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# ARTICLE

## BALANCING INTERNATIONAL TRADE WITH ENVIRONMENTAL PROTECTION: INTERNATIONAL LEGAL ASPECTS OF ECO-LABELS

*Surya P. Subedi\**

### I. INTRODUCTION

The prospect of long-term global and irreversible harm to the environment by certain economic activities of our generation has brought environmental issues from the periphery to the center of the international political agenda. Consequently, the world has entered a new age of environmental diplomacy, resulting in a rapid evolution of the international law of the environment. The political awakening and rising level of public concern over the state of our environment during the past few decades have resulted in the adoption of a number of international instruments designed to limit the harm to the environment from human activity. While most measures adopted in the first few decades of the second half of this century concentrated primarily on end-of-pipe solutions, many measures adopted in the recent past have sought to identify and arrest the environmental problems before they occur. In accordance with this precautionary approach, which demands that attention be paid to the sources of the problem, states started exploring various possibilities of creating economic incentives for various industries to produce environmentally less damaging products rather than imposing the will of the state on particular industries.

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Although traditionally market forces have been perceived as environmentally unfriendly actors, certain experiences have demonstrated that well conceived economic incentives to industry can play a significant role in programs for the protection of the environment and the sustainable use and development of the resources of the earth. Accordingly, it was as early as 1971 that Germany's national environmental plan put forward the concept of eco-labels for consumer products.<sup>1</sup> The eco-labeling program was launched in 1978 as the first program of its kind in the world and has served since then as a model for all other efforts of similar character of other countries.<sup>2</sup> Since then eco-labeling programs—putting labels on products to inform consumers of their environmentally-friendly character—have become increasingly popular.

Currently, such environmental labeling schemes, which can be described as "positive labeling programs," exist in approximately twenty-two countries.<sup>3</sup> In an effort to harmonize the eco-labeling programs within the member countries of certain organizations, joint measures have been undertaken to adopt a unified system of granting such labels. Examples of this include the decisions of the Nordic Council and the European Union on this matter.<sup>4</sup> Thus, the labeling programs are apparently becoming increasingly popular in many industrialized countries as well as the fast-growing economies of the world. The potential usefulness of labeling requirements aimed at protecting the environment has been recognized by a growing number of states.<sup>5</sup> Indeed, Agenda 21 recognizes the significance of eco-labeling schemes in these words: "Governments, in cooperation with industry and other relevant groups, should encourage expansion of environmental labeling and other environmentally related product information programs designed to assist consumers to make informed choices."<sup>6</sup>

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1. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ENVIRONMENTAL LABELLING IN OECD COUNTRIES 43 (1991) [hereinafter OECD REPORT].

2. See *id.*; Veena Jha et al., *Eco-Labeling and International Trade: Preliminary Information from Seven Countries*, UNCTAD Discussion Paper No. 70, 13 (1993).

3. There are a variety of environmental labels ranging from hazard warnings on chemicals and pesticide packaging (which could be defined as "negative labeling programs") to "recycled paper" self-claims on publications and stationery.

4. See OECD REPORT, *supra* note 1, at 36.

5. Because of space problems, only a few selected cases of eco-labeling schemes will briefly be surveyed in this Article.

6. AGENDA 21 & THE UNCED PROCEEDINGS (Nicholas A. Robinson ed., 1993)

The main objective of eco-labeling programs is to harness market forces and channel them towards promoting more environmentally friendly patterns of production. Since the labels provide consumers with an easily-recognizable symbol indicating that a product's environmental friendliness has been assessed and approved by a credible body of experts, the label should improve the sales or image of a labeled product. It is hoped that by creating consumer awareness of less environmentally damaging products and helping the so-called "green consumers" to make informed purchasing decisions, labeling schemes will eventually encourage manufacturers to change their entire product development process into a more environmentally friendly process.

However, this growth of national and regional organizational labeling programs, albeit voluntary, may raise international concern because it may have repercussions on the existing international trading system based mainly on the General Agreements on Tariffs and Trade (GATT) system.<sup>7</sup> While the GATT system is designed to remove barriers to trade, the national and regional eco-labeling systems could be viewed by other states as new non-tariff barriers to free trade. It is this international legal and trade aspect of the eco-labeling system that this Article examines.

Although present labeling programs are for the most part voluntary, discrimination may result, particularly when employing the cradle-to-grave assessment method when foreign goods are assessed by a national eco-label awarding body. Therefore, it is necessary to briefly examine the existing major labeling schemes before examining the international legal aspects of such schemes. Other types of environmental label (e.g., negative labeling that indicates a product's dangers or hazardous properties) will not be discussed in this Article as its aim is to examine international legal aspects of eco-labeling

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at 38, para. 4.21.

7. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, art. X.1 (1994) (GATT 1947 was incorporated into the WTO as GATT 1994 in Annex IA to the WTO Agreement) [hereinafter GATT].

schemes that are designed to base the award of a label on a life-cycle analysis of a product.

## II. AN OVERVIEW OF EXISTING ECO-LABELING PROGRAMS<sup>8</sup>

As stated earlier, the first environmental label was issued in Germany in 1978.<sup>9</sup> By 1991 the program had 3,600 labeled products in 64 product categories.<sup>10</sup> A similar program was launched in Canada in 1988 and in Japan in 1989.<sup>11</sup> Under a harmonized Nordic Council Program, Norway, Sweden, and Finland began their labeling scheme in 1991.<sup>12</sup> They were followed in the same year by Austria, Portugal, and France.<sup>13</sup> The European Union launched its unified scheme in 1992 when it adopted a Community Regulation authorizing national bodies within the Member Countries to issue eco-labels under the general supervision of Brussels.<sup>14</sup> Programs are currently under consideration in certain other OECD countries. Among developing countries, India,<sup>15</sup> the Republic of Korea, and Singapore have already launched their eco-labeling programs while Brazil, Colombia, Malaysia, and the Association of Southeast Asian Nations (ASEAN) are exploring the possibility

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8. See generally PETER H. SAND, LESSONS LEARNED IN GLOBAL ENVIRONMENTAL GOVERNANCE 26-28 (1990); OECD REPORT, *supra* note 1; Owen McIntyre, *Environmental Labelling—Clean Conscience for the Consumer or a Missed Opportunity?*, 1994 J. BUS. L. 270, 273-76; Christian Tietje, *Voluntary Eco-Labeling Programs and Questions of State Responsibility in the WTO/GATT Legal System*, 29 J. WORLD TRADE 123, 127-28 (1995).

9. See OECD REPORT, *supra* note 1, at 43.

10. See *id.* at 13.

11. See *id.* at 49-53.

12. See *id.* at 13.

13. See *id.*

14. Council Regulation 880/92, 1992 O.J. (L 99) 1 [hereinafter EC Council Regulation].

15. Under the Indian eco-labeling program an "Eco-mark" label is to be awarded by the Bureau of Indian Standards (BIS) to products meeting national environmental and pollution control standards. A non-phosphate laundry detergent became the first product to receive the "Eco-mark" from the BIS in March, 1994. The Bureau seems to have worked out the criteria and standards for awarding the "Eco-mark" label to 16 different groups of products. See *A Consumer-Friendlier Country*, WORLD CONSUMER, Mar. 13, 1994, at 7. See also M. van Amelrooy, *Indian Environmental Policy and the Use of Economic Instruments*, in THE INDO-DUTCH PROGRAM ON ALTERNATIVES IN DEVELOPMENT, OCCASIONAL PAPERS AND REPRINTS 1 (1994). See generally Vinod Rege, *GATT Law and Environment-Related Issues Affecting the Trade of Developing Countries*, 28 J. WORLD TRADE 95, 135 tbl.5 (1994).

of developing eco-labeling systems.<sup>16</sup>

Under all programs currently existing or proposed, there are committees with broad representation—with members from the government department concerned, as well as consumer, environmental, and industry interests—that determine or suggest to a government minister which product categories are eligible for labeling. Within each category the scope of products is defined, and the threshold criteria a product must meet is established with the help of experts.

Domestic or foreign manufacturers may, if they so wish, submit products for consideration. If the product meets the criteria of the product category, a label can be obtained and used when marketing the product, in accordance with the terms and conditions of the contract concluded with the committee or administering body. Since the German scheme is the oldest and perhaps the most developed scheme of all eco-labeling programs, a close examination of this scheme and of the relatively recent attempt of the EC to harmonize the eco-labeling program within the EC would help to understand how the labeling schemes operate.

#### A. *The German "Blue Angel" Program*

The German eco-labeling scheme is a voluntary, government-sponsored scheme that works with the private sector and non-governmental organizations.<sup>17</sup> Anyone may propose a product category for the award of a German eco-label—a "Blue Angel" label.<sup>18</sup> Once the application is submitted for the award of the label, three bodies are involved in the process of granting the award: (i) the Federal Environment Agency (FEA)

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16. See generally Rege, *supra* note 15, at 135 tbl.5.

17. See OECD REPORT, *supra* note 1, at 43, 48; A-Z OF ENVIRONMENTAL PROTECTION IN GERMANY 52-54, 122-124 (Informationszentrum Umwelt 1992) (1988).

18. See OECD REPORT, *supra* note 1, at 45. The "Blue Angel" is the official emblem of the United Nations Environment Program (UNEP), although pursuant to correspondence dating back to 1978, the UNEP Secretariat authorized its use for the German eco-labeling scheme. In 1991, UNEP unsuccessfully tried to obtain protection of the emblem under Article 6 *ter* of the *Paris Convention for the Protection of Industrial Property* (refused on the grounds that UNEP is "not an independent intergovernmental organization"). Information about this correspondence was kindly supplied to the author by Professor Dr. Peter H. Sand, Director of the English Section of the 1994 Session of the Center for Studies and Research in International Law and International Relations of The Hague Academy of International Law (on file with author).

(it is a governmental environmental protection authority); (ii) the eleven-member non-governmental Environmental Label Jury (ELJ) (it includes representatives from environmental and science organizations, consumer associations, industry, trade unions, and the media); and (iii) the non-profit scientific organization Institute for Quality Assurance and Labeling (RAL) whose members are 140 private-sector associations.

The awarding of the German Blue Angel label is a four-stage process. First, the FEA reviews proposals for product categories and passes them to the ELJ, which then determines which ones warrant further investigation. These then become the subjects of a cradle-to-grave analysis by the FEA, whereby important environmental impacts are assessed in each stage of a product's life.

The second stage involves the life-cycle reports prepared by the FEA, which in turn go to the RAL for an expert hearing to establish the threshold criteria. When the life-cycle report and the threshold criteria are sent back to the ELJ, the third stage involves review by the ELJ of the reports of the FEA and the RAL. It is then up to the ELJ to accept, amend, or reject the reports for the award of the Blue Angel label to the product as an environmentally-friendly product within a product category. The fourth stage involves the supervision by the RAL of the awarding and signing of contracts with manufacturers.

Germany uses the Blue Angel symbol of the United Nations Environment Program (UNEP) as its eco-label together with the word "Umweltzeichen" ("environmental label") above the explanatory phrase "weil . . ." ("because . . .") below, and the words "Jury Umweltzeichen."<sup>19</sup> The idea behind this German initiative was to reduce pollution in the environment by encouraging industry to produce environmentally-friendly consumer products through technological innovation; since the program would help provide more accurate information in guiding consumer choices, the "green" consumer would opt for

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19. When the program was launched in 1978 the word "Umweltfreundlich" ("environmentally-friendly") was used rather than the word "Umweltzeichen." However, when the goods produced in Germany and abroad began to enter the market in the 1980s with the self-proclaimed words "environment-friendly" and "ozone-friendly," the word "Umweltfreundlich" was replaced by the word "Umweltzeichen" in 1988 in the German eco-label. See generally OECD REPORT, *supra* note 1, at 43.

environmentally-friendly products even if it meant paying a higher price for such products.

### B. *The EC Eco-Label Award Scheme*

With a view to harmonizing the environmental labeling efforts underway in several EC countries, the Council of the EC introduced, through the adoption of Council Regulation 880/92 of March 23, 1992, a Europe-wide Eco-Label Award Scheme.<sup>20</sup> The scheme is in keeping with the Fifth Environment Action Program of the EC, which stresses the importance of subsidiaries and of market based instruments.<sup>21</sup>

The Eco-Label Award Scheme has been hailed as a good example of both these approaches. The EC eco-label, the official logo of the EC—a flower with the letter “e” and Community’s star symbolism<sup>22</sup>—is to be awarded to products that have a reduced impact on the environment.<sup>23</sup> The task of defining a product group and establishing ecological criteria for that product group is perhaps the most important aspect of any eco-labeling program because it is these criteria that a product must meet to qualify for an eco-label.<sup>24</sup> Therefore, it is during the development of ecological criteria for a product group that the EC Commission works in close co-operation with the Member States.<sup>25</sup>

A national body begins the process by preparing a report on the definition of product groups and the criteria to be applied to a product within the product group.<sup>26</sup> The national body does so in consultation with the various national interest groups and submits it to the Commission.<sup>27</sup> In turn, the Commission seeks the opinion of the Consultation Forum composed of representatives from industry and trade as well as consumer and environmental organizations.<sup>28</sup> After this consultation,

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20. EC Council Regulation, *supra* note 14.

21. *See id.*; Commission Decision 93/326/EEC, 1993 O.J. (L 129) 23; Commission Decision 93/430/EEC, 1993 O.J. (L 198) 35; Commission Decision 93/431/EEC, 1993 O.J. (L 198) 38; Commission Decision 93/517/EEC, 1993 O.J. (L 243) 13.

22. *See* EC Council Regulation, *supra* note 14, Annex II.

23. *See id.* art. 1.

24. *See id.* art. 5.

25. *See id.* arts. 6, 7.

26. *See id.* arts. 5-10.

27. *See id.* art. 6.

28. *See* EC Council Regulation, *supra* note 14, Annex II, art. 6.



the Commission presents its proposal to the Regulatory Committee composed of representatives from Member States.<sup>29</sup>

Once Community agreement is reached on the definition of the product group and the criteria for a product, the Commission formally adopts the criteria and publishes them in the Official Journal.<sup>30</sup> The establishment of ecological criteria applicable to each product is based on the study of the entire life cycle of the product.<sup>31</sup> In other words, it involves examining in detail the cradle-to-grave aspects of the raw materials used, manufacturing process, distribution, end use, and final disposal.<sup>32</sup>

Manufacturers or importers may make an application to the competent body in the Member country where the product is manufactured or imported from a non-EC country.<sup>33</sup> When the national body decides that the EC eco-label can be awarded to the product because it meets the criteria of the Community level, it must, nevertheless, inform the Commission of its decision.<sup>34</sup> The Commission then passes on the decision to other national bodies who can register their objection to the decision within 30 days.<sup>35</sup> If no objection is registered, the label can be awarded and used in all Member States.<sup>36</sup> If objections are raised, the decision will have to be explored again at Community level.<sup>37</sup>

Like the German scheme, the EC scheme is also voluntary and open to both EC and non-EC manufacturers.<sup>38</sup> What is important about this scheme is that once approved by one Community Member State, it can be used throughout the other 14 states (perhaps more states in the near future because of the ongoing enlargement of the EU) without having to file a separate application in every country.<sup>39</sup>

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29. *See id.* art. 7.

30. *See id.* art. 14(a).

31. *See id.* art. 3(d).

32. *See id.* art. 5(4).

33. *See id.* art. 10(1).

34. *See* EC Council Regulation, *supra* note 14, Annex II, art. 10(3).

35. *See id.* art. 10(3)(4).

36. *See id.* art. 10(4).

37. *See id.*

38. *See id.* art. 4.

39. *See id.*

### C. Other Schemes

Although the Canadian program is largely based on the German scheme, the former is different in certain respects from the latter in that the organization which is responsible for handling the whole project—Environmental Choice—is a governmental organization. It is administered by a Secretariat on behalf of an independent Advisory Board, consisting of 16 members appointed by the Environment Minister among which include representatives from environmental, industry, and consumer groups. The Environmental Choice logo is “a maple leaf representing Canada’s environment, composed of three doves, symbolizing the three major partners joining to protect the environment: government, industry and commerce.”<sup>40</sup>

Japan launched its eco-labeling program in 1989 as a quasi-governmental project called the “Project for the Promotion of the Ecologically Safe Merchandise,” better known as the Eco-Mark program.<sup>41</sup> “The Eco-Mark symbol is two arms embracing the world, symbolizing the protection of the earth with our own hands. The arms spell out the letter ‘e,’ which stands for ‘environment,’ ‘earth,’ and ‘ecology.’”<sup>42</sup>

The Nordic Council’s eco-labeling program began in 1989 when the ministers from the five Nordic countries, namely, Denmark, Finland, Iceland, Norway, and Sweden agreed to introduce a harmonized Nordic environmental label.<sup>43</sup> The symbol of the Nordic label is a white swan in a green background with the words “environmentally-labeled” above in Swedish, Norwegian, or Finnish languages. The Nordic scheme is similar to the EC scheme; in fact, the former could have provided a model for the latter.

The situation in the United States is different altogether. No legislative measures have been adopted on this matter at the federal level. Although the federal Environmental Protection Agency has published federal procurement guidelines on

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40. OECD REPORT, *supra* note 1, at 49. See also *Door Open for Ecologo Applications*, ECOLOGO (Environmental Choice, Toronto, Ont.), Aug. 1989, at 1 (offering a picture of the logo).

41. OECD REPORT, *supra* note 1, at 52-53.

42. *Id.* See also “Eco Mark” Design Decided on, “Eco Mark” Project to Be Implemented, JAPAN ENVTL. SUMMARY, Mar. 10, 1989, at 1, 2 (offering a picture of the symbol).

43. See OECD REPORT, *supra* note 1, at 59; SAND, *supra* note 8, at 26.

certain materials with recycled content, these guidelines are not binding.<sup>44</sup> However, much legislation has been adopted at the state level to regulate certain labeling activities.<sup>45</sup> A great deal of such activity also takes place in the private sector.<sup>46</sup>

"The Green Cross Certification Company is a non-profit division of Scientific Certifications Systems Inc., a food and products testing company," which verifies environmental claims by manufacturers and issues Green Cross labels.<sup>47</sup> There is another program called the Green Seal, also operating as a private environmental labeling body, which uses environmental criteria based on the entire life-cycle of each product.<sup>48</sup>

### III. INTERNATIONAL LEGAL IMPLICATIONS OF ECO-LABELS

#### A. *Trade Implications*

First, it should be made clear that eco-labeling programs differ significantly from traditional government instruments that might be regarded as trade barriers. Hence, it has been a generally perceived view<sup>49</sup> that current environmental labeling programs, which are voluntary, do not presently pose serious trade implications.<sup>50</sup> Second, labeling programs are by their nature discriminatory because the goal is to select only those products that have significantly less environmental impact compared with other products in their category. This is the only way that labeling programs can identify more environmentally friendly products in any given category.

Nevertheless, the trade impact of ever-growing environmental labeling programs will depend substantially on how the schemes are administered. As stated in the 1991 OECD Report on environmental labeling, "[b]ecause all existing labeling programs seek to employ a cradle-to-grave perspective in es-

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44. See OECD REPORT, *supra* note 1, at 67.

45. See *id.*

46. See *id.* at 68. See generally Glenn Israel, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims*, 20 B.C. ENVTL. AFF. L. REV. 303 (1993).

47. OECD REPORT, *supra* note 1, at 68.

48. See *id.*

49. See, e.g., Report by the Chairman of the Group on Environmental Measures and International Trade presented to the Contracting Parties at their Forty-ninth Session, Feb. 2, 1994, GATT B.I.S.D. (40th Supp.) at 88 (1995) [hereinafter Report by the Chairman].

50. See *id.*

tablishing criteria . . . one could imagine national discrimination as a result of criteria calling for differing production methods, cultivation practices, or raw material use."<sup>51</sup> "For example," the Report continues, "out of concern for tropical deforestation, product criteria might require that the wood in a product be selected from timber grown in a sustainable manner."<sup>52</sup> This is what Austria actually did in 1992 through federal legislation.<sup>53</sup> Austria was later forced to amend the federal law when Indonesia and Malaysia threatened legal action before the GATT panel.<sup>54</sup> Moreover, international trade could be adversely affected by the environmental labeling programs to the extent that imported products do not have access to national schemes on the same terms as domestically produced goods.

Another concern raised in this context is that when the eco-labeling programs grow, trade effects not inherent to the environmental purpose of the scheme can arise, particularly for small foreign suppliers and those from developing countries. For instance, under certain labeling schemes the administrators of the scheme visit the manufacturing plant before a label is granted to ensure that the plant is in compliance with environmental standards relevant to the product category.<sup>55</sup>

It will be difficult for many manufacturers in developing countries to meet the costs of such inspection procedures as most labeling schemes in OECD countries require the applicant manufacturer to pay the cost involved in processing the application. Further, since the eco-labeling schemes also charge fees for the application,<sup>56</sup> the annual contract, and sometimes label publicity, all such expenses might prove too burdensome for small and foreign firms. These expenses could be interpreted as administrative trade barriers.

Similarly, the life-cycle analysis perspective of a national labeling scheme may have trade implications on foreign states, and especially on developing countries, as they might use process and production methods that are judged environmentally unsound in developed eco-label awarding countries. Not the

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51. OECD REPORT, *supra* note 1, at 33.

52. *Id.*

53. *See infra* Part III.B.2.

54. *See id.*

55. *See* OECD REPORT, *supra* note 1, at 33.

56. *See* EC Council Regulation, *supra* note 14, art. 11.

unwillingness on the part of foreign manufacturers to produce more environmentally-friendly products, but mere absence of such capacity both in terms of capital and know-how could be behind the production of environmentally unsound products. The question as to whether certain processes and production methods are, or are not, environmentally sound would depend on how a national label awarding body defines the criteria for a product to be eligible for a label. If the national body makes such decisions under the influence of domestic environmental standards, it may run the risk of imposing domestic values and standards on exporting countries, raising the international trade issue of "extraterritoriality."

Another problem is that a labeling program could be viewed as a trade barrier if it involves requirements that put small and foreign producers at a disadvantage because of the costs involved or other reasons. Every eco-labeling program, even voluntary ones, would have to be consistent with the provisions of Articles 2 to 7 of the 1994 Agreement on Technical Barriers to Trade<sup>57</sup> (TBT), including the Code of Good Practice for the Preparation, Adoption and Application of Standards.<sup>58</sup> Article 2.1 of the Agreement requires that Member States must "ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country."<sup>59</sup>

Similarly, Article 2.2 requires all contracting parties to "ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade."<sup>60</sup> Although under this provision of the TBT Agreement, states can adopt technical regulations necessary to fulfill a legitimate objective, which includes the environment, "such technical regulations [must]

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57. Agreement on Technical Barriers to Trade, Apr. 15, 1994, arts. 2-7, Marrakesh Agreement Establishing the World Trade Organization, reprinted in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 138 (GATT Secretariat ed., 1994) [hereinafter TBT].

58. *Id.* Annex III.

59. *Id.* art. 2.1.

60. *Id.* art. 2.2.

not be more trade-restrictive than necessary to fulfill such a legitimate objective.<sup>61</sup>

Article 2.9 provides that when a Member State adopts a technical regulation with regard to a product, and the regulation has a significant effect on the trade of other Member States, it must fulfill a number of requirements stipulated in the Agreement.<sup>62</sup> For instance, the State concerned must publish a notice in a publication to this effect at an appropriate stage, early enough to allow reasonable time for other contracting parties to make comments in writing and take these comments into account.<sup>63</sup>

Therefore, the Member State concerned would have to ensure that effective access to labeling schemes is granted to overseas suppliers. This would provide them with an opportunity to participate in the selection process of a product's category for consideration of labeling as well as establishing the criteria and threshold levels that such products must meet to qualify for a label.

Moreover, to avoid undermining the provisions of the GATT Article X.1<sup>64</sup> and reduce the adverse impact of eco-labeling on third countries, it would be necessary to increase the transparency of eco-labeling programs, including the details of the product categories covered, their criteria, and threshold levels.

These are just certain examples of possible trade implications of the current and future eco-labeling programs. However, such impacts will depend, by and large, upon the practice of national labeling authorities when selecting product categories for labeling and determining the environmental criteria that the products must meet to be eligible to use the label. The selection process may favor product attributes that can more easily be met by domestic manufacturers, or take into account local environmental resource constraints and local preferences for specific attributes of products which may ultimately put foreign products at a disadvantage.

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61. *Id.*

62. *Id.* art. 2.9.

63. *See id.* arts. 2.9.1, 2.9.4.

64. GATT, *supra* note 7, art. X.1.

## B. The GATT Rules and Eco-Labels

### 1. The GATT Implications

If eco-labeling programs have trade implications, they are also likely to have the GATT implications. That is not to say that such programs would necessarily be inconsistent with the GATT rules. The fundamental principles of national treatment and non-discrimination of the GATT require every contracting party to accord to foreign products "treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."<sup>65</sup> If foreign products cannot achieve the criteria set by a national label awarding body for reasons explained in the preceding section, labeling programs could run the risk of violating the above provision of the GATT. However, as pointed out in the 1991 OECD Report on environmental labeling, "it is difficult to view this as discrimination on the basis of national origin, *per se*."<sup>66</sup> The argument runs thus: under the existing eco-labeling programs a product may not be denied an eco-label because of its geographic or national origin, but because it did not meet the criteria set for the product category.

Nevertheless, it is submitted that such market-based instruments may result in trade effects distinct from their environmental objectives, altering the competitive position of small and foreign manufacturers. Of course, the GATT does not prevent countries from following environmental policies such as eco-labeling, provided that such policies do not constitute hidden barriers to trade. At the same time, it is also doubtful whether the GATT permits eco-labeling programs by individual contracting parties.

The main principles of the GATT are enshrined in Articles I (most favored nation treatment) and III (national treatment).<sup>67</sup> These provisions ensure that international trade between the contracting parties does not suffer from any discriminatory practices of any contracting state against the product of another state that is a party to the GATT. However, Article XX provides for certain general exceptions under which a con-

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65. *Id.* art. III.4.

66. OECD REPORT, *supra* note 1, at 34.

67. GATT, *supra* note 7, arts. I, III.

tracting party may derogate from its obligations undertaken under the GATT:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;

...  
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.<sup>68</sup>

In the *Tuna/Dolphin I* case,<sup>69</sup> the GATT Panel held that the GATT allows, under certain conditions, eco-labeling—i.e., measures by individual states permitting or requiring labels referring to environmental aspects of production and process methods—provided that such schemes do not undermine the main principles of the GATT.<sup>70</sup> The Panel also held that the primary aim of any environmental measures that affect trade should be to protect the environment rather than the domestic market.<sup>71</sup> Accordingly, the GATT Panel found that provisions of the U.S. legislation on Tuna/Dolphin were not only intended to protect the species but were also intended to protect the U.S. fishing industry.<sup>72</sup> Thus, the U.S. law violated the GATT Article III because it discriminated between the imported product and the like domestic product. It could not be defended under exceptions in the GATT Article XX because, in the Panel's view, the exceptions applied only to measures with

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68. *Id.* art. XX.

69. GATT Panel Report on United States—Restrictions on Imports of Tuna, Feb. 18, 1992, GATT B.I.S.D. (39th Supp.) at 205, para. 7.3 (1993) [hereinafter United States Restrictions on Imports of Tuna].

70. *Id.* at 205.

71. *Id.* at 200, para. 5.31.

72. *Id.* at 200-01, paras. 5.32-5.33.



internal or domestic objectives.<sup>73</sup> The Panel held that:

a contracting party is free to tax or regulate imported products and like domestic products as long as its taxes or regulations do not discriminate against imported products or afford protection to domestic producers, and a contracting party is also free to tax or regulate domestic production for environmental purposes. As a corollary to these rights, a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own.<sup>74</sup>

The Panel explained that if individual states were to be allowed to impose their national environmental standards on other states allegedly under the exceptions provided for in Article XX of the GATT that:

each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.<sup>75</sup>

A similar view was taken by the second tuna panel of the GATT that examined the measures taken by the U.S. prohibiting imports of tuna harvested through methods that killed dolphins.<sup>76</sup> Under the U.S. Marine Mammal Protection Act (MMPA) of 1972, no country, whether primary or intermediary, was allowed to export tuna products to the U.S. unless they certified that they did not import tuna from countries which harvested tuna through methods that killed dolphins.<sup>77</sup> The EC and the Netherlands (on behalf of the Netherlands Antilles) lodged a complaint against this measure of the United States.<sup>78</sup> The issue before the Panel was not the competence

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73. *Id.* at 194-95, paras. 5.11, 5.12, 5.14.

74. *Id.* at 204, para. 6.2.

75. *Id.* at 199, para. 5.27.

76. See GATT Panel Report on United States—Restrictions on Imports of Tuna, May 20, 1994, 33 I.L.M. 839 [hereinafter Panel Report].

77. *Id.* at 846-50, paras. 2.5-2.15

78. *Id.* at 844.

of the United States to take environmental measures to protect dolphins, but the propriety of the U.S. trade embargoes on the import of tuna products from other countries designed to secure changes in the policies that other members of the GATT pursued within their own territories.

The Panel held that the measures included in the U.S. MMPA were inconsistent with the obligations of the U.S. undertaken under the GATT.<sup>79</sup> The Panel declared that the U.S. measures were not covered by exceptions in Article XX of the GATT.<sup>80</sup> The Panel stated that:

Article XX provides for an exception to obligations under the General Agreement. The long-standing practice of panels has accordingly been to interpret this provision narrowly, in a manner that preserves the basic objectives and principles of the General Agreement. If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties.<sup>81</sup>

It is not that the GATT Panel rejected the validity of the environmental objectives of the United States to protect and conserve dolphins. Instead the Panel found that such environmental objectives had to be achieved without undermining the obligations of the United States under the GATT. Specifically, the Panel stated that:

[T]he objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the General

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79. *Id.* at 899, para. 6.1.

80. *Id.*

81. *Id.* at 894, para. 5.26 (footnote omitted).

Agreement. . . . [T]he issue in this dispute was not the validity of the environmental objectives of the United States to protect and conserve dolphins. The issue was whether, in the pursuit of its environmental objectives, the United States could impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction. The Panel therefore had to resolve whether the contracting parties, by agreeing to give each other in Article XX the right to take trade measures necessary to protect the health and life of plants, animals and persons or aimed at the conservation of exhaustible natural resources, had agreed to accord each other the right to impose trade embargoes for such purposes. The Panel had examined this issue in the light of the recognized methods of interpretation and had found that none of them lent any support to the view that such an agreement was reflected in Article XX.<sup>82</sup>

This indicates that while a state's ability to conserve its own natural resources is unfettered by the GATT, the ability of such a state to take environmental measures to conserve resources outside its borders is doubtful. The Austrian federal legislation of 1992 on the labeling of tropical timber and timber products is an illuminating example.<sup>83</sup> The timber certification scheme is different from the eco-labeling scheme since timber certification deals with the origin of timber and timber products and not with life-cycle analysis of all timber and timber products. But the Austrian initiative is relevant to this study as it raises certain interesting legal questions concerning the compatibility of national environmental measures with the GATT rules.

## 2. The Austrian Experience

In the height of growing public concern within and outside Austria over the destruction of tropical forests and the global long-term impact on the change of world climate, the Austrian parliament adopted legislation in 1992<sup>84</sup> with the aim of stop-

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82. Panel Report, *supra* note 76, at 898, para. 5.42.

83. See Lilly Sucharipa-Behrmann, *Austrian Legislative Efforts to Regulate Trade in Tropical Timber and Timber Products*, 46 AUSTRIAN J. PUB. & INT'L L. 283, 284 (1994).

84. See *id.* See also Brian F. Chase, *Tropical Forests and Trade Policy: The Legality of Unilateral Attempts to Promote Sustainable Development Under the*

ping all imports of tropical timber and tropical timber products from areas that were not sustainably managed.<sup>85</sup> What is significant about this federal law is that it provides for *mandatory* labeling of tropical timber and tropical timber products being placed on the market with a quality mark, written "made of tropical timber" or "containing tropical timber" and imposes a 70% import tariff on all tropical timber and tropical timber products.<sup>86</sup>

Permission to carry this quality mark was to be issued by the Austrian Federal Ministry for Environment upon application, provided that the applicant could prove that the tropical timber and the tropical timber products met the criteria set by the federal law.<sup>87</sup> That is to say that the tropical timber or the tropical timber product had to be exclusively from sustainably managed forests. For the purposes of this law, sustainable forest management meant, *inter alia*, economic and ecologically sustainable exploitation of the raw material timber, diversified exploitation, reforestation in accordance with the criteria of economic and ecologically sustainable exploitation and preservation of all functions of the forest.<sup>88</sup>

Shortly after the law entered into force, the ASEAN countries, especially Malaysia and Indonesia, expressed their concern about the compatibility of the Austrian law with the obligations of Austria under the GATT.<sup>89</sup> The main arguments of the ASEAN countries advanced through their communication to the GATT Council was that the Austrian law was discriminatory, unjustifiable, and an unnecessary obstacle to trade.<sup>90</sup>

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GATT, 17 HASTINGS INT'L & COMP. L. REV. 349, 374 (1994).

85. Owing to the growing international concern for the preservation of tropical forests a new International Tropical Timber Agreement (ITTA) was concluded in January 1994 at Geneva. This Agreement, which replaces the earlier (1983) ITTA, is the first internationally binding instrument on tropical timber that emphasizes sustainable management of tropical forests. See U.N. CONF. ON TRADE & DEV., INTERNATIONAL TROPICAL TIMBER AGREEMENT 15 (U.N. Doc. TD/Timber.2/16, U.N. Sales No. E.94.II.D.23) (1994). See also Karl G. van Orsdol & Jean-Pierre Kiekens, *Environmental Labeling: A Market Based Solution for Promoting Sustainable Forestry Management in the Tropics*, in CONSERVATION OF WEST AND CENTRAL AFRICAN RAINFORESTS 279, 280 (1992); Sucharipa-Behrmann, *supra* note 83, at 284.

86. See Sucharipa-Behrman, *supra* note 83, at 284-86; Chase, *supra* note 84, at 375-76.

87. See Sucharipa-Behrmann, *supra* note 83, at 286.

88. See *id.* at 285-86.

89. See *id.* at 287.

90. See *id.* at 277-78. See also Chase, *supra* note 84, at 376-78.

The ASEAN countries complained that the law did not require mandatory labeling of other types of wood and wood products imported into Austria or produced domestically.<sup>91</sup> Therefore, they argued, Austria was not honoring its obligations under the GATT, especially those relating to the most-favored-nation treatment and the national treatment.<sup>92</sup> They also challenged the Austrian decision to levy a 70% import tariff on tropical timber and tropical timber products.<sup>93</sup>

Defending its law, Austria stated "that its move was not induced by any economic or protective motivation but by strictly environmental" concerns.<sup>94</sup> Austria argued that the labeling requirement did not constitute an obstacle to trade since product labeling *per se* was not a trade restriction, and the law did not impose any quantitative or qualitative restrictions on imports from any destination.<sup>95</sup> One of the interesting arguments advanced by Austria was that the law was not discriminatory in nature since it applied to any tropical timber or tropical timber product, including its own tropical timber products (it should be noted that this country has no tropical forest), irrespective of the country of export or origin.<sup>96</sup> Austria also rejected the allegations of extra-territorial action since the law applied exclusively to the Austrian territory.<sup>97</sup>

However, faced with criticism from tropical timber exporting countries and the likelihood of losing the case if it were to be referred to the GATT Panel, Austria amended its law and abolished the mandatory labeling requirement for tropical timber and tropical timber products as well as the 70% import tariff.<sup>98</sup> Under the amended law the labeling requirement is

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91. It should be noted that Article XX(g) of the GATT requires that any measure adopted by a contracting party must be "made effective in conjunction with restrictions on domestic production or consumption." GATT, *supra* note 7, art. XX(g). Here, the question may arise as to what corresponding domestic measure is Austria supposed to take since it has no tropical forest? The tropical countries would say that Austria should subject all timber and timber products to the same rules as those applied to tropical timber and tropical timber products. If Austria did so, it would not be accused of taking discriminatory measures.

92. *See* Sucharipa-Behrmann, *supra* note 83, at 287.

93. *See id.* at 285.

94. *Id.* at 288.

95. *See id.*

96. *See id.* at 289.

97. *See id.*

98. *See id.* at 290.

(like any other eco-labeling program) voluntary, and the quality mark can now be issued to all kinds of timber and timber products from sustainably managed forests.<sup>99</sup> Analysts have stated that if the Austrian move had subjected all kinds of timber from unsustainably managed areas to the regime introduced and had levied a much lower tariff on all timber imports, it would have been a successful pioneering move rather than a counter-productive exercise as the amendment to the original federal law strengthened the arguments advanced by the ASEAN countries. By introducing a much lower import tariff on all timber and timber products from unsustainably managed areas, Austria would have been in a position to help internalize environmental and social costs and increase export revenues in countries implementing sustainable forestry techniques.<sup>100</sup>

### C. *Unresolved Legal Issues*

If Austria had not amended the law and the ASEAN countries had taken the dispute before the GATT Panel, we would have witnessed a very interesting development. The Panel would have been left with two questions to answer: (i) was the Austrian law in violation of Article I and/or Article III of the GATT; and (ii) if the answer was in the affirmative, could the law still be defended under the general exceptions provided for in Article XX of the GATT? Since such an opportunity was aborted by the amendment to the Austrian law, these two questions remain unresolved.

The answer to the first question depends on how the term "like product" in Articles I and III of the GATT is defined. Article I(1) requires every contracting party to accord immediately and unconditionally the most-favored-nation treatment accorded to any product originating or destined for any other country "to the like product" originating in or destined for the territories of all other contracting parties. Similarly, Article III(4) requires every contracting party to accord treatment to the products of the territory of any contracting party similar to those accorded "to like products" of national origin.

The answer, therefore, depends on whether or not all

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99. *See id.* at 290-91.

100. *See Chase, supra* note 84, at 374.

kinds of timber can be regarded as "like products" in the sense of the GATT. Austria argued that since tropical timber and other timber were not "like products," the original Austrian law was not discriminatory in nature since it applied to all tropical timber or tropical timber products regardless of the country of origin. If all timber and timber products are considered "like products," the original Austrian law was perhaps in violation of the GATT. But if tropical timber and tropical timber products are to be considered as different products from other kinds of timber and timber products, the original Austrian law was not in violation of the GATT.<sup>101</sup>

With regard to the answer to the second question, it is, of course, possible for a state to take measures derogating from its obligations under the GATT, provided that such measures do not result in "arbitrary or unjustifiable discrimination" between products from other contracting parties themselves or between domestic products and products from such countries.<sup>102</sup> The general exceptions contained in Article XX(b) and (g) permit exceptions from the GATT obligations for measures that are "necessary to protect human, animal or plant life or health" or which relate "to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."<sup>103</sup>

Therefore, it is doubtful whether the unilateral measures regarding the protection of tropical forests by a non-tropical country (Austria) were "necessary" in the sense of Article XX.<sup>104</sup> Since the original Austrian legislation did not require mandatory labeling for other kinds of timber and timber products imported from other contracting parties or produced domestically, it could be argued that the Austrian law was not in

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101. According to Chase, since temperate softwood and tropical hardwood logs directly compete in the plywood, construction, and furniture industries, tropical and non-tropical timber are considered to be "like products" in a number of different industries worldwide. *Id.* at 383.

102. See generally Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 22 J. WORLD TRADE 37 (1991).

103. *Id.* at 38.

104. Chase maintains that "at least tentatively, mandatory labeling laws as applied to tropical timber appear to be prohibited under the GATT because they unjustifiably discriminate between 'like' timber products under the 'soft' MFN and NTO [national treatment obligation] requirements contained in the preamble of Article XX." Chase, *supra* note 84, at 386.

accordance with Article XX either.

Austria is not alone in taking measures designed to protect tropical rainforests. Among the countries that have taken certain steps in this direction, the initiative of the Netherlands is of significance for the purposes of this study and will be reviewed next.

#### *D. The Dutch Initiative to Protect Tropical Rainforests*

The Government of the Netherlands, through a policy paper on tropical rainforests in 1992, adopted a policy that from 1995 onward, the use of tropical timber should be limited to timber from countries or regions with a forest management system geared to protection and sustainable production.<sup>105</sup> This policy is arguably in compliance with the 1990 Bali meeting of the International Tropical Timber Council (ITTC), which states that by the year 2000 all tropical timber is to be derived from sustainable logging practices.<sup>106</sup> The intention of the policy paper seems to be to use trade in tropical timber as an instrument to promote sustainable forest management. With a view to achieving this objective, the Dutch Government concluded a Netherlands' Framework Agreement on Tropical Timber in June 1993 (Agreement) with various umbrella organizations of commercial entities, individual companies, and other organizations involved in trade in tropical timber as well as in the protection of tropical rainforests.<sup>107</sup>

The Agreement stated that "a properly functioning market-oriented system to distinguish sustainably from non-

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105. See THE NETHERLANDS' MINISTRY OF ENVIRONMENT, INFORMAL WORKSHOP ON TIMBER CERTIFICATION (1994).

106. See James Cameron & Farhana Yamin, *Forests*, 1 YB. INT'L ENV. L. 201-202 (1990). See also U.N. CONF. ON TRADE AND DEV., INTERNATIONAL TROPICAL TIMBER AGREEMENT 14 (U.N. Doc. TD/Timber.2/16, U.N. Sales No. E.94.II.D23) (1994). However, it should be noted that no international instrument defines what constitutes sustainable logging of tropical timber.

107. A copy of the Agreement entitled, "Netherlands Framework Agreement on Tropical Timber" was kindly supplied to the author by the Ministry of Environment of the Netherlands (on file with author) [hereinafter Framework Agreement]. For a brief report on this Agreement see 4 YB. INT'L ENV. L. 265, 267 (1993). It was signed on 25 June 1993 at The Hague by 12 parties, including Ministers from various government Ministries, two environmental NGOs, and all national associations and trade unions engaged in some form of trade in tropical timber such as the Netherlands Association of Timber Agents and the Netherlands Timber Trade Association.



sustainably produced timber can be an effective incentive to promote sustainable forest management, since the costs of sustainable production can be passed on to the consumer."<sup>108</sup> Under Article 2 of the Agreement, the Dutch Government and other contracting parties undertook "to ensure that from 31 December 1995, the trading and processing of tropical timber in the Netherlands shall be limited to timber supplied from countries or regions with a forestry policy and management system geared to protection and sustainable production."<sup>109</sup>

The Agreement included a plan of action to prepare the conditions necessary to achieve its objective, that all tropical timber supplied on the Netherlands market from 1995 onwards is sustainably produced.<sup>110</sup> Accordingly, it was proposed that from 1997 onwards, tropical timber could be imported into the Netherlands only after ascertaining that the timber came from a sustainably managed forest, the origin of the tropical timber has been established, and a certificate has been awarded. The following targets were set in order to achieve these objectives during the first phase of the action plan (i.e., the Development and Exploration Phase, 1993):

1. A clear insight into the flow of tropical timber onto the Dutch market, and the actors involved.
  
2. Agreement on the basic points of departure and methodology to be used in more fully defining the concept of sustainable forest management and the means of testing this concept for each producer country and/or forest management unit.
  
3. A practical system for collecting, processing, analyzing and supplying to each of the Parties relevant information needed for the implementation of this Framework Agreement.
  
4. Insight into the modalities of a certification system and the means of initiating its implementation.

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108. Framework Agreement, *supra* note 107, at preamble, para. 8.

109. *Id.* art. 2. The deadline was since extended to December 31, 1996.

110. *Id.* art. 3.

5. Insight into the demand in the Netherlands for sustainably produced tropical timber.

6. Insight into the possibility or, as the case may be, the modalities of legislation to restrict the trading, processing and use of tropical timber in the Netherlands to timber supplied from countries or regions with a forest policy and management structure aimed at protection and sustainable production.<sup>111</sup>

Similarly, the targets set for the second phase (Experimental Phase, 1994) were as follows:

1. A clear insight into the agreements concluded, and still to be concluded, with the relevant authorities in producer countries which currently supply or could supply the Netherlands with sustainably produced tropical timber.

2. An operational certification system and identification of the actors involved.

3. An elaborated proposal for sustainable consumer information activities designed to encourage demand in the Netherlands for tropical timber which has been awarded a certificate and to discourage demand for tropical timber that has not been awarded a certificate.<sup>112</sup>

Finally, the targets set for the third and last phase (Introduction Phase, 1995) were:

1. The exclusive supply of sustainably produced tropical timber on the Dutch market.

2. Wide familiarity with, and a positive attitude to, tropical timber which has been awarded a certificate on the part of the Dutch consumer.

3. Clarity regarding the activities to be pursued in the follow-

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111. *Id.* art. 4.

112. *Id.* art. 5.

up phase, i.e. following the expiry of this Framework Agreement, or the way in which this Framework Agreement shall be succeeded.<sup>113</sup>

However, in view of the GATT rules on non-discrimination, the Dutch Government appears to have abandoned its plan for the adoption of a new legislation to go ahead with its initial plan on tropical timber and tropical timber products. It appears to be another climbdown by yet another ambitious small European power. Now the Dutch Government appears to seek support for its loose voluntary labeling program from the business sector solely on the basis of persuasion rather than imposition.

The initial Dutch initiative differed from the Austrian move in a number of ways. First, unlike the latter, the former did not seek to ban the import of tropical timber *products* even if they were from non-sustainably managed forests. Second, it was not going to be the Government of the Netherlands that sought to unilaterally impose a ban on tropical timber. Under the Framework Agreement the Dutch Government undertook to explore the possibility of concluding bilateral agreements with tropical timber producing countries for bilateral co-operation in the field of sustainable forest management, trade in, and processing of sustainably produced timber. Third, the Dutch Government aimed to achieve the objectives stipulated in the Agreement through co-operation with NGOs and companies involved in tropical timber trade rather than impose its will on the importers of such timber. The signatories of the Framework Agreement were simply required to purchase their timber from those exporters and importers who have met the requirements of the certification scheme.

Fourth, the ban envisaged on tropical timber from countries and regions from unsustainably managed forests was supposed to come into effect on December 31, 1996.<sup>114</sup> However, the legislation required for the achievement of the objectives of the Agreement has not been adopted and is unlikely to be adopted. This may be one reason why no legal problem has been raised concerning the compatibility of the envisaged measures with the GATT rules and other rules of international law. Moreover, the Dutch government entered into negotiations

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113. *Id.* art. 6.

114. *Id.* art. 2.

with certain tropical timber producing countries to win their support and to convince them of the desirability of this legislation, with a view perhaps to avoiding the Austrian situation in which Austria had to repeal its law in the face of the opposition by certain tropical timber producing countries. One will have to wait and see whether any state challenges the Dutch measures designed to achieve the objectives of the 1993 Framework Agreement when a voluntary labeling scheme is in place on tropical timber from unsustainably managed forests.

Therefore, at this stage it is difficult to determine the legal ramifications of the Dutch initiative. Nevertheless, since the Dutch certification of the tropical timber system is largely a voluntary one rather than a mandatory one and does not exceed the limits of the GATT exceptions it may not bring into the spotlight similar legal issues as those raised by the Austrian move. However, since the Dutch initiative does not apply to all timber the allegation of trade-discrimination against the GATT rule may follow.

#### IV. SUGGESTED MEASURES FOR STRENGTHENING ECO-LABELING

The discussions in the preceding paragraphs demonstrate that the legal ramifications of eco-labeling programs are far from clear. The impact of such economic measures on the world trading system represented in the GATT merit a closer examination. Unfortunately, not much has been done in this direction at the inter-governmental level, although there exists quite a substantial amount of literature on the subject.<sup>115</sup> A GATT working group on trade and environment was established as early as 1971.<sup>116</sup> However, its first meeting took

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115. See generally Ralf Buckley, *International Trade, Investment and Environmental Regulation*, 27 J. WORLD TRADE 101 (1993); Christopher Thomas & Greg A. Tereposky, *The Evolving Relationship Between Trade and Environmental Regulation*, 27 J. WORLD TRADE 23 (1993); Charnovitz, *supra* note 102, at 37-55; Eliza Patterson, *GATT and the Environment: Rules Changes to Minimize Adverse Trade and Environmental Effects*, 26 J. WORLD TRADE 99 (1992); Jan Klabbbers, *Jurisprudence in International Trade Law: Article XX of GATT*, 26 J. WORLD TRADE 63 (1992); Ernst-Ulrich Petersmann, *International Trade Law and International Environmental Law: Prevention and Settlement of International Environmental Disputes in GATT*, 27 J. WORLD TRADE 43 (1993).

116. See Charnovitz, *supra* note 102, at 37.

place only in 1991, and it continued to work until 1993.<sup>117</sup> Nevertheless, the objectives set by the group were somewhat lopsided since it was concerned only with the effect of environmental policy on trade, not vice versa.

When the Contracting Parties of the GATT gathered in Marrakech, Morocco to conclude the new trade agreement in April 1994, they established a Sub-Committee on Trade and Environment to look into the trade aspects of environmental measures.<sup>118</sup> Labeling was one of the topics that the Sub-Committee was scheduled to discuss in its meeting beginning September 12, 1994.<sup>119</sup> One can hope that this Sub-Committee, which has become a Committee after the entry into force of the instruments signed at Marrakech, will address the lacunae that presently exist on the matter. Eco-labeling has continued to be one of the main items on the agenda of discussion of the new WTO Committee on Trade and the Environment but little progress has been made in adopting concrete measures.<sup>120</sup> Perhaps the time has come for a "Green Round" of the GATT after the WTO Ministerial Conference in December 1996 in Singapore since the Singapore Conference did not do much on this front.<sup>121</sup>

The WTO Committee on Trade and Environment submitted a detailed report to the Singapore Ministerial Conference outlining its work on various topics including eco-labeling.<sup>122</sup> In its conclusions and recommendations the Committee stated that "[w]ell-designed eco-labeling schemes/programs can be effective instruments of environmental policy to encourage the development of an environmentally-conscious consumer public."<sup>123</sup> The Report continued:

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117. See Report by the Chairman, *supra* note 49, at 75

118. See *Sub-Committee on Trade and Environment Begins Work Programme*, TRADE AND ENV'T, July 26, 1994, at 2.

119. *Id.*

120. See Press Releases of the WTO Committee on Trade and the Environment, *Trade and the Environment, News and Views from the WTO*, WTO Doc. Press/TE 010 (July 8, 1996), and Press/TE 013 (Sept. 27, 1996).

121. See The Conclusions of the 1st Ministerial Conference of the Members of the WTO, *Singapore Ministerial Declaration*, WTO Doc. WT/MIN(96)/DEC/W, Dec. 13, 1996, 36 I.L.M. 218.

122. See The Report of the WTO Committee on Trade and Environment, *Trade and the Environment, News and Views from the WTO*, WTO Doc. Press/TE 014 (Nov. 18, 1996).

123. *Id.* at 131, para. 183.

Increased transparency can help deal with trade concerns regarding eco-labeling schemes/programs while it can also help to meet environmental objectives by providing accurate and comprehensive information to consumers. The CTE [the Committee on Trade and Environment] felt that an important starting point for WTO Members to address some of the trade concerns raised over eco-labeling schemes/programs is by discussing how to ensure adequate transparency in their preparation, adoption and application, including affording opportunities for participation in their preparation by interested parties from other countries. The transparency provisions contained in the TBT [Technical Barriers to Trade] Agreement, including the Code of Good Practice for standardizing bodies contained in Annex 3 of the Agreement provide a reference point to the further work of the CTE in enhancing transparency of eco-labeling schemes/programs.<sup>124</sup>

As pointed out in the 1992 study by the GATT Secretariat on Trade and Environment, the GATT places few limits on the freedom of countries to apply non-discriminatory regulations to protect their environment. With regard to the measures that are discriminatory but at the same time necessary for the protection of the environment, it may be a good idea to amend Article XX by inserting a provision allowing a country to impose measures relating to the protection of the environment, both its own and that of the world at large or to negotiate a new international Code or Agreement containing such provisions.<sup>125</sup> The agreements concluded at the end of the Uruguay

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124. *Id.* at 31, para. 184.

125. *See* TBT, *supra* note 57, Annex III. Of course, there is the WTO Committee on Trade and the Environment to deliberate on such matters and come up with proposals in this respect. However, the Committee can only recommend to the WTO how this Organization could contribute to the protection and promotion of the environment within the existing GATT/WTO legal framework. What is needed is to take a fresh look at the GATT/WTO regime and consider adopting a protocol to the GATT to enable individual Member States to take national measures designed to protect the environment in accordance with internationally approved standards. Not much attention seems to have been paid during the Uruguay Round of trade negotiations to the impact of trade liberalization on the environment. Now, an informed and concerned public are questioning the merits of trade liberalization and concerned about its potential conflict with the promotion of environmental goals. What appears to be the future course of action for the international community is to adopt a new international instrument which seeks to balance trade liberalization with its adverse impact on the environment.

Round have in effect tried to ensure that voluntary standards such as voluntary labeling programs aimed at the environment do not create unnecessary obstacles to trade.<sup>126</sup> Although, as mentioned earlier, Article 2.2 of the TBT Agreement includes the environment as a legitimate objective for the achievement of which states can adopt certain technical regulations and standards,<sup>127</sup> such measures should not be more trade-restrictive than necessary to fulfil the objective. The overall and perhaps overriding objective of the instruments adopted at the conclusion of the Uruguay Round of trade negotiations seems to be to limit trade restrictions to an absolute minimum.<sup>128</sup>

With the proliferation of national eco-labeling programs, a number of other transnational trade-related problems are likely to arise. Environmentally-friendly products are likely to gain an increasing share of not only domestic but also international markets. For instance, German exports carrying the "Blue Angel" are already quite popular among "green consumers" in many EC countries. In this state of affairs, as stated by Sand, "[t]o avoid unfair trade practices, arrangements for mutual recognition of national environmental labels, possibly including harmonized standards and procedures of product selection and identification, will become necessary."<sup>129</sup>

Indeed, as discussed earlier, the Nordic Council's harmonized eco-labeling program encompasses five countries, and the EC's harmonized program presently includes 15 countries with a prospect of 20 in the near future.<sup>130</sup> Both economic efficiency and consumer confusion may warrant harmonization. Consumer confusion may arise not only from several official and

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126. *Id.*

127. *Id.*

128. This was also the position taken at the Rio World Conference on Environment and Development. For instance, Principle 12 of the 1992 Rio Declaration on Environment and Development declares that:

Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

*Report of the United Nations Conference on Environment and Development, in AGENDA 21 & THE UNCED PROCEEDINGS 1, 10 (Nicholas A. Robinson ed., 1993).*

129. SAND, *supra* note 8, at 28.

130. See OECD REPORT, *supra* note 1, at 13.

semi-official eco-labels but also from "ozone-friendly" non-substantive claims of manufacturers. Government sponsored eco-labeling programs may help curb false advertising claims by manufacturers to exploit "green consumers." Deceptive and unsubstantiated claims such as labels carrying "environmentally-friendly" or "ozone-friendly" words have appeared in many products available in the market. Such claims confuse consumers and dilute the significance of genuine attempts to encourage consumers to buy more environmentally friendly products.

In fact, owing to inflated claims by supermarket chains and manufacturers for products that were often barely superior to the traditional ones, the effectiveness of eco-labeling schemes seems to have declined in many developed countries. For instance, a report published in March 1996 by the National Consumer Council of the U.K. concluded that claims for many green products were "misleading, meaningless or even downright dishonest, leaving consumers cynical and confused."<sup>131</sup> Consumers are unwilling to pay more for products that perform badly even if they are claimed to be environmentally friendly. It is quite understandable that people should give up trying to buy more expensive "green" products altogether since, as pointed out by the UK Consumer Council, many of the "green" claims "are often woolly, meaningless, unverifiable, open to multiple interpretations, confusing, or of no real benefit."<sup>132</sup> Indeed, a detergent product called "Daz Ultra" sold by Proctor and Gamble in the UK, claiming to be "biodegradable" was found to have exceeded EC standards on biodegradability. Vague claims such as UK supermarket chain Tesco's "Dolphin friendly" tuna fish or "softer on the environment" labeled toilet rolls are difficult claims to verify.

Another possibility of achieving harmonization would be through the establishment of an international body empowered to approve product groups and criteria. Like the EC and the Nordic system, the actual certification and awarding of labels could take place at the national level. It could be a body like the newly created World Trade Organization (WTO). Alterna-

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131. See Paul Gosling, *'Green Consumers' Give Up Trying to Save the World*, INDEP., Apr. 21, 1996, at 1.

132. *Id.*



tively, it should also be possible to entrust the WTO itself with such powers through a protocol and establish a division within this organization. An international agreement could be concluded defining the criteria to be used in the life-cycle analysis of a few selected products in every state party to such an agreement.

However, as pointed out in the OECD report, one must not overlook the possibility that "[g]iven different composition of product markets and the varying environmental concerns in countries, the final product criteria established in a supra-national system may be either too high or too low from a member country's perspective."<sup>133</sup> Indeed, it is a matter that will have to be judged in light of the practice of the EC countries in the years to come.

Yet another suggested approach is the mutual recognition of labels based on reciprocity. A state could automatically award its national label to products that had been awarded a label by another country and vice versa. This would not only reduce confusion among consumers but also help minimize the costs involved, especially for small and foreign manufacturers. It should be emphasized that in order for such a rule based on reciprocity to be effective it is desirable that the criteria between the two countries must be very similar. However, the danger envisaged above with regard to a possible lowering of standards under an international agreement would also apply here. One way of safeguarding against such risk is to require that every country should award labels to such products whose quality is higher than normal environmental attributes among similar products.

## V. CONCLUSION

Labeling programs appear to hold promise as effective market-based tools for environmental protection, provided they are supervised by a credible agency. Except for food products and pharmaceuticals, for which there is a separate mechanism for labeling, almost every product can be brought within the voluntary eco-labeling program through economic incentives.<sup>134</sup> For instance, varnishes, coatings, gas burners, recy-

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133. OECD REPORT, *supra* note 1, at 37.

134. One possible economic incentive could be lowering the VAT on eco-labeled

cluded paper-products, washing machines, dishwashers, batteries, engine oil, plastic products, and household detergents are among the products that have already been subjects for eco-labeling in different countries.<sup>135</sup>

However, it should be noted that the role of such programs can be a modest one as they are part of a broader environmental policy, and a labeled product may still harm the environment in one manner or another. All labeling schemes acknowledge that a labeled product is only *relatively* more benign than another in the same category. Modern-day consumers demand industrial products, and these are likely to harm the environment. In light of this, labeling programs aim to capitalize on the growing concern of consumers for the environment and encourage them to pay more for genuinely environmentally-friendly products. In short, eco-labeling programs, like most environmental measures, can be described as a damage-limitation exercise, which, of course, can function as a very useful economic instrument for the protection and improvement of the environment. However, this instrument can function effectively if regulated properly by a credible national agency under a harmonized national policy if it is a voluntary eco-labeling program. If it is a mandatory national eco-labeling program which is likely to affect other states, such a program should be based on an international legal instrument such as an internationally binding code of conduct for eco-labeling.<sup>136</sup>

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products.

135. See OECD REPORT, *supra* note 1, at 48.

136. This was actually the advice offered by the GATT Panel on the *Tuna/Dolphin I* case for states willing to use mandatory eco-labelling schemes having effects on other states even if such schemes were designed to protect human, animal or plant life or health. See United States Restrictions on Imports of Tuna, *supra* note 69, at 204, paras. 6.3, 6.4.

