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Voluntary Initiatives and the World Trade Organisation

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FIELD

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1 Introduction and Summary

Faced with the prospect of stricter government regulation, rising insurance premiums and fewer investors and lenders willing to finance the industry, it has been suggested that the mining and minerals sector might choose to promote the development of a voluntary initiative as a means of achieving sustainable development objectives and improving environmental performance.[1] To the extent that a voluntary initiative for the mining and minerals industry ("mining voluntary initiative") might rely on public or private incentives that extend preferential treatment to mining and mineral products or corporations based on the way in which minerals and metals are produced, it could have implications for international trade and the rules of the World Trade Organisation ("WTO").

In particular, there is a concern that the WTO Agreements could be read narrowly to prohibit a mining voluntary initiative that describes production and process methods governing the way in which metals and minerals are produced rather than having an impact on their physical characteristics ("NPR-PPMs").[2] To avoid the possible prohibition of a mining voluntary initiative based on NPR-PPMs, it has been suggested that the mining voluntary initiative could avoid WTO jurisdiction altogether through the exclusion of governments from its development and implementation.[3]

This paper considers (1) whether the WTO Agreements would necessarily prohibit a NPR-PPM-based mining voluntary initiative and (2) the relevance of government inclusion in a mining voluntary initiative's design or implementation to WTO jurisdiction. It concludes that:

[1] See MMSD, "A Challenge for Those Interested in the Future of the Minerals Industries: Options for Moving Forward" http://www.iied.org/mmsd/mmsd_pdfs/options_moving_forward.pdf.
[2] *Ibid*.
[3] *Ibid*.

- a NPR-PPM-based mining voluntary initiative could be justified under the WTO Agreements and, accordingly, a mining voluntary initiative should not be presumed to conflict with WTO obligations on that ground alone;
- government participation in the mining voluntary initiative will make it and implementing measures that rely on the mining voluntary initiative more susceptible to WTO scrutiny, however, the mining voluntary initiative could survive WTO scrutiny if (a) it did not discriminate between "like" products on the basis of their country of origin or (b) its objective were environmental protection within the meaning of the relevant exceptions in the WTO Agreements;
- a mining voluntary initiative developed and implemented by only non-governmental actors could be indirectly subject to WTO obligations if governments bound by the WTO Agreements took measures at the national level to ensure that the non-governmental actors within their territories complied with WTO obligations in the development and implementation of a mining voluntary initiative.

In view of these conclusions, and bearing in mind that a mining voluntary initiative might rely on implementing measures developed by governments in order to be effective, it would be appropriate to design the mining voluntary initiative with a view to complying with the WTO Agreements rather than designing it to avoid NPR-PPMs or WTO jurisdiction through the exclusion of governments from its design or implementation.

2 Mining and Minerals Voluntary Initiative

A voluntary initiative to promote sustainable development objectives in the mining and minerals sector ("mining voluntary initiative") could take any number of forms, ranging from broad aspirational principles to strict benchmark requirements or standards.[4] Depending on where it lies in this range, a mining voluntary initiative could develop in three stages. First, the development of a mining voluntary initiative might commence with the setting of "norms" which could be subject to ongoing review and improvement (development). Secondly, it might proceed with implementation of the norms through procedures that assess conformity with the mining voluntary initiative (assessment). Thirdly, the voluntary initiative might rely on incentives for compliance with the norms or "enforcement" of the norms through market or regulatory mechanisms (enforcement).

When examining the relationship between a mining voluntary initiative and international instruments such as the WTO Agreements, it is important to distinguish between the norms created by the voluntary initiative and the measures that might buttress those norms, such as measures that create incentives for compliance. Depending on their nature, content and who develops them, both the norms and the supporting measures could be subject to WTO scrutiny.

[4] Stratos Inc, "Voluntary Initiatives and Application to the Mining and Metals Sector" http://www.iied.org/mmsd/mmsd_pdfs/voluntary_initiatives.pdf.

There might be multiple participants in the development of a voluntary initiative. Industry representatives, social and environmental non-governmental organisations (NGOs), technical experts and governments might work alone or in combination at each stage in the development, assessment and enforcement of the mining voluntary initiative. For example, industry or NGOs might develop the norms but then rely on independent experts or government to implement or enforce the norms.[5]

2.1 Relationship With National Laws And Regulations

The norms developed by a mining voluntary initiative might be more rigorous than government regulations and policies in some circumstances but they would not be a substitute for government regulatory mechanisms.[6] Indeed, there might be some aspects of the mining voluntary initiative process – such as implementation or enforcement of the norms – that depend on regulatory measures developed by governments.

For example, mechanisms for assessing conformity with the mining voluntary initiative norms could rely on government participation in a certification scheme. Government measures might also be necessary to create the appropriate incentives for compliance. Accordingly, where the nature of the metal or mineral product makes it practicable, a government could participate in a labelling regime that relied on compliance with the voluntary initiative. Governments already sponsor voluntary labelling schemes, such as Germany's Blue Angel label, the European Union's eco-labelling regime and the United States Energy Star programme, and similar labelling programmes could be developed with respect to metals and minerals.[7] Alternatively, governments might ban the sale or import of raw materials or finished products that do not comply with the voluntary initiative. Legislation proposed in the United States to prevent the import of diamonds from countries using trade in diamonds to facilitate armed conflict is an example of the type of government measure that could be developed in support of a mining voluntary initiative.[8] Other government measures that could encourage compliance with a mining voluntary initiative might include tax or regulatory relief for companies that comply with the voluntary initiative or government purchase of products being conditioned on satisfaction of the voluntary initiative norms.

2.2 Relationship With International Environmental Agreements And Principles

Norms and measures supporting a mining voluntary initiative are likely to draw from international environmental agreements, principles and procedures that have been

[5] *Ibid*.

[6] See eg UNEP Discussion Paper, "Voluntary Initiatives: Current Status, Lessons Learnt and Next Steps", based on the UNEP Multi-Stakeholder Workshop on Voluntary Initiatives, 20 September 2000, section 3.1, http://www.unepie.org/outreach/vi/vi_workshop.htm.

[7] See Germany's Blue Angel label, http://www.blauer-engel.de/Englisch/index.htm; EU Eco-label Scheme, http://europa.eu.int/comm/environment/ecolabel/program.htm; US EPA Energy Star Program, http://www.energystar.gov/.

[8] See US Bill for the Clean Diamonds Act, 2001 CONG US S 1084, 107th Congress, 1st Session, introduced in US Senate by Mr. Durbin, 21 June 2001. See also http://www.oneworld.org/globalwitness/diamonds/summary.htm.

negotiated and developed by governments. International environmental laws and principles are helpful in that they might serve as a source for voluntary initiatives and, in some respects, shield them from a WTO challenge.

International formulations of sustainable development objectives will be particularly relevant to a mining voluntary initiative. As developed through state practice and international instruments and agreements, the concept of "sustainable development" may be described as having four elements.[9] First, it concerns the need to preserve natural resources for future generations ("inter-generational equity"). Secondly, it requires that natural resources be exploited or used in a sustainable manner. Thirdly, the concept of sustainable development requires that natural resources be used "equitably" in the sense that they should be exploited in a way that takes account of the needs of other states ("intra-generational equity"). Fourthly, sustainable development demands that environmental concerns be integrated into economic and other development plans.[10]

International procedures and practices for environmental impact assessments, public participation and access to environmental information might also be relevant sources for a mining voluntary initiative.[11]

Sustainable development objectives and other relevant environmental principles and procedures described in international instruments will have an impact on the way in which the industry operates and the processes and procedures used to produce metals and minerals. Accordingly, an important feature of a voluntary initiative for the mining and minerals sector is that the norms and any supporting measures are likely to govern how the metals and minerals are extracted and processed rather than their physical characteristics. As discussed below, whether a voluntary initiative concerns only the process and production methods or the physical characteristics of the product might be relevant to a WTO analysis.

In the WTO context, it is also relevant to note that norms developed by a mining voluntary initiative will be global. They will not be limited to extraction and production of metals and minerals in one country but will apply to metals and minerals that are extracted and produced around the world. Any measures in support of a voluntary initiative that are developed in one country to serve to implement the norms or encourage compliance with them might also apply outside that country. As discussed below, measures that have an "extraterritorial" effect might prove more difficult to justify under the WTO Agreements.

3 WTO Rules

The rules of the World Trade Organisation (WTO) aim to reduce tariff and non-tariff barriers to international trade. The WTO rules, negotiated and agreed by governments, impose obligations on the governments that are parties to the WTO Agreements (WTO

[9] See e.g. 1987 Brundtland Report. See futher P Sands, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, Vol. 1 (1995), pp 198ff (hereinafter "Principles').
[10] See Principles, p 199.
[11] See Principles, Chapters 15 and 16. See also Aarhus Convention, http://www.unece.org/leginstr/cover.htm.

Members).[12] As discussed in Part IV of this paper, there might be some circumstances in which a voluntary initiative to achieve sustainable development objectives in the mining and minerals sector would constitute a barrier to international trade in violation of governments' WTO obligations. The WTO obligations of most relevance to a voluntary initiative for the mining and minerals sector are set out in the General Agreement on Tariffs and Trade (GATT) and the Agreement on Technical Barriers to Trade (TBT Agreement).[13]

The GATT and the TBT Agreement are part of a package of international trade agreements that were negotiated during the so-called Uruguay Round of international trade negotiations that were completed in 1994.[14] The GATT is the broader of the two Agreements, applying to a variety of government measures that restrict international trade in goods. The TBT Agreement applies to all products but it covers only "technical" regulations or standards that serve as barriers to international trade. Although the TBT Agreement furthers the objectives of the GATT, it is considered "different from, and additional to" the GATT.[15]

3.1 GATT

The GATT rules apply to government measures – such as laws, regulations, taxes or charges – that discriminate against any product on the basis of its country of origin or that restrict the amount of imports or exports of any product. Products covered by the GATT include raw materials and manufactured items.

3.1.1 Non-Discrimination And Quantitative Restrictions Under GATT

The main GATT rules are set out in Articles I, III and XI. GATT Article I requires that WTO Members that extend favourable treatment to products of one country must accord the same favourable treatment to "like products" of all other WTO Members (Most Favoured Nation Treatment). GATT Article III prohibits measures that discriminate between foreign and domestic "like products" (National Treatment). Under GATT Article XI, WTO Members must not prohibit or impose quantitative restrictions on the importation or export of products from or to another WTO Member (through quotas, import licences or other measures).

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[12] 142 governments and the European Communities are parties to the WTO Agreements, see http://www.wto.org.

[13] General Agreement on Tariffs and Trade 1994¸ Annex 1A Multilateral Agreements on Trade in Goods, Marakesh Agreement Establishing the World Trade Organisation, 15 April 1994; Agreement on Technical Barriers to Trade, Annex 1A Multilateral Agreements on Trade in Goods, Marakesh Agreement Establishing the World Trade Organisation, 15 April 1994.

[14] It should be noted that other WTO Agreements, such as the General Agreement on Trade and Services, the Agreement on Subsidies and Countervailing Measures or the Agreement on Government Procurement, might also apply but will not be considered in any detail in this paper. Some WTO Agreements, such as the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), are unlikely to apply directly to a mining voluntary initiative but might provide helpful guidance as to how the GATT and the TBT Agreement might be applied.

[15] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, 12 March 2001, WT/DS135/AB/R, para 80 [hereinafter *Asbestos*].

3.1.2 Exceptions Under GATT

Measures that are found to violate Articles I, III or XI might still be allowed under GATT exceptions such as those in Articles XX and XXI.

GATT Article XX sets out a number of exceptions to Article I, III or XI obligations, some of which might be relevant to a mining voluntary initiative. For example, Article XX(b) permits measures "necessary to protect human, animal or plant life or health" and Article XX(g) permits measures "relating to the conservation of exhaustible natural resources". Whether a measure is "necessary" to protect the life or health of humans, animals or plants will depend on whether there are reasonably available alternative measures that are less inconsistent with GATT obligations.[16] A measure "relating to" the conservation of exhaustible natural resources is one that is "primarily aimed at" conservation of those resources.[17] However, under the introductory clauses or "chapeau" of Article XX, the measure will not be excused if it is applied in an arbitrary or unjustifiable manner, or as a disguised restriction on trade.

In the past, some WTO Members have suggested that exceptions such as those in Articles XX(b) and (g) are intended to apply only to protect humans, animals or plants or exhaustible natural resources in the territory of the state imposing the measure and that they do not extend to measures that aim to protect humans, animals or plants or exhaustible natural resources beyond its borders. However, reading these exceptions in the context of other exceptions in Article XX and based on past interpretations of Article XX(b) and (g) by the WTO dispute settlement body, it is possible for extraterritorial measures to be justified under Articles XX(b) and (g).[18] To the extent that measures that have an extraterritorial impact are supported by international agreements or consensus, they are more likely to be "necessary" or "related to" the relevant objectives.[19]

Article XXI of the GATT provides for a further justification of measures that violate GATT obligations. Under Article XXI, WTO Members shall not be prevented from taking action "necessary" to protect its essential security interests or in pursuance of their United Nations peace and security obligations.

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[16] *United States – Section 337 of the Tariff Act of 1930*, Report of the Panel adopted 7 November 1989, BISD 36S/345, para. 5.26; similar reasoning was followed in *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37S/200, para. 75 (adopted on 7 November 1990). Both cases are quoted in para. 6.24 of *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Panel adopted 20 May 1996, WT/DS2/R (the Panel's interpretation of Article XX(b) was not appealed, and was thus not reviewed by the Appellate Body) and in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* Report of the Appellate Body adopted on 10 January 2001, WT/DS161/AB/R; WT/DS169/AB/R, [hereinafter *Korea – Beef*], para 166 and *Asbestos*.

[17] See *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body adopted 20 May 1996, WT/DS2/AB/R and *United States Import Prohibitions of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body adopted 8 Nov. 1998 [hereinafter *US – Shrimp/Turtle*], para 136.

[18] *US – Shrimp/Turtle*.

[19] *US – Shrimp/Turtle*.

3.1.3 PPMs

WTO Members have debated whether the GATT applies to measures that concern a product's process and production method which has no discernible impact on the product's physical characteristics (NPR-PPM). Policy arguments against measures that rely on NPR-PPMs are based on concerns that they remove the objective basis for distinguishing between products (i.e., their physical characteristics) and thereby invite disguised protectionism and allow trade restrictions to become a means for coercing change in the domestic policies of exporting countries.[20] However, the WTO's dispute settlement body has stated that each measure must be examined on a case-by-case basis and that a blanket exclusion of measures based on NPR-PPMs from the GATT exceptions is not acceptable.[21] Legitimate concerns about disguised protectionism and the "export" of domestic policies – invariably by the WTO Members with greater economic leverage – can still be addressed in the context of assessing what is "necessary" to protect humans, animals or plants or what "relates to" exhaustible natural resource conservation and in applying the introductory clauses of Article XX.

3.2 TBT Agreement

The TBT Agreement governs technical requirements concerning product characteristics or their related processes and production methods (PPMs) that act to restrict trade across international borders. Although the TBT Agreement covers all products traded between Members, including raw and finished products, it applies only to particular kinds of measures affecting trade in those products, namely technical regulations, voluntary standards and conformity assessment procedures.

3.2.1 Technical Regulations And Standards

Technical regulations and standards describe product characteristics or their related PPMs, including marking or labelling requirements as they apply to a product, process or production method.[22] The principal difference between technical regulations and standards is the nature of compliance. Technical regulations are mandatory whereas compliance with technical standards is voluntary. A "recognised body" must approve the technical standard and it must be intended for common and repeated use.[23] A "recognised body" is not defined.

[20] See, e.g., Working Party on Border Tax Adjustments; *Report (1996) Of The Committee On Trade And Environment,* WT/CTE/1, 12 November 1996, para 24.

[21] *US – Shrimp/Turtle*, para 121-122, interpreting Article XX. See also Howse, R. and Regan, D. "The Product / Process Distinction – An illusory Basis for Disciplining 'Unilateralism' in Trade Policy". EJIL 11 (2000), pp. 249 – 289 cf John H. Jackson "Comments on Shrimp/Turtle and the product/process distinction" EJIL, 11(2000), 303-307.

[22] TBT Agreement, Annex 1, paras 1 and 2.

[23] TBT Agreement, Annex 1, para 2.

3.2.2 National Treatment, No Unnecessary Obstacle To International Trade And Reliance On International Standards

Technical regulations are permitted under Article 2.1 of the TBT Agreement provided they do not discriminate between domestic and foreign products (National Treatment). Under Article 2.2, technical regulations must not create unnecessary obstacles to international trade in the sense that they must not be more trade-restrictive than necessary to fulfil a "legitimate objective". "Legitimate objectives" include protection of human health or safety, animal or plant life or health, or the environment. Article 2.4 provides that technical regulations must be based on international standards except where it would be ineffective or inappropriate to do so.

With respect to the preparation, adoption and application of voluntary technical standards, Article 4.1 of the TBT Agreement requires Members to take "such reasonable measures as may be available to them to ensure that… non-governmental standardising bodies …, accept and comply with [the] Code of Good Practice [in Annex 3 to the TBT Agreement]." Mirroring the provisions that apply to technical regulations, the Code of Good Practice contains substantive rules requiring National Treatment, prohibiting unnecessary obstacles to international trade and requiring reliance on international standards.[24] "Non-governmental standardising bodies" are not defined.[25]

Where governments require some form of assurance that a product conforms with a technical regulation or standard, it must do so in accordance with the National Treatment rule and the conformity assessment procedures must not create an unnecessary obstacle to international trade (Article 5 of the TBT Agreement). WTO Members must also ensure that the conformity assessment procedures developed by non-governmental bodies also observe the National Treatment rule and that they do not create an unnecessary obstacle to international trade (Article 8 of the TBT Agreement).

3.2.3 PPMs

Motivated by the same policy concerns described in the context of the GATT, some WTO Members might argue that the TBT Agreement does not apply to technical regulations or standards that rely on NPR-PPMs and that they should be examined instead under the GATT. The use of the word related PPMs in the definition of a technical regulation and standard could be read to exclude non-related PPMs that are not physically part of the product. However, the negotiating history of this provision is inconclusive[26] and

[24] TBT Agreement, Annex 3.

[25] Only a "non-governmental body" is defined as a "[b]ody other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation" Annex 1, paragraph 8.

[26]WT/CTE/W/10-G/TBT/W/11, 29 August 1995."Note by the Secretariat on the Negotiating History of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards, and Process and Production Methods unrelated to Product Characteristics." This Note discussed the NPR-PPMs in respect of the TBT's definition of a (voluntary) standards rather than a (compulsory) regulation. The Note summarised findings as follows:

"Standards that are based on processes and production methods (PPMs) related to the characteristics of a product are clearly accepted under the TBT Agreement, subject to them being

subsequent negotiations between WTO Members with respect to the applicability of the TBT Agreement to voluntary NPR-PPM based labelling schemes have also been inconclusive.[27] Accordingly, it is possible that the TBT Agreement could be interpreted to apply to NPR-PPM based technical regulations or standards.

4 Voluntary Initiatives and WTO Rules

WTO rules might be relevant at any one of the three stages in the development, assessment or enforcement of a mining voluntary initiative. At the first stage, the WTO rules might apply to the norms themselves. The means of assessing conformity with the norms might be subject to the WTO rules at the second stage of the mining voluntary initiative process. At the third stage, the mechanism that creates the incentive for compliance or enforces the norm could also fall under the WTO rules.

4.1 Development of Norms

Norms developed by a mining voluntary initiative might be subject to the GATT or the TBT Agreement whether or not governments contribute to their development.

4.1.1 GATT

If governments participate in setting norms for a voluntary initiative and those norms serve to discriminate against products on the basis of their country of origin or to impose quantitative restrictions on the product, they could violate GATT Articles I (Most Favoured Nation Treatment), III (National Treatment) or XI (quantitative restrictions). However, if the norms were not being applied in an arbitrary or unjustifiable manner, or as a disguised restriction on trade, it might be possible to justify the voluntary initiative norms under

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applied in conformity with its substantive disciplines. The negotiating history suggests that many participants were of the view that standards based *inter alia* on PPMs unrelated to a product's characteristics should not be considered eligible for being treated as being in conformity with the TBT Agreement.

Towards the end of the negotiations, some delegations proposed changing the language contained in the "definitions" in Annex 1 of the Agreement to make it unambiguous that only PPMs related to product characteristics were to be covered by the Agreement, but although no participant is on record as having opposed that objective, at that late stage of the negotiations it did not prove possible to find a consensus on the proposal."

[27] 1996 CTE Report, para 67, paras 70-73, indicated that "many delegations expressed the view that the negotiating history of the TBT Agreement indicates clearly that there was no intention of legitimizing the use of measures based on non-product-related PPMs under the TBT Agreement, and that voluntary standards based on such PPMs are inconsistent with the provisions of the Agreement as well as with other provisions of the GATT." However, it later notes that: "[a]nother view is that all forms of eco-labelling, including eco-labels that involve non-product-related PPMs, are covered by the TBT Agreement and that the inclusion of non-product-related PPM-based elements in an eco-labelling regime is not per se a violation of WTO rules. According to this view, the TBT Agreement provides sufficient flexibility to permit non-product-related PPM-based eco-labelling to be used, subject to appropriate trade disciplines, and the validity of any eco-labelling regime under the WTO must be judged according to the relevant rules of the multilateral trading system."

either paragraphs (b) or (g) of Article XX. For example, if the objective of the norms were to protect human, animal or plant life or health and there was no reasonably available alternative measure that was less inconsistent with GATT obligations, the norms could be justified under Article XX(b). If the norms were primarily aimed at the conservation of natural resources, they might be permitted under Article XX(g).

Even if the norms were based on non-product related production and process methods (i.e. PPMs that had no impact on the physical characteristics of the metal or mineral or "NPR-PPMs"), they could still be justified under Articles XX(b) or (g). As noted above, the WTO's dispute settlement body has said that NPR-PPMs are not categorically excluded from the Article XX exceptions. Moreover, the extraterritorial application of the norms could be permitted under the Article XX exceptions, especially if the norms could be supported by evidence of international agreement or consensus. International instruments and agreements that promulgate sustainable development principles and other environmental principles relevant to a mining voluntary initiative could assist in justifying the norms under Article XX.[28]

Finally, if the norms were necessary to protect essential security interests or if they were made in accordance with UN peace and security obligations – such as UN resolutions calling for trade sanctions – then a mining voluntary initiative could be justified under Article XXI. For example, the proposed US legislation concerning diamond imports relies on UN resolutions and could be justified under Article XXI. Where mining is associated with conflict, essential security interests of a WTO Member could be at risk and might warrant the development of norms under mining and mineral voluntary initiative.

If governments did not participate in the development of the voluntary initiative norms, the norms would not be subject to the GATT. Only governments are obliged to comply with GATT provisions.

4.1.2 TBT Agreement

If the norms developed by the voluntary initiative were approved by a "recognised body" and were for common and repeated use, they could be a technical "standard" subject to Article 4.1 of the TBT Agreement. Article 4.1 is relevant to technical standards administered by governments or non-governmental bodies. Although the TBT Agreement does not impose obligations directly on non-governmental bodies, it requires WTO Member governments to take "reasonable measures" to ensure that non-governmental bodies in their territories observe the Code of Good Practice. "Reasonable measures" by governments might include laws or regulations requiring compliance with the Code of Good Practice in which case the convenors of a mining voluntary initiative could be required to observe the National Treatment rule, avoid the creation of unnecessary obstacles to international trade and rely on international standards in the development of norms.

Unfortunately, neither a "recognised body" nor a "non-governmental standardising body" is defined. The terms would likely include national and international standards organisations such as the International Organisation for Standardisation (ISO). However, they might also

[28] See above Part II.

include a non-governmental body established to design a technical standard for the mining and minerals sector.

4.2 Norm Assessment

Government participation in any mechanisms employed to implement the voluntary initiative norms, such as certification schemes, could result in WTO scrutiny under either the GATT or the TBT Agreement. If it violates any of the substantive rules of the GATT, it might be possible to justify a certification scheme under the GATT exceptions. The application of the GATT exceptions discussed in the context of the norms would also apply to a certification scheme. Under the TBT Agreement, an implementation mechanism administered by government that required an assurance of conformity with a technical standard, such as a certification scheme, would be subject to the non-discrimination and no unnecessary obstacle to international trade rules in Article 5.

If a certification scheme were administered only by a non-governmental body, governments would have to take "reasonable measures" to ensure that the non-governmental body observed the National Treatment rule and avoided the creation of unnecessary obstacles to international trade in its administration of a certification scheme.

4.3 Norm Enforcement

Enforcement mechanisms developed by non-governmental actors in support of a voluntary initiative which did not depend on government participation would be unlikely to be subject to any of the WTO rules. Non-governmental (non-binding) labelling schemes, qualification for private schemes such as equitable investment, insurance benefits or inclusion on a special market exchange, or other private market-based incentives would not raise GATT concerns. If these private incentives could be deemed to be a technical standard within the meaning of the TBT Agreement, governments would need to take reasonable measures to ensure that the non-governmental body administering the scheme observed the Code of Good Practice.

If it were decided that some form of government recognition or endorsement of the voluntary initiative were required to make the norms effective, any government incentives that relied on compliance with the mining voluntary initiative norms could be subject to the GATT or the TBT Agreement.

Government measures or "incentives" giving effect to a mandatory labelling regime, a sale or import ban, tax or regulatory relief or government procurement, that were predicated on compliance with the norms developed by a mining voluntary initiative, could be subject to the GATT Articles I, III or XI. If the government "incentives" discriminated against products on the basis of country of origin (Articles I and III - Most Favoured Nation and National Treatment) or imposed quantitative restrictions on imports or exports (Article XI), they could nevertheless be justified under the GATT exceptions. Articles XX(b) and (g) and XXI could apply to permit the government "incentives" as described above in the context of voluntary initiative norms.

Government measures or "incentives" that relied on compliance with mining voluntary initiative norms might be "technical regulations" subject to the TBT Agreement. Although government "incentives" would be based on voluntary norms, compliance with the norms would be mandatory for those seeking to comply with the incentive. Products could not bear the government-endorsed label unless they had complied with the norms. Products could not be sold or imported into a country imposing a ban unless they complied with the norms. They would not qualify for tax or regulatory relief or government procurement unless they complied with the norms. It is possible that, by reference to the voluntary initiative norms, the government incentives would describe product characteristics or related PPMs. The WTO dispute settlement body has interpreted "product characteristics" broadly to include both intrinsic and "related" characteristics such as the means of identification, the presentation and the appearance of a product.[29] However, it is also possible that non-related-product PPMs that do not have an impact on the physical characteristics of the product would also be covered by the TBT Agreement.

If the government incentives were "technical regulations", they would be subject to the National Treatment provision in Article 2.1 of the TBT Agreement. If they created an unnecessary obstacle to international trade, the incentives would violate Article 2.2. However, to the extent that the incentives were not more trade-restrictive than necessary to fulfil a "legitimate objective" such as the protection of human health or safety, animal or plant life or health, or the environment, they could survive a challenge under Article 2.2. Assuming that the voluntary initiative norms upon which the incentives relied could be categorised as "international standards", the incentives would satisfy the requirement that technical regulations rely on international standards under Article 2.4 of the TBT Agreement.

[29] *Asbestos*, para 67.