Chapter 13
Voluntary Codes in the United States,
the European Union and Developing Countries:
A Preliminary Survey

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Introduction

Any attempt to review worldwide use of a particular policy instrument is almost invariably destined to be cursory and incomplete, and this review of market-oriented voluntary codes in use in the United States, the European Union and developing countries is no exception. While admittedly far from comprehensive, our preliminary research of voluntary initiatives in these jurisdictions suggests some intriguing themes deserving further exploration. These themes revolve around the relationship between how receptive the legal system and government agencies are to voluntary codes (what could be called “the regulatory culture” of voluntary codes) and what voluntary instruments emerge (the number, shape and content of those codes).

In the United States, the federal government has explicitly encouraged the use of self-regulatory instruments in the areas of environmental, human rights, worker and consumer protection. It is not surprising, therefore, that there has been significant voluntary code activity in all of these sectors. In some cases, U.S. governments have played direct and primary roles in the development and implementation of these voluntary instruments, while in others a more “hands-off” approach has been adopted, leaving the leadership role to businesses or others.

In Europe, at the European Union level, the direct involvement of government is apparently preferred for developing and operating voluntary instruments. In the case of both environmental and consumer protection instruments, European governments have played central roles in ensuring that key voluntary instruments are of a certain quality. In developing countries, given their wide diversity, it is harder to make useful generalizations concerning the experience with voluntary instruments, although there is evidence from India and Indonesia suggesting that a strong government role can help facilitate development of effective voluntary approaches.

In an effort to provide the reader with a sense of the breadth of voluntary initiatives activity currently being undertaken, this chapter reviews voluntary initiatives in four major sectors: environmental protection, human rights and worker safety, consumer protection in the conventional (non-Internet) marketplace, and consumer protection in the context of e-commerce. Analysis of each of these sectors is then subdivided by examining initiatives in terms of who is the lead proponent — that is, we review voluntary initiatives spearheaded by government, the private sector and non-governmental organizations.
Environmental Voluntary Initiatives

Our research suggests that governments, the private sector and non-governmental organizations (NGOs) in the United States, the European Union and developing countries are demonstrating growing openness to the use of voluntary approaches as one way of responding to environmental challenges, although the degree of interest and the approaches taken vary significantly from jurisdiction to jurisdiction and from player to player. Increasingly, governments in each of these jurisdictions seem to be promoting voluntary initiatives in tandem with regulatory incentives (e.g. firms that go “beyond compliance” with the law are potentially subject to reduced inspections or greater regulatory flexibility) and public recognition schemes. Meanwhile, the voluntary initiatives spearheaded by businesses and NGOs often seem to be directed as much at gaining marketplace advantage (e.g. with consumers, investors, suppliers and insurers) as at relieving government pressure, and in many cases business and NGO codes seem to be in competition, with both sides trying to prove to the public (or their particular stakeholders) that their respective rules, development and enforcement processes provide the most credible path to environmental protection. While similar patterns are seen in developing countries, these countries have their own distinctive operational environments that, in part, shape their voluntary initiatives, including particularly weak regulatory infrastructures, and fixations with concerns that the voluntary initiatives do not interfere with economic development.

The United States: Government-led Voluntary Environmental Initiatives

U.S. government interest and involvement in voluntary initiatives seem to stem primarily from recognition of the need to find ways of avoiding some of the limitations of traditional command-and-control environmental regulation.1 Framed more positively, one commentator has stated that government-led voluntary environmental initiatives:

...can motivate beyond compliance environmental performance that otherwise would not occur...may also enable regulators to create detours around existing regulatory obstacles.....[and] respond to a long-standing industry position that the current system unnecessarily

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burdens business and that equal or superior environmental outcomes can be achieved less expensively.²

Perhaps reflecting this view, the federal government has actively promoted voluntary approaches in which corporations agree to meet certain goals in exchange for regulatory flexibility and, occasionally, public recognition as a good corporate citizen. Nash and Ehrenfeld describe two generations of government-led voluntary environmental initiatives that have emerged from this regulatory reform effort. According to their research, the first generation was dedicated to recognizing companies that were taking voluntary pollution prevention steps, and to providing direct technical assistance to firms.³ An example of this first generation was the U.S. Industrial Toxics Project, also known as the “33/50 Program,” because it called for 33 percent reductions of 17 toxic chemicals by 1992 and 50 percent by 1995. The program met its ultimate goal of a 50 percent reduction one year ahead of schedule, in 1994.⁴ Over the life of the program, 7,500 companies were invited to participate, of which nearly 1,300 responded (13 percent) with commitments, and their facilities reported more than 60 percent of the 1988 releases and transfers of 33/50 chemicals.⁵ The Environmental Protection Agency concentrated much of its outreach on those 500 or so companies responsible for the largest releases and transfers; of those, 64 percent participated in the program.⁶ While the rates of participation were not outstanding, the 33/50 Program provided evidence of industry interest in such programs, and showed considerable success in meeting targeted objectives.

The second generation of voluntary environmental initiatives focused on what Nash and Ehrenfeld describe as “reinventing” environmental regulation. This has included the Common Sense Initiative, described generally as an attempt to move away from a regulatory focus on a single environmental medium (air or water, for example) to addressing the full impact of individual industrial sectors. Common Sense Initiative proposals included offering regulatory flexibility in exchange for superior environmental performance.⁷ A recent study concludes that voluntary environmental programs have now become an established activity of environmental regulatory agencies at all levels of government, with an increasing focus on pollution prevention.⁸ In 1999, the Environmental Protection Agency proposed a two-track regulatory system, with a new performance track that invites facilities to meet certain voluntary stipulations in return for

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5. Ibid., p. 4.
6. Ibid.
7. Nash and Ehrenfeld (footnote 1).
8. Stoughton, Shapiro and Reda (footnote 1).
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a mix of regulatory, financial and other benefits, while the remaining facilities stay on the existing compliance-oriented system.9

Increasingly, legislation is being amended to explicitly acknowledge and encourage companies to adopt environmental management systems such as ISO 14001.10 Examples have included Wisconsin’s Cooperative Environmental Agreements Program and Oregon’s Green Permits Program,11 both described by one researcher as offering several regulatory tiers “to distinguish the good or better actors from the poor ones and to treat the categories differently [by providing] incentives for performance at the higher tier levels.”12 Similarly, Connecticut has taken the step of explicitly incorporating voluntary initiatives into a regulatory scheme. Under An Act Concerning Exemplary Environmental Management Systems,13 the Connecticut Commissioner of Environmental Protection may provide regulatory flexibility (in the form of expedited review of permit applications, for example) to companies registered as adhering to environmental systems such as ISO 14001.14

At the federal level, another incentive for firms to establish environmental management systems and pollution prevention systems is the Federal Sentencing Guidelines for Organizations, developed by the United States Sentencing Commission.15 The Guidelines set out a series of aggravating and mitigating circumstances to be
weighed in considering appropriate penalties for corporate criminals. Among the most novel of the mitigating considerations is whether a corporation exercised due diligence by establishing “compliance standards and procedures to be followed by [the organization’s] employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.” Essentially, a corporation that establishes a coherent and comprehensive management system, and ensures effective communication and compliance to it, is better protected from exposure to onerous penalties (and indeed is less likely to contravene the law) than one that has no such management system. The Guidelines thus provide an additional government incentive for companies to adopt proactive, preventative practices.

The United States: Business-led Voluntary Environmental Initiatives

Among the most significant business-led voluntary environmental initiatives in operation in the United States is ISO 14001, an environmental management system that has been the focus of serious public policy debate. As mentioned above, ISO 14001 has recently started to be directly recognized in U.S. environmental legislation. In addition to this direct form of governmental approval, there are indications that ISO 14001 is gaining momentum for non-governmental, market reasons. For example, large U.S. firms are increasingly requiring that their suppliers put in place ISO environmental management system approaches, thus creating market-driven supply-chain pressure on

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18. See, for example, NAPA (footnote 11). According to NAPA, “the emergence of ISO 14001 and other voluntary, private efforts by firms to identify and manage their environmental responsibilities is likely to raise the level of compliance and create some opportunities for pollution prevention. ... Although third-party registration is not a guarantee of a firm’s compliance, state and federal regulators are justified in presuming that certified firms are less likely to pose compliance problems than uncertified firms, and thus less desirable as targets for inspection. That conclusion could change if the integrity of the third-party registration process were to be compromised.” (p. 61). See also Pacific Institute for Studies in Development and Security, ISO 14001: Environmental Management Systems and Public Policy (footnote 12); K. Kao-Cushing, “Why Environmental Management System Standards Matter,” Pacific Institute Report (Fall 2000), pp. 6–10; K. Kollman and A. Prakash, “Green by Choice?: Cross-National Variations in Firms’ Responses to EMS-based Environmental Regimes,” World Politics 53:3 (2001), pp. 399–430; C. Coglianese and J. Nash, eds., Regulating from the Inside: Can Environmental Management Systems Achieve Policy Goals? (Washington: Resources for the Future, 2001).

19. See R Florida and D. Davison, “Why Do Firms Adopt Advanced Environmental Practices (And Do They Make a Difference)?” in Coglianese and Nash, eds., ibid. On the basis of survey evidence, the authors conclude that business benefits, such as cost savings, improved business performance and improved stakeholder relations, are important motivations for adopting environmental management systems, along with regulatory compliance.
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companies to adopt environmental management systems.20 While ISO 14001 may be gaining in popularity, this is not to suggest that it is without weaknesses: criticisms to date have focussed on its lack of substantive performance requirements and inadequate public reporting obligations.21

Aside from the growing U.S. acceptance of ISO 14001, there have also been some ambitious attempts by particular American industry sectors to establish their own environmental programs. The chemical and forestry industries offer two particularly interesting and occasionally controversial examples.22 The programs demonstrate the significance of non-governmental factors as incentives for development and operation of voluntary environmental initiatives — in particular, the need to address negative public perceptions of the industries.

Chemical manufacturers had a serious public relations problem on their hands in the 1980s, following the release of toxic chemicals from a plant owned by a U.S.-based company in Bhopal, India, in 1984. Following Bhopal, the Chairman of the U.S. Chemical Manufacturers Association’s (CMA) Public Perception Committee championed the adoption of the Canadian Chemical Manufacturers Association’s Responsible Care program, because it was clear to him that the “industry had a performance problem that it could not advertise [its] way out of.”23 The CMA’s board unanimously adopted Responsible Care in September 1988. It is a condition of membership in the CMA that companies comply with the 10 principles of Responsible Care and six codes of management practice.24 In the past, commentators have questioned Responsible Care’s effectiveness in achieving actual improvement in the industry, noting among other things that the Program focusses on inputs, not outputs (e.g. reduced what levels of pollutants will be achieved), lacks coercive sanctions, and does not involve independent expert third-party compliance verification.25 On the positive side, however, the same commentators have also noted that the CMA is working to create mechanisms for measuring performance on some aspects of its codes, and is moving toward a third-party verification system.26 Commentators have also lauded the Responsible Care

20. For instance, Kao-Kushing, (footnote 18), p. 7, notes that “Major multi-national corporations, such as Ford and GM, are already requiring or strongly recommending that their suppliers conform to the ISO 14001 standard.”
21. Ibid.
22. For insightful recent comparative analysis of the American chemical, forestry and ISO 14001 environmental management systems, see Coglianese and Nash (footnote 18).
26. Ibid., p. 35.

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Program’s call on firms to adopt a “no accidents, injuries, or harm to the environment” approach to operation. 27 Responsible Care members are to...

establish a policy of openness with surrounding communities but decide for themselves which information to disclose about their operations. About half of the American Chemistry Council’s members have had their Responsible Care programs externally verified, but results of these assessments generally are not available to the public. Firms participating in the Canadian Responsible Care program, however, must provide a copy of their verification report to anyone who requests it. 28

In short, the program has problematic aspects, but is still evolving. The evolution seems to be toward increased openness and independent compliance auditing, but there are many steps to go before reaching that objective.

As with the American chemical industry, the American Forest and Paper Association (AF&PA) 29 was also concerned with the public image associated with its logging activities, and so instituted the Sustainable Forestry Initiative (SFI) in 1994. 30 An independent expert review panel, with representatives from government, academic, conservation and other sectors, reviews the program and advises AF&PA on its progress. The program provides a system of “principles, objectives and performance measures” to ensure the perpetual growth and harvesting of trees and the protection of wildlife, plants, soil and water. 31 Participation in the program has been mandatory for AF&PA members since 1996. 32 In its 2000 annual report for SFI, AF&PA reported that 90 percent of industrial forest land in America is controlled by its membership, who are required to comply with the SFI program. 33 AF&PA has stated that it has expelled 17 companies to date for failure to comply, and another 23 have been suspended, 34 but it does not disclose on its Web site the names of these companies.

Although the AF&PA SFI initiative does not subject members to independent third-party field audits, the Association has made a number of adjustments to the

27. Coglianese and Nash (footnote 18). In this regard, the American Responsible Care initiative is now superior to the Canadian originator, as discussed in Moffet, Bregha and Middelkoop, “Responsible Care,” Chapter 6, above.
28. Coglianese and Nash. Ibid.
32. Ibid.
34. See the AF&PA Web site, <www.afandpa.org>.
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program which seem to have prompted such third-party evaluations to be undertaken. In 1999, it developed a verification system (facilitating compliance audits) and introduced a Forest Monitoring Project. The Izaak Walton League of America manages the project, which involves random visits to companies with significant holdings in selected sites, as well as field inspections at a combination of company-selected and randomly chosen sites. These initiatives have apparently stimulated many AF&PA members to engage in third-party audits; in 2001, AF&PA reported that 100 million acres are enrolled in the SFI program in North America and 85 million will be third-party certified by June 2002. More than a third of its members’ forest lands “[had] been either committed to or [had] already undergone an independent third-party audit for certification under the SFI Standard.” Thus, as with the U.S. Responsible Care initiative, the SFI program seems to be evolving toward a more publicly accountable program, with performance measurements and third-party verification of results.

Similar to Responsible Care, however, the AF&PA SFI is not without its critics, including representatives of such environmental NGOs as the World Wildlife Fund and the Natural Resources Defense Council, who have put their support behind the U.S. version of the Forest Stewardship Council (FSC). Until 2001, a key distinction between the two programs was that the FSC initiative involved “chain of custody” labelling of forest products while the AF&PA SFI program did not. However, in 2001, the AF&PA SFI announced that “an on-product labeling system for organizations that have successfully completed 3rd party certification and meet comprehensive label use requirements on fiber sources” would be available as of the fall of 2001. As in other countries, there has been a competition for credibility between industry-driven forestry industry certification initiatives and environmental NGO-driven programs — particularly FSC, which has certified forests in more than 30 countries. It is a competition for credibility, not only among the public but also among important commercial players. It was widely seen as a victory for FSC when the building-supply chain Home Depot, having been the target of numerous protests from environmental groups over the years, opted to publicly endorse the efforts of FSC and promised to carry FSC-certified wood products.

38. See footnote 36.
39. See, e.g., the Canadian experience on this issue in Gregory T. Rhone, David Clarke and Kernaghan Webb, “Two Voluntary Approaches to Sustainable Forestry Practices,” Chapter 9, above.

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The United States: NGO-promoted Voluntary Environmental Initiatives

Non-governmental organizations can be a significant source of pressure for change on U.S. corporations, as demonstrated by the above-noted example of a building supply company endorsing use of a particular forestry labelling scheme for wood products sold in its stores following targeted protests by environmental groups. One method of applying such pressure is for an NGO to lead the development of a set of standards, and then exhort corporations to adhere to them. This kind of NGO-led rule making can be viewed as problematic, of course, for the targeted companies, which are expected to submit to rules that they may have had no hand in developing. Conscious that voluntary codes are of little value when they are simply ignored, activists have, in some cases, engaged some of the targeted companies in the rule-making process, in the hope that this would increase the likelihood of their initiative being adopted and influencing market behaviour.

The CERES Principles, though hardly alone in this regard, provide a useful example of this evolution from antagonism to engagement. Motivated by the massive environmental damage resulting from the oil spill from the tanker Exxon Valdez off the Alaska coast in 1989, a coalition of investors, environmental activists, labour unions and religious groups formed the Coalition for Environmentally Responsible Economics (CERES). The group envisioned an ambitious system of corporate disclosure of “consistent and comparable” environmental information, in much the same way that corporations are required to disclose financial data in accordance with generally accepted accounting principles. Unfortunately, from the group’s perspective, fewer than 20 relatively small corporations originally endorsed the principles. However, through an intensive and somewhat lengthy process of negotiation and compromise (which, among other things, resulted in such concessions as a name change from the antagonistic original “Valdez” program name, and substantial changes to the obligations and operation of the program), the initiative has now attracted some much more prominent endorsers, including American Airlines, Bank of America Corporation, Bethlehem Steel Corporation, Body Shop International PLC, Coca Cola USA, Ford Motor Company, General Motors, Polaroid Corporation, Sunoco Inc. and Vancouver City Savings Credit Union. This willingness to work with industry has permitted the CERES Principles to flourish to a much greater extent than would have been possible under CERES’s original regime: it now boasts nine Fortune 500 endorsers and more than 50 corporate endorsers in total.

CERES started a related program in 1997, in collaboration with the United Nations Environment Programme, called the Global Reporting Initiative (GRI). As the name suggests, its focus is global. In essence, GRI seeks to establish uniformity in sustainable development reporting by companies of their performance and progress toward the environmental, social, and economic aspects of sustainable development.

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42. See <www.ceres.org/about/endorsing_companies.htm>.
The GRI’s *Sustainability Reporting Guidelines* were released in draft form in March, 1999, and were released in revised form in June 2000. In 2002, the GRI established a permanent, independent, international body with a multistakeholder governance structure. Its core mission is the maintenance, enhancement and dissemination of the Guidelines through ongoing consultation and stakeholder engagement. CERES and GRI may be said to blur the lines between those programs that are led by business and those led by NGOs. Now that GRI is collaborating with the United Nations Environment Programme, there is an element of international government organization (IGO) support as well. Clearly, activists were the primary players at the program’s inception; however, the program’s growing credibility is the result of industry-NGO-IGO partnerships contributing to its ongoing evolution.

### The European Union: Government-led Voluntary Environmental Initiatives

#### The Eco-Label and Eco-Management and Auditing Scheme

The European Eco-label (as well as some of the corresponding national labelling schemes) and the Eco-Management and Auditing Scheme represent two examples of market-oriented voluntary environmental initiatives spearheaded by the European Union (EU). While both attempts have met with, at best, mixed success so far, both programs’ administrators have been seeking ways to improve them, foecussing on keys to increasing legitimacy in the eyes of stakeholders.

The European Commission established the European Eco-label in 1992, with the stated goals of promoting “products which have a reduced environmental impact during their entire life cycle,” and providing “consumers with better information on the environmental impact of products,” without compromising worker or product safety or significantly affecting the product’s fitness for use. Clearly, the success of the program depends upon its acceptance by those participating interest groups and by the market itself. Since its creation, an estimated 250 products have been awarded the European Eco-label, in 17 products groups, ranging from footwear to textiles to light bulbs.

In 1994, the European Commission started working on a proposal to revise the scheme. In the memorandum accompanying the proposal, the Commission acknowledged the tepid response from industry and consumers. It admitted that industry had taken “a very reserved position” toward the scheme and only supported it to the extent that it

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45. Ibid., article 4.
46. For a more comprehensive treatment of the issues associated with eco-labels, see Kathryn Harrison, “Promoting Environmental Protection through Eco-labelling: An Evaluation of Canada’s Environmental Choice Program,” Chapter 10, above.
48. The memorandum was formerly available at <www.europa.int/comm/dg11/ecolabel/proprev.htm>, but seems to have been removed from the EU Web site.

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might replace national eco-labelling schemes. Industry’s principal difficulty appeared to be that eco-labels are awarded selectively — that is, as the Commission itself put it, “only a number of products on the market can qualify for the label.”49 This, however, has not been the only barrier to the program’s success. Studying the Eco-label’s past (and potential future) fortunes in Benelux and Italy, researchers found a number of barriers, including a lack of information about the scheme among companies, and the perception that the label was a weak marketing tool.50 Others, outside the EU, have called the scheme a barrier to trade.51 A key challenge for the Eco-label’s administrators has been to redesign the program to address these problems.52 In 2000, the Eco-label program was substantially revised.53 Among other things, the revisions widened the program’s scope to cover services as well as products, reinforced stakeholder participation in developing the environmental criteria, reduced fees for small and medium-sized enterprises, introduced a ceiling on the annual fee, renewed emphasis on promotion of the scheme and reinforced coordination with national eco-label schemes.54 It is too early to assess whether these revisions will increase the market take-up of the scheme. Notable, however, is the central role that the European Commission played in developing this scheme, which is similar to the strong role played by the Canadian federal government in the original development of its Eco-Logo scheme, but markedly more interventionist than the American approach, in which there is no direct government involvement or leadership in eco-labelling initiatives.

This pattern of an interventionist leadership role for the European Commission in the development of voluntary eco-labelling initiatives, and a lack of similar leadership in the United States, repeats itself in the area of voluntary environmental management systems (most notably, ISO 14001), with this role largely being left to the business sector. This is in stark contrast to the European model: the European Eco-Management and Auditing Scheme (EMAS) is without question a product of the EU.

Originally envisaged as a regulatory initiative that would apply in a compulsory manner to all relevant businesses,55 EMAS was introduced in June 1993 by the EU with a

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49. Ibid.
54. Ibid.
55. See Orts (footnote 1) especially from pp. 1289 ff.
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framework established by regulation, but operating as a voluntary program. All EU member states were then required to operationalize EMAS in their respective jurisdictions (e.g. to designate the competent body to verify environmental statements made by companies as part of their EMAS public disclosures). EMAS is open to any company operating an industrial site (that is, manufacturing or energy production) in the EU. EMAS has also been applied on an experimental basis to the public service and sites involved in distribution. The objective of EMAS is to “promote continuous improvements in the environmental performance of industrial activities.”

EMAS has been forced to compete for credibility with other programs having similar objectives, most notably ISO 14001, with which it has much in common. However, in two respects, EMAS is more stringent: it incorporates performance elements and public disclosure requirements, which ISO 14001 lacks. Responsibility for these differences is almost universally attributed to U.S. business participation in the ISO process and its absence from EMAS. Given the success of ISO 14001 in comparison to EMAS, the EU has had to consider what place there will be for EMAS in the future. After all, given the growing visibility of ISO 14001, it is not on the face of things very obvious what incentive a company would have for implementing EMAS. The European Commission appears confident in the possibilities of EMAS, despite the competition. In 2001, the EMAS scheme was revised to incorporate ISO 14001 as its environmental management component.

It seems apparent that the direct, central role played by the EU in developing EMAS, and the failure of the American and Canadian governments to play a similar role in the development of ISO 14001 (a business-led initiative), has contributed to one program being more rigorous (EMAS) but the other more popular (ISO 14001). The rationalization of the two systems that occurred in Europe in 2001 demonstrates the influence of ISO 14001 in Europe. In terms of reception by companies, in early 2002, there were more than 3,700 registered EMAS sites in Europe. In 2002 (the last year for which statistics are available), there were more than 23,000 companies with ISO 14001 certification in Europe. Commentators have explored the cross-national differences in reception of environmental management systems, and have concluded that the

57. Orts, ibid., p. 1291.
59. Ibid., article 1.
61. See, e.g., Parto, ibid., p. 187.

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differences may in part reflect the regulatory climate within the countries. These commentators have suggested that the United States is more adversarial and legalistic, while European countries such as Germany are more prescriptive and interventionist.

Individual European Government-led Voluntary Environmental Agreements

Another important European government-led form of voluntary initiative in the environmental area is the voluntary environmental agreement — sometimes also called the voluntary covenant — which has been defined as a collective agreement between a “public authority and an industrial sector focussing on one particular industrial pollution concern and including a collective quantified pollution target to be met by the firms of the industry.” Such agreements have been struck at the national level in all EU countries. In 1996, they numbered 300, with many more at the subnational level. Their innovative distinguishing features have been described as twofold: “the jointness of policy formulation and implementation and voluntariness of the mode of governance that stress the importance of co-operation and partnership between private and public actors.” Writers have noted that these two qualities actually appear on a continuum, which explains the variety of approaches; for instance, while many agreements within EU countries exert only a moral obligation on companies, most (90 percent) in the Netherlands are binding contractual obligations. In such cases, of course, the agreements cease to be voluntary once they are negotiated, but retain their element of voluntariness throughout the development stage.

The willingness of European governments and businesses to work together to develop joint, quasi-contractual and individuated agreements that exceed regulatory requirements represents yet another example of the distinctive regulatory environment in Europe as compared to that in North America. The American governmental approach appears to support voluntary pollution-prevention initiatives, and often involves government in a leadership role, but tends to rely more on regulatory incentives (e.g. reduced inspections, easier permit processes) and public recognition than individuated agreements. It is apparent that, whenever individuated agreements are negotiated between government and industry, care must be taken to develop them in an open and transparent manner that will not be seen by competitors as unfair favouritism and by the public as a “closed-door” relaxation of legal standards.

67. Ibid. Emphasis in original.
69. For discussion of the situation in Canada, and the legal implications of using such agreements, see Kernaghan Webb and Andrew Morrison, “The Law and Voluntary Codes: Examining the ‘Tangled Web’,” Chapter 5, above.
70. Ibid.
European Business-led and NGO-led Voluntary Environmental Initiatives

One of the most prominent voluntary sustainable forestry initiatives in Europe is the Forest Stewardship Council (FSC). An international non-governmental organization, FSC calls for the certification of forest areas harvested in an environmentally and socially sound way and the labelling of products derived from those forests. From the outset, FSC has been led by timber users, traders and representatives of environmental and human rights organizations, not the forest resource extraction industry. This industry has in turn developed its own certification schemes, as has been the case in Canada and the United States. Until recently, such efforts were focussed at the national levels. In 1999, however, national forestry organizations in Europe banded together to form the Pan European Forestry Certification Council, which offers its own option for certification. The program operates in a manner similar to that of FSC, with a logo available for wood products, and specific rules regarding chain of custody.

This seems to represent another example of competition between business-led and NGO-led voluntary processes, similar to that in the United States and Canada. While it is too early to predict which (if either) initiative will ultimately emerge as the dominant player in the marketplace, it is clear that consumers, non-governmental organizations, the media and public perception will play a central role in determining the success or failure of the processes. What is also clear is that governments in Canada, Europe and the United States have all tended to play a comparatively minor role in developing and promoting these sorts of initiatives, leaving it instead to the businesses and environmental organizations to assume leadership roles. This likely reflects recognition that the issue (of what constitutes acceptable sustainable forestry practices, and how this is measured) has an important market element to it, and that governments

71. Almost 10 million ha of forests have been certified in Sweden, 1 million in the United Kingdom, and an additional 600,000 in other European Union countries. Former Eastern Bloc countries such as Croatia, the Czech Republic, Estonia and Poland have more than 3 million hectares of FSC-certified forests. (See Forests Certified by FSC-Accredited Certification Bodies, available at <www.fsc.org/keepout/content_areas/77/55/files/ABU_REP_70_2004_06_01_FSC_Certified_Forest.pdf>.) In Europe, funding for FSC has been received from the European Commission, the Austrian and Dutch governments, WWF-Netherlands, IUCN-Netherlands and the Swedish Society for Nature Conservation. (See “Frequently Asked Questions,” available at <www.fsc.org/fsc/about/about_fsc/faqs>.) FSC has “received endorsement and activity commitment from a wide range of NGOs, including WWF, Friends of the Earth and Greenpeace.” (See “Frequently Asked Questions,” ibid.)


75. However, there had been at least one at the supranational level, the Nordic Forest Certification project, launched by Sweden, Norway and Finland in 1996.


77. Ibid.

78. See Rhone, Clarke and Webb, “Sustainable Forestry Practices”, Chapter 9, above, and the discussion of the United States FSC initiative in this chapter, above.

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are not well placed to lead, although they maintain important roles in terms of setting out and enforcing the ground rules about what constitutes accurate and inaccurate representations of sustainable forestry practices, and regulating the forest extraction industry in their jurisdictions.

**Developing Countries: The Environmental Protection Challenge**

Voluntary environmental initiatives — whether in the form of a consumer product eco-labelling program, or some form of environmental management system or other voluntary code — are mechanisms that are inherently intended to maintain a certain level of behaviour according to an environmental standard. One of the difficulties in establishing such initiatives in developing countries is that firms there may claim that they are not able to meet such standards. This problem was exemplified in a case study presented to the World Trade Organization (WTO) by the government of Colombia, regarding a Colombian flower growers’ association that complained of effectively being barred from the German market because of a (voluntary) environmental standard developed by German importers. This represented a situation in which the rule-makers were Europeans (developing environmental standards found acceptable for German consumers), while the Colombians were rule-takers (feeling compelled to adhere to the standard, in order to gain access to the market, in spite of the cost implications).

One of the immediate questions raised by the Colombian flower situation is, if the demands of German consumers for higher environmental standards concerning flowers were to necessitate increased costs for the product or service in question, would these consumers pay for it, or would they abandon their principles in favour of less costly flowers from elsewhere? If German consumers were willing to pay for their principles, this should not be problematic for Colombian flower growers, as long as the costs of meeting with these standards were passed on to the consumers. From the standpoint of producers in developing countries who are faced with high environmental standards being demanded by consumers in developed countries, a key concern is that they have an opportunity to participate in the rule-making process that will affect them. The WTO has established a code of good practice concerning the development of standards, which, among other things, calls for openness, transparency and access to rule making. However, it is not clear that WTO rules apply to voluntary, non-governmental schemes, particularly when these are developed by bodies other than recognized standards organizations.

A second distinctive issue for many developing countries is the adequacy (or more accurately, the inadequacy) of the domestic regulatory framework for environmental protection, and these countries’ capacity to effectively implement such a framework. As commentators have noted, environmental regulatory institutions in

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81. Ibid.
developing countries “are chronically short of funding, expertise and political support.”

In the absence of a well-functioning regulatory framework, some of the pressure for industry to adopt voluntary environmental approaches may decrease (at least insofar as that pressure comes from government). Looked at another way, this might signal the need for a different and more central role for voluntary environmental approaches in developing countries, to compensate for a weaker regulatory framework. In the absence of a strong regulatory presence, one of the many challenges for governments in developing countries is to devise mechanisms that harness non-regulatory forces to stimulate the private sector to meet environmental standards.

**Government-led Voluntary Environmental Initiatives in Developing Countries**

The government of Indonesia has shown leadership in devising voluntary environmental schemes as adjuncts to a regulatory regime. In 1995, Indonesia’s environmental regulatory agency established PROPER (Program for Pollution Control Evaluation and Rating), with the objective of creating “incentives for compliance through honor and shame.” Under the PROPER program, government regulators, using data from inspections and other sources, rate individual emitters who participate in the program. The results and process are vetted by an advisory panel that includes environmental organizations. The results are selectively made public through both a press conference and an Internet site. Two of the five “colour” ratings are for companies that exceed the standards required by law (a “gold” and a “green” rating). The other three ratings are for companies that do not comply with the standards required by law (black, blue and red).

A recent study that examined PROPER over time provides evidence that community pressure, negative media attention and other non-regulatory (market) factors, are major stimuli for improved environmental performance, but that increased environmental information to plant managers (i.e. managers learn more about problems through an environmental audit program) is also a significant factor. Thus, both external (community, media and market) and internal factors (valuable information gleaned from the audit) help explain why abatement activity takes place. The research seems to support the view that, for a variety of reasons, voluntary reporting programs can be a useful incentive for environmental improvements, even when the regulatory regimes are weak. The PROPER program has led to the establishment of a similar program in the


84. The following description of PROPER is a paraphrase from Afsah, Blackman and Ratunanda (footnote 82).

85. Ibid.

86. Ibid., pp. 12–14.

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Philippines,\(^8^7\) and the development of PROPER-like programs in China, Mexico, India, Colombia, Bangladesh and Thailand.\(^8^8\)

**Industry-led Voluntary Environmental Initiatives in Developing Countries**

A recent study comparing use of regulatory and private-sector-led environmental protection measures in Mexico suggests that in the “informal sector” (i.e. small firms with few pre-existing ties to the State, operating in pollution-intensive activities such as leather tanning, brick and tile making and metal working), peer monitoring can be a useful supplement to regulatory approaches, and that industry-led initiatives show considerable promise in addressing pollution problems.\(^8^9\) Author Allen Blackman’s research into the environmental impact of Mexico’s traditional brick-making kilns indicated that brick making is highly polluting, and yet for a variety of technical and political reasons, difficult to regulate. In these circumstances, industry-led monitoring initiatives may work well to buttress regulatory command-and-control process standards. In particular, Blackman says the following about private-sector-led initiatives:

Private sector-led initiatives would seem to enjoy a number of advantages over state-run programs. First, the willingness of the majority of the brickmakers ... to cooperate with the project suggests that private sector-led projects may be best suited to engage firms that by their nature are bound to be wary of sustained contact with regulatory authorities. Second, the enthusiasm that the ... Project generated among founders, participants and the public at large suggests that private sector-led projects may be able to draw more freely on public sympathy for environmentalism than top-down bureaucratic initiatives. And finally, the Projects’ success at consensus building among a diverse set of stakeholders suggests that private sector-led initiatives may be better able to sidestep the politics and bureaucracy that often plague public sector-led initiatives.\(^9^0\)

Blackman goes on to note, however, that the brick-making initiative would not have had as much success without governmental support.

For larger firms operating in developing countries, particularly those exporting to developed countries or attempting to attract investment from developed countries, participation in business-led voluntary initiatives that emanate from developed countries may be considered “the price of doing business.” For example, there is evidence to

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88. See Afshah, Blackman, and Ratunanda (footnote 82), p. 8.
90. Ibid., p. 16.
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suggest that the ISO 14001 Environmental Management Standard is increasing popular in Indonesia. A recent study suggests that industry representatives wish to comply with the standard to gain access to new markets and investment because compliance is demanded of them.91

NGO-led Voluntary Environmental Initiatives in Developing Countries

Commentators have suggested that, in the absence of effective regulatory environmental protection mechanisms, local citizens will seek other forms of “informal regulation” to address the problem. Local community associations, for example, may create contractural pacts directly with industries concerning such matters as emission controls or compensation.92 The incentive for firms to negotiate such pacts may come from a number of sources, including “social ostracism of the firm’s employees, the threat of physical violence, boycotting the firm’s products, and monitoring and publicizing the firm’s emissions.”93

In addition to this local, community-oriented approach to stimulating voluntary environmental protection from industry, the private sector in developing countries may also comply with voluntary environmental protection codes that are spearheaded and supported by environmental non-governmental organizations. Perhaps the most well known of these is the Forest Stewardship Council and its initiative for sustainable forestry practices, which is discussed earlier in this chapter and elsewhere in this volume. The FSC head office is in Mexico. Its organizational structure specifically includes members from developing countries (referred to as “the South”), in both economic and social positions.94 There are now more than 2 million hectares of FSC-certified forests in developing countries, including 884,000 in Bolivia, 600,000 in Brazil, 72,000 in Indonesia, 55,000 in Malaysia, 400,000 in Mexico, 14,000 in the Philippines, 41,000 in the Solomon Islands and 91,000 in Zimbabwe.95 While such programs operate in and apply to forestry activity in Canada, the United States and Europe, it is clear that they operate as adjuncts to regulatory structures pertaining to forestry management. The same is not necessarily true in developing countries, where FSC obligations and monitoring

94. For discussion of FSC’s organizational structure, particularly its General Assembly (which includes a social and indigenous chamber, an environmental chamber and an economic interest chamber, each with 33.3 percent of voting power in the General Assembly, and each subdivided into Northern and Southern sub-chambers), see *Forest Stewardship Council A.C. By-laws*, available at <www.fsc.org/keepout/content_areas/77/84/files/FSC_By_laws__revised_November_2002.PDF>.
95. *Forests Certified by FSC-Accredited Certification Bodies* (footnote 71). It should be noted that the independent non-profit Malaysian Timber Certification Council (MTCC), which has a board with government, non-governmental, industry and academic representatives, operates in a manner similar to FSC, and that the two organizations have entered into a collaboration. See “Good Fellers,” *The Economist*, January 27, 2001.
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may be the primary force for environmental protection, and regulatory action assumes a more secondary role.

Thus, while government, the private sector and NGOs have all set up voluntary environmental initiatives in developing countries, their role and importance may be quite different from what is common in developed countries. The challenge is finding the right set of incentives to stimulate good environmental behaviour in the absence of a strong regulatory presence. Evidence suggests that the incentives may come as much from community and media pressure, as from consumer and investor pressure (largely originating in developed countries). Proponents of “Western” voluntary initiatives operating in developing countries, which could be seen to have significant direct benefits to developed as opposed to developing countries, need to be sensitive to allegations that the programs are “imposing” (albeit via non-governmental, non-coercive instruments) Western interests and values on developing countries. The best response to this appears to be to fully and meaningfully involve developing country participants in establishing and operating the program, so that it is not perceived as an externally imposed initiative.

Human Rights and Worker Safety-Oriented Initiatives

For financial reasons, over the course of the 1980s and 1990s, much of the labour-intensive production of industries such as the clothing and shoe sectors migrated out of high-wage developed countries and into the low-wage developing economies of Central and South America and Asia. During that time and since, consumers in developed countries have been showing increased interest in the conditions under which the products they purchase are made, not just the quality of the products themselves. For example, a 1996 American survey reported that three quarters of U.S. shoppers would be willing to pay higher prices for apparel that had not been made by workers in oppressive working conditions.

In this context, “fair trading” or “ethical trading” voluntary initiatives have been developed to assure consumers that workers have not suffered in the making of particular products. More specifically, the initiatives stipulate standards for factory or agricultural workers in developing countries who produce goods for the developed world, stating that the workers should be fairly compensated for their labour and products, and have the opportunity to work under humane conditions. Typically, an item produced in conformity with the criteria established by a given initiative bears a label to communicate this fact to consumers in developed countries. Ultimately, the success of these initiatives depends almost entirely on the consumers, whose purchasing decisions drive the process.

96. For further discussion, see Gregory T. Rhone, John Stroud and Kernaghan Webb, “Gap Inc.’s Code of Conduct for Treatment of Overseas Workers,” Chapter 7, above.

97. As reported in “Dress Code: Stamping out Sweatshops,” The Economist, April 19, 1997, p. 28. Of course, surveys may not translate into purchases at the cash register.

98. A recent Environics International poll found that one in five respondents had “punished” a company in the previous year for failing to behave in a socially responsible manner, as reported in “Consumers Punishing Abusive Companies,” USA Today, April 1, 2001, p. 16.
The great variety of “fair trade” initiatives in the marketplace — some developed with the strong encouragement of government, some emanating from the private sector, others from non-governmental organizations — is indicative of the belief of these various parties that large numbers of consumers are concerned with the issues, and are looking for labels that indicate ethical behaviour. In some situations, the initiatives (and the groups that support them) are in direct competition. Ideally, the competition can breed a culture of constant evolution and improvement, as each player attempts to outperform the others. However, some argue that it can also cause problems for consumers, who face a barrage of somewhat confusing, all apparently legitimate programs. Of course, there is no guarantee that good programs (i.e. the most effective or most protective) will necessarily emerge victorious over the others.

Another important question is whether the programs actually do for workers in developing countries what they purport to do — that is, improve the quality of the lives of workers. It is possible to argue that to raise standards in any given developing country is to deprive that country of its competitive advantage (as was discussed above in regard to environmental issues). A counterargument could be made that the presence of a well-run factory that is subject to strict standards and monitoring will not only improve the lives of the workers concerned, but will also provide a model of good practice to the rest of that country. Others simply see the phenomenon of Western standards and monitoring as ineffective — a means of alleviating Western consumers’ guilty feelings. One writer expressed the issue this way:

Many in the South and in the trade unions in general suspect that “Codes of Conduct” and “independent monitoring” constitute but the most recent of all public relations gimmicks and privatization of enforcement of labor rights.99

On the other hand, when representatives of non-governmental organizations in developing countries participate in compliance monitoring exercises, and come away from the experience supportive of the initiatives in question, it certainly suggests that the programs have some merit.100 Research also suggests that when compliance verification is looked at more as a learning and empowering experience for workers, and not simply a commercial exercise carried out by outsiders, it is more rewarding in the long run.101

In contrast to the voluntary environmental initiatives examined above, which entail a wide variety of initiatives that apply to activities in both developed and developing countries, it is apparent that the phenomenon of fair trade initiatives pertaining to labour seems to have a distinct developing-country focus. In effect, there is


100. This was the experience of Magaly Pineda, of the Research Center for Feminist Action of the Dominican Republic, as related at a September 21, 1998, North-South Institute social labelling workshop in Toronto. The program review, An Independent Evaluation of Levi Strauss & Co.'s Code of Conduct Process: A Pilot Program in the Dominican Republic (August 1998), is available from the authors of this chapter.

little apparent consumer concern about the safety and human rights of workers in developed countries. While the perception may be wrong, it is assumed that government (and perhaps unions) are adequately protecting workers in developed countries, and that there is no need for companies to comply with voluntary codes of conduct for their developed-country workers and no need for non-governmental third parties to attest to that. On the other hand, there is considerable concern that there is no effective governmental presence to protect workers’ rights in developing countries, so that compliance with a code of conduct, particularly when attested to by a qualified independent third party, can become a proxy for effective regulatory protection in those jurisdictions.

The United States: Government-led Voluntary Ethical Trading Initiatives

In August 1996, U.S. President Clinton convened a task force of labour, human rights and consumer groups, and several major apparel makers to create the Apparel Industry Partnership (AIP). AIP sought to protect the rights of workers around the world, while providing consumers with the means to make informed choices about their clothing purchases. After eight months of negotiations, AIP presented its *Workplace Code of Conduct* and *Principles of Monitoring* to President Clinton on April 14, 1997. Companies participating in the AIP must implement a code of conduct that meets or exceeds the standards, and must also undergo internal and external monitoring. They also commit to remedying any problems revealed through the monitoring process and to releasing a public report of their performance. Despite hopes that the program would put an end to the companies’ significant image problems, the AIP and its corresponding monitoring body, the Fair Labor Association (FLA), have continued to be dogged by criticism — some of the most vocal emanating from U.S. college student associations — that the programs do not effectively protect overseas clothing workers.

Regardless, the program is now operating, and seems to have retained major private sector support and participation, as well as the support of labour, consumer and student organizations. In 2002, FLA revised its monitoring program so that FLA rather
than member companies select the compliance verifiers and the factories to be audited.\textsuperscript{107} The FLA also committed to greater transparency so that consumers and the public will have access to the results of factory audits, including the name of the FLA member company whose facility was audited, the country and region where the facility is located, the size of the facility and the type of product manufactured, areas of non-compliance and status of remediation. As of September 2002, 176 U.S. and Canadian universities had joined the FLA, and more than 1,100 university suppliers were affiliated with the FLA, as a result of university code of conduct requirements that companies manufacturing university-licensed products must participate in the FLA. The FLA has also accredited independent external monitoring organizations, including multinational and local commercial auditing firms, non-profit companies and several southern NGOs, such as COVERCO, an independent, Guatemala-based group that has conducted monitoring of a Liz Claiborne supplier.\textsuperscript{108} The U.S. government continues to provide major financial assistance for the program, most recently a $750,000 grant from the Department of State in support of Fair Labor’s external monitoring program.\textsuperscript{109}

United States: Industry Versus NGO-led Fair Trade Initiatives

While AIP’s multistakeholder approach has been developing, several other programs have also been taking shape. A U.S-based industry group, the American Apparel and Footwear Association first developed its standards in 1999, called the Worldwide Responsible Apparel Production (WRAP) Certification program.\textsuperscript{110} WRAP places responsibility for seeking and paying for certification in the hands of the factory owners.\textsuperscript{111} The WRAP Board includes major corporate members such as Sara Lee (Hanes, Leggs, Playtex, etc.), Vanity Fair Corporate (Lee, Wrangler and Chic Jeans), Kellwood (which produces private label goods for Wal-Mart), as well as former U.S. labour and government leaders, and one NGO representative. WRAP is also endorsed by maquiladora and manufacturers’ associations in a dozen developing countries. As of December 2002, WRAP had certified more than 330 factories in 32 countries as being in compliance with the WRAP Principles. According to the WRAP Web site, a total of 1,025 factories in 68 countries have registered to be certified. One report has concluded that “WRAP is generally considered to have the lowest code standards and the least thorough or transparent monitoring program.”\textsuperscript{112}

\textsuperscript{111} The following information derived from the WRAP Web site (see footnote 110) and the Maquila Solidarity Network (footnote 107).  
A number of student groups have placed their support behind the Workers’ Rights Consortium (WRC), officially launched in April 2000. Unlike FLA or WRAP, the WRC does not certify factories or brands. It carries out investigations (both proactive and in response to worker and third-party complaints) of factories producing for member universities. Investigations are carried out by joint investigative teams made up of WRC members and local NGO and labour organizations. As of November 22, 2002, 110 U.S. and Canadian universities were members of the WRC.

One of the most established labor code initiatives is Social Accountability 8000 (SA8000), developed by the New York-based charity Social Accountability International (SAI). SA8000 is a factory certification system based on the ISO management system model. SAI accredits compliance verification organizations to carry out factory audits. Accredited auditors are selected and paid for by the companies rather than by SAI. SAI was founded in 1997 as the Council on Economic Priorities Accreditation Agency to address the growing consumer concern with labour conditions. SAI’s affiliate, the Council on Economic Priorities, carried out studies on codes of conduct, finding them to be inconsistent and difficult to monitor. In response to these inadequacies, SA8000 was developed, using an international advisory board that includes experts from trade unions, businesses and NGOs. While not immune to criticism, the SA8000 approach has been generally recognized as one of the more rigorous labour-oriented code initiatives. As of December 31, 2002, there were 190 SA8000-certified facilities in 31 industries and 31 countries, employing 123,810 workers.

What is apparent is that despite government support and a comparatively transparent and inclusive process, the AIP/FLA initiative is still not universally accepted by manufacturers or student consumers as the most appropriate program for the promotion of their interests. Thus, the “honest broker” image that is sometimes bestowed on government-supported programs has not, at least to date, prevented others from launching parallel programs.

**European Government-led Ethical Trading Voluntary Initiatives**

Although no EU-led ethical trade voluntary programs have emerged to parallel the European Eco-label or the Eco-Management and Audit Scheme (discussed earlier in the chapter), the European Parliament has expressed support for a new European code of conduct for ethical business. The proposal, made by a British Labour European MP, called for voluntary codes of conduct to be adopted by companies doing business in developing countries. The proposal also called for independent monitoring and verification, a new legal base for a statutory European framework governing companies’ operations.

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114. Information from the Maquila Solidarity Network (footnote 107).
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operations worldwide, the setting up of an independent European monitoring and verification body with public hearings in the European Parliament, and a mechanism to cut off European funding when companies breach fundamental rights.\textsuperscript{117} To date, the proposed initiative has not materialized.

In a manner similar to the U.S. government’s support of the Apparel Industry Partnership/Fair Labor Initiative (discussed above), the government of the United Kingdom has supported the Ethical Trading Initiative (ETI), particularly at the financial level. Supporters of ETI have noted that “governments have become aware that globalization can create losers both in the developing and developed worlds — possibly jeopardising fresh steps to liberalise world trade.”\textsuperscript{118} ETI grew from this context. ETI was established in the United Kingdom in January 1998 and describes itself as an alliance of companies, NGOs and trade union organizations. Substantial operations funding has come from a £530,000 grant from the U.K. Department of International Development, as well as contributions from its membership,\textsuperscript{119} which includes a significant number of large, U.K.-based retail chains, food and clothing manufacturers and importers, NGOs and trade union coalitions.\textsuperscript{120} Government, too, has involved itself by guaranteeing at least one bank loan in support of an ETI project.\textsuperscript{121} ETI has taken a relaxed, incremental approach to gaining acceptance, encouraging company input into the development of ethical trade benchmarks and their implementation. Had they followed a more prescriptive approach, the argument goes, ETI risked having commercial buy-in from companies holding a marginal part of the market. As it stands, ETI claims to have buy-in from companies with a total annual turnover of £50 billion. ETI is apparently recognizing the value of gradual change on a large scale, over immediate change on a small scale.\textsuperscript{122}

European Business-Led Ethical Trading Initiatives

Perhaps the best known private sector ethical trading initiative to emerge from Europe is that of The Body Shop, a beauty products retail chain. The Body Shop has committed itself to developing and maintaining trading relationships (with customers, franchisees and suppliers) that are commercially viable, mutually beneficial and based on trust and respect.\textsuperscript{123} This includes commitments to safe and healthy working environments, fair wages and non-discrimination, use of environmentally sustainable resources whenever possible, and no use of animals in testing of Body Shop products.\textsuperscript{124}

\begin{itemize}
  \item \textsuperscript{117} Ibid.
  \item \textsuperscript{119} Ibid., p. 9.
  \item \textsuperscript{120} Membership list is available at <www.ethicaltrade.org>.
  \item \textsuperscript{121} “Divine Moment for Fair-trade Crusader,” \textit{The Express} (U.K.), October 8, 1999.
  \item \textsuperscript{122} This discussion admittedly does not do justice to the other fair trading programs in Europe. See, e.g., the Clean Clothes Campaign, at <www.cleanclothes.org>.
  \item \textsuperscript{124} Ibid.
\end{itemize}

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Community Trade is a special purchasing program to support long-term sustainable trading relationships with communities in need.\(^{125}\) The goal is to “help create livelihoods, and to explore a trade-based approach to supporting sustainable development by sourcing ingredients and accessories directly from socially and economically marginalised producer communities.”\(^ {126}\)

The Body Shop releases Values Reports and conducts independent third-party social, environmental and animal protection auditing.\(^ {127}\) In 1997, the *Body Shop Values Report* scored the highest rating for the second year running, evaluated by SustainAbility for the United Nations Environmental Programme. As mentioned earlier, The Body Shop is also a member of CERES, the global sustainability reporting program.

### European NGO-led Ethical Trading Initiatives

The pioneering Max Havelaar Foundation, a non-profit NGO based in the Netherlands, was established in 1988 to promote a seal of approval for ethically traded coffee. The Foundation bases its program on some fundamental marketplace practicalities: to be successful, a label must be visible and accessible to consumers, and the program should operate so that farmers’ interests “coincide with the long-term interests of the consumer, trade and industry” rather than on charitable principles.\(^ {128}\) Under the program, a minimum price is set, one that is well above what the open commodities markets are tolerating at any given time. Of course, consumers, the final participants in this private rule-making structure, ultimately assume the cost. The consumer market’s acceptance of the label, meanwhile, can perhaps fairly be described as moderate. Recent indications are that acceptance is steadily rising, with 3.3 million kg of Max Havelaar-labelled coffee having been sold in 1998, a seven percent increase over 1997; still, this constitutes only three percent of the Dutch coffee market.\(^ {129}\)

While the Netherlands branch of Max Havelaar was the first major fair trading scheme in Europe, it is certainly no longer alone. Similar labelling organizations now exist in 14 European countries, as well as in Canada, the United States and Japan. They are grouped under an umbrella body called Fairtrade Labelling Organizations International, headquartered in Bonn, Germany.\(^ {130}\) The group focusses efforts on promoting fair trade, in particular to the EU and national governments, to demonstrate to politicians the viability of labelling as a consumer-oriented market option.
Developing Countries: Ethical Trading Initiatives

Most human rights and labour-oriented initiatives originate in developed countries. Rugmark, however, is an example of one that originated in the very country whose people it was designed to help. Rugmark was started in India by the South Asia Coalition on Child Servitude in 1989. A producing-marketing partnership was established with German non-governmental organizations in 1994. The Rugmark Foundation provides for the monitoring of child labour in the carpet weaving industries of that country. The initiative has since expanded to Nepal and Pakistan. Rugmark’s national branches in these exporting countries are responsible for establishing locally applicable criteria, and carrying out monitoring and inspection of registered looms against those criteria. Meanwhile, Rugmark Foundation offices have been set up in the United States and Germany, the two largest importers of handwoven carpets.

A carpet bearing the Rugmark label purports to ensure, among other things, that no child younger than 14 was involved in manufacturing it. In addition, import and export levies are employed to finance schools for former labourers. Rugmark labels carry individual serial numbers to ensure a clear chain of custody from the loom to the consumer. Clearly, programs such as Rugmark are not a panacea for unfortunate conditions in developing countries. Indeed, no social labelling scheme can be, because the presence of large numbers of workers who are willing to do labour-intensive tasks for low wages is the primary competitive advantage of these countries. The key would appear to be to design rules that permit them to capitalize upon this competitive advantage, while at the same time eliminating the worst forms of abuse.

It is clear that market-driven ethical trading initiatives such as those discussed above will never represent a comprehensive solution to problems associated with poor worker treatment in developing countries. Their weaknesses are self-evident: only workers in participating factories benefit, factories not engaged in the manufacture of export-oriented products will be outside of the reach of the programs, and the programs themselves depend on consumers making the purchases. It is also self-evident that, first and foremost, there must be adequate laws and enforcement of those laws. Until such legal regimes are effectively in place, voluntary ethical trading initiatives with third-party monitoring represent a prototype for the legal regimes that, it is hoped, will eventually materialize. The proliferation of such programs around the world, and the support of

132. For more information, see <www.rugmark.org>.
133. The Kaleen label, administered by a government/industry organization called the Carpet Export Promotion Council, purports to take similar steps towards improving the lot of children in the Indian carpet weaving industry. Promoted as the “Hallmark of Commitment to Child Welfare,” the label assures the consumer that a given carpet has been made by a company committed to eliminating child labour, but is generally considered as taking a much more moderate approach than Rugmark to dealing with the problem. (A Rugmark U.S.A. spokesperson stated in conversation with the authors that Kaleen performs no monitoring at all.) It is, of course, a product of a government that has vigorously complained of outsiders’ standards and other measures creating barriers to trade.
134. This having been said, all other things being equal, a progressive factory owner who treats workers well may not only increase his or her ability to attract good workers, but may also put pressure on other factory owners to provide similar improved conditions, in an effort to maintain the supply of good workers.

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governments for them in several jurisdictions, suggests recognition of the value of these programs, as one small step toward a more comprehensive and effective solution.

Perhaps the most significant development in the area of social labelling has been increased recognition of the importance of, and actual participation by, developing country workers, NGOs, academics and others in the monitoring of compliance with labour-oriented code programs. The potential for learning and empowerment that can take place through such participation is significant, and suggests the need to move away from a single-focussed conventional commercial auditing approach to a more hybrid model involving local actors.

Approaches to Consumer Protection in the Conventional Marketplace

As the following discussion makes clear, market-oriented voluntary approaches to consumer protection have been used for many years. Their development seems to stem largely from private sector recognition that consumers are often looking for more than the basic protections provided through the law, and that it is good business to provide protections to consumers that go beyond those required by law. In addition, businesses develop voluntary consumer protection approaches to stave off new laws. Finally, there is an evident relationship between the existence of adequate consumer protection laws and the development of voluntary consumer protections — that is, businesses are more likely to put effective voluntary approaches in place when there is a strong legal framework.

The United States: Two Examples of Private Consumer Protection

In the United States, governments engage in considerable consumer protection activity through well-established regulatory regimes at both the federal and state levels — activity that has spurred private sector consumer protection initiatives. However, it appears that governments have not directly developed voluntary consumer protection approaches. The late 19th and early 20th centuries saw increased public and governmental concern with misleading advertising and deceptive marketing claims. This led to the introduction of more aggressive misleading advertising legislation, and the response by some businesses to organize into “vigilance committees” to self-regulate and encourage good advertising practices. As the movement grew and shifted from a focus on misleading advertising to more general concern with ethical business practices, its name changed, and in 1912 the Better Business Bureau was born.

The entity commonly known to consumers as the Better Business Bureau actually consists of hundreds of local BBB chapters, groups of local businesses that have

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135. See, in particular, discussions in Bendell (footnote 101), and Maquila Solidarity Network (footnote 112).
136. *Conventional* refers to the non-on-line marketplace. Electronic commerce presents its own set of issues, as we note below, and is thus dealt with separately.
137. This historical material is culled from *History and Traditions* (1996), available at <www.bosbbb.org/about/history.asp>.

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licensed the use of the name and the familiar torch logo from the umbrella group, the Council of Better Business Bureaus, Inc. (CBBB), based in Arlington, Virginia.138 CBBB and the BBB chapters are supported by more than 250,000 businesses in the United States. Virtually any kind of business that deals with consumers in any way may join the organization.139 The local BBBS provide several services, including information about individual companies, consumer complaint handling and dispute resolution. Companies that agree to adhere to the BBB standards of ethical behaviour, submit to its dispute resolution process, and pay BBB membership dues are entitled to display the BBB insignia on their premises and in their promotional material. As well, at the national level, the CBBB runs a program to ensure integrity in advertising.

The BBBS garner considerable respect from government and business groups, and millions of consumers continue to call upon the BBBS as the first line of protection, whether to prevent an unsatisfying transaction from occurring (by checking on a company before doing business with it) or to complain when one does. It is true that the rules established by the BBBS in the marketplace may be viewed by some as weak — in the sense that they may not be consistently applied and enforced, and that businesses are not required to become members. Nevertheless, the program is so well branded as a leader in ethical market conduct that a tremendous number of businesses continue to see value in membership. This is a kind of regulation through mutual reinforcement of reputations: the BBBS help member businesses demonstrate that they abide by rules of ethical market conduct; meanwhile, good member businesses help reinforce the public view of BBBS. While the BBBS have been the subject of some criticism, focussing in particular on the variable quality of service from one chapter to another,140 it is clear that BBBS perform a useful front-line function, ensuring ethical standards in business and providing information on reliable merchants to consumers.141

Another century-old veteran in the marketing of integrity arose in the publishing world: Good Housekeeping magazine and its Good Housekeeping Seal of Approval, which first appeared in the magazine in 1909.142 Under the program, a manufacturer wishing to advertise in the magazine requests approval for its products. If the product is approved, then it may carry the seal, and the magazine promises refunds to unsatisfied consumers who are not satisfied with the product.
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customers. In exchange, the manufacturer commits to purchasing a set amount of advertising in the magazine. Like the BBB system, the Seal represents a double commitment from both the company and from Good Housekeeping. As long as the promise of the warranty is kept, then the scheme appears to be a model combination of ethical marketing and good business sense.

There is a symbiotic relation between government and business-driven initiatives such as the BBB and the Good Housekeeping Seal of Approval, in the sense that these sorts of private sector initiatives provide up-front information to consumers about product or merchant reliability, set and apply standards of ethical business behaviour, and provide a form of redress when problems arise, thus decreasing the need for government intervention. But when an organization such as the BBB is confronted with a problem deserving of legal action (for example, when an advertiser refuses to abide by a BBB National Advertising Division decision), the matter is often passed on to the Federal Trade Commission (FTC). The then Chairman of the FTC stated publicly that self-regulation can serve as an important complement to FTC consumer protection enforcement efforts, and in that regard referred to the BBB’s advertising self-regulatory program as “an effective model.”

The European Union: EU-led Voluntary Consumer Protection Initiatives

As can readily be understood, in the European internal market, there is tremendous potential for cross-border consumer problems to arise. In 1998, the European Commission adopted a “Communication” on the out-of-court settlement of consumer disputes, with the goal of encouraging and facilitating the settling of consumer disputes before going to court. The Communication recognizes the benefit that would accrue to Europe’s cross-border consumers if the tremendous variety of out-of-court systems for consumers already in operation across Europe were brought together in a network.

The Communication thus established the principles to which out-of-court settlement bodies would have to adhere in order to participate in the network: independence, transparency, respect of the adversarial principle, effectiveness, legality, liberty and representation. Member states soon began to identify those bodies that met

143. The Good Housekeeping Seal of Approval itself does not appear to denote that the Good Housekeeping Institute has tested the product, simply that the purchase price will be refunded if the product proves defective within two years. The Institute does test products, but the indicator of such testing is a different logo: the GH Report Stamp. See The GH Institute Reports, available at <http://magazines.ivillage.com/goodhousekeeping/consumer/institute/articles/0,,284511_290570-2,00.html>.


145. Ibid.


147. Ibid.

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these basic guarantees. In 2001, the European Extra-Judicial Network (EEJ-NET) entered a pilot phase, having brought together the acceptable out-of-court settlement bodies, coupled with a linked centralized system for communication and assistance (a clearing house) in each participating jurisdiction. Reflecting the widely diverging approaches in place in each jurisdiction (and the degree of involvement of centralized government consumer agencies), 20 out-of-court bodies were identified (some public, some private) in the United Kingdom, while in Germany there are 203, only 1 in Denmark (the government-funded Consumer Complaints Board) and 2 in France. A complement to this process is FIN-NET, which came into effect on February 1, 2001. FIN-NET is an out-of-court complaints network for financial services to help businesses and consumers resolve disputes in the internal market in a fast and efficient manner. In the United Kingdom, the Financial Ombudsman Service (FOS) is identified. FOS is funded by levies on the participating companies and free to the consumer; it was created by statute.

EEJ-NET and FIN-NET can be seen as ambitious schemes to link and rationalize public and private non-judicial bodies providing recourse for consumers, a process that has particular relevance in an internal market consisting of many jurisdictions with widely divergent regulatory, market and social cultures and tremendous variation in consumer redress approaches. The private and voluntary consumer redress schemes that are part of the process are all vetted to ensure that they meet minimum standards, and undoubtedly those that do not meet the threshold will be under strong pressure to make the appropriate adjustments. In a way, the resulting integration and rationalization of public and private systems can be seen as a possible model, and logical evolution, for private voluntary systems (i.e. their acceptance by and conformity to governmental authorities and standards). A key challenge is determining when to “let all flowers bloom” (i.e. encourage the development of voluntary approaches with little externally imposed structure) and when to begin culling, trimming and insisting on minimum standards.

European Union: National Government-led Voluntary Consumer Protection Model

The United Kingdom is witnessing a process of revising a regulatory process that was quite innovative when first proposed in the 1970s. The Office of Fair Trading (OFT) is the United Kingdom’s consumer protection agency and competition regulator.


151. Ibid.

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One of the duties of its director general has been to encourage trade and professional associations to establish codes of practices to promote the interests of consumers, and many such codes have been put in place. However, in the past few years the OFT has concluded that systemic problems with the codes have made many of them ineffective: many of them remain little known among the firms they are supposed to be regulating, some have tended to adopt lowest common denominator standards, and their disciplinary procedures have caused difficulties for the associations (in the sense that expulsion of non-compliant members would sometimes result in weakening those associations).152

In an attempt to resolve these problems, in 1999, the U.K. Department of Trade and Industry (to which OFT is responsible) proposed a new approach to consumer protection,153 under which the OFT would bestow a Seal of Approval on codes that would adhere to a set of “core principles,” including truthful advertising, clear and adequate pre-contractual information, and the availability of low-cost third-party redress.154 Before receipt of the Seal of Approval, a code’s sponsors must establish a supervisory body with wide-ranging representation, ensure compliance with the code, and publish reports on the code’s successes and failures.155 A program for approval and promotion of codes of conduct is now in place as part of the UK Enterprise Act, 2002.156 It is interesting to note the parallels between the development at the EU level of the EEJ-NET, whereby qualifying public and private consumer redress schemes must meet certain basic standards, and the initiatives of the Department of Trade and Industry to require domestic voluntary codes schemes to meet certain basic standards.

**EU-level Private Sector-led Voluntary Consumer Protection Scheme**

In 1992, the European Advertising Standards Alliance was created, in response to a direct challenge from the then EU Competition Commissioner, to show how the issues affecting advertising in the Single Market could be successfully dealt with through cooperation rather than detailed legislation.157 The national self-regulatory bodies, with the support of the respective parts of the European advertising industry (i.e. the advertisers, the agencies and the media), then established the Alliance. The aims of the Alliance are to promote and support the development of effective self-regulation and to coordinate the handling of cross-border complaints and to provide information on

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154. Ibid., p. 37.

155. Ibid.

156. See <www.oft.gov.uk/Business/Codes/default.htm>.


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advertising self-regulation in Europe. Cross-border consumer complaints are adjudicated according to the rules of the competent Alliance member in the country of origin of the medium concerned, but the process is coordinated through the Alliance. The results of cross-border complaints are published in a publicly available quarterly report. For example, a U.K. consumer complained to the U.K. Advertising Standards Authority (ASA) about a direct mailing from a Dutch advertiser. ASA referred the complaint to the Dutch equivalent of the ASA (the SRC NL). SRC contacted the advertiser, who indicated that the advertisement had been stopped and that in the future the SRC would contact the ASA in advance of publication to discuss mailing content.158

The Alliance would appear to be an example of “regulation by raised eyebrow,” where the threat of legislative action prompts industry self-regulatory action. Notably, there appears to be little interest in developing a pan-European advertising code, on the grounds that each jurisdiction has its own unique cultural, economic, legal and social context.159

European Union: National Level Private Sector-led Consumer Protection Schemes

Although the U.K. Office of Fair Trading is playing an increasingly supportive role in promoting voluntary codes, it is worth noting that a number of very successful voluntary codes have operated with little support or attention from the OFT. The U.K. Press Complaints Commission and the U.K. Advertising Standards Authority are decades-old examples of self-regulatory initiatives offering an adjudicatory forum for members of the public who are unhappy with the conduct of a member of the respective industry.160 Both organizations emphasize the importance of transparency and public understanding of their operation. Both have been aided in this task by the advent of the Internet: their respective Web sites abound in such information as complete details regarding previous adjudications, guides to the adjudicative process, and reports providing statistics on the nature of complaints and how they have been handled.

Developing Countries: Voluntary Consumer Protection Initiatives

Strongly enforced consumer protection laws are an uncommon phenomenon in developing countries. Misleading advertising may be prevalent and product safety standards lax, but rectifying the situation may not be a high priority for authorities there. In such a situation, there may therefore be a role for non-governmental entities (business or consumer) in establishing at least some baseline standards for business. This may come about in a number of ways. It may be a natural byproduct of globalization; international companies entering developing countries may sometimes bring their own

158. Case No. 233, discussed in Alliance Update 16 (February 2000), p. 15.
160. See <www.pcc.org.uk> and <www.asa.org.uk>. It should be noted that, as a result of regulations introduced in 1998, the ASA can now refer complaints to the Office of Fair Trading for possible injunctive relief. See discussion in Webb and Morrison, “The Law and Voluntary Codes,” Chapter 5, above.

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standards, which can raise the bar for local companies, who will have to compete to survive.\textsuperscript{161} Alternatively, the pressure may come from within, from local groups seeking to improve the ethical conduct of businesses.\textsuperscript{162} For example, within six months of the first consumer organization being established in India (in 1966), the Fair Trade Practices Association was established by the private sector.\textsuperscript{163} Or, it may come from outside groups. At least one group, Consumers International, has established an international code of business ethics, which is intended to be as applicable in the developing world as in the developed world.\textsuperscript{164} In any of these cases, given the reluctance or inability of governmental authorities to act, there is definitely a place for others to fill the void.

Studies also suggest that the introduction of effective consumer protection legislation in developing countries can be an important stimulus for self-regulatory activity by the private sector. A study of business self-regulation and consumer protection in India concludes that there was an increased amount of self-regulation by the public as well as by the private corporate sector as a result of the enactment and implementation of the \textit{Consumer Protection Act, 1986}.\textsuperscript{165} The author of that study suggests that mounting pressure by consumer organizations and the growing number of cases filed by consumers before the publicly financed quasijudicial Consumer Disputes Redressal Agencies (established pursuant to the 1986 legislation) have stimulated the private sector to become more socially accountable. For example, the enactment of the legislation

...had a visible effect on the CFBP [the Council for Fair Business Practices] and its member businessmen. In the same month when the Act came into being, the CFBP and the Rotary Club jointly organized a workshop on the Consumer Protection Bill and the consensus was that “the business community should think of ways and means to prevent further doses of government legislation.”\textsuperscript{166}

\textsuperscript{161} \textit{New York Times} columnist Thomas L. Friedman recently discussed at length the popularity of U.S. franchise restaurants in some non-Western countries. The attraction of such establishments, he noted, included “a clean bathroom, international sanitation standards, smiling service and quality controls — all at a cheap price they could afford.” See T. Friedman, \textit{The Lexus and the Olive Tree} (New York: Anchor Books, 2000), p. 293. The phenomenon of Western companies offering their services to developing countries is not an undiluted good, however; witness U.S. cigarette companies increasing their marketing in developing countries in order to compensate for declining sales at home.


\textsuperscript{164} See the Consumers International Web site, <www.consumersinternational.org>. It must be admitted that the code does not seem to have experienced any significant take-up among international businesses.

\textsuperscript{165} Singh (footnote 163).

\textsuperscript{166} Ibid., p. 19. In the context of the author’s discussion, this reaction “to prevent further doses of government legislation” seems to be intended to indicate a desire by the private sector to constructively resolve consumer disputes before they go to the public redress institutions, not simply to engage in rearguard actions against new legislation.

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Thus, it would appear that voluntary consumer protection approaches may be developed and be particularly important in developing countries where the regulatory system is weak, but that the introduction and implementation of consumer protection legislation in those countries may also stimulate voluntary private sector consumer protection activity.

On-line Consumer Protection, Including Protection of Consumer Privacy

Electronic commerce is an area in which innovative voluntary approaches to consumer protection may be particularly well suited. The increased ability to use the Internet to search for and purchase goods and services from merchants located both locally and around the world represents a tantalizing prospect full of potential advantages for consumers.\(^{167}\) There is the potential for enhanced consumer convenience, increased access to information about products and services, improved choice, and cheaper prices. This potential, if realized, will also benefit merchants. In particular, small and medium-sized businesses may be able to expand their markets substantially through e-commerce applications, unencumbered by conventional expenses associated with building and operating new facilities.

However, the on-line purchasing experience is considerably different from the conventional “off-line” experience of a consumer buying an item at a “bricks and mortar” establishment. Instead of a consumer directly seeing, touching and feeling products and services he or she wishes to buy, and thereby judging the appropriateness of the product or service at the time of sale (and similar judgments concerning the reliability of the merchant), the on-line consumer is more dependent on information-technology-based substitutes for appraising products and the reliability of merchants.\(^{168}\) When dealing with an on-line merchant, there also needs to be increased attention paid to issues of delivery and return, what consumer information is gathered, how it is used, held and when it is disclosed to third parties, and techniques for dealing with consumer concerns should problems arise. For all of these reasons, consumers have consistently expressed reservations concerning on-line purchases,\(^{169}\) and to date the amount of business activity undertaken over the Internet has been relatively low, compared to on-line business-to-business activity.

\(^{167}\) It should be acknowledged that consumer access to computers and the Internet, varies widely from jurisdiction to jurisdiction. Consumers in developing countries are at a particular disadvantage in this regard.

\(^{168}\) It is true that on-line merchants are also at a disadvantage in terms of assessing the reliability and honesty of their customers. E-commerce consumer security standards can also be of assistance to merchants.

\(^{169}\) See, e.g., a 1999 Consumers International survey revealing that sites were hard to find, product choice was limited, researchers had to call to find out whether the retailer delivered in their own country, poor information was provided, researchers were sometimes re-routed to other sites, the price of an item was sometimes difficult to evaluate, delivery was frequently unreliable, receipts were provided less than 50 percent of the time, seldom was there mention of applicable law, and crucial contract terms were frequently missing. Privacy was another serious concern. See Consumers International, Consumers@Shopping: An International Comparative Study of Internet Shopping (London: Consumers International, September 1999). See also a 2001 update of the study, showing similar results. See also a report of the National Consumer Council (U.K.), E-commerce and Consumer Protection, (London: National Consumer Council, August 2000), available at <www.ncc.org.uk/pubs/pdf/e-commerce.pdf>.

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In apparent recognition of both the differences between the off-line and on-line consumer experiences, as well as the significant potential benefit of e-commerce to consumers and merchants alike, intergovernmental organizations, governments, the private sector, non-governmental organizations and standards organizations have each variously attempted to develop solutions to problems associated with on-line purchasing activity. The result has been a proliferation of voluntary approaches, all variously attempting to protect consumers, including principles and guidelines, merchant reliability codes, seal and trustmark programs, complaints-handling and money-back guarantee services, third-party mediation and dispute resolution initiatives, escrow/insurance and credit card charge-back programs, and information initiatives.

The focus of attention here is on a selection of key merchant reliability and privacy voluntary code, seal and trustmark initiatives being developed in the United States and Europe, as well as in developing countries.
The United States: Government-led Voluntary On-line Consumer Initiatives

For the most part, American governments have allowed the private sector to take the lead in developing voluntary approaches to on-line consumer protection, but this has not meant that government agencies have not been active in identifying key issues and concerns, monitoring the progress of private sector initiatives, and in certain cases, threatening legislative action when private regulation has not proven sufficient. In September 2000, following a conference held jointly by the Federal Trade Commission and the Department of Commerce on consumer protection in the global e-commerce marketplace, the FTC released a report that, among other things, encouraged continued development of industry programs that better inform consumers and prevent disputes. Industry initiatives that address consumer concerns, such as certification programs, rating systems, codes of conduct and escrow and insurance programs, were described as key to the continued growth of e-commerce.

On the other hand, with regard to on-line consumer privacy, in May 2000, the FTC recommended congressional action to protect on-line consumers’ personal information. An FTC Web survey revealed that only 20 percent of the busiest commercial sites had implemented all four of the basic fair information practices that underlie personal information protection (notice, choice, access and security). Although the FTC praised industry self-regulatory practices, only 8 percent of sites in the random sample, and 45 percent of sites in the most popular group, displayed a privacy seal. As a result, the FTC concluded that self-regulatory efforts alone cannot ensure that the on-line marketplace as a whole will emulate standards adopted by industry. The FTC noted that industry initiatives should continue to play an important role within any statutory structure and widely adopted seal programs could be an important component of that effort. “While the Commission applauds the efforts by the private sector to address the issue of online privacy,” said then Chairman Robert Pitofsky, “the survey results show that such efforts have not been enough.” As a result, the FTC recommended that Congress enact legislation to ensure a minimum level of privacy protection for on-line consumers, establishing “basic standards of practice for the collection of information

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online.”\textsuperscript{181} In the meantime, a “safe harbour” approach has been adopted by the FTC, as discussed in Chapter 8.

\textbf{U.S. Private Sector-led Voluntary On-line Consumer Initiatives}

As mentioned in the introduction to this section, there has been a veritable explosion of voluntary on-line consumer protection initiatives introduced by the private sector in the United States and elsewhere. In this section, we focus on only a handful of the better known ones.

BBBOnLine Inc., a wholly owned subsidiary of the Council of Better Business Bureaus, Inc., has adapted old rules to a new medium and adopted new rules when that medium has created new problems.\textsuperscript{182} Through its Reliability Program, BBBOnLine applies BBB’s traditional roles — advertising regulation, information provision, merchant certification and dispute resolution — to the field of electronic commerce. At the same time, BBBOnLine has also attempted to address consumers’ new concerns regarding the fair handling of their personal information through its Privacy Program and its Kid’s Privacy Program — the latter essentially providing assurances that personal information will not be solicited (without parents’ permission) from minors surfing on-line.\textsuperscript{183} Businesses wishing to participate in these programs agree to adhere to a given set of rules (and, in the case of the two privacy programs, undergo an audit of their Web sites). In return, they are permitted to display a logo or seal that informs the consumer of their adherence to the program. When the consumer clicks on the logo, he or she is brought to the BBBOnLine site, where a profile of the company is available. BBBOnLine has marketed the virtues of these programs to the public and the business community, and now claims that nearly 15,000 Web sites have qualified to display one or both of the BBBOnLine trustmarks.\textsuperscript{184}

Perhaps spurred on by this success, BBBOnLine has added a \textit{Code of Online Business Practices} to its set of voluntary mechanisms.\textsuperscript{185} The Code was introduced in November 2000, after a year-long drafting and consultation process during which more than 1000 comments were received from consumer, business, BBB and government representatives. The five principles that underlie the Code are truthful and accurate communications, adequate and upfront disclosure about the business and its goods and services, safe and secure personal information practices, appropriate consumer redress should things go wrong, and special protections for children.\textsuperscript{186} At the time of the principles’ introduction, an FTC Commissioner stated, “The Commission is active in providing baseline standards to protect consumers through law enforcement efforts and

\textsuperscript{181} Ibid.

\textsuperscript{182} See the BBBOnLine Web site, <www.bbbonline.org>.

\textsuperscript{183} See <www.bbbonline.org/privacy/kid.asp>.


\textsuperscript{185} The Code is available at <www.bbbonline.org/code/code.asp>.

other activities. Accordingly, I welcome the BBB’s initiative to give businesses the tools to provide confidence to consumers shopping online."\(^{187}\)

In the field of privacy protection, there are many other codes and trustmarks in addition to BBBOnline’s initiative. Another prominent program is Truste, and it too is entirely privately funded. Still other programs have been developed to compete in the on-line consumer protection arena. Webtrust is a product of the American Institute of Certified Public Accountants in collaboration with the Canadian Institute of Chartered Accountants. It distinguishes itself from BBBOnline by undertaking very thorough and costly audits with client companies.\(^{188}\) Clicknsettle offers an automated program designed to help parties reach monetary settlements, particularly in insurance-related disputes.\(^{189}\) Squaretrade provides on-line mediation services to consumers.\(^{190}\) These initiatives all take different approaches, but all are efforts by American business to self-regulate and thereby assure consumers that their concerns about electronic commerce can be met — with a minimum of government intervention.

As discussed earlier, the FTC continues to closely monitor issues associated with consumer protection in the on-line context, holding workshops, issuing discussion papers, outlining basic acceptable practices, and recommending to Congress that legislation be introduced when they feel that self-regulatory approaches have not been sufficient. In effect, continuing dialogue is taking place between the FTC, the business community and consumers about what constitutes adequate consumer protection in the on-line context. The FTC, while apparently predisposed towards market-based private regulatory solutions, is not shy about recommending legislation when it feels that business has not met the challenge. The fact that the FTC has done so with regard to personal information protection could very well have a salutary effect on self-regulatory on-line business practices in general.

European Union: Voluntary Online Consumer Initiatives

Government-led or Supported Initiatives

EU-Level

With the exception of personal information protection (in the case of which all member states have been required by an EU directive to put legislation in place\(^{191}\)), the EU has so far resisted the temptation to regulate consumer protection in e-commerce. As with the American federal government, the European Commission has actively encouraged the development of effective voluntary approaches. In this regard, the Commission has established the eConfidence Forum, which includes as its main

\(^{187}\) Ibid.
\(^{188}\) See <http://webtrust.org>.
\(^{189}\) See <www.clicknsettle.com>.
\(^{190}\) See <www.squaretrade.com>.
\(^{191}\) See Colin J. Bennett, “Privacy Self-Regulation in a Global Economy: A Race to the Top, the Bottom or Somewhere Else?” Chapter 8, above.
components the promotion of high standards of good business practices (e.g. codes of conduct, trust marks, complaint settlement procedures), as well as easy and affordable access to third-party alternative dispute resolution systems, especially for cross-border disputes. The Forum has also been used to support the work of the Commission’s eConfidence group of stakeholders, which is working with the Commission to develop general principles that, if necessary, could be applied to codes of conduct and trust mark schemes by accreditation bodies in EU member states. In late 2001, a joint European Consumers’ Organisation (BEUC) and industry program was announced, and the European Commission indicated its intention to promulgate a resolution concerning it. Essentially, it is similar to the TrustUK model (see below) — that is, it is a “seal of seals” initiative to endorse codes of conduct and trustmark schemes covering on-line shopping.

EU Member State Government-Supported Voluntary On-line Consumer Initiatives

While government-supported voluntary on-line consumer protection schemes are operating in several EU jurisdictions, discussion here focusses on the experience in the United Kingdom. The U.K. government, and in particular the Department of Trade and Industry, has indicated that it believes that codes and conduct and alternative dispute resolution have an important contribution to make to consumer confidence in e-commerce. The U.K. government has strongly supported the establishment of TrustUK, a private sector body that involves the participation of business, consumer and regulatory organizations in approving e-commerce codes. The U.K. government has also indicated that it is a priority to develop a way of linking such national initiatives at the EU level.

Industry-initiated Voluntary On-line Consumer Initiatives

As mentioned, the TrustUK scheme is a private sector initiative supported by government. Under the program, promoters of codes of practices and seal programs (such as the former Web Trader program, for example) may submit their own consumer protection programs to TrustUK. Those that meet the criteria will be able to carry the TrustUK logo. This sort of “seal of seals” program is designed to provide consumers with an extra level of assurance of the quality of a given voluntary program. TrustUK approved the on-line codes of the former “Which? Web Trader” (a voluntary approach initiated by the U.K. Consumers Association, which is discussed below), the U.K. Direct Marketing Association, and the Association of British Travel Agents.

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192. Information in this section has been derived from the eConfidence Web site, <http://econfidence.jrc.it>.
193. A second draft is available from the eConfidence Web site, ibid.
NGO-initiated Voluntary Online Consumer Initiatives

Launched in July 1999 and closed at the end of 2002, the “Which? Web Trader” on-line seal program of the U.K. Consumers’ Association was a good example of a voluntary e-commerce consumer protection initiative run by a non-governmental organization. The program operated in conjunction with Which?, the Association’s publication for consumers. The “Which? Web Trader” scheme was a program designed to ensure that consumers get a fair deal and to protect them when things go wrong. Merchants in the United Kingdom who agreed to meet and abide by the Web Trader Code of Practice could display the Web Trader logo. The program was free for participating merchants. When the Consumers’ Association received complaints from consumers about the service from a merchant displaying the Web Trader logo, it investigated and could withdraw permission to use the logo (following a procedure that allowed merchants to explain their side). More than 2600 commercial organizations were accepted into the Web Trader scheme. In its function as an up-front verifier of merchant reliability, and a follow-through resolver of disputes, the program was similar to those operated by the BBB discussed earlier in this chapter, the key exception being that this program was run not by and for business (and in turn, consumers) but by a consumer organization for consumers (although participating businesses, in turn, benefit).

The Consumers’ Association formed Web Trader links with consumer groups in other European and non-European countries. Through these links, businesses in those countries have the opportunity of belonging to a program similar to Web Trader, and under which the businesses may display a logo virtually identical to the Web Trader logo.197 A system of mutual recognition was established as well, whereby an unsatisfied consumer may complain to the national consumer organization of his or her own country when the complaint arises from dealings with a business bearing the foreign “equivalent” to the Web Trader.

Developing Countries: Voluntary On-line Consumer Initiatives

Much of what is true of the off-line world in developing countries applies equally in the realm of electronic commerce: the lack of effective government standards for consumer protection can be problematic. While in many ways the Internet represents a new venue for exploitation of vulnerable consumers, it does have the virtue of providing a low-cost means of disseminating consumer information. In China, for example, a Web site with the somewhat cryptic domain name, <www.e315.com>, offers a platform for consumers wishing to complain publicly about goods or services with which they are unsatisfied. Before the Internet, such information would likely have been available only in hard copy to consumers. A more organized approach to offering on-line consumer information is that of the Consumers’ Association of Singapore (CASE), with its CASE Trust seal of approval program, operating in a fashion similar to the U.S. and

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197. European Commission, Enterprise Director General, WEBTRADER Trust Scheme for B@C E-commerce, Supported by the Enterprise DG — Main Results of the Pilot Operation, at <http://europa.eu.int/comm/enterprise/ict/policy/webtrader.htm>.

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European on-line programs already discussed. While Singapore may no longer qualify as a developing country, it is clearly a non-Western one, and the example of the CASE Trust program demonstrates the adaptability of the seal of approval model to any number of cultures. This adaptability, combined with the Internet’s affordability as a medium of information dissemination, shows the potential of the Internet as a vehicle for increasing consumer information (and thus improving consumer protection) in developing countries. Of course, numerous obstacles remain — on-line access to this information is hardly a priority to those whose basic needs are barely met or not met at all. However, the fact is that at least in some countries, in the absence of effective government regulation the Internet may be the most cost-effective and efficient method there is of making information available to the people to help them protect themselves.

Conclusions

Even from this admittedly inadequate preliminary review, it is apparent that voluntary initiatives to protect the environment, workers and consumers are flourishing in the United States, Europe and developing countries. Different styles and approaches are apparent from jurisdiction to jurisdiction, and from context to context. In the United States, there is an apparent predisposition to let the private sector lead in developing voluntary approaches, with government encouraging and supporting but generally not intervening, except when it is apparent that the self-regulatory techniques are proving insufficient. The support comes in many forms, including positive public statements and endorsements from high-ranking officials, government-run workshops and discussion papers that monitor progress and set out baseline standards, and the facilitation of multistakeholder processes. American federal and state governments have shown a proclivity to lead in the development of voluntary pollution prevention approaches rather than in other sectors, particularly with respect to those with no immediate and apparent market “drivers” (e.g. consumer, supplier or investor demand). Nevertheless, private sector- and NGO-led market-driven voluntary environmental approaches are also flourishing in the United States.

In Europe, the European Commission appears to show more willingness to play a lead role in the development and operation of voluntary approaches. This is particularly evident in the environmental area, where the Eco-Management and Auditing System, while voluntarily applied, is based on a European-wide regulatory framework. The roughly comparable system in operation in America (and elsewhere), ISO 14001, was developed largely by and for industry, with the participation of others. Perhaps not surprisingly, EMAS seems, on the whole, to be a more rigorous approach to environmental management than ISO 14001, although efforts are under way to make the two more compatible. Operating alongside EMAS are voluntary industry and NGO-driven environmental initiatives, such as the Pan European Forest Certification system and the Forest Stewardship Council.

With regard to consumer protection, the European Commission has demonstrated leadership in developing an ambitious cross-jurisdictional alternative redress system that incorporates both public and private redress systems that meet certain basic standards. In a sense, the European approach seems to be one of coordination and integration of public and private voluntary approaches that have previously been allowed to operate without significant governmental oversight. As such, it represents an interesting model of evolution for voluntary approaches (i.e. their eventual integration into government regimes) that, if successful, may be emulated in other contexts and jurisdictions. The e-commerce context may be one candidate for such an integrated EU-level approach, although it is too early to predict.

In developing countries, several insights of importance seem to emerge from the preceding review. First, governments, the private sector and non-governmental organizations all seem to be increasingly recognizing the important role that voluntary approaches can play, regardless of and sometimes specifically in recognition of, the often weak regulatory infrastructures. On the other hand, empirical evidence from at least one jurisdiction seems to suggest that industry may be stimulated to develop or make more effective its voluntary approaches upon the introduction and implementation of effective legal techniques. Thus, in various ways, whether the regulatory system is weak or is quite effective, there is an apparent role for voluntary initiatives. A promising and distinctive development is an apparent increased recognition of the importance and use of developing country NGOs, workers, academics and others in the monitoring of labour-oriented codes. Such involvement has potential to be both empowering and educational for the parties involved, and could operate alongside commercial audits.

Looking at the experiences in toto, Europe seems to be providing the most innovative examples of use of voluntary approaches in direct support of public policy objectives. Whether it be the development of EMAS, or the new European alternative redress system, there is an apparent willingness on the part of governments to overtly draw on and rationalize voluntary approaches into a systematic public policy framework. It is difficult at this stage to say whether other jurisdictions will follow the European lead or develop their own unique approach.199

199. See discussion on this topic in Webb and Morrison, “Law and Voluntary Codes,” Chapter 5, above.

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