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ENVIRONMENTAL GOVERNANCE AND THE GLOBAL SOUTH

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ABSTRACT

Over the last several decades, efforts to regulate the environment through traditional public law at national and international levels have stalled. In contrast, private environmental governance has flourished as nongovernmental entities have engaged in standard setting and assessment practices traditionally left to public government. This Article observes that while private governance of producers' environmental product claims has grown tremendously in recent years, the vast majority of the governance originates in the global North and thrusts the global North's economic and environmental agenda into the global South. In light of recent empirical studies of the effectiveness of such governance, the Article observes that the global North's approach has not worked well—producers in the global South see little benefit from participating in the schemes, and the schemes have had little and in some cases adverse impacts on the global South environment. The Article concedes that private or even a hybrid public-private governance of producers' environmental marketing claims is no panacea to global environmental problems, but it argues that the global South is likely to benefit from such governance, if the schemes originate within the global South and are imbued with Relational Integrity Regulation principles.

INTRODUCTION

Suresh and his wife Dalia have been growing coffee in Kodagu, India, since the early 1990s. They are fortunate to farm land in the Western Ghats, a mountainous “micro hotspot of biodiversity,” in western

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India.¹ Silver oak trees create a canopy, shading the coffee bushes, which can grow as high as 20 feet.² The climate and shade provide a perfect combination for growing Arabica and Robusta coffees, whose berries are able to mature more slowly and fill out better, providing a stronger quality coffee.³ In recent years, Suresh's neighbors have begun to sell their crop to international companies, such as Illy. But to do so, the retailers have required that the farmers certify their coffee to a set of environmental and social standards developed by nongovernmental entities in the global North. Certification enables the retailer to market the coffee to consumers in the global North as sustainable. Abiding by the standards would require changes to the way Suresh grows his coffee and hires help to harvest it. Certification would also involve expensive auditing to ensure that Suresh's farm maintains the sustainable practices. Suresh appreciates the environmental and social costs of his business, but he also knows he must provide for his family. And hometown pride is involved too: Suresh and Dalia are troubled that the path to growing their business appears to require that they conform their practices to environmental and social norms established by others, located far from their home in India.

For generations, Diego and his family have caught Patagonian cod, just off the stormy coast of Argentina. Diego and his oldest son fish with bottom tangle nets that flow from the back of their wooden boat powered by an aged gasoline engine, which is essentially the same way Diego fished with his father decades ago. In recent years, Diego has noticed a decline in the number of fish he is able to catch, especially when compared with when he fished with his father. Diego is still able to provide for his family, but he wonders about his son's ability to follow in his steps. Undoubtedly, there are more environmentally responsible ways for Diego to fish. That environmental expertise exists within Argentina, but gaps in public environmental governance infrastructure keep the necessary information from reaching Diego. A few nongovernmental entities offer environmental education and would certify Diego's catch to a set of environmental standards, but the entities are organized in the global North, advance a global North perspective on the environment, and

¹ S. Goppikrishna Warriier, *Coorg Farmers are Now Growing Coffee that is Helping the Environment*, SCROLL.IN (Sept. 17, 2016), <https://scroll.in/article/816322/coorg-farmers-are-nowgrowing-coffee-that-is-helping-the-environment> [<https://perma.cc/477H-C66Y>].

² New South Wales Flora Online, *Grevillea robusta* A.Cunn. Ex R.Br., PLANTNET, <http://plantnet.rbgsyd.nsw.gov.au/cgi-bin/NSWfl.pl?page=nswfl&lvl=sp&name=Grevillea~robusta> [<https://perma.cc/WV45-6GC9>] (last visited Nov. 17, 2018) (giving the height of the silver oak in meters; but 8–40 meters converts to about 26–131 feet).

³ Warriier, *supra* note 1.

generally target large fisheries that supply fish to the international marketplace. Consequently, Diego is left to fend for himself.

Shade-grown coffee in Kodagu, India, may not appear to have much in common with Patagonian cod, but appearances can be deceiving. Both products are produced in the global South, generally by small- to medium-sized enterprises. The products have ecological life cycles and leave ecological footprints, which in the aggregate are significant.⁴ Buyers and consumers appreciate the products' qualitative attributes. The products' environmental costs and benefits directly impact the global South and have ripple effects in the global North.⁵ And—whether they know it or not—both producers face a set of incentives to conform to voluntary sustainability standards (“VSS”) devised and administered in the global North.

Without a doubt, the need for environmentally responsible production is critical. Collectively, we are exceeding the Earth's ability to provide for our consumption and assimilate our waste by 40 percent; current levels of global development and consumption of natural resources are unsustainable.⁶ Countries in the global North⁷ far outpace those in the global South in their consumption of the Earth's natural resources.⁸ While environmental movements and governance schemes have arisen in the North, too often they thrust Northern environmental and economic values upon the global South.⁹ Some have wisely called for the global

⁴ See *Coffee's Hidden Carbon Footprint*, GLOBAL COFFEE REPORT (Feb. 2018), <http://gcrmag.com/technology/view/coffees-hidden-carbon-footprint> [<https://perma.cc/77TA-TKC6>]; NORTH SEA FOUND., SEAS AT RISK: THE CARBON FOOTPRINT OF FISHERIES, https://energyefficiency-fisheries.jrc.ec.europa.eu/c/document_library/get_file?uuid=924c1ba8-94af-440d-94cb-f9cb124d2d57&groupId=12762 [<https://perma.cc/AK3W-3SDG>].

⁵ See GLOBAL COFFEE REPORT, *supra* note 4.

⁶ Ruth Gordon, *Unsustainable Development*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 68 (Shakwat Alam et al. eds., Cambridge University Press 2015).

⁷ Sumudu Atapattu & Carmen G. Gonzalez, *The North-South Divide in International Environmental Law: Framing the Issues*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 2 (Shakwat Alam et al. eds., Cambridge University Press 2015) (noting that the global North refers to “wealthy industrialized nations” such as the United States, European Union members, Japan, and Australia; global South refers to less wealthy nations in Africa, Asia, and Latin America).

⁸ Gordon, *supra* note 6, at 68 (noting that the global North, where 20 percent of the earth's population live, consume “more than 80 per cent of the total global economic output”).

⁹ Atapattu & Gonzalez, *supra* note 7, at 1; M. Rafiqul Islam, *History of the North-South Divide in International Law: Colonial Discourses, Sovereignty, and Self-Determination*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH 48 (Shakwat Alam et al. eds., Cambridge University Press 2015) (noting that Southern states “perceive environmentalism as a means of undermining their sovereignty and enabling Northern states to gain access to Southern untapped resources”). See Gordon, *supra* note 6, at 56–58 (describing the development of environmentalism in the global North and South).

North to critically examine its own development and consumption levels, noting that it would be biophysically impossible to increase development in the global South to the level enjoyed in the global North, and that instead, the global North should reduce its “inflated ecological footprint to create the ecological space for growth in the global South.”¹⁰

This Article makes a different appeal. In recent years, environmental governance has grown to include private and public-private governance schemes that incentivize producers to make more environmentally responsible products and nudge consumers to buy them. Private environmental governance occurs when nongovernmental actors engage in conduct designed to accomplish traditional public government function.¹¹ Public-private environmental governance results when governmental and nongovernmental actors partner in accomplishing tasks typically left to purely governmental actors.¹² VSS, such as Rainforest Alliance and the Marine Stewardship Council (“MSC”), are prime examples of private and public-private environmental governance.¹³ The entities are nongovernmental, they set environmental and social standards for producers, certify products and production processes that conform to the standards, and audit those certified to ensure ongoing compliance.¹⁴ Most VSS include a label that signals compliance with the VSS.¹⁵ Targets of VSS labels include consumers and recently (and more significantly) businesses.¹⁶

But VSS paint with a broad brush. For example, smallholders like Diego, the Argentine fisher noted above, face the same VSS as industrial fisheries in the global North and have little hope of profitable compliance.¹⁷ Statistics show why this dynamic presents a key challenge. Globally,

¹⁰ Gordon, *supra* note 6, at 68.

¹¹ Michael P. Vandenberg, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 146 (2013).

¹² *See id.*

¹³ Kristin Komives & Amy Jackson, *Introduction to Voluntary Sustainability Standards*, in VOLUNTARY STANDARD SYSTEMS: A CONTRIBUTION TO SUSTAINABLE DEVELOPMENT 6 (Carsten Schmitz Hoffmann et al. eds., 2014).

¹⁴ Axel Marx et al., *Voluntary Sustainability Standards: An Overview*, LEUVEN CTR. FOR GLOB. GOVERNANCE STUD. 1–2, 12–13 (2015), https://ees.kuleuven.be/klimos/papers/marx_2015_voluntary_sustainability_standards.pdf [<https://perma.cc/BC5P-Z2DF>].

¹⁵ Komives & Jackson, *supra* note 13, at 5.

¹⁶ *Id.*

¹⁷ *See* Aidenvironment, *Including Smallholders in Biofuel Certification: Recommendations to Voluntary Sustainability Standards*, SWISS FED. INST. OF TECH. 1–2 (2013), <https://energycenter.epfl.ch/files/content/sites/energy-center/files/projects/Bioenergy%20Team/Recommendations%20on%20Smallholder%20Inclusiveness.pdf> [<https://perma.cc/MP5T-8QNC>].

experts estimate that 31.4 percent of fish stocks are unsustainably fished; 58.1 percent are fully fished, meaning that 89.5 percent of fish stocks cannot support any increase in production.¹⁸ Fishing is a widespread occupation: during 2014, 56.6 million people engaged in fishing worldwide, 84 percent of whom lived in Asia.¹⁹ VSS, such as the MSC, operate to distinguish those producers that produce environmentally responsible goods from those that do not.²⁰ Currently, MSC certifies 12 percent of global catch, and little of that is caught in the global South.²¹ The producers' choice to certify their products is generally motivated by economic concerns: Certification may lead to more efficient production processes, price premiums, and greater access to markets.²² It may also reflect an appreciation for the environment, preserving the coffee-bearing soil and fish stock for themselves and generations to come.²³ In an era where formal, public environmental law, especially in the international context, has become ossified, VSS provide a means of advancing environmental goals by incentivizing producers and downstream retailers to supply the market with environmentally responsible products through environmentally responsible processes.

VSS operate in international and domestic markets within the global North and South, but the vast majority of VSS are organized in

¹⁸ FOOD & AGRIC. ORG. OF THE UNITED NATIONS, THE STATE OF WORLD FISHERIES AND AQUACULTURE 2016, 13 (2016), <http://www.fao.org/3/a-i5798e.pdf> [<https://perma.cc/7DCL-MXKH>]. The Food & Agricultural Organization of the United Nations (FAO) is an intergovernmental organization representing 194 nations and the EU. *What We Do*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, <http://www.fao.org/about/what-we-do/en/> [<https://perma.cc/DG9S-3GR2>] (last visited Nov. 17, 2018) (stating its strategic objectives include (1) "Help eliminate hunger, food insecurity, and malnutrition"; (2) "Make agriculture, forestry, and fisheries more productive and sustainable"; (3) "Reduce rural poverty"; (4) "Enable inclusive and efficient agricultural and food systems"; and (5) "Increase the resilience of livelihoods to threats and crises.").

¹⁹ FOOD & AGRIC. ORG. OF THE UNITED NATIONS, THE STATE OF WORLD FISHERIES AND AQUACULTURE, *supra* note 18, at 12.

²⁰ *Track a Fishery*, MARINE STEWARDSHIP COUNCIL, <https://fisheries.msc.org/en/fisheries/@@search> [<https://perma.cc/DQ7F-79KB>] (last visited Nov. 17, 2018) (reflecting three certified fisheries operating off of the Argentine Coast).

²¹ MARINE STEWARDSHIP COUNCIL, MSC GLOBAL IMPACTS REPORT 2017, 4 (2017), <https://www.msc.org/documents/environmental-benefits/global-impacts/msc-global-impacts-report-2017> [<https://perma.cc/UL5P-YLT6>].

²² See Allen Blackman & Jorge Riviera, *Producer Level Benefits of Sustainability Certification*, 25 CONSERVATION BIOLOGY 1176, 1177 (2011), https://business.gwu.edu/sites/g/files/zaxdzs1611/f/downloads/Faculty_Rivera_Producer-Level-Benefits-Sustainability-Certification.pdf [<https://perma.cc/72PW-DRW8>].

²³ See Anna Carlson & Charles Palmer, *A Qualitative Meta-synthesis of the Benefits of Eco-labeling in Developing Countries*, 127 ECOLOGICAL ECON. 129, 136 (2016).

and operate from the global North.²⁴ Predictably, the global North VSS reflect global North-based environmental and economic priorities.²⁵ As global North retailers seek to market their own sustainability agendas, they increasingly require members of their value chains to certify their products, often to North-based VSS. For example, Walmart has launched a Sustainability Index, which scores products based upon a variety of social and environmental factors.²⁶ Suppliers with top scores in a product area receive a Sustainability Badge on their product.²⁷ When, as in the coffee industry, value chain producers are in the global South, the result is that to participate in global value chains, global South producers such as Suresh are compelled to certify to global North-based VSS.

This Article argues that the global South should manage its own ecological footprint, in part, by generating its own public-private VSS. Doing so would enable the global South to set and execute its own sustainable development agenda, striking a proper balance between environmental and economic goals. In previous scholarship, I have argued that the regulation of environmental marketing claims such as VSS, should conform to Relational Integrity Regulation.²⁸ VSS that spring from Relational Integrity Regulation are reflexive, preference-directed, activate consumers' personal norms, and focus on products and their production processes.²⁹ Here I return to those principles, asserting that the global South VSS would benefit from Relation Integrity Regulation. I note that while VSS provide a potentially effective and efficient means of balancing and advancing environmental and economic goals, they are no panacea.³⁰

²⁴ See Philip Schleifer, *Can voluntary sustainability standards survive in emerging markets?*, MONGABAY (Mar. 17, 2015), <https://news.mongabay.com/2015/03/can-voluntary-sustainability-standards-survive-in-emerging-markets/> [<https://perma.cc/A6SR-LAP5>].

²⁵ See *id.*

²⁶ *Sustainability Index*, WALMART, <https://corporate.walmart.com/global-responsibility/environment-sustainability/sustainability-index-leaders-shop> [<https://perma.cc/3ZV9-RNUJ>] (last visited Nov. 17, 2018).

²⁷ *Sustainability Frequently Asked Questions*, WALMART, <https://corporate.walmart.com/global-responsibility/environmental-sustainability/sustainability-leaders/sustainability-leaders-frequently-asked-questions> [<https://perma.cc/Y5AC-8KLL>] (last visited Nov. 17, 2018).

²⁸ See generally Jeffrey J. Minneti, *Relational Integrity Regulation: Nudging Consumers Toward Products Bearing Valid Environmental Marketing Claims*, 40 ENVTL. L. 1327 (2010) (asserting that the most effective environmental marketing claim regulation is Relational Integrity Regulation. This species of regulation involves four attributes: it is reflexive; it is preference-directed; it is aimed at activating consumers' personal norms; and it focuses on the product and its production process).

²⁹ *Id.* at 1338, 1341.

³⁰ See Tracey M. Roberts, *The Rise of Rule Four Institutions: Voluntary Standards*

Although VSS have been used for over twenty years, there has been little empirical work done on their effectiveness. Those studies that have been completed, especially those with counterfactuals and control groups, indicate that VSS have produced mixed and sometimes adverse effects on global South producers and the global South environment. That said, the recent emergence of a few successful global South-based VSS suggests that VSS may yet be a useful tool of environmental governance. Moreover, when imbued with Relational Integrity Regulation principles, VSS could be a particularly effective way for the global South to forge a balance between its competing interests in sustainability and economic development.

The Article continues as follows: Part I provides additional background information on VSS. Part II reveals the impacts of established VSS on the global South and its producers. Part III recommends that stakeholders in the global South develop their own VSS, rooted in effective environmental governance principles. The last section concludes this Article.

Certification and Labeling Systems, 40 ECOLOGY L.Q. 107, 154 (2013) (discussing the economics of VSS and finding that VSS, though not without fault, are an effective means of delivering “desired consumer information and facilitating trade to fulfill consumer preferences”); 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, 667–77, 690–91 (2009) (discussing the application of behavioral economics to environmental marketing schemes, and the regulation of the schemes and finding that regulation of environmental marketing claims is appropriate because absent regulation, the market alone is unable to drive false claims from products); Cecilia Soler et al., *How Can High-Biodiversity Coffee Make it to the Mainstream Market? The Performativity of Voluntary Sustainability Standards and Outcomes for Coffee Diversification*, ENVTL. MGMT. 230, 230–31 (2016) (discussing the economic and environmental benefits of coffee certification); Allison Loconto & Cora Dankers, *Impact of international voluntary standards on smallholder market participation in developing countries—A review of the literature*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS 11–14 (2014), <http://www.fao.org/3/a-i3682e.pdf> [<https://perma.cc/KF2Q-PB8G>] (describing potential economic and environmental impacts of VSS); *The Impacts of Private Standards on Producers in Developing Countries: Literature Review Series on the Impacts of Private Standards—Part II*, INT’L TRADE CTR. 10–22 (2011) [hereinafter *ITC Study*], <http://www.intracen.org/The-Impacts-of-Private-Standards-on-Producers-in-Developing-Countries/> [<https://perma.cc/B2WN-G7VQ>] (discussing the economic and environmental impacts of VSS, as the International Trade Centre is a joint venture of the WTO and UN and provides trade related technical assistance through the United Nations Conference of Trade and Development (UNCTAD)). For a perspective on how international environmental law’s evolution has impacted India and the Indian government’s efforts to ensure its indigenous and poor populations have a voice in environmental governance, see Kishan Khoday & Usha Natarajan, *Fairness and International Environmental Law from Below: Social Movements and Legal Transformation in India*, 25 LEIDEN J. OF INT’L L. 415 (2012).

I. A PRIMER ON VSS

That VSS have reached into rural India but not coastal Argentina is a result of the history of VSS and their utility as a market-based environmental governance tool. This Part provides a sense of context for the development of VSS, describes their theoretical utility in the marketplace and the environment, and discusses the recent proliferation of VSS.

A. *VSS in Context*

Efforts to address the unsustainable nature of our current consumption patterns are myriad, arising from public and private sources operating in domestic and international arenas. For example, in 2015, the United Nations adopted a set of seventeen Sustainable Development Goals, which include the following:

- Ensure access to water and sanitation for all;³¹
- Ensure sustainable consumption and production patterns;³²
- Take urgent action to combat climate change and its impacts;³³

³¹ *Goal 6: Ensure access to water and sanitation for all*, UNITED NATIONS SUSTAINABLE DEV. GOALS, <http://www.un.org/sustainabledevelopment/water-and-sanitation/> [<https://perma.cc/BRC2-7ZGZ>] (last visited Nov. 17, 2018) (stating that targets include improving water quality by reducing pollution and increasing recycling and reusing of water; improving efficiency of water use; protecting and restoring water ecosystems; and expanding developing country capacities for efficient water use).

³² *Goal 12: Ensure sustainable consumption and production patterns*, UNITED NATIONS SUSTAINABLE DEV. GOALS, <http://www.un.org/sustainabledevelopment/sustainable-consumption-production/> [<https://perma.cc/MM4N-UYQX>] (last visited Nov. 17, 2018) (stating that targets include achieving “sustainable management and efficient use of natural resources”; by 2020 achieving “the environmentally sound management of chemicals and all wastes throughout their life cycle, in accordance with agreed international frameworks, and significantly reduce their release to air, water and soil in order to minimize their adverse impacts on human health and the environment”; encouraging “companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle”; ensuring “that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature”; supporting “developing countries to strengthen their scientific and technological capacity to move towards more sustainable patterns of consumption and production”; and promoting mechanisms for raising capacity for effective climate change-related planning and management in least developed countries and small island developing states, including focusing on women, youth, and local and marginalized communities).

³³ *Goal 13: Take urgent action to combat climate change and its impacts*, UNITED NATIONS SUSTAINABLE DEV. GOALS, <http://www.un.org/sustainabledevelopment/climate-change-2/>

Conserve and sustainably use the oceans, seas and marine resources;³⁴
 Sustainably manage forests, combat desertification, halt and reverse land degradation, halt biodiversity loss and;³⁵

[<https://perma.cc/F6MT-KFQ4>] (last visited Nov. 17, 2018) (stating that targets include: integrating “climate change measures into national policies, strategies and planning”; and improving “education, awareness-raising and human and institutional capacity on climate change mitigation, adaptation, impact reduction and early warning”).

³⁴ *Goal 14: Conserve and sustainably use the oceans, seas and marine resources*, UNITED NATIONS SUSTAINABLE DEV. GOALS, <http://www.un.org/sustainabledevelopment/oceans/> [<https://perma.cc/5XTL-ZXB3>] (last visited Nov. 17, 2018) (stating that targets include: “By 2025, prevent and significantly reduce marine pollution of all kinds, in particular from land-based activities, including marine debris and nutrient pollution. By 2020, sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and take action for their restoration in order to achieve healthy and productive oceans; Minimize and address the impacts of ocean acidification, including through enhanced scientific cooperation at all levels; By 2020, effectively regulate harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and implement science-based management plans, in order to restore fish stocks in the shortest time feasible, at least to levels that can produce maximum sustainable yield as determined by their biological characteristics”; and “[p]rovide access for small-scale artisanal fishers to marine resources and markets”).

³⁵ *Goal 15: Sustainably manage forests, combat desertification, halt and reverse land degradation, halt biodiversity loss*, UNITED NATIONS SUSTAINABLE DEV. GOALS, <http://www.un.org/sustainabledevelopment/biodiversity/> [<https://perma.cc/3RTB-YBZ4>] (last visited Nov. 17, 2018) (stating that targets include ensuring “the conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems and their services, in particular forests, wetlands, mountains and drylands, in line with obligations under international agreements”; promoting “the implementation of sustainable management of all types of forests, halt deforestation, restore degraded forests and substantially increase afforestation and reforestation globally”; combating “desertification, restor[ing] degraded land and soil, including land affected by desertification, drought and floods, and striv[ing] to achieve a land degradation-neutral world”; ensuring “the conservation of mountain ecosystems, including their biodiversity, in order to enhance their capacity to provide benefits that are essential for sustainable development”; taking “urgent and significant action to reduce the degradation of natural habitats, halt the loss of biodiversity and, by 2020, protect[ing] and prevent[ing] the extinction of threatened species”; promoting “fair and equitable sharing of the benefits arising from the utilization of genetic resources and promot[ing] appropriate access to such resources, as internationally agreed”; taking “urgent action to end poaching and trafficking of protected species of flora and fauna and address both demand and supply of illegal wildlife products”; introducing “measures to prevent the introduction and significantly reduce the impact of invasive alien species on land and water ecosystems and control or eradicate the priority species”; integrating “ecosystem and biodiversity values into national and local planning, development processes, poverty reduction strategies and accounts”; “mobiliz[ing] and significantly increas[ing] financial resources from all sources to conserve and sustainably use biodiversity and ecosystems”; mobilizing “significant resources from all sources and at all levels to finance sustainable forest management and provide adequate incentives to developing countries

Revitalize the global partnership for sustainable development.³⁶

In an effort to incentivize producers' environmentally responsible practices and inform consumers of the same, the United States and European Union have both launched VSS, which include the product labels Energy Star and EU Flower.³⁷ Other governments, nongovernmental organizations ("NGOs"), and private firms have also launched VSS. Eco-label Index, a global directory of VSS that include labels, lists 464 ecolabels from 199 countries in 25 different industries.³⁸

VSS share the following attributes: (1) they are not legally binding; (2) they direct organizational conduct, such as that of producers, not individuals; (3) they focus on social and/or environmental issues and are not exclusively technical; and (4) they have a governance structure that involves setting standards, certifying members, auditing members for compliance, and resolving disputes.³⁹

Market demand for ecolabeled products has resulted in free-riding, as some in the field make intentionally false or deceptive claims about their products, leading to claims of greenwashing.⁴⁰ In response, governments

to advance such management, including for conservation and reforestation"; and enhancing "global support for efforts to combat poaching and trafficking of protected species, including by increasing the capacity of local communities to pursue sustainable livelihood opportunities").

³⁶ *Goal 17: Revitalize the global partnership for sustainable development*, UNITED NATIONS SUSTAINABLE DEV. GOALS, <http://www.un.org/sustainabledevelopment/globalpartnerships/> [<https://perma.cc/KCJ8-3TV5>] (last visited Nov. 17, 2018) (outlining the following targets: "Enhance international support for implementing effective and targeted capacity-building in developing countries to support national plans to implement all the sustainable development goals, including through North-South, South-South and triangular cooperation"; "Enhance the global partnership for sustainable development, complemented by multi-stakeholder partnerships that mobilize and share knowledge, expertise, technology and financial resources, to support the achievement of the sustainable development goals in all countries, in particular developing countries"; and "Encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships").

³⁷ See ENERGY STAR, <https://www.energystar.gov/> [<https://perma.cc/29DT-3KYC>] (last visited Nov. 17, 2018); *Environment: EU Ecolabel*, EUR. COMM'N, http://ec.europa.eu/environment/ecolabel/index_en.htm [<https://perma.cc/UU2C-XS3D>] (last visited Nov. 17, 2018).

³⁸ ECOLABEL INDEX, <http://www.ecolabelindex.com/> [<https://perma.cc/7MX9-HTVJ>] (last visited Nov. 17, 2018).

³⁹ See Komives & Jackson, *supra* note 13, at 3–5; Marx et al., *supra* note 14, at 1–2, 12–13.

⁴⁰ August Rick, *Greenwashing: The 'Eco-Friendly' Scam Wining Over China's 1.3B Consumer Marketplace*, FORBES (Oct. 26, 2017), <https://www.forbes.com/sites/augustrick/2017/10/26/greenwashingthe-eco-friendly-scam-winning-over-chinas-1-3b-consumermarketplace/#26a8446dacfb> [<https://perma.cc/9B3Z-YF6B>].

have taken action. For example, the U.S. proscribes false or deceptive ecolabels,⁴¹ and the U.S.’s Federal Trade Commission has promulgated the Green Guides, which provide guidance to those seeking to mark their goods with environmental labels and claims.⁴² The Guides are designed to keep marketers from making false or deceptive claims about their products by offering definitions of commonly used environmental terms such as compostable, recyclable, and biodegradable.⁴³ Should a marketer use a defined term in a manner inconsistent with the definitions provided in the Green Guides, the Green Guides provide some protection from sanction under Section 5.⁴⁴

The proliferation of labels and the potential for greenwashing has also impacted the development of VSS, by creating market demand for independent, third-party certification of product labels and claims.⁴⁵ Certification of products flowing in international commerce has generated trade concerns as the VSS could be used as a pretext for trade barriers, inappropriately restricting market access.⁴⁶

In response, the World Trade Organization’s (“WTO”) 1994 Ministerial Decision on Trade and the Environment created a new committee—the Committee on Trade and the Environment (“CTE”).⁴⁷ In 2001, the Doha Ministerial Declaration included environmental labelling and standard setting in the CTE’s work program, charging it as follows⁴⁸:

We instruct the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to:

⁴¹ 15 U.S.C. § 45(a).

⁴² 16 C.F.R. 260 (1999).

⁴³ *Id.* See Minneti, *supra* note 30, at 657–67 (2009) (discussing the structure and function of the Green Guides).

⁴⁴ 16 C.F.R. 260.1(a) (stating the Green Guides “do not confer any rights on any person and do not operate to bind the FTC or the public. The Commission, however, can take action under the FTC Act if a marketer makes an environmental claim inconsistent with the guides.”).

⁴⁵ See, e.g., *Ecolabels and Certificates Help Consumers Make Sustainable Choices*, UPM GROUP, <http://www.upm.com/Responsibility/Product-stewardship/Environmental-labels-certificates/Pages/default.aspx> [<https://perma.cc/66BR-3945>] (last visited Nov. 17, 2018).

⁴⁶ See Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 201, https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm [<https://perma.cc/B9NH-SNQU>] (last visited Nov. 17, 2018) (stating that members agree that technical regulations and standards should be an obstacle to international trade).

⁴⁷ *The Committee on Trade and Environment*, WTO, https://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm [<https://perma.cc/Z4ZR-B4QJ>] (last visited Nov. 17, 2018).

⁴⁸ *Labeling*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/envir_e/labelling_e.htm [<https://perma.cc/TJ8B-2SFQ>] (last visited Nov. 17, 2018).

- (i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and distortions would benefit trade, the environment and development;
- (ii) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights; and
- (iii) labelling requirements for environmental purposes.⁴⁹

The Committee serves as a forum for information sharing and information gathering. For example, at the November 1, 2017 meeting, representatives from Peru presented on best practices for managing polychlorinated biphenyls (“PCBs”) used in mining equipment, demonstrating how public-private partnerships can be effective in dealing with environmental issues.⁵⁰ The WTO Secretariat discussed the latest updates to the Environmental Database, which tracks members’ notifications to the WTO regarding, among other topics, environmental regulatory measures that impact trade.⁵¹ Two WTO intergovernmental agreements, the Agreement on Technical Barriers to Trade⁵² (“TBT”) and the Agreement on Trade-Related Aspects of International Property Rights (“TRIPS”),⁵³ speak to members’ public and private efforts to regulate through VSS.

B. *Costs and Benefits of VSS*

This Section focuses on the economics of VSS, framing them as a potential market-based environmental governance tool. From a demand

⁴⁹ WTO, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#32.3 [https://perma.cc/NG8E-UP7B] (last visited Nov. 17, 2018).

⁵⁰ *WTO members share latest information on national environmental measures* (Nov. 1, 2017), WTO, https://www.wto.org/english/news_e/news17_e/envir_01nov17_e.htm [https://perma.cc/9CBZ-F3KE].

⁵¹ CTE, *Environmental Database*, WTO, https://www.wto.org/english/tratop_e/envir_e/envldb_e.htm [https://perma.cc/XYZ3-4TZC] (last visited Nov. 17, 2018). In 2015, the period the Secretariat reported on at the November 2017 meeting, the TBT triggered 61 percent of all notifications received, which was consistent with previous years. For additional information about the WTO’s work on trade and the environment, see *Trade and Environment*, WTO, https://www.wto.org/english/tratop_e/envir_e/envir_e.htm [https://perma.cc/J7D8-VAW4] (last visited Nov. 17, 2018).

⁵² Agreement on Technical Barriers to Trade, *supra* note 46.

⁵³ *WTO Legal Texts*, WTO, https://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs [https://perma.cc/6TZS-CMYZ] (last visited Nov. 17, 2018).

perspective, some consumers and businesses seek environmentally responsible goods.⁵⁴ The demand for environmentally responsible goods must be sufficiently strong, in the aggregate, to warrant producers' attention.⁵⁵ In some industries, consumer and business demand has been cultivated by social movement campaigns and NGOs that shed light on the environmental harms producers were causing.⁵⁶ Initially the movements promoted "buycotts," that named and shamed producers, but the movements and NGOs then turned to recognizing producers with strong environmental practices through certification.⁵⁷

Having recognized a critical mass of demand, producers use environmentally responsible processes to make environmentally responsible products.⁵⁸ Through their certification and auditing functions, VSS provide a set of environmental best practice standards to which producers can conform their products and processes.⁵⁹ Pairing consumers who demand environmentally responsible products with the producers who make and sell them is costly because while producers may have good information about their products' environmental benefits, consumers do not, triggering credence costs for consumers.⁶⁰ VSS correct this information asymmetry because they provide consumers with standard setting, enforcement schemes, and product labels that signal the products' conformity with the standards.⁶¹ Thus, when a consumer purchasing coffee in a grocery store faces shelves lined with coffee producers' products, VSS labels, such as Rainforest Alliance or UTZ, direct the consumer to environmentally responsible coffees.⁶² The labels may also shed light on environmental issues associated with the product, thereby building demand for the certified products.⁶³

⁵⁴ Roberts, *supra* note 30, at 117.

⁵⁵ *Id.* at 121.

⁵⁶ TIM BARTLEY ET AL., LOOKING BEHIND THE LABEL: GLOBAL INDUSTRIES AND THE CONSCIENTIOUS CONSUMER 91–95 (2015) (discussing the evolution of FSC forestry and forest product certifications); Axel Marx & Jan Wouters, *Competition and Cooperation in the Market of Voluntary Sustainability Standards* (Ku Leuven Working Paper No. 135, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2431191 [<https://perma.cc/X8RT-HWSQ>] (last visited Nov. 17, 2018) (noting that NGO boycotts and reputation production were the "main incentive" for establishing environmental VSS).

⁵⁷ BARTLEY ET AL., *supra* note 56, at 92.

⁵⁸ Roberts, *supra* note 30, at 117.

⁵⁹ See David E. Adelman & Graeme W. Austin, *Trademarks and Private Environmental Governance*, 93 NOTRE DAME L. REV. 709, 721 (2017).

⁶⁰ Roberts, *supra* note 30, at 122–23. For a discussion of environmental credence costs, see Minneti, *supra* note 30, at 670.

⁶¹ Roberts, *supra* note 30, at 124–25; Adelman & Austin, *supra* note 59, at 721.

⁶² Roberts, *supra* note 30, at 118–21.

⁶³ *Id.* at 121–22.

Economists characterize the benefits to VSS members as “club goods” and “private goods” that produce public goods.⁶⁴ Club goods are those that inure to VSS members by virtue of their participation in the VSS—they receive an enhanced reputation because they are engaging in environmentally responsible conduct.⁶⁵ Private goods are the prices VSS members can charge because of their conformity to the VSS.⁶⁶ Should the consumer purchase the certified good, the product’s price must be acceptable to the consumer and the producer.⁶⁷ Ideally, the price will reflect those costs associated with the product’s intrinsic production costs, its environmentally responsible attributes, and the information costs associated with certification to the VSS.⁶⁸ In theory, steady consumer demand will lead to the steady supply of environmentally responsible goods, which in turn, leads to environmental benefits.⁶⁹ These are the public goods, produced as a result of the producer-consumer exchange.⁷⁰

In addition to facilitating market-based transactions—and because they set environmental norms through their standards, audit producers to ensure compliance with the standards, and facilitate consumer purchase of environmentally responsible goods—VSS are essentially a form of private environmental regulation.⁷¹ VSS governance fills gaps left by the failures of formal public domestic and international governments.⁷² The failures arise in three situations: (1) jurisdictional disjunction—when nations lack the power to govern a natural resource because the resource

⁶⁴ GRAEME AULD, *CONSTRUCTING PRIVATE GOVERNANCE: THE RISE AND EVOLUTION OF FORESTRY, COFFEE, AND FISHERIES CERTIFICATION* 13–14 (Yale Univ. Press 2014).

⁶⁵ *Id.* at 14.

⁶⁶ *Id.*

⁶⁷ Roberts, *supra* note 30, at 122.

⁶⁸ *Id.* at 121 (noting that when the return on the investment of environmentally responsible practices is not strong enough, producers may choose to reallocate the use of their resources, choosing to supply the market with other goods). See BARTLEY ET AL., *supra* note 56, at 108–09 (discussing Indonesian farmers’ choices to shift from certified timber production to palm oil production, resulting in significant deforestation).

⁶⁹ Roberts, *supra* note 30, at 131–32. *But see* Cathy Roheim Wessells et al., *Product Certification and Ecolabelling for Fisheries Sustainability* 18, FAO FISHERIES TECHNICAL PAPER (2001) (noting that should consumer demand for environmentally responsible goods be smaller than its supply, then VSS may lead to increased prices on goods that are not environmentally responsible).

⁷⁰ AULD, *supra* note 64, at 14.

⁷¹ Roberts, *supra* note 30, at 125–29.

⁷² *Id.* at 134–40; Adelman & Austin, *supra* note 59, at 714 (“The intensifying ideological opposition to national environmental regulations and multilateral treaties has elevated the importance of private governance. Almost daily, the prospects of government responses to environmental and other global problems appears more remote.”).

does not exist exclusively within its border, such as migrating wildlife; (2) jurisdictional overlap—when multiple nations have power over a resource, but because each is self-interested none are able to collaboratively regulate the resource; and (3) regulatory fragmentation—when governmental entities compete with one another for authority over shared land use rights, resulting in local rules that compete and conflict with one another and lead to a race to the bottom in the rigor of the rules.⁷³

As noted above, when interest in environmentally responsible products began to grow, producers started affixing their own labels to their products, promoting the products' environmental attributes, which were frequently unverified and often false or misleading.⁷⁴ Subsequent cries of greenwashing triggered another use of VSS, third-party certification schemes that legitimized the claims about the products.⁷⁵

Theoretical models suggest positive and negative impacts from the growth in VSS. Among the positive impacts, vertical differentiation of VSS may result in the market entry of VSS with less rigorous standards.⁷⁶ Those VSS will certify producers that seek certification but cannot afford the costs associated with more rigorous standards.⁷⁷ This same group of VSS is likely to be more sensitive to local conditions affecting producers, which may result in stronger market uptake of the VSS, and as a result more widespread environmental impact.⁷⁸ Further differentiation of VSS could lead to a stepwise improvement of lowest performers.⁷⁹ At the other end of the spectrum, more rigorous VSS can signal high performing environmental products and processes, supplying market demand for products that are highly environmentally responsible.⁸⁰ In theory, an increase in the number of certification and audit companies working with VSS should lead to a decrease in producers' costs for VSS certification and audits.⁸¹ As more VSS enter the market, more certification and audit companies

⁷³ Roberts, *supra* note 30, at 134–36.

⁷⁴ BARTLEY ET AL., *supra* note 56, at 92.

⁷⁵ *Id.*

⁷⁶ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ENVIRONMENTAL LABELLING AND INFORMATION SCHEMES 9 (May 2016), <https://www.oecd.org/env/policy-perspectives-environmental-labelling-and-information-schemes.pdf> [<https://perma.cc/Z3J4-8C8X>] [hereinafter OECD REPORT].

⁷⁷ Roberts, *supra* note 30, at 114.

⁷⁸ OECD REPORT, *supra* note 76.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Andrew Prag, Thomas Lyon & Aimee Russillo, *Multiplication of Environmental Labelling and Information Schemes (ELIS): Implications for Environment and Trade* 32 (OECD Environment Working Papers, No. 106, 2016).

will be needed to implement the standards. The influx of such firms would drive down costs of certification of audits, for the benefit of producers.

Negative effects include difficulty in selecting VSS because producers do not know precisely which VSS consumers will value and which VSS are most appropriate for the producers' production environment. Horizontal intensification may require a producer to participate in multiple VSS to achieve sufficient market access, which causes increases in enrollment and compliance costs.⁸² The extension of VSS into carbon or environmental footprinting will likely lead to an increase in costs that will be disproportionately felt by producers in developing countries.⁸³ Assessment of product footprints requires a calculation of the product's life cycle, which in turn requires significant data collection and evaluation, potentially expensive changes to the product and/or production processes, and more expensive auditing measures.⁸⁴ Such cost increases will more significantly affect producers in developing countries, who have access to fewer resources to start with than those in developed or emerging economies.

Theoretical models of VSS proliferation posit that the increase in VSS in a given product category may result in a dilution of environmental standards.⁸⁵ Though their mission may be to protect and conserve environmental resources, VSS are also businesses that seek market survival. As new VSS firms enter the market, each seeks to increase its market share of certified products. In markets that will tolerate many certifiers, such as coffee, the pursuit of certified products will lead VSS to reduce their environmental standards, making certification easier for producers.⁸⁶ The resulting market would be one that is vertically differentiated, with firms racing each other to lower certification standards in an effort to increase their market share of producers, thereby ensuring their survival.⁸⁷ While producers may find it easier to certify their products, the overall environmental impact of certification would be reduced. And because most environmentally labeled products are credence goods, consumers are not likely to be aware that there is disparity in the products' environmental impacts, which reduces incentives for producers to aim for the greatest possible favorable environmental impact from their products.

⁸² See OECD REPORT, *supra* note 76, at 9.

⁸³ Prag, Lyon & Russillo, *supra* note 81, at 32.

⁸⁴ See Simone Manfredi et al., PRODUCT ENVIRONMENTAL FOOTPRINT (PEF) GUIDE, EUR. COMM'N JOINT RES. CTR. 5 (July 12, 2009), <http://ec.europa.eu/environment/eussd/pdf/footprint/PEF%20methodology%20final%20draft.pdf> [<https://perma.cc/6Y3B-T293>].

⁸⁵ Prag, Lyon & Russillo, *supra* note 81, at 32; OECD REPORT, *supra* note 76, at 9–10.

⁸⁶ Roberts, *supra* note 30, at 118–21.

⁸⁷ Adelman & Austin, *supra* note 59, at 733; AULD, *supra* note 64, at 14.

In theory, the proliferation of standards and their labels may confuse consumers, who will face retail shelves with similar products bearing different environmental labels.⁸⁸ Such confusion defeats the purpose of the labels, which exist, in part, to signal to consumers those products that are environmentally responsible.⁸⁹ As a result, consumer confusion may negatively impact consumer demand for labeled products because consumers may grow to distrust the labels, and consumers may be less likely to purchase the same goods over time.⁹⁰ Any such change in consumer demand would adversely impact producers' supply of the goods and any price premium they may be able to reap from participating in VSS.⁹¹ Having a sense of context for the development of VSS and their theoretical economic utility, the Article now turns to the actual marketplace for VSS, describing their growth in number, type, and sophistication over the last two decades.

C. *The Proliferation of VSS*

The exceptional growth of VSS since the 1990s is widely recognized and has occurred in the number of VSS schemes and the area certified by VSS.⁹² As noted above, Ecolabel Index lists 463 ecolabels in 199 countries and 25 industries.⁹³ VSS schemes mainly operate in developed countries; in many least developed countries no VSS are active.⁹⁴

⁸⁸ Andreas Rasche, *Voluntary Standards as Enablers and Impediments* in HANDBOOK OF RESEARCH ON SUSTAINABLE CONSUMPTION 23 (Lucia A. Reisch & John Thørgerson eds., 2015).

⁸⁹ Adelman & Austin, *supra* note 59, at 720.

⁹⁰ *Id.* at 725–26; Prag, Lyon & Russillo, *supra* note 81, at 30 (noting that consumers perceive self-declared claims in the seafood industry to be “misleading or unverifiable”).

⁹¹ Adelman & Austin, *supra* note 59, at 725–26.

⁹² OECD REPORT, *supra* note 76; Julia Lemoud et al., *The State of Sustainable Markets—Statistics and Emerging Trends*, INT'L TRADE CTR. xii (2017), <http://www.intracen.org/publication/The-State-of-Sustainable-Markets-2017-Statistics-and-Emerging-Trends/> [<https://perma.cc/VNM2-3ZTJ>]; Prag, Lyon & Russillo, *supra* note 81, at 32; Marx & Wouters, *supra* note 56; Adelman & Austin, *supra* note 59; Thomas Dietz & Jennie Auffenberg, *The Efficacy of Private Voluntary Certification Schemes: A Governance Costs Approach* (ZenTra Working Paper in Transnational Studies No. 39/ 2014, Oct. 22, 2014).

⁹³ ECOLABEL INDEX, *supra* note 38.

⁹⁴ Axel Marx & Jan Wouters, *Is Everybody on Board? Voluntary Sustainability Standards and Green Restructuring*, LEUVEN CTR. FOR GLOB. GOVERNANCE STUD. 511, 515 (2015). The authors examined the use of four leading VSS: FSC, PEFC, SAI, and GLOBALG.A.P. *Id.* at 513–14. They mapped the uptake of the standards in two measurement waves, conducted in 2010 and 2013. *Id.* at 514. EU member states account for 29 percent of active VSS. Sixty-four percent of private environmental VSS operate in a single country. Prag, Lyon & Russillo, *supra* note 81, at 21. The authors note that a full understanding

Correspondingly, a majority of certified entities are based in developed countries; few are based in developing countries.⁹⁵ In the forestry context, VSS are primarily adopted in the global North as opposed to the global South, creating market access barriers for global South producers who seek to participate in global value chains that require VSS certification.⁹⁶ Global North producers are accustomed to complying with regulations and as a result, the gap between their current practice and compliance with VSS is relatively small, when compared to producers in the global South, whose practices may require considerable revision to comply with VSS.⁹⁷ Further, even if the standardization gap is not significant for global South producers, the investment in time and money necessary to complete the certification process and comply with audits may be too high for global South producers, given that they may not receive a price premium on their efforts.⁹⁸

Trends in the growth of the number of environmental VSS include the following: Government operated schemes are a minority.⁹⁹ Over the past twenty years, most VSS are a product of non-state actors, including NGOs and private firms, and private firms have created more VSS than NGOs.¹⁰⁰ Business-to-consumer schemes represent 70 percent of all environmental VSS, indicating that businesses are driving the generation of VSS.¹⁰¹ Firms are now shifting away from biodiversity to climate change VSS.¹⁰² Growth in the number of VSS can also be described as intensification and extensification.¹⁰³ Intensification characterizes the proliferation of business-to-consumer VSS that certify the same sectors on the same issues and use an ecolabel to indicate certification.¹⁰⁴ For example, certifiers of environmentally responsible coffee production include: 4C Association, Bird Friendly Coffee, C.A.F.E. Practices, Rainforest

of the impact of private environmental VSS requires an understanding of the impact of private environmental VSS originating in one country but certifying producers in another; to date there is no reliable data that quantify that impact. Of the 64 percent originating and operating in the same country, 28 percent are in the United States. Prag, Lyon & Russillo, *supra* note 81, at 21. Annex B of the report includes a graph depicting the countries of origin for private environmental VSS.

⁹⁵ Marx & Wouters, *supra* note 94, at 515.

⁹⁶ *Id.* at 517.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ OECD REPORT, *supra* note 76, at 6.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*; see also Prag, Lyon & Russillo, *supra* note 81, at 19.

¹⁰⁴ *Id.*

Alliance Certified, Sustainable Agricultural Network, and UTZ Certified.¹⁰⁵ Intensification growth can be horizontal or vertical. Horizontal intensification refers to the emergence of new VSS that target environmental impacts not covered by existing VSS.¹⁰⁶ For example, among the coffee certifiers mentioned above, Rainforest Alliance Certified, established in 1992, certifies coffee produced in compliance with comprehensive environmental and social standards, and Bird Friendly Coffee, established in 1998, certifies coffee produced with best practices in shade management and protection of bird habitats.¹⁰⁷ Vertical VSS growth refers to the differentiation in standards based on the rigor of the certification scheme. For example, 4C Association is designed to attract the worst producers and incrementally facilitate their improvement,¹⁰⁸ whereas C.A.F.E. Practices sets a higher level of environmental performance for certification and includes a life-cycle analysis.¹⁰⁹ Extensification refers to those VSS that conduct life-cycle analysis of products, measuring, for example a product's carbon footprint or its environmental footprint.¹¹⁰ Carbon footprinting is concerned with the product's life-cycle greenhouse gas emissions.¹¹¹ Environmental footprinting includes a life-cycle analysis of additional product impacts, such as the impact on water and biodiversity.¹¹²

In terms of area certified, certified cotton farms increased 252.8 percent from 2011–2015, with a 46 percent increase from 2014–2015.¹¹³ Certified coffee farms increased 63.3 percent over the same period; certified forests increased 61 percent from 2008–2015.¹¹⁴ Organic certified products cover the largest area at 1.1 percent of all agricultural land worldwide.¹¹⁵ Approximately 10 percent of global forests are certified;¹¹⁶ The Program for the Endorsement of Forest Certification (“PEFC”) holds the highest share of certified global forest area, at 6.1 percent.¹¹⁷ Not

¹⁰⁵ ECOLABEL INDEX, *supra* note 38 (survey of ecolabels using “coffee” as a search term in the Ecolabel Index).

¹⁰⁶ See Prag, Lyon & Russillo, *supra* note 81, at 19.

¹⁰⁷ ECOLABEL INDEX, *supra* note 38.

¹⁰⁸ OECD REPORT, *supra* note 76, at 8.

¹⁰⁹ ECOLABEL INDEX, *supra* note 38; see Melissa Thomas et al., *C.A.F.E. Practices Results Assessment: Fiscal Years 2011–2012*, CONSERVATION INT’L (2011–2012).

¹¹⁰ OECD REPORT, *supra* note 76, at 22.

¹¹¹ Prag, Lyon & Russillo, *supra* note 81, at 19–20.

¹¹² *Id.* at 20.

¹¹³ Lemoud et al., *supra* note 92, at 4.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 5.

¹¹⁶ *Id.* at 8.

¹¹⁷ *Id.* at 6.

surprisingly, a VSS is more likely to increase certifications if its sustainability standards are weak, when compared with competing VSS.¹¹⁸

Some industries have seen a convergence or harmonization of VSS in addition to or instead of a proliferation of VSS. Convergence arises when VSS promote the mutual recognition of one another's standards as roughly equivalent.¹¹⁹ For example, USDA Organic and EU Organic mutually recognize one another as do Environmental Choice New Zealand and Thai Green Label.¹²⁰ Convergence of private VSS is highly uncommon, reflecting the competitive, uncoordinated, and fragmented nature of the intensification of VSS.¹²¹ Harmonization occurs when individual VSS entities adopt codes of best practices.¹²² Sustainable Agricultural Network/Rainforest Alliance's and UTZ's adoption of International Social and Environmental Accreditation and Labelling ("ISEAL") Alliance's Code of Good Practice is a prime example of harmonization.¹²³

The proliferation of private VSS can be attributed to consumer demand for more environmentally responsible products and processes, government's failure to respond to that demand, NGOs' interest in and capacity for responding to consumer demand, and businesses' interest in marketing their environmentally responsible products and processes.¹²⁴ An empirical study of VSS considered (1) the extent to which VSS support

¹¹⁸ Dietz & Auffenberg, *supra* note 92, at 16 (studying the spread of coffee certification by examining three components of coffee VSS: sustainability, economic, and enforcement standards). Sustainability standards included environmentally specific standards, such as the use of pesticides and fertilizers, water conservation, and ecosystem and wildlife protections. *Id.* at 11. That the strictness of a sustainability standard was directly related to the spread of the standard was explained by the inference that stricter sustainability standards generated higher implementation costs, which could not be fully compensated by the market. *Id.* at 17. Interestingly, the authors found that the rigor of enforcement standards, which included auditing procedures and compliance plans, had "no absolutely negative impact" on the spread of coffee certification, *id.* at 16, suggesting that the most significant costs of VSS uptake are on the front end of the standard.

¹¹⁹ Prag, Lyon & Russillo, *supra* note 81, at 19–20.

¹²⁰ Marx & Wouters, *supra* note 94, at 17.

¹²¹ *Id.*

¹²² Prag, Lyon & Russillo, *supra* note 81, at 19–20.

¹²³ See *ISEAL Members*, ISEAL ALLIANCE, <https://www.isealalliance.org/about-iseal/iseal-members> [<https://perma.cc/46HR-R4KA>] (last visited Nov. 17, 2018). ISEAL Alliance has set codes for standard setting, assessing impacts, and assurance with which members must comply. For information about the Codes, see *ISEAL Codes of Good Practice*, ISEAL ALLIANCE, <https://www.isealalliance.org/our-work/defining-credibility/codes-of-good-practice> [<https://perma.cc/Z7PM-5RLJ>] (last visited Nov. 17, 2018).

¹²⁴ See Roberts, *supra* note 30, at 129–40; Minneti, *supra* note 30, at 29–43 (describing non-state actors' VSS schemes).

producers and (2) the geographic availability of VSS.¹²⁵ The study found that VSS tend to provide more support for producers when the VSS are full members of ISEAL, headquartered in an Organization for Economic Cooperation and Development (“OECD”) country, have been in existence for longer than average, and engage producers and buyers in management of the VSS.¹²⁶ VSS variables that reflect no predictive relationship for producer support include whether the VSS were public (connected to a formal government scheme) or for-profit and private. Not surprisingly, VSS availability is significantly and positively correlated to country level GDP.¹²⁷ The more wealthy a country, the more likely the country’s markets include high-quality goods touting sustainability benefits.¹²⁸ The demand for such goods incentivizes profit-maximizing certifiers and VSS to enter the markets and certify the goods.¹²⁹ Markets where firms are more competitive will have more VSS available to them.¹³⁰ The study defined firm competition in terms of the firm’s ability to effectively and efficiently manage its resources as expressed through its use of indicators to gauge best practices.¹³¹ The indicators included use of a bank account, email, and the capacity to engage in high-volume production.¹³²

The proliferation of VSS is clear evidence of consumers’ demand for private VSS.¹³³ Among European consumers, 54 percent seek out environmentally responsible goods, and 84 percent strongly consider the

¹²⁵ Matteo Fiorini et al., *Suppliers’ Access to Voluntary Sustainability Standards (VSS)* (European University Institute Working Paper 1, 2017) [hereinafter *Access to VSS*].

¹²⁶ *Id.* at 16–17. The authors conducted an empirical study of approximately 1000 data points on 180 VSS arising from 80 sectors. *Id.* at 6. All of the VSS studied covered at least one sustainability area (economic and management, ethics and integrity, environment, quality management system, social), and had a fixed governance structure and credible audit system. *Id.* at 6. The information was assimilated into a database called the Sustainability Map. *Sustainability Map*, ITC, <http://sustainabilitymap.org/home> [<https://perma.cc/C5BJ-Z855>] (last visited Nov. 17, 2018). The authors defined support. *Access to VSS*, *supra* note 125, at 11. OECD countries include: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. *Members and partners*, OECD, <http://www.oecd.org/about/membersandpartners/> [<https://perma.cc/9C8K-UU9C>] (last visited Nov. 17, 2018).

¹²⁷ *Access to VSS*, *supra* note 125, at 21.

¹²⁸ *Id.* at 20.

¹²⁹ *Id.*

¹³⁰ *Id.* at 22.

¹³¹ *Id.* at 21.

¹³² *Id.*

¹³³ *See* ECOLABEL INDEX, *supra* note 38.

environment in their purchase decisions.¹³⁴ As noted above, state actors' failures, at the domestic and international level, to require and/or incentivize producers to generate environmentally responsible products in response to consumer demand-motivated social movements and NGOs to first boycott and then later develop their own private VSS that could name those producers who produced environmentally responsible products and shame those that did not.¹³⁵

Firms, including producers, distributors, and retailers, are now also participating in VSS governance through the adoption of third-party VSS or the creation of their own VSS. From an internal perspective, a firm's adoption of a VSS scheme can enable the firm to secure long-term supply of resources and construct barriers to entry for rival firms.¹³⁶ With the advent of global value chains, firms are now seeking to certify their entire supply chain, rather than a single ingredient, product, or process.¹³⁷ External demand may also lead a firm to pursue certified products. Such demands include pressure from investors; non-consumer buyers, such as distributors; and insurers who perceive VSS as a risk reduction tool.¹³⁸ In addition, the adoption of VSS may protect the firm from resource scarcity and may preempt future governmental regulation.¹³⁹ A key benefit of private VSS schemes is their flexibility. Through a private VSS, the firm can adopt standards that fit its supply chain needs, thereby governing its conduct without the interference of state actors' schemes, which may prove less flexible and more costly to the firm. Starbucks and Nespresso are examples of these trends because each has developed its own sustainability programs and contracted with third-party certifiers to validate compliance with the schemes. C.A.F.E. Practices is Starbucks' program.¹⁴⁰ Starbucks has contracted with SCS Global Services ("SCS") to certify its producers' compliance with environmentally sound practices.¹⁴¹ Similarly, Nespresso has contracted with Rainforest Alliance to ensure the coffee it sells is sustainably farmed.¹⁴²

¹³⁴ Prag, Lyon & Russillo, *supra* note 81, at 18.

¹³⁵ Marx & Wouters, *supra* note 94, at 9–10; Dietz & Auffenberg, *supra* note 92, at 2; Adelman & Austin, *supra* note 59, at 13.

¹³⁶ Prag, Lyon & Russillo, *supra* note 81, at 18; Marx & Wouters, *supra* note 94, at 10.

¹³⁷ Prag, Lyon & Russillo, *supra* note 81, at 18.

¹³⁸ *Id.*

¹³⁹ *Id.* at 18; Marx & Wouters, *supra* note 94, at 10.

¹⁴⁰ *Ethical Sourcing Coffee*, STARBUCKS, <https://www.starbucks.com/responsibility/sourcing/coffee> [<https://perma.cc/W6SB-GF4N>] (last visited Nov. 17, 2018).

¹⁴¹ *Starbucks C.A.F.E. Practices*, SCS GLOBAL SERVICES, <https://www.scsglobalservices.com/starbucks-cafe-practices> [<https://perma.cc/92WY-GCUD>] (last visited Nov. 17, 2018).

¹⁴² *Teaming Up on Certification: The Secret to Sustainable Quality*, NESPRESSO, <https://>

This Part has provided background information on the development of VSS and the costs and benefits associated with VSS, and this Part has described the recent growth in the number, types, and complexity of VSS. One might conclude that the growth in VSS is evidence that they have accomplished their potential utility by leading to producers' enhanced environmental and social welfare practices and resulted in actual environmental benefit and social change. As the next Part details, such is not necessarily the case, especially in the global South.

II. IMPACT OF VSS ON GLOBAL SOUTH PRODUCERS AND ENVIRONMENTS

In spite of the fact that VSS have been operating in the global South for decades, the depth of research on VSS in the global South is relatively shallow. This Part first summarizes studies that have focused on VSS's effect on producers; it then turns to studies evaluating VSS's impacts on the global South environment. Results of the producer-focused studies are context-specific, but some general trends emerge: global South producers, especially smallholder producers, see little monetary benefit from certification; market access is the most widespread benefit of VSS participation, but smallholder producers generally cannot participate on their own—instead, they must join producer organizations, partnering with other producers to spread the costs of certification. Certification has taught some producers more efficient and environmentally responsible production processes. Public government can facilitate VSS uptake among producers. In spite of how integral producers are to the success of VSS, VSS rarely permit producers to participate in decision-making.

Environment-focused studies are fewer in number than producer-focused studies; their results are also highly context-specific, varying by global South nation and industry. General trends include some positive changes in producer practices that may lead to environmental benefits, such as the use of more environmentally responsible chemicals and better use of water; however, evidence of direct environmental benefit from VSS is exceedingly thin, with only one study suggesting that coffee farmers' practices led to an increase in biodiversity, and with several studies showing that forestry certification had no or had adverse impacts on deforestation.

www.nespresso.com/ch/en/our-choices/sustainable-coffee-quality/the-secret-to-sustainable-and-quality-coffee?utm_id=6a26af9d-9d10-4647-92%E2%80%A6 [https://perma.cc/HYB5-R4EG] (last visited Nov. 17, 2018).

A. IMPACT OF VSS ON PRODUCERS IN THE GLOBAL SOUTH

Consideration of the impact of VSS on developing country producers is important because it is the producers whose uptake of the VSS gets the process started and the producers bear most of the risks and costs associated with VSS.¹⁴³ Because VSS are by their nature voluntary, producers must be incentivized to seek and maintain certification of their products. Incentives generally arise from a cost-benefit analysis drawn from short- and long-term assessments of certification.¹⁴⁴ Certification costs include investment in equipment, time spent learning new practices, time spent working through the certification paperwork, paying for third-party audits, and maintaining certification standards over time.¹⁴⁵ Social and cultural norms also factor into producers' decision-making because certification frequently involves changes to production processes. Potential certification benefits include an increase in profit, increased market and credit access, increased access to government-based land rights, and producers' ability to learn more efficient and environmentally responsible production processes.¹⁴⁶ As more fully detailed below, studies of the impacts of VSS on producers are just beginning to yield useful data; early reports indicate that the impacts of VSS on global South producers are mixed and context-specific.¹⁴⁷ This Section summarizes VSS impacts on producers' (1) revenue, (2) access to markets and credit, (3) environmental practices, and (4) access to government resources.

¹⁴³ See Martijn Scheltema, *Balancing Public and Private Regulation*, 12 *UTRECHT L. REV.* 16, 30 (2016) (noting that producers bear most of the large risks and costs associated with VSS uptake and that few VSS account for this fact).

¹⁴⁴ See J.W. Molenaar & J.J. Kessler, *The Business Benefits of Using Sustainability Standards: A Meta-Review*, *AIDENVIRONMENT* 4 (2017), <https://www.standardsimpacts.org/sites/default/files/Aidenvironment%20report%20business%20benefits%20of%20standards.pdf> [<https://perma.cc/QG2M-WAVR>].

¹⁴⁵ *Id.* at 24.

¹⁴⁶ *Id.* at 6–7, 28, 35.

¹⁴⁷ Greeje Schouten & Verena Bitzer, *The Emergence of Southern Standards in Agricultural Value Chains: A New Trend in Sustainability Governance?*, 120 *ECOLOGICAL ECON.* 175, 175 (2015) (observing that the impact of Northern standards on Southern producers is “highly contested.” Some researchers have found positive socio-economic effects, others have insignificant or variable effects, and still others have found that the outcome of the standards are “particularly ambiguous” for small producers. Also noting “[e]ven when producers are compliant, there is little certainty that the new practices lead to the desired level of sustainability.”).

1. Impact of VSS on Producers' Revenue

Generally, VSS do not have a positive impact on producers' revenue.¹⁴⁸ While certification may increase sales volume through market access, the costs of certification tend to keep producers from realizing profits from VSS.¹⁴⁹ A few industries, such as coffee and cocoa, appear to more consistently yield increased net income for producers because the producers have more market power.¹⁵⁰ They are able to charge a price premium

¹⁴⁸ *ITC Study*, *supra* note 30. The ITC is a joint venture of the WTO and UN and provides trade-related technical assistance through the United Nations Conference of Trade and Development (UNCTAD). *Id.* at ii. The ITC completed a literature review of fourteen studies, each of which included a counterfactual control group; the literature review revealed that eight of the fourteen studies found a positive impact; four found mixed or no evidence of a positive impact, and two found that the standards adversely impacted producers' net income. *ITC Study*, *supra*, at 14. Study authors conducted a systematic review of forty-seven research papers that assessed the socioeconomic and environmental impacts of private VSS on producers in developing countries. *Id.* at ix. Thirty-five of the papers were written by academics or researchers commissioned by international organizations; the balance were written by international development organizations or standards organizations. *Id.* at 6. Twenty-one of the articles were published in peer-reviewed journals. *Id.* at 6. The forty-seven papers discussed a variety of standards, but most focused on Fairtrade, Organic, and FSC, with most of the control-group studies focused on Fairtrade and Organic. *See Our Role in the UN and WTO*, ITC, <http://www.intracen.org/itc/about/how-itc-works/our-role-in-the-un-and-wto/> [<https://perma.cc/4F5K-4FEN>] (last visited Nov. 17, 2018). *But see* Prag, Lyon & Russillo, *supra* note 81, at 30 (discussing the proliferation of environmental labelling and information schemes, noting that there is "likely no general, explicit positive (or negative) impact" of VSS competition that applies to all sectors. Instead, the impacts vary by industry). The proliferation of VSS among coffee and cocoa producers is related to economic and environmental benefits, but in the seafood industry, the proliferation of VSS has led to a perception that the VSS labels are misleading or unverifiable. *Id.* at 30. Loconto and Dankers note that Fairtrade and Organic were the "most consistently profitable" for smallholders. Loconto & Dankers, *supra* note 30, at 45.

¹⁴⁹ Carlson & Palmer, *supra* note 23, at 130. Of the twenty case studies the authors reviewed, only two certified producers showed a price premium from certification. *Id.* at 134. The authors defined developing countries to include those classified as middle or low income countries by the World Bank in 2014. *Id.* at 129, n.1. They noted that while over half of the global forests are located in developing countries, 80 percent of the forests certified by FSC are in Europe and North America. *Id.* at 132. Further, as to fisheries, developing countries supply 60 percent of the volume and 50 percent of the value of fish and fishery products; only 19 of the 231 MSC certified fisheries are in developing countries. *Id.* at 132.

¹⁵⁰ *ITC Study*, *supra* note 30, at 15; COSA, THE COSA MEASURING SUSTAINABILITY REPORT: COFFEE AND COCOA IN 12 COUNTRIES 3 (2013), <https://thecosa.org/wp-content/uploads/2014/01/The-COSA-Measuring-Sustainability-Report.pdf> [<https://perma.cc/Y56C-RMPV>] [hereinafter COSA REPORT]. Data from the report was collected from studies conducted in the following countries between 2009–2013: Mexico, Guatemala, Nicaragua, Costa Rica, Colombia, Peru, Cote d'Ivoire, Ghana, Tanzania, Vietnam, Indonesia, and Papua New Guinea. *Id.* at 36–37. *But see* Marcela Ibanez & Allen Blackman, *Is Eco-Certification a*

for certified goods, and they are able to keep the revenue from the increased prices.¹⁵¹ In other industries, even if the producers can charge a price premium, supply chain dynamics place market power in the hands of retailers, who absorb the increase in revenues from price premiums and do not pass the revenue back to the producers.¹⁵² And still other industries, such as fisheries and forestry, generally will not support a price premium for certified goods, which means that producers cannot pass the costs of certification on to buyers and instead, must absorb it themselves.¹⁵³

2. Impact of VSS on Producers' Market and Credit Access

Participation in private VSS generally enhances producers' business opportunities, which include access to markets and credit, reputation, and changes in practices and product variety.¹⁵⁴ Enhanced business

Win-Win for Developing Country Agriculture? Organic Coffee Certification in Colombia, 82 WORLD DEV. 14, 15 (2016) (assessing the effect of organic coffee certification in Colombia and finding that certification provided no benefits to producers' income or net returns). The authors examined coffee production in Cauca, Colombia, from 224 certified organic coffee producers. *Id.* at 24. They noted that the organic certification scheme they studied has well-defined standards that are enforced at the farm level through peer and third-party monitors. *Id.* at 25. But certification did not produce any benefits to producers in the form of labor costs, income, or net returns. *Id.* at 25.

¹⁵¹ *ITC Study*, *supra* note 30, at 15; COSA REPORT, *supra* note 150, at 41. Certified farmers' yield was 14 percent better than uncertified farmers' yield; their net income was 7 percent higher; and they had 32 percent more training. COSA REPORT, *supra* note 150, at 41. Other economic indicators surveyed included revenue, costs, income, diversification of risk, information related to risk, access to credit, volatility, vulnerability, business development, differentiation, efficiency, governance, services, and the farmers' perception of their economic situation. *Id.* at 43.

¹⁵² Carlson & Palmer, *supra* note 23, at 132.

¹⁵³ *ITC Study*, *supra* note 30, at 15; Carlson & Palmer, *supra* note 23, at 132 (stating that "even if a price premium exists for certified fish, it would not provide a sufficient incentive to sustainably manage fishery stocks"); Loconto & Dankers, *supra* note 30, at 48 (finding that forest certification rarely resulted in price premiums that covered certification costs). *But see* Carlson & Palmer, *supra* note 23, at 132 (noting that an earlier study of forestry in the Asia-Pacific region and Bolivia found price premiums as high as 51 percent). Research reveals no other study finding similar price premiums in forestry.

¹⁵⁴ *ITC Study*, *supra* note 30, at 16. Of the thirteen control group studies that addressed the issue, nine found positive impacts on business opportunities, four found mixed results or no impact, and none found negative impacts. *Id.* at 16. Of those studies with mixed results, lower crop diversification was most commonly cited. *Id.* The study authors suggested that the decrease in crop diversification was a result of the increased success with certified crops. *Id.* Because of price premiums and/or increased market access, farmers are more likely to focus on certified crops, thereby limiting the crops they plant. *Id.* Forestry study authors cited mixed results because government regulation drove changes in practice, not

opportunities and practices may outweigh the importance of price premiums for producers.¹⁵⁵ Increases in market and credit access, increased and better yield quality, and additional training each have long-term impacts that, while not reflected in immediate profitability, may lead to net long-term profitability.¹⁵⁶ Certification differentiates certified producers' products from those not certified, giving the products a positive reputation and prestige.¹⁵⁷ Reputational benefits of certification are most pronounced among small firms.¹⁵⁸ To the extent that VSS guide producers toward cultivating relationships with buyers rather than merely making one-off deals, VSS empowers firms to enter long-term contracts with retailers, which in turn enables firms to invest in more sustainable practices.¹⁵⁹ In the coffee and cocoa industries, producers tend to seek multiple certifications, because doing so appears to increase their market options and income.¹⁶⁰

Generally, to participate in a certified product market, smallholder producers must work together, and together, they must participate in vertically coordinated arrangements.¹⁶¹ Certification requires more organizational and financial strength than an individual smallholder is capable of providing.¹⁶² Moreover, a vertically coordinated arrangement enables producers to upgrade their value chain—shifting their participation to markets for higher-priced goods, resulting in increased revenues.¹⁶³ Thus, when considering the impact of VSS on smallholder producers, the impact is somewhat exclusionary, because it requires smallholders to essentially migrate away from their smallholder status to be successful. In some industries, VSS have a direct effect on the way certified smallholders participate in the market because corporate buyers and supply chain

certification schemes. *Id.* Non-control group studies revealed the same trends: participation in private VSS enhances producers' business opportunities. *Id.* at 17. Certification provides producers with international market access. Carlson & Palmer, *supra* note 23, at 136. An earlier study showed that certification enabled firms to maintain their client base or gain access to high value export markets. *Id.* at 132.

¹⁵⁵ *ITC Study*, *supra* note 30, at 24.

¹⁵⁶ Carlson & Palmer, *supra* note 23, at 136.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 132.

¹⁶⁰ COSA REPORT, *supra* note 150, at 41.

¹⁶¹ Loconto & Dankers, *supra* note 30, at 50. See also Jania Grabs et al., *Understanding Coffee Certification Dynamics: A Spatial Analysis of Voluntary Sustainability Standard Proliferation*, 19 INT'L FOOD AND AGRIBUSINESS MGMT. REV. 31, 50 (2016) (noting that smallholder coffee farmers in Latin America "struggle to achieve positive cost-benefit outcomes of VSS participation").

¹⁶² Grabs et al., *supra* note 161, at 52.

¹⁶³ *Id.*

captains, not consumers, drive the market and “serve as the gatekeepers for inclusion in certified value chains.”¹⁶⁴ VSS can integrate smallholders into new markets, but in light of their costs and commitments, VSS must be seen as a “continuum of improvements towards long-term competitiveness rather than an immediate one-time boost to sales.”¹⁶⁵

Market access may not be relevant for global South forestry and fishery producers. About 80 percent of the wood produced in developing countries is used in developing countries.¹⁶⁶ Similarly, the majority of fish caught in the global South is consumed within the global South.¹⁶⁷ Market access is even less relevant for small-scale fisheries, which tend to produce more irregular quantities and qualities of fish.¹⁶⁸ Such fisheries may not be integrated into supply chains that require proof of temperature controls, further restricting access.¹⁶⁹ Alternatively, market access for large-scale, industrial fisheries is more prevalent than price premiums because their size enables them to supply international fish markets and contract with large corporations, ensuring a stable demand for their fish.¹⁷⁰

Although VSS may open new markets for global South producers, they may also preclude access to markets. As noted above, the WTO's CTE provides a forum for member states to discuss trade-related environmental issues. During the Committee's 2016 Annual Meeting, Ecuador presented on its experiences with organic agricultural certification for small- and medium-sized enterprises (“SMEs”), observing that obstacles to SME uptake of VSS included: VSS administrative costs, lengthy certification processes, and the need to seek multiple certifications arising from the lack of harmonization between VSS.¹⁷¹ Ecuador favored a tariff on certified organic foods to incentivize SMEs to participate in VSS.¹⁷² At the 2015 Annual Meeting, delegations urged member countries to consider the interests of developing countries as they responded to reports of illegal, unreported, and unregulated fishing.¹⁷³ During a June 2014 CTE meeting, the International Organization for Standardization (“ISO”), a private,

¹⁶⁴ *Id.* at 39 (referencing PETER GIBBON & STEFANO PONTE, *TRADING DOWN: AFRICA, VALUE CHAINS, AND THE GLOBAL ECONOMY* (Temp. Univ. Press 2005)).

¹⁶⁵ Locanto & Dankers, *supra* note 30, at 60.

¹⁶⁶ Carlson & Palmer, *supra* note 23, at 132.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 132, n.5.

¹⁷⁰ *Id.* at 137.

¹⁷¹ CTE, at 2, U.N. Doc. WT/CTE/23 (2016).

¹⁷² *Id.*

¹⁷³ CTE, at 4, U.N. Doc. WT/CTE/23 (2015).

non-state actor, presented on its requirements and guidelines for the greenhouse gas footprint of products and its draft standard addressing the water footprint of products, processes and organizations.¹⁷⁴ While some delegations at the meeting expressed support for the ISO work, others expressed concern regarding the impact of the standards on developing country SMEs market access, cautioning that the standards could be used as a trade barrier.¹⁷⁵ In response to the OECD report on its ecolabel project, delegations expressed concern about the impact of the proliferation of VSS on market access for developing country producers.¹⁷⁶

3. VSS Impact on Producers' Environmental Practices

VSS typically require producers to educate themselves on efficient and environmentally responsible production processes. Benefits of VSS participation include increased awareness of environmental impacts and enhanced stakeholder participation.¹⁷⁷ For example, the certification process enabled producers to better understand the need to protect their stock to ensure that it would be available for long-term business.¹⁷⁸ Certification exposed producers to training in safety, hygiene, nutrition, dispute resolution, leadership, efficient management practices, and of course, the certificate's rules and regulations.¹⁷⁹ Producers' pride and self-esteem that flows from producing a certified product is a significant benefit of certification, one that "may in some cases be sufficient to drive continued sustainable resource management development."¹⁸⁰

4. VSS Impacts on Producers' Access to Government Resources

To thrive in a certified market, certified smallholders need institutional support from national governments in the form of national regulations, subsidies, or preferential trade arrangements.¹⁸¹ Certification has provided producers with government support and empowerment, including "regulatory relief, tax benefits, public good provision, and preferential

¹⁷⁴ CTE, at 1, U.N. Doc. WT/CTE/21 (2014).

¹⁷⁵ *Id.* at 1–2.

¹⁷⁶ *Id.* at 4.

¹⁷⁷ Carlson & Palmer, *supra* note 23, at 135.

¹⁷⁸ *Id.* at 136.

¹⁷⁹ *Id.* at 135.

¹⁸⁰ *Id.* at 136.

¹⁸¹ Loconto & Dankers, *supra* note 30, at 40.

treatment in the allocation of resource access rights.”¹⁸² Increase in access rights was the most prominent benefit certified producers received from governments. Access rights included “securing land- or fishery-use concessions, allocation of catch quotas, or legal recognition of customary rights.”¹⁸³ Securing such rights is essential if a producer is to invest in the infrastructure and equipment necessary for certification, and ultimately engage in more environmentally sustainable practices.¹⁸⁴ As a result of acquiring access rights, certified producers were empowered to engage in long-term planning, which benefitted the producers and the environment.¹⁸⁵

In terms of public-private initiatives, while early studies indicated that government did not and should not play a role in certification, contemporary studies indicate that government can and does facilitate smallholder producers’ access to certified markets.¹⁸⁶ Specifically, governments can facilitate the investment in certification by: providing support services, such as testing labs and extension offices to provide training about certification; establishing national standards that harmonize with international standards; and finally, governments themselves can incentivize smallholder participation by establishing procurement plans that purchase certified products.¹⁸⁷

This Section has focused on the impacts that VSS have on global South producers. Though the research pool is shallow, a few general conclusions can be drawn. As currently structured, producers see little profit from participating in VSS; some producers have found that VSS create new market and credit opportunities, while others have found VSS create barriers to market entry. VSS have helped some producers learn more efficient and environmentally responsible production processes. And finally, government can play an important role in facilitating producer uptake of VSS.

B. Integration of Global South Producers into VSS Governance

One might expect that producers would play a fundamental role in the governance structure of VSS, given how integral producers are to the success of VSS. As further discussed below, however, such is not the case. In fact, the general trend is for producers to play a limited or no role

¹⁸² Carlson & Palmer, *supra* note 23, at 135.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 135–36.

¹⁸⁵ *Id.* at 136.

¹⁸⁶ Loconto & Dankers, *supra* note 30, at 60–61.

¹⁸⁷ *Id.*

at all in VSS governance structure.¹⁸⁸ In a survey of thirty-three VSS, research revealed that twenty VSS (61 percent) do not reserve producers a seat on their important decision-making bodies.¹⁸⁹ Among the twenty, eight imply producers will be represented, but do not require participation, and twelve offer no representation opportunities to producers.¹⁹⁰ A separate study of forty-five VSS found that only 14 percent reported that they include populations affected by the standards, such as producers and local communities, in their decision-making.¹⁹¹ Researchers found that 98 percent of VSS included industry and civil society representatives in their decision-making,¹⁹² but that representation is not equal, revealing significant power imbalances in decision-making bodies.¹⁹³ Two entities, PEFC and Roundtable on Sustainable Palm Oil, report that industry stakeholders outnumber other stakeholders by 4:1.¹⁹⁴ VSS may permit NGOs to serve in governance, and some NGOs represent producers' interests,¹⁹⁵ but unless the NGO's organization documents compel it to do so, the NGO may act in its own best interests, thus making NGOs a poor substitute for producers in VSS governance. Some VSS draw producers into standard-setting committees, but not high decision-making bodies.¹⁹⁶ While producers should be involved in standard setting, they should not

¹⁸⁸ Elizabeth A. Bennett, *Who Governs Socially-Oriented Voluntary Sustainability Standards? Not the Producers of Certified Products*, 91 *WORLD DEV.*, 53, 60–61 (2016); see BEN COLLINS ET AL., *THE NEW REGULATORS? ASSESSING THE LANDSCAPE OF MULTI-STAKEHOLDER INITIATIVES 9* (2017), <https://msi-database.org/data/The%20New%20Regulators%20-%20MSI%20Database%20Report.pdf> [<https://perma.cc/2UVA-AGJW>].

¹⁸⁹ Bennett, *supra* note 188, at 61. The author selected a set of VSS from those frequently studied in academic literature and those on the ISEAL membership list. *Id.* at 58. From that set, she identified ten criteria, including those VSS that were private standard setters, certified supply chains, used third party auditors, and those that certified entities with production sites in at last two regions/continents and had products that were produced and consumed in different countries. *Id.* at 58.

¹⁹⁰ *Id.* at 61–62. The author discusses how decision making bodies include boards of directors, general assemblies, and advisory councils. *Id.* at 57. Bennett's research focused on the two decision-making bodies with the most power in the organization.

¹⁹¹ COLLINS ET AL., *supra* note 188, at 5. The report defines MSI as entities that (1) have a governance structure that requires more than one stakeholder in its primary decision making body, (2) set standards, which (3) operate in more than one country, and (4) focus on standardizing conduct on issues of public concern, such as human rights, the environment, and corruption prevention. *Id.* at 6. The authors noted that research collected data on MSIs from the MSIs' websites. *Id.* at 6.

¹⁹² *Id.* at 5.

¹⁹³ *Id.* at 11.

¹⁹⁴ *Id.*

¹⁹⁵ Bennett, *supra* note 188, at 62.

¹⁹⁶ *Id.* at 65.

be precluded from participating in the VSS's most significant decisions, such as which producers the VSS will target, how many producers the VSS can carry, and VSS benefits to producers and growth strategies.¹⁹⁷ Researchers acknowledge that while 49 percent of the VSS engaged affected populations outside of decision-making through implementation workshops or interviews during compliance reviews, such consultation is insufficient; those directly affected by VSS ought to have a say in the structure of VSS.¹⁹⁸

That producers typically play such a small role in VSS governance is troubling. Producers, such as Suresh and Diego, have a wealth of information about how to produce their products in a sustainable manner and the economics of sustainable production.¹⁹⁹ Moreover, because producer participation in VSS is voluntary and the profit potential for producers is questionable, if producers are not included in the VSS governance structure, they are less likely to participate in the VSS. To the extent that the proliferation of VSS has led to a certification landscape that essentially requires certification for market access, such as in the Indian coffee markets, when producers are not included in VSS decision-making, the producers lose a right to self-determination, and the VSS themselves become less inclusive and less democratic.²⁰⁰ Alternatively, when primary decision-making bodies are included in VSS—such that producers have a meaningful voice in how the VSS are organized, the standards are set, and the certified entities are audited and possibly sanctioned—producers have a vested interest in VSS outcomes, and as a result, are more likely to meaningfully participate in the VSS. In addition, participation in governance may build producer communication, management, and leadership skills, which may be transferable to producers' organizations and lead to stronger environmental impacts.

An organization's failure to include a key stakeholder in governance is not a random decision, but reflects the organization's strategy for survival and effectiveness.²⁰¹ In the VSS context, survival is linked to the VSS's legitimacy, and for some VSS, that legitimacy is expressed by the VSS's inclusive approach to governance.²⁰² But clearly, VSS can derive a sufficient degree of legitimacy to survive without including producers,

¹⁹⁷ *Id.*

¹⁹⁸ COLLINS ET AL., *supra* note 188, at 10.

¹⁹⁹ See Bennett, *supra* note 188, at 61; COLLINS ET AL., *supra* note 188, at 9.

²⁰⁰ Bennett, *supra* note 188, at 55.

²⁰¹ *Id.* at 55–56.

²⁰² *Id.*

as this is demonstrated by those in the study that have survived for decades without including producers in governance.²⁰³ An organization's governance structure may reflect those to whom the organization is primarily accountable, such as donors, members of industry, and civil society.²⁰⁴ If the organization does not perceive itself to be primarily accountable to producers, it may have little interest to include producers in governance.²⁰⁵ Alternatively, organizations may design governance structures to facilitate access to the resources that the organizations need to be effective, which include funding, information, and major contracts.²⁰⁶ Thus, the organization may include in governance those stakeholders that provide access to important resources and exclude those, such as producers, which do not.²⁰⁷

A related empirical study of VSS considered (1) the extent to which VSS support producers and (2) the geographic availability of VSS.²⁰⁸ The study found that VSS tend to provide more support for producers when the VSS are: full members of ISEAL, headquartered in an OECD country, have been in existence for longer than average, and engage producers and buyers in management of the VSS.²⁰⁹ VSS variables that reflect no predictive relationship to producer support include whether the VSS was public (connected to a formal government scheme) or for-profit and private. Not surprisingly, VSS availability is significantly and positively correlated

²⁰³ *Id.* at 65.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Bennett, *supra* note 188, at 65.

²⁰⁷ *Id.*

²⁰⁸ *See* Access to VSS, *supra* note 125.

²⁰⁹ *Id.* at 16–17. The authors conducted an empirical study of approximately 1000 data points on 180 VSS arising from eighty sectors. *Id.* at 6. All of the VSS studied covered at least one sustainability area (economic and management, ethics and integrity, environment, quality management system, or social), had a fixed governance structure, and credible audit system. *Id.* The information was assimilated into a database, called the Sustainability Map. *Sustainability Map: Your Roadmap to Sustainable Consumption, Production and Trade*, ITC, <http://sustainabilitymap.org/home> [<https://perma.cc/R25U-QQSC>] (last visited Nov. 17, 2018). The authors defined support for producers as: Technical Assistance for Requirements, Technical Assistance Beyond Requirements, Financial Assistance, and Learning Forums. Access to VSS, *supra* note 125, at 15. OECD Countries include: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. *See Members and partners*, OECD, <http://www.oecd.org/about/membersandpartners/> [<https://perma.cc/5D7V-EA79>] (last visited Nov. 17, 2018).

to country level GDP.²¹⁰ The more wealthy a country, the more likely the country's markets include high-quality goods touting sustainability benefits.²¹¹ The demand for such goods incentivizes profit-maximizing certifiers and VSS to enter the markets and certify the goods.²¹² Markets where firms are more competitive will have more VSS available to them.²¹³ The study defined firm competition in terms of the firm's ability to effectively and efficiently manage its resources as expressed through its use of indicators to gauge best practices.²¹⁴ The indicators included use of a bank account, email, and the capacity to engage in high volume production.²¹⁵

C. *Impacts of VSS on the Global South Environment*

Though the topic is not well-researched,²¹⁶ VSS appear to have little positive impact on the environment in the global South. The dearth of research perhaps reflects the difficulty of tracking environmental outcomes and the difficulties associated with control group-based research projects. To the extent it occurs, the environmental impact of private VSS is a product of the VSS's market share, the rigor of its standards, and the appropriateness of the standards, given the countries where it operates.²¹⁷ As with the impact on global South producers noted above, the impact of VSS on the environment in the global South is mixed.²¹⁸ Studies reflect

²¹⁰ Access to VSS, *supra* note 125, at 21.

²¹¹ *Id.* at 20.

²¹² *Id.*

²¹³ *Id.* at 22.

²¹⁴ *Id.* at 21.

²¹⁵ *Id.*

²¹⁶ *ITC Study*, *supra* note 30, at 21 (noting that environmental impact was the least studied effect of producers' participation in VSS). The ITC study found five control-group studies examined in the issue, of those, three found positive impact, one found no impact, and one found adverse impact. *Id.* at 22. Positive impacts included increased soil conservation and enhanced resource management. *Id.* The mixed-impact study assessed forestry certification in Bolivia and found that certification provided little environmental improvement and that deforestation was unabated. *Id.* Negative impacts included soil erosion on Fairtrade farms. *Id.* Non-control group studies were also sparse and revealed the same thin results. *Id.* at 25. Other literature reviews reached similar conclusions. *See* Prag, Lyon & Russillo, *supra* note 81, at 22 (citing a 2011 literature review that found none of the eleven peer-reviewed studies it examined displayed any statistically significant evidence that certification improved producers' environmental performance). Non-peer-reviewed studies found certification led to positive environmental impacts, but Prag noted that drawing conclusions with confidence from such studies is difficult. *Id.*

²¹⁷ Prag, Lyon & Russillo, *supra* note 81, at 22.

²¹⁸ BARTLEY ET AL., *supra* note 56, at 102–04.

a range of results: from producers' adoption of more favorable environmental practices, to increases in adverse environmental outcomes, such as deforestation, as a result of certification.²¹⁹

Certification of coffee farms has resulted in positive environmental outcomes, such as soil²²⁰ and water conservation,²²¹ a decrease in the use of raw sewage as fertilizer and increase in organic and pulp fertilizers,²²² and an increase in biodiversity.²²³

Certification in the forestry industry, however, appears to do more harm than good. Studies show a few favorable outcomes, but generally, certification does not abate deforestation²²⁴ and has been shown to lower tree regeneration.²²⁵ Some researchers assessed the environmental impact

²¹⁹ COSA REPORT, *supra* note 150, at 40–41; Ibanez & Blackman, *supra* note 150, at 24; BARTLEY ET AL., *supra* note 56, at 102–03 (stating that in the forestry industry, while some harvesters of high-value tropical hardwoods have realized a premium for certified wood, “[f]or most forest management companies, market premiums have been uncertain or so small that they barely cover the direct costs of certification”; also noting in Bolivia, increases in certification did not slow the rate of deforestation).

²²⁰ *ITC Study*, *supra* note 30, at 22.

²²¹ COSA REPORT, *supra* note 150, at 40–41. The report discussed how water and soil conservation practices included whether soil cover was mulch or planted soil; whether the farmers used check dams, drainage channels, or diversion ditches to retain water, and whether the farmers used soil ridges around the plants, contour planting and terracing, and trees and shrubs as fencing. *Id.* at 61.

²²² Ibanez & Blackman, *supra* note 150, at 24.

²²³ COSA REPORT, *supra* note 150, at 40–41. COSA found that producers who are certified with VSS engage in 33 percent more environmentally responsible water and soil practices and their farming is correlated with a 17 percent increase in the level of biodiversity. *Id.* at 40–41. COSA measured biodiversity by surveying the extent to which the producers' land was grassland, monoculture, and produced with sparse shade, dense shade or covered with natural forest. *Id.* at 63.

²²⁴ *ITC Study*, *supra* note 30, at 22 (a mixed impact study assessed forestry certification in Bolivia and found that certification provided little environmental improvement and that deforestation was unabated); ALLEN BLACKMAN ET AL., DOES ECO-CERTIFICATION STEM TROPICAL DEFORESTATION?, FOREST STEWARDSHIP COUNCIL CERTIFICATION IN MEXICO (2015), <http://www.rff.org/files/document/file/RFF-DP-15-36.pdf> [<https://perma.cc/2XYK-P4LT>] (finding “no evidence that FSC certification affects deforestation”). In addressing their findings, the authors noted that their study tested only deforestation, not other environmental impacts such as forest degradation. *Id.* at 31–32. They further noted that their findings were consistent with five of six other quantitative studies of certification's impact on the environment. *Id.* at 31.

²²⁵ ALLEN BLACKMAN ET AL., DOES FOREST CERTIFICATION IN DEVELOPING COUNTRIES HAVE ENVIRONMENTAL BENEFITS? INSIGHTS FROM MEXICAN CORRECTIVE ACTION REQUESTS 3 (2014), <http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-DP-14-06.pdf> [<https://perma.cc/G2VU-4DNN>]. In their review of literature addressing the effectiveness of forestry certification, the authors observed that there has not been much research done

of VSS by analyzing the number and scope of corrective action requests (“CARs”) that certified producers received as a way of assessing the extent to which the producers modified their forestry practices.²²⁶ These results were also mixed.²²⁷ A study of CARs in Brazil and Mexico found that most were easily corrected (signaling little environmental benefit) and despite an increase in certification, deforestation and degradation persisted.²²⁸

This Section has summarized empirical research into the impact of VSS on producers in the global South and the global South environment. While the research is nascent, some early themes have emerged: VSS appear to only have a slight positive impact on producers’ net income, have generally increased producers’ market access, and VSS participation has taught producers more efficient and environmentally responsible production practices. Those practices have led to some environmental benefits, including more responsible use of chemicals and water and increases in biodiversity on coffee farms. But certification of forests has not generally had a positive environmental impact. Of course additional

in the area and the findings that exist are mixed. *Id.* at 2. The authors noted that most studies that sought to quantitatively evaluate certification based on direct observation do not weed out those producers that sustainably manage their forests prior to certification, such that certification comes easily and without enhanced benefit to the environment. *Id.* at 2–3. The authors found only two studies that set aside producers with self-selection bias; in one, certification resulted in “minor effects on a range of environmental outcomes,” but in the other tree regeneration “was actually lower on certified plots than on conventional ones.” *Id.* at 3.

²²⁶ *Id.* at 4.

²²⁷ *Id.*

²²⁸ *Id.* In their study, the authors focused on Mexico where the FSC has certified thirty-nine producers, the third highest number of any developing country. *Id.* at 6. FSC’s certification program extends beyond direct forestry management and also evaluates social issues such as communication, conflict resolution, worker training, and safety. *Id.* at 6–8. In conducting their study, the authors set aside producers with self-selection bias and reviewed 1162 CARs issued from 1997 to 2013. *Id.* at 14. They found that 44 percent of the CARs focused on social issues, with most of them directed at communication and conflict resolution. *Id.* at 15. The authors also noted that 26 percent of the CARs concerned forest management, specifically focusing on regeneration and reforestation, while 16 percent concerned environmental issues, focusing on sensitive sites and high conservation value forests. *Id.* at 15–16. In discussing their findings, the authors opined that FSC may have focused on well-performing producers and that FSC certification has not “lifted relatively poor performing [producers] out of the cellar.” *Id.* at 21. The authors further noted that social-issue CARs may have predominated because Mexico’s forestry management involves common property and “complex social and regulatory structures,” resulting in the need for enhanced communication and conflict resolution. *Id.* The authors concluded that developing country “[s]ocial institutions need to be built and enhanced to ensure sustainable forest management.” *Id.* at 22.

empirical research is essential, especially control group-based research into the impact of VSS on the environment, but collectively, the findings described here suggest that absent changes to their regulatory structure, VSS are not an effective or efficient means for accomplishing environmental goals. After describing a few successful VSS originating in the global South, the next Part recommends changes to VSS governance structure that may enable VSS to be a more effective environmental governance tool.

III. THE CURRENT STATE OF GLOBAL SOUTH-BASED VSS AND THE PATH AHEAD

The previous Parts have described the impact of VSS that have been developed in the global North, directed at the global South, but have not generally included producers into their governance, and have not drawn public government into their structure. Granted, the limited effectiveness of VSS in meeting environmental goals suggests that they cannot be the global South's only environmental regulatory tool. But we have not yet seen what VSS might accomplish if they were developed in the global South, inclusive in their governance structure, and imbued with Relational Integrity Regulation principles. After describing a few global South-based VSS, the next Section of the Article casts a vision for such a VSS.

A few global South-based VSS have emerged in recent years, which is perhaps not surprising, given the proliferation of schemes in the global North and the potential for the schemes to produce benefits in the global South. To avoid repeating the mistakes that VSS in the global North have made and to ensure that global South VSS reach their potential, the Article recommends that the global South VSS abide by Relational Integrity Regulation principles: that is, they should be reflexive, preference-directed, activate consumers' personal norms, and focus on product and production process attributes. In addition, to the extent possible, the global South VSS should harmonize with other VSS and include collective assessment provisions. Having taken these steps, global South VSS need not be concerned with running afoul of WTO's intergovernmental trade agreements because enforcement of the agreements' provisions against global South VSS is unlikely. And the steps are feasible, if the global South draws upon the expertise and resources available to it.

A. *Global South-Based VSS Originating and Operating in the Global South*

A few global South-based VSS have been established in recent years, and work is being done to build more.²²⁹ Drawing from the example of Indonesia's work with sustainable palm oil, a researcher identified several factors that have contributed to the emergence of global South VSS: (1) global South governments recognize that sustainability is of national interest and effective stewardship of the environment is a source of national pride; (2) Southern countries have recognized that North-based certification schemes are an expression of "an unbalanced power relationship between consumer countries and producer countries," and the North-based schemes have impeded Southern producers' market access and incorrectly dismissed Southern producers' products as unsustainable; and (3) North-based private non-state actor certification schemes have essentially functioned as a trade barrier, whereas South-based schemes are perceived as a trade opportunity.²³⁰

Global South governments that move toward their own VSS generally proceed through three phases.²³¹ First, many varied North-based VSS confront firms within a Southern nation, but the Southern nation's government regards the VSS as an issue that Southern firms must contend with on their own.²³² In the second phase, the Southern government realizes that VSS may be essential for success in the global market, so it begins cooperating with private Northern VSS.²³³ Having experienced the factors listed above, in the third phase, the Southern government develops its own environmental certification scheme.²³⁴

In a study examining the emergence of three global South VSS—palm oil in Indonesia, soy in Brazil, and fruit in South Africa—scholars found two significant differences between the North-based VSS operating in each country and the Southern schemes that emerged: the schemes targeted different audiences and they had different sources of legitimacy.²³⁵

²²⁹ See PIETER GLASBERGEN, ARE SOUTHERN GOVERNMENTS RECLAIMING SUSTAINABILITY STANDARD-SETTING, in MEETING SUSTAINABILITY GOALS: VOLUNTARY SUSTAINABILITY STANDARDS AND THE ROLE OF GOVERNMENT 33 (2016), https://unfss.files.wordpress.com/2016/09/final_unfss-report28092016.pdf [<https://perma.cc/3GP8-S3ES>].

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Greetje Schouten & Verena Bitzer, *The emergence of Southern standards in agricultural*

As to audiences, the authors of the study found that the Northern standards targeted external groups, such as NGOs and multinational buyers when developing standards.²³⁶ As a result, the standards reflect North-based value chain thinking, and the standards direct a North-based, demand-side sustainability agenda toward the South.²³⁷ Alternatively, the Southern standards initially sought an internal audience of supply side producers within the Southern nations.²³⁸ The emphasis was on state sovereignty to design and implement sustainable agricultural regulation.²³⁹

As to sources of legitimacy, Northern standards are strongly rooted in moral sources of legitimacy that include Northern constructions of sustainability.²⁴⁰ Northern-based standards that are directed to the South have filled perceived voids in Southern environmental governance.²⁴¹ However, as indicated from the emergence of Southern standards, the South is beginning to reject the idea that it cannot engage in its own effective environmental governance, and thus, it need not seek to conform to the North's definition of sustainability to participate in the marketplace for its goods.²⁴² Southern nations are developing a sense of national pride and nation-specific brand identity to reposition producer firms in the global value chain.²⁴³ The authors characterize such legitimacy as "cognitive legitimacy" and assert that as a source of legitimacy, cognitive legitimacy is much more durable than the moral legitimacy that roots the Northern standards.²⁴⁴ The authors additionally noted that the Southern standards also find legitimacy in being more cost-productive for producers by providing less stringent and less expensive requirements, which enables more widespread adoption of the standards.²⁴⁵

Scholars caution that challenges arising from the current structure of the global South VSS may impede the performance of the VSS.²⁴⁶ The challenges include (1) enforcement, especially with many smallholders

value chains: A new trend in sustainability governance?, 120 *ECOLOGICAL ECON.* 175, 181 (2015).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Schouten & Bitzer, *supra* note 235, at 181.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* at 182.

²⁴⁵ *Id.* at 181.

²⁴⁶ See GLASBERGEN, *supra* note 229, at 33; Schouten & Bitzer, *supra* note 235, at 182.

contributing to the market;²⁴⁷ (2) uptake, because the standards may not provide a direct means for producers to enhance their market share and the standards do not provide support for costly audit procedures;²⁴⁸ (3) integrity, because the Southern standards tout their regional, Southern focus, yet the standards merely imitate the content of Northern standards, but on a state-specific scale;²⁴⁹ and (4) scope—the Southern standards emphasize national identity, pride, and sovereignty, but if the VSS certify goods to be exported to the North, they need to be internationally recognized.²⁵⁰ Given these current challenges, the standards may not have solved any of the producer-level problems that the Northern standards created.²⁵¹

B. Next Steps in the Development of Global South VSS

In light of the four challenges noted above, the path forward involves the following steps: (1) build VSS that integrate public and private stakeholders into environmental governance by conforming the VSS to Relational Integrity Regulation; (2) to the extent possible, harmonize VSS within industry sectors and with international standards, especially if the certified products will supply international markets; and (3) establish a culture of assessment that will produce the data necessary to discern whether the VSS are performing as they should and how they can be better utilized.

1. Global South VSS Should Conform to Sound Environmental Governance Principles

Seeking a form of meta-regulation, there is widespread support for the integration of public and private stakeholders into environmental governance.²⁵² Currently in some global South countries, private VSS fill in

²⁴⁷ See GLASBERGEN, *supra* note 229, at 33–34.

²⁴⁸ See Schouten & Bitzer, *supra* note 235, at 182.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *ITC Study*, *supra* note 30, at 24; Schouten & Bitzer, *supra* note 235, at 181; GLASBERGEN, *supra* note 229, at 7–12 (discussing drivers for government involvement with VSS and roles government can play); *id.* at 27–28 (stating that “governments can have an important role to play as a developer of national-level standards for use in domestic markets, as a convener of local stakeholders and sectoral roundtables or dialogues, and as a source of support for smallholder training and other initiatives,” and that “governments should be the proponent of policies and regulations, land use planning and zoning programs,

gaps left by public regulation; in others, the systems are superfluous, with VSS not changing the practices of those producers that comply with existing government regulation.²⁵³ Integrating private and public regulation may enhance producer benefits and ultimately enhance environmental benefits.²⁵⁴

Such integration should conform to Relational Integrity Regulation principles, which by their nature draw public and private stakeholders into the regulatory process.²⁵⁵ As noted above, this species of regulation

improved governance and enforcement, resolution of land use conflict and disputes, or other policy frameworks that can improve the enabling environment and thereby mutually support the transformative change envisioned by VSS"); *id.* at 31 (stating "government cooperation in the creation and implementation of VSS, though rendering more transaction costs, lends more legitimacy and credibility to the standard itself" and "VSS that are aligned with national and global development goals will have the biggest impact on progress because they span the chasm between public and private spheres"); *id.* at 47–48 (highlighting the global South VSS in Brazil and Mozambique and suggesting that government can work with VSS to establish a "jurisdictional approach" to VSS, where the certification moves beyond individual producers to include entire regions); OECD, GREEN GROWTH AND DEVELOPING COUNTRIES: A SUMMARY FOR POLICY MAKERS, 11–12 (2012), <https://www.oecd.org/dac/50526354.pdf> [<https://perma.cc/94HH-BUQT>] (advocating for developing countries to establish nationwide green growth policies that integrate public and private interests). *See also* Peter Eddie Aldinger, *Addressing Environmental Justice Concerns in Developing Countries: Mining in Nigeria, Uganda, and Ghana*, 26 GEO. INT'L ENVTL. L. REV. 345, 378–85 (2014) (recommending that developing countries increase the level of public participation in environmental governance to ensure that the governance properly treats environmental justice issues); OECD REPORT, *supra* note 76, at 15. In partnership with UNFSS, India and Brazil have recently launched national VSS platforms. *See* MANISH PANDE, THE INDIA STORY: IMPACT OF PRIVATE SUSTAINABILITY STANDARDS ON MARKET ACCESS AND SUSTAINABLE DEVELOPMENT, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (2017); *Launch of the Brazilian Voluntary Sustainability Standards National Platform Support*, UNFSS (May 31, 2017), <https://unfss.org/2017/05/18/launch-of-the-brazilian-voluntary-sustainability-standards-national-platform-supported-by-unfss/> [<https://perma.cc/5H72-EN9W>]; *Creating an Ecosystem for Quality*, QUALITY COUNCIL OF INDIA, <http://www.qcin.org/Indian-PSS-Platform.php> [<https://perma.cc/UHY5-5FZY>] (last visited Nov. 17, 2018) (showing that India has launched a national VSS platform, through its national government-initiated Quality Council. The Council will work with representatives from government agencies, industry (including manufacturing and service) and consumers to generate a domestic VSS). For an introduction to the VSS platform in India, see Manish Pande, *A Platform for PSS in India*, QUALITY COUNCIL OF INDIA (Dec. 16, 2016), http://www.qcin.org/documents/00_introduction%20to%20the%20platform_16122016_Manish.pdf [<https://perma.cc/G52X-S2KJ>]. *See also* Marx & Wouters, *supra* note 94, at 19–20.

²⁵³ Marx & Wouters, *supra* note 94, at 19.

²⁵⁴ *Id.*

²⁵⁵ Minneti, *supra* note 30, at 1377 (noting that the ISO's environmental marketing claim standards meet or exceed relational integrity criteria, and perhaps exceed state-actor standards).

involves four attributes: it is reflexive; it is preference directed; it is aimed at activating consumers' personal norms; and it focuses on the product and its production process.²⁵⁶

Reflexive environmental regulation empowers relevant stakeholders to determine the best course of environmental management for themselves.²⁵⁷ For example, should India choose to develop a coffee-based VSS, it would enact a regulation that prescribes who should play a role in VSS decision-making and script fundamental processes for setting standards, certifying and auditing producers, enforcing the standards, and addressing disputes arising from the VSS implementation. Private stakeholders, including Suresh and other area producers, members of the products' value chain, such as roasters and distributors, NGOs, and consumer representatives would give substance to the VSS by determining the nature and scope of the standards and the precise steps in the processes associated with VSS implementation. Reflexive regulation leverages stakeholders' strengths, such as Suresh's understanding of the local economy and his relationships with those in the coffee industry and environmental NGOs, which can provide Suresh and other producers with environmental best practices for coffee growing and harvesting.

Government, which has expertise in establishing regulatory frameworks, access to public resources, capacities for information campaigns, and vested interests in the sustainable use of natural resources, is called upon to share those strengths with private VSS stakeholders. In Argentina, for example, VSS would provide a vehicle regulating the environmental practices of smallholder producers such as Diego. Rather than regulate through command and control regulation that is expensive and difficult to enforce, Argentina can set in motion a VSS, which carries its own incentives for enforcement. Argentina can incentivize smallholder participation by providing the fisheries with access to otherwise restricted waters and promote the VSS through information campaigns, targeting local producers and consumers. Private stakeholders, such as Diego, who are most familiar with market forces and industry needs and have a vested interest in the success of the certified products, bring their expertise and interest to bear in creating the nature, scope, and precise detail of the standards, certifying and auditing producers, and promoting certified products.

When VSS are produced through reflexive regulation in the global South, the scheme has increased integrity because the VSS reflect the global South's perspective on sustainable development. Nations in the

²⁵⁶ *Id.* at 1343.

²⁵⁷ *Id.* at 1337.

global South perceive that North-based standards tend to serve Northern interests.²⁵⁸ Northern actors' understandings of sustainability, scientific knowledge, and big firm interests tend to drive the content of standards.²⁵⁹ And Southern participation in the development of standards content is "quantitatively and qualitatively" less significant than Northern participation.²⁶⁰ Thus, there is "unbalanced distribution of costs and benefits to the detriment of Southern producers," and a "disempowerment of Southern stakeholders due to their exclusion from decision making processes."²⁶¹ Alternatively, global South-based schemes advance the global South's environmental and economic values and priorities, and the global South's construct of property rights. A reflexive South-based VSS would give a regulatory voice to those typically left out of the decision-making, such as Suresh and Diego, in North-based schemes.²⁶² As such, the schemes would directly address the enforcement, uptake, integrity, and scope challenges noted above that have plagued existing global South-based VSS that lack a reflexive structure.

Relational Integrity Regulation is also preference-directed.²⁶³ Preference-directed regulation provides information to consumers so that they can make choices consistent with their preferences.²⁶⁴ VSS are preference-directed because they bear product labels that inform consumers about products' environmental attributes, enabling consumers to make purchase decisions consistent with their environmental preferences. When the VSS are accompanied by an information campaign, the VSS can educate consumers about environmental issues associated with products and production processes, thereby shaping their preferences. A global

²⁵⁸ Schouten & Bitzer, *supra* note 235, at 175.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 181.

²⁶² Emmanuelle Cheyns, *Making "minority voices" heard in transnational roundtables: the role of local NGOs in reintroducing justice and attachments*, 31 AGRIC. HUMAN VALUES 49, 449–51 (2014) (describing approaches to communication that NGOs can utilize with producers to ensure that producers are more engaged in VSS, including: (1) teaching producers how other VSS stakeholders communicate with each other and how producers can effectively communicate with those stakeholders; and (2) helping producers establish a common cause between themselves and other stakeholders). For a discussion of the pathways to VSS certification for coffee producers in Colombia, Costa Rica, and Guatemala, see Grabs et al., *supra* note 161, at 49 (stating that the current VSS "incentive structure rewards either large, advanced, already sustainable farms due to their reliability and the low implementation costs of farms located in select geographic areas well known for particular flavors").

²⁶³ Minneti, *supra* note 30, at 1343.

²⁶⁴ *Id.* at 1338–39.

South-based VSS would likely communicate more directly with global South consumers and businesses than a VSS originating in the global North because the VSS messages would be cast in a language more familiar to those in the global South and more consistent with their preferences. In the coffee context, for example, coffee that is shade-grown in India is not only better for the coffee, but it is better for the environment because it preserves and protects biodiversity and wildlife, and by permitting the natural canopy of trees to stand on the hillside, the practice protects against erosion and runoff during the monsoon seasons.²⁶⁵ A coffee-based VSS would direct consumers' preferences by guiding them to shade-grown (thus environmentally responsible) coffee. Likewise, a VSS attached to Patagonian cod would emphasize that the fish are sustainably caught, emphasizing that the approach to fishing will protect the stock for future generations.

Relational Integrity Regulation activates an individual's personal norms.²⁶⁶ Personal norms are those that draw upon an individual's personal sense of duty or obligation to act.²⁶⁷ Regulation can activate and deepen personal norms by creating an awareness of the significance of consumers' individual and collective choices regarding environmentally responsible behavior.²⁶⁸ Through on-product or off-product information campaigns, VSS can activate consumers' personal norms by informing consumers of the significance of their individual purchases (such as the extent to which a good has less post-consumer waste) and the significance of collective purchases (such as how less waste is generated when consumers as a group purchase the products that conform to the VSS). Given the inherently personal nature of this aspect of Relational Integrity Regulation, a global South-based VSS would more effectively activate consumers' personal norms than a global North-based scheme because the global South scheme would be a product of those closest to the global South consumers. In Argentina, where most of the Patagonian cod is locally caught and consumed, a VSS developed in Argentina would be able to communicate more directly with the Argentine population, because it would be a product of the people in Argentina. The logo and information about the VSS would be a natural expression of Argentine values and thus more likely to activate consumers' personal norms.

²⁶⁵ See S. Gopikrishna Warriar, *Bringing Coffee Back Into The Shade*, INDIA CLIMATE DIALOGUE (Sept. 12, 2016), <http://indiaclimatedialogue.net/2016/09/12/putting-shade-back-growing-coffee-sun/> [<https://perma.cc/U9MW-JQ3C>].

²⁶⁶ Minneti, *supra* note 30, at 1340–41.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

In the VSS context, Relational Integrity Regulation focuses on both the product's environmental attributes and the product's production process's environmental attributes.²⁶⁹ Producing a recyclable product is good, but producing a recyclable product with a production process that is more environmentally responsible than other processes is better. Effective production process management requires effective value chain management from producer to end user. VSS originating in the global South would be able to take better advantage of global South-based value chains because the VSS stakeholders could leverage existing business and manufacturing relationships in setting environmentally responsible standards for production processes, essentially growing the product and production process standards from within. VSS originating in the global North enter global South value chains from a distance, and must be imposed upon the global South marketplace, somewhat artificially, and must construct value chain relationships anew, requiring the investment of resources to cultivate trust between market players. As in much of the global South, smallholder producers such as Suresh and Diego generate goods, which in the aggregate, have a significant environmental impact. Generating a VSS that focuses on the products' life cycles will require an intimate understanding of local market forces and environmental conditions. When the VSS is a product of the global South, it stands a better chance of being responsive to those forces and conditions.

2. Global South VSS Should Harmonize with Other VSS

In addition to conforming to Relational Integrity Regulation principles, to the extent feasible, global South VSS should harmonize with one another. As described in detail above, in many industries, such as coffee, VSS have proliferated through horizontal intensification. From a producer's perspective, that has meant producers, such as Suresh, must often seek certification from several VSS, resulting in expensive application and auditing processes.²⁷⁰ From a consumer's perspective, the proliferation has led to confusion about the significance of the VSS and a dilution in the value of VSS. Harmonization arises when VSS agree to recognize one another, such that a producer's certification by one VSS is recognized by another. To the extent that a producer participates in a value chain,

²⁶⁹ *Id.* at 1341–42.

²⁷⁰ See ITC, THE INTERPLAY OF PUBLIC AND PRIVATE STANDARDS, LITERATURE REVIEW SERIES ON THE IMPACTS OF PRIVATE STANDARDS—PART III 32–33 (2011).

downstream members of the chain would accept the producer's product as long as the product was certified by the VSS associated with the value chain or one recognized as certified. As a result, harmonization removes producers' need for multiple certifications to participate in certified markets. In the coffee industry, for example, the Kodagu region, which is known for the quality of its coffee, could generate a standard that, while an expression of the Kodagu people, is consistent with other VSS in India. Distributors and retailers would recognize the Kodagu VSS as well as other regional or national VSS that conform to the same baseline standards, thus negating the need for producers to certify to the VSS for each retailer or distributor to which they seek to sell.

Because VSS operating in the same industry sectors compete with one another for certifications, the VSS entities themselves are not likely to seek harmonization. In fact, as noted above, as VSS compete for certifications, they will find that as they lower their standards, they increase their certifications, resulting in a race to the lowest possible standards and decreased environmental impact. To combat such a trend, public or private meta-regulators should incentivize harmonization. For example, in India, VSS industry leaders or India itself may require that overlapping standards recognize each other, or that, prior to entering the standard-setting field, a VSS must complete a market analysis, ensuring that there is a genuine need for the VSS because there are no other VSS certifying the same products to similar levels.²⁷¹ Such meta-regulation would likely limit the number of VSS for a commodity, thereby reducing the potential for consumer confusion about VSS and the potential for competing VSS to dilute environmental standards.

Harmonization should occur among private and public standards, and, to the extent possible, between private and public standards.²⁷² Again,

²⁷¹ *Id.* at 34–35 (suggesting that VSS firms are more likely to lead harmonization efforts than intergovernmental treaties). The threshold requirements and rigor of VSS appear to vary with the requirements and rigor of government regulation, suggesting that nations may well be served to incentivize producers to comply with private VSS, rather than maintain their own separate schemes. *See id.* at 37 (citing a study of forestry certification in forty-seven countries); OECD REPORT, *supra* note 76, at 15. Should a government choose to incentivize participation in a single standard or group of standards, the government should appreciate the impact of its endorsement and should thoughtfully consider which VSS it chooses to work with. *See generally* NORMA TREGURTHA & DAVID D'HOLLANDER, MEETING SUSTAINABILITY GOALS: VOLUNTARY SUSTAINABILITY STANDARDS AND THE ROLE OF GOVERNMENT 49 (2016) https://unfss.files.wordpress.com/2016/09/final_unfss-report_28092016.pdf [<https://perma.cc/MVM9-TTSD>]. The author recommends that stakeholders participate in a global conversation to determine co-regulation best practices. *Id.* at 49.

²⁷² ITC, *supra* note 270, at 39–40.

working from a meta-regulation perspective, should a global South nation consider a national standard, the nation should seek to harmonize the standard with existing domestic standards.²⁷³ If the product is generally exported, such as coffee, again to the extent possible, the standards should be harmonized with international standards. International standard-setting bodies such as the ISO and ISEAL Alliance provide regulatory space for developing countries to develop standards that migrate toward internationally recognized standards.²⁷⁴

3. Global South VSS Should Include Collective Assessment Provisions

As noted above, the development of effective VSS has been hindered by the dearth of research evaluating VSS impacts on stakeholders and the environment. Concerns about VSS governance also arise from a consumer-facing perspective. Seventy-eight percent of VSS have power to impose sanctions on certified entities, but 26 percent of that group do not conduct compliance evaluations and 66 percent do not publically disclose their evaluations.²⁷⁵ This data is troubling on a number of levels. First, 22 percent of the VSS have no power to sanction certified entities that fail to abide by standards. Absent such power, a VSS's ability to facilitate environmental change is considerably weakened because the certified entity has no incentive to change practices. The same is true for those VSS that have the power to sanction, but fail to use it. The VSS that conduct compliance evaluations but fail to publicly disclose their findings preclude the public from learning whether certified entities are engaged in environmentally responsible conduct and provide the opportunity to cover irresponsible conduct.²⁷⁶ The lack of public accountability erodes the important signaling function that VSS provide to consumers.

²⁷³ For example, when Kenya sought to establish a national food safety standard, it chose to develop a standard consistent with a GLOBALG.A.P., a prominent international agricultural standard setter. ITC, *supra* note 270, at 35–36.

²⁷⁴ See *Members Eligibility for Capacity Building Support by ISO*, ISO (Sept. 5, 2018), https://isotc.iso.org/livelink/livelink/fetch/-9871253/9871275/9871278/17795594/ISO_regions_of_liaison_2017-02-01%28E%29.pdf?nodeid=18705219&vernum=-2 [<https://perma.cc/XZ93-3QEK>] (detailing ISO's work with developing countries); ISEAL, SETTING SOCIAL AND ENVIRONMENTAL STANDARDS 19 (2014), https://www.isealalliance.org/sites/default/files/resource/2017-11/ISEAL_Standard_Setting_Code_v6_Dec_2014.pdf [<https://perma.cc/WH4G-6ENU>] (requiring that members' standards conform to international standards unless doing so would be ineffective or inappropriate).

²⁷⁵ COLLINS ET AL., *supra* note 188, at 14.

²⁷⁶ See *id.*

Only 40 percent of Multi-Stakeholder Initiatives (“MSIs”) provide a complaint mechanism to receive and address concerns about certified entities’ conduct.²⁷⁷ Such mechanisms are important because they offer communities the ability to notify MSIs when a certified entity is not acting in conformity with the standards.²⁷⁸ The failure of 60 percent of the MSIs to provide complaint mechanisms, and the fact that the vast majority do not include affected populations in their primary decision-making bodies, support the inference that MSIs are generally less concerned with their work among affected populations and more concerned with managing their industry or civil society stakeholder expectations.²⁷⁹ MSIs’ lack of engagement with affected populations may explain why there is little uptake of standards among affected populations and why even when there is uptake, there is no clear pattern of positive environmental impact as a result of certification.

Any future global South-based VSS must include requirements for the assessment and evaluation of the impacts of the VSS. To the extent that VSS are subject to meta-regulation and harmonized as described above, public and private regulators should require individual VSS to assess their impacts and effectiveness, and the VSS should be required to share their assessment results with a central standardizing body so that aggregate VSS performance can be studied and the findings translated into improved performance for all VSS. Absent such a requirement, a few VSS may choose to engage in such assessment, but market pressures will likely keep the VSS from engaging in the kind of information sharing proposed here, which is essential to improving the performance of the VSS.

C. *Intergovernmental Agreements Do Not Pose a Threat to the Development of Global South-Based VSS*

Should the global South VSS operate in international markets, the steps recommended here are not likely to be a problem for international trade regulation. Through the WTO’s TBT²⁸⁰ and TRIPS,²⁸¹ the WTO governs members’ trade with one another. The WTO is not a problem here for two reasons: first, the relevant WTO Agreements provide regulatory space for the development of environmental VSS in the global South, and

²⁷⁷ *Id.* at 17.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 18.

²⁸⁰ See Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 201, https://www.wto.org/english/res-e/publications_e/tbttotrade_e.pdf [<https://perma.cc/E97G-54PM>].

²⁸¹ *Id.* at 7, 9.

second, even if a global South VSS conflicts with WTO provisions, enforcement against the global South VSS is highly unlikely, given the expense and length of time associated with WTO enforcement actions.

In an effort to keep environmental VSS from becoming a pretext for restrictions on international trade, the TBT's Code of Good Practice prescribes standards that (1) treat a nation's products more favorably than like products from another country,²⁸² or (2) create "unnecessary obstacles to international trade."²⁸³ As to harmonization, the TBT compels VSS to use international standards as a basis for the VSS, unless doing so would be "ineffective or inappropriate."²⁸⁴ The TBT's provisions expressly apply to member states that enact VSS,²⁸⁵ and arguably apply to non-state actors engaged in the same conduct.²⁸⁶

TBT Article 12 provides a safe harbor for VSS operating in developing countries because it calls upon developed countries to provide differential and more favorable treatment to VSS in developing countries, requiring developed countries to "take into account the special development, financial, and trade needs of developing country [m]embers."²⁸⁷ Article 12 also permits the WTO TBT Committee to grant developing countries specific, time limited exceptions from TBT obligations.²⁸⁸ In addition, the Preamble to the TBT, which draws upon the chapeau test of the General Agreement on Tariffs and Trade Article XX, contemplates that a VSS may depart from the TBT if done for the purpose of protecting the environment and departing from the TBT does not result in "arbitrary or unjustif[ied] discrimination."²⁸⁹

²⁸² *Id.* at 61 ¶ D.

²⁸³ *Id.* at 61 ¶ E. For a comprehensive treatment of the TBT's impact on developing country VSS, see Jeffrey J. Minneti, *Rising Together: Clarifying the International Environmental Marketing Claim Regulatory Landscape so that Developing Country Exporters May More Effectively Market their Environmentally Responsible Products*, 2 NOTRE DAME J. INT'L & COMP. L. 1, 12–23 (2011).

²⁸⁴ Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 201 at 61 ¶ F.

²⁸⁵ *Id.* at 44 art. 4.1.

²⁸⁶ *Id.* (requiring that member states take reasonable measures to ensure that non-state actors operating within them comply with the TBT's Code of Good Practice).

²⁸⁷ *Id.* at 54 arts. 12.1–12.2.

²⁸⁸ *Id.* at 55 art. 12.8.

²⁸⁹ *Id.* at 39. Critics of the WTO agreements assert that the rules favor free trade because the trade-related provisions are broad in scope, the environmental exceptions are narrowly defined, and the WTO dispute settlement panels are not sufficiently neutral and lack the expertise necessary to strike the appropriate balance between trade and environmental goals. See Daniel C. Etsy & Damien Geradin, *Market Access, Competitiveness and Harmonization, Environmental Protection in Regional Trade Agreements*, 21 HARV. ENVTL. L. REV. 265, 328–30 (1997). A review of WTO jurisprudence suggests that the preamble's

TRIPS provides a baseline level of intellectual property rights.²⁹⁰ As with the TBT, TRIPS mandates that a member nation's product mark requirements treat other nations' similar products no less favorably.²⁹¹ Like the TBT, TRIPS provides safe harbors for least-developed countries.²⁹² Such countries need only comply with TRIPS "to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities," and TRIPS rules will be applied in a "flexible and supportive manner."²⁹³

In spite of the safe harbors mentioned above, should a global South VSS run afoul of the TBT or TRIPS, the VSS need not fear sanction under either agreement.²⁹⁴ Enforcement under each carries a heavy price tag, in part because the enforcement provisions are broad legal standards, rather than precise legal tests.²⁹⁵ Consequently, even identifying a breach of the agreements becomes a challenge. While the agreements provide a wealth of sanctions in the event of finding noncompliance, reaching them requires significant costs, including the expertise needed to state a claim, the collection and processing of data in support of the claim, and the time to work through the enforcement procedures.²⁹⁶ These costs are borne by governments, which, especially in the global South, have few resources to spare.²⁹⁷ Further, for VSS operating locally on goods consumed locally, such as a VSS affixed to Patagonian cod, there is little risk that the VSS would run afoul of any international trade agreement, because the cod is not an international commodity.

"arbitrary and unjustified" standard is extremely difficult to satisfy. See Stephanie Hartmann, *Comparing the National Treatment Obligation of the GATT and the TBT: Lessons Learned from the EC-Seal Products Dispute*, 40 N.C. J. INT'L L. & COM. REG. 629, 660 (2015).

²⁹⁰ Rachel Brewster, *The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property*, 12 CHI. J. INT'L L. 1, 19–20 (2011).

²⁹¹ General Agreement on Tariffs and Trade (Oct. 30, 1947) Article IX ¶ 1.

²⁹² *Decision on Measures in Favour of Least-Developed Countries*, WTO, https://www.wto.org/english/docs_e/legal_e/31-dlldc_e.htm#31 [<https://perma.cc/2S33-WFVA>] (last visited Nov. 17, 2018).

²⁹³ *Id.*

²⁹⁴ See Peter K. Yu, *TRIPS and its Achilles' Heel*, 18 J. INTELL. PROP. L. 479, 485 (2011) (identifying five challenges to TRIPS' enforcement: historical, economic, tactical, disciplinary, and technological).

²⁹⁵ See, e.g., Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 201 at 61 (prescribing standards on "like products" that provide "less favourable treatment" to products from other countries and the TBT's Article 12 safe harbor provisions); Yu, *supra* note 294, at 482.

²⁹⁶ See Yu, *supra* note 294, at 487–91; Sidney A. Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 ADMIN. L. REV. 435, 447–51 (2002) (describing the WTO dispute resolution process).

²⁹⁷ See Yu, *supra* note 294, at 487–88.

D. *Meta-regulation, Harmonization, and Collective Assessment Are Feasible Steps*

There are actors in place to enable the global South to take the steps proposed here. The United Nations Forum on Sustainability Standards (“UNFSS”) and private entities such ISEAL Alliance, GLOBALG.A.P., and the Committee on Sustainable Assessment (“COSA”) have the resources and experience necessary to partner with nations in the global South and facilitate their development of VSS that are consistent with Relational Integrity Regulation principles, domestically and internationally harmonized, and continually assessed.

A primary objective of the UNFSS is to empower the global South to realize the potential economic and environmental benefits of VSS by providing an information platform for decision-makers.²⁹⁸ UNFSS has positioned itself to pay particular attention to global South smallholder and medium-sized producers.²⁹⁹

ISEAL Alliance is a global membership association for VSS.³⁰⁰ Its mission is to provide VSS expertise to public and private VSS stakeholders, measure and share the impact of VSS, solve problems that arise with VSS implementation, and build support for VSS.³⁰¹ It has produced Codes of Good Practice (“The Codes”) for standard setting, standard auditing, and assessing the social and environmental impacts of the standards.³⁰² The Codes are consistent with Relational Integrity Regulation because the provisions are reflexive, preference- and process-directed, and provide VSS the regulatory space necessary to activate consumers’ personal norms. The provisions are inherently reflexive because they do not prescribe specific provisions for any one certification scheme, but they set standards for the development of credible standards. The provisions associated with

²⁹⁸ *UNFSS Objectives*, UNFSS, <https://unfss.org/about-us/objectives/> [<https://perma.cc/UDV8-9DEC>] (last visited Nov. 17, 2018); *UNFSS Focus*, UNFSS, <https://unfss.org/about-us/focus/> [<https://perma.cc/R8YE-25V2>] (last visited Nov. 17, 2018).

²⁹⁹ *UNFSS Focus*, *supra* note 298.

³⁰⁰ *About ISEAL*, ISEAL ALLIANCE, <https://www.isealalliance.org/about-iseal> [<https://perma.cc/HU2W-5W9A>] (last visited Nov. 17, 2018).

³⁰¹ *Our Mission*, ISEAL ALLIANCE, <https://www.isealalliance.org/about-iseal/our-mission> [<https://perma.cc/H7UZ-HS83>] (last visited Nov. 17, 2018). Commentators note that ISEAL has become a VSS “watchdog,” defining credible VSS and signaling to the market those that have satisfied its standards. Marx & Wouters, *supra* note 94, at 22–23.

³⁰² *ISEAL Codes of Good Practice*, ISEAL ALLIANCE, <https://www.isealalliance.org/credible-sustainability-standards/iseal-codes-good-practice> [<https://perma.cc/JU2M-P6YQ>] (last visited Nov. 17, 2018) [hereinafter *The Codes*].

standard setting require an assessment of the need for the standard, the scope of the standard, its stakeholders, the process for developing the standard, that the public have an opportunity to review and comment on the standard, that all stakeholders have a genuine opportunity to participate in decision-making,³⁰³ and that the standard is regularly reviewed.³⁰⁴ The provisions require VSS to address products' processes and production.³⁰⁵ The Assurance Code provides standards for certifying products, and includes the management of the certification process.³⁰⁶ The Impacts Code sets standards for monitoring and evaluating the extent to which the standard is accomplishing its social or environmental purposes and for continuously improving the VSS performance.³⁰⁷

The Codes require that to the extent possible, VSS harmonize with other domestic and international standards.³⁰⁸ Provision 4.2 of the Standard Setting Code requires that, prior to establishing a new VSS, the VSS initiator must inform other organizations with similar standards of the initiator's interest in creating a new standard and seek the input of the organizations with similar standards.³⁰⁹ The Provision's desired outcome is to avoid duplication and have consistency between standards with overlapping scopes.³¹⁰ Standard Setting Provision 6.3 requires that national or regional VSS use international standards as a basis for developing new standards, unless the international standards would be ineffective or inappropriate, and that standards are as consistent as possible with international standards and at least as rigorous.³¹¹

³⁰³ Access to VSS, *supra* note 125, at 20. VSS that are full members of ISEAL are far more likely to engage in more producer-friendly practices. *Id.*

³⁰⁴ *The Codes*, *supra* note 302. The Code of Good Practice is rooted in a set of "Credibility Principles," which ISEAL identified in consultation with 400 stakeholders worldwide. The Credibility Principles include sustainability, improvement, relevance, rigor, engagement, impartiality, transparency, accessibility, truthfulness, and efficiency. *Id.*

³⁰⁵ *Id.* at 19 (stating that standards shall "be expressed in terms of process, management and performance criteria, rather than design or descriptive characteristics").

³⁰⁶ ISEAL, ASSURING COMPLIANCE WITH SOCIAL AND ENVIRONMENTAL STANDARDS: ISEAL CODE OF GOOD PRACTICE (2017), https://www.isealalliance.org/sites/default/files/resource/2017-11/ISEAL_Assurance_Code_Version_1.0.pdf [https://perma.cc/YJL2-YM5F].

³⁰⁷ ISEAL, ASSESSING THE IMPACTS OF SOCIAL AND ENVIRONMENTAL STANDARDS SYSTEMS: ISEAL CODE OF GOOD PRACTICE (2014), https://www.isealalliance.org/sites/default/files/resource/2017-11-ISEAL_Impacts_Code_v2_Dec2014.pdf [https://perma.cc/8PVP-G2JR].

³⁰⁸ *The Codes*, *supra* note 302.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

In contrast to ISEAL, which focuses on setting requirements for standard setting, GLOBALG.A.P. prescribes actual standards and certifies crops, livestock, and aquaculture.³¹² The scheme is vertically differentiated through localg.a.p., which is an assurance program designed for producers who seek to supply goods to a market that requires certification but are unable to satisfy the requirements associated with GLOBALG.A.P. certification.³¹³ Localg.a.p. provides a step-up certification system, allowing producers up to five years of localg.a.p. assurance monitoring before the producers must seek full GLOBALG.A.P. certification.³¹⁴ During the localg.a.p. assurance time frame, producers can move from being Foundation members to Intermediate members, reflecting their progression to more rigorous standards.³¹⁵

Like GLOBALG.A.P., COSA is involved with setting agricultural standards, but in contrast to GLOBALG.A.P., COSA works with organizations, from producers to VSS such as UTZ, to help them identify their sustainability goals and create standards and measurement tools to assess whether the goals are being met.³¹⁶ COSA's measurement tools are scientifically sound, statistically valid, and consider the social, environmental, and economic dimensions of the standards.³¹⁷ Having created effective sustainability measurement tools, COSA seeks to manage the data collected from the tools so that the public can access the data to make more informed sustainability choices.³¹⁸

CONCLUSION

After more than twenty years of growth, VSS have not yet reached their potential in the global South. Some commodities have seen a robust

³¹² *Certification For Producers*, GLOBALG.A.P., http://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-certification [https://perma.cc/Y3JK-YEVW] (last visited Nov. 17, 2018).

³¹³ *The Stepping Stone to Safe and Sustainable Agriculture*, GLOBALG.A.P., http://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-certification/localg.a.p [https://perma.cc/ZHS4-JFJG] (last visited Nov. 17, 2018).

³¹⁴ *Frequently Asked Questions: About localg.a.p.*, GLOBALG.A.P., https://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-certification/localg.a.p./faq/index.html [https://perma.cc/4D2N-7GX3] (last visited Nov. 17, 2018).

³¹⁵ *Id.*

³¹⁶ *Our Impact*, COSA, <https://thecosa.org/what-we-do/our-impact/> [https://perma.cc/7A8B-CC5E] (last visited Nov. 17, 2018); *Our Approach*, COSA, <https://thecosa.org/what-we-do/our-approach> [https://perma.cc/TR5F-GLX3] (last visited Nov. 17, 2018).

³¹⁷ *Our Approach*, COSA, <https://thecosa.org/what-we-do/our-approach/> [https://perma.cc/RR5U-66KS] (last visited Nov. 17, 2018).

³¹⁸ *Id.*

increase in certification, such as coffee and forestry products, but others, such as fisheries, are largely untouched. In general, certified communities have not provided producers, consumers, or the environment with the benefits that VSS have to offer. While market forces will likely continue to drive North-based schemes into the South, the global South can and should do better. By incorporating VSS with relational integrity into their environmental governance schemes, harmonizing the VSS, and engaging in continuous assessment of the VSS, the global South will realize the benefits that VSS offer.

Coffee producers in Kodagu, India, are in an interesting position. A number of global North-based VSS are eager to certify their products, and India has recently launched its own nationwide VSS platform. Should that platform incorporate relational integrity principles, the platform is more likely to be effective. The very existence of the platform suggests the potential for thoughtful harmonization of public and private VSS. Drawing upon the support of organizations such as ISEAL and COSA, India can ensure that the VSS that operate within it deliver on the goods VSS offer.

Argentine fisheries are in a different position. Few VSS operate in the market, perhaps because, unlike Indian coffee, which is largely exported, much of the Patagonian cod the fisheries catch are consumed domestically, and as a result, there is less demand from the global North for certified fish than certified coffee. Given the depletion in fish stock and the potential for more environmentally responsible fishing practices to protect and grow the stock, conditions are ripe in Argentina for the creation of a public-private VSS scheme incorporated into a broader web of environmental governance. Again, international organizations stand ready to partner with Argentina as it takes these next steps.

As an environmental governance tool, VSS have flourished; perhaps during the next twenty years, they will sufficiently mature to deliver on the promise they hold for the global South.