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Rising Together: Clarifying the International Environmental Marketing Claim Regulatory Landscape so that Developing Country Exporters May More Effectively Market Their Environmentally Responsible Products

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ARTICLES**RISE TOGETHER: CLARIFYING THE INTERNATIONAL ENVIRONMENTAL
MARKETING CLAIM REGULATORY LANDSCAPE SO THAT DEVELOPING
COUNTRY EXPORTERS MAY MORE EFFECTIVELY MARKET THEIR
ENVIRONMENTALLY RESPONSIBLE PRODUCTS**

*Jeffrey J. Minneti**

INTRODUCTION

In the evolving story of environmental marketing claim regulation, state actors no longer have center stage. Perhaps they never have. Instead, non-state actors ranging from individual firms to inter-industry professional standardizing bodies now play leading roles. Regulation of environmental marketing claims generally takes the form of standardization and certification schemes for voluntary eco-labels. As of 2011, there are over 400 eco-labels worldwide.¹ A 2009 survey of 340 eco-labels in forty-two countries received responses from just over 100 labels.² The responses provided a composite view of eco-label organizations. Most are non-profits (58%); a few are

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¹ See ECOLABEL INDEX, <http://www.ecolabelindex.com> (last visited Oct. 2, 2011). Ecolabel Index has created a directory of eco-labels; it currently tracks over 400 labels in more than 200 countries and twenty-five industry sectors. *See id.*

² See WORLD RES. INST. & BIG ROOM INC., GLOBAL ECOLABEL MONITOR 2010 1–2 (2010), *available at* http://www.ecolabelindex.com/downloads/Global_Ecolabel_Monitor2010.pdf (last visited Nov. 05, 2011). World Resources Institute and Big Room, Inc. launched the survey in November 2009 in an effort to increase the transparency of eco-labels and reduce confusion among eco-labels, making it easier for institutional buyers to compare and contrast eco-labels. *See id.* at 4.

government entities (8%); and some are for-profit institutions (18%).³ 92% of the respondents require certification before issuing a label. Of those, 64% require third-party certification.⁴ Fewer than half (46%) have measured the environmental or social impact of their labeling program; 21% plan to do so.⁵ Most eco-labelers (88%) make public who or what they have certified, and most (87%) make their certification criteria public.⁶ Many (47%) are currently developing new standards.⁷ Non-profit eco-labelers tended to use “more rigorous” processes for standard development and conformity assessment.⁸ Interestingly, fewer than 30% of eco-labelers recognize or are recognized by other eco-labelers.⁹

In 2010, the International Social and Environmental Accreditation and Labeling (ISEAL) Alliance conducted a study to determine trends among 100 standard users in business, government, and NGOs.¹⁰ The study revealed that standards are widely used and accomplish a variety of purposes, including increasing firm operational efficiency, marketing, and assessing and improving sustainability practices.¹¹ Trust in standards and their promotion in the market depend on credible standard verification, multi-stakeholder standard-setting, and good standard system governance.¹² The respondents’ frustrations included the lack of effectiveness of individual standards systems and the complexity and overlap among various standards systems.¹³

³ See *id.* at 2. Respondents were largely from Europe (fifty-one respondents) and North America (forty-nine respondents). See *id.* at 7.

⁴ See *id.* at 10. The length of time from first applying for an eco-label to the eco-label award varied greatly among respondents; however, 74% require from two weeks to six months to award an eco-label. See *id.*

⁵ See *id.* at 12. 33% of respondents have not monitored and have no plan to monitor the impact of their standards. See *id.*

⁶ See *id.* at 11. 62% of respondents make their eco-labels available worldwide. See *id.*

⁷ See *id.* at 12. When asked what would help improve “the overall effectiveness of your eco-label program,” most claimed additional resources, better marketing, and consumer awareness of their programs. See *id.* at 13. Very few claimed that differentiation between good and bad standards (three respondents) or the harmonization of standards (three respondents) would improve their effectiveness. See *id.*

⁸ See *id.* at 2.

⁹ See *id.* at 14.

¹⁰ See ISEAL ALLIANCE, THE ISEAL 100, 3 (2011), available at http://www.isealalliance.org/sites/default/files/ISEAL100_web.pdf (last visited Nov. 23, 2011). Respondents included eighty “thought leaders” in business and twenty among governments and NGOs. *Id.* The respondents were drawn from a database of leaders that ISEAL generated in light of its industry contacts and knowledge of the industry. See *id.* at 6. Respondents were from seventeen countries, but the vast majority was from the United Kingdom (42%), continental Europe (34%), and the United States (17%). See *id.*

¹¹ See *id.* at 3. 78% of corporate respondents included operational efficiency among the “main benefits” of standards, 60% included communications and marketing, and 56% included sustainable performance. See *id.* at 11.

¹² See *id.* at 3.

¹³ The most common frustration (31% of respondents) was the “sheer number of standards in operation.” *Id.* at 15. Office Depot was quoted as stating: “Each standard setter is very tied to its own approach and methodology. If they organised themselves as a group and improved

The effectiveness of environmental marketing claim regulation and voluntary eco-label schemes has been the subject of much debate.¹⁴

their business model, interest would escalate dramatically. They are all protecting their tiny slice of the pie, but the pie could be much bigger [sic].” *Id.* Interestingly, half of the respondents rejected the idea of a “catch-all” eco-label, preferring instead that the existing standards systems harmonize. *See id.* at 3. Responding businesses, on average, used four different standard systems for their operations; 73% of the respondents stated they would consider using more standards systems in the future. *See id.*

¹⁴ *See* Org. for Econ. Co-operation & Dev. [OECD], *Eco-labeling: Actual Effects of Selected Programmes*, at 5–8, OCDE/GD(97)105 (May 30, 1997) (noting that the market impact of eco-labels is difficult to assess, given that the information is often confidential, but that anecdotal evidence suggests that eco-labels increase product sales; noting that hard evidence of trade effects of eco-labels has not been found, but the potential for trade concerns arises when eco-label criteria include production-related criteria that reflect developed country preferences that are difficult for developing countries to satisfy; and stating that the environmental benefits of eco-labeling will arise when “a balance is reached between the number of eco-labeled products and the stringency of the criteria”); DIRK SCHEER, ET AL., “ENABLING DEVELOPING COUNTRIES TO SEIZE ECO-LABEL OPPORTUNITIES,” PROJECT BACKGROUND PAPER 10 (2008) (noting that there is a “general lack” of empirical data on the effectiveness of eco-label schemes; however, economic forecasters predict that with sufficient market penetration, the labels may result in “considerable environmental benefits”); OECD COMM. FOR FISHERIES & UNITED NATIONS [U.N.] FOOD & AGRIC. ORG. [FAO] FISHERIES & AQUACULTURE DEP’T, ROUND TABLE ON ECO-LABELLING AND CERTIFICATION IN THE FISHERIES SECTOR 10 (2009) (noting that eco-labels and certification “have a positive role to play in incentivising improved fisheries management”); Jeffrey J. Minneti, *Is It Too Easy Being Green? A Behavioral Economics Approach to Determining Whether to Regulate Environmental Marketing Claims*, 55 LOY. L. REV. 653, 691 (2009) (finding that regulation of environmental marketing claims is appropriate because, absent regulation, the market alone is unable to drive false claims from products). *But see* THOMAS LIEBI, MONITORING ECO-LABELS: YOU CAN HAVE TOO MUCH OF A GOOD THING 3, 4, 17–18 (2002) (noting that profit-maximizing firms prefer to offer products with low environmental benefits but market the goods as environmentally responsible and charge a high price for the goods; consumers, aware of this preference, decide not to choose the high-priced, low-quality goods; regulation acts to keep firms from cheating and restores consumer trust in firms’ claims; however, the level of monitoring inherent in the regulation increases costs and hence prices, without increasing the actual environmental benefits of the products, resulting in a price for the goods above the equilibrium point and, thus, deadweight loss); Peter E. Robertson, *Global Resources and Eco-labels: A Neutrality Result*, 15 REV. INT’L ECON. 735, 740 (2007) (arguing that where one country adopts the eco-label scheme of a second country, consumers in the second country may free ride on the environmentally responsible purchases of the first country’s consumers by decreasing their own environmentally responsible purchases, resulting in no net reduction in environmental damage); Mireille Chiroleu-Assouline, *Is a Consumer’s Green Awareness Increase Always Good for the Environment?* 18–19 (June 27, 2011) (preliminary manuscript) (arguing that increasing consumer awareness of a product’s environmental benefits and willingness to pay for those benefits does not necessarily mean that producers will increase the environmental benefits of a product; when consumer awareness of products’ environmental attributes is non-uniform, “mass market” and even “niche posture” firms are likely to seek to expand their market share by adopting lower levels of green quality). In 2000, the WTO’s Committee on Trade and Environment (CTE) published a note that summarized three eco-labeling articles. *See* WTO Comm. on Trade & Env’t, *Information Relevant to the Consideration of the Market Access Effects of Eco-Labeling Schemes*, WT/CTE/W150 (June 29, 2000). The note sought to provide the CTE with the tools it might need to draw conclusions about eco-labeling trends and eco-labels’ potential trade impact. *See id.* The first

Supporters of such schemes recognize that an eco-label scheme, standing alone, is not likely to play a significant role in addressing environmental problems; however, supporters argue that eco-labels can be an effective tool to raise consumer awareness of environmentally responsible products and to nudge consumers toward environmentally responsible purchases.¹⁵ In recent years, retailers and distributors have led efforts to promulgate eco-label schemes; thus, no longer is consumer demand alone driving the market for eco-labeled products.¹⁶ Instead, big-box retailers are now requiring that their suppliers and manufacturers generate environmentally responsible products and processes.

While the regulation of environmental marketing claims that the state and non-state actors produce may, standing alone, be of good quality,¹⁷ in this era of ever-increasing globalization, a question emerges regarding whether the existing eco-label schemes contemplate developing country interests.¹⁸ In

piece noted that among North American Free Trade Agreement (NAFTA) countries, although concern for environmental protection was high, “environmental labeling appears to have settled into a ‘niche’ or specialized market segment.” *See id.* at 1. Next, the CTE summarized a study from Consumer International’s Office for Developed and Transition Economies. *See id.* at 2–4. As noted in the preceding article, the study recognized the need for harmonization of eco-label criteria, but it argued that eco-labels should not be seen as a “trade issue,” subject to WTO regulation, because the WTO lacks a “credible environmental perspective.” *Id.* at 3–4 (quoting OFFICE FOR DEVELOPED & TRANSITION ECONS., CONSUMERS INT’L, GREEN LABELS 23 (1999)). Instead, the study recommended that a “credible international institution” should take on the task. *See id.* at 4. The International Organization for Standardization (ISO), the study asserted, would not be an appropriate organization, because it lacks technical expertise in environmental issues and “its administrative structure makes it difficult for environmental and consumer groups to participate throughout the entire course of standards development.” *Id.* (quoting OFFICE FOR DEVELOPED & TRANSITION ECONS., *supra*, at 21). The study recommended a partial harmonization strategy, composed of bilateral agreements among national eco-labeling schemes. *See id.* The third article considered the green marketing trends in Germany. *See id.* (reviewing U.N. CONFERENCE ON TRADE & DEV. [UNCTAD], PROFITING FROM GREEN CONSUMERISM IN GERMANY (1999)). It argued that consumer interest in green products was likely to grow, and consequently, developing countries should “think of proactive ways in which to adapt their exports to the environmental requirements of the German market.” *Id.* To assist in that process, the article suggested that developing and developed countries participate in sector-specific bilateral workshops to improve information flow. *See id.*

¹⁵ *See* SCHEER ET AL., *supra* note 14, at 11–12 (noting that when coupled with other elements, including links between eco-labels and firm-level environmental management systems, government procurement policies, and waste policy regulation, eco-labels may be an effective environmental management tool).

¹⁶ *See id.* at 14 (including producers, consumers, distributors, government, and eco-labeling bodies as stakeholders in eco-label schemes). *See also* OECD COMM. FOR FISHERIES & U.N. FAO FISHERIES & AQUACULTURE DEP’T, *supra* note 14, at 13 (noting that “retailers and brand owners are now driving demand” for supplier compliance with eco-label schemes).

¹⁷ *See* Jeffrey J. Minneti, *Relational Integrity Regulation: Nudging Consumers Toward Products Bearing Valid Environmental Marketing Claims*, 40 ENVTL. L. 1327 (2010) (noting that the ISO’s environmental marketing claim standards meet or exceed relational integrity criteria and, perhaps, exceed state actor standards).

¹⁸ *See* U.N. INDUS. DEV. ORG. [UNIDO], ROUND TABLE: SUSTAINABILITY STANDARDS IN INTERNATIONAL TRADE: HURDLES OR OPPORTUNITIES? 7 (2009) (noting two concerns for

general, developed countries are net importers; developing countries¹⁹ are net exporters. If an environmental marketing claim criteria-setting body promulgates environmental product standards or product certification schemes without conferring with developing countries and considering their interests, the body may produce standards and certification procedures that are beyond the reach of exporters in developing countries.²⁰ If the developing country exporters are not able to conform or prove conformity with the standards, the exporters will not be able to participate in the product market.²¹ Furthermore, if multiple environmental marketing claim criteria-setting bodies prescribe different standards and certification schemes for the same products without conferring with one another or developing country exporters, the exporters will face a range of standards and certification schemes and will likely spend exceedingly scarce resources attempting to conform to a variety of schemes.²²

This Article squarely addresses these concerns through the following steps. First, in Part I, the Article ranks environmental marketing claim criteria-setting bodies based on an evaluation of the extent to which the bodies consider developing country interests in their schemes. The ranking indicates that developing country state actors' schemes, not surprisingly, most carefully consider developing country interests in their work. At the other end of the spectrum lie non-state actors, which least consider developing country interests in their work. Part II describes the characteristics of state actors, the current international legal framework that governs the entities' schemes, and explains

developing countries arising from eco-label and certification schemes: national capacity weakness in conformity assessment processes and developing countries often left "voiceless" in the process of generating such schemes).

¹⁹ "Developing countries" refer to those countries listed as low- or middle-income countries on the World Bank's 2011 World Development Indicators (WDI). See WORLD BANK, WDI 2011 xxiii (2011) [hereinafter WDI 2011], available at <http://data.worldbank.org/data-catalog/world-development-indicators/wdi-2011> (breaking down the size of the world's economy by country).

²⁰ See *Environmental Requirements and Market Access: Preventing "Green Protectionism,"* WTO, http://www.wto.org/english/tratop_e/envir_e/envir_req_e.htm (last visited Oct. 2, 2011) (noting that the environmental standards that one country issues could "cause unwarranted economic and social cost to others, particularly developing countries, by hindering exports").

²¹ See May A. Massoud et al., *Environmental Management System (ISO 14001) Certification in Developing Countries: Challenges and Implementation Strategies*, 44 ENVTL. SCI. & TECH. VIEWPOINT 1884, 1885 (2010) (noting that developing countries face a host of challenges in generating environmental management systems, including "[l]ack of appropriate infrastructure, unsound policies, ineffective environmental regulations as well as financial and human resource constraints.").

²² See, e.g., WTO Comm. on Trade & Env't, *Report of the Meeting Held on 29 September 2010*, ¶ 45, WT/CTE/M/50 (Nov. 2, 2010) [hereinafter *September 2010 Report*] (quoting the representative from Brazil who stated that "[o]verlapping standards, lack of harmonization and lack of equivalence between schemes created trade obstacles"). Accord WTO Comm. on Trade & Env't, *Report of the Meeting Held on 17 February 2010*, ¶ 44, WT/CTE/M/49 (Apr. 7, 2010) [hereinafter *February 2010 Report*] (quoting the representatives from Colombia and Argentina expressing their concerns regarding the proliferation of private standards and the potential for the standards to become de facto requirements for market access).

why the Article concludes that state actors provide the most consideration to developing country interests. Part III focuses on non-state actors, again providing characteristics of the bodies, the legal framework applicable to the bodies' work, and an explanation for why the Article concludes the bodies provide the least consideration to developing country interests. In light of the finding that consideration of developing country interests is especially lacking among non-state actors' schemes, Part IV discusses two clarifications to the World Trade Organization's (WTO) Agreement on Technical Barriers to Trade (TBT) that would incentivize non-state actors to incorporate developing country interests into their schemes.²³ Arguably, the effect of the clarifications may slow the development of environmental marketing standards and certification schemes. However, by drawing developing countries into the standards and certification development process, the clarifications will lead to increased developing country exporter participation in eco-label schemes, resulting in more widespread environmentally responsible manufacturing processes and products.

For the purpose of this Article, environmental criteria-setting bodies are those bodies that generate criteria for benchmarking environmental performance. State actor environmental criteria-setting bodies operate as organs of government at a national or local level. For example, in the United States, the Federal Trade Commission (FTC) and the Environmental Protection Agency (EPA) both generate environmental criteria. The FTC has promulgated the Green Guides,²⁴ and the EPA and FTC have joined to produce the Energy Guide and Energy Star programs.²⁵ At the local level, states within the United States also generate their own environmental standards. For example, California state law prohibits "untruthful, deceptive, or misleading" environmental marketing claims.²⁶ California's public policy states that environmental marketing claims should be supported with "competent and

²³ In 1999, Atsuko Okubo observed that under then-existing WTO law, environmental marketing claim schemes may become de facto trade barriers. See Atsuko Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, 11 GEO. INT'L ENVTL. L. REV. 599, 600 (1999). The author recommended that the TBT should regulate all environmental labeling and that the WTO should establish an international notification system to provide members with notice of labeling schemes. See *id.* at 639-43.

²⁴ See Guides for the Use of Environmental Marketing Claims, 16 C.F.R. pt. 260 (2010) [hereinafter Green Guides]. For a discussion of the Green Guides, see Minneti, *supra* note 14.

²⁵ See 42 U.S.C. § 6294(g) (2006) (noting Federal Trade Commission (FTC) authority within the Energy Star program); 42 U.S.C. § 6294a(b) (2006) (noting the Environmental Protection Agency (EPA) and Department of Energy's (DOE) responsibilities in the Energy Star program). For a discussion of the Energy Guide and Energy Star programs, see Minneti, *supra* note 17.

²⁶ See CAL. BUS. & PROF. CODE § 17580.5 (West, Westlaw through Ch. 360 of 2011 Reg. Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex. Sess.); IND. CODE § 24-5-17-2 (West, Westlaw through 2011 First Regular Session) (prohibiting environmental marketing claims that do not meet the criteria within the Indiana Code, FTC trade regulations or guides, or other federal agency regulations that establish environmental marketing claim standards).

reliable evidence” and that the claims should adhere to “uniform and recognized standards.”²⁷

Non-state actor environmental criteria-setting bodies are those that work above the governmental plane, setting environmental criteria on behalf of specific firms, specific industries, or multiple industries. An example of a firm-specific entity setting environmental criteria is Walmart, which is generating a sustainability index that will apply to products sold in its stores.²⁸ In contrast, the Global Social Compliance Programme (GSCP) sets environmental criteria on behalf of a specific industry, “buying companies.”²⁹ Inter-industry actors include professional environmental criteria-setting organizations whose primary goal is to generate environmental criteria either for sale, as in the case of the International Organization for Standardization (ISO),³⁰ or for public distribution, as in the case of ISEAL Alliance.³¹

Environmental criteria are criteria that define acceptable levels of environmentally responsible behavior. The criteria range from technical regulations, which are mandatory, to standards and guidelines, which are voluntary.³² In the context of environmental marketing claims, few environmental criteria are mandatory. The closest example is the US government’s Energy Guide program, which requires that covered products be labeled, unless the products are intended for export.³³ Most environmental marketing claim criteria are voluntary standards or guidelines. For example, the European Union’s eco-label regulation invites firms to conform their environmental practices to a set of standards and, upon doing so, allows the firms to display the EU eco-label on their products.³⁴ Likewise, ISO has

²⁷ See CAL. PUB. RES. § 42355 (West, Westlaw through Ch. 360 of 2011 Reg. Sess. and Ch. 11, and 13–16 of 2011-2012 1st Ex. Sess.).

²⁸ See *Sustainability Index*, WALMART, <http://walmartstores.com/sustainability/9292.aspx> (last visited Oct. 15, 2011). Walmart has structured a three-step process leading up to its use of a “simple tool” that will provide consumers with information about the environmental impact of the products they purchase. See *id.* The steps in the process include having its suppliers complete a sustainability assessment, generating a life-cycle analysis database, and the release of the tool described above. See *id.* Currently Walmart is working through the first two steps. See *id.*

²⁹ See GLOBAL SOC. COMPLIANCE PROGRAMME, <http://www.gscpnet.com> (last visited Oct. 15, 2011).

³⁰ See *About*, INT’L ORG. FOR STANDARDIZATION, <http://iso.org/about.htm> (last visited Oct. 15, 2011).

³¹ See *About Us*, ISEAL ALLIANCE, <http://http://www.isealalliance.org/content/about> (last visited Oct. 15, 2011).

³² The WTO draws the same distinction in its Agreement on Technical Barriers to Trade (TBT). See Agreement on Technical Barriers to Trade, Annex 1 ¶¶ 1–2, Apr. 15, 1994, 1868 U.N.T.S. 120 [hereinafter TBT], available at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm (last visited Nov. 05, 2011).

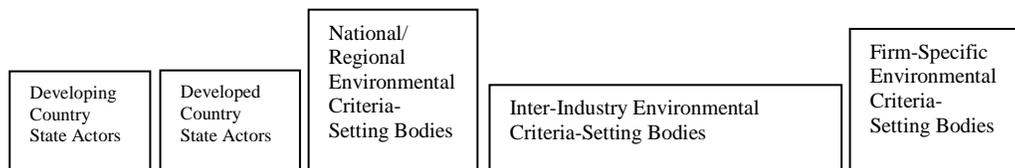
³³ See 42 U.S.C. § 6300 (2006).

³⁴ See Regulation (EC) No. 66/2010 of 25 Nov. 2009, art. 12, 2010 O.J. (L 27). For a discussion of the EU regulation, see Minneti, *supra* note 17.

promulgated a set of voluntary standards that firms can use to establish an eco-label program.³⁵

I. ENVIRONMENTAL MARKETING CLAIM CRITERIA-SETTING BODIES' CONSIDERATION OF DEVELOPING COUNTRY INTERESTS

A review of the extent to which the environmental criteria-setting bodies consider developing countries' interests in their criteria-setting systems reveals a spectrum ranging from those that primarily consider, act on, and advance developing countries' interests to those that choose not to consider developing countries' interests in their criteria-setting systems. Figure 1 summarizes the spectrum.



Highest Consideration

Lowest Consideration

Figure 1: Spectrum of Environmental Marketing Claim Criteria-Setting Bodies' Consideration of Developing Country Interests in Their Criteria-Setting Schemes

Out of self-interest, developing country state actors, which, as detailed below, include legislative and administrative agency actions, most strongly consider developing country interests in shaping their environmental marketing claim schemes. Acting in conformity with WTO trade law and/or international law and norms, developed country state actors also strongly consider developing country interests in their environmental marketing claim regulation, though not as strongly as developing country actors. Non-state actor national and regional environmental claim criteria-setting bodies generally operate in partnership with government, industry, professional standardizing bodies, and consumer groups. Those operating within developing countries also strongly consider developing country interests. Given their makeup, however, their concerns are generally not as focused on developing country interests as the state actors mentioned above. Such bodies operating within developed countries generally have even less concern for developing country interests. As indicated by the broader space afforded them on the spectrum, inter-industry criteria-setting bodies offer a wide range of consideration to developing country interests. As detailed below, entities such as ISEAL Alliance and ISO offer considerable deference to developing country interests.

³⁵ See *Voluntary Standards*, INT'L ORG. FOR STANDARDIZATION, <http://www.iso.org/iso/search.htm?qt=14024&sort=rel&type=simple&published=on> (last visited Oct. 15, 2011). For a discussion of ISO eco-label standards, see Minneti, *supra* note 17.

Groups such as the Green Business Network, however, provide little to no concern for developing country interests in their schemes. Firm-specific environmental marketing claim criteria-setting bodies generally offer the least consideration of developing country schemes.

II. STATE ACTOR ENVIRONMENTAL CRITERIA-SETTING BODIES

A. Characteristics

State actors generally have the capacity to prescribe environmental regulations, standards, or both because they act as agents of the state. Generally, developing and developed countries have government agencies that serve as national criteria-setting bodies and promote the countries' interests in the international criteria-setting arena. For example, Mexico's Dirección General de las Normas [General Bureau of Standards] acts within the country's Secretary of Economy to promote Mexico's interests among international criteria-setting bodies.³⁶ Senegal's Association Sénégalaise de Normalisation [Senegalese Association of Normalization] performs a similar function: in addition to crafting national criteria, the agency promotes Senegal's interests regionally and internationally.³⁷ Likewise, the mission of Thailand's Industrial Standards Institute is to generate standards that are consistent with international standards and promote its national standards, regionally and internationally.³⁸ And the United States draws upon the work of the American National Standards Institute (ANSI)³⁹ for its voluntary private sector standards, in addition to agencies such as the FTC and EPA, noted above. The agencies generally form partnerships with private businesses to formulate policy and craft their criteria.⁴⁰ In addition, national criteria-setting bodies participate in international standardization. For example, Mexico and Thailand have member bodies on the ISO working committee charged with setting environmental criteria; Senegal is an observing member.⁴¹

³⁶ See *Normalización Internacional*, SECRETARÍA DE ECONOMÍA, http://www.economia.gob.mx/swb/es/economia/p_Normalizacion_Internacional (last visited Oct. 21, 2011).

³⁷ See *Présentation*, ASS'N SÉNÉGALAISE DE NORMALISATION [ASN], <http://www.asn.sn/presentation.htm> (last visited Oct. 21, 2011).

³⁸ See THAILAND INDUS. STANDARDS INST., <http://www.tisi.go.th> (last visited Oct. 21, 2011).

³⁹ See AM. NAT'L STANDARDS INST. [ANSI], <http://ansi.org> (last visited Oct. 21, 2011).

⁴⁰ See, e.g., *Présentation*, *supra* note 37 (noting that ASN has partnered with the private sector to generate a uniform set of product standards).

⁴¹ See *TC-207—Environmental Management*, INT'L ORG. FOR STANDARDIZATION [ISO], http://www.iso.org/iso/standards_development/technical_committees/list_of_iso_technical_committees/iso_technical_committee_participation.htm?commid=54808 (last visited Oct. 21, 2011).

B. Legal Landscape Applicable to State Actor Environmental Criteria-Setting Bodies

International trade law sets boundaries on countries' national environmental criteria-setting efforts and provides opportunities for developing countries to advance and protect their interests. Developing countries that are members of the WTO, such as Mexico, Thailand, and Senegal, must set such criteria in keeping with the WTO's Technical Barriers to Trade (TBT) requirements. As detailed more fully below, the composition of the WTO, the attention provided to developing countries during the Doha Round of WTO negotiations, and the TBT's express consideration of developing countries' interests, have each created fora where developing countries can articulate, protect, and promote their interests.

1. WTO Membership

The WTO currently has 153 members.⁴² Two-thirds of its members are developing countries.⁴³ The WTO does not define "developing country." Instead, a member country declares itself developed or developing.⁴⁴ Other members may challenge a member's declaration of developed or developing.⁴⁵ The WTO provides preferential treatment for least developed countries (LDCs).⁴⁶ It defines LDCs as those that appear on the United Nations (UN) list of LDCs.⁴⁷ The UN applies the following criteria to determine whether a country is an LDC:

- a low-income criterion, based on a three-year average estimate of the gross national income (GNI) per capita (under \$750 for inclusion, above \$900 for graduation);
- a human resource weakness criterion, involving a composite Human Assets Index (HAI) based on indicators of: (a) nutrition; (b) health; (c) education; and (d) adult literacy; and
- an economic vulnerability criterion, involving a composite Economic Vulnerability Index (EVI) based on indicators of: (a) the instability of agricultural production; (b) the instability of exports of goods and services; (c) the economic importance of non-traditional activities

⁴² See *Members and Observers*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited, Oct. 21, 2011). Thirty additional "states or customs territories" are seeking accession to the WTO. See *Accessions*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/acc_e/acc_e.htm (last visited Oct. 3, 2011).

⁴³ See *Developing Countries Overview*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm (last visited Oct. 21, 2011).

⁴⁴ See *Development: Definition*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited Oct. 21, 2011).

⁴⁵ See *id.*

⁴⁶ See *Developing Countries Overview*, *supra* note 43.

⁴⁷ See *Least Developed Countries [LDCs]*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Oct. 21, 2011).

(share of manufacturing and modern services in GDP); (d) merchandise export concentration; and (e) the handicap of economic smallness (as measured through the population in logarithm); and the percentage of population displaced by natural disasters.⁴⁸

Currently, thirty-two WTO members are classified as LDCs.⁴⁹

2. *Doha Round Negotiations*

The WTO launched the Doha Round, its latest round of negotiations, at the Fourth Ministerial Conference in Doha, Qatar, in November 2001.⁵⁰ Participants adopted the Doha Ministerial Declaration.⁵¹ Recognizing that developing countries make up the majority of WTO membership, the Declaration seeks to place developing countries' "needs and interests at the heart" of its work.⁵² Participants "strongly reaffirmed" their commitment to sustainable development.⁵³ Specifically, the ministers stated that they were "convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive."⁵⁴ The Doha Declaration Work Program includes two paragraphs focused on trade and the environment. The first, paragraph 31, states that the ministers agree to negotiate the relationship between existing WTO rules and multilateral environmental agreements (MEAs), procedures for information sharing between WTO committees and MEA Secretariats, and the reduction or elimination of tariff and non-tariff barriers to environmental goods and services.⁵⁵ Paragraph 32 instructs the WTO Committee on Trade and the Environment (CTE) to "give particular attention to" the effects of environmental measures on developing and least developed countries and to instances where "the elimination or reduction of trade restrictions or distortions would benefit trade, the environment, and development."⁵⁶ In addition, the Committee must attend to "labelling requirements for environmental purposes."⁵⁷

⁴⁸ See *The Criteria for the Identification of the LDCs*, UNITED NATIONS, <http://www.un.org/special-rep/ohrlls/ldc/ldc%20criteria.htm> (last visited Oct. 21, 2011).

⁴⁹ See *Accessions*, *supra* note 42.

⁵⁰ See *The Doha Round*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dda_e/dda_e.htm#development (last visited Oct. 21, 2011).

⁵¹ See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter *Doha Ministerial Declaration*], available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf.

⁵² See *id.* ¶ 2.

⁵³ See *id.* ¶ 1.

⁵⁴ *Id.* ¶ 6.

⁵⁵ See *id.* ¶ 31.

⁵⁶ See *id.* ¶ 32(i).

⁵⁷ See *id.* ¶ 32(iii).

3. *Technical Barriers to Trade (TBT)*

The WTO's TBT provides a number of rights and obligations that govern the process of generating regulations and standards. The TBT's Preamble sheds light on the purpose and goals for the TBT.⁵⁸ The TBT recognizes the value of international standards and conformity assessments in improving the efficiency of production and the conduct of international trade.⁵⁹ Specifically relevant to the issues discussed here, the TBT further recognizes countries should be free to take "measures necessary to ensure the quality of [their] exports," the protection of the environment and the life or health of animals and plant life, and the prevention of deceptive practices.⁶⁰ And the TBT recognizes that international standards can contribute to the transfer of technology from developed countries to developing countries but that developing countries "may encounter special difficulties" as they formulate and apply regulations, standards, and conformity assessments.⁶¹ The TBT's purpose is to encourage the development of standards and conformity assessments but also to ensure that regulations and standards, "including packaging, marking and labelling requirements" and conformity assessment measures, "do not create unnecessary obstacles to international trade."⁶² Countries may not apply measures that they develop to protect the environment and plant and animal life in a manner that would result in "arbitrary or unjustifiable discrimination between countries" or a "disguised restriction on international trade."⁶³

a. *TBT Article 2*

TBT article 2 discusses member countries' national governments' preparation, adoption, and application of technical regulations.⁶⁴ Given that developing countries are typically exporters of goods that fall subject to technical regulations,⁶⁵ article 2 provides protection from developed countries' regulations that may create barriers to export.⁶⁶ For example, TBT members must ensure that their technical regulations treat imported products "no less favorab[ly]" than national origin products or products originating in any other

⁵⁸ See TBT, *supra* note 32, at pmb1.

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See *id.*

⁶³ *Id.*

⁶⁴ *Id.* at art. 2. TBT Annex 1 defines "central government body" as a "[c]entral government, its ministries, and departments or anybody subject to the control of the central government in respect of the activity in question." *Id.* at Annex 1, ¶ 6.

⁶⁵ TBT Annex 1 defines "technical regulation" as a mandatory restriction on "product characteristics or their process and production methods, including applicable administrative provisions" and product packaging and labeling requirements. See *id.* at Annex 1, ¶ 1.

⁶⁶ See generally TBT, *supra* note 32, at art. 2.

country.⁶⁷ Also, as noted above, members' technical regulations must not create "unnecessary obstacles to international trade."⁶⁸ Article 2.2 further states that members' technical regulations "shall not be more trade-restrictive than necessary to fulfill a legitimate objective."⁶⁹ Legitimate objectives expressly include the protection of the environment and the prevention of deceptive practices.⁷⁰ Thus, should a developed country generate an environmental marketing claim regulation designed to protect the environment, the regulation could restrict international trade—but no more than necessary to fulfill the environmental objective. As noted above, the United States' Energy Guide is an environmental marketing claim regulation, but at least presently, the regulation does not apply to exported goods.⁷¹ Thus, it does not run afoul of article 2.2.

The WTO promotes the use of international standards, perhaps to the detriment of developing countries.⁷² Specifically, when a member is crafting a technical regulation and relevant international standards exist or will be imminently completed, the member "shall use" the international standards unless the international standards would be "ineffective or inappropriate" given the member's legitimate objective for the regulation.⁷³ The WTO's Appellate Body has defined "relevant" as a standard that is "bearing upon or relating to the matter in hand; pertinent."⁷⁴ Although Annex 1 of the TBT's Explanatory Note to the definition of "standard" states that international standards are based on consensus, the Appellate Body has held that even those standards not based on consensus are considered "international standards" for the purposes of article 2.4.⁷⁵ For developing countries, the Appellate Body's decision is significant because standards that are not the product of consensus may disproportionately reflect the position of developed countries. Generally, developed countries have greater resources to expend on standards development. Thus, they are better equipped to play a more substantial role in standards development without any obligation to consider or act on developing countries' interests. By requiring developing countries to use international standards, the TBT may require a developing country to use a standard that conflicts with its environmental agenda.

Should a developing country object to the use of an international standard, it can argue that climate, geography, and "fundamental" technical problems render use of the international standard "ineffective or inappropriate" given the developing country's "legitimate" objective for using its own

⁶⁷ See *id.* at art. 2.1.

⁶⁸ *Id.* at art. 2.2.

⁶⁹ *Id.*

⁷⁰ See *id.*

⁷¹ See Minneti, *supra* note 17, for a discussion of the Energy Guide and Energy Star

programs.

⁷² See TBT, *supra* note 32, at art. 2.4.

⁷³ *Id.*

⁷⁴ *Id.* at art. 2(B) (quoting Panel on EC-Sardines).

⁷⁵ See *id.* ¶ 10 (citing Panel on EC-Sardines).

standard.⁷⁶ “Ineffective” means “something that does not ‘hav[e] the function of accomplishing,’ having a result, or ‘brought to bear.’”⁷⁷ “Inappropriate” means “not ‘specifically suitable,’ ‘proper,’ or ‘fitting.’”⁷⁸ Distinguishing ineffective from inappropriate, the Panel on EC-Sardines stated that “[t]he question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed.”⁷⁹ “Legitimate” objectives are those referred to in article 2.2 and include protection of the environment and prevention of deceptive practices.⁸⁰ Thus, a developing country could seek to fashion its own environmental marketing claim regulation, even though there is a relevant international standard, such as ISO 14024, as long as the developing country can argue that the international standard does not achieve the result of protecting its environment or preventing deceptive practices or that the regulation is not specifically suitable to those aims.⁸¹ On paper, the argument exists; however, one wonders whether, given its limited resources, a developing country would actually be able to craft an environmental marketing claim regulation that differs from the international standard and still have the capacity to defend the standard before the WTO.

The TBT provides additional pressure to accept international standards. First, should a member prepare a technical regulation for one of the preceding legitimate objectives, and the technical regulation “is in accordance with relevant international standards,” the TBT will rebuttably presume the regulation does not create an unnecessary obstacle to international trade.⁸² Second, should a member prepare a regulation on a topic for which there is no relevant international standard or the member’s regulation is not in accord with relevant international standards, and the member’s standard “may have a significant effect” on other members’ trade, the member must publish a notice of the regulation, indicating the regulation’s objective and rationale.⁸³ Upon request, the member shall provide copies of the regulation and identify how the regulation deviates from international standards.⁸⁴ And the members must, “[w]ithout discrimination,” allow other members to comment on the regulation, discuss the other members’ comments, and take the comments and results from the discussions into account in the preparation of the regulation.⁸⁵ To ensure that international standards reflect all members’ interests, the TBT

⁷⁶ See *id.* at art. 2.4.

⁷⁷ *Id.* at art. 2(B)(2) ¶ 20 (quoting Panel on EC-Sardines).

⁷⁸ *Id.*

⁷⁹ *Id.* (emphasis in original).

⁸⁰ See *id.* ¶ 22.

⁸¹ The party claiming inconsistency with article 2.4—here, perhaps, a developed country or a second developing country—bears the burden of proving that the regulation is inconsistent with article 2.4. See *id.* ¶ 9.

⁸² See TBT, *supra* note 32, at art. 2.5.

⁸³ See *id.* at art. 2.9.

⁸⁴ See *id.* at art. 2.9.3.

⁸⁵ See *id.* at art. 2.9.4.

requires that members play a “full part, within the limits of their resources” in the preparation of international standards.⁸⁶

b. TBT Article 4

Article 4 turns away from technical regulation and addresses members’ central governments’ preparation, adoption, and application of standards, which is an area of great relevance to environmental marketing claims, given that most environmental marketing claim regulatory systems have standards, by nature.⁸⁷ The TBT defines “standards” as non-mandatory “rules, guidelines or characteristics for products or related processes and production methods.”⁸⁸ Article 4 requires that members “ensure” that their central standardizing bodies comply with the TBT’s Code of Good Practice for the Preparation, Adoption and Application of Standards (Code of Good Practice).⁸⁹ Article 4 further requires that members “take such reasonable measures available to them” to ensure that local governments, non-state actors within their territories, and regional standardizing bodies of which they or a body within their territory is a member, each comply with the TBT Code of Good Practice.⁹⁰ Members’ obligation to ensure compliance with the Code of Good Practice applies even if the standardizing body has not accepted the Code of Good Practice.⁹¹ Members must acknowledge that standardizing bodies that comply with the Code of Good Practice are complying with the TBT provisions.⁹²

Thus, if Senegal’s central or local governments sought to create a voluntary eco-label scheme that set standards for environmental marketing claims, the governmental agencies would need to comply with the TBT’s Code of Good Practice. Moreover, if the eco-label is the product of a non-state actor within the developing country’s borders, then the WTO member must use reasonable measures to ensure that the non-state actor complies with the TBT’s Code of Good Practice, even if the non-state actor itself has not accepted the Code.

1. The TBT’s Code of Good Practice

Like the TBT itself, the Code of Good Practice provides a set of rights and obligations, many of which mirror those applied in the context of technical regulations. Any standardizing body, including central, local, or nongovernmental bodies, within a TBT member’s territory may accept the TBT’s Code of Good Practice.⁹³ Accepting or withdrawing bodies must notify

⁸⁶ *See id.* at art. 2.6.

⁸⁷ *See id.* at art. 4.1.

⁸⁸ *See id.* at Annex 1, ¶ 2.

⁸⁹ *See id.* at art. 4.1.

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.*

⁹³ *See id.* at Annex 3. ¶ B.

the International Organization for Standardization/International Electrotechnical Commission (ISO/IEC), indicating the standardizing body's name, address, and current and expected standardizing activities.⁹⁴

In the context of environmental marketing claims, relevant substantive provisions include the following requirements for standardizing bodies: article D requires that the environmental marketing claim scheme must treat "like products" from other countries "no less favorabl[y]" than the scheme treats products originating from the standardizing body's home country.⁹⁵ This requirement suggests that two like products would either receive or not receive an eco-label, depending not on whether the product was manufactured domestically or in a foreign nation but on whether the product satisfied the eco-label criteria. Concern has arisen regarding how to define "like products." The issue is whether the likeness determination should exclusively consider aspects of a product's process or production methods (PPMs) that affect the physical characteristics of the end product or whether it should also consider PPMs that are not product related (NPR PPMs) and, thus, have no impact on the physical characteristics of the end product.⁹⁶

For example, if a domestic tire manufacturer changes a chemical component of his tires such that the resulting tire has different physical characteristics from foreign-made but otherwise similar tires, the manufacturer would have made a PPM change resulting in a new product. Because the domestic and foreign products have different physical characteristics, they would not be considered "like products," requiring the same treatment under the TBT. An eco-label scheme that provides a label only for products using the new chemical would not run afoul of the TBT Code of Good Practice because the scheme would not be treating like products differently.

⁹⁴ See *id.* at Annex 3, ¶ C.

⁹⁵ See *id.* at Annex 3, ¶ D.

⁹⁶ See Erich Vranes, *Climate Labelling and the WTO: The 2010 EU Ecolabelling Programme as a Test Case under WTO Law*, in EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 2 (Christoph Herrmann & Jörg Philipp Terhechte eds., 2011). Professor Vranes notes that WTO members and the academic community have debated whether the TBT would apply to a state actor created voluntary eco-label scheme that draws upon NPR PPMs. See *id.* at 7. The concern centers upon the fact that NPR PPMs utilize factors that are disassociated with the end product, but the TBT is thought to cover only product-related PPMs. Professor Vranes points out that in the context of discussing Article L of the Code of Good Practice, the WTO Committee on Technical Barriers to Trade has stated that Article L applies voluntary labeling requirements and its application is not dependent upon the kind of information provided on the label. See *id.* (citing Comm. on Technical Barriers to Trade, *First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade*, G/TBT/5 ¶ 12 (Nov. 19, 1997)). Those who argue that the TBT should not cover NPR PPM analysis, which include developing countries, assert that since the TBT does not cover such schemes, the schemes are per se invalid. See *id.* In response, Professor Vranes argues that the TBT does not permit or exclude measures; instead, it prescribes new obligations, in addition to those under GATT. See *id.* Thus, the better argument for developing countries is that the TBT applies to voluntary eco-label schemes that use NPR PPM because the TBT provisions are essentially stricter than those under GATT. See *id.*

NPR PPMs, however, are process and production methods that have no impact on the physical characteristics of the end product, such that a change in the processing—perhaps a more environmentally responsible process that uses less energy—has no impact on the end product’s physical characteristics.⁹⁷ Foreign tires produced with the non-energy efficient process will look, feel, and perform the same as the domestic tires with the new process, but the domestic tire would be more environmentally responsible. Under an eco-label scheme that considers NPR PPMs, such as the EU’s Eco-Label Regulation,⁹⁸ the foreign tire may not receive the eco-label, but the domestic tire would, even though the physical characteristics of the tires are the same.

If the like-products provision of the TBT does not contemplate NPR PPMs, awarding the eco-label to the domestic but not the foreign tire may run afoul of Paragraph D of the TBT Code of Good Practice because the eco-labeling entity would be treating a foreign product less favorably than a domestic “like product.”⁹⁹ Note that even if the eco-labeling entity is a non-state criterion-setting body, issues may arise under the TBT because members are directed to use reasonable means to ensure that non-state standardizing bodies comply with the TBT Code of Good Practice.¹⁰⁰

Whether products that result from NPR PPM are “like products” under the TBT is an open question. In the context of discussing whether the EU Ecolabel Act, which uses NPR PPM, is consistent with the TBT, Professor Erich Vranes argues that like products are those that have a “close competitive relationship” and that whether such a relationship exists should be examined from the consumers’ perspective.¹⁰¹ Noting that consumers may perceive NPR PPMs, such as the energy consumption involved with tire production, as a factor that distinguishes two otherwise physically indistinguishable products, the NPR PPM may make one product sufficiently unlike another to receive different treatment under an eco-label scheme.¹⁰² Such a result would be consistent with the TBT because the eco-label scheme would not be treating like products differently.¹⁰³ However, because likeness is considered from the consumers’ perspective, which is not necessarily the perspective taken by an

⁹⁷ See *id.* at 2.

⁹⁸ For a discussion of the EU regulation, see Minneti, *supra* note 17.

⁹⁹ See TBT, *supra* note 32, at Annex 3, ¶ D.

¹⁰⁰ See *id.* at art. 4.1.

¹⁰¹ See Vranes, *supra* note 96.

¹⁰² See *id.* at 12.

¹⁰³ Professor Vranes observes that a mere potential violation is not de facto discrimination. See *id.* at 18–19. Instead, only if the facts show that the eco-label scheme disproportionately favors domestic products over foreign products would the eco-label result in de facto discrimination. See *id.* at 18–19. Should the eco-label scheme give rise to a violation under the TBT, it would trigger the WTO’s Appellate Body that has confirmed that GATT article XX, which provides a set of defenses to otherwise impermissible regulations, may justify the eco-label scheme, and the scheme would likely satisfy the TBT because labeling is generally thought to be a “rather non-restrictive means for pursuing environmental goals.” See *id.* at 22, 24 (citing Andrew Green, *Climate Change, Regulatory Policy and the WTO: How Constraining are Trade Rules?*, 8 J. INT’L ENVTL. L. 143, 186 (2005)).

eco-label scheme, Professor Vranes notes that there is a “clear risk” that the eco-label scheme will treat products that consumers perceive as like, differently, resulting in a violation of the TBT.¹⁰⁴ Nothing in the Code of Good Practice provides a justification for treating like products differently.

TBT article 12 grants “[s]pecial and [d]ifferential” treatment to developing countries.¹⁰⁵ If an eco-labeling entity is operating within a developing country, arguably it may assert that article 12 permits it to discriminate against foreign like products.¹⁰⁶ Article 12.1 calls upon developed country members to provide differential and “more favorable treatment to developing country members.”¹⁰⁷ Specifically, developed country members are to “take account of the special development, financial, and trade needs of developing country members” when assessing developing country members’ rights and obligations under the TBT.¹⁰⁸ In addition, article 12.8 permits the WTO’s Committee on Technical Barriers to Trade to grant developing countries “specified, time-limited exceptions in whole or in part” from TBT obligations.¹⁰⁹

In addition, even if the eco-labeling entity is not operating within a developing country, Professor Vranes notes that the TBT Preamble contemplates that departure from the TBT’s obligations may be justified if done, among other reasons, for protection of the environment and if the departure does not constitute “arbitrary or unjustifiable discrimination.”¹¹⁰ Moreover, noting that WTO provisions should be considered cumulatively, Professor Vranes argues that the justifications provided in GATT article XX may apply to the TBT.¹¹¹ Among those justifications is article XX(b), a provision that permits measures that are necessary to protect human, animal, or plant life and article XX(g), which permits measures that relate to the exhaustion of natural resources as long as the measures are made effective with restrictions on domestic production or consumption.¹¹² Such measures must also satisfy the introductory clause of article XX, the *chapeau*, which proscribes measures that are applied in a manner that results in “arbitrary or unjustifiable discrimination.”¹¹³ Professor Vranes concludes that the EU eco-label scheme, which uses NPR PPMs, likely satisfies the TBT, either under the TBT itself or under the GATT Article XX justifications.¹¹⁴ Thus, a developing

¹⁰⁴ See *id.* at 23, 25.

¹⁰⁵ See TBT, *supra* note 32, at art. 12.

¹⁰⁶ See *id.* at arts. 12.1, 12.2, 12.8.

¹⁰⁷ See *id.* at art. 12.1.

¹⁰⁸ See *id.* at art. 12.2.

¹⁰⁹ See *id.* at art. 12.8.

¹¹⁰ Vranes, *supra* note 96, at 23; TBT, *supra* note 32, at pmb1.

¹¹¹ See Vranes, *supra* note 96, at 23.

¹¹² See General Agreement on Tariffs and Trade (GATT 1947) arts. XX(b), (g) available at http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm (last visited Nov. 05, 2011).

¹¹³ *Id.* at art. XX.

¹¹⁴ See Vranes, *supra* note 96, at 25–26.

country eco-label scheme that employs NPR PPMs would also likely satisfy the TBT.

Article E provides that the eco-label standards must not be “prepared, adopted, or applied” in a way that would create or have the effect of creating “unnecessary obstacles to international trade.”¹¹⁵ A voluntary eco-label scheme that uses NPR PPMs may also violate article E for the same reasons it might violate article D. The issue here becomes whether the eco-label scheme is necessary to accomplish the standardizing body’s environmental goals. Professor Vranes notes that generally, eco-labeling schemes are considered a “suitable and comparatively rather non-restrictive means for pursuing environmental goals.”¹¹⁶

The environmental marketing claim scheme must use existing international standards as a basis for the scheme, unless doing so would be “ineffective or inappropriate,” due to fundamental climactic, geographic, or technological problems.¹¹⁷ The most prevalent international standards for environmental marketing claims are ISO’s 14021, 14024, and 14040 series. One component of the ISO standards presents a potential issue for developing countries. The ISO eco-label scheme contemplates the use of life-cycle analysis in setting criteria for eco-labels. Specifically, ISO 14024, which deals with third-party environmental marketing claims, such as those a non-state actor would generate, states that “[t]he objective of reducing environmental impacts and not merely transferring impacts across media or stages of the product’s life cycle is best served by considering the whole product life cycle when setting product environmental criteria.”¹¹⁸ The international standard provides a list of life-cycle stages that a standardizing body should take into account, including “extraction of resources, manufacturing, distribution, use, and disposal.”¹¹⁹ The standard requires that a standardizing body justify “[a]ny departure” from a life-cycle approach or a “selective use of restricted environmental issues.”¹²⁰

ISO’s use of life-cycle analysis raises two sets of issues. First, because life-cycle analysis contemplates non-product related processes such as energy inputs, life-cycle analysis is an NPR PPM.¹²¹ Therefore, use of the ISO standard draws in the preceding discussion of the TBT’s treatment of NPR PPMs. Second, there is considerable disagreement regarding the utility of life-cycle analysis and confusion about defining the appropriate stages of the analysis. As noted above in the discussion of the Doha Declaration Work Program, the WTO’s CTE must “give particular attention” to “labelling requirements for environmental purposes.”¹²²

¹¹⁵ TBT, *supra* note 32, at Annex 3, ¶ E.

¹¹⁶ Vranes, *supra* note 96, at 24.

¹¹⁷ See TBT, *supra* note 32, at Annex 3, ¶ F.

¹¹⁸ ISO 14024, Principle 5.4.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See *id.* at 6.

¹²² Doha Ministerial Declaration, *supra* note 51, ¶ 32 (iii).

In the CTE's April 2003 Report of the Meeting, the European Communities proposed that the CTE discuss a voluntary eco-label based on life-cycle analysis.¹²³ The European Communities' discussion exposed members' views on life-cycle analysis. The representative from Malaysia reportedly stated:

Voluntary eco-labelling schemes based on life-cycle approach was a concept not well understood and its practice was not universally accepted. These schemes had not been determined to be the most effective or least costly labelling schemes. System boundaries were not always clear, processes were often ill-defined—especially when they generated more than one product—and full information on the choice of technology available and data on environmental processes was also often incomplete or inaccurate and could, therefore, lead to distortion of such an assessment. Life-cycle analysis was still fraught with subjectivity and many unknowns, and if widely applied could provide avenues for misuse [sic].¹²⁴

Representatives from Cuba, Brazil, Chile, and Indonesia voiced similar concerns.¹²⁵

WTO members voiced similar concerns in September 2010 in discussion regarding carbon footprint labels.¹²⁶ For example, Argentina questioned the level of transparency provided to the development of carbon-footprint methodologies that considered life-cycle analysis, and Turkey argued that NPR-PMM-based eco-label schemes were inconsistent with WTO rules, given that the schemes could give rise to disguised protectionism.¹²⁷ In spite of the representatives' concerns, however, if a developing country sought to create an eco-label scheme that did not utilize a life-cycle approach, or used a limited form of life-cycle analysis, as long as the developing country justified its reason for doing so, its scheme would be consistent with ISO 14024, the international standard, and thus consistent with the TBT Code of Good Practice. Moreover, the developing country's justification for ISO 14024 purposes would likely also satisfy the exception in Code of Good Practice paragraph F, because the developing country would likely argue that use of the ISO 14024 would be ineffective or inappropriate due to fundamental climactic, geographic, or technical issues.¹²⁸

¹²³ See WTO Comm. on Trade & Env't, *Report of the Meeting Held on 29 April 2003*, WT/CTE/M/33, ¶ 37 (21 May 2003). Note that the European Communities' proposal found expression in the EU's Ecolabel Act 66/2010.

¹²⁴ *Id.* ¶ 62.

¹²⁵ See *id.* ¶¶ 63, 64.

¹²⁶ See *September 2010 Report*, *supra* note 22, at 42, 43, 47–50.

¹²⁷ See *id.* ¶¶ 42, 50.

¹²⁸ See TBT, *supra* note 32, at Annex 1, art. 3.F.

Several other Code of Good Practice provisions have an impact on developing countries' ability to protect and advance their environmental interests, though their roles are less significant than those above. Paragraph G of the Code of Good Practice invites standardizing bodies to play as "full" a role as possible in the work of international standardizing bodies so that standards are harmonized. For developing countries, doing so is difficult due to costs associated with traveling to and participating in meetings.¹²⁹ Moreover, developing country national standardizing bodies face a number of challenges, including understaffed laboratories, obsolete equipment, and a lack of infrastructure for essential data collection and processing.¹³⁰

The UN Conference on Trade and Development (UNCTAD) established a Consultative Task Force in 2004 to assist developing countries in understanding key trends in environmental requirements applicable to exported products.¹³¹ Since its inception, the Task Force has hosted a number of meetings, the latest in 2006, designed to build capacity and provide dialogue and networking opportunities for state and non-state actors.¹³² ISO has established DEVCO, a policy committee charged with addressing developing countries' needs.¹³³ In addition to identifying developing countries' needs and suggesting ways to meet them, DEVCO monitors the implementation of ISO's Action Plan for developing countries.¹³⁴ The plan's outputs focus on increasing developing country participation in ISO standardizing activities, building awareness of the function and utility of standards among developing country stakeholders, increasing developing countries capacity to engage in standards work, and educating youths on the relevance and importance of international standards.¹³⁵

Several of the Code of Good Practice provisions promote the harmonization of standards. For example, Paragraph G encourages all the standardizing bodies within a member's territory to participate in international standardizing work through a single delegation that represents the members'

¹²⁹ See Md. Nazrul Islam, ISO 14001: Legal Challenges for Developing Countries, in *Environmental Law in Developing Countries* 15, at 30 (2001), available at <http://data.iucn.org/dbtw-wpd/edocs/EPLP-043.pdf>.

¹³⁰ See United Nations Conference on Trade & Dev. (UNCTAD) Secretariat, *Environmental Requirements and Market Access for Developing Countries*, ¶ 22, TD/(XI)/BP/1 (20 April 2004), available at http://www.unctad.org/en/docs/tdxibpd1_en.pdf.

¹³¹ See Consultative Task Force on Environmental Requirements and Market Access for Developing Countries, UNITED NATIONS CONFERENCE ON TRADE & DEV. [UNCTAD], http://www.unctad.org/trade_env/test1/projects/taskforce.htm (last visited Nov. 1, 2011).

¹³² See *id.*

¹³³ See *What is DEVCO?*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/what_is_devco (last visited Oct. 4, 2011).

¹³⁴ See *id.*

¹³⁵ See INT'L ORG. FOR STANDARDIZATION, *ISO ACTION PLAN FOR DEVELOPING COUNTRIES 2011-2015* (2010) [hereinafter ISO ACTION PLAN], available at http://www.iso.org/iso/iso_action_plan_developingcountries-2011-2015.pdf (last visited Nov. 05, 2011).

standardizing bodies.¹³⁶ In addition, the Code of Good Practice calls upon standardizing bodies within a member to avoid duplicating or overlapping the work of other standardizing bodies and to seek to achieve national consensus on their standards.¹³⁷ As long as developing countries play an equitable role in the harmonization of standards, the process greatly benefits developing countries because it reduces the number of standards that exporters must satisfy.

Paragraph I provides that standardizing bodies shall, “[w]herever appropriate,” specify product standards based on the products’ performance, rather than on the products’ “design or descriptive characteristics.”¹³⁸ Arguably standards based on design or descriptive characteristics may include eco-label standards that address NPR PPMs or life-cycle analysis because such standards contemplate how products are designed and the products’ composition. Thus the paragraph may be read to discourage such standards. However, research reveals no such interpretation of the phrase. Further, the disclaimer “wherever appropriate” may be applicable—environmental concerns may be an area where the preference against design or descriptive based standards does not apply. This conclusion finds support in the TBT’s expressed acknowledgement of the importance of environmental concerns.¹³⁹

The Code of Good Practice requires a significant amount of transparency among standardizing bodies. Standardizing bodies must publish their current work programs, including standards under development and standards adopted, at least once every six months.¹⁴⁰ A standardizing body must allow sixty days for interested parties within the body’s member state to comment on any draft standard, unless the standard addresses an “urgent” problem arising from safety, health, or environmental concerns.¹⁴¹ Notification of the draft standard must indicate whether the draft deviates from international standards.¹⁴² Any interested party within a member’s territory may request a copy of a draft standard, which the standardizing body must promptly provide.¹⁴³ Standardizing bodies must take comments into account as they develop draft standards.¹⁴⁴ If requested to do so, standardizing bodies must reply to comments received from standardizing bodies that have accepted the Code of Good Practice, and the reply must explain why the draft standard deviates from the international standards, if it does so.¹⁴⁵ Once adopted, a standard must be “promptly published.”¹⁴⁶ The dispute resolution provision of

¹³⁶ See TBT, *supra* note 32, at Annex 3, ¶ G.

¹³⁷ See *id.* at Annex 3, ¶ H.

¹³⁸ *Id.* at Annex 3, ¶ I.

¹³⁹ See TBT, *supra* note 32, at pmb1.

¹⁴⁰ See *id.* at Annex 3, ¶ J.

¹⁴¹ See *id.* at Annex 3, ¶ L.

¹⁴² See *id.*

¹⁴³ See *id.* at Annex 3, ¶ M.

¹⁴⁴ See *id.* at Annex 3, ¶ N.

¹⁴⁵ See *id.*

¹⁴⁶ *Id.* at Annex 3, ¶ O.

the Code of Good Practice requires those who have accepted it to provide “sympathetic consideration to and adequate opportunity for” consultations with one another.¹⁴⁷

c. TBT Article 5

Article 5 addresses central governments’ efforts to regulate conformity assessments, such as eco-label schemes that include certification criteria.¹⁴⁸ The provisions relevant to environmental marketing claims are similar to those discussed above regarding the promulgation of technical regulations and standards. The TBT defines “conformity assessments” as “[a]ny procedure” that determines whether technical regulations or standards are fulfilled.¹⁴⁹ Applicable procedures include sampling, testing and inspecting, evaluation, verification, assurance of conformity, registration, and accreditation.¹⁵⁰

Article 5 also requires members to ensure that they grant suppliers of like products originating in other members’ territories access to conformity assessment procedures that are “no less favorable” than those granted to like products originating within the member.¹⁵¹ Access includes the possibility of performing conformity assessment procedures at suppliers’ facilities and the capacity to receive any mark associated with the procedures.¹⁵² As with technical regulations and standards, conformity assessment measures may not create “unnecessary obstacles to international trade.”¹⁵³ Conformity assessment procedures must not, on their face, or as applied, be “more strict than necessary” to provide the importing member with “adequate confidence” that the products conform to the applicable standards or regulations.¹⁵⁴ Article 5 requires the conformity procedures to be implemented as “expeditiously as possible” and in a manner that is no less favorable to products originating within other members than to domestic products.¹⁵⁵ Of particular relevance to the environmental marketing claim context, article 5 provides that where international standardizing bodies have produced guides or recommendations for conformity assessment procedures, members shall use them, unless doing

¹⁴⁷ See *id.* at Annex 3, ¶ Q.

¹⁴⁸ See *id.* at art. 5.

¹⁴⁹ See *id.* at Annex 1, ¶ 3.

¹⁵⁰ *Id.* at Explanatory Note.

¹⁵¹ See *id.* at art. 5.1.1.

¹⁵² See *id.*

¹⁵³ See *id.* at art. 5.1.2.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.* at art. 5.2.1. Conformity procedures may require those seeking assessment provide only that information necessary to assess conformity and applicable fees. See *id.* at art. 5.2.3. The procedures must protect confidential information and commercial interests. See *id.* at art. 5.2.4. Fees must be equitable; facilities for conformity assessments must not cause “unnecessary inconvenience.” *Id.* at art. 5.2.5. And the procedures must include a process for receiving and responding to complaints. See *id.* at art. 5.2.8. The article expressly supports members’ ability to carry out “reasonable” spot checks within their territories. See *id.* at art. 5.3.

so would be inappropriate due to concerns such as preventing deceptive practices or protecting the environment or animal and plant life.¹⁵⁶ This provision raises the same issues noted above, regarding the ISO's 14024 international standard for eco-labels.

As with technical regulations and standards, article 5 states that members, "within the limits of their resources" shall play a "full part" in the efforts of international standardizing bodies to develop conformity assessment guides and recommendations.¹⁵⁷ Should a central government issue standards that are not in accord with guides or recommendations issued by international standardizing entities, or—should no relevant guides or recommendations exist—central governments must follow the same general notice and comment procedures discussed above under article 2.¹⁵⁸

d. TBT Article 6

Article 6 directs central government bodies to "ensure, whenever possible" that they accept the results of other members' conformity assessment procedures, even if different from their own, as long as they are satisfied that the rigor of the conformity assessment procedures is equivalent to their own.¹⁵⁹ Article 6 contemplates that members may need to consult with one another to arrive at a "mutually satisfactory understanding" regarding each other's conformity assessment procedures.¹⁶⁰ Article 6 encourages members to permit the participation of conformity assessment bodies in other members in their conformity assessment procedures under conditions that are "no less favorable" than those provided to conformity assessment bodies within the members' territory.¹⁶¹ Because there are few central government-based environmental marketing claim conformity assessment procedures, article 6, standing alone, has little impact on global environmental marketing claims. For those environmental marketing schemes to which it applies, article 6 may give rise to trade barriers for developing countries. Article 6 turns on whether members are satisfied with one another's conformity assessment processes. Given that the legal and technical structures of developing countries are significantly weaker than developed countries, satisfying a developed country's needs may be exceedingly difficult for a developing country.¹⁶²

e. TBT Articles 7, 8, and 9

TBT articles 7 and 8 extend TBT articles 5 and 6 to local and non-state actor entities involved in conformity assessment procedures, which would

¹⁵⁶ See *id.* at art. 5.4.

¹⁵⁷ See *id.* at art. 5.5.

¹⁵⁸ See *id.* at art. 5.6.

¹⁵⁹ See *id.* at art. 6.1.

¹⁶⁰ See *id.*

¹⁶¹ See *id.* at art. 6.4.

¹⁶² See Islam, *supra* note 129.

include those non-state actors that operate eco-label certification programs.¹⁶³ However, members need only use “reasonable” measures to ensure compliance with articles 5 and 6.¹⁶⁴ The inherent difficulties with articles 5 and 6, noted above, remain.

When a member requires assurance of conformity with a technical regulation or standard, article 9 directs members to “formulate and adopt” conformity assessment systems in conjunction with international conformity assessment systems by becoming members of the systems or participating with them.¹⁶⁵ As noted above in the discussion of developing country participation in the development of international standards, fulfilling their obligation under article 9 is especially difficult for developing countries, given their lack of resources and criteria-setting infrastructure.

f. TBT Article 11

Article 11 addresses the provision of technical assistance and advice to other members, should the other members request such assistance or advice.¹⁶⁶ Article 11 emphasizes developed countries’ duty to provide technical assistance and advice to developing countries.¹⁶⁷ Specifically, article 11 directs members to advise other members, especially developing country members, on the preparation of technical regulations and conformity assessment procedures and to provide advice and technical assistance on the development of national standardizing bodies and participation in international standardizing bodies.¹⁶⁸ Should a member, especially a developing country member, seek access to the conformity assessment procedures of another member for the developing country’s producers, the member shall grant the developing country member technical assistance regarding the necessary steps producers should take for their products to satisfy the other member’s conformity assessment procedures.¹⁶⁹ If requested, members shall provide technical assistance and advice to other members regarding the establishment of institutions and legal frameworks that would enable the other members to fulfill their obligations under international or regional conformity assessment provisions.¹⁷⁰ Article 11 directs members, if requested, to encourage bodies within their territories that participate in regional or international conformity assessment procedures to provide advice and technical assistance to other members seeking the ability to do the same.¹⁷¹ Should a member decide to

¹⁶³ See TBT, *supra* note 32, at arts. 7.1, 8.1, 8.2.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.* at art. 9.

¹⁶⁶ See *id.* at art. 11.

¹⁶⁷ See *id.* at arts. 11.1–11.2.

¹⁶⁸ See *id.* at arts. 11.1–11.4.

¹⁶⁹ See *id.* at art. 11.5.

¹⁷⁰ See *id.* at art. 11.6.

¹⁷¹ See *id.* at art. 11.7.

provide advice and technical assistance to other members, members “shall give priority to the needs of the least-developed country Members.”¹⁷²

g. TBT Article 12

As noted above in the discussion of the Code of Good Practice, article 12 requires members to provide “differential and more favourable treatment to developing countr[ies].”¹⁷³ Specifically, members must consider the special needs of developing countries as they implement the TBT.¹⁷⁴ As they develop regulations, standards, and conformity assessment procedures, members must take into account the special needs of developing country members “with a view” to ensuring that the members’ regulations, standards, and conformity assessment procedures do not create “unnecessary obstacles to exports from developing country Members.”¹⁷⁵ Members must recognize that developing countries may not use international standards as a basis for their regulations or standards when the international standards are not “appropriate to their development, financial, and trade needs.”¹⁷⁶

Additionally, members must “take such reasonable measures as may be available to them” to ensure that international standardizing and conformity assessment bodies operate in such a manner that developing countries have representation in the bodies and can play an active role in the bodies.¹⁷⁷ Should a developing country member seek international standards for a product of special interest, members must take reasonable measures to ensure that international standardizing bodies examine the possibility of developing standards for the product, and if practicable, develop the standard.¹⁷⁸ Article 12 directs members to provide technical assistance to developing countries to ensure that technical regulations, standards, and conformity assessment procedures do not create “unnecessary obstacles to the expansion and diversification of exports” from developing countries.¹⁷⁹

Article 12 recognizes that developing country members may face special problems in preparing regulations, standards, and conformity assessment procedures and that they may have difficulty fully discharging their obligations under the TBT.¹⁸⁰ Article 12, therefore, empowers the TBT committee to grant developing countries, upon request, specific, time-limited exceptions from TBT obligations.¹⁸¹ Developed country members “shall bear in mind” developing countries’ special difficulties in complying with TBT

¹⁷² *Id.* at art. 11.8.

¹⁷³ *Id.* at art. 12.1.

¹⁷⁴ *See id.* at art. 12.2.

¹⁷⁵ *Id.* at art. 12.3.

¹⁷⁶ *Id.* at art. 12.4.

¹⁷⁷ *Id.* at art. 12.5.

¹⁷⁸ *See id.* at art. 12.6.

¹⁷⁹ *Id.* at art. 12.7.

¹⁸⁰ *See id.* at art. 12.8.

¹⁸¹ *See id.*

obligations and “shall take account” of developing countries’ financing, trade, and development needs as they assist developing countries.¹⁸²

On its face, article 12 recognizes difficulties developing countries face and it appears to offer protections to developing countries; however, it has several shortcomings. First, article 12 places a number of obligations squarely on the shoulders of WTO members. However, in the context of environmental marketing claim regulation, members are not the primary actors. Instead, non-state actors are responsible for the bulk of eco-label related standards. While the TBT’s Code of Good Practice applies to such non-state actor criteria-setting bodies, the Code is not mandatory, and nothing in the Code of Good Practice requires that non-state actors provide deferential treatment to developing country members.

Second, to the extent the TBT requires the use of international standards, it may disadvantage developing countries because nothing in article 12 requires that the non-state actor international standard-setting bodies that produce the international standards achieve a threshold level of participation from developing countries.

A recurring theme in article 12 and throughout the TBT is an attempt to balance competing objectives. On one hand, the TBT proscribes regulations that create unnecessary barriers to trade and seeks to harmonize state and non-state actor regulatory schemes. On the other, it attempts to provide appropriate deference to the needs of developing countries. To date, the precise scope of the deferential side of the balance is unclear. There is no jurisprudence and no decision from any competent WTO body to clarify members’ obligations under article 12.¹⁸³

Third, the TBT makes no reference to relevant provisions of international environmental agreements, such as the Montreal Protocol, the Basel Convention, the Climate Change Convention, or the Biodiversity Convention, that provide deferential treatment of developing countries.¹⁸⁴ Should a developing country draw upon those agreements in support of its own environmental marketing claim regulation or in response to a developed country regulation, the impact of the international environmental agreements is not clear.¹⁸⁵ The TBT’s emphasis on international standards, especially ISO-generated standards, may encourage countries to ignore international agreements in favor of ISO standards.¹⁸⁶

¹⁸² *Id.* at art. 12.9.

¹⁸³ TBT Article 14 provides that disputes arising under the TBT will be resolved under the Dispute Settlement Body and will follow applicable GATT Provisions. *See id.* at art. 14.

¹⁸⁴ *See Islam, supra* note 129, at 29.

¹⁸⁵ *See id.*

¹⁸⁶ *See id.* at 30.

C. Degree of Developing Country Interest Advancement: Highest

Among the group of environmental marketing claim criteria-setting bodies, developing countries' own lawmakers and standardizing bodies perform the best job of considering developing countries' interests. Through their legislative function and the public-private partnerships that characterize their criteria-setting bodies, developing countries can determine their interests and priorities and promote them. For example, Thailand administers its Green Label¹⁸⁷ through the Thailand Environmental Institute, a non-state actor that partners with industry and local and central governments in Thailand.¹⁸⁸ The Green Label certifies the environmental effectiveness of consumers and products ranging from fluorescent bulbs to cleaning agents to fertilizers.¹⁸⁹ It also certifies some service providers, including dry cleaning, laundry services, and gas stations.¹⁹⁰ Certification principles include life-cycle assessment, the political importance of the good certified, the ability to satisfy proposed criteria, and the existence of appropriate test methods.¹⁹¹ Several of the product criteria draw upon ISO/IEC standards. For example, certified passenger cars must comply with Thai law and the management systems of ISO 9001:2000 or ISO TS 16949.¹⁹² The Green Label applies to twenty-five product categories; 507 product models from seventy-five companies have been certified.¹⁹³ In addition to its own Green Label, seventeen other eco-labels operate in Thailand.¹⁹⁴ Of the seventeen, one is firm-specific, and the rest are industry-specific or inter-industry eco-labelers.¹⁹⁵

Mexico does not have a national eco-label; however, Ecolabel Index reports that twenty-eight eco-labeling entities operate within Mexico.¹⁹⁶ The eco-labels cover a vast array of products, from agricultural goods to

¹⁸⁷ See *Green Label*, THAI ENV'T INST., <http://www.tei.or.th/greenlabel/index.html> (last visited Oct. 19, 2011).

¹⁸⁸ See *About TEI*, THAI ENV'T INST., <http://www.tei.or.th/main.htm> (last visited Oct. 19, 2011).

¹⁸⁹ See *Thai Green Label Products*, THAI ENV'T INST., <http://www.tei.or.th/greenlabel/categories.html> (last visited Oct. 2, 2011).

¹⁹⁰ See *id.*

¹⁹¹ See *Criteria Development*, THAI ENV'T INST., <http://www.tei.or.th/greenlabel/ctdevelopment.html> (last visited Oct. 2, 2011).

¹⁹² See *TGL-33-04 Passenger Car*, THAI ENV'T INST., <http://www.tei.or.th/greenlabel/Eng%20PDF/TGL-33-04.pdf> (last visited Oct. 19, 2011).

¹⁹³ See GREEN LABEL: THAILAND, LIST OF GREEN THAI LABEL PRODUCT 3 (2011), <http://www.tei.or.th/greenlabel/eng%20pdf/2011-06-Name-GL-eng.pdf>.

¹⁹⁴ See *All Ecolabels in Thailand*, ECOLABEL INDEX, <http://www.ecolabelindex.com/ecolabels/?st=country=th> (last visited Oct. 2, 2011).

¹⁹⁵ See *id.* UPS uses a carbon neutral shipping label that informs consumers that UPS has offset any greenhouse gas emissions through the purchase of carbon offset credits.

¹⁹⁶ See *All Ecolabels in Mexico*, ECOLABEL INDEX, <http://www.ecolabelindex.com/ecolabels/?st=country=mx> (last visited Oct. 2, 2011).

manufactured goods.¹⁹⁷ Two of the twenty-eight eco-labels are firm-specific labels; the rest are either industry-specific or inter-industry eco-labels.¹⁹⁸ Recently, Mexico enacted a statute that regulates firms' environmental management systems.¹⁹⁹ Specifically, the statute regulates a firm's self-declared claims about its environmental performance, and the statute sets up an environmental management audit system, which allows a firm that complies with the system's reference terms to earn a certificate.²⁰⁰ High-performing firms may earn the Environmental Award of Excellence.²⁰¹ In addition, Mexico's Secretary of the Economy promulgated an internal regulation that adopts an eco-label scheme identical to ISO 14024.²⁰²

Like Mexico, Senegal has no national eco-label. In 2006, legislation created the Mécansime pour un Développement Propre (MDP), charged with taking on projects that will enhance Senegalese environmental practices.²⁰³ Ecolabel Index reports that only one eco-label operates in Senegal; it is an industry-specific label.²⁰⁴

III. NON-STATE ACTOR ENVIRONMENTAL CRITERIA-SETTING BODIES

A. Characteristics

Because non-state actors set environmental criteria without governmental authority, their criteria take the form of standards, guidelines, and codes of best practices. The actors are typically international in scope and

¹⁹⁷ *See id.*

¹⁹⁸ *See id.* Firm-specific labels include UPS and Sherwin Williams.

¹⁹⁹ *See* Reglamento de la Ley General Del Equilibrio Ecológico y la Protección al Ambiente en Materia de Autoregulación y Auditorías Ambientales [LGEEPA] [Regulation of the General Law of the Ecological Balance and the Protection to the Environmental Atmosphere in the Matter of Self-Regulation and Audits], Diario Oficial de la Federación [DO], 29 de abril de 2010 (Mex.).

²⁰⁰ *See id.* at arts. 1, 3.

²⁰¹ *See id.* at art. 31.

²⁰² *See* Etiquetas y Declaraciones Ambientales—Etiquetado Ambiental Tipo I—Principios y Procedimientos [Environmental Labels and Declarations—Environmental Labelling Type I—Principles and Procedures], DIARIO OFICIAL DE LA FEDERACIÓN [DO], 21 de mayo de 2004 (Mex.), available at http://dof.gob.mx/nota_detalle.php?codigo=678207&fecha=21/05/2004. Mexico has also adopted ISO's approach to life-cycle analysis. *See* Gestion Ambiental—Análisis del Ciclo de Vida—Principios y Marco de Referencia [Environmental Management—Analysis of the Life-Cycle—Principles and Frame of Reference], DIARIO OFICIAL DE LA FEDERACIÓN [DO], 21 de mayo de 2004 (Mex.), available at http://dof.gob.mx/nota_detalle.php?codigo=678207&fecha=21/05/2004.

²⁰³ *See* Arrêté Ministeriel No. 5610 (2006) (Sen.), available at <http://faolex.fao.org/docs/pdf/sen82370.pdf>.

²⁰⁴ *See* All Ecolabels in (Senegal + Kenya), ECOLABEL INDEX, <http://www.ecolabelindex.com/ecolabels/?st=country=sn;country=ke> (last visited Oct. 2, 2011). LEAF Marque is the only eco-labeler operating within Senegal. *See id.* LEAF Marque promotes environmentally responsible farming and certifies those that satisfy its criteria. *See* LINKING ENV'T & FARMING [LEAF], <http://www.leafuk.org/leaf/home.eb> (last visited Oct. 2, 2011).

fall into one of four groups: those composed of national or regional criteria-setting bodies, firm-specific criteria-setting bodies, industry-specific bodies, and inter-industry criteria-setting bodies.

a. *National or Regional Environmental Criteria-Setting Bodies*

Many countries have national standardizing bodies, though as noted above, few engage in setting standards for environmental marketing claims. Among the over 400 eco-labels,²⁰⁵ only twenty-seven are national.²⁰⁶ Of those, five are from developing countries; the rest are from developed countries.²⁰⁷ Given that ISO is the most prevalent international standardizing body, especially in the context of environmental marketing claim standards, national standardizing body participation in ISO also sheds light on the scope of national standardizing body activity. 45.8% of developing countries have member bodies participating in ISO.²⁰⁸ In contrast, 62.3% of developed countries participate through member bodies. ISO Technical Committee 207 (TC 207) is charged with generating environmental standards.²⁰⁹ 30% of

²⁰⁵ See ECOLABEL INDEX, *supra* note 1.

²⁰⁶ See *National Eco-Labels: Worldwide*, DER BLAUE ENGEL, http://www.blauer-engel.de/en/blauer_engel/whats_behind_it/national_eco-labels_worldwide.php (last visited Oct. 2, 2011).

²⁰⁷ The six developing countries include the People's Republic of China, India, Brazil (state and non-state actor joint label), the Philippines (launched by national government, maintained by non-state actor), and Thailand (state and non-state actor joint label). *See id.*

²⁰⁸ As noted above, developing countries are defined as low- to mid-income on the World Bank's World Resource Indicators; developed countries are defined as high income. ISO's membership is drawn from the list of its members on its website. *See ISO Members*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/about/iso_members.htm (last visited Oct. 4, 2011). ISO defines member bodies as the national body "most representative of standardization in its country." *See Member Bodies*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/about/iso_members/member_bodies.htm (last visited Oct. 4, 2011). ISO accepts only one member body from each participating country. *See id.* Member bodies may participate and vote on any policy or technical committee matter. *See id.* ISO also permits corresponding memberships to national standardizing bodies that are not yet fully developed. *See Correspondent Members*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/about/iso_members/correspondent_members.htm (last visited Oct. 4, 2011). Such members may be kept informed of ISO work of interest. However, they may not participate in meetings, and they may not vote. *See id.* 25% of developing countries are corresponding members; 5.8% of developed countries are corresponding members. *See ISO Members, supra.* Countries with "very small" economies may join ISO as subscriber members. *See Subscriber Members*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/about/iso_members/subscriber_members.htm (last visited Oct. 4, 2011). Subscriber members pay reduced fees for membership that allows them to remain in contact with international standardization, but it appears they do not have voting rights. *See id.* 7% of developing countries are subscriber members of ISO; 0.0% of developed countries are subscriber members. *See ISO Members, supra.*

²⁰⁹ *See ISO/TC 207*, <http://www.tc207.org> (last visited Oct. 4, 2011) (providing the website for ISO's TC 207 on Environmental Management).

developing countries participate on TC 207; 42% of developed countries participate on the committee.²¹⁰

Some developing countries participate in regional criteria-setting entities, such as the African Organization for Standardization (ARSO).²¹¹ Because of their regional scope, these criteria-setting bodies and organs advance the interests of geographic regions rather than specific countries. ARSO's mandate is to "develop tools for standards development, standards harmonization, and implementation of these systems to enhance Africa's internal trading capacity, increased [sic] Africa's product and service competitiveness globally, and uplift . . . the welfare of African consumers as well as standardization forum for future prospects in international trade referencing."²¹² Senegal is a founding member of ARSO.²¹³

Thailand is a member of the Association of Southeast Asian Nations (ASEAN).²¹⁴ ASEAN has taken on a number of environmental projects; in 2005, it sought to develop regional indicators for clean air, water, and land.²¹⁵ In addition, developing countries enter into formal relations with developed countries to advance their interests in criteria setting, among other tasks. Mexico's Proyecto de Facilitación del Tratado de Libre Comercio entre México y la Unión Europea (PROTLCEUM) is an agreement between Mexico and the European Union, which, in its technical standards component, increases each countries' understanding of standards, regulations, and conformity assessment processes.²¹⁶

b. *Firm-Specific Environmental Criteria-Setting Bodies*

There are a wide variety of firm-specific eco-labels; each has its own approach to setting environmental criteria and applying those criteria to products. Walmart's Sustainability Index is perhaps the best known firm-

²¹⁰ ISO permits members to observe TC 207's activities. See *TC 207—Environmental Management*, *supra* note 41. 16% of developing countries have observer status on TC 207; 11.6% of developed countries have observer status on ISO. See *id.*

²¹¹ See AFR. ORG. FOR STANDARDISATION, <http://www.arso-oran.org> (last visited Oct. 4, 2011).

²¹² *About ARSO*, AFR. ORG. FOR STANDARDISATION, http://www.arso-oran.org/?page_id=2 (last visited Oct. 4, 2011).

²¹³ See *Présentation*, *supra* note 37.

²¹⁴ See *Overview*, ASS'N SE. ASIAN NATIONS, <http://www.asean.org/64.htm> (last visited Oct. 4, 2011).

²¹⁵ See *Environment Sector*, ASS'N SE. ASIAN NATIONS, <http://www.asean.org/14470.htm> (last visited Oct. 4, 2011).

²¹⁶ See *Normalización Internacional*, *supra* note 36. Topics within the agreement include harmonizing criteria with international standards, improving the adequacy of conformity assessment processes, and increasing understanding of the role of voluntary standards and certifications. See *Plan Operativo Global del Proyecto de Facilitación del Tratado de Libre Comercio México Unión Europea para la Comisión Nacional de Normalización*, SECRETERÍA DE ECONOMÍA, http://www.economia.gob.mx/swb/es/economia/p_Tratado (last visited Oct. 4, 2011).

specific environmental criteria setting body.²¹⁷ As noted above, Walmart's goal is to provide a tool allowing consumers to assess the environmentally responsible attributes of products they seek to purchase.²¹⁸ Development of the tool requires that Walmart establish sustainability criteria for its suppliers.²¹⁹

Chemical company BASF has developed an eco-efficiency label that identifies products that have satisfied its eco-efficiency analysis.²²⁰ The analysis begins with defining a benefit that a customer may receive from a product.²²¹ All products offering the benefit are collected, and a life-cycle analysis is conducted on the products.²²² In addition, product production costs are also collected.²²³ Those products providing the least environmental impact at the best cost are awarded the label.²²⁴ A third-party has validated BASF's eco-efficiency analysis.²²⁵ BASF has partnered with the UN Industrial Development Organization (UNIDO) and the UN Environment Program (UNEP) to create a software program that allows small and medium-sized enterprises (SMEs) in developing countries to assess the eco-efficiency of their dye works; BASF has also engaged capacity building in Egypt.²²⁶

The Home Depot uses an Eco Options label to signal products that have less impact on the environment than other similar products.²²⁷ Labeled products include those that industry-specific criteria-setting bodies, such as WaterSense and Forestry Stewardship Council (FSC), have certified and those that a third-party has vetted through life-cycle analysis.²²⁸

Timberland marks products with a Green Index that rates the products' environmental impact.²²⁹ The index is based on an assessment of the products' climate impact, chemical use, and resource consumption.²³⁰ Climate impact

²¹⁷ See *Sustainability Index*, *supra* note 28.

²¹⁸ See *id.*

²¹⁹ See *id.*

²²⁰ See *Eco-Efficiency Label*, BASF CHEMICAL CO.,

<http://www.basf.com/group/corporate/en/sustainability/eco-efficiency-analysis/labels/index> (last visited Oct. 2, 2011).

²²¹ See *FAQs*, BASF CHEMICAL CO.,

http://www.basf.com/group/corporate/en/function:rendering-service:/faqsearch/faqsearch-result/resultCat/faq-sd_eco-efficiency/functions/faqsearch/faqsearch_ (last visited Oct. 2, 2011).

²²² See *id.*

²²³ See *id.*

²²⁴ See *id.*

²²⁵ See *id.*

²²⁶ See *BASF's Joint Co-Efficiency Project with UNIDO and UNEP*, BASF CHEMICAL CO., <http://www.basf.com/group/corporate/en/sustainability/global-compact/unido-unep> (last visited Oct. 2, 2011).

²²⁷ See *Eco Options*, HOMEDEPOT.COM, <http://www6.homedepot.com/ecoptions/index.html?> (last visited Oct. 2, 2011).

²²⁸ See *id.* The Home Depot's website provides no further information about the third-party certification process.

²²⁹ *Green Index Rating*, TIMBERLAND.COM, <http://responsibility.timberland.com/green-index-rating> (last visited Oct. 2, 2011).

²³⁰ See *id.*

uses an ISO 14000 compliant life-cycle analysis to measure greenhouse gas emissions.²³¹ Chemical use focuses on the presence of polyvinyl chloride and solvent adhesives.²³² Resource consumption considers the percentage of recycled, organic, and renewable sources within the products.²³³ Nothing in Timberland's literature suggests that it exposes the products to third-party verification.

c. *Industry-Specific Environmental Criteria-Setting Bodies*

The vast majority of eco-labels are the product of non-state actor industry-specific environmental criteria-setting bodies.²³⁴ These organizations are typically international in scope and develop expertise in setting criteria for a single industry or small group of industries. Examples include FSC²³⁵ and the Marine Stewardship Council (MSC).²³⁶ Each generates standards of conduct and certification schemes, including an eco-label for its respective industry.²³⁷ FSC creates policies and standards that support worldwide responsible forestry management.²³⁸ It draws upon third-party certification bodies to assess whether entities seeking use of the FSC label have satisfied the FSC criteria.²³⁹ Likewise, MSC sets policy and standards for fisheries, and it, too, draws upon third-party certifiers to assess whether fisheries have satisfied the MSC standards.²⁴⁰ MSC provides technical assistance to fisheries that have not yet satisfied MSC standards.²⁴¹ MSC also has a Developing World Program designed to build capacity among developing country fisheries and to facilitate developing country participation in its policy and standard-setting activities.²⁴²

²³¹ See *id.*

²³² See *id.*

²³³ See *id.*

²³⁴ See *All Ecolabels*, ECOLABEL INDEX, <http://www.ecolabelindex.com/ecolabels> (last visited Oct. 2, 2011).

²³⁵ See FOREST STEWARDSHIP COUNCIL, <http://www.fsc.org> (last visited Oct. 2, 2011).

²³⁶ See MARINE STEWARDSHIP COUNCIL, <http://www.msc.org> (last visited Oct. 2, 2011).

²³⁷ See FOREST STEWARDSHIP COUNCIL, *supra* note 235; MARINE STEWARDSHIP COUNCIL, *supra* note 236.

²³⁸ See *Policy & Standards*, FOREST STEWARDSHIP COUNCIL, http://www.fsc.org/policy_standards.html (last visited Oct. 2, 2011).

²³⁹ See *Accreditation Program*, FOREST STEWARDSHIP COUNCIL, <http://www.fsc.org/accreditation.html> (last visited Oct. 2, 2011).

²⁴⁰ See *Get Certified! Fisheries*, MARINE STEWARDSHIP COUNCIL, <http://www.msc.org/get-certified/fisheries> (last visited Oct. 2, 2011).

²⁴¹ See *Find a Consultant for Fishery Improvements*, MARINE STEWARDSHIP COUNCIL, <http://www.msc.org/get-certified/fisheries/technical-assistance/consultants> (last visited Oct. 2, 2011).

²⁴² See *About the Developing World Program*, MARINE STEWARDSHIP COUNCIL, <http://www.msc.org/about-us/credibility/working-with-developing-countries/about-the-developing-world-programme> (last visited Oct. 2, 2011).

d. *Inter-Industry Environmental Criteria-Setting Bodies*

Inter-industry environmental criteria-setting bodies can be roughly divided into three groups: (1) those that focus on setting standards that any industry can use, such as ISO, (2) those that certify firms' efforts to set environmental criteria, such as the Consumer Goods Forum (CGF), and (3) those that both set inter-industry criteria and certify against those criteria, such as Green Business.

With the release of its environmental management system standard, ISO has become a major player among non-state actor environmental criteria-setting bodies. It has generated a number of standards related to environmental marketing claims, including ISO 14020, providing general principles for environmental labels; ISO 14021 for self-declared environmental marketing claims; ISO 14024 for third-party claims; ISO 14025 for claims regarding products' life cycles; ISO 14040, which provides a framework for conducting life-cycle analysis; ISO 14044 for life-cycle analysis requirements and guidelines; and ISO 14049, which provides examples for conducting life-cycle analysis.²⁴³ In addition, ISO has developed a number of standards related to the collection and reporting of greenhouse gas emissions (ISO 14064 series), and ISO is currently developing a standard for determining carbon footprints.²⁴⁴

ISO's standards are generic in the sense that any firm can use the standards to develop its own environmental marketing scheme, but standards are also specific in that they provide definitions of commonly used terms and criteria for environmental label development and maintenance.²⁴⁵ ISO does not certify that firms are in compliance with its standards; instead, it sets criteria for certifying bodies.²⁴⁶ As noted above, ISO sets standards through technical committees (TCs); TC 207 is charged with generating environmental

²⁴³ See *TC 207/SC 3: Environmental Labelling*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_tc_browse.htm?commid=54836 (last visited Oct. 2, 2011); *TC 207/SC 5: Life Cycle Assessment*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_tc_browse.htm?commid=54854 (last visited Oct. 2, 2011).

²⁴⁴ See *TC 207/SC 7: Greenhouse Gas Management and Related Activities*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_tc_browse.htm?commid=546318 (last visited Oct. 2, 2011).

²⁴⁵ See, e.g., ISO 14024 (providing a set of definitions for commonly used environmental marketing claims, including recyclable, compostable, and biodegradable, and also providing the steps a firm must negotiate to create an environmental label scheme).

²⁴⁶ See, e.g., ISO 14024 Part 7 (listing items certifiers must consider and procedures for assessing compliance with the eco-label).

management standards.²⁴⁷ TC 207, like other ISO TCs, is made up of member bodies or observers.²⁴⁸ Each member or observer represents the national standardizing body of one country.²⁴⁹ The national standardizing bodies may be state or non-state actors.²⁵⁰ They are expected to take into account the views of all national stakeholders relevant to the standard under development.²⁵¹ Once TC member bodies have drafted a standard, they vote on it; if two-thirds vote in favor and no more than one-quarter vote against it, the final draft standard is sent to all member bodies for a vote.²⁵² Again, if two-thirds vote for and no more than one quarter vote against, the standard is accepted as an international standard.²⁵³ If a draft or final standard fails to achieve the required threshold votes, it is sent back to the TC for further revision.²⁵⁴

Like ISO, CGF sets general environmental criteria but does not certify firms' compliance with the criteria. In contrast with ISO, which has ties to national government standardizing bodies, CGF is a global network of 650 retailers, manufacturers, service providers, and other stakeholders.²⁵⁵ It began in 2009 with the merger of Comité International d'Entreprises à Succursales (CIES), a network of food and consumer goods retailers, and CEO Forum and Global Commerce Initiative, which were networks of retailers and manufacturers.²⁵⁶

CGF's mandate is to "develop common positions on key strategic and operational issues affecting the consumer goods business."²⁵⁷ Sustainability is one of the organization's "strategic priorities."²⁵⁸ CGF is developing common positions on sustainability through the Global Social Compliance Programme (GSCP).²⁵⁹ Currently GSCP has thirty-two members, including adidas, Best

²⁴⁷ See *TC 207: Environmental Management*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_tc_browse.htm?commid=54808 (last visited Oct. 2, 2011).

²⁴⁸ See *TC 207*, INT'L ORG. FOR STANDARDIZATION [ISO], http://www.iso.org/iso/standards_development/technical_committees/list_of_iso_technical_committees/iso_technical_committee.htm?commid=54808 (last visited Oct. 2, 2011).

²⁴⁹ See *How ISO Develops Standards*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/about/how_iso_develops_standards.htm (last visited Oct. 2, 2011).

²⁵⁰ See *id.*

²⁵¹ See *id.*

²⁵² See *id.*

²⁵³ See *id.*

²⁵⁴ See *id.*

²⁵⁵ See *Who We Are*, CONSUMER GOODS FORUM, <http://www.theconsumergoodsforum.com/1-wweare/index.asp> (last visited Oct. 2, 2011).

²⁵⁶ See *Who We Are, History*, CONSUMER GOODS FORUM, <http://www.theconsumergoodsforum.com/1-wweare/1.1-history/index.asp> (last visited Oct. 2, 2011).

²⁵⁷ *Who We Are*, *supra* note 255.

²⁵⁸ See *id.*

²⁵⁹ See *Who We Are: Our Professional Committees*, CONSUMER GOODS FORUM, <http://www.theconsumergoodsforum.com/1-wweare/1.4-committees/index.asp> (last visited Oct. 2, 2011).

Buy, Dole, Ikea, and Walmart.²⁶⁰ Any “buying companies” worldwide may join GSCP, regardless of the nature of the consumer goods sold, and participants need not be members of CGF.²⁶¹ GSCP has developed a set of reference tools representing the common knowledge available on sustainability issues.²⁶² Members commit themselves to non-competitive use of the tools, meaning that their compliance with the tools may not be used for marketing or seeking a competitive advantage over other retailers.²⁶³ Instead, the tools are designed to build upon international standards and harmonize existing systems.²⁶⁴ All tools are freely available to GSCP members and non-members.²⁶⁵

GSCP has released three tools that address firms’ environmental practices: Environmental Reference Requirements, Environmental Implementation Guidelines, and Reference Environmental Audit Process.²⁶⁶ The Environmental Reference Requirements describe environmental best practices and a set of common interpretations of environmental requirements and their implementations.²⁶⁷ The tool is designed for sites across a supply chain.²⁶⁸

The Environmental Reference Requirements provide three levels of performance: Awareness and Compliance, Proactive Management and Performance Improvement, and Leading Practice.²⁶⁹ At Level 1, the firm must demonstrate that it has a basic environmental management structure, it is aware of its significant environmental aspects and impacts, it is aware of and complies with applicable legal requirements, and it provides workers with information and training regarding environmental issues.²⁷⁰ Level 1’s focus is on site-level operations, activities, and potential environmental impacts.²⁷¹

²⁶⁰ See *GSCP Members: The Task Force*, GLOBAL SOC. COMPLIANCE PROGRAMME, <http://www.gscpnet.com/structure-a-governance/task-force.html> (last visited Oct. 2, 2011).

²⁶¹ See *id.*

²⁶² See *What is the Global Social Compliance Programme (GSCP)?*, GLOBAL SOC. COMPLIANCE PROGRAMME, <http://www.gscpnet.com/about-the-gscp/about-the-gscp.html> (last visited Oct. 2, 2011).

²⁶³ See *id.*

²⁶⁴ See *id.*

²⁶⁵ See *id.*

²⁶⁶ See *GSCP Environmental Reference Tools*, GLOBAL SOC. COMPLIANCE PROGRAMME, <http://www.gscpnet.com/working-plan/environmental-module.html> (last visited Oct. 2, 2011).

²⁶⁷ See GLOBAL SOC. COMPLIANCE PROGRAMME, ENVIRONMENTAL REFERENCE REQUIREMENTS 2 (2010) [hereinafter ENVIRONMENTAL REFERENCE REQUIREMENTS], available at http://www.gscpnet.com/gscpfiles/GSCP_Environmental_Reference_Requirements.pdf.

²⁶⁸ See *id.*

²⁶⁹ See *id.* at 3.

²⁷⁰ See *id.* at 4. The Reference Requirements cover the following “performance areas”: environmental management system, energy use, transport and greenhouse gases, water use, wastewater effluent, emissions to air, waste management, pollution prevention/hazardous and potentially hazardous substances, major incident prevention and management, contaminated land/soil and groundwater pollution prevention, land use and biodiversity, and nuisances. See *id.* at 5.

²⁷¹ See *id.*

Level 2 requires that the firm have an environmental management system in place, that the firm engage workers and representatives in environmental issues, that its environmental practices are consistent with international standards, and that the firm demonstrates that it is managing all significant environmental aspects and impacts, and achieving performance improvement targets.²⁷² Level 2 moves the firm's focus from its site to its interactions with and influences on the local environment.²⁷³

Level 3 requires that the firm's environmental management and performance exceed industry standards, the firm engages with key stakeholders to achieve "significant" improvement in performance, the firm considers its environmental impact and influence on areas beyond the firm's local environment, and that the firm demonstrates leadership in environmental management and the ability to stretch its performance improvement targets.²⁷⁴ Should a firm find that applicable international, regional, national, or local environmental regulations are more stringent than the GSCP reference requirements, the regulations "shall take precedence."²⁷⁵

GSCP's Environmental Implementation Guidelines provide guidance for the implementation of the Environmental Reference Requirements.²⁷⁶ For each Reference Requirement, the Guidelines provide background information, interpretations, a set of action statements, and examples for how to comply with the action statements and the Reference Requirement.²⁷⁷

GSCP's Reference Environmental Audit Process & Methodology provides a set of best practices and tools for auditing the environmental management practices of firms within a retailer's supply chain.²⁷⁸ The Reference's topics include risk assessment, preparing for and conducting audits, and interpreting the audit results.²⁷⁹ The audit materials are based on the Environmental Reference Requirements but can be adapted to other environmental practice codes.²⁸⁰ The audit tools include self assessments, pre-audit site profiles, audit checks, alert notifications, audit reports, summaries of findings and corrective action, and supplemental audit information.²⁸¹

Like ISO and CGF, ISEAL sets environmental criteria but does not certify compliance with the criteria. ISEAL is more like CGF than ISO because it is a purely private entity, but in contrast to CGF, which sets environmental standards for buying companies, ISEAL sets standards for firms

²⁷² See *id.*

²⁷³ See *id.*

²⁷⁴ See *id.*

²⁷⁵ See *id.*

²⁷⁶ See GSCP, Environmental Implementation Guidelines (2010), available at http://www.gscpnet.com/gscpfiles/GSCP_Environmental_Implementation_Guidelines.pdf.

²⁷⁷ See *id.* at 15–16.

²⁷⁸ See GSCP, Reference Environmental Audit Process & Methodology (2010), available at <http://www.gscpnet.com/working-plan/environmental-module.html>.

²⁷⁹ See *id.* at 3.

²⁸⁰ See *id.* at 4.

²⁸¹ See *id.* at 3.

that certify other firms' environmentally responsible practices within specific industries. ISEAL is essentially a non-profit association of non-state standardizing bodies.²⁸² It provides guidance and support to entities that generate voluntary social and environmental standards.²⁸³ Its guidance includes a set of good practice codes; its support includes working with private companies, other non-profits, and governments that use or reference voluntary codes.²⁸⁴ ISEAL's Codes of Good Practice currently include a guide for Setting Social and Environmental Standards²⁸⁵ (Standard-Setting Code) and an Assessing the Impacts of Social and Environmental Standard Systems²⁸⁶ (Impacts Code). ISEAL is currently drafting an Assurance Code, which will provide guidance on auditor competence, audit implementations, transparency, consistency in standard interpretation, and accessibility to audit systems.²⁸⁷ ISEAL expects to publish its first draft of the Assurance Code in 2012.²⁸⁸

²⁸² See *About Us*, ISEAL ALLIANCE, <http://www.isealalliance.org/content/about-us> (last visited Oct. 3, 2011) [hereinafter ISEAL ALLIANCE]. Full members of ISEAL include the Forestry Stewardship Council, Marine Stewardship Council, Rainforest Alliance, and Roundtable on Sustainable Biofuels. *Full Members*, ISEAL ALLIANCE, http://www.isealalliance.org/organisation/full_members (last visited Nov. 1, 2011) [hereinafter *ISEAL Full Members*]. Associate members are those that are committed to complying with the ISEAL codes but are not yet in full compliance. Associate members include Alliance for Water Stewardship, Bonsucro, Global Footprint Network, and People 4 Earth. See *Associate Members*, ISEAL ALLIANCE, http://www.isealalliance.org/organisation/associate_members (last visited Nov. 1, 2011).

²⁸³ See ISEAL ALLIANCE, *supra* note 282.

²⁸⁴ See *id.*

²⁸⁵ See ISEAL, *Setting Social and Environmental Standards v.5.0 (2010)*, available at http://www.isealalliance.org/sites/default/files/P005_ISEAL_Std-Setting_Code_v5.01.pdf [hereinafter *Standard-Setting Code*] (last visited Nov. 05, 2011). ISEAL is submitting its *Standard-Setting Code* to a review process scheduled to begin in 2013. See *id.* at 2. The process will establish a steering committee that will make revisions to the code in light of comments previously received, open the code to public comment, consider the comments, make any needed revisions to the code, and submit the revised code to the ISEAL Stakeholder Council for a recommendation regarding approval. See *id.* If the council recommends approval, the revised code would be submitted to the ISEAL Board for approval. See *id.*

²⁸⁶ See ISEAL, *Assessing the Impacts of Social and Environmental Standards Systems v.1.0 (2010)* [hereinafter *ISEAL Impacts Code*], available at http://www.isealalliance.org/sites/default/files/P041_ISEAL_Impacts_Codev1.0.pdf (last visited Nov. 05, 2011).

²⁸⁷ See Patrick Mallet & Paddy Doherty, *The ISEAL Assurance Code (June 10, 2011)*, available at <http://www.isealalliance.org/sites/default/files/Assurance%20Code%20Presentation%20Jun%2010%202011.pdf> (last visited Nov. 05, 2011).

²⁸⁸ See *id.* ISEAL's Assurance Code July 2011 Newsletter sheds some light on the direction the code is taking. See Paddy Doherty, *The ISEAL Assurance Code Newsletter July 2011*, available at <http://www.isealalliance.org/sites/default/files/Assurance%20Code%20Newsletter%20July%202011.pdf> (last visited Nov. 05, 2011). The Code's goal is to develop a model of assurance that will "help deliver the sustainability aspects of the standards system." *Id.* Assurance that standards are met should not be seen as a purely regulatory function. See *id.* Instead, assurance should be a collaborative process, such that the producer and the certifier work

Because the Assurance Code is not complete, the Article will briefly summarize ISEAL's Standard-Setting and Impacts Codes.

The Standard-Setting Code provides standardizing bodies with criteria to determine whether organizations that use the standardizing bodies' standards will make progress toward achieving their environmental objectives, without creating unnecessary barriers to trade.²⁸⁹ The Standard-Setting Code draws upon the ISO/IEC Guide 59 Code of Good Practice for Standardization, the TBT's Code of Good Practice, and the TBT's Principles for the Development of International Standards.²⁹⁰ ISEAL's code notes that the ISO/IEC and TBT good practice guides were not specifically designed for environmental standards.²⁹¹ The Standard-Setting Code states that it serves to complement and coexist with the ISO/IEC and TBT guides, providing information especially relevant to environmental standard setters.²⁹² In addition to its code provisions, ISEAL's Standard-Setting Code includes "non-binding" guidance provisions, designed to build capacity for standardizing bodies.²⁹³ The Standard-Setting Code applies only to voluntary standards.²⁹⁴

Organizations seeking to claim compliance with the Standard-Setting Code must adopt the entire code²⁹⁵ and must demonstrate their compliance to an "independent evaluation mechanism" that ISEAL has established.²⁹⁶ Upon commencement of standard development, the Code requires that the organization generate and publish a set of "terms of reference," which include the following elements: (1) justification of the need for the standard; (2) objectives of the standard; and (3) assessment of the risk of implementing the standards and a plan for mitigating them.²⁹⁷

The Code's guidance further requires that the standardizing body identify relevant interested parties and any groups subject to being disadvantaged by the standard, such as developing countries.²⁹⁸ Interested parties include any individual or group that a standard concerns or directly affects.²⁹⁹ The standardizing body must generate a stakeholder map that identifies the proposed standards' major interest sectors, key interested parties, key stakeholders, and a means to communicate with them.³⁰⁰ The body must approach stakeholders, proactively seeking their contribution to the standard-

together to see that the client reaches its goal. *See id.* In addition, the Assurance Code should explain the relationship between certifier capacity building and certifier impartiality. *See id.*

²⁸⁹ *See* Standard-Setting Code, *supra* note 285, at 3.

²⁹⁰ *See id.*

²⁹¹ *See id.* ¶ 1.2

²⁹² *See id.*

²⁹³ *See id.* at 3

²⁹⁴ *See id.* ¶¶ 1.2, 3.3.

²⁹⁵ *See id.* ¶ 4.1.1.

²⁹⁶ *See id.* ¶ 4.1.2.

²⁹⁷ *See id.* ¶ 5.1.1.

²⁹⁸ *See id.*

²⁹⁹ *See id.* ¶ 3.2.

³⁰⁰ *See id.* ¶ 5.3.1.

development process.³⁰¹ And, in an effort to maintain consistency among standards, the standardizing body must inform organizations that have generated related standards of its proposed standard and invite their participation.³⁰² When the process impacts disadvantaged groups, such as developing countries, the standardizing body must seek to fund the groups' participation; when not possible, the body must look to other means to facilitate their participation, such as through technical assistance and capacity building.³⁰³

In addition, the standardizing body must make its terms of reference, standard-setting process, and decision-making process publicly available, at least in electronic form on the body's website.³⁰⁴ The standardizing body must give interested parties an opportunity to comment on the summary of the standard and the proposed terms of reference.³⁰⁵ The standardizing body must receive comments for a reasonable time and have a process in place for considering the comments.³⁰⁶ The decision-making process must "strive for consensus,"³⁰⁷ in other words, general agreement—the absence of sustained opposition from important concerned interests on substantial issues.³⁰⁸ The body must define criteria for determining whether the body will consider an alternative decision-making process, such as voting, and the method for the voting.³⁰⁹ The body must ensure that the decision-making process will not allow a significant interest group to dominate or be dominated during the process.³¹⁰ Instead, the decision-making process must be characterized by a "balance of interests" among all interested parties.³¹¹ When a standardizing body limits decision-making to its members, it must provide membership criteria that is "transparent and non-discriminatory."³¹²

Furthermore, the standard's objective must be clear and explicitly stated.³¹³ The standard's structure must form a "logical framework" that links the standard's objective to its principles, criteria, indicators, and verifiers.³¹⁴ The structure must allow for an assessment of progress toward achieving the

³⁰¹ *See id.*

³⁰² *See id.* ¶ 6.6.1.

³⁰³ *See id.* ¶ 5.7.3.

³⁰⁴ *See id.* ¶ 5.2.1.

³⁰⁵ *See id.* ¶ 5.2.2.

³⁰⁶ *See id.*

³⁰⁷ *See id.* ¶ 5.9.1.

³⁰⁸ *See id.* ¶ 3.1.

³⁰⁹ *See id.* ¶ 5.9.1.

³¹⁰ *See id.* ¶ 5.9.2.

³¹¹ *See id.* ¶ 5.5.1.

³¹² *See id.* ¶ 5.5.3. Transparency requires that the membership decision-making process and justification for a membership decision must be made available to the applicant. *See id.* at ¶ 5.5.3 Guidance Provisions. Membership criteria is non-discriminatory when the criteria is objective, the fees are not excessive, and the process ensures all parties interested in membership receive "objective and transparent" treatment. *See id.*

³¹³ *See id.* ¶ 6.1.1.

³¹⁴ *See id.* ¶ 6.2.1.

standard's objective.³¹⁵ A standardizing body must express the standard's structure in terms of "process, management and performance criteria" not "design or descriptive" terms.³¹⁶ Thus, the standard's focus must be on the way a product is produced, the way production is managed, and the actual practices that define the way the product performs.³¹⁷ The standard should not be prescriptive or descriptive but outcomes-based.³¹⁸ A standardizing body must use existing international standards as the basis for regional or national standards, unless doing so would be "ineffective or inappropriate."³¹⁹ Such conditions arise upon consideration of "fundamental climactic, geographic, or technical factors," cultural factors, and economic and regulatory conditions.³²⁰ When adopting international standards, the standardizing body must develop "interpretive guidance" that explains how to take into account local conditions when applying the standards.³²¹ A standard must be "no more trade-restrictive than necessary" to fulfill its objective.³²²

Once a standardizing body develops a draft standard, it must subject the draft to at least one comment round.³²³ If the comment round results in persisting unresolved issues, the body must subject the draft to a second comment round.³²⁴ In general the comment rounds should last for sixty days.³²⁵ The body must take all comments into account, either by incorporating into the standard the issue area that the comment addresses or by providing a justification for not incorporating it.³²⁶ The body must prepare a written synopsis of how it has addressed each issue raised in the comments it has received.³²⁷ It must then publish the synopsis and send it to all parties that submitted comments.³²⁸

The standardizing body must promptly place all final standards in the public domain and make them available for free in electronic format.³²⁹ The body must make hard copies available upon request, charging only reasonable administrative costs.³³⁰ In addition to publishing its standards, the body must also make its work program publicly available, updating it every six months.³³¹

³¹⁵ See *id.* ¶ 6.2.2.

³¹⁶ See *id.* ¶ 6.3.2.

³¹⁷ See *id.* ¶ 6.3.2.

³¹⁸ See *id.*

³¹⁹ See *id.* at ¶ 6.5.1.

³²⁰ See TBT, *supra* note 32, at Annex 3, ¶ F.

³²¹ See Standard-Setting Code, *supra* note 285, ¶ 6.5.2.

³²² See *id.* ¶ 6.1.2.

³²³ See *id.* ¶ 5.6.1

³²⁴ See *id.* ¶ 5.6.1.

³²⁵ See *id.* ¶ 5.6.2. A body may shorten the comment period to a minimum of 30 days, if needed. See *id.* If it does so, it must publish the justification for the shortened period. See *id.*

³²⁶ See *id.* ¶¶ 5.8.1, 5.8.1.

³²⁷ See *id.* ¶ 5.8.2.

³²⁸ See *id.* ¶ 5.8.3.

³²⁹ See *id.* ¶ 5.10.2.

³³⁰ See *id.* ¶ 5.10.3. Upon request, the standardizing body must provide, within its means, translations of the standard's draft and final versions. See *id.* at ¶ 5.10.4.

³³¹ See *id.* ¶ 5.4.1.

The work program must include the body's contact information and the scope, objective, and rationale for each standard.³³²

ISEAL's Impacts Code is a tool that standardizing bodies can utilize to determine whether their assessment of their standardizing systems is effective.³³³ Like the Standard-Setting Code, the Impacts Code is expressly applicable to environmental standardizing bodies.³³⁴ The Code is based on a set of assessment principles, which include ensuring that the assessment (1) has an appropriate scope; (2) has a practical focus, meaning that it makes effective use of resources and has a realistic approach to assessment; (3) has consistent and credible evaluations and impact assessments; (4) is open to stakeholders' scrutiny; (5) provides effective communication; (6) invites broad stakeholder participation; (7) leads to improved effectiveness; and (8) springs from the standardizing body's institutional capacity.³³⁵

The substantive portions of the Impacts Code enable a standardizing body to assess whether its standards system is achieving its goals.³³⁶ In the context of a review that involves stakeholders and a transparent setting, the Impacts Code has the standardizing body identify its long-term sustainability goals, link those goals to the issues that the body wants to address, and define the desired sustainability impacts, expected outcomes, and outcome indicators.³³⁷ In addition, the standardizing body must assess the effectiveness of the strategies that support standard adoption and compliance.³³⁸ The strategies include verification of standards' compliance, the presence of incentives to encourage compliance, promotions of the standard, provision of capacity training, and efforts to advocate for the recognition of the standards in regulation.³³⁹ The Impacts Code provides standards and guidance for conducting the review of standards systems, covering topics such as indicator selection, data collection, data management, and data confidentiality.³⁴⁰ And the Impacts Code provides standards for evaluation of the data obtained, for learning from the evaluation, and for improving standards systems in light of the evaluation.³⁴¹

In contrast to ISO, CGF, and ISEAL, the Green Business Network sets environmental marketing claim criteria and certifies firms' compliance with its criteria. Green Business offers a seal of approval to a variety of industries, including consumer products and services.³⁴² Firms interested in the seal

³³² See *id.*

³³³ See ISEAL Impacts Code, *supra* note 286, at 3.

³³⁴ See *id.* at 1.

³³⁵ See *id.* at 4.

³³⁶ See *id.*

³³⁷ See *id.* ¶¶ 8.1–8.4, 9.1.

³³⁸ See *id.* ¶ 8.5

³³⁹ See *id.*

³⁴⁰ See *id.* ¶¶ 9.1–9.7.

³⁴¹ See *id.* ¶¶ 10–11.

³⁴² See *Standards & Ratings System*, GREEN BUSINESS NETWORK,

<http://www.greenbusinessnetwork.org/seal-of-approval/standards-and-rating-system.html> (last visited Nov. 1, 2011).

submit an application. Upon receipt, Green Business screens the firms against Green Business' criteria.³⁴³ The criteria include general terms, such as environmentally responsible sourcing, manufacturing, and marketing, and more specific criteria, depending upon the firms' industries.³⁴⁴ Some of the specific criteria are Green Business-generated. For example, the principles that Green Business applies to a clothing and fabric producer include whether the firm uses certified organic, reclaimed, or recycled fibers or other sustainable materials.³⁴⁵ Its preferences for such firms include the use of natural or low-impact dyes that are fiber reactive and phosphate free.³⁴⁶ Others are based on industry-specific criteria-setting bodies, such as the Global Organic Textile Standard.³⁴⁷ In 2011, Green Business began an internal audit of firms using its seal; its plan is to audit members at least once every three years.³⁴⁸ Green Business operates through a non-profit organization called Green America.³⁴⁹ In addition to operating Green Business, Green America also publishes National Green Pages, which lists businesses that have received Green Business' seal and other businesses that satisfy its "basic criteria," though the basic criterion is not defined.³⁵⁰

B. Legal Landscape Applicable to Non-State Actor Criteria-Setting Bodies

This Part of the Article will first describe the existing relevant WTO law, focusing on the portions of the TBT and its Code of Good Practice applicable to non-state actors³⁵¹ and the TBT Committee's decision on

³⁴³ *See id.*

³⁴⁴ *See id.*

³⁴⁵ *See Clothing and Fabric Products*, GREEN BUSINESS NETWORK, <http://www.greenbusinessnetwork.org/clothing-a-fabric-products.html> (last visited Oct. 4, 2011).

³⁴⁶ *See id.*

³⁴⁷ *See id.* (linking to GLOBAL ORGANIC TEXTILE STANDARD (GOTS), <http://www.global-standard.org> (last visited Nov. 1, 2011)).

³⁴⁸ *See Screening FAQ*, GREEN BUSINESS NETWORK, <http://www.greenbusinessnetwork.org/seal-of-approval/screening-faq-.html> (last visited Oct. 4, 2011).

³⁴⁹ *See Green America—About Us*, GREEN AMERICA, <http://www.greenamerica.org/about/> (last visited Oct. 4, 2011).

³⁵⁰ *See National Green Pages Sign-up*, NATIONAL GREEN PAGES, <http://www.greenpages.org/advertise.php> (last visited Oct. 4, 2011).

³⁵¹ Note that the discussion here does not focus on TBT article 3 because that article applies to local state and any non-state actor promulgation of technical regulations. *See* TBT, *supra* note 32, at art. 3. Because environmental marketing claims are generally voluntary, they do not fall within the TBT's definition of technical regulation. *See id.* at Annex 1 ¶ 1. The article requires members to take "such reasonable measures as may be available to them" to ensure that local and non-state actors comply with the provisions of article 2, noted above, except for the provisions regarding notice to other members. *See id.* at art. 3.1. Members are "fully responsible" for their observance of article 2's provisions as well as the observance of local governments and non-state actors operating within their territories. *See id.* at art. 3.5. The

Principles for the Development of International Standards, Guides, and Recommendations with Relation to articles 2, 5, and Annex 3 of the Agreement.³⁵² Next, this Part will examine whether the existing law obligates non-state actors such as those described above to integrate developing country interests into their standards development processes.

1. *WTO Law Applicable to Non-State Actor Criteria-Setting Bodies*

a. *Agreement on Technical Barriers to Trade*

As noted above, TBT article 4 requires members to take “reasonable measures” to ensure that non-governmental standardizing bodies operating within their territories are complying with the TBT Code of Good Practice.³⁵³ Significant substantive provisions of the Code of Good Practice include standardizing bodies’ obligations to treat domestic products “no less favorably” than foreign “like products”³⁵⁴ and to ensure that the standard development process does not create “unnecessary obstacles to international trade.”³⁵⁵

A threshold question is whether the non-state actors described above fall within the TBT definition of non-governmental standardizing bodies. TBT Annex 1 defines a non-governmental body as a body other than a central or local governing body.³⁵⁶ Thus, each of the non-state actors described above, from national and regional standardizing bodies to Walmart to Timberland to ISO and ISEAL, would qualify as a non-governmental body because each is not central or local governing bodies. The next issue is whether the non-state actors described above are standardizing bodies within the context of the TBT. The TBT does not define “standardizing body,” but it defines “standard.” As noted above, a standard is a document that a “recognized body” has approved, which provides:

For common and repeated use, rules, guidelines or characteristics for products or related processes and

article requires members to form and implement “positive measures” that will assure local and non-state actor are observing article 2’s requirements. *See id.*

³⁵² *See Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995*, G/TBT/Rev.9, Annex B (Sept. 8, 2008).

³⁵³ *See TBT*, *supra* note 32, at art. 4.1.

³⁵⁴ *See id.* at Annex 3, ¶ D.

³⁵⁵ *See id.* at Annex 3, ¶ E.

³⁵⁶ *See id.* at Annex 1, § 7. The definition expressly includes those non-central and local governing bodies that have legal power to enforce technical regulations. *See id.* However, the definition does not limit non-governmental bodies to those that have legal power to enforce technical regulations; it merely states that those bodies fall within the definition. *See id.* In the context of environmental marketing claims, the authority to enforce technical regulations is rarely at issue because the applicable criteria are voluntary standards, not mandatory regulations.

production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking, or labelling requirements as they apply to a product, process or production method. Logically, a body that makes standards is a standardizing body.³⁵⁷

Nothing in the TBT, its definitional annex, or its interpretations defines “recognized body,” but because the TBT definitional annex defines a number of bodies, including local governing, central governing, regional, international, and non-governmental, a fair inference can be drawn that “recognized body” refers to one of the bodies defined in the annex.³⁵⁸ Given that, as previously noted, the TBT Annex broadly defines non-governmental bodies and the non-state actors described here fit within that definition, for the purpose of the TBT’s definition of standard, the non-state actors are “recognized bodies.”

Attention next turns to whether the actions of the non-state actors are standardizing actions. Again, the breadth of the TBT standard definition likely catches the non-state actors identified here. Without question, national and regional standardizing bodies are engaged in the practice of producing standards. In addition, Walmart’s Sustainability Index, BASF’s eco-efficiency label, and Timberland’s Green Index are standards for the purpose of the TBT because the schemes provide voluntary guidelines or characteristics for products. For the same reason, ISO, CGF, and ISEAL are each standardizing bodies. Thus, to ensure standardizing body compliance with the TBT Code of Good Practice, members’ obligations under TBT article 4 apply to each of the non-state actor criteria-setting bodies described here.

b. Principles to Guide the Development of International Standards

TBT article 15.4 requires the WTO’s TBT committee to meet every three years and “review the operation and implementation” of the TBT to ensure members’ “mutual economic advantage” and balance members’ “rights and obligations” under the TBT.³⁵⁹ During its second triennial review, which took place at a series of meetings from 1998-2000,³⁶⁰ the TBT committee

³⁵⁷ See *id.* at Annex 1, ¶ 2.

³⁵⁸ TBT Annex 1 notes that the terms used in the TBT that are the same as those used in the ISO/IEC Guide 2:1991 have the same meaning as assigned in the ISO/IEC Guide. However, nothing in the ISO/IEC Guide 2:1991 defines “recognized body.” See Arthur E. Appleton, *Supermarket Labels and the TBT Agreement*, 4 BUS. L. BRIEF 10, 12, nn. 20–22 (Fall 2007). The Guide defines “body” as a “legal or administrative entity that has specific tasks and composition.” *Id.* at 21.

³⁵⁹ See TBT, *supra* note 32, at art. 15.4.

³⁶⁰ See WTO Comm. on Technical Barriers to Trade, *Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade*, G/TBT/9, at 2 (Nov. 13, 2000).

reached a decision on the Principles to Guide the Development of International Standards under TBT articles 2, 5, and the Code of Good Practice (Standards Development Principles).³⁶¹ The Standards Development Principles reflect the committee's recognition that "[a]dverse trade effects might arise from standards emanating from international bodies" that lacked "procedures for soliciting input from a wide range of interests."³⁶² Therefore, for international standards to have their maximum impact on the "trade-facilitating objectives of the [a]greement," all members should have "the opportunity to participate in the elaboration and adoption of international standards."³⁶³ To ensure that "all members" have such opportunities, the Standards Development Principles set levels for standardizing bodies' transparency, openness, impartiality, consensus, relevance, effectiveness, coherence, and consideration of developing countries' constraints on participation in standards development.³⁶⁴

Nothing in the Standards Development Principles or the statement of background and purpose supporting them explicitly states to whom the Principles apply. However, the Standards Development Principles state that they relate to TBT articles 2, 5, and Annex 3.³⁶⁵ TBT articles 2 and 5 address members' central governing bodies;³⁶⁶ the Code of Good Practice applies to any standardizing body that chooses to accept it.³⁶⁷ Thus, the Standards Development Principles apply directly to members' central governing bodies and any standardizing body that has accepted the Code of Good Practice. Given that, as noted above, the non-state actor criterion-setting bodies described here are standardizing bodies, any bodies that have accepted the TBT Code of Good Practice must also comply with the Standards Development Principles.

1. *Transparency*

Standardizing bodies should make "all essential information" regarding their work on standards development "easily accessible" to at least the interested parties within members' territories.³⁶⁸ Transparency processes should minimally include: (1) notifications regarding proposed standards should be made early enough for interested parties to become familiar with the proposals; (2) sufficient notice of draft standards should be given early enough

³⁶¹ See WTO Comm. on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the Committee since 1 January 1995*, G/TBT/1/Rev.7, at 26 (Nov. 28, 2000).

³⁶² See Decision of the Committee on Principles for the Development of International Standards, Guides, and Recommendations, with Relation to Articles 2, 5, and Annex 3 of the Agreement, WTO Committee on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the Committee since 1 January 1995*, G/TBT/1/Rev.7, at § IX (Nov. 28, 2000) [hereinafter Principles for the Development of International Standards].

³⁶³ See *id.*

³⁶⁴ See *id.*

³⁶⁵ See *id.*

³⁶⁶ See TBT, *supra* note 32, at art. 2, 5.

³⁶⁷ See *id.* at Annex 3, ¶ B.

³⁶⁸ See Principles for the Development of International Standards, *supra* note 362, ¶ 3.

and in sufficient detail so that others can comment on the drafts and the comments can be considered through discussion or amendment to the standards; (3) standardizing bodies should promptly provide the full text of draft standards to members of the international standardizing body and promptly publish standards upon adoption; and (4) standardizing bodies should periodically publish their work programs indicating standards under development and those adopted.³⁶⁹

The Principle recognizes the utility of the Internet in communicating essential information about standards to others, but it also recognizes that developing countries may not have such technical means available.³⁷⁰ The Principle recommends that standardizing bodies have processes in place to make hard copies of information available upon request.³⁷¹

2. *Openness*

International standardizing body membership should be open to relevant bodies, at least within WTO members.³⁷² Note that this Principle does not apply to some of the non-state actor criteria-setting bodies described here because they are not international standardizing bodies. The TBT defines an international body as one whose “membership is open to the relevant bodies of at least all members.”³⁷³ Of those described here, ISO is an international standardizing body because it has a membership that is open to all WTO members. None of the other non-state actors described here operates as an international standardizing body because their memberships are not open to all WTO members. International standardizing body members should be able to participate in every stage of standards development, from early policy development through adoption.³⁷⁴ The Principle expressly encourages developing country participation by stating that standardizing bodies should provide developing countries with “meaningful” participation opportunities at all stages of development.³⁷⁵ And the Principle underscores standardizing bodies’ adherence to the TBT’s Code of Good Practice, which requires that participation in international standardization activities takes place through a single delegation that represents the interests of all relevant standardizing bodies.³⁷⁶

³⁶⁹ *See id.* ¶ 4.

³⁷⁰ *See id.* ¶ 5.

³⁷¹ *See id.*

³⁷² *See id.* ¶ 6.

³⁷³ *See id.* at Annex 1, ¶ 6.

³⁷⁴ *See id.*

³⁷⁵ *See id.* ¶ 7.

³⁷⁶ *See id.*

3. *Impartiality and Consensus*

To avoid giving privilege or favor to a specific supplier, country, or region, the Principle states that all WTO member relevant bodies should receive “meaningful” opportunities to contribute to all facets of standards development.³⁷⁷ Impartiality should be shown throughout the development of standards, including fees charged for standards and the right to incorporate the adopted international standard into regional or national standards.³⁷⁸

4. *Effectiveness and Relevance*

To facilitate international trade and prevent unnecessary trade barriers, international standards “need to be” relevant and “effectively respond” to the market, regulators, countries’ scientific and technological development.³⁷⁹ Further, standards “should not distort the global market, have adverse effects on fair competition, or stifle innovation and technological development.”³⁸⁰ The standards should not prefer the “characteristics or requirements of specific countries or regions when different needs or interests exist in other countries or regions.”³⁸¹ And the standards should be “performance based,” not based on “design or descriptive characteristics.”³⁸² To achieve effectiveness and relevance, international standardizing bodies should consider relevant regulatory or market needs and scientific and technological developments; provide a process for reviewing obsolete, inappropriate, or ineffective standards; and develop a process for improving communications with the WTO.³⁸³

5. *Coherence*

The Principle urges international standardizing bodies to avoid duplicating or overlapping the work of other international standardizing bodies and encourages international standardizing bodies to cooperate and coordinate with one another.³⁸⁴

6. *Development Dimension*

The Principle states that standardizing bodies should consider the constraints that developing countries face in effectively participating in

³⁷⁷ See *id.* ¶ 9.

³⁷⁸ See *id.*

³⁷⁹ See *id.* ¶ 10.

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.* ¶ 11.

³⁸⁴ See *id.* ¶ 12.

standards development.³⁸⁵ Additionally, the Principle encourages international standardizing bodies to seek “[t]angible ways” to facilitate developing countries’ involvement.³⁸⁶ The Principle suggests that providing technical assistance, in accordance with TBT article 11, may be appropriate.³⁸⁷

Thus, as to the non-state actor criteria-setting bodies described here, three levels of WTO law potentially affect the bodies’ standard-setting practices and the extent to which they must consider developing country interests. First, the TBT requires WTO members to use reasonable efforts to ensure that such bodies comply with the TBT Code of Good Practice, even if the body itself has not accepted the Code.³⁸⁸ Second, the TBT allows the bodies to accept its Code of Good Practice.³⁸⁹ Third, if a body has accepted the Code of Good Practice, the body must also comply with relevant provisions of the Standards Development Principles.³⁹⁰ Attention now turns to whether these levels of WTO law have created an environment where developing country interests are integrated into non-state actor standard-setting practices.

C. Degree of Developing Country Interest Advancement

A review of the non-state actor environmental criteria-setting bodies described above reveals that non-state actors vary greatly in the consideration they give to developing countries’ interests when setting criteria. Those that fail to consider developing country interests likely fail to do so because non-state actors have no direct legal obligation to consider such interests and few incentives to do so. Nothing in the WTO regulatory scheme described above directly obligates non-state actors to consider developing countries’ interests in their work. Instead, TBT article 4 places the burden on members to use reasonable measures to ensure that non-state actors comply with the Code of Good Practice.³⁹¹ Relevant Code of Good Practice provisions do not directly obligate non-state actors to consider developing country interests; instead, the provisions require non-state actors to treat domestic products that are like foreign products no less favorably and to avoid creating or applying standards in a manner that creates unnecessary obstacles to international trade.³⁹² There has been no interpretation of the scope of members’ duty to ensure compliance with the Code of Good Practice provisions. Thus, the members’ duty under article 4 is vague.

Those standardizing bodies that have accepted the Code of Good Practice must abide by the Standards Development Principles, which expressly

³⁸⁵ See *id.* ¶ 13.

³⁸⁶ See *id.*

³⁸⁷ See *id.*

³⁸⁸ See TBT, *supra* note 32, at art. 4.1.

³⁸⁹ *Id.* at Annex 3(B).

³⁹⁰ See *id.* at art. 2, 3, Annex 3; Principles for the Development of International Standards, *supra* note 362.

³⁹¹ See TBT, *supra* note 32, at art. 4.1.

³⁹² See *id.* at art. 5.2.1.

include a Development Dimension principle.³⁹³ That principle requires the bodies to consider developing countries' interests and ways to involve developing countries in the bodies' standard-setting processes.³⁹⁴ The most recent list of standardizing bodies that have voluntarily accepted the Code of Good Practice includes national standardizing bodies from 132 developed and developing countries.³⁹⁵ Thus, through the Code of Good Practice and the Standards Development Principles, those bodies have an obligation under WTO law to consider developing country interests. Aside from the national standardizing bodies, however, none of the other non-state actor environmental criteria-setting bodies described here has accepted the Code of Good Practice.³⁹⁶ In fact, out of the 171 bodies that have accepted the Code of Good Practice, most are national standardizing bodies.³⁹⁷ Only fifteen out of the 171 appear to be industry-specific or inter-industry non-state actors.³⁹⁸

Even if a non-state actor chose to accept the TBT Code of Good Practice and thereby should also comply with relevant Standards Development Principles, there is no enforcement mechanism associated with the Standards Development Principles to ensure that a standardizing body is adhering to its Principles. Thus, unless a member country reins it in, a non-state actor that has not voluntarily accepted the TBT Code of Good Practice is free to set environmental criteria for itself and, in the case of a retailer or manufacturer, its supply chain, without regard for developing country interests.

Indeed, such appears to be the case with the non-state actor firm-specific criteria-setting bodies, such as Walmart, The Home Depot, and Timberland. None has accepted the TBT Code of Good Practice. Nothing on their websites or their literature suggests that they take developing country interests into account or that they consider whether their environmental marketing claim schemes create trade barriers for developing countries.³⁹⁹ While BASF has chosen to assist developing countries in its efforts to make their dye processes more eco-efficient,⁴⁰⁰ the matrix it draws upon to set its

³⁹³ See Principles for the Development of International Standards, *supra* note 362, ¶ 13.

³⁹⁴ See *id.*

³⁹⁵ See ISO, Standardizing Bodies Having Notified Acceptance of the WTO TBT Code of Good Practice for the Preparation, Adoption, and Application of Standards (Feb. 28, 2011), available at http://www.standardsinfo.net/info/docs_wto/TbtList_20110228.pdf (last visited Nov. 05, 2011).

³⁹⁶ See *id.*

³⁹⁷ See *id.*

³⁹⁸ See *id.* The fifteen include non-state industry-specific actors in Australia, Japan, Mexico, New Zealand, and Sweden.

³⁹⁹ See *Sustainability Index*, *supra* note 28 (describing Walmart's sustainability assessment); *Eco Options*, *supra* note 227 (describing The Home Depot's Eco Options product line that contributes to energy efficiency, water conservation, healthy homes, clean air, and sustainable forestry); *Green Index Rating*, *supra* note 229.

⁴⁰⁰ See *Eco-Efficiency Label*, BASF CHEMICAL CO., *supra* note 220.

eco-efficiency standards does not contemplate developing country interests or WTO obligations.⁴⁰¹

Absent any legal obligation to do so, ISO has taken a number of steps to see that developing countries play as full a role as possible in its standard-setting processes. Its membership is open to national standardizing bodies from developing and developed nations.⁴⁰² Its standard-setting process is transparent, and its voting process favors no member. In addition, as noted above, ISO has established DEVCO, a policy committee charged with addressing developing country needs.⁴⁰³ DEVCO monitors ISO's implementation of its Action Plan for Developing Countries,⁴⁰⁴ which focuses on providing technical assistance and capacity building within developing countries.⁴⁰⁵ Critics note that DEVCO's reach is limited by its funding, which appears to be donor based.⁴⁰⁶ In addition, they point out that developing countries' limited resources and ISO's membership and procedural rules make it difficult for developing countries to effectively participate in ISO environmental standard development.⁴⁰⁷

Current membership of ISO's TC 207, the committee charged with working on environmental management standards, illustrates the level of involvement of developing countries and whether their collective voices are heard when standards come up for a vote. 30.6% of the developing countries worldwide are members of TC 207, whereas 42% of developed countries are members of TC 207.⁴⁰⁸ Of the members participating on TC 207, 60.5% are developing countries; the remaining countries are developed.⁴⁰⁹ Thus, under ISO voting rules, which require a two-thirds vote of participating TC members

⁴⁰¹ See U.N. Indus. Dev. Org. (UNIDO), *Eco-Efficiency for SMEs in the Moroccan Dyeing Industry* (2002), available at http://www.basf.com/group/corporate/en/function/conversions:/publish/content/sustainability/global-compact/images/Eco-Efficiency_for_SMEs_in_the_Moroccan_Dyeing_Industry.pdf (explaining a joint effort of UNIDO, BASF, and UNEP to create a sustainable approach to industrial development).

⁴⁰² See *Who Can Join ISO*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/about/discover-iso_who-can-join-iso.htm (last visited Nov. 1, 2011).

⁴⁰³ See *What is DEVCO?*, *supra* note 133.

⁴⁰⁴ See *id.*

⁴⁰⁵ See *ISO ACTION PLAN*, *supra* note 135.

⁴⁰⁶ See *Islam*, *supra* note 129, at 35 (citation omitted).

⁴⁰⁷ See *id.* at 25–26 (quoting UNCTAD, Commodities Division, *ISO 14001: International Environmental Management Systems Standards, Five Key Questions for Developing Country Officials, Draft for Comments 38* (1996)). The UNCTAD report further states “developing countries have voted on a standard in which they have had no input, on a standard largely prepared and developed by corporate experts from industrialized countries.” *Id.* at 26.

⁴⁰⁸ See *TC 207 Environmental Management*, *supra* note 248; WDI 2011, *supra* note 19, at 10–13 (breaking down the size of the world's economy by country).

⁴⁰⁹ Worldwide, roughly 68% (145 out of 214) of countries are developing countries; 32% (69 out of 214) are developed. See WDI 2011, *supra* note 19, at 10–13. Thus, the ratio of developing to developed countries on TC 207 is similar to the global ratio of developing to developed countries.

to send a standard to ISO general membership,⁴¹⁰ to the extent that the developing country members speak for developing country non-members, the former have the ability to advance developing country interests on TC 207 environmental management standards.

When a standard reaches a final vote, developing countries represent 61.8% of the 110 member bodies eligible to vote; developed countries represent the remainder.⁴¹¹ Here again, when standards reach a final vote, developing country members have the number of votes needed to advance and protect their interests. Thus, ISO's structure, policy committee work, and general membership and TC 207 membership each provide significant opportunities for developing countries to involve themselves in ISO work and protect and advance their interests.

Unlike the specific actions that ISO has taken to involve developing countries in its standardization process, CGF has made only general statements that could be interpreted to support developing countries but do not clearly do so. For example, CGF's GSCP materials suggest that it seeks to harmonize its standards with environmental standards, and Levels 1 and 2 of its Environmental Reference Requirements require firms to satisfy relevant legal requirements and ensure that their environmental practices are consistent with international standards.⁴¹² Nothing in the Environmental Reference Requirements, however, speaks to firms' compliance with the TBT Code of Good Practice or the TBT Committee's Standards Development Principles.⁴¹³ Nothing in the materials suggests that firms should provide differential treatment to developing country exporters, even as the retailers align all of their suppliers under the same set of environmental practice criteria.⁴¹⁴ If the criteria are set above developing country capacities, developing country exporters are effectively boxed out of the retailers' supply chain. Again, while the Reference Requirements appear to support harmonization of environmental practice criteria,⁴¹⁵ nothing in the tool prevents retailers from generating their own set of standards. This leaves developing country exporters in the difficult position of attempting to comply with a number of environmental practice criteria.

In stark contrast to the criteria-setting practices of firm-specific non-state actors and inter-industry actors like CGF, ISEAL Alliance's Standard Setting Code draws upon language from the TBT, the TBT Code of Good Practice, and the TBT Committee's Standards Development Principles.⁴¹⁶ ISEAL perceives itself as filling a gap between ISO standards, which offer

⁴¹⁰ See *How ISO Develops Standards*, *supra* note 249.

⁴¹¹ See *TC 207 Environmental Management*, *supra* note 248.

⁴¹² See *Environmental Reference Requirements*, *supra* note 267, at 5.

⁴¹³ See *id.*

⁴¹⁴ See *id.*

⁴¹⁵ See *What is the GSCP?*, *supra* note 262.

⁴¹⁶ See *Standard-Setting Code*, *supra* note 285, at 3.

general environmental standards, and those industry-specific organizations, such as FSC and MSC, that seek to provide specific environmental criteria.⁴¹⁷

As a firm develops its standards, ISEAL requires that the firm consider stakeholders that would be advantaged by the standard and those that would be disadvantaged.⁴¹⁸ ISEAL expressly requires that firms consider developing countries' interests and seek ways to increase developing country participation in their standards development process.⁴¹⁹ Additionally, ISEAL requires that the environmental standards withstand at least one notice and comment round,⁴²⁰ providing an opportunity for developing countries to express and advance their interests. The transparency of ISEAL's standard development process ensures that developing countries will, at a minimum, understand how ISEAL-certified firms generate their environmental criteria.⁴²¹ In ISEAL's Impacts Code, which allows certifiers to assess whether their schemes are achieving their objectives, ISEAL again requires that the certifiers expose their schemes to stakeholder scrutiny, inviting them to comment on whether the schemes are reaching the firms' objectives.⁴²²

ISEAL's Standard Setting and Impacts Codes are models of how a non-state criteria-setting body can integrate developing country interests into environmental criteria setting schemes. As noted above, FSC and MSC are ISEAL members.⁴²³ As such, the degree of the bodies' consideration of developing countries interests is high.

Green Business' standardization and certification schemes are distinct from the other non-state actor inter-industry criteria-setting bodies described above on several levels. First, unlike the other inter-industry schemes, Green Business sets criteria and certifies compliance with those criteria.⁴²⁴ The others either do not certify compliance at all, e.g., ISO, or draw upon third parties to assess whether certification is appropriate, e.g., CGF and ISEAL. Nothing on the Green Business Network, Green America, or National Green Pages websites indicates how any of the entities sets environmental criteria or who plays a role in setting the criteria.⁴²⁵ The criteria are stated in general terms, without specifying compliance levels.⁴²⁶ Nothing suggests that the entities looked to ISO 14024 to set their criteria for their eco-label, and nothing suggests that the entities comply with the TBT's Code of Good Practice, the TBT Standards Development Principles, or ISEAL's Good Practice Codes.⁴²⁷

⁴¹⁷ See *id.* ¶ 1.2.

⁴¹⁸ See *id.* ¶ 5.1.1.

⁴¹⁹ See *id.* ¶ 5.7.3.

⁴²⁰ See *id.*

⁴²¹ See *id.* ¶ 5.2.1.

⁴²² See ISEAL Impacts Code, *supra* note 286, at 2.

⁴²³ See ISEAL Full Members, *supra* note 282.

⁴²⁴ See Standards & Rating System, *supra* note 342.

⁴²⁵ See GREEN AMERICA, <http://www.greenamerica.org> (last visited Nov. 1, 2011); GREEN BUSINESS NETWORK, <http://www.greenbusinessnetwork.org> (last visited Nov. 1, 2011); NATIONAL GREEN PAGES, <http://www.greenpages.org> (last visited Nov. 1, 2011).

⁴²⁶ See Standards & Rating System, *supra* note 342.

⁴²⁷ See *id.*

Nothing indicates that Green Business factors the concerns of developing countries into its standard-setting practices or the certification process for its eco-label.⁴²⁸ The opaqueness and generalities associated with its schemes suggests that Green Business and its related entities are largely ignorant of developing country interests. Without question, this form of standardization and eco-label certification is most dangerous to developing countries.

The preceding assessment evaluated the extent to which non-state actor criteria-setting bodies consider developing country interests based on how the schemes are designed. A review of WTO CTE and TBT Committee meeting minutes captures the perceptions of developing countries themselves.⁴²⁹ Examination of these committee reports reveals that in spite of the levels of WTO regulation noted above and the efforts of entities such as ISO, CGF, and ISEAL, developing countries routinely complain that non-state actor criteria-setting bodies' efforts to engage in environmental regulation are creating obstacles to international trade.⁴³⁰

WTO members raised concerns regarding non-state actor carbon footprint schemes, for example, during the CTE committee meeting in February 2010.⁴³¹ The representative from Colombia observed that non-state actor carbon footprint standards were proliferating and that, generally, the non-state actor standard development process lacked transparency, which could result in trade restrictions, especially for SMEs in developing countries.⁴³² The representative from Argentina further stated that non-state actor standards were frequently more restrictive than international environmental standards and that in light of developing countries' limited financial resources and technical capacities, the standards could create obstacles to international trade.⁴³³ The Argentine representative noted that there was considerable disparity among non-state actor standardizing schemes, especially in how the schemes defined the scope of life-cycle analysis;⁴³⁴ the representative also stated that the proliferation of non-state schemes had the potential to confuse consumers.⁴³⁵ The representative from Turkey added that with over 400 environmental labels, developing countries were finding it "challenging and costly" to meet the range of requirements.⁴³⁶ The representative from Turkey also noted that non-state actor carbon footprint schemes had the potential to become "disguised protectionism."⁴³⁷ Representatives from China and Kenya shared similar concerns.⁴³⁸

⁴²⁸ *See id.*

⁴²⁹ *See February 2010 Report, supra* note 22, ¶ 14.

⁴³⁰ *See id.* ¶¶ 14, 15.

⁴³¹ *See id.* ¶¶ 9, 10, 20, 22, 23.

⁴³² *See id.* ¶ 14.

⁴³³ *See id.* ¶ 15.

⁴³⁴ *See id.* ¶ 16.

⁴³⁵ *See id.* ¶ 16.

⁴³⁶ *See id.* ¶ 19.

⁴³⁷ *Id.* ¶ 20.

⁴³⁸ *See id.* ¶¶ 22–23.

Developing country members of the WTO CTE raised the issue of non-state actor environmental standards again at its meeting in September 2010.⁴³⁹ The Colombian representative stated that large retailers' environmental standards "were of particular concern as they could become de facto technical barriers to trade."⁴⁴⁰ El Salvador's representative echoed other members' concerns and stressed the difficulties and costs that SMEs in developing countries faced due to the lack of harmonization of standards and transparency in the standards development process.⁴⁴¹

The WTO's TBT Committee members have raised similar concerns. At the committee's June 2009 meeting, in a discussion of standards, India noted that the proliferation of standards, guides, and recommendations posed a "serious barrier to international trade," one that "had a particularly negative impact on developing country exports."⁴⁴² India pointed out that non-state actors had created a range of standards that "negatively affected" developing countries' access to developed country markets.⁴⁴³ Representatives from Mexico, Kenya, Uganda, Egypt, Cuba, Tanzania, China, Pakistan, and Argentina agreed with India's concern.⁴⁴⁴

Assessment of the non-state actor environmental marketing claim schemes and developing country responses to those schemes suggest that if the universe of non-state actors were limited to international organizations such as ISO or ISEAL, then developing countries would have ample opportunity to advance and protect their interests as the non-state actors engaged in standard-setting and certification practices. Unfortunately, the universe is not so limited; instead, it is crowded with non-state actors that have no formal mechanism in place to recognize and consider developing country interests in their schemes, resulting in the potential development of environmental marketing schemes that create trade barriers for developing countries. In addition, as noted above, standing alone, neither the Code of Good Practice nor the Standards Development Principles has any enforcement mechanism.⁴⁴⁵ Thus, even if a non-state actor agreed to comply with the provisions, its failure to do so would have no consequences. The next section considers potential solutions to these problems.

⁴³⁹ See *September 2010 Report*, *supra* note 22, ¶ 45.

⁴⁴⁰ See *id.* ¶ 46.

⁴⁴¹ See *id.* ¶ 48.

⁴⁴² See WTO Comm. on Technical Barriers to Trade, *Minutes of the Meeting of June 25–26, 2009*, ¶ 307, G/TBT/M/48 (Sept. 29, 2009) [hereinafter *June 2009 Meeting Minutes*].

⁴⁴³ See *id.* ¶ 308.

⁴⁴⁴ See *id.* ¶¶ 309–16.

⁴⁴⁵ Those that accept the Code of Good Practice agree to "afford sympathetic consideration" to the representations of others who have accepted the code and "adequate opportunity" for consultation regarding the representations. See TBT, *supra* note 32, at Annex 3, art. Q. They further agree to make an "objective effort" to resolve complaints. See *id.*

IV. ASSESSMENT OF SOLUTIONS TO THE TRADE BARRIER PROBLEMS THAT MAY ARISE FROM NON-STATE ACTOR ENVIRONMENTAL MARKETING CLAIM STANDARDS AND CERTIFICATION SCHEMES

Working from the premise that the existing legal landscape does not effectively ensure that non-state actors, especially firm and industry-specific standardizing bodies, will recognize and consider developing country interests as they set their environmental marketing claim standards or certification processes, this section summarizes and assesses two solutions to make the legal landscape more effective. Solutions include: (A) do nothing and allow the market and existing law to filter out those schemes that do not consider developing country interests; and (B) modify existing WTO law to require or incentivize non-state actors to consider developing country interests as they set and certify compliance with their schemes.

A. No Changes to the Legal Landscape

Regardless of the fact that developing countries have argued that some non-state actor criteria-setting bodies' environmental marketing claim schemes are creating trade barriers and the schemes themselves appear to give no deference to developing country interests, there are several reasons why some would argue that there should be no changes to the current United States or WTO legal landscape. First, though there may be the potential for trade barriers to arise, to date, no developing countries have offered any proof that the purported barriers exist. Second, even if they do exist, the law does not proscribe all trade barriers, only those that create unnecessary obstacles to international trade.⁴⁴⁶ Non-state actor voluntary schemes designed to protect the environment may well withstand WTO law scrutiny. Third, even if the barriers exist and obstruct developing countries' participation in international trade, additional national or WTO regulation may not be the most efficient approach to removing the barriers, especially since the conduct at issue—that of non-state actors in the global marketplace—is beyond the direct reach of the WTO and difficult for national governments to regulate. Instead, market forces alone may be sufficient to free the flow of trade, giving developing country exporters access to developed country markets.

1. *No Harm, No Foul*

Absent a showing of actual boxing out of markets or developing country claims against developed country importers, some would argue that there is no need to make any change to the current legal landscape affecting international environmental marketing claims. However, those most vulnerable to harm from schemes that are insensitive to developing country interests are SMEs within developing countries that have no resources to spend

⁴⁴⁶ See *id.* at pmbl. See also *id.* at art. 2.2.

on making claims before international trade tribunals. Their best hope is to speak through their national standardizing bodies and WTO representatives, which they have done. Thus, the absence of any showing of actual harm does not indicate that there is no issue to be resolved.

2. *Non-State Actor Environmental Marketing Claim Schemes May Give Rise to Trade Barriers, but the Barriers Are Necessary and, Thus, Neither Arbitrary nor Unjustified*

Relevant WTO law has been crafted to strike a balance between members' efforts to protect their environment and other members' access to markets. The GATT and TBT regimes do not proscribe all obstacles to trade; those that are necessary and are not arbitrary or unjustified are permissible. Arguably, voluntary non-state actor eco-label schemes are necessary to allow sellers to inform consumers of their environmentally responsible products. As long as the non-state actor's standard-setting and certification processes are designed to further that goal, they would likely not be considered arbitrary or unjustified. Thus, should any barrier arise from non-state actor environmental marketing schemes, the barrier would be a necessary one because it maintains the balance between some members' environmental concerns and others' access to market concerns.

The difficulty with this argument is that the potential exists for the development of schemes that are far more rigorous than those with which any developing country could ever hope to comply. For example, the scheme may require that producers conduct a highly detailed NPR-PPM analysis, but a developing country SME exporter may lack the technological infrastructure to collect the data needed for the analysis. Thus, the exporter would not be able to certify its product, even though the product may have significant environmental attributes and be comparable to certified products. While the non-state actor's scheme may be consistent with WTO law because it is necessary and not arbitrary or unjustified,⁴⁴⁷ it may still result in a significant trade barrier. And if the developed country non-state actor is a large retailer with a self-declared product label, a developing country exporter must fit within the retailer's label criteria to supply the retailer. Otherwise, the developing country exporter is left out of the market. Furthermore, with non-state actors developing a wide range of certification schemes, developing country exporters are forced to attempt to comply with a number of schemes, each with its own criteria and certification processes, just to compete. Thus, while in theory WTO law establishes a balance between environmental management and access to trade, in practice, the balance is offset. Developing

⁴⁴⁷ See *id.* at pmb1. See also *id.* at art. 2.2.

country exports, while produced through environmentally sound practices, are not able to obtain developed country certification.⁴⁴⁸

3. *Allow the Market and Existing Regulation to Filter Out Schemes that Do Not Consider Developing Country Interests*

Through the WTO's TBT, the TBT Code of Good Practice, and the TBT's Standards Development Principles, WTO law currently has the legal structures in place to require that members take reasonable efforts to ensure non-state actor environmental marketing claim criteria-setting bodies recognize and advance developing country interests. Should a member fail to take such measures, or do so but allow the existence of non-state actor schemes that are not compliant with WTO law, market pressure may be sufficient to drive the non-compliant non-state actors from the market. Informed consumers can demand products that are environmentally responsible yet sensitive to developing country needs. As demand for such products increases, arguably, the supply of such products also increases, and the market shifts to accommodate more suppliers that are environmentally responsible and sensitive to developing countries and drive out those suppliers that are not. The emergence and influence of consumer watchdog groups such as TerraChoice and organizations such as ISEAL illustrate the market's ability to regulate itself. By casting a spotlight on non-compliant actors or certifying the credibility of compliant actors, such groups promote developing country interests and provide valuable information to consumers. Through their information campaigns, the organizations spur demand for environmentally responsible products that do not give rise to trade barriers.

The market characteristics at issue, however, likely render it incapable of driving from retailers' shelves environmental marketing claims that are false or insensitive to developing countries. As noted elsewhere, a consumer's product choices involve information costs. Much of the information consumers need to make informed choices is available on the product's label, including price, quantity, and quality.

Some product attributes, however, involve credence costs—those costs of which the consumer learns, if at all, through his research or post-purchase use of the product. Information regarding a product's environmentally responsible attributes falls into this category because from a product's label alone, the consumer cannot know for certain whether the product's environmental claims are valid or whether the product's eco-label incorporates standardizing and certification procedures that are sensitive to developing countries. Furthermore, as consumers shop, they purchase many products bearing eco-labels, many of which are low-priced items. Because of the high

⁴⁴⁸ Note that developed country non-state actor criteria-setting bodies that set shallow or superficial criteria for the environmental marketing claim schemes are not at issue because they are not likely to restrict developing country participation in their schemes.

number of eco-labeled products purchased and low prices associated with the products, there is little incentive for consumers to engage in the kind of research necessary to verify product claims. Consequently, consumers themselves are unlikely to affect demand such that it drives from the market eco-labeled products that are invalid or insensitive to developing countries. While organizations such as TerraChoice and ISEAL effectively guide some consumer demand, they are too few and not known well enough to play a significant role in changing the marketplace. Thus, the market itself is not likely to drive from retailers' shelves the products bearing eco-labels that are insensitive to developing countries.

B. Modify Existing WTO Law to Ensure that Non-State Actors Recognize and Consider Developing Country Interests as They Standardize and Certify Environmental Marketing Claims

Arguably, two clarifications to the WTO's TBT are all that are necessary to draw the non-state actors at issue here into the applicable WTO legal structures. First, the TBT definition of non-governmental body must be clarified so that it expressly includes non-state firm-specific, industry-specific, and inter-industry bodies. Second, the scope of WTO members' duty to ensure that standardizing bodies operating within their territories are complying with applicable TBT provisions must be clarified. As explained more fully below, the first clarification may arise from TBT committee decisions or through a competent WTO body decision, arising from a WTO member filing a dispute against another member, while the second clarification is best left to a competent WTO body.⁴⁴⁹

As its annual compilation of Decisions and Recommendations illustrates, the TBT Committee is charged with administering the TBT.⁴⁵⁰ Its rules of procedure permit members to submit proposals for committee review and approval.⁴⁵¹ Should a member seek clarification of the term "non-governmental body," the member could propose clarifications to the TBT Committee and seek consensus on them.⁴⁵² The current definition of non-governmental body reads: "Body other than a central government body or a

⁴⁴⁹ See *Technical Barriers to Trade*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm (last visited Nov. 1, 2011) (noting TBT Committee activities and linking to TBT disputes).

⁴⁵⁰ See WTO Comm. on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the Committee on Technical Barriers to Trade Since Jan. 1, 1995*, G/TBT/1/Rev.10 (June 9, 2011), available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/G/TBT/1R10.doc> (last visited Nov. 23, 2011).

⁴⁵¹ See *id.* at ch. VI.

⁴⁵² See *id.*

local government body, including a non-governmental body which has legal power to enforce a technical regulation.”⁴⁵³

The TBT Committee could add an explanatory note to the definition which reads:

A non-governmental body includes a body that generates a standard and is neither a central government body nor a local government body. Such a body is a recognized body for the purpose of this Agreement.

Such a note would clarify that a non-governmental body could be a firm-specific, industry-specific, or inter-industry body that generates a standard. As noted above, such bodies could accept the TBT Code of Good Practice and, in so doing, would also have to adhere to the TBT Committee’s Standards Development Principles, each of which would cause the body to consider developing country interests as the body conducts its standardization and certification processes.

Having clarified the definition of non-governmental body, the focus shifts to bringing the non-governmental actions within the members’ duties created within the TBT. TBT article 4.1 requires members to take “such reasonable measures as may be available to them” to ensure that, among other entities, non-governmental standardizing bodies within their territories accept and comply with the Code of Good Practice, and by incorporation, the Standards Development Principles.⁴⁵⁴ Here again, “reasonable measures” may be clarified through an explanatory note.⁴⁵⁵ Such a note could provide examples of measures a member should take to ensure compliance with the TBT’s Code of Good Practice and Standards Development Principles. For instance, the note may provide:

A member takes reasonable measures to ensure acceptance and compliance with the Code of Good Practice and the Standards Development Principles when it requires or incentivizes standard-setting entities to certify compliance with the Code of Good Practice and Standards Development Principles.

Such a note would permit a range of options for members to take from prescribing acceptance and compliance to incentivizing acceptance and compliance. Prescribing acceptance and compliance would require a

⁴⁵³ TBT, *supra* note 32, at Annex 1, ¶ 8.

⁴⁵⁴ *Id.* at art. 4.1.

⁴⁵⁵ At a recent WTO TBT Committee meeting, India urged the Committee to generate guidelines defining the meaning of “reasonable measures” to strengthen the enforcement of the TBT Code of Good Practice on non-governmental standardizing bodies. See *June 2009 Meeting Minutes*, *supra* note 442, ¶ 308.

significant amount of political will and, to be effective, enforcement capacity. If political will or enforcement capacity is lacking, a member could choose to incentivize acceptance and compliance with more favorable tax treatment, speedier certification processes, or other devices designed to nudge standardization and certification entities toward Code of Good Practice and Standards Development Principles acceptance and compliance.

Opponents of the clarifications suggested above argue that the WTO ought not to get involved in regulating non-state actor standardizing and certification schemes because it is not the most effective body for regulating such entities.⁴⁵⁶ Opponents observe that the WTO members themselves have not yet clarified the meaning of many environmental standards and that the WTO forum has not been an effective debate forum.⁴⁵⁷ For the WTO to act before a critical mass of understanding has developed would put the WTO in the position of dictating intrastate environmental policy on behalf of individual members.⁴⁵⁸ Should the WTO assume such a role, opponents argue that the credibility and legitimacy of the WTO would be questioned.⁴⁵⁹ The WTO is not, and has never been, an environmental policy setting organization.⁴⁶⁰ It lacks the institutional expertise to discern the best approaches to environmental problems.⁴⁶¹ Moreover, existing WTO rules and decisions provide sufficient guidelines for members.⁴⁶² Rather than enacting more specific or further reaching provisions, the WTO should allow individual members and functional non-state actors to fill the regulatory space with their own environmental policy.⁴⁶³ As long as non-state actors respond to circumstances within developing countries and provide meaningful opportunities for developing countries to be involved in standard and certification development, the non-state actors may optimize the benefits of standards and certification schemes to sustainable development.⁴⁶⁴ The U.S. Representative on the WTO CTE committee has taken a similar position, arguing that the WTO's Doha mandate under paragraph 32(i) limits the CTE's purview to government actions, not non-state actors.⁴⁶⁵

Opponents' arguments make a critical assumption that, if invalidated, renders their arguments moot. Opponents argue that existing WTO rules and decisions provide sufficient guidance to non-state actors and create an environment where non-state actors, such as ISEAL, are able to flourish and

⁴⁵⁶ See Steven Bernstein & Erin Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. INT'L ECON. L. 575, 604–05 (2008).

⁴⁵⁷ See *id.*

⁴⁵⁸ See *id.* at 578.

⁴⁵⁹ See *id.* at 579.

⁴⁶⁰ See *id.* at 606.

⁴⁶¹ See *id.*

⁴⁶² See *id.* at 607.

⁴⁶³ See *id.* at 605.

⁴⁶⁴ See *id.* at 606–07.

⁴⁶⁵ See *February 2010 Report*, *supra* note 22, ¶¶ 7–8. *Accord September 2010 Report*, *supra* note 22, ¶ 52.

generate standardizing and certification schemes that meet or exceed WTO rules. Admittedly, ISEAL, ISO, and other similar organizations meet or exceed relevant WTO legal thresholds. However, many non-state actors do not; they, too, have filled the regulatory space under existing WTO rules. Organizations such as CGF have a tremendous amount of market power, yet they do not comply with key provisions in the TBT Code of Good Practice and Standards Development Principles. As long as such organizations are able to find suppliers that can satisfy their standards and certification requirements, they will continue to operate, even if doing so effectively boxes developing country exporters out of the market.

Moreover, the clarifications noted above do not breach the principle of “embedded liberalism”⁴⁶⁶ at the core of the WTO because they do not put the WTO in the position of setting environmental policy. Instead, the clarifications direct members to ensure that non-state criteria-setting bodies to adhere to a set of best practices and principles that would have them include developing country interests in their criteria-setting and certification schemes. The precise measures that members should take to ensure criteria-setting bodies’ acceptance and compliance with the Code of Good Practice and the Standards Development Principles are left to members to work out. Within those provisions, the extent to which developing country interests drive criteria-setting bodies’ practices is left for members and criteria-setting bodies to determine.

Moreover, the clarifications suggested above are consistent with the WTO’s position on environmental requirements. In its statement entitled “Environmental Requirements and Market Access: Preventing ‘Green Protectionism,’” the WTO notes that the “answer is not to weaken environmental standards, but to enable exporters to meet them” and recommends that a balance be struck between protecting market access and the environment.⁴⁶⁷ The clarifications will achieve that balance because they clarify the role that WTO members must play in protecting market access, without generating environmental policy. Admittedly, the clarifications may slow the development of environmental marketing claim schemes because as non-state actors integrate developing countries and their interests into their schemes, the standardization and certification processes may become slower. Additionally, the standards themselves may not be initially as high as they would have been, had the entities not considered developing countries.

However, by drawing developing countries and their exporters into the processes, more environmentally responsible developing country exporters will be able to participate in the market, resulting in a global increase in the supply

⁴⁶⁶ See Bernstein & Hannah, *supra* note 456, at 608 (noting that embedded liberalism involves a set of norms, which state that global trade liberalism “ought to be predicated on domestic political interventionism to cushion its impact and socially embed markets . . .” (internal citations omitted)).

⁴⁶⁷ See *Environmental Requirements and Market Access: Preventing “Green Protectionism,” supra* note 20.

of goods produced in an environmentally responsible manner. In turn, greater benefit to the environment would result. As developing country exporters' capacities and proficiencies in manufacturing and supplying environmentally responsible products increase, standards themselves may also increase, resulting again in an overall net gain to the environment.

CONCLUSION

This Article has surveyed environmental marketing claim criteria-setting bodies to determine the extent to which the bodies consider developing country interests in their schemes. Finding that most of the current schemes are the product of non-state bodies and that many such bodies fail to consider developing country interests in their schemes, the Article has suggested two clarifications to the WTO's TBT. These clarifications would make WTO members responsible for taking reasonable measures to ensure that non-state actors acting within their territories are integrating developing countries' interests into their standardization and certification schemes. In doing so, the clarifications would maintain a balance between safeguarding market access for developing country exporters and protecting the environment. Such a balance would result in a general rise in both environmentally responsible firm conduct and the supply of environmentally responsible products.