, are counter to efforts like fair trade to re-embed social relations in supply chains. Of the 49 products examined, none pictured açai plantations, instead preferring romanticized and mystified representations of the Amazonian river. No labels depicted the reality of the difficult working environments that Amazonian *ribeirinhos* operate in to secure their livelihoods.

A related issue is the role of Amazon *ribeirinhos* in cultivating the palms on which açai grows over the centuries (as well as Indigenous groups). Generally, two schemes are relevant where a group in a particular area has been the stewards for a particular plant variety. The first is geographical indicators, but no geographical indicators were provided for on the açai products examined.<sup>159</sup> Perhaps this is because the palms on which açai grows are across country borders.

The second schemes are those international agreements, namely the *Convention on Biological Diversity* and the *Nagoya Protocol*, that establish bilateral access and benefit sharing schemes

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<sup>158</sup> ECOCERT, TECHNICAL STANDARDS DEFINING THE REQUIREMENTS RELATING TO PRODUCTS ORIGINATING FROM FAIR TRADE 4 (2010) (arguing just like the other predominant fair trade schemes, make plantations eligible for fair trade certification). Although, ECOCERT explains that products from plantations will only be fair trade certified under exceptional circumstances, but it is unclear what those exceptional circumstances may be. ECOCERT does state that, when considering the eligibility of a plantation, the context of plantation (e.g. size of land, type of production), as well as the corporate structuring of the plantation (e.g. shareholding structure) are relevant considerations. Note also the incorporation of plantations into fair trade is not necessarily counter to progressing social justice, but much will depend on the political context and state willingness to regulate fair trade practices on plantations. See, e.g., Sarah Besky, *Can a Plantation be Fair? Paradoxes and Possibilities in Fair Trade Darjeeling Tea Certification*, 29 ANTHROPOLOGY WORK REV. 1 (2008) (stating the context-specific factors that influence whether fair trade certification makes the conditions on plantations just and favorable to workers.) In the context of açai, plantations are only now emerging and competing with small-scale operations and wild-harvesting. Combined with the current political climate in Brazil following the country's 2018 presidential election, it is questionable whether the context is conducive to supporting fair work conditions on plantations. See PETER FLEMING AND MARC T. JONES, THE END OF CORPORATE SOCIAL RESPONSIBILITY: CRISIS AND CRITIQUE 91, 91 (2013) (commenting on Nestle's ability to appropriate the work of fair trade social movements for corporate branding).

<sup>159</sup> Cf. Rosemary J. Coombe & S. Ali Malik, *Transforming the Work of Geographical Indications to Decolonize Racialized Labor and Support Agroecology*, 8 U.C. IRVINE L. REV. 363 (2018) (arguing that geographical indicators combined with fair trade and analogous certification schemes have the potential to transform unequal relations within and between countries that perpetuate harms).

regarding genetic materials and related traditional knowledge. Access and benefit sharing schemes incentivize biodiversity conservation and recognize the role of traditional communities as stewards of particular genetic resources.<sup>160</sup> State signatories to these international instruments then implement these schemes through domestic legal regimes. However, access and benefits schemes generally do not apply in the context of açai production and export. The schemes are relevant where a company wishes to patent genetic material from the palms on which açai grows or the fruit themselves. In the context of a traditional food item dramatically increasing in value like açai, access and benefit sharing schemes are irrelevant, as a third-party is not taking the açai plant genetics and related knowledge to develop, for instance, a new plant variety or pharmaceutical drug. Thus, no direct avenues exist to reward those communities that have acted as stewards to the açai palms that now provide significant economic benefits to a range of supply chain actors.

## VI. Biodiversity and Ecological Sustainability: Green-Washing

### A. Biodiversity Conservation

Nineteen of the 49 products examined made claims about how the wild harvesting of açai preserves the biodiversity of the Amazon rainforest. For instance, one product claimed that:

This Açai is wild harvested from deep in the Amazon forests. This means the fruit grows in its native bio-diverse ecosystem maintaining its natural nutrient profile. Wild harvesting ensures that the delicate environment of the Amazon is protected” (*Raw Organic Açai Powder*, Loving Earth Pty Ltd).

Another claimed:

Harvested sustainably from a wild and vigorous 25-foot Brazilian tropical palm that naturally grows prolifically across 2.5 million acres of Amazon River floodplains -- supporting the Açai Berry industry makes these trees more valuable vertical than logging them – and how good is that? (*Açai Powder*, Power Super Foods Pty Ltd)

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<sup>160</sup> See, e.g., MANUEL RUIZ & RONNIE VERNOOY, THE CUSTODIANS OF BIODIVERSITY: SHARING ACCESS TO AND BENEFITS OF GENETIC RESOURCES 4–5 (2012).



These claims imply that food can be produced and consumed on a large and globalized scale while having only a minimal, or even positive, impact on the natural environment. The consumer is told that it is possible to use and consume aspects of Amazonian ecosystems while simultaneously conserving the same ecosystems.<sup>161</sup>

Conventional food production in relation to fruits tends to be monoculture, mechanized and input intensive. To cast açai berries production and consumption as a counter to conventional food systems, açai berry labels do not draw attention to the long, energy-intensive supply chains that employ highly technical food processing methods.<sup>162</sup> Instead, the food labels place emphasis on the harvesting process, with descriptors including “wild-harvested,” “wild-gathered,” “hand-picked” and “manually harvested.” These phrases convey the message that açai berries are grown in the wild as opposed to on farms and that açai berries are harvested by hands and not machinery. As mentioned above, it also devalues and invisibilizes the Amazonian *ribeirinhos*’ role as stewards of the *Euterpe oleracea* palm on which açai grows.

As global demand for açai has continued to increase, market pressures have incentivized the development of more intensive açai farms. Furthermore, Brazilian politicians have sought to attract private investment into açai plantations and increase the use of synthetic fertilizers in açai management.<sup>163</sup> This outcome is predicated on the theory of comparative advantage, which provides the rationale for international trade and investment law.<sup>164</sup> Comparative advantage holds that each country should specialize in the commodities that they produce best, rather than directing resources towards commodity production that is more difficult for them to perform due to, for instance, environmental, geographic and social conditions. As Brazil, and other Latin American countries, are particularly well-suited for growing açai, the theory provides that they should specialize and intensify the production of açai berries.

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<sup>161</sup> C.f. Robin Canniford & Avi Shankar, *Purifying Practices: How Consumers Assemble Romantic Experiences of Nature*, 39 J. CONSUMER RES. 1051, 1051 (2013).

<sup>162</sup> The supply chain is energy intensive owing to the need for refrigeration for frozen açai pulp or juice. The powders do not require the same refrigeration, but the processing methods used to formulate the powders have the potential to be energy intensive depending on the context and methods employed.

<sup>163</sup> Jennifer A. Lewis, *The power of knowledge: information transfer and açai intensification in the peri-urban interface of Belém, Brazil*, 74 AGROFORESTRY SYS. 293, 297–98 (2008).

<sup>164</sup> Carmen G. Gonzalez, *Deconstructing the Mythology of Free Trade: Critical Reflections on Comparative Advantage*, 17 BERKELEY LA RAZA L. J. 65 (2006).

[In the last few years,] production of açai has intensified in the floodplains leading to large areas of diverse forest being converted into açai agroforests and [to açai berries] being grown on monoculture plantations. A recent study by Freitas et al. examined the impact of the demand for açai on the biological diversity of Amazonian floodplain forests. They found a loss of 50% of tree species diversity and a 63% reduction in pioneer species (hardy varieties that are the basis for forest ecosystems). These findings align with empirical studies that illustrate a negative correlation between increase[s in intensive agricultural production for export to meet global demand] and declines in [dietary diversity] and on- and off-farm biodiversity.<sup>165</sup>

Similarly, Barlow et al.<sup>166</sup> compared the biodiversity loss from human disturbances within forests in the Amazonian flood plains (including from açai agroforestry) to the expected biodiversity loss from deforestation. They commented that:

At its most stringent, Brazil's centrepiece environmental legislation, the Forest Code, mandates Amazonian landowners to maintain 80% of their primary forest cover. Our results show that even where this level of compliance is achieved, the primary forests of these landscapes may only retain 46%-61% of their potential conservation value and are likely to have lost many species of high conservation and functional importance.<sup>167</sup>

In the catchments studied then, more biodiversity was lost due to human disturbances than would be expected by deforestation to the extent allowed under Brazilian laws. Barlow et al.<sup>168</sup> framed their research as evidence for urgent regulatory interventions that go beyond preventing deforestation and center on preserving the diversity of these ecosystems. While market dynamics stemming from the popularity of açai may prevent land use change in the

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<sup>165</sup> Johnson, Parker & Maguire, *supra* note 136, at 314.

<sup>166</sup> Jos Barlow et al., *Anthropogenic disturbance in tropical forests can double biodiversity loss from deforestation*, 535 NATURE 144, 144 (2016).

<sup>167</sup> *Id.* at 147.

<sup>168</sup> *Id.* at 144.

Amazonian floodplains, the market as it currently functions does not conserve biodiversity and instead facilitates simplified agroforests.

Despite the common marketing claims regarding “wild-harvested” açai berries, the rapid development of açai plantations in upland areas of the Amazon river delta suggests that açai is increasingly sourced from plantations.<sup>169</sup> Alternatively, it may indicate that domestic markets are now relying on plantation-grown açai, while wealthier Western markets have maintained access to açai that is wild-harvested and organic.

More broadly, trends in the intensification of açai production for export show how the successful marketing of açai products, with its emphasis on the multiple benefits of açai consumption for health and the environment and rural development, contribute to undermining these very claims. The popularity of açai, partly fueled by such claims, creates market incentives to intensively produce açai berries on monoculture farms, which in turn undermines the claims about how the consumer choice to buy açai contributes to the preservation of pristine Amazonian environments.

### B. Organic

The main way in which environmental claims are regulated in global supply chains is through voluntary organic certification.<sup>170</sup> Organic claims are common on açai products with 29 of the identified labels describing the açai contents as organic.<sup>171</sup> Of these, 17 claims were supported by third-party certification marks, and 12 claims were unsupported by a certification scheme.

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<sup>169</sup> Alistair John Campbell et al., *Anthropogenic disturbance of tropical forests threatens pollination services to açai palm in the Amazon river delta*, 55 J. APPL. ECOL. 1, 1 (2018).

<sup>170</sup> See Hui-Shung Chang & Lydia Zepeda, *Consumer perceptions and demand for organic food in Australia: Focus group discussions*, 20 RENEWABLE AGRIC. & FOOD SYS. 155, 159 (2004) (containing empirical research that finds that Australian consumers generally interpret organic claims as communicating that a product is “free of chemicals, pesticides and residues,” “healthiness,” and “wholesomeness”); see generally STEWART LOCKIE, *Capturing the Sustainability Agenda: Organic Foods and Media Discourses on Food Scars, Environment, Genetic Engineering, and Health*, 23 Agric. & Human Values 313 (2006) (discussing, amongst other topics, the viewpoints surrounding organic foods); Lydia Zepeda & Jinghan Li, *Characteristics of Organic Food Shoppers*, 39 J. AGRIC. & APP. ECON. 17 (2007) (investigating the characteristics of organic food shoppers compared to nonorganic food shoppers).

<sup>171</sup> Generally, organic agriculture refers to a set of ecologically-based land use practices that do not use synthetic in-puts (fertilizers, herbicides, insecticides, genetically modified seeds, etc.). Underlying the concept of organic agriculture is, *inter alia*, resistance to industrial agriculture, characterised by intensive practices, low biodiversity and a high dependence on external in-puts.

For highly processed foods like açai berries, these organic claims give the message that the consumer can purchase a product that is simultaneously clean, green, and super convenient. Warde<sup>172</sup> suggests that processed foods are often marketed, especially towards working people with caring responsibilities, as quick and easy yet also showing care to the family – overcoming the antinomie of convenience and care. Açai superfood products also emphasize their convenience (e.g. ready to blend smoothie packets or freeze-dried powders) that synchronously allow the consumer to care for the environment and their own body:

The açai in our [product name] is natural and organic and is harvested from the Brazilian rainforest. For your convenience, our product range includes RioLife 100% certified organic and wild harvested freeze-dried açai powder..... The only açai in Australia with absolutely nothing added to it! . . . since RioLife Açai berries are wild harvested and organic, there are no pesticides involved.<sup>173</sup>

Yet the claim that these products care for the environment is not easy to verify and may be greenwashing. No legally binding standards exist in Australia in relation to “organic” claims nor does any required pre-market verification process exist. Thus, the manufacturer of the açai product broadly determines: firstly, whether they will make an organic claim, and secondly, whether they will seek certification of their claim by a NGO or make the claim without third-party certification.

The only way in which an Australian government regulator would examine the substantiation of an organic claim on a product for domestic consumption would be if a consumer, NGO or competing business made a complaint to one of the state consumer protection regulators or the ACCC (discussed above). Under s18 of the *Australian Consumer Law*,<sup>174</sup> the complaint would have to allege that a product’s claim is ‘misleading and deceptive.’ When investigating whether an organic claim is misleading or deceptive, the ACCC refers to the *Australian Standard for Organic and biodynamic product* (AS 6000-2015) as a guideline.<sup>175</sup> Sellers

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<sup>172</sup> Warde, *supra* note 37, at 152.

<sup>173</sup> RioLife, *supra* note 149.

<sup>174</sup> *Competition and Consumer Act 2010* (Cth) (Austl.) (being a model law that applies at both Commonwealth and State levels).

<sup>175</sup> See *Organic Claims*, AUSTRALIAN COMPETITION & CONSUMER COMM’N. <https://www.accc.gov.au/consumers/groceries/organic-claims> (last visited Mar. 13,

wishing to comply with consumer and imported food law in Australia would, therefore, follow the minimum standards set out in AS 6000-2015 to mitigate their potential liability.<sup>176</sup> This approach, thus, informally enrolls the manufacturer to self-regulate their use of organic claims (which they may do by obtaining organic certification in accord with the standard), and enrolls the consumer, and other market actors, in information-gathering to trigger an ACCC investigation.<sup>177</sup> However, it would be difficult for a consumer to detect whether an organic claim was actually misleading since açai is harvested in lands not subject to secure land tenure rules, and moves through globalized supply chains.<sup>178</sup> For example in relation to wild-harvested plants, an açai product would be consistent with 2.9.2 of the AS 6000-2015, if the açai berries it contains were sourced from a clearly defined collection area and the collection area was not subject to synthetic farming inputs in the last three years.<sup>179</sup> Additionally, the operator must carry out collections in a way that does not “disturb the stability of the natural habitat or the

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2019) (stating that “there is a voluntary Australian standard for growers and manufacturers wishing to label their products ‘organic’ and ‘biodynamic’ (AS 6000-2009)” and that “this standard is a useful reference point when determining whether a product is organic”); *see generally* Memorandum, Memorandum of Understanding Between the Commonwealth of Australia and Standards Australia International Limited 2003 (Austl.) (Standards Australia, which is analogous to the American National Standards Institute, is a long-established NGO and not-for-profit in Australia. This organization develops standards in a range of sectors, participates in the creation of international standards and accredits other organizations to develop standards. It works closely with the Australian Government pursuant to the Memorandum of Understanding Between the Commonwealth of Australia and Standards Australia Limited.).

<sup>176</sup> *See generally Imported Food Control Act 1992* (Cth) (Austl.) Because açai is an imported product, it is also regulated under *the Imported Food Control Act 1992* (Cth), which contains a “labelling offence” in s 8A. The offence is made out where a person does not meet “applicable standards” relating to information on food packaging labels and carries a penalty of imprisonment for 10 years. The burden of proof falls on the defendant to prove that they did not commit a labeling offence, which places the onus on the party with the most information about a food package’s contents. “Applicable standards” is defined as ‘the national standard in force in relation to that food or matter’, and so would likely encompass the AS 6000-2015.

<sup>177</sup> *See generally* Curll et al., *supra* note 76, at 425 (discussing further the pathway of enforcement) The ACCC usually only takes action where there is a complaint and the issue is of significance; *see also* Julia Black, *Enrolling actors in regulatory systems: examples from UK financial services regulation*, 2003 PUB. L. 63 (2003) (discussing the concept of enrollment).

<sup>178</sup> *See* Fábio de Castro, *Local politics of floodplain tenure in the Amazon*, 10 INT’L. J. COMMONS 1 (2016) (finding that forests are community-based management systems, which are not subject to land tenure rules).

<sup>179</sup> *Organic and Biodynamic Products 2015* (Austl.) Farming inputs must meet the requirements in Appendix B of the AS 6000-2015 if the product is to be labelled as “organic” in a manner complying with the standard. Generally, farming inputs should be naturally occurring materials (e.g. compost).

maintenance of species in the collection area” (art 2.9.2(b)). Thus, consumers would generally need to rely on third-party organic certification, consistent with AS 6000-2015.

Even though certification is not a precondition to marketers making organic claims in Australia, organic claims on açai products certified by a third-party were more common than uncertified claims. Third-party certification involves non-state actors setting management standards which meet, and perhaps go beyond, AS 6000-2015. No requirements, on-going monitoring or approval processes exist in relation to certification bodies. Thus, their ability to create and implement standards generally occurs without any regulatory intervention from governments.

Meanwhile, certification trademarks are available for an entity setting itself up as a certification body, provided their trademark application includes the standards that the goods must meet before the certification trademark can be employed.<sup>180</sup> The rights to use and license the certification trademark are limited to the rules governing the use of the mark, as submitted in the trademark application. In sum, certification bodies are not regulated by a government body in terms of their activities or standards; but they are able to obtain private property rights in their certification mark, which incidentally provides a small level of regulatory oversight through the requirement that a trademark application includes the scheme’s rules.

The Australian and New Zealand approach to regulating organic claims significantly differs to the US where the term “organic” can only be used on a food label if the product has been produced according to the Organic Food Production Act and the US Department of Agriculture’s (USDA) organic regulations.<sup>181</sup> The US approach enables significantly more public oversight and critique of organic standards. However, the USDA’s Organic Standards are routinely critiqued for representing the interests of large-scale, industrial organic operations owned by corporations rather than requiring genuinely sustainable farming practices.<sup>182</sup>

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<sup>180</sup> TRADE MARKS ACT 1995 (Cth) pt 16 (Austl.).

<sup>181</sup> Organic Foods Production Act of 1990, Pub. L. No. 101-624, 104 Stat. 3935 (codified as amended at 7 U.S.C.A. §§ 6501–6524 (West, Westlaw through Pub. L. No. 115–281)).

<sup>182</sup> See Jaffee and Howard, *supra* note 156; Alessandra Arcuri, *The Transformation of Organic Regulation: The Ambiguous Effects of Publicization*, 9 REG. & GOV. 144 (2014); Leslie King & Julianne Busa, *When Corporate Actors Take Over the Game: The Corporatization of Organic, Recycling and Breast Cancer Activism*, 16 SOCIAL MOVEMENT STUD. 549 (2017); MICHAEL A. HAEDICKE, ORGANIZING ORGANIC:

Of the 17 açai products that claimed to be certified, over half were accredited through the not-for-profit entity Australian Certified Organic (ACO). This is consistent with the ACO being the most common certification mark applied to organic products sold in Australia.<sup>183</sup> ACO's Standard 7.5 relates to "wild harvesting." Given that most açai does not grow on farms subject to private property rights, standard 7.5 is likely to be the standard used by açai product manufacturers to obtain certification.<sup>184</sup> The USDA's Organic Regulation "5022: Wild Crop Harvesting" is highly similar to Standard 7.5, which indicates that analogous standards and evidentiary requirements apply to açai certified as organic and imported into the US.<sup>185</sup>

To be certified organic under standard 7.5, açai product manufacturers must periodically verify that the açai harvesting is not "degenerating to the natural systems" of the Amazonian estuary or other natural habitats in which the palm grows.<sup>186</sup> Essentially, the açai manufacturer must check on, and verify that, the harvested areas regenerate post-harvest, and that the harvesting of açai does not involve felling of the palms or impacts to other flora to the extent that harvesting has compromised surrounding ecosystems.<sup>187</sup> The standard states that the harvesting area should "encourage comingling of species of wild-harvest products and native species so as to mimic as much as is feasibly possible the natural ecosystems within which these species have evolved."<sup>188</sup> In other words, the wild harvesting of açai should be conducted in smaller-scale ways that make use of an abundant species without resulting in the loss of ecosystems functions or the biodiversity that supports ecosystems.

The açai manufacturer must identify on a map a clear area for the harvesting of açai that are "a satisfactory distance" from conventional farming or related contamination risks.<sup>189</sup> The açai manufacturer must keep a record of all "collectors" and any local

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CONFLICT AND COMPROMISE IN AN EMERGING MARKET (2016); JULIE GUTHMAN, *AGRARIAN DREAMS: THE PARADOX OF ORGANIC FARMING IN CALIFORNIA* (2004).

<sup>183</sup> *Organic Certification*, ORGANIC FOOD AU, [http://www.organicfood.com.au/content\\_common/pg-organic-certification.seo](http://www.organicfood.com.au/content_common/pg-organic-certification.seo) (last visited Mar. 13, 2019).

<sup>184</sup> AUSTRALIAN CERTIFIED ORGANIC STANDARD PTY. LTD., AUSTRALIAN CERTIFIED ORGANIC STANDARD § 7.5, at 54 (2017).

<sup>185</sup> U.S. DEP'T AGRIC., AGRIC. MKTG. SERV. NOP 5022, WILD CROP HARVESTING (2011), <https://www.ams.usda.gov/sites/default/files/media/5022.pdf>. (last visited Mar. 14, 2019); *see also* 7 CFR § 205.207.

<sup>186</sup> AUSTRALIAN CERTIFIED ORGANIC STANDARD PTY. LTD., AUSTRALIAN CERTIFIED ORGANIC STANDARD § 7.5.1, at 54 (2017).

<sup>187</sup> *Id.* at § 7.5.1–7.5.2, at 54.

<sup>188</sup> *Id.* at § 7.5.3, at 54.

<sup>189</sup> *Id.* at § 7.5.5–7.5.6, at 54.

agents, as well as the respective quantities of açai berries they provided.<sup>190</sup> Açai manufacturers must further provide instructions to collectors or other local agents that defines the area of collection and informs them about the standard.<sup>191</sup> To evidence that these instructions were provided, the collectors or relevant agents must “sign statements to say that they have followed the instructions,” which are kept on file by the açai manufacturer.<sup>192</sup>

Documents formulated and provided by the açai processor provide the evidentiary base for certification in the context of açai. This evidence is provided by the açai processor to a Brazilian certification body that is recognized by the ACO. The ACO assesses the evidence gathered by the approved Brazilian certification body, along with import documentation and documented proof that the product was not fumigated or irradiated at the Australian border. The ACO may then confer its certification mark to the açai processor or importer as a wholesaler. The on-going use of the mark is subject to annual review by the ACO, and the ACO performs random checks on imported products to test for contaminants.

Overall, an açai processing company does not know for certain whether the instructions were followed nor is it required to perform periodic checks. Financial and time pressures may lower incentives to examine whether their instructions to forest farmers have been followed. It is also conceivable that these standards are not practical, given that they were not developed with the bottom-up involvement of Amazonian *ribeirinhos* and apply broadly to all wild-harvested products. In the case of açai products, the organic certification does not represent, as consumers would assume, a product that is free from synthetic chemicals. Rather, it represents that açai processors and forest farmers have self-substantiated their efforts to avoid harvesting too close to, for instance, conventional farms. No objective scientific evidence, or evidence verified first-hand by the ACO itself, is used in the process of certification.

Moreover, the biodiversity loss in the Amazonian floodplains suggests that the organic certification requirements, especially those regarding the preservation of ecosystems during harvest, are not being followed or that not enough actors have voluntarily agreed to such standards. In the context of açai then, organic certification is not confirmation that the product is sustainably harvested. Consumers think they are buying a product that is “clean and green” even though the veracity of these claims

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<sup>190</sup> *Id.* at § 7.5.13–7.5.14, at 55.

<sup>191</sup> *Id.* at § 7.5.12, at 54.

<sup>192</sup> *Id.*



requires much more evidence and oversight than the supply chains of a globally-traded, durable commodity allows. Moreover, consumers cannot know what proportion of land is being preserved as organic or biodiverse due to açai production, but it is not likely to be large as long as it remains a market niche. At the same time, the more popular the product becomes, the more likely it is to create pressure for unsustainable production practices.

## VII. Conclusion

Through our preliminary development of a label chain governance analysis, we demonstrate how to connect, and the value of connecting, the micro world of the consumer and their everyday choices with the macro world of cultural, social, political and governance institutions.<sup>193</sup> In Part II we suggested that this approach can help scholars, activists and engaged consumers to not only critically evaluate particular products but also identify patterns in markets and supply chains that should be addressed by collective action and governance strategies beyond consumer choice. We operationalized our approach through a case study of the marketing for açai berry products, introduced in Part III. These marketing claims suggest that choosing these products enable consumers to govern their own health while also contributing to market signals, as a form of regulation, which supports a fairer more sustainable food system.

Our analysis of health claims in Part IV shows the factors that have influenced the generally lax regulatory standards around health claims and suggests the need to reconsider whether certain health and nutritional claims should be legally allowed to be made on foods at all. In the European Union, for example, many claims about diseases and disease markers that can be allowed in the US and Australia are legally prohibited. The result is that many of the misleading and overreaching claims seen on US and Australian superfood products are not seen in the market in the EU. Addressing the claims themselves will be important. Stricter regulation of the claims and more active monitoring and enforcement of the requirements to back up claims in the US and Australia would help prevent misleading claims and quieten the noisy landscape of self-interested commercial health messages provided to consumers.<sup>194</sup>

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<sup>193</sup> See Schneider & Davis, *supra* note 41, at 32 (discussing the intersection between food production, industry, regulation, and consumer choice).

<sup>194</sup> See Curll et al., *supra* note 76, at 443–45 (discussing the failure of Australian and American regulatory measures in preventing fraudulent food label health claims).

Public messaging and guidance regarding food choices should adopt a more holistic understanding of the connections between human bodily health and food. One example of this approach is the development of sustainable dietary guidelines by various nations. Brazil's dietary advice, for instance, tells citizens that "[d]iet is more than the intake of nutrients."<sup>195</sup> Such guidance needs to be combined with restrictions on food advertising itself and in particular on commercially conflicted health messaging.<sup>196</sup> This would help create space for public health professionals to provide fairer and more precise messages about healthy diets and healthy lives and may go some of the way to mitigating the cultural factors that promote over-consumption. Finally, public regulatory interventions, such as fiscal measures, could be taken that make ultra-processed, unhealthy food products less economically and physically accessible, while improving the availability and accessibility of a diverse range of unprocessed, unbranded plant food.<sup>197</sup>

Our analysis of fair trade representations in Part V showed how product labels leave out the limitations inherent in market-based responses to social inequalities and highlight a simple understanding of social issues and social change. They tend to provide some technically true information (e.g. demand for açai has created more employment opportunities) that are undermined by the omission of other aspects (e.g. the working conditions, the lack of land tenure security, the problems with dependence on raw agricultural commodities for livelihoods). Rather, açai product labels tended to reinforce social inequalities by omitting the distinct culture and position of Amazonian *ribeirinhos*, including in particular, the significance of their agroforestry skills and knowledge in enabling the mass supplies of açai while preserving biodiversity.

Part VI exposed how food labels can depict technically true environmental claims but avoid contextualizing these temporary benefits within the broader dynamics of capitalist, globalizing food supply chains that necessarily incentivize monoculture, intensive

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<sup>195</sup> See Christine Parker & Hope Johnson, *Sustainable Healthy Food Choices: The Promise of 'Holistic' Dietary Guidelines as a National and International Springboard*, 18 QUT L. REV. 1, 32–34 (2018) (citing Carlos Augusto Monteiro et al., *Dietary Guidelines to Nourish Humanity and the Planet in the Twenty-First Century: A Blueprint from Brazil*, 18 PUB. HEALTH NUTRITION 2311 (2015)).

<sup>196</sup> See *id.* at 38–40 (summarizing relevant regulatory policy measures and supporting literature); see also Walter Willett et al., *Food in the Anthropocene: The EAT-Lancet Commission on Healthy Diets from Sustainable Food Systems*, 393 LANCET 447, 478–84 (2019) (summarizing regulatory policy measures necessary for healthy sustainable diets).

<sup>197</sup> See Willett et al, *supra* note 199, at 484.

farming. Moreover, this part illustrated how the depiction of third-party certification marks is designed, and empirical evidence showed how it has created, consumer trust in environmental claims. Going beyond the marks to critically examine the evidence and standards being imposed undermines the trust created when it comes to wild-harvested, imported products. The difficulties of verifying claims in this context stem from the distances over which global food chains operate and the way in which these claims rely largely on documentary evidence provided by parties with an interest in being certified.

As Dorothy Smith observed the “work of inquiry” as to how local sites of people’s experience “are connected into the extended social relations of ruling and economy” must be “technical,” yet “its product should be ordinarily accessible and usable, just as a well-made map is, to those on whose terrain it maps.”<sup>198</sup> Similarly, our deconstruction of the label as governance space is technical and scholarly in part. Yet, we also propose it as an emancipatory study that can be communicated for reflexive consumers<sup>199</sup> who wish to identify and exercise agency in relation to social systems and structures. We do not mean to imply that every individual consumer must be aware of everything in the supply chain and its governance behind every product. Democratic control and accountability of the market and the food system, however, requires that there be enough individuals and groups, consumers, activists, policy-makers, business people, artists, and so on, who look behind the label and identify governance practices that recreate injustice and inequality and act to change them. Therefore, we see our study as a resource to further critical examinations of the food label as a governance space while positioning such analyses as a starting off point from which to think through, detail and advocate for new possibilities for the regulatory governance of food systems.

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<sup>198</sup> DOROTHY SMITH, *INSTITUTIONAL ETHNOGRAPHY: A SOCIOLOGY FOR PEOPLE* 29 (2005).

<sup>199</sup> See generally Antony Beckett & Ajit Nayak, *The Reflexive Consumer*, 8 *MARKETING THEORY*, 299 (2008) (introducing the concept of the “reflexive consumer” and discussing how marketing practices affect consumer choice and identity).