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THE CASE FOR 'SUI GENERIS' DEVELOPING COUNTRY-LED INITIATIVES ON CARBON FOOTPRINT LABELLING

MAHESH SUGATHAN*

This Note makes the case for recognizing developing country-led 'sui generis' labelling schemes linked to carbon offset measures, after due verification, as equivalent to or replacing requirements related to product carbon labelling schemes. Such labelling schemes are increasingly being explored in many OECD countries and even if, de jure, voluntary for both domestic producers and importers, they could potentially have an adverse impact on developing country exports due to their 'de facto' mandatory nature and the competitive advantage that products labelled as 'climate-friendly' enjoy in the market. While product carbon labelling schemes are still in their early days, they have the potential to evolve rapidly through private-sector or supermarket-led schemes. 'Sui generis' voluntary positive labelling initiatives launched by developing countries themselves could tap into their inherent advantages in terms of the lower carbon footprint of their products, particularly for labour-intensive products. Such schemes could also benefit from the Clean Development Mechanism (CDM) and other carbon offset projects for developing countries, including those channelled through the 'Green Fund' that could be set up under the auspices of the UNFCCC. Given the positive benefits of such schemes for both the environment as well as in promoting export-led development in developing countries, ways must be found to ensure a 'legitimate space' for such schemes under WTO rules, most notably under the TBT Agreement.

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I. INTRODUCTION

Standards play an important role in international trade. They provide assurances to consumers and regulators about quality, safety, performance and other characteristics with regard to products as well as production processes. They also facilitate harmonization in these aspects and thus, smoothen the flow of international trade. However, the way they are designed or applied may also create obstacles to international trade. Hence, rules have been agreed upon under the WTO's Agreement on Technical Barriers to Trade ("TBT Agreement") to enable a balance between the fulfilment of legitimate objectives and the protection of trade interests. Article 2.2 and Article 2.4 of the TBT Agreement capture this attempt at striking the right balance between both the above-mentioned competing interests. In addition, the second sentence of Article 2.5 states that technical regulations prepared, adopted or applied in accordance with international standards and for the aforementioned legitimate objectives 'shall be rebuttably presumed not to create an unnecessary obstacle to international trade.'

These provisions strengthen regulation on technical barriers. Despite this, the above clauses pertain to government regulations and there still exists much ambiguity in the application of these rules of the TBT Agreement for private sector standards. With respect to their local government and non-governmental bodies within their territories, Article 3.1 of the TBT Agreement merely states that "*Members shall take such reasonable measures as may be available to them to ensure compliance by such bodies with the provisions of Article 2, with the exception of the obligation to notify as referred to in paragraphs 9.2 and 10.1 of Article 2.*"¹ Such provisions are viewed as 'aspirational' and 'best-endeavour' provisions and do not create any binding

¹ Agreement on Technical Barriers to Trade art. 3.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex. 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

obligations on WTO Members to take responsibility for the non-tariff barriers created by non-governmental bodies.² Further, there is greater leeway in terms of design of the standards if no international benchmarks exist.

There are references in the WTO's Code of Good Practice for the Preparation, Adoption and Application of Standards³ under the TBT Agreement set by non-governmental institutions, though there is no agreement or clarity on whether the Code also applies to private entities such as supermarkets. Supermarkets often set their own standards as a pre-condition for exporters to be able to sell their products, for instance, as 'organic'. It may be noted that such standards are not pre-conditions for products to enter the country, which are de jure conditioned by government regulations and thus, disciplined by the WTO. However, they often become de facto mandatory requirements because supermarkets, enjoying a significant customer base of shoppers, may simply refuse to order products from importers that do not meet their standards. Further, exporters may need to comply with diverse supermarket requirements in the same market, increasing compliance costs. This can be particularly challenging for small and medium enterprises and producers from developing countries, given that compliance and certification costs may be high. Many governments and private entities also have a list of certification bodies they recognize, and from whom developing country exporters need to get their compliance with standards certified. In addition, it is also not always easy for developing country stakeholders to participate actively and effectively in international standard-setting processes such as the International Standards Organisation (ISO). This difficulty is more so in the case of national and private standard-setting bodies for various reasons, including time and resource constraints, lack of capacity and the non-transparent nature of many standard-setting processes.⁴

Furthermore, most WTO Members accept that the TBT Agreement governs technical regulations and standards based on process and production-related

² Apurba Khatiwada, *Non-Governmental Bodies in the TBT Agreement*, 3, 18-20 (Int'l Econ. Law e-journal Working Paper Series, Apr. 29, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2473627.

³ TBT Agreement, *supra* note 2, Code of Good Practice for the Preparation, Adoption and Application of Standards, Annex. 3.

⁴ See, for example, J. Swinnen & M. Maertens, *Standards, Trade and Developing Countries*, WORLD BANK (June 4, 2009), http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1239120299171/5998577-1244842549684/6205205-1259868742627/6620468-1259868833400/Standards_Swinnen.pdf; See also WTO, REPORT OF THE COMMITTEE ON TRADE AND ENVIRONMENT, WT/CTE/19 (Dec. 5, 2012) and WTO, REPORT OF THE COMMITTEE ON TRADE AND ENVIRONMENT, WT/CTE/20 (Nov. 11, 2013).

methods (PPM) only to the extent that they affect final products.⁵ If it is argued that non-product related process and production methods are not covered, then labelling requirements, such as those based on carbon emissions generated during a product's production and transport, would not be covered or disciplined under TBT rules, unless and until they impact the final characteristics of the product. For instance, the choice to use hydro-power or coal-power in producing steel does not have an impact on the final quality of steel that is produced, though the carbon footprint of the steel produced may vary enormously. These are however open to debate and also remain a source of contention among WTO Members.⁶ No WTO dispute has examined whether non-product related PPMs fall within the TBT Agreement.⁷

Given these challenges, in certain cases, a new approach to PPM-based standard-setting and related labelling, particularly private sector standards, needs to be tried out; one that is '*sui generis*' and driven by developing countries themselves, reducing costs and potentially bringing multiple benefits, while addressing the concerns of consumers and governments in the major importing countries. The emerging area of product carbon footprinting ('PCF') standards and labelling offers a unique opportunity for trying out this approach. PCF, which will be the focus of this Note, is very much a PPM-based standard as it pertains to carbon emissions associated with the life-cycle of a product, most notably its production process.

II. INTERNATIONAL ENVIRONMENTAL FRAMEWORKS SUPPORTIVE OF A '*SUI GENERIS*' APPROACH

Before examining the challenges and opportunities that these standards create, it is worthwhile to recollect certain principles and norms established in the context of

⁵ *Labelling*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm (last visited Aug. 5, 2014).

⁶ Uncertainty related to the application of the TBT Agreement is a result of ambiguity in the definitions of a "technical regulation" and a "standard" in Annex 1 of the Agreement. Annex 1(1) and Annex 1(2) both use the phrase "related production methods" in their first sentence, but fail to use the term "related" in their second sentences which governs the "labelling" of a product, process or production method. This omission leaves room to argue that labelling requirements need not be "product-related. For a general overview of the debate see, IISD & UNEP, ENVIRONMENT AND TRADE: A HANDBOOK, http://www.iisd.org/trade/handbook/5_1.htm; Arthur E. Appleton, *Supermarket Labels and the TBT Agreement*: "Mind the Gap", 4.1 BUS. L. BRIEF 10, 10-13 (2007).

⁷ Arthur E. Appleton, *Supermarket Labels and the TBT Agreement*: "Mind the Gap", 4.1 BUS. L. BRIEF 10, 10-13 (2007).

international environmental frameworks that would lend support to a 'win-win' standard-setting approach based on a '*sui generis*' model.

The 1972 Stockholm Declaration emphasised the need to consider "the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries."⁸ In the 1992 Rio Declaration, States agreed that "environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply," that "the special situation of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority", and that standards used by some countries "may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."⁹ This is reflective of the principle of Common but Differentiated Responsibilities that emerged from the Rio Declaration and is also enshrined in the 2012 Rio +20 Outcome document, "The Future We Want."¹⁰ It is recognised as an important principle, guiding negotiations on climate change mitigation and adaptation under the United Nations Framework Convention on Climate Change (UNFCCC). The principle recognises historical differences in the contributions of developed and developing States to global environmental problems, and differences in their respective economic and technical capacity to tackle these problems. Despite their common responsibilities, important differences exist between the stated responsibilities of developed and developing countries.

In terms of standard-setting, it also translates into differentiated environmental standards depending on a range of factors, including special needs and circumstances, future economic development of countries, and historic contributions to the creation of an environmental problem. For instance, many developing countries have labour-intensive techniques for agricultural production. Developing country exports will be unfairly penalized if PCF methods take only air-freight emissions into account and do not consider emissions associated with fuel and capital-intensive techniques used in the developed world like tractors or harvesters or use of trucks to transport local produce.

⁸ The United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, June 5-16, 1972, U.N. Doc. A/Conf.48/14/Rev. 1(1973).

⁹ United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, principle 11, UN Doc. A/CONF.151/26 (vol. I), Annex. 1 (Aug. 12, 1992).

¹⁰ G. A./RES/66/288, ¶ 15, U.N. Doc. A/RES/66/288 (Sept. 11, 2012).

There are also a number of multilateral environment related initiatives that could aid African, Caribbean and Pacific Group of States (ACP) in the realm of both carbon footprint as well as organic standards such as the Green Economy initiative. The United Nations Environment Programme (UNEP) has defined Green Economy as one that results in improved human well-being and social equity, while significantly reducing environmental risks and ecological scarcities.¹¹ The Rio +20 Outcome Document cautions that Green Economy policies should not result in 'arbitrary and unjustified discrimination' in, and a 'disguised restriction' on international trade.¹² At the same time it also focuses on the positive opportunities from a green economy in terms of creating markets, improving market access and enhancing economic and social development through trade. UNEP's Green Economy and Trade Report also highlights a number of opportunities in agriculture, renewable energy and forestry that developing countries could harness.

There are also many initiatives for reducing carbon emissions discussed under the UNFCCC that tie into green economy opportunities for developing countries, and in turn could have positive links to PCF standards (as discussed below) through offsetting. These include the Clean Development Mechanism (CDM) and Reducing Emissions from Deforestation and Forest Degradation (REDD +).¹³

III. WHAT ARE CARBON FOOTPRINTING STANDARDS?

A Product Carbon Footprint (PCF) is an estimate of the sum of all greenhouse gases (GHGs) released during the life cycle of a good or service ("cradle to grave") or parts thereof ("cradle to gate"). PCFs are calculated in order to better

¹¹ UNITED NATIONS ENVIRONMENT PROGRAMME, GREEN ECONOMY DEVELOPING COUNTRIES SUCCESS STORIES 5 (2010).

¹² G. A./RES/66/288, ¶ 58(h), U.N. Doc. A/RES/66/288 (Sept. 11, 2012).

¹³ The CDM under the Kyoto Protocol to the UNFCCC enables low-carbon projects including renewable energy, energy-efficiency, afforestation, and creates the possibility of earning carbon credits called certified emission reductions (CERs). CERs can be traded and sold, and can be used by industrialized countries to meet a part of their reduction targets under the Kyoto Protocol. REDD+ is a set of policy approaches and positive incentives designed to reward developing countries for strengthening the mitigation potential in their forests. Under this scheme, financial incentives are offered to developing countries that slow, halt and reverse emissions from deforestation and degradation, while investing in low-carbon paths to sustainable development. REDD+ also includes the conservation, sustainable management, and enhancement of forest carbon stocks, the importance of which was acknowledged in the Rio+20 Conference. See United Nations Conference on Sustainable Development (Rio +20), Rio de Janeiro, Braz., June 20-22, 2012, *Outcome of the Conference*, ¶ 193, A/CONF.216/L.1 (June 19, 2012).

understand GHG emissions along the entire life cycle of products. This enables two groups of stakeholders to contribute to climate change mitigation: the businesses that are responsible for product design, packaging, end of life options etc., and their consumers who can consciously choose low carbon products and reduce emissions related to their use.¹⁴

PCF standards evolved from early initiatives based on the ‘food-miles’ concept, as European retailers and consumers voiced concerns about the sustainability of global supply chains, and the environmental and climate impacts associated with imported food. This led to several UK-based supermarkets introducing labels for air-freighted produce, and there was even a consideration of disallowing organic certification for air-freighted produce.¹⁵ This, however, was not followed through after criticism of the move’s impact on developing country producers. The ‘food-miles’ concept was eventually re-evaluated in light of various scientific studies that showed that many air-freighted products such as cut flowers, fruits and vegetables often had a lower carbon footprint compared to those grown in greenhouses in Europe or trucked in using road transport. Further, lower-carbon ocean transport was not an option for many of these products as they were highly perishable. Kasterine and Brown¹⁶ point out three flaws in the ‘food-miles’ arguments for stopping ‘organic’ certification. *First*, the total amount of emissions associated with the import of organic foods is so small that stopping certification would have ‘negligible’ effects on emissions. *Second*, the combined effects of local road transportation in Europe by consumers as well as freighters far outstrips emissions created by produce - such as Kenyan beans - tightly packed into an aircraft hold. *Third*, carbon emissions need to be estimated along the entire production-chain that would also consider other factors such as the lower energy-intensity of production in the developing countries and in the southern hemisphere. For example, Britain's farmers alone receive about £ 2.8 billion per year in subsidies, which they use to purchase fuel, electricity and gas. African farmers receive little or no subsidies, and their production is much less carbon-intensive. Given these, and the positive development benefits of African food exports to Europe, particularly for small farmers’ livelihoods, there was a call for a more balanced, fair and equitable approach.¹⁷

¹⁴ *Product Carbon Footprinting Standards in the Agri-food Sector*, INT’L TRADE CENTRE 1 (2012), http://www.biotope.org/congress/BackgroundDocs2/S4_Value_Chain/ITC_Product%20Carbon%20Footprinting%20Standards.pdf [hereinafter *Carbon Footprinting Standards*].

¹⁵ This was not followed through after criticism of the move’s impact on developing country producers.

¹⁶ Alexander Kasterine & Stephen Browne, *A green wall? Kenya, organics, and “food miles”*, OPEN DEMOCRACY, Jan. 25, 2008, http://www.opendemocracy.net/article/globalisation/a_green_wall_kenya_organics_and_food_miles.

¹⁷ *Id.*

Attention therefore shifted to 'life-cycle' based carbon footprinting standards that took into account the entire life-cycle of products and also ways of communicating this information to consumers in a meaningful manner through various labelling initiatives. Similarly, there have also been moves to develop carbon footprint standards for whole companies and projects but the present Note will essentially focus only on product carbon footprint (PCF) standards, given its relevance in international trade. However, the methodological problems seen in the 'food-miles' approach that may adversely impact developing countries do not entirely go away in 'life-cycle' based approaches as will be shown below.¹⁸

Most PCF labelling and certification initiatives are based on a few select methodologies or 'framework standards' that have been developed worldwide. Most are based on the life-cycle analysis for which the International Standards Organisation (ISO) has developed the ISO 14044 standard.¹⁹ One PCF methodology that has been widely used is the PAS 2050, a public methodology developed by the British Standards Institute.²⁰ While the ISO set about developing a full-fledged PCF standard (ISO 14067), the absence of consensus among ISO members, including many developing countries, meant that only a technical specification comprising of principles, requirements and recommendations for the quantification and the communication of complete as well as partial PCFs could be agreed upon as of May 21, 2013.²¹

In addition, a few other methodologies have been developed in the public and private spheres. These include the GHG Protocol (developed by the World Business Council for Sustainable Development and World Resources Institute), the Product Environmental Footprint Methodology (European Commission),

¹⁸ See also, for example, Mikkel Thrane et al., *Carbon Footprint: A Catalyst for Life Cycle Assessment?*, 12(1) J. INDUS. ECOLOGY 1, 3 (2008); T Wiedmann & J. Minx, *A Definition of 'Carbon Footprint'*, in ECOLOGICAL ECONOMICS RESEARCH TRENDS 1-11 (Carolyn C. Pertsova ed., 2008).

¹⁹ The ISO 14044 specifies requirements and provides guidelines for life cycle assessment (LCA) including: definition of the goal and scope of the LCA, the life cycle inventory analysis (LCI) phase, the life cycle impact assessment (LCIA) phase, the life cycle interpretation phase, reporting and critical review of the LCA, limitations of the LCA, relationship between the LCA phases, and conditions for use of value choices and optional elements; *Analysis of Existing Environmental Footprint Methodologies for Products and Organizations: Recommendations, Rationale, and Alignment*, EUR. COMM. JOINT RESEARCH CENTRE (2011), <http://ec.europa.eu/environment/eussd/pdf/Deliverable.pdf>.

²⁰ *Specification for the assessment of the life cycle greenhouse gas emissions of goods and services*, BRITISH STANDARDS INSTITUTE, UNITED KINGDOM, 21 (2008), <http://www.aurumorganic.com/Docs/PAS2050.pdf>.

²¹ *ISO/TS 14067 – Carbon Footprint of Products*, PEF WORLD FORUM, <http://www.pef-world-forum.org/initiatives/international-standards/iso-14067/> (last visited May 17, 2014).

BPX 30-323 (French Environment and Energy Management Agency (ADEME) and Organization of the French Standardization System (AFNOR), AB-Agri GHG Modelling (AB-Agri, UK) and Stop Climate Change (Agra-TEG), Germany and the Swedish Climate Certification for Food Standard. Many of these methodologies also involve the establishment of product category rules (PCRs) for carbon foot printing of different types of products.

Individual PCF labelling and certification initiatives (also known as 'implementation initiatives') are thus based on the above methodologies. There are a number of such initiatives that have been launched mainly by European retailers. For instance, the Carbon Trust Foot-printing Certification Company Limited (CTFCC), a public organization wholly owned by the Carbon Trust Enterprises Limited, UK, works with local, international and multinational companies to independently verify the carbon footprints of products and services. Certification by the CTFCC provides access to the Carbon Footprint Label, which is not restricted to any specific good or service. There are two types of carbon footprint labelling options offered by CTFCC - the Carbon Reduction Label and the Carbon Measurement Label. The main message of the Carbon Reduction Label to consumers is that the company has measured its PCF (the exact figure may or may not be displayed on the label) and that the company commits to reduce GHG emissions. Use of this Label also requires re-certification every two years, where it must be demonstrated that the carbon footprint of a certified product or service has reduced. The Carbon Measurement Label, on the other hand, allows the company to show that it has accurately measured the footprint and the label provides the option as to whether or not to communicate the exact carbon footprint. This label however implies no commitment to reduce the product's carbon footprint. These labelling schemes are voluntary and may be used by companies to improve brand reputation and enjoy a competitive advantage. The Carbon Trust's certifiers have evaluated the PCFs of many consumer and business-to-business products ranging from high volume food, beverage and agricultural products such as potatoes, milk, juice and wine, to complex goods such as electronics, hand dryers, and pharmaceuticals, with supply chains stretching across the globe. The Trust has worked with clients in UK, Europe, US, Latin America, Asia and Australasia. With the exception of South Africa, it has not (at the time of writing) worked with clients in the ACP. In South Africa, Colours, a fruit company supplying to UK retailers, has undertaken carbon foot-printing according to CTFCC requirements. The UK supermarket chain TESCO is a prominent company applying the Carbon Reduction Label and a public database on all its labelled products is available on the internet.²²

²² For further details about the certification process and method of accessing the relevant documents, see *The Certification Process*, CARBON TRUST, <http://www.carbontrust.com/>

There are also moves in France to make carbon labelling mandatory for all products. In 2010, the Grenelle 2 law was adopted in France to potentially make carbon labelling and disclosure of environmental impacts of consumer goods a legal requirement on the basis of the results of a national pilot. If and when the scheme is implemented, it will be the first example of a mandatory environmental labelling scheme to include PCFs.²³ The pilot testing phase in France has reportedly involved 168 companies (selected out of 260 applicants) from all sectors, with one-third belonging to the food and beverages sector.²⁴ They also included foreign companies from countries like Chile, Colombia and Sweden.²⁵ The pilot phase will involve testing several issues such as calculation methodologies, data, communication etc, and the whole process was open to proposals by firms. However, so far the French parliament has not yet introduced any mandatory carbon labelling requirement as there is an agreement among most firms that PCF methodologies will need to be further refined and harmonized.²⁶ Yet, some French retailers have already launched their own independent PCF schemes. For instance, the French retailer Casino has introduced a carbon index label covering more than 600 products.²⁷ Similarly, many European supermarkets have launched their own PCF labelling schemes for various categories of products, particularly food products (where the PCF is relatively simpler to measure).²⁸

media/322504/the-product-carbon-footprint-certification-process.pdf (last visited May 17, 2014).

²³ *Carbon Footprinting Standards*, *supra* note 15.

²⁴ *Environment Product Declaration, France*, PEF WORLD FORUM, <http://www.pef-world-forum.org/initiatives/country-governmental-initiatives/france/> (last visited Aug. 9, 2014).

²⁵ *1st PEF World Summit : Benchmarking Sustainability of Products and Organisations*, PEF WORLD FORUM (Oct. 8-9, 2013), http://issuu.com/thema1/docs/1st_pef_world_summit_compagnion.

²⁶ *Summary of Report on Company Feedback from the French National Environmental Labelling Pilot*, ERNST AND YOUNG (2013), http://www.developpement-durable.gouv.fr/IMG/pdf/synthserapportEYV2_EN_3.pdf; *Grenelle II: An hors d'oeuvre for eco-labelling across the EU*, VEDANTIX (Dec. 6, 2013), <http://www.verdantix.com/blog/index.cfm/post/grenelle-ii-an-hors-d-oeuvre-for-eco-labelling-across-the-eu-113> (last visited Aug. 9, 2014).

²⁷ For further information, see *Reducing Greenhouse Gas (GHG) Emissions*, GROUPE CASINO, <http://www.groupe-casino.fr/en/The-Casino-Carbon-Index-a-green.html> (last visited May 17, 2014).

²⁸ Antonin Vergez, *Display of Environmental Footprints of Products : Advances in France and in Europe*, ECON. COMM. FOR LATIN AMERICA AND THE CARIBBEAN (June 13-14, 2014), available at http://www.eclac.cl/comercio/noticias/documentosdetrabajo/0/50080/Presentacion-Antonin_Vergez-V_Seminario_HC.pdf.

IV. SWEDISH CLIMATE CERTIFICATION FOR FOOD STANDARD: A POSSIBLE ‘DEVELOPMENT-FRIENDLY’ TEMPLATE?

The Swedish Climate Certification for Food Standard (SCCFS) was started in 2007 as a joint initiative between the Federation of Swedish Farmers, dairies and meat co-operatives, and two labelling organisations for food products: Swedish Seal (Svenskt Sigill) and KRAV. It takes an interesting and rather different approach from other schemes, and basically consists of a set of requirements or ‘standard for standards’.²⁹

An interesting aspect of the SCCFS document is its recognition of the importance of trade as well as the economic needs of and conditions in low-income countries. For eg: Chapter 15 of the document states that, “Trade is necessary to provide the market with the right qualities at the right time and that this holds true also for climate certified food. At the same time, local conditions vary greatly across the world when it comes to factors such as climate, availability of technology, culture, resources and knowhow.”³⁰

Chapter 15 lays down detailed requirements for recognition of equivalent certification systems. It recognizes that there are many ways to achieve the improvement that is represented by the SCCFS, and while the SCCFS has been developed with Swedish conditions in mind, the conditions in less developed economies may be very different. It also aims for *compatibility* of systems developed in other regions with the SCCFS recognition. The term ‘compatibility’ as used in the document implies that the systems have similar ambitions, but may be different in technical solutions: the relative magnitude of the various climate issues may differ, as well as the availability of technology and the financial strength. It also has a section (15.3) entitled ‘Other production systems accepted as equivalent’, which gives special treatment to countries with a low Human Development Index (under 0.700), to enable smallholder producers from these countries to qualify for the standard.³¹ Some interesting criteria include group certification for at least 25

²⁹ SCCFS, CLIMATE CERTIFICATION FOR FOOD, ANNEX 1 REQUIREMENTS FOR CLIMATE STANDARDS 2ND DRAFT, available at <http://www.klimatmarkningen.se/wp-content/uploads/2012/09/Annex-1-Requirements-for-climate-standards-may-2013.pdf>.

³⁰ CLIMATE CERTIFICATION FOR FOOD (KLIMATCERTIFIERING FÖR MAT), REQUIREMENTS FOR RECOGNITION OF EQUIVALENT CERTIFICATION SYSTEMS 57 (2012), <http://www.klimatmarkningen.se/wp-content/uploads/2012/02/15-Requirements-for-recognition-of-equivalent-certification-systems-Klimatcertifiering-for-mat-2012-2.pdf>.

³¹ The document provides that products which are intended to be sold as certified to the Climate Certification for Food shall fulfil the requirements in ch. 13.6 of the Criteria for

smallholder producers or more and the standards and certifications systems accepted are all organic or ISEAL full member systems³² that cover smallholder group certification. The exceptions for low HDI countries, however, only apply to products that cannot be produced in the country where the product is finally sold. This would therefore exclude all products that can be produced in Sweden. Section 15.4 provides a way for certifying single products or producers as being equivalent to the SCCFS in cases where there are less than 25 operators in a region (defined by common climate and culture - a country or province) that intend to use the Climate Certification for Food. Another example of 'special and differential' treatment includes the application of different thresholds for countries with a low HDI with regard to climate impact of emissions from transport.³³

The Swedish scheme has a number of merits in that it relies on a simple 'certification of award' label, as long as the minimum criteria agreed upon are met. Implementation is quick and straightforward. However, it makes comparisons across different product categories difficult; for example, the consumer can compare different types of meat but cannot make comparisons between meat and vegetables. It does, however, recognise differences in systems and conditions, and rewards efforts for mitigation. The scheme is, thus, a good example of how the principle of special and differential treatment can be integrated within a standard itself.

The *Criteria for Mitigation of Climate Impact from Food Production and Distribution*,³⁴ including Chapter 15, is of significance to developing countries as it provides an example of a 'development-friendly' template that could be taken into account by other PCF implementation initiatives. The chapter on 'Recognition of equivalent

Mitigation of Climate Impact from Food Production and Distribution. *See supra* note 30. § 15.3 states "Smallholder producers in countries with low HDI use at average only one third of the energy compared to what is used in food production in developed countries. There are many strong arguments to enhance trade with the poorest countries."

³² *Full Members*, ISEAL ALLIANCE, <http://www.isealalliance.org/our-members/full-members> (last visited Aug. 9, 2014). As per the ISEAL Alliance website, "Full members are sustainability standards set by organisations that have demonstrated a high level of compliance with ISEAL's Codes of Good Practice, verified through independent evaluation and peer review processes. Through systems that are proven to be credible and effective, they commit to continuously improving their impacts." It further adds that these organisations "are leaders in a growing number of sectors, including fisheries, agriculture, forestry, biofuels, textiles, and mining."

³³ CLIMATE CERTIFICATION FOR FOOD (KLIMATCERTIFIERING FÖR MAT), CRITERIA FOR MITIGATION OF CLIMATE IMPACT FROM FOOD PRODUCTION AND DISTRIBUTION, Ch. 12, § 5 (2010), <http://www.klimatmarkningen.se/wp-content/uploads/2009/02/Climate-Certification-of-Food-2010-3.pdf>.

³⁴ *Supra* note 35.

certification systems' was developed after criteria was discussed with numerous national and international stakeholders, including the Swedish Board of Trade, UNCTAD and ITC.³⁵ Such a process could also be considered by other public and private PCF implementation schemes, so as to ensure that trade and development related concerns of developing countries, including the ACP, are safeguarded.

V. PRODUCT CARBON STANDARDS: FUTURE OUTLOOK AND IMPLICATIONS FOR DEVELOPING COUNTRIES

It is still unclear as to the future direction in which PCF standards will evolve. However, given the fact that agricultural and food products are, by the nature of their production processes, the easiest to footprint, such standards could potentially affect a large number of developing countries, particularly those that rely on agricultural exports. There are concerns not only with the higher costs associated with certification, but also the fact that the criteria or methodologies used may not correspond to the prevailing realities in developing countries. Some existing standards such as PAS 2050 (which provides the basis for a number of schemes, notably the aforementioned UK Carbon Trust's Carbon Labelling Initiative) currently excludes production of capital goods in their assessment of product life-cycles. This imparts a bias against labour-intensive production practices prevalent in developing countries (including the ACP), as it results in artificial shrinkage of the footprint of goods produced by capital-intensive methods. It also excludes transport of consumers to and from the retail outlet, which according to a recent review by TESCO, the UK supermarket chain, accounted for 35 percent of a product's emissions - second highest after production inputs, which accounted for 38 percent.³⁶

The development of publicly available databases in Europe, which is essential if PCF initiatives are to gather speed, could exclude processes carried out in

³⁵ Eva Mattson, *Climate Certification for Food, International Perspectives on Climate Certification of Food – Recognition of equivalent certification systems* (May, 2012), available at <http://www.klimatmarkningen.se/wp-content/uploads/2009/11/background-report-recognition-of-equivalent-system-2012-08-22.pdf>. This report constitutes the background for the development of Chapter 15. It was prepared by Eva Mattson from Grolink and was commissioned by Ana Richert of Svenskt Sigill [hereinafter MATTSON].

³⁶ Jackie Wills, *Tesco: Every Little Helps when Reducing Carbon Emissions*, THE GUARDIAN, May 17, 2013, <http://www.theguardian.com/sustainable-business/tesco-reducing-carbon-emissions>; TESCO, CARBON PRINTING UK PRODUCTS (May 5, 2013), http://www.tescopl.com/assets/files/cms/Resources/BFF_case_study_09052013.pdf (last visited Aug. 10, 2014).

developing countries.³⁷ There is a need to ensure that existing databases are relevant to realities prevailing in developing countries. Some options that have been proposed include development of easily accessible databases for tropical regions and developing regional land-use change databases. PCF methodologies such as ISO 14067 and PAS 2050 also provide for taking into account direct and indirect land-use change for foot printing purposes. However, there is lack of reliable data on land-use change in tropical eco-systems, and this could lead to calculations being based on second-best 'guesstimates'. Further, the fact that only recent land use change (after 1990 for PAS 2050) is calculated for carbon footprints places a far greater burden on tropical developing countries than on developed countries that were largely deforested decades or centuries ago.³⁸ There is a great deal of difficulty and challenge in obtaining relevant and accurate data to calculate carbon footprints and tracing them across diverse producers of raw materials, particularly in developing countries where informal markets operate.³⁹ The increased need for documentation and traceability will further lead to associated cost increases. Such costs often cannot be recouped (at least presently) through increased 'premium-prices' on carbon-labelled products as in the case of organic products.

Furthermore, there is an increasing realization among businesses that methodologies for PCF labelling initiatives would need to be harmonized further and communication of product footprints to consumers will need to be made simpler, easily understandable as well as enable them to make easier choices.

Certification processes will also need to be made more 'developing country-friendly.' Consumers largely appear sceptical of 'climate-friendly' claims by manufacturers and retailers (up to 60% surveyed in the UK) and prefer third-party verification (up to 70% surveyed in the UK).⁴⁰ Third-party verification will therefore need to be an important element for any carbon-labelling strategy adopted by ACP countries. Further initiatives like group-certification for small

³⁷ *Counting Carbon in the Marketplace – and at the Border*, DIIS POLICY BRIEF 4 (2009), http://en.diis.dk/files/publications/PolicyBriefs2009/PB2009_dec_Counting_carbon_in_marketplace_web.pdf.

³⁸ PAUL BRENTON ET AL., WORLD BANK, CARBON FOOTPRINTS AND FOOD SYSTEMS: DO CURRENT ACCOUNTING METHODOLOGIES DISADVANTAGE DEVELOPING COUNTRIES? 59 (2010), available at <https://openknowledge.worldbank.org/handle/10986/2506>.

³⁹ U.N. Econ. & Soc. Comm'n for Asia & the Pac., Asia-Pac. Res. & Training Network on Trade, Carbon Standards and Carbon Labelling: An Emerging Trade Concern, 3 Policy Brief No. 29 (Nov. 2010) (Nitya Nanda & Rajan Sudesh Ratna).

⁴⁰ ACCOUNTABILITY & CONSUMERS INTERNATIONAL, WHAT ASSURES CONSUMERS ON CLIMATE CHANGE? - SWITCHING ON CITIZEN POWER 9 (2007).

producers as provided for by the Swedish Krav scheme,⁴¹ and using regional certifiers covering a group of countries, as in the case of Bio-Latina in Latin American countries (certifying for the German Stop Climate Change Label), could be replicated for other initiatives.⁴²

Standard-setting processes for PCF initiatives are not completely transparent either. Except for ISO 14067, most national and private sector PCF standard-setting initiatives do not have a platform or vehicle whereby all interested and affected stakeholders make their views and concerns known. Most national schemes appear to have actively involved predominantly national producers and consumer groups. This does not seem to be consistent with the global nature of the climate change problem and the need to avoid unilateral actions. Perhaps it may not be practical to duplicate the ISO processes for other initiatives; more cost-effective and efficient ways to reach out to a wide group of stakeholders may need to be developed.⁴³ The criteria for participation etc also may need to be made public on websites beforehand, and an 'early warning'/invitation channel to various national standards bodies and suppliers also may need to be built-in. A good example of consultation beforehand with affected stakeholders is the Sustainable Ethanol Initiative operated by SEKAB in Sweden, where the Brazilian producers were consulted and the initiative was developed in close collaboration with them.⁴⁴

Thus, while there is a great deal of uncertainty as to the future evolution and shape of PCF standards and implementation initiatives, there are examples of good practice that exist that are more responsive to developing country concerns and

⁴¹ MATTSON, *supra* note 35, at 7.

⁴² See BIOLATINA, <http://www.biolatina.com/> (last visited Aug. 10, 2014).

⁴³ For instance, the development process for PAS 2050 was based on consensus building and sourcing of technical knowledge/expertise from a wide group of international stakeholders. Further, it was overseen by the Steering Group, which is an independent group of experts, representing academia, NGO, Government, industry, etc. The document was developed over 18 months with two rounds of consultation with external stakeholders. It was also supported by working groups of experts, market research and pilots with companies. Over 1,000 stakeholders were consulted, with over 3000 comments received and considered by the Steering Group and the project team. The engagement with the international community and the inputs from organizations in various countries was significant. See BSI Shop, PAS 2050: YOUR QUESTIONS ANSWERED, <http://shop.bsigroup.com/upload/Shop/Download/PAS/PAS2050-QA.pdf>. However, what may be interesting to see are the actual details of the stakeholders involved and their nationalities. Such details should be easily accessible on the websites of all PCF standard-setting initiatives.

⁴⁴ *About the Initiative*, SUSTAINABLE ETHANOL, <http://www.sustainableethanolinitiative.com/default.asp?id=1087> (last visited May 18, 2014).

that can perhaps be used as a template in future standards. However, as the section below argues, more efforts are needed to ensure that standard-setting in this area is responsive to the realities prevalent in developing countries and perhaps also enables a win-win situation for consumer concerns as well as environment and development priorities.

VI. NEED FOR A 'SUI GENERIS' APPROACH TO PCFs TO ENABLE A 'TRIPLE-WIN' FOR CLIMATE CHANGE, ENVIRONMENT AND DEVELOPMENT

It is clear that consumers in major markets like the EU will increasingly be concerned about the carbon footprint of their consumption patterns as well as imports and will want to clearly understand what a label means for the carbon impact arising from their purchasing decisions. It is true that the complexity and lack of harmonization among PCF methodologies may lead to a long period of delay before such schemes are widely adopted by retailers in Europe and elsewhere. Rather than reacting defensively, once PCF labelling schemes become widespread, it may be in the strategic interest of developing country exporters, particularly in the food sector, to proactively adopt labelling schemes that could confer a competitive advantage to them in export markets, while at the same time addressing any consumer concerns regarding the carbon-intensive nature of their production and transport schemes. A good way of addressing such concerns would be for developing country producers to adopt such labelling schemes that advertise their low-carbon footprint due to inherently climate-friendly techniques used by developing country producers or as a consequence of being linked to carbon-offset projects. Such projects could include forestry offset projects under UNFCCC's REDD+ mechanism,⁴⁵ or clean energy projects under the Clean Development Mechanism (CDM)⁴⁶. The carbon credits earned by such projects (which

⁴⁵ According to its website, UN-REDD+ (Reducing Emissions from Deforestation and Forest Degradation) describes itself as "an effort to create a financial value for the carbon stored in forests, offering incentives for developing countries to reduce emissions from forested lands and invest in low-carbon paths to sustainable development. 'REDD+' goes beyond deforestation and forest degradation, and includes the role of conservation, sustainable management of forests and enhancement of forest carbon stocks." See, *About REDD+*, UN-REDD PROGRAMME, <http://www.un-redd.org/aboutredd/tabid/102614/default.aspx> (last visited Aug. 10, 2014).

⁴⁶ The Clean Development Mechanism (CDM), defined in Article 12 of the Kyoto Protocol, allows a country with an emission-reduction or emission-limitation commitment under the Kyoto Protocol (Annex B Party) to implement an emission-reduction project in developing countries. Such projects can earn saleable certified emission reduction (CER) credits, each equivalent to one tonne of CO₂, which can be counted towards meeting Kyoto targets. For details, see *Clean Development Mechanism*, UNITED NATIONS FRAMEWORK

supermarkets or big retailers invest in) could also be used to partially or completely offset any carbon-intensive imports from that country.

A good example of such an existing scheme is the brand Confisa, makers of chocolate in Switzerland, which carries a ‘carbon neutral’ label on its chocolate products, advertising that all CO₂ emissions resulting from the production of a chocolate bar are being offset by cocoa farmers through rainforest reforestation.⁴⁷ Similarly, Costa Rica is developing the “C-Neutral” label to certify that tourism and certain industrial practices mitigate all of the carbon dioxide emitted by them.⁴⁸ Confisa’s label and the Costa Rican initiative are good examples of how the footprint of a product (even produced carbon intensively, or air-freighted) could be completely offset through reforestation initiatives that are certified, making the product, in effect, ‘carbon-neutral’.

Similar initiatives would not only be good for the planet but also for corporate image (of bigger supply-chains) as well as deliver a ‘win-win-win’ for trade, development and the green economy. Labelling schemes that state that the carbon emissions associated with production and air-freighting have been completely or substantially offset would also be much simpler for consumers to understand than complex labels showing grams of CO₂ per product, or those that try to calculate precise measurements of carbon footprints along the supply-chain. They could also be certified through credible but inexpensive certifiers, including through ‘group-certification’ so as to ensure consumer acceptability.

The advantage of such schemes would be not only cost-savings (avoiding expensive compliance with certification and labelling requirements laid down by supermarkets and importing entities in the developed world) and a marketing advantage for developing country producers, but also positive externalities accruing to developing countries through greater investments in carbon offset projects. For supermarket chains that source from developing country producers, they could also be opportunities to present ‘greener credentials’ to their customer base. For instance, supermarket chains in their annual reports and outreach to consumers could advertise the fact that a certain percentage of their imports from developing countries were ‘climate-neutral’ through the use of offsets in these countries. Those supermarkets that advertised this fact might enjoy greater approval ratings and public popularity and customer base compared to supermarkets that cannot advertise this fact, even if it implied a certain investment cost by the supermarket in verifying the offset claims.

CONVENTION ON CLIMATE CHANGE, http://unfccc.int/kyoto_protocol/mechanisms/clean_development_mechanism/items/2718.php (last visited Aug. 10, 2014).

⁴⁷ See PUR PROJECT, <http://www.purprojet.com/en/about-us> (last visited May 18, 2014).

⁴⁸ *Costa Rica Aims to Become First Carbon Neutral Country*, WORLDWATCH INSTITUTE, <http://www.worldwatch.org/node/4958> (last visited Aug. 10, 2014).

Another type of '*sui generis*' labelling scheme would not involve any kind of PCF measurements at all. Rather, they could advertise carbon-friendliness in other ways; for instance, using positive labels that state that 98 per cent of energy procured comes from renewable energy sources. Such schemes may not meet the strict PCF criteria that could possibly be laid down by certain supermarkets, but could still grant developing country producers (once certified) some degree of competitive advantage, and should be given proactive preference by supermarkets even if they cannot carry carbon offset or footprint labels.

The example of '*sui generis*' labelling schemes in the context of PCF schemes also raises a pertinent question. While private and PPM-standards are not clearly regulated under WTO rules, there would be a scope for including more 'development-friendly' language or provisions within the TBT Agreement that would recognise the desirability of '*sui generis*' labelling schemes, including those that rely on PPMs such as reliance on renewable energy. Such provisions, perhaps as part of the Annex on Good Practice, could oblige members as well as non-governmental bodies within their jurisdiction to accept as an equivalent, alternative labelling schemes developed within the exporting country that are certified to address the fundamental consumer concerns, even if they do not strictly meet the standard and certification requirements laid down by the importing countries. This would be similar, though not identical, to an existing provision I of Annex 3 (Code of Good Practice) of the TBT Agreement which states that, "Wherever appropriate, the standardizing body shall specify standards based on product requirements in terms of performance rather than design or descriptive characteristics." Similarly, a provision could also be inserted obliging standard-setters to be responsive to the needs, concerns and prevailing realities in developing countries while setting standards and to make due allowance for such differences. The ISEAL Codes of Good Practice are effective screens for assessing the credibility of sustainability standards. Institutions and companies make reference to, and use the Codes in a variety of ways for purchasing and policy. Ways could be found to ensure that retailers and private standard-setters make reference to, and abide by the ISEAL Codes of Good Practice when developing sustainability related standards including organics and carbon labelling.⁴⁹

While additional provisions in the TBT Agreement may not be binding on non-governmental (including private sector) entities that have not signed up to the Code, such provisions can send a strong message on developing country concerns to private standard-setters worldwide, reflect the principle of special and differential treatment more strongly within the WTO, and also provide a more

⁴⁹ *Our Codes of Good Practice*, ISEAL ALLIANCE, <http://www.isealliance.org/our-work/defining-credibility/codes-of-good-practice> (last visited May 18, 2014).

supportive legal background for launching further developing country-driven '*sui generis*' labelling schemes.