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Ecolabeling in the Multinational Mining Industry: A Method toward Environmental Sustainability

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Ecolabeling in the Multinational Mining Industry: A Method toward Environmental Sustainability

ABSTRACT

The international mining industry's environmental impact is not new. However, with the rise of international scrutiny on climate change and global warming, what the industry can do to lessen its impact is changing. Consumers are demanding stronger commitments to the environment from producers, and producers are therefore requiring stronger commitments from their suppliers. One such commitment the extractive industry can adhere to is implementing an ecolabeling regime for open pit mines mining critical minerals for consumer products. Ecolabels signal to customers that the environment is a priority for companies. However, with an ecolabel comes trade implications and concerns about accuracy. A nongovernmental organization should implement the ecolabeling regime to ensure credibility and monitoring while avoiding most of the concerns relating to restrictions on trade. This guarantees the mining industry does not just pay lip service to environmental sustainability.

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I. INTRODUCTION

Organic. Dolphin-safe tuna. Energy Star. Blue Angel. All of these have something in common: they are ecolabels designed to convey a message of environmentally friendly production practices or usages to consumers. Ecolabels do not have one singular definition. For the purposes of this Note, ecolabeling is an effort of environmental certification standards that companies use to identify environmentally preferable products in the industry.¹ Due to the consumer education aspect of ecolabels, pressure from corporate buyers, and efficiencies that companies identify during the ecolabeling process, industries are incentivized to improve production processes to make them environmentally friendly.² This Note focuses on consumer demand for sustainable products as well as other market factors relating to sustainability, which has risen throughout the twenty-first century and only continues to rise with the international emphasis on combating climate change.³ Demand for ecolabeling existed in the consumer market prior to the early 2000s,⁴ but ecolabeling has not proliferated many industries. Prominent industries with ecolabeling schemes include the seafood, timber, and consumer-appliances industries. As of the end of 2022, there are 456 tracked ecolabels across twenty-five industry sectors in 199 countries.⁵ One industry noticeably missing a transnational, comprehensive ecolabeling regime is the mining industry.

The criticism the mining industry receives is due to the noticeable impact on the environment that mineral extraction creates and the impact of the usage of extractives on greenhouse gases, like coal. The industry is also infamous for blood, or conflict, diamonds, which now come with stronger reporting and authentication requirements (although only recently has a new reporting standard included the environment as a factor).⁶ Often, mining companies are excluded from

1. See Amit Singh, *International Legal Aspects of Eco-Labeling in the Context of North-South Division on International Trade Rules*, 48 INDIAN J. INT'L L. 45, 47 (2008).

2. See *id.* See generally Kahn M.R. Taufique, Kristian S. Neilsen, Thomas Dietz, Rachael Shwom, Paul C. Stern & Michael P. Vandenberg, *Revisiting the Promise of Carbon Labeling*, 12 NATURE CLIMATE CHANGE 132 (2022).

3. See *Climate Change Widespread, Rapid, and Intensifying - IPCC*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Aug. 9, 2021), <https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/> [<https://perma.cc/K2RB-CWCD>] (archived Sept. 30, 2022).

4. See Jeffery R. Blend & Eileen O. van Ravenswaay, *Measuring Consumer Demand for Ecolabeled Apples*, 81 AM. J. AGRIC. ECON. 1072, 1072 (1999) (discussing opinion polls of consumer demand for ecolabels).

5. ECOLABEL INDEX, <https://www.ecolabelindex.com/> (last visited Oct. 30, 2022) [<https://perma.cc/DTF4-6HRZ>] (archived Sept. 30, 2022).

6. See Meike Schulte, Sreejith Balasubramanian & Cody Morris Paris, *Blood Diamonds and Ethical Consumerism: An Empirical Investigation*, 13 SUSTAINABILITY

any socially responsible investment (SRI) from the financial sector due to their negative impact on the environment.⁷ The reputation the mining industry cannot shake is in part due to the vast negative impacts of mining not only on the environment but also on pollution and health.⁸ A report commissioned by the industry in 2002 to examine the industry's environmental, social, and human rights impacts demonstrates the mining industry's awareness of the negative environmental impacts that mining and production produce.⁹ Corporate social responsibility (CSR) initiatives are among the most extensive in the mining industry, with growing engagement throughout the industry.¹⁰ Even with the prominence of environmental and social governance (ESG) goals, mining corporations utilizing these goals do not have a strong enough incentive to enact tangible change. This leads to selective reporting and greenwashing.¹¹ Critiques of mining industries' ESG goals include a lack of actual effort and concern companies are just utilizing ESG goals as a public relations stunt.¹²

While organizations exist that regulate and monitor mining companies, they often do not include enough large-scale mining companies to create a globalized impact making a difference, or they focus on just one mineral.¹³ International monitoring systems, like the United

4558, 4559 (2020) (an empirical study based off a consumer questionnaire relating to preferences for sustainable diamonds).

7. See Heledd Jenkins & Natalia Yakovleva, *Corporate Social Responsibility in the Mining Industry: Exploring Trends in Social and Environmental Disclosure*, 14 J. CLEANER PROD. 271, 272 (2006).

8. See JASON POTTS, MATTHEW WENBAN-SMITH, LAURA TURLEY & MATTHEW LYNCH, THE INT'L INST. FOR SUSTAINABLE DEV., STATE OF SUSTAINABILITY INITIATIVES REVIEW: STANDARDS AND THE EXTRACTIVE ECONOMY 2–3 (2018).

9. UYANGA GANKHUYAG & FABRICE GREGOIRE, UNITED NATIONS DEV. PROGRAMME, MANAGING MINING FOR SUSTAINABLE DEVELOPMENT: A SOURCEBOOK 4 (Andy Quan ed., 2018) [hereinafter UNDP SOURCEBOOK].

10. See Tomas Frederiksen, *Corporate Social Responsibility, Risk and Development in the Mining Industry*, 59 RES. POL'Y 495, 495 (2018).

11. See RESPONSIBLE MINING FOUND., THE ESG DUE DILIGENCE AND TRANSPARENCY REPORT ON EXTRACTIVE COMMODITY TRADING 8 (Mar. 8, 2021), <https://2020.responsibleminingindex.org/mn/results/thematic/320> [<https://perma.cc/TU G4-8PAE>] (archived Oct. 17, 2022) (finding that commitments to environmental protection exist but implementation is often missing, and due diligence limited). Greenwashing is the practice of companies utilizing marketing tools to promote an ideal of environmentally safe practices to consumers while contradicting their actual efforts and record on the environment. For reasons why companies utilize greenwashing, see *What is Greenwashing?*, ETHICAL CONSUMER (Feb. 19, 2020), <https://www.ethicalconsumer.org/transport-travel/what-greenwashing> [<https://perma.cc/9T6M-YCM7>] (archived Sept. 30, 2022).

12. See *supra* note 10, at 495–96.

13. See, e.g., *About Us*, INT'L COUNCIL OF MINING & METALS, <https://www.icmm.com/en-gb/about-us> (last visited Nov. 2, 2022) [<https://perma.cc/38U8-S8GT>] (archived Sept. 30, 2022) (highlighting that its members of the council account for one third of the global industry); *About AIST*, ASS'N FOR IRON & STEEL TECH.,

Nations Development Programme (UNDP) or the International Institute for Environment and Development, do not provide any true sanction to these corporations because there are no enforcement mechanisms in place. Other governing organizations with guidelines, such as the Initiative for Responsible Mining Assurance, have difficulties enforcing guidelines and move slowly, even if they have stronger technical knowledge of mining operations due to industry involvement.¹⁴

With the prominent rise of ESG goals in consumer-facing corporations, suppliers are presented with an opportunity to further environmental goals while meeting corporate customers' demands.¹⁵ Because multinational mining companies do not often supply goods directly to the consumer (buying the final product that used the mined minerals), the mining companies are in a unique position to promulgate standards that start at the beginning of the supply chain process: extraction.¹⁶ Since mining companies do not directly deal with the consumer, ESG goals within the mining company are not the sole means to effectively promote environmental sustainability and should not be the only means. While corporate reputation is a strong driver of market and consumer decisions, which can increase environmental efforts toward sustainability, supply chain pressure is another significant motivator.¹⁷ That motivation is clear, because over three-fourths of the largest firms in eight global sectors utilized environmental supply chain contracting requirements in 2022.¹⁸

Ecolabeling provides the mining industry an opportunity to improve its environmental "street cred" because it promotes a regime that signals the environmental impact of production of extractives for

<https://www.aist.org/about-aist> (last visited Oct. 19, 2022) [<https://perma.cc/5KAR-VSDW>] (archived Sept. 30, 2022) (a non-profit organization focusing on only steel and iron production and processing); *About ICA*, INT'L COPPER ASS'N, <https://copperalliance.org/about-ica/> (last visited Oct. 9, 2022) [<https://perma.cc/87WQ-S4ML>] (archived Sept. 30, 2022) (having thirty members focused on regional copper centers).

14. See POTTS, WENBAN-SMITH, TURLEY & LYNCH, *supra* note 8, at 15.

15. See *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/W94Y-97V5>] (archived Sept. 30, 2022) (discussing 181 CEOs signing the new Statement on the Purpose of a Corporation that focuses on ESG); Michael O'Leary & Warren Valdmanis, *An ESG Reckoning Is Coming*, HARV. BUS. REV. (Mar. 4, 2021), <https://hbr.org/2021/03/an-esg-reckoning-is-coming> [<https://perma.cc/T93P-8VH9>] (archived Sept. 30, 2022).

16. See Aidan Davy, *Equivalency Matters*, INT'L COUNCIL OF MINING & METALS (Mar. 23, 2021), <https://www.icmm.com/en-gb/stories/2021/equivalency-matters> [<https://perma.cc/6P8A-FATA>] (archived Sept. 30, 2022).

17. See Michael Vandenberg, *The Drivers of Corporate Climate Mitigation*, ENV'T L.F. 29 (2018).

18. See Michael Vandenberg & Patricia Moore, *Governance by Contract: The Growth of Environmental Supply Chain Contracting*, 12 MICH. J. ENV'T & ADMIN. L. (forthcoming 2023).

consumers to differentiate and rank based off preferences.¹⁹ As multinational corporations focus on CSR initiatives, ecolabeling can further those initiatives while creating a uniform means of promoting sustainability in the industry, starting from the source. Ecolabeling's success in other industries emphasizes the mining industry's opportunity to commit to sustainability and environmentalism while maximizing profit because corporate buyers are increasingly listening to consumers' demands, as seen with ESG goals and the increase of environmental supply chain contracting.

This Note analyzes the monitoring frameworks that the mining industry currently utilizes for sustainability initiatives and the possibility of initiating an ecolabeling regime. Part II examines the current ways multinational mining companies protect environmental sustainability and the current international mining governance framework. Part III analyzes the continued use of voluntary inclusion in industry councils and organizations for environmental protection and other ecolabeling regime possibilities as well as the trade implications public regulation of ecolabeling has. Part IV argues that private ecolabeling is a solution to further integrate sustainability goals in multinational mining corporations while avoiding the pitfalls and litigation a public regulatory regime brings.

II. HISTORY OF ENVIRONMENTAL GOVERNANCE

Mining, from discovery to processing, is one of the most environmentally disruptive industries in the world.²⁰ The rise of CSR (and ESG goals) is largely due to the volume of the extractive industry's environmental disasters that have taken place since the 1960s.²¹ As such an essential industry, mining's impact on the environment (and sustainable development, including human, Indigenous, and labor rights) cannot be ignored. However, mining companies' own environmental and sustainability reporting does not equate to actual action. The industry is aware of ESG goals and reporting but is guilty of not disclosing much detail about actual quantitative environmental impacts.²²

Private environmental governance often uses the same instruments as public environmental governance, such as information

19. See Magdalena Wojnarowska, Mariusz Sołtyski & Anna Prusak, *Impact of Eco-Labeling on the Implementation of Sustainable Production and Consumption*, 86 ENV'T IMPACT ASSESSMENT REV. 1, 1 (2021) (analyzing consumer preferences for organic ecolabels).

20. See Jenkins & Yakovleva, *supra* note 7, at 272.

21. See Alyson Warhurst, *Corporate Citizenship and Corporate Social Investment: Drivers of Tri-Sector Partnerships*, 1 J. CORP. CITIZENSHIP 57, 58 (2001) (arguing corporate and social responsibility concerns in society are linked to environmental disasters around the world).

22. See Jenkins & Yakovleva, *supra* note 7, at 273.

disclosure, marketable permits, and more.²³ Where public governance provides exceptions or gaps in environmental regulation, private governance can fill such gaps through emphasis on consumer preferences and contractual requirements.²⁴ Relating to carbon emissions, private governance focuses on inducing industrial companies to report on their corporate-wide emissions, while public governance focuses reporting requirements only on specific, large facilities.²⁵ Large companies that impose environmental standards throughout their supply chains are another effective example of private environmental governance that permeates multiple industries.²⁶ The social pressure companies face to protect the environment emphasizes the role that information disclosure has on companies' social licenses to operate, providing yet another private governance tool.²⁷

The concept of a social license to operate helps to explain the social risk faced by the mining industry because of mineral extraction's high social and environmental cost.²⁸ A social license to operate is essentially the acceptance and support of stakeholders near the mine, as well as the support of society as a whole.²⁹ By utilizing information accessible to consumers, companies can harness market pressure to comply with their social licenses to operate.³⁰ Consumer concerns regarding the environment can provide a strong pressure for companies to change products or supply chain management to implement environmentally friendly practices.³¹ To earn a social license, mining companies cannot ignore their CSR activities—rather, their efforts to promote CSR are the reasons that mining companies have a social license.³² It requires mining companies to do the morally right thing, rather than comply with minimum regulatory standards.³³ Not only does it provide mining companies incentive to comply and prioritize CSR, a social license is an “essential risk management tool” for mining companies because without stakeholder engagement and approval,

23. See MICHAEL VANDENBERGH, SARAH LIGHT & JAMES SALZMAN, PRIVATE ENVIRONMENTAL GOVERNANCE (forthcoming 2023) (manuscript at 3) (on file with authors).

24. See *id.* at 4.

25. See Michael Vandenberg & Mark Cohen, *Climate Change Governance: Boundaries and Leakage*, 18 N.Y.U. ENV'T L.J. 221, 259–60 (2010).

26. See *id.* at 226–27.

27. See *id.* at 223–24.

28. See Saenz Cesar, *Corporate Social Responsibility Fit Helps to Earn the Social License to Operate in the Mining Industry*, 74 RES. POL'Y 1 (2021) (article in press).

29. See BDO GLOBAL, SOCIAL LICENSE TO OPERATE IN MINING: CURRENT TRENDS AND TOOLKIT 4 (2020).

30. See Vandenberg & Cohen, *supra* note 25, at 224.

31. See *id.* at 278 (mentioning the rise of dolphin-safe tuna because of consumer environmental concerns).

32. See Cesar, *supra* note 28, at 7.

33. BDO GLOBAL, *supra* note 29, at 11.

mining operations are often delayed and costs rise.³⁴ However, not all companies highly value the social license to operate, creating an area that private environmental governance cannot reach.³⁵

Public governance of the mining industry pressures multinational mining corporations to comply with environmental and sustainable development goals, like those promoted by the UNDP. The UNDP itself acknowledges that the legal framework regulating mining, including international hard and soft law, has inconsistencies creating gaps that need filling.³⁶ Many international hard and soft laws focus on human rights, which are a facet of sustainable development goals, but do not address the specific environmental impact of mining globally.³⁷ There are also conventions that focus on facets of environmental concerns, like air quality, biodiversity, and water quality, which do impact the mining industry, but there is not one specific public international regime for mining regulation.³⁸ The lack of mining-specific treaties gives rise to a piecemeal approach of national regulation and private, voluntary initiatives to promote environmental sustainability. One industry body that focuses on sustainability is the International Council on Mining and Metals (ICMM), which has worked closely with the UNDP in its development of the UN Guiding Principles on Business and Human Rights.³⁹

While the ICMM created a framework that promotes reporting of mining practices for sustainability transparency, it does not do enough to effect tangible environmental protection. The ICMM was created in 2001 by the mining industry after CEOs of large mining companies recognized that sustainable development was a politically and financially sound investment initiative.⁴⁰ Industry CEOs created the Global Mining Initiative in 1999, which held the Mining, Minerals, and Sustainable Development project at its core.⁴¹ That created ICMM and its Sustainable Development Framework.⁴² The Sustainable Development Framework requires signees to publish reports on their performance of sustainable initiatives that have independent verification.⁴³

34. *See id.*

35. *See* VANDENBERGH, LIGHT & SALZMAN, *supra* note 23, at 4–5.

36. *See* UNDP SOURCEBOOK, *supra* note 9, at 3.

37. *See id.*

38. *See id.* at 4.

39. *See id.* at 6.

40. Alberto Fonseca, *How Credible are Mining Corporations' Sustainability Reports? A Critical Analysis of External Assurance Under the Requirements of the International Council on Mining and Metals*, 17 CORP. SOC. RESP. & ENV'T MGMT. 355, 356 (2010).

41. *See id.*

42. *See generally* INT'L COUNCIL ON MINING & MINS., SUSTAINABLE DEVELOPMENT FRAMEWORK (2003) (listing principles that mining companies take on to promote sustainable development "to enhance shareholder value").

43. *See id.* at 1.

A downside of such industry sustainability reporting is that the reporting is mostly conducted at the corporate—not the mine-site—level, which ignores specific mining activities' impacts on the environment.⁴⁴ Sustainability reporting to satisfy ICMM's principles requires assurance which increases verification of report claims.⁴⁵ However, assurance undertaken at multiple large mining corporations emphasized the significant control over the assurance that the corporations had, which raised questions and concerns about accuracy and reliability.⁴⁶ ICMM's Assurance Protocols create guidelines to protect assurance independence, but many mining companies' ICMM reports only contain *limited* assurance engagements, continuing to raise concerns about accuracy.⁴⁷ The ICMM's efforts provide a strong starting point for the industry but do not effectively create pressure for accountability relating to the environment.

A. *Social Licenses to Operate*

Access to information regarding a company's environmental efforts increases consumer confidence that the company will promote environmental sustainability. That access essentially creates a social license for the company to operate.⁴⁸ Reputation is vital to a company's brand, making social licenses themselves essential. Because of this, social license-based pressure can induce a company to implement new environmental standards and initiatives to meet consumer demand for such changes.⁴⁹ The forest certification system created by industry leaders in the Forest Stewardship Council is an example of an ecolabel, which is one illustration of a response to social license pressure.⁵⁰ While a company might utilize an ecolabel regime to retain its social

44. UNITED NATIONS ENV'T PROGRAMME, SUSTAINABILITY REPORTING IN THE MINING SECTOR: CURRENT STATUS AND FUTURE TRENDS SUMMARY 1 (2020).

45. Rooted in the financial and accounting services, assurance is the process of evaluating companies' "public disclosures about [their] performance, as well as underlying systems, data and processes against suitable criteria and standards in order to increase the credibility of public disclosure." Fonseca, *supra* note 40, at 348.

46. *See id.*

47. *See id.* at 364; ANGLO AM., COMPLIANCE WITH THE INTERNATIONAL COUNCIL FOR MINING AND METALS ASSURANCE PROCEDURE 14 (2019) (a mining company engaging limited assurance). Limited assurance is less than what would be provided in an audit, and thus is a low-level amount of assurance. To learn more about the levels of insurance, see *Limited Assurance Engagement: All You Need To Know!*, ACCT. HUB, <https://www.accountinghub-online.com/limited-assurance-engagement/> (last visited Nov. 2, 2022) [<https://perma.cc/ERL9-U4V2>] (archived Sept. 30, 2022).

48. *See* Andrej Miklosik & Nina Evans, *Environmental Sustainability Disclosures in Annual Reports of Mining Companies Listed on the Australian Stock Exchange (ASX)*, 7 HELIYON 1, 3 (2021); Vandenbergh & Cohen, *supra* note 25, at 224.

49. *See* Vandenbergh & Cohen, *supra* note 25, at 226.

50. *See* Graeme Auld, Steven Bernstein & Benjamin Cashore, *The New Corporate Social Responsibility* 33 ANN. REV. ENV'T RES. 413, 424 (2008).

license, it is not the only action a company can take to keep its license. A labeling scheme that emphasizes sustainable forest management convinces consumers to purchase these products. However, it also creates incentives along the supply chain to meet consumer interest in the products.⁵¹ While CSR initiatives are now the norm in mining companies, there is still a discrepancy between the initiatives and actual behavioral change.⁵² In other words, the mining industry is not putting its money where its mouth is.

Socially conscious investing became much more prominent in the past decade, comprising \$30.7 trillion in 2018.⁵³ This investing provided another social license for companies to promote environmental sustainability. How companies do business is increasingly important for consumers and investors alike.⁵⁴ The mining industry in particular faces pressure from both consumers and investors to promote environmental sustainability in operations.⁵⁵ SRI also relies on information about companies' environmental performance to invest in corporations that emulate environmental best practices.⁵⁶ Market participants recognize the importance of sustainability efforts relating to ESG goals, demonstrating how markets disclose information efficiently.⁵⁷ Often, mining companies are not considered environmentally friendly, but there is a growing interest in SRI within the mining industry.⁵⁸ For investment fund managers, ESG is a "key concern" when facing restrictions on where funds can be invested.⁵⁹ This creates an opportunity for the mining industry to visibly commit to ESG goals that signal to investors committed to SRI that the industry is a sustainable investment. Committing to an ecolabel would provide companies with more access to revenue and a financial incentive to increase environmentally responsible production.⁶⁰

51. See *id.* at 425.

52. See Frederiksen, *supra* note 10, at 496.

53. See Miklosik & Evans, *supra* note 48, at 2; Guillermo Badía, Maria C. Cortez & Luis Ferruz, *Socially Responsible Investing Worldwide: Do Markets Value Corporate Social Responsibility?*, 27 CORP. SOC. RESP. ENV'T MGMT. 2751, 2761 (2020) (analyzing global markets and socially responsible investment to determine whether SRI is a profitable method of investing).

54. See Jason S. Johnston, *Signaling Social Responsibility: On the Law and Economics of Market Incentives for Corporate Environmental Performance 2* (Univ. of Pa. L. Sch., Inst. for L. & Econ., Research Paper No. 05-16, 2005), <http://ssrn.com/abstract=725103> [<https://perma.cc/8BEE-AZ7X>] (archived Nov. 23, 2022).

55. See Miklosik & Evans, *supra* note 48, at 2.

56. See Johnston, *supra* note 54, at 10.

57. See Badía, Cortez & Ferruz, *supra* note 53, at 2761.

58. See Chris Holman, *ESG Investments in Mining*, NATIXIS (Mar. 11, 2021), <https://apac.cib.natixis.com/m-a-pulse-in-apac-articles/focus-on/articles/esg-investments-in-mining> [<https://perma.cc/KXE8-RTM6>] (archived Oct. 17, 2022).

59. See BDO GLOBAL, *supra* note 29, at 10.

60. See Holman, *supra* note 58.

B. Influential Financing

The Equator Principles (EP) are similarly utilized by banks to finance in a socially responsible way, promoting “sound environmental management practices.”⁶¹ As of the end of 2022, 137 financing institutions in thirty-eight countries have adopted the Equator Principles.⁶² The EP are voluntary and focus on responsibly financing projects to limit negative collateral effects of such financing.⁶³ Financial institutions often adopt the EP due to reputational concerns and to show their focus on responsible conduct, finding the benefits of such reputational gains far outweigh the costs of implementation.⁶⁴ This is supported by the size of the banks implementing the EP—often they are significantly larger than those institutions that have not adopted the EP. The size difference emphasizes that ESG goal-oriented behavior is especially prominent among institutions that dominate the financing industry.⁶⁵ Financial institutions’ willingness to invest in mining companies depends on ESG performance, and some lenders penalize borrowers based off performance regarding ESG metrics.⁶⁶

The driver of financial institutions’ adoption of the EP is public scrutiny of investments in projects that have detrimental side effects on the environment or surrounding community.⁶⁷ This scrutiny demonstrates the importance of social licenses to operate, and the power consumers hold. However, the EP have limitations when applied to project financing. The EP only regulate direct financing of projects, which leaves out other financing that banks provide. The EP only have a \$50 million threshold before they apply.⁶⁸ This means smaller projects with potentially high environmental costs are left outside the EP scope.⁶⁹ Financing institutions also reward or penalize mining companies for ESG performance through interest rate changes.⁷⁰ Similar to internal CSR or ESG goals that companies have, financial

61. EP4, EQUATOR PRINCIPLES 3–4 (July 2020). The Equator Principles are voluntary guidelines that financial institutions can adopt that prioritize investments with lower negative environmental and community impacts. *See id.*

62. *Members & Reporting*, EQUATOR PRINCIPLES, <https://equator-principles.com/members-reporting/> (last visited Oct. 19, 2022) [<https://perma.cc/6LLC-F8PJ>] (archived Oct. 19, 2022).

63. *See* Bert Scholtens & Lammertjan Dam, *Banking on the Equator. Are Banks that Adopted the Equator Principles Different from Non-Adopters?*, 35 *WORLD DEV.* 1307, 1308 (2007).

64. *See id.* at 1309.

65. *See id.* at 1316.

66. *See* BDO GLOBAL, *supra* note 29, at 10.

67. *See* Andrew Hardenbrook, *The Equator Principles: The Private Financial Sector’s Attempt at Environmental Responsibility*, 40 *VAND. J. TRANSNAT’L L.* 197, 206 (2007).

68. *Id.* at 207–08.

69. *See id.*

70. *See* BDO GLOBAL, *supra* note 29, at 10.

institutions that committed to the EP are criticized as lacking transparency and accountability—appearing, just as CSR and ESG goals do, like publicity stunts.⁷¹ Because of this, measuring any true environmental impact from institutions using the EP as a framework for investments is difficult to do.⁷²

Private financing provides a great incentive to corporations as well as developing countries to adopt ecologically minded policies and development. In the 1990s, there was a large shift from foreign aid to private financing in developing countries.⁷³ Private financing quadrupled to \$167 billion from 1990 to 1995, vastly eclipsing foreign aid to developing countries during the same time frame.⁷⁴ Over half the financing went toward developing factories and manufacturing plants as part of foreign direct investment.⁷⁵ While multiple factors motivated such a switch, one notable factor is a growing acceptance of market-driven economics by governments instead of state-driven finances.⁷⁶ Environmental implications exist when considering SRI and countries' motivations toward foreign direct investment projects such as a new mining operation or production of mining materials. Incentivizing developing countries—often where mines are located—to prioritize environmentally-conscious foreign direct investment through private financing offers another facet of the push for sustainable development. Companies investing in the developing world bring cleaner, more modern technology with them that lowers the impact on the environment.⁷⁷

In June 2022, the US Securities and Exchange Commission (SEC) proposed an amendment related to names of ESG funds and the disclosures the funds provide to their investors. The new requirements would amend a naming rule (Rule 35d-1) under the Investment Company Act of 1940,⁷⁸ recognizing that the name of a fund is a large marketing tool.⁷⁹ Currently, Rule 35d-1 requires funds with certain names to have a policy of investing 80 percent of their assets in investments that the name of the fund suggests are relevant.⁸⁰ This proposed amendment will expand the 80 percent requirement to fund names

71. Hardenbrook, *supra* note 67, at 209.

72. *Id.* at 227.

73. See Stephan Schmidheiny & Bradford Gentry, *Privately Financed Sustainable Development*, in THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 119 (Daniel C. Esty & Marian R. Chertow eds., 2008).

74. *See id.*

75. *See id.* at 120.

76. *See id.* at 119.

77. *See id.* at 122.

78. *See* 17 C.F.R. § 270.35d-1 (2001).

79. *See* SEC AND EXCH. COMM'N, FACT SHEET, AMENDMENTS TO THE FUND "NAMES RULE" (2022), <https://www.sec.gov/files/ic-34593-fact-sheet.pdf> (last visited Oct. 19, 2022) [<https://perma.cc/FR2L-62ST>] (archived Oct. 17, 2022).

80. *See id.*

with terms that suggest the fund focuses on investments or issuers that have particular characteristics.⁸¹ This would encapsulate funds that incorporate ESG factors in their investment decisions, reaching annual reports, advisor brochures, and fund prospectuses, which provide information to the public about the fund.⁸² However, this rule does not impact funds that are not subject to the SEC's supervision, such as any foreign fund with no connection to the United States. The amendment would not touch mining companies, just the funds that utilize ESG factors in their investments, so it would not provide much regulation or oversight for companies themselves. However, these funds will be more conscientious in what they choose to invest in, underscoring the importance of a visible commitment to environmental sustainability that the mining industry needs.

C. Current Labeling in Mining

Labeling in the mining industry is not a new concept. Diamonds have been subject to a conflict-free rating system due to public pressure and concern about ethical consumption of these minerals.⁸³ This labeling system, which is focused on "blood," or conflict, diamonds stemming from human rights abuses or sold to finance corruption or other violence, does not focus on the environment as its main concern.⁸⁴ However, the newer sustainability-rated diamond standard—SCS-007—does include the environment in its rating system.⁸⁵ Consumers' ethical buying behavior is influenced by concerns about a good's country of origin, which is understandable due to a lack of information about the supply chain of diamonds.⁸⁶ Information accessibility is essential for consumers to prioritize the environment and to provide companies' social licenses to operate.

81. See *id.*

82. See Maia Gez, Taylor Pullins, Claudette Druehl & Fatima A. Hassan Ali, *SEC Proposes Amendments to Rules to Regulate ESG Disclosures for Investment Advisers & Investment Companies*, WHITE & CASE LLP (June 13, 2022), <https://www.whitecase.com/insight-alert/sec-proposes-amendments-rules-regulate-esg-disclosures-investment-advisers-investment> [<https://perma.cc/24GJ-CL85>] (archived Oct. 17, 2022).

83. See Schulte, Balasubramanian & Morris Paris, *supra* note 6, at 4559 (an empirical study based off a consumer questionnaire relating to preferences for sustainable diamonds).

84. See *id.* at 4559–60.

85. See Kyle Roderick, *New Sustainable Diamond Certification Standard Provides Scientific Proof Of Origin And Builds Consumer Trust*, FORBES (July 27, 2021), <https://www.forbes.com/sites/kyleroederick/2021/07/27/new-sustainable-diamond-certification-standard-provides-scientific-proof-of-diamond-origin-and-builds-consumer-trust/?sh=3d739b2f547a> [<https://perma.cc/34TG-T96S>] (archived Oct. 17, 2022).

86. See Schulte, Balasubramanian & Morris Paris, *supra* note 6, at 4570.

Gold and other precious metals also have labels and are regulated—both by private organizations and governmental regulation.⁸⁷ The Responsible Jewellery Council provides a multi-step process to earn certification that covers the jewelry and watch supply chain to ensure best practices, and to notify consumers that the products they buy are ethically sourced and created.⁸⁸ Focused on meeting the seventeen UN Sustainable Development Goals, the Responsible Jewellery Council allows for a global standard focusing on responsible supply chains.⁸⁹ While not a true ecolabel, this regime does emulate a certification process similar to that of conflict-free diamonds (and includes such diamonds in the Responsible Jewellery Council, as well).⁹⁰ To become certified, there is a self-assessment and then an independent audit conducted by auditors with social accountability expertise, providing an independent monitoring system.⁹¹ Otherwise, the extractive and mining industry does not have a comprehensive labeling regime that encompasses multiple minerals on a broad scale.

III. DIFFERENT ECOLABEL REGIMES AND THEIR VIABILITY

Ecolabeling regimes do not all look the same. Private versus public, positive versus negative, and the scope of the label all have different implications on governance, trade, and feasibility of implementation. This Part will analyze the possibility for a public, government-regulated labeling scheme over a private, market-controlled scheme, navigating the trade consequences and the likelihood for effective enforcement. It will then consider the merits of positive labels versus negative labels and the implications both bring to consumer perception and product profitability.

There are multiple avenues to implement an ecolabel in the mining industry. One implementation system is a public regime implemented by a government. This raises trade concerns but provides a stronger mechanism for monitoring and enforcement with the weight of hard law behind it. Another option would integrate a private, industry-led labeling regime, which has the advantage of limiting trade impacts but faces legitimacy concerns and enforcement complications

87. See Effie Marinos, *Steps to Increase the Sustainable Use of Precious Metals*, SGS (Oct. 16, 2012), <https://www.sgs.com/en/news/2012/10/steps-to-increase-the-sustainable-use-of-precious-metals> [<https://perma.cc/2GHY-PVDZ>] (archived Nov. 2, 2022).

88. *Code of Practices 2019*, RESPONSIBLE JEWELLERY COUNCIL, <https://responsiblejewellery.com/standards/code-of-practices-2019/> (last visited Nov. 2, 2022) [<https://perma.cc/BYQ2-SSKW>] (archived Oct. 19, 2022).

89. See *History*, RESPONSIBLE JEWELLERY COUNCIL, <https://responsiblejewellery.com/about/history/> (last visited Nov. 2, 2022) [<https://perma.cc/54NM-Q2TJ>] (archived Oct. 19, 2022).

90. See *id.*

91. See Marinos, *supra* note 87.

because the implementing body is the industry itself. Both regimes are discussed further below.

A. Public Ecolabeling Regimes

Government-regulated ecolabeling initiatives provide many positive impacts on the environment. Public ecolabeling also forces corporations to comply with standards, having a more effective enforcement capability when companies do not comply. A public ecolabel is government created, requiring manufacturers to meet certain standards to receive the labeling certification.⁹² While government ecolabeling regimes are either voluntary (letting companies decide whether to work toward receiving the label)⁹³ or mandatory (as seen in China's labeling scheme because market incentives are not persuasive enough in the face of high negative environmental impacts), both require similar things from companies and are not seen much differently in the eyes of the World Trade Organization.⁹⁴ Often, a subsidy is offered to sweeten the deal and encourage corporate cooperation to meet governmental standards.⁹⁵ Examples of government-led ecolabeling regimes include Germany's Blue Angel standard (the first ecolabel regime in the world, created in 1978),⁹⁶ the European Union (EU) Ecolabeling Board, and the American Green Seal Certification.⁹⁷

National, government-led ecolabels are recognized more often among consumers than ecolabels that are industry led.⁹⁸ Public ecolabels also incentivize corporations through government policies for subsidies or lower taxes—creating demand not only from the consumer side of the market but also from the government side for sustainable practices.⁹⁹ The subsidy for compliance with the ecolabel standard is important to prevent consumer disinterest due to higher costs associated with labeled products.¹⁰⁰ Subsidies also promote greater

92. See Jingzhe Gao, Zhongdong Xiao, Haixiao Wei & Guanghui Zhou, *Dual-channel Green Supply Chain Management with Eco-label Policy: A Perspective of Two Types of Green Products*, 146 *COMPUT. & INDUS. ENG'G* 1, 2 (2020).

93. See generally Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (adopted June 13, 2012) (interpreting voluntary very narrowly) [hereinafter *US—Tuna II*].

94. See generally Gao, Xiao, Wei & Zhou, *supra* note 92.

95. See *id.* at 2–3.

96. See Ming Du, *Voluntary Ecolabels in International Trade Law: A Case Study of the EU Ecolabel*, 33 *J. ENV'T L.* 167, 168 (2021).

97. See Gao, Xiao, Wei & Zhou, *supra* note 92, at 2.

98. See Frieder Rubik, Dirk Scheer & Lucia Pietroni, *Eco-labelling and Consumers: Towards a Re-focus and Integrated Approaches*, 2 *INT'L J. INNOVATION & SUSTAINABLE DEV.* 175, 179 (2007).

99. See Fabio Iraldo & Michele Barberio, *Drivers, Barriers and Benefits of the EU Ecolabel in European Companies' Perception*, 9 *SUSTAINABILITY* 751, 753 (2017).

100. See Gao, Xiao, Wei & Zhou, *supra* note 92, at 3.

sustainability in the supply chain.¹⁰¹ Companies within the EU ecolabeling scheme cite the lack of public incentives and government recognition of a company's compliance with the labeling requirements as a main barrier to implementation, rather than the cost of implementing the scheme's requirements.¹⁰² This indicates that financial incentives such as subsidies and tax reductions are better ways to induce voluntary compliance with ecolabeling than reducing the administrative costs of implementing a label scheme.¹⁰³ It also suggests that private ecolabeling regimes are more successful when created in tandem with complementary public policies like subsidies or reducing taxes.¹⁰⁴

Looking at the EU Ecolabel scheme as an example, government-promoted labeling requirements allow for a centralized body (here, the European Commission and the EU Ecolabel Board) to enforce correct application of the label as well as to promote the use of the label, furthering demand for compliance.¹⁰⁵ The label is voluntary, so companies are not excluded from the market if they do not choose to apply for and comply with the label regime.¹⁰⁶ The EU Ecolabel regime is almost identical to the Nordic Council's White Swan ecolabeling regime, as both are voluntary; however, the EU Ecolabel is open to non-member states' manufacturers.¹⁰⁷ The EU Ecolabeling Board is a multi-stakeholder endeavor, including industry representatives, consumer organizations, and environmental organizations.¹⁰⁸ This allows for an inclusive process of label certification decisions regarding which companies will receive a label as well as which industries are compatible with such a labeling regime.¹⁰⁹

Public, government-led ecolabels raise questions regarding their restrictive nature toward trade. When a country establishes an ecolabel as part of its commitment to protect the environment, that national regulation tends to influence international trade patterns.¹¹⁰ Because these are local or national label regimes, foreign producers are often not consulted, and the criteria used for the labels may not be

101. *See id.*

102. *See* Iraldo & Barberio, *supra* note 99, at 763.

103. *See id.*

104. *See* Du, *supra* note 96, at 171.

105. *See id.* at 173.

106. *See id.* at 174.

107. *See* Surya P. Subedi, *Balancing International Trade with Environmental Protection: International Legal Aspects of Eco-Labels*, 25 *BROOK. J. INT'L L.* 373, 380–81 (1999).

108. *See* Gian Luca Baldo, Massimo Marino, Marco Montani & Sven-Olof Ryding, *The Carbon Footprint Measurement Toolkit for the EU Ecolabel*, 14 *INT'L J. LIFE CYCLE ASSESSMENT* 591, 592 (2009).

109. *See* Subedi, *supra* note 107, at 380.

110. *See* Soyong Lee, *Compatibility of Eco-Labeling Scheme with WTO and Its Potentially Conflicting Impacts*, in *LEGAL ISSUES ON CLIMATE CHANGE AND INTERNATIONAL TRADE LAW* 43, 43 (Deok-Young Park ed., 2016).

relevant to foreign producers.¹¹¹ This lack of consultation creates tension that can lead to disputes at the World Trade Organization (WTO). While most members of the WTO find voluntary, market-based labeling schemes have potential as “efficient economic instruments,” many developing countries feel ecolabels are just non-tariff trade barriers in disguise.¹¹² As such, an ecolabel restricts developing countries’ access to markets due to a lack of financial and institutional capacity to implement any ecolabeling scheme to meet the source country’s label requirements.¹¹³ Developing countries are concerned that developed countries’ ecolabel standards will force them to comply with standards that developing countries do not wish to observe, just to access developed countries’ markets.¹¹⁴ Ecolabels also create potential conflicts with the General Agreements on Tariffs and Trade (GATT) and the Technical Barriers to Trade Agreement (TBT Agreement) due to the possibility of discrimination in international trade.¹¹⁵

GATT raises potential dispute concerns regarding a public ecolabeling regime because any public regime will be subject to the national treatment and most favored nation rules GATT requires.¹¹⁶ These rules, but specifically the national treatment rule, compel a country to treat products with foreign origin no less favorably than they treat local products, including in taxation, regulation, the products’ distribution, or use.¹¹⁷ These requirements mean the complainant must demonstrate that the ecolabel discriminates against similar foreign or domestic products. One of the requirements to violate Article 3.4 is that the ecolabel must negatively affect the competitive opportunities in the market.¹¹⁸ While a country negatively affected by

111. *See id.* at 46.

112. *See Du, supra* note 96, at 171 (citing World Trade Organization, *Report to the Fifth Session of the WTO Ministerial Conference in Cancun*, WTO Doc. WT/CTE/8 (July 11, 2003)).

113. *See* CTR. FOR INT’L ENV’T L., ECO-LABELING STANDARDS, GREEN PROCUREMENT, AND THE WTO: SIGNIFICANCE FOR WORLD BANK BORROWERS 3 (2005). These fears are also seen in other environmental treaty negotiations and drafts, which created the concept of common but differentiated responsibilities and financial assistance from developed countries to developing to implement the treaty’s requirements. For an example of one such treaty, see generally United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, 165 (building into the framework different requirements for industrialized countries than for developing countries and ensuring a general commitment for industrialized countries to make financial and technology transfers to developing countries that facilitate implementation of the framework convention goals).

114. *See Du, supra* note 96, at 172.

115. *See* Subedi, *supra* note 107, at 375.

116. General Agreement on Tariffs and Trade, arts. 3.4, 1.1, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

117. *Id.* art. 3.

118. Rolf Weber, *Energy Labels: Nudging Policy to Avoid Trade Implications?*, in ENERGY LAW AND ECONOMICS 239, 246 (Klaus Mathis & Bruce Huber eds., 2018)

an ecolabeling regime may initiate a dispute under GATT, the treaty's exceptions to these rules, like Article 20, include measures related to the environment.¹¹⁹ The TBT Agreement contains similar rules, but without explicit exceptions like Article 20(b)'s exception for the environment in GATT.

Article 2 in the TBT Agreement includes a national treatment standard like GATT (Article 2.1), but also requires that technical regulations do not create "unnecessary obstacle[s] to international trade" (Article 2.2).¹²⁰ A technical regulation is a "document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory."¹²¹ This can include specific terms, symbols, or labeling requirements either for a product or production method.¹²² Any public, mandatory ecolabeling regime would fall within Article 2's scope. However, not every measure is a technical regulation, even if labeling requirements may be subject to enforcement regardless. They can also be considered a standard. What hinges on the difference between a technical regulation and a standard is whether compliance is mandatory or not.¹²³ When a labeling measure contains certain conditions to use it and prohibits non-labeled products using similar terms as part of the regime, like the United States' "dolphin-safe tuna" label, that is a technical regulation subject to the TBT Agreement because it restricts market access for those products that do not comply with the requirements to use the label.¹²⁴

US—Tuna II exemplifies the pitfalls of a labeling requirement implemented by a country. The United States regulated tuna fishing practices to protect dolphins, whose fins would get caught in specific types of nets because dolphins swim above schools of tuna.¹²⁵ The "dolphin-safe tuna" label companies could place on tuna products was only available if they complied with the fishing regulations.¹²⁶ The label was only focused on particular fishing methods in the eastern tropical

(referring to Panel Report, *United States—Certain Country of Origin Labeling (COOL Requirements)*, WTO Doc. WT/DS/384/R (adopted Nov. 18, 2011)).

119. GATT, *supra* note 116, art. 20(b).

120. Agreement on Technical Barriers to Trade, art. 2.1–2.2, Apr. 15, 1994, 1186 U.N.T.S. 276, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

121. *Id.* at Annex 1, ¶ 1.

122. *See id.*

123. *See id.* at Annex 1.1–1.2.

124. *US—Tuna II*, *supra* note 93, ¶ 196.

125. Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 4.6, WT/DS381/R (Sept. 15, 2011).

126. *See* Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385(d)(1)–(3).

Pacific, an area abundant in yellowfin tuna.¹²⁷ The label did not prioritize actual dolphin mortality, just the specific nets used to catch the tuna.¹²⁸ The United States inferred that regulating the nets would help prevent the large purse seine nets used to catch the tuna below dolphins from also capturing dolphins, lowering dolphin mortality in the region.¹²⁹ This is because separating the tuna from dolphins means using speed boats to chase the dolphins off, often leaving baby dolphins behind. Fishermen would inevitably scoop the baby dolphins into the net instead of just tuna.¹³⁰ Mexico—challenging the ecolabel scheme at the WTO—had many fishermen catching tuna in the region, meaning the label adversely affected the country.¹³¹ Even though the United States described the labeling as a voluntary initiative, the Appellate Body concluded it was mandatory.¹³² Mexico's access to US markets for its tuna products was affected because the fishing practices did not meet the "dolphin-safe" labeling requirements.¹³³ This prohibited Mexico from using the US "dolphin-safe tuna" label or any other kind of dolphin-safe label for their tuna products.¹³⁴ Compliance was mandatory to receive a market advantage.

Any labeling regime promulgated by a country runs the risk of functioning as mandatory and implicating the TBT Agreement, even if labeling is technically voluntary. In *US—Tuna II* the "voluntary" label became a technical regulation (and therefore, mandatory). A dolphin-safe label was only attainable through the US labeling regime and no other, even though producers could still market tuna in the US without any kind of label at all.¹³⁵ Even though market access was not restricted if countries did not comply with the regulations, the Appellate Body concluded the label was mandatory. Since voluntary ecolabeling regimes attempt to influence consumers' perceptions of products, they have the potential to negatively impact international trade due to the competitive relationship between products.¹³⁶ Because of this, both mandatory and voluntary government-led ecolabels risk WTO rule violation. This creates concerns about implementing a governmental

127. See Doug Palmer, *U.S. Tuna Plan Pleases Conservationists, Upsets Mexican Industry*, REUTERS (Apr. 10, 2013), <https://www.reuters.com/article/us-usa-mexico-dolphins/u-s-tuna-plan-pleases-conservationists-upsets-mexican-industry-idUSBRE93918P20130410> [<https://perma.cc/N5A8-TKME>] (archived Oct. 17, 2022).

128. See Laurens Ankersmit & Jessica Lawrence, *The Future of Environmental Labelling: US—Tuna II and the Scope of the TBT*, 39 LEGAL ISSUES ECON. INTEGRATION 127, 131 (2012).

129. See *id.*

130. See Palmer, *supra* note 127.

131. See Ankersmit & Lawrence, *supra* note 128, at 131.

132. See *US—Tuna II*, *supra* note 93, ¶ 199.

133. See *id.*

134. See *id.*

135. See Ankersmit & Lawrence, *supra* note 128, at 133.

136. See Lee, *supra* note 110, at 48.

ecolabel regime in the mining industry due to *US—Tuna II*'s effective removal of any distinction between mandatory and voluntary schemes. *US—Tuna II* collapses the distinction between voluntary and mandatory labeling systems, reducing voluntary labels' appeal to governments.

A second facet of *US—Tuna II* is that the TBT Agreement's scope includes ecolabels based on non-product related (NPR) process or production methods (PPMs). PPMs differentiate products based on how they are made, not their physical characteristics. NPR PPMs are a subset of PPMs because they are production methods that have no trace in the final product, like the labor practices used in production.¹³⁷ The Panel in *US—Tuna II* found that the dolphin-safe label, based on an NPR PPM (because it focused on the fishing practices, not the actual product), was covered by the TBT Agreement's technical regulation definition.¹³⁸ What matters is whether a label applies to a product—like the US label applying to tuna as a product.¹³⁹ Because of this decision, ecolabels are now covered by the TBT Agreement. However, the use of ecolabels was not discriminatory against Mexico—because they did not require a change in regulatory policy from Mexico.¹⁴⁰ However, the United States could still discriminate in violation of Article 2.1, even if the practice was acceptable under Article 2.2. This leaves the door open for government-implemented ecolabeling regimes—if they comply with Article 2.2's least restrictive means necessary requirement in the TBT Agreement—but still requires caution in implementation.

Within the framework of GATT and the TBT Agreement, the feasibility of an intergovernmental ecolabeling regime in the mining industry does not seem realistic. Ecolabels are often seen as a compromise between hardline legislation that risks trade restrictiveness and remaining complacent with regards to environmental policy. They put the choice on the consumer to value particular environmental goals and do not prohibit importation of products altogether like legislation could.¹⁴¹ While the benefits include the ability to monitor and enforce noncompliance against companies, discrimination concerns make it difficult to conclude that a government-led initiative is the most effective strategy for ecolabeling in the industry. While an ecolabel regime created by multiple countries by agreement solves the trade concerns, an intergovernmental ecolabel runs the very real risk of strong bias toward industrialized mining industry standards,

137. See Ankersmit & Lawrence, *supra* note 128, at 135.

138. See *US—Tuna II*, *supra* note 93, ¶ 7.78.

139. See *id.*

140. See Ankersmit & Lawrence, *supra* note 128, at 138.

141. See *id.* at 129.

intentional or not.¹⁴² Because of that risk, even if the likelihood of WTO litigation is minimized due to the GATT and TBT Agreement's focus on national labels, a governmental labeling scheme is not the most practical choice.

B. *Private, Market-Originated Ecolabeling Regimes*

Another form of ecolabel implementation is a private ecolabel regime. The removal of any government involvement in the labeling regime lessens the risk of WTO litigation relating to the ecolabel. A private regime can operate in the gaps that governments leave in relation to environmental policy, allowing for more impactful change in industries that governments are slow to regulate. However, the lack of government involvement lowers enforcement and monitoring capabilities. Privately led ecolabeling regimes also operate on a true voluntary basis instead of the mandatory-in-effect label seen in *US—Tuna II*. This raises concerns about implementation by multinational mining companies whose profit motives are seemingly in direct opposition to the environmental protection goal of an ecolabel. An example of a nongovernmental, organization-led ecolabel is Nordic Swan, which does receive some governmental support, or the Sustainable Forestry Initiative, which is solely industry led.¹⁴³

Underlying ecolabeling schemes is the belief that the information disclosed relating to the process and production of goods will allow consumers to make decisions based off that information, without specifically detailing what those decisions should be.¹⁴⁴ Ecolabels center the focus of consumers on the *process*, rather than just the *product*, because it signals the product was sustainably harvested or produced, providing a smaller negative environmental impact.¹⁴⁵ With such an ability to move consumer preference through information disclosure, the market can shift in response to the change in consumer demand affecting the international trading system.¹⁴⁶ Labels provide an opportunity for consumers to make a more informed decision without having to search for the provided information. This means the value of

142. See Ralph Piotrowski & Stefan Kratz, *Eco-Labeling in the Globalised Economy*, 4 IPG 430, 432 (1999).

143. See Samir Gandhi, *Regulating the Use of Voluntary Environmental Standards Within the World Trade Organization Legal Regime: Making a Case for Developing Countries*, 39 J. WORLD TRADE 855, 856 n.4 (2005).

144. See Aarti Gupta, *Transparency Under Scrutiny: Information Disclosure in Global Environmental Governance*, 8 GLOB. ENV'T POL. 1, 3 (2008).

145. See *id.*; Doug Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 529 (2004) (describing how process information can include "any number of other social, economic, or environmental circumstances that are related causally to a consumer product, but that do not necessarily manifest themselves in the product itself").

146. See Lee, *supra* note 110, at 43.

additional information does not need to exceed the cost of the search—it is right in front of the consumer, on the label.¹⁴⁷

Even if a labeling regime is set by an industry body, or any other kind of nongovernmental body, it runs the risk of violating the TBT Agreement's rules on standards applying to a voluntary regime. This is because a "standard" under the TBT Agreement is not limited to "central government bodies" and explicitly mentions "non-governmental standardizing bodies."¹⁴⁸ So, while private labeling regimes are less likely to be subject to WTO litigation, they do not eliminate the risk for such litigation under the TBT Agreement. It is not clear that voluntary, private regimes are included in the scope of the TBT Agreement. However, the TBT Agreement may apply to private regimes when the government is sufficiently involved, like if the private body consulted the government while implementing a labeling scheme.¹⁴⁹ Even if an ecolabel is promulgated by a nongovernmental organization (NGO), developing countries still have a concern that developed countries will utilize the ecolabel to discriminate against products from developing countries in a disguised attempt at restricting trade.¹⁵⁰

The rise of NGO environmental standards is seen as cause for concern by developing countries. Developing countries are concerned because these standards or ecolabels can escape WTO discipline due to their voluntary, nongovernmental characteristics, regardless of whether they restrict trade.¹⁵¹ This is particularly true in countries where manufacturers cannot afford to adjust manufacturing due to cost or logistics to comply with an ecolabel's requirement or standards.¹⁵² NGO ecolabels, or other privately created ecolabels, do not follow a commonly accepted legal standard for how ecolabels should work.¹⁵³ This further creates inconsistencies between different labels and how they work, delegitimizing the entire concept of an ecolabel.

There is a lot of rightful concern about private ecolabeling regimes, especially since private organizations are taking on the role of regulators, usually a job left for governments.¹⁵⁴ However, the benefits of a private regime include adaptability and the ability to further corporations' social licenses by consumers. By the nature of not being government created, private ecolabels are voluntary—they are soft

147. See Mark A. Cohen & Michael P. Vandenberg, *The Potential Role of Carbon Labeling in a Green Economy*, 34 ENERGY ECON. S53, S54 (2012).

148. TBT Agreement, *supra* note 120, art. 10.3.1.

149. See Lee, *supra* note 110, at 53.

150. See Gandhi, *supra* note 143, at 855.

151. See *id.* at 857.

152. See *id.* at 859. While there are other trade concerns developing countries face, such as the impact of ecolabel standards on tariff reduction negotiations, that is outside the scope of this Note.

153. See Pavel Castka & Charles J. Corbett, *Governance of Eco-Labels: Expert Opinion and Media Coverage*, 135 J. BUS. ETHICS 309, 310 (2016).

154. See *id.*

law, not required.¹⁵⁵ Consumers view private ecolabels as less legitimate compared to government ecolabels, but when large companies further down the supply chain adopt them, the effect on ensuring compliance is similar to government ecolabels.¹⁵⁶ This is because larger companies' adoption helps make it impossible for upstream suppliers—like mining corporations—to reject an ecolabel scheme due to companies' sizes and market power as the consumer-facing component in the supply chain.¹⁵⁷

Research shows that industry-created ecolabels are viewed as less trustworthy by consumers compared to governmental and environmental NGO-created labels.¹⁵⁸ However, consumers who receive environmental information from businesses themselves, who they typically deem untrustworthy, will still buy ecolabeled products from that business if there is third-party certification.¹⁵⁹ This indicates that private labeling regimes can overcome the concerns consumers have about accuracy and commitment to the environment, while also sidestepping the trade restriction concerns that exist with government-led ecolabel regimes.

One NGO-created ecolabel exemplifies how involving multiple stakeholders in an equal process provides an effective way to create and retain sustainable practices. That is the sustainably sourced fishing ecolabel by the Marine Stewardship Council (MSC). Created in 1998 by the World Wide Fund for Nature and Unilever, the now-independent MSC focuses on the declines in ocean fisheries.¹⁶⁰ The MSC management practices value inclusiveness, third-party certification, standard-setting processes, and transparency.¹⁶¹ It is independent with no singular stakeholder having greater influence than the other stakeholders.¹⁶² The three principles that guide the standard setting for fisheries are healthy target stock status, mitigation of environmental impacts, and effective management.¹⁶³ Once fisheries gain certification, the fish sold will have the blue label that confirms

155. See *id.* at 311.

156. See *id.*

157. See *id.*

158. Nicole Darnall, Hyunjung Ji & Diego A. Vázquez-Brust, *Third-Party Certification, Sponsorship, and Consumers' Ecolabel Use*, 150 *J. BUS. ETHICS* 953, 953 (2018) (citing Nicole Darnall, Cerys Ponting & Diego Vázquez-Brust, *Why Consumers Buy Green*, in *GREEN GROWTH: MANAGING THE TRANSITION TO SUSTAINABLE CAPITALISM* 287 (Diego Vazquez-Brust & Joseph Sarkis eds., 2012)).

159. See Darnall, Ji & Vázquez-Brust, *supra* note 158, at 954.

160. See William Martin, *Marine Stewardship Council: A Case Study in Private Environmental Standard-Setting*, 44 *ENV'T L. REP. NEWS & ANALYSIS* 10097, 10097 (2014).

161. See *id.* at 10098.

162. See *id.* at 10099.

163. *The MSC Fisheries Standard*, MARINE STEWARDSHIP COUNCIL, <https://www.msc.org/standards-and-certification/fisheries-standard> (last visited Mar. 15, 2022) [<https://perma.cc/6UYS-JW6R>] (archived Sept. 21, 2022).

the fish is sustainable. The fishery is also subject to annual audits to confirm compliance, with a reassessment of certification every five years.¹⁶⁴ The MSC blue label is a successful ecolabel, found on more than twenty-five thousand seafood products in the world.¹⁶⁵ This makes the label the most widely recognized for certified sustainable seafood.

C. *Type of Ecolabel*

As explained above,¹⁶⁶ there are many ways to implement an ecolabel. From voluntary or mandatory (though *US—Tuna II* made this distinction moot in practice regarding governmental labeling) to negative or positive, each type of label carries with it different implications regarding efficacy and reliability. Consumers who buy ecolabeled products focus on the legitimacy of the business and its commitment to the environment. Ecolabels with third-party verification or certification legitimize untrustworthy businesses, increasing the likelihood consumers will buy the product.¹⁶⁷ While not exhaustive, this subsection will detail a few main differences between the type of labels and how they impact consumer choice.

Voluntary ecolabels are those that do not require compliance but are a goodwill effort to meet certain environmental standards that businesses choose to comply with. Voluntary labels are usually those not promulgated by the government, but rather by industries, NGOs, or other third parties.¹⁶⁸ A majority of ecolabels existing today are voluntary.¹⁶⁹ Of those labels, most are government or NGO sponsored.¹⁷⁰ When not government created, they are considered part of the mechanisms of the market, shifting power from governments to “global networks of interacting institutions,” that are prioritizing environmental policy faster or further reaching in scope than governments.¹⁷¹ Assurance is a key component in voluntary labels, where standards are set by industry associations or multiple stakeholders, also requiring compliance governance.¹⁷² Mandatory labels are most likely government created because they force compliance in order to have access to the market. As *US—Tuna II* exemplifies, voluntary, gov-

164. See Martin, *supra* note 160, at 10099.

165. See *How Does the Blue MSC Label Compare?*, MARINE STEWARDSHIP COUNCIL, <https://www.msc.org/what-we-are-doing/our-approach/how-does-the-blue-msc-label-compare> (last visited Mar. 16, 2022) [<https://perma.cc/L7LJ-CGJ2>] (archived Sept. 21, 2022).

166. See *supra* Part III.A–B.

167. See Darnall, Ji & Vázquez-Brust, *supra* note 158, at 954.

168. See *supra* Part III.A–B.

169. See Castka & Corbett, *supra* note 153, at 311–12.

170. See ECOLABEL INDEX, *supra* note 5.

171. See Castka & Corbett, *supra* note 153, at 311.

172. See *id.* at 312.

ernment-created ecolabels can be treated as a mandatory label, which risks WTO dispute resolution and delegitimizing the label.¹⁷³

The efficacy of an ecolabel lies in how it communicates to consumers the information that the label signifies. Consumers often struggle to understand the meaning behind an ecolabel, which negatively impacts trust in the label and product.¹⁷⁴ Green marketing creates consumer confusion because different ecolabels appear similar with vague “green” terms that do not actually convey the environmental impact behind the label’s requirements.¹⁷⁵ A positive ecolabel is one that provides information in a positive way—indicating that this product is more environmentally friendly than other, nonlabelled products.¹⁷⁶ Examples of positive ecolabels include Blue Angel or Nordic Swan.¹⁷⁷ On the other hand, a negative ecolabel signals negative environmental consequences, helping consumers avoid environmentally harmful products.¹⁷⁸

Negative ecolabels are less common and are not likely to provide a strong commitment from members within the label’s industry. The World Wide Fund for Nature’s color-coded system indicates the environmental impact certain fish have.¹⁷⁹ Green is an environmentally conscious choice, yellow requires reflection, and red means it is not environmentally sustainable.¹⁸⁰ Fisheries and industry actors’ likelihood to subscribe to a color system that can negatively label their fish is very slim.¹⁸¹ Actors are unlikely to market their fish with a label indicating the fish is unsustainable due to the negative connotations that unsustainable fishing practices have.¹⁸² This system needs mandatory compliance or government backing by regulation to create buy-in from all industry actors and substantial environmental change. This makes a negative ecolabel an unlikely choice for an ecolabel

173. See *US—Tuna II*, *supra* note 93, at 2 (the WTO “found that the US ‘dolphin-safe’ labelling provisions constitute a ‘technical regulation’ within the meaning of Annex 1.1. to the *TBT Agreement* . . .”).

174. See Gunne Grankvist, Ulf Dahlstrand & Anders Biel, *The Impact of Environmental Labelling on Consumer Preference: Negative vs. Positive Labels*, 27 *J. CONSUMER POL’Y* 213, 215 (2004).

175. See Sun-Jung Moon, John Costello & Dong-Mo Koo, *The Impact of Consumer Confusion from Eco-labels on Negative WOM, Distrust, and Dissatisfaction*, 36 *INT’L J. ADVERT.* 246, 250 (2017).

176. See Grankvist, Dahlstrand & Biel, *supra* note 174, at 218–19.

177. *Id.* at 219.

178. See *id.* at 226–27.

179. See *The Fish of Your Choice*, WORLD WIDE FUND FOR NATURE (May 7, 2015), https://wwf.panda.org/wwf_news/?246131/The-fish-of-your-choice/ [<https://perma.cc/G2HJ-CVZ7>] (archived Sept. 21, 2022).

180. See *id.*

181. See Grankvist, Dahlstrand & Biel, *supra* note 174, at 222 (explaining that individuals with an intermediate level of environmental concern react more strongly to negative labels than positive, while those consumers that have high environmental concern react equally to negative and positive environmental labels).

182. See *id.*

regime in the mining industry already riddled with a negative public image regarding the environment. A negative label system, especially a color-coded system used by the World Wide Fund for Nature, could also risk greenwashing the practices of the mining company. By providing a green label for products that are relationally more sustainable compared to the rest of the industry, this labeling system risks deceiving customers that the product is more environmentally friendly than it is.

IV. NGO-LED PRIVATE ECOLABELING REGIME

Ecolabels have many advantages—some unanticipated—for companies and consumers alike when implemented. Companies looking to implement or comply with an ecolabeling regime (whether publicly or privately led) often cite consumer demand and anticipated market competitiveness, including market share and new customers, as the main drivers for starting an ecolabel.¹⁸³ The improvement of a company's overall environmental performance and sustainability is not often a main driver for implementation, but proves an unanticipated benefit.¹⁸⁴ This indicates that, regardless of whether companies are environmentally minded or market driven, ecolabels are an effective tool to promote sustainability and increase the company's market share.

The multinational mining industry should utilize a private ecolabel to promote environmental sustainability. The main customers in the mining industry are not consumers of goods directly, but rather other firms or companies within the supply chain that manufacture products for consumers. Implementing a private label created by an NGO with input from the mining industry sidesteps most of the trade concerns that a mandatory, government-implemented label creates. However, this loses the enforcement mechanisms inherently built into a public, mandatory ecolabeling regime. Government subsidies and monitoring for compliance provide strong incentives to companies to fully commit and comply with the labeling requirements, without greenwashing their products.¹⁸⁵ Without a centralized body with the power to penalize companies for shoddy compliance, private ecolabels lose their credibility in consumers' eyes.¹⁸⁶ Third-party assurance can partially overcome this legitimacy concern, but with less weight than enforcement systems. Because of credibility concerns with industry-created labels, an NGO should implement an ecolabel for key minerals.

183. See Iraldo & Barberio, *supra* note 99, at 759.

184. *See id.*

185. See Du, *supra* note 96, at 173, 175.

186. *See id.*; Nicole Darnall, Hyunjung Ji & Matthew Potoski, *Institutional Design of Ecolabels: Sponsorship Signals Rule Strength*, 11 *REGUL. & GOVERNANCE* 438, 440 (2017).

This works to the benefit of the industry due to customers' natural inclination to trust government or NGO-created ecolabels.¹⁸⁷

A. *Mechanics of an NGO-Created Ecolabel*

An ecolabel created by a mining NGO helps to market extractives in a more positive light, which is becoming increasingly important in today's political climate focused on the effects of global warming and climate change. It also alleviates the concerns that arise with an industry-created label. Those concerns include the pressure multinational mining companies will put on the industry association for weaker standards and requirements to use the label.¹⁸⁸ This pressure stymies genuine environmental improvement, especially since industry associations are comprised of the industry actors whose actions are being scrutinized. Third-party certification helps protect the integrity of the ecolabel by promoting consumer trust but does not fully resolve this concern to create a credible, trustworthy label.¹⁸⁹ This confirms that an NGO-sponsored certification and labeling scheme is the best way to implement true, industry-wide change.

An international NGO focused specifically on the mining industry and implementing an ecolabel must implement this regime. It must have an independent body and certification process with third-party monitoring. Third-party certification is important because the mining industry is one of the world's most damaging toward the environment.¹⁹⁰ The industry struggles to monitor and police itself toward more sustainable practices, often only paying lip service to greener practices without providing due diligence.¹⁹¹ This kind of certification also strengthens the label's—and the companies' that comply with it—reputation with the public and media, who are more likely to criticize poorly governed ecolabels.¹⁹² Information disclosure bolsters monitoring by external third parties, which is essential in a private ecolabeling scheme with no ability to impose legal penalties for nonconformance.¹⁹³ This allows nonconforming actors to correct actions and work towards conformance.¹⁹⁴

Assurance practices are easily met through the NGO certification because it is an independent third party. The mining NGO's leadership must include stakeholder engagement from mining companies and industry groups as well as scientists and other NGOs. However, every

187. See Darnall, Ji & Vázquez-Brust, *supra* note 158, at 964.

188. See Darnall, Ji & Potoski, *supra* note 186, at 441.

189. See Castka & Corbett, *supra* note 153, at 312, 314.

190. See Jenkins & Yakovleva, *supra* note 7, at 272.

191. See RESPONSIBLE MINING FOUND., *supra* note 11, at 8.

192. See Castka & Corbett, *supra* note 153, at 314.

193. See Darnall, Ji & Potoski, *supra* note 186, at 440.

194. See *id.*

stakeholder will hold equal weight for voting purposes to keep the NGO independent. Industry-created labels are not viewed as credible while NGO labels are often viewed as too subjective, aligning with specific agendas and campaigns.¹⁹⁵ This independence is essential to the effectiveness of the NGO and the ecolabel certification program.

The leadership structure of the NGO should mirror the MSC's structure to retain independence while increasing diversity in the stakeholders involved. Like the Initiative for Responsible Mining Assurance, the NGO should have strong technical knowledge in mining operations.¹⁹⁶ This technical knowledge can bring needed expertise when creating the framework for the ecolabel that corporations will use regarding which environmental practices to improve and how to do so sustainably. This goes hand in hand with the involvement of scientists and other industry actors seated on the leadership board.

Creation of an ecolabeling scheme needs consultation from other organizations and coalitions, especially those with members of mining companies from developing countries. Working with smaller coalitions of companies and industry actors, like the Initiative for Responsible Mining Assurance, increases perspectives of those in the industry that are smaller and have less capacity. Creating an NGO to collaborate with coalitions and the industry itself facilitates this consultation. This is especially important because developing countries are concerned about ecolabels essentially becoming trade barriers.¹⁹⁷ Similar to the concerns developing countries have about government-led ecolabels, the standards set in the ecolabel requirements are likely to reflect Western ideals about the environment. Developing countries without a long history of environmental degradation through industrialization often perceive such requirements as undeserved punishment.¹⁹⁸ Consultation with developing countries and their companies allows for broader consideration and room for tiered steps for implementation to comply with the label.

There are many different types of mining, each with its own environmental impacts and specific minerals. The four main methods are underground, open-surface or pit, placer, and in-situ mining.¹⁹⁹ To have the widest application and impact, an ecolabel focused on the mining industry should apply to open-pit mining. Huge volumes of earth move in open-pit mining. It is the most common form of mining for strategic metals used in consumer electronics and industrial ma-

195. See Martin, *supra* note 160, at 10099.

196. See POTTS, WENBAN-SMITH, TURLEY & LYNCH, *supra* note 8, at 15.

197. See Du, *supra* note 96, at 171.

198. See Piotrowski & Kratz, *supra* note 142, at 433–34.

199. *What Are the Main Methods of Mining?*, AM. GEOSCIENCES INST., <https://www.americangeosciences.org/critical-issues/faq/what-are-main-mining-methods> (last visited Mar. 14, 2022) [<https://perma.cc/8GC6-4YHS>] (archived Sept. 22, 2022).

chinery.²⁰⁰ It also extracts minerals used in nuclear fission, like uranium and plutonium, which are increasingly important in the push for “greener” energy.²⁰¹ These strategic minerals are critical because of the economic importance relating to their use and the high risk for supply shortages.²⁰² Due to the significance of such minerals now and into the future, the ecolabel should retain a limited focus on critical, strategic minerals. This is especially important because of where in the world the minerals are extracted. China and Brazil are some of the top global producers of critical minerals in the world but have a history of environmental abuses relating to rare-earth mineral mining.²⁰³

The environmental degradation that open-pit mining results in is widespread. Because the minerals found in open-pit mining are often in very small quantities, the amount of mined ore is much higher.²⁰⁴ Crushed rock can expose radioactive elements and metallic dust. Tailings are a mixture of crushed rock and liquid—potentially radioactive or toxic—and are a result from open-pit mining.²⁰⁵ Tailings are often held in dams, which can rupture and release toxic waste into rivers and surrounding areas.²⁰⁶ The air pollution volume from dust reaches 75–

200. See Ali Somarin, *A Snapshot of Strategic Metals*, THERMOFISHER SCI. (May 27, 2014), <https://www.thermofisher.com/blog/mining/a-snapshot-of-strategic-metals/> [<https://perma.cc/Y2XA-8PAN>] (archived Sept. 22, 2022).

201. See *id.*

202. See *Critical Raw Materials*, BRIT. GEOLOGICAL SURV., <https://www.bgs.ac.uk/geology-projects/critical-raw-materials/> (last visited Mar. 14, 2022) [<https://perma.cc/L2E5-K9A3>] (archived Sept. 23, 2022).

203. See *Production Share of Critical Minerals Worldwide As of 2020 by Majority Producing Country*, STATISTA, <https://www.statista.com/statistics/1127203/critical-minerals-production-share-by-majority-producing-countries-global/> (last visited Mar. 18, 2022) [<https://perma.cc/V544-W4LZ>] (archived Sept. 23, 2022) (compiling data from the U.S. GEOLOGICAL SURV., MINERAL COMMODITY SUMMARIES 2021, <https://pubs.usgs.gov/periodicals/mcs2021/mcs2021.pdf> [<https://perma.cc/MTS9-HBE7>] (archived Sept. 23, 2022)); Michael Standaert, *China Wrestles with the Toxic Aftermath of Rare Earth Mining*, YALE ENV'T 360 (Jul. 2, 2019), <https://e360.yale.edu/features/china-wrestles-with-the-toxic-aftermath-of-rare-earth-mining> [<https://perma.cc/3X4K-HV2E>] (archived Sept. 23, 2022) (“Today, concrete leaching ponds and plastic-lined wastewater ponds dot the hills.”); Athayde Motta & Miles Litvinoff, *Lifting the Veil of Secrecy on Rights Abuses Caused by Brazil’s Mining Industry*, OPENGLOBALRIGHTS (Oct. 28, 2021), <https://www.openglobalrights.org/lifting-the-veil-of-secrecy-on-rights-abuses-caused-by-brazils-mining-industry/> [<https://perma.cc/3FXV-4HQJ>] (archived Sept. 23, 2022) (discussing a 2015 tailings dam collapse that killed nineteen people and a 2019 tailings dam rupture that killed 270 people, releasing millions of tons of toxic waste into the area while the Brazilian government is trying to loosen the regulations regarding tailings dams).

204. See *Environmental Risks of Mining*, MISSION 2016: STRATEGIC MIN. MGMT, MASS. INST. TECH. <https://web.mit.edu/12.000/www/m2016/finalwebsite/problems/mining.html> (last visited Mar. 14, 2022) [<https://perma.cc/Q2G9-FL4R>] (archived Sept. 23, 2022).

205. See *id.*

206. See Motta & Litvinoff, *supra* note 203.

100 cubic kilometers per year.²⁰⁷ Acid mine drainage is another significant issue that open-pit mines exacerbate. The metal that mines target is often rich in sulfides, which reacts with air and water once exposed, forming sulfuric acid.²⁰⁸ This acid can be released anywhere the sulfides are exposed. The acid mine drainage severely impacts fish, surrounding animals, and plants near the mine. Once it occurs, there is no current way to prevent it from continuing.²⁰⁹ This requires continual water treatment, with no end in sight. Closed open-pit mines that are no longer in use have a high occurrence of acid mine drainage.

The label's requirements must be simple enough for consumers to grasp but not too simple that mining companies easily comply without substantively changing environmental practices. Because consumers are not the only drivers of environmental change for multinational firms, the label requirements should encompass the other drivers that encourage label implementation. Relating to supply chain contracting,²¹⁰ which has seen an increase in environmental protection clauses, the label should identify that the product or material complies with the supply chain contracting requirements. Like the sustainably sourced fish ecolabel in the Marine Stewardship Council, the mining ecolabel should focus on three specific principles.²¹¹ These principles will encompass the primary standard of environmentally sustainable open-pit mining. Firstly, the mining levels must become or remain sustainable for the surrounding environment. While mines can naturally close due to mineral depletion, such mine closures must close ethically with the environment in mind. Principle Two reflects this idea by focusing on minimizing the environmental impact on the surrounding ecosystem. Principle Three will focus on the management structure of the mining operation and company, including supply chain contracting. The management must have the ability to respond to changing circumstances and maintain sustainability.

While the principles do not define what multinational mining companies must do to gain certification, the principles guide the standard

207. See Michaela Koščová, Mark Hellmer, Seroni Anyona & Tatiana Gvozdikova, *Geo-Environmental Problems of Open Pit Mining: Classification and Solutions*, 41 E3S WEB CONFS. 1, 2 (2018).

208. See *Acid Mine Drainage*, EARTHWORKS, https://earthworks.org/issues/acid_mine_drainage/ (last visited Mar. 14, 2022) [<https://perma.cc/U9PC-FSYT>] (archived Sept. 23, 2022).

209. See *id.*

210. See Vandenberg & Moore, *supra* note 18, at 52 (describing an empirical study by the authors on environmental supply chain contracting, where 84 percent of firms in seven global sectors utilized environmental supply chain contracting in 2022).

211. The three principles that the MSC focuses on are sustainable fish stocks, minimizing environmental impact, and effective management of fisheries. These are intended as high-level principles, with further implementation that highlights specific requirements and goals. Those requirements are created in partnership with the fishing industry and scientists within the MSC itself. See generally Martin, *supra* note 160.

setting that the mining NGO will do that will spell out the criteria. The criteria should focus on some of the bigger ecological impacts of open-pit mining, like acid mine drainage, tailings storage and waste, open-pit voids, and responsible mine closures.²¹² Another avenue that mining companies should commit to is the responsible divestment of assets (including small mines) to smaller firms. Smaller firms may have less mining experience and less capacity to commit to environmental sustainability.²¹³ Requiring responsible divestment ensures mining corporations do not wash their hands of mines with a high cost of compliance with the label's requirements. The NGO would create the actual certification standards required, closely partnering with scientists, solely based on science, not politics.²¹⁴ Much like the MSC label, the label would require no more than is necessary to retain sustainable practices to ensure a balance between environmental groups and the mining industry.²¹⁵

Utilizing the three principles, the NGO's leadership board must have a certification process for open-pit mining companies. This would define the processes required to meet the standards set. Scientists, with their own monitoring by another independent third party, would govern the certification process. This system, much like the MSC system, allows for further transparency and certainty that it is science, not ideology, governing certification requirements. Once mining companies meet those standards, they are certified. This requires annual audits to ensure compliance with the standards and a reassessment of the certification every few years to ensure companies do not lower their practices but retain their certification.

Certification allows the mining companies to export and ship the extracted minerals with certification of sustainability provided by the

212. See GREEN DIRECTORY, *How Can Mining Become More Environmentally Sustainable?*, <https://www.sa-green-info.co.za/portal/article/1633/how-can-mining-become-more-environmentally-sustainable> (last visited Mar. 15, 2022) [<https://perma.cc/A5S9-QYA5>] (archived Sept. 27, 2022) (noting that mines that are shut down but not properly closed create increased risks of environmental contamination and potential illegal activity); *Can We Mitigate Environmental Impacts from Mining?*, AM. GEOSCIENCES INST., <https://www.americangeosciences.org/critical-issues/faq/can-we-mitigate-environmental-impacts-mining> (last visited Mar. 15, 2022) [<https://perma.cc/4VYP-WK8S>] (archived Sept. 27, 2022).

213. See FRANCOIS SANTOS, MARTIN SPROTT, POPPO HOFSTEENGE, CHRIS LIVITSANIS & GORDON MUNN, KEARNEY, *MINING TAKES ON THE SUSTAINABILITY CHALLENGE 1* (2016), <https://www.kearney.com/documents/291362523/291364505/Mining%2BTakes%2Bon%2Bthe%2BSustainability%2BChallenge.pdf/f002cd17-aafd-33a8-9372-9e40c849db84?t=1580148443000> (last visited Nov. 2, 2022) [<https://perma.cc/UR6W-AVTW>] (archived Sept. 27, 2022).

214. This would mirror the MSC's focus on science, not ideology or emotional appeals to saving the environment. This keeps the standard proportional, not moving beyond the goal of sustainable mining of strategic minerals long term. See Martin, *supra* note 160, at 10098–99.

215. See *id.* at 10098.

mining NGO. That certification allows sellers or producers utilizing those minerals to use the ecolabel on the final products that are for sale. Much like raw organic cotton and the Nordic Swan label, the focus is on growing practices and production even though the label is on the final consumer product.²¹⁶ Because minerals are not the final product that consumers purchase, this allows for information about sustainable sourcing of the product to reach the consumers. The final product would have the ecolabel put on by the seller, not the mining company. However, certification allows the mining company to alert buyers and manufacturers utilizing the minerals in the supply chain that the product is sustainably certified and complies with supply chain contract requirements for environmental sustainability.

B. *Why an NGO Label Is Effective and Why It Matters*

An independent NGO-created ecolabel further commits the industry to environmental sustainability, fulfilling the environmental policy gaps created by governments and unfilled through UNDP's soft law initiatives.²¹⁷ The industry's previous environmental and sustainability initiatives signal the industry's capacity to adhere to an ecolabeling regime.²¹⁸ It also indicates that those initiatives are often lacking in tangible effects, which leaves room for ecolabels to have an actual impact on how mining companies operate.²¹⁹ The industry awareness of the need for environmental protection existed as far back as 2002, with the industry report commissioned relating to the environment and human rights.²²⁰ Those members in ICMM have also recently committed to a goal of net-zero greenhouse gas emissions by 2050, signaling a stronger commitment to furthering sustainability.²²¹ Ecolabels are a way for the mining industry to put its money where its mouth is, helping to meet corporate customer demands for environmentally

216. See Beatrice Kogg, *Greening a Cotton-textile Supply Chain: A Case Study of the Transition towards Production without a Powerful Focal Company*, 43 *GREENER MGMT. INT'L* 53, 55 (2003) (illustrating how an ecolabel can place requirements on an upstream chain of suppliers to improve the chain's overall environmental performance).

217. See UNDP SOURCEBOOK, *supra* note 9, at 43–48 (discussing, *inter alia*, soft law frameworks applicable to sustainable mining).

218. See Frederiksen, *supra* note 10, at 496.

219. See RESPONSIBLE MINING FOUND., *supra* note 11.

220. See UNDP SOURCEBOOK, *supra* note 9, at 14.

221. See ICMM CLIMATE CHANGE STATEMENT, INT'L COUNCIL ON MINING & MINS. (2021), https://www.icmm.com/website/publications/pdfs/mining-principles/net-zero-by-2050_en-gb.pdf, (last visited Feb. 25, 2022) [<https://perma.cc/HG3T-APUE>] (archived Sept. 28, 2022). The commitment is related to Scope 1 and 2 greenhouse gas emissions, in line with the Paris Agreement. These emissions focus on the direct emissions from mining and those from the generation of purchased energy. They do not focus on the emissions created throughout the supply chain.

friendly production and products from the source—the extraction of minerals.²²²

This also emphasizes the supply chain pressure that mining corporations are facing with those companies buying the minerals extracted. Large companies that are consumer facing because they produce or sell the final product are increasingly focusing on their own CSR and ESG goals, which are related to their social licenses to operate.²²³ The executive pay at these companies is more and more often tied to ESG goals: in 2021, 25 percent of US companies included some form of ESG metric in executive incentive plans.²²⁴ Because consumers provide companies with their social license to operate, consumer companies' concerns about brand image provide a powerful tool to pressure the multinational mining industry to implement true change.²²⁵ There is rising pressure on mining companies to decarbonize from companies whose activist investors are increasing demand for stronger ESG performance.²²⁶ This culminates in the increased support for ESG proposals at shareholder meetings of US companies—reaching 32 percent in 2021, up from 21 percent in 2017.²²⁷

Industry customers are prioritizing sustainable products and services from mining companies as a crucial component to responsible sourcing.²²⁸ Especially relating to critical metals essential in the renewable energy market (e.g., nickel, cobalt, and rare earth metals), there is pressure to increase the sustainability of those minerals'

222. See Aidan Davy, *Equivalency Matters*, INT'L COUNCIL ON MINING & MINS. (Mar. 23, 2021), <https://www.icmm.com/en-gb/stories/2021/equivalency-matters> [https://perma.cc/85QV-BBTZ] (archived Sept. 28, 2022).

223. See Cesar, *supra* note 28, at 7.

224. See Lydia Beyoud, *Executive Pay Tied to ESG Goals Grows as Investors Demand Action*, BLOOMBERG L. (Mar. 14, 2022), <https://news.bloomberglaw.com/esg/executive-pay-tied-to-esg-goals-grows-as-investors-demand-action> [https://perma.cc/PQ9E-AT92] (archived Sept. 28, 2022).

225. See Vandenberg & Cohen, *supra* note 25, at 223–24.

226. See Marcelo Azevedo, Friso De Clercq, Xenia Greenhalgh, Eduardo Mencarini & Elsbeth Wijburg, *Pressure to decarbonize: Drivers of Mine-side Emissions*, MCKINSEY & CO. (July 7, 2021), <https://www.mckinsey.com/industries/metals-and-mining/our-insights/pressure-to-decarbonize-drivers-of-mine-side-emissions> [https://perma.cc/CE5A-VAUD] (archived Sept. 28, 2022).

227. See Ross Kerber & Simon Jessop, *Analysis: How 2021 Became the Year of ESG Investing*, REUTERS (Dec. 23, 2021), <https://www.reuters.com/markets/us/how-2021-became-year-esg-investing-2021-12-23/> [https://perma.cc/2JFD-KWN8] (archived Sept. 28, 2022).

228. See Kathryn Jacobs, Janet Taylor & Amy Callahan, *Mining & Metals: How Accelerated Purpose Keeps Companies on Track*, ACCENTURE (Sept. 11, 2020), <https://www.accenture.com/us-en/blogs/chemicals-and-natural-resources-blog/wef-mining-metals-accelerated-purpose-covid19> [https://perma.cc/T6GB-GMRB] (archived Sept. 28, 2022).

production.²²⁹ These metals are mined in open pits, influencing mining companies' decision to implement the certification process for the ecolabel. Ecolabels provide a visible commitment to the environment that consumers are demanding of companies, which ensures that the supply chain is a persuasive means of advocating for ecolabeling in the industry.

Further related to consumers and tangential effects in the industry itself, implementing an ecolabel regime for mining production can increase investment by institutional and non-institutional investors alike. Market participants care about information disclosure, and ecolabels add an additional layer of information access.²³⁰ The growing interest of SRI in the mining industry helps increase demand for use of ecolabeling,²³¹ making the move to implement the regime both environmentally sound and a sound business decision. Deutsche Bank Global Markets Research suggests that by the end of 2020, almost 50 percent of global, managed assets have incorporated ESG factors.²³² With the proposed SEC investment firm rule amendments, it is even more important to have clear ESG commitments to ensure investments into the industry continue. BlackRock, a large institutional investor, pledged in 2020 to divest from companies generating more than 25 percent of their revenues from thermal coal production.²³³ These ESG pressures from institutional investors are compelling, because almost thirty of the largest institutional investors control or own over half of the shares of the five hundred largest US companies.²³⁴ With share ownership comes the ability to appoint an environmentally minded director to the board of directors, which has occurred.²³⁵ These types of pushes and demands from investors that care about SRI and ESG goals emphasize the pressure that lagging mining companies face to comply

229. See *Mining Industry*, ENGIE IMPACT, <https://www.engieimpact.com/who-we-serve/mining-industry-sustainability> (last visited Mar. 15, 2022) [<https://perma.cc/2L42-62VH>] (archived Sept. 28, 2022) (describing the pressure to improve sustainability in support of decarbonization efforts).

230. See Johnston, *supra* note 54, at 10.

231. See Holman, *supra* note 58.

232. See *Bridging the Sustainability Gap*, FLOW (Nov. 2020), <https://flow.db.com/trust-and-agency-services/bridging-the-sustainability-gap> [<https://perma.cc/25VN-679W>] (archived Sept. 30, 2022).

233. See *Sustainability as BlackRock's New Standard for Investing*, BLACKROCK, <https://www.blackrock.com/au/individual/blackrock-client-letter> (last visited Sept. 30, 2022) [<https://perma.cc/TQB8-L57L>] (archived Sept. 30, 2020). *But see* Jasper Jolly, *BlackRock holds \$85bn in Coal Despite Pledge to Sell Fossil Fuel Shares*, GUARDIAN (Jan. 13, 2021), <https://www.theguardian.com/business/2021/jan/13/blackrock-holds-85bn-in-coal-despite-pledge-to-sell-fossil-fuel-shares> [<https://perma.cc/PG6S-TNY3>] (archived Sept. 30, 2022) (criticizing BlackRock for utilizing a loophole in their stated commitment allowing the investment fund to hold assets totaling \$85 billion in large mining companies whose profits from thermal coal do not reach the 25 percent threshold).

234. See Vandenberg & Moore, *supra* note 18, at 22

235. See *id.* (discussing institutional investors' ability to instate a climate change-minded board member against Exxon Mobil's objections).

with the labeling scheme.²³⁶ Certification and ecolabeling allow these investors to easily identify mining companies committed to sustainable environmental practices.

Increasing access to funding allows smaller mining operations to commit to environmental sustainability while not sacrificing profitability or growth to achieve it, helping eliminate inequities that a labeling scheme can create among developed versus developing countries' mining companies. Relatedly, the large financial institutions committed to the EP are often hesitant to finance mining projects because of the lack of true ESG commitment. These institutions, when they do finance mining projects, impose harsher interest rates or penalize borrowers based off performance on ESG metrics.²³⁷ More recently, large investment banks are committing billions to sustainable finance for investments working toward achieving the Paris Agreement goals or the UN Sustainable Development Goals.²³⁸ On the insurance side, over thirty of some of the largest global insurance companies are committed to not insuring coal mines or other fossil fuel heavy projects, although certain large US insurance firms have not made any commitment.²³⁹ There is even a Net Zero Insurance Alliance devoted to decarbonizing insurance underwriting, which makes it more difficult for mining companies to secure financing because the investment would be too risky without insurance.²⁴⁰ Ecolabels help work to solve the penalties that mining companies face when procuring financing, providing further incentive for the companies to implement an ecolabeling regime. Certification and labeling schemes are increasingly sound business decisions for mining companies. These outside influences pressure lagging companies to comply with the environmental initiatives the NGO would set, helping prevent a free rider problem.

V. CONCLUSION

Ecolabels are not a new instrument to promote environmental sustainability in production or consumption. The mining industry is riddled with environmental degradation claims and a negative image

236. See Martin, *supra* note 160, at 10098 (“[F]or those lower-performing fisheries that are not certified, the market demand and associated market rewards provide an incentive for these fisheries to ‘up their game.’”).

237. See BDO GLOBAL, *supra* note 29, at 10.

238. See DEUTSCHE BANK, SUSTAINABLE FINANCE FRAMEWORK – DEUTSCHE BANK GROUP 1 (2020), <https://www.db.com/files/documents/2020july-db-sustainable-finance-framework-final-for-disclosure.pdf> (last visited Nov. 2, 2022) [<https://perma.cc/6HPH-3DB9>] (archived Sept. 30, 2022).

239. See Steven Mufson, *What Could Finally Stop New Coal Plants? Pulling the Plug on Their Insurance*, WASH. POST (Oct. 26, 2021), <https://www.washingtonpost.com/climate-environment/2021/10/26/climate-change-insurance-coal/> [<https://perma.cc/8SHT-YBPQ>] (archived Sept. 30, 2022).

240. See *id.*

due to the increasing awareness of environmental sustainability and mining's negative impact on the earth and the communities close to mines. Multinational mining corporations' weak CSR and ESG goals provide little comfort for consumers who have strong preferences for environmentally friendly products. With an increasing focus on climate change and the lasting impacts of nonrenewable resource usage, the mining industry's adoption of an ecolabel regime through a mining NGO would come as a strong signal of its commitment to sustainability while remaining a sound business decision. The increasing government regulation regarding the environment is often fraught with global trade implications and barriers that prevent meaningful regulation. Indeed, governments of high mineral production countries are trying to deregulate mining.²⁴¹ An industry-led initiative will fill a gap in the soft law initiatives of the UNDP and the hard law of governmental regulation, allowing the industry to adapt at a much faster pace and in line with the technical expertise that industry leaders already possess. The time to adapt to the changing global environment is now, and the mining industry has the capacity and the incentives to do so.

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241. See Motta & Litvinoff, *supra* note 203 (explaining how a new bill introduced in Brazil would allow some tailings dams to no longer need environmental licenses).

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