

# **Product and Raw Material Eco-Labeling: The Limits for a Transatlantic Approach**

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## I. Introduction to the Problem

One of the publishing world's great surprises in the late 1980s was the success of a British paperback innocuously entitled, The Green Consumer's Guide.<sup>1</sup> This book topped the bestseller's list for nine months, was subsequently translated into ten foreign editions and sold in 17 countries.<sup>2</sup> In the United States, books suggesting ten, one hundred, and even five hundred things you could do to save the planet sold briskly, as well. The impetus behind these sales was the unease and activism of citizens who have since been collectively identified as "Green Consumers." Since the late 1980s, increasing numbers of people from all walks of life worried over the state of the environment have sought to promote environmental protection through everyday activities such as recycling newspapers and plastic, planting trees, and, of importance to this chapter, favoring 'green' products in their purchases.

Polls throughout the Organization for Economic Cooperation and Development (OECD) nations have consistently demonstrated that consumers believe they will pay more for environmentally superior products.<sup>3</sup> This shift in purchasing preference holds considerable market potential and has been closely tracked by manufacturers. Indeed, between 1985 and 1990 the introduction of products with "green" claims increased nineteen-fold in the United States.<sup>4</sup> While the wave of green product introductions has subsided from its flood crest just a few years ago, consumers remain concerned over the environmental impacts of their purchases, and producers over the environmental qualities of their products.<sup>5</sup>

The problem is how to make their purchases matter, i.e., how to identify the true green from the mock green products. Adrift in a sea of "recyclable," "recycled," "ozone-friendly" and "biodegradable" claims, where can the green consumer find a safe harbor to assess reliably the overall environmental quality of products? Books such as the Green Consumer's Guide provide one anchor, but since 1990 environmental labels have become increasingly important.

There are three basic types of environmental labels. *First-person voluntary labels* such as "recyclable" and "CFC-free" are the largest class of environmental labels. Placed on products by

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<sup>1</sup> John and Julia Hailes, *The Green Consumer's Guide* (1988).

<sup>2</sup> James Salzman, *Environmental Labelling in OECD Countries* (1991).

<sup>3</sup> Whether those polled actually do pay more for 'green' products is a different issue altogether.

<sup>4</sup> Salzman, *op. cit.*, at 15.

<sup>5</sup> The launch of niche-marketed 'green products' has slowed to a trickle. Their retreat in the marketplace has been due in part to poor performance, consumers' disillusion with specious environmental claims and the improvement of mainstream products in their environmental profiles and marketing. Charles Clover, "Sainsbury's Set to Drop 'Green' House Cleaner," *Daily Telegraph*, September 10, 1996.

their manufacturers, so long as the claims are factually verifiable and accurate these labels face few legal restraints or trade concerns. *Third-person mandatory labels* such as "flammable" and "eco-toxic" are a small class and required by law. The best-known examples of these labels include California's Proposition 65, energy efficiency labels on major appliances, and fuel-efficiency ratings on new cars.<sup>6</sup> As with first-person labels, third-person mandatory labels are generally accepted and not the subject of public debate.

Indeed, public concern has focused almost exclusively on *third-party voluntary labels*, labels representing independent judgments of the environmental quality of the product. The purpose of such labels is to represent an environmental seal of approval, identifying products as environmentally superior to their competition. Key to this identification of superior products is the use of life-cycle methodologies which assess the product's impacts throughout its life.

Third-party voluntary labels include resource-based labels which identify, for instance, whether tuna were caught with 'dolphin-friendly' nets or whether timber was taken from 'sustainably-harvested' forests, report card labels which simply quantify a product's environmental impact (analogous to nutrition content labels on food), and eco-labels which assess the overall environmental worthiness of consumer products.

The goals of third-party environmental labels are simple: provide consumers with accurate information regarding the environmental qualities of products and, by doing so, introduce a competitive dynamic in the marketplace. Since not all products will place the same burden on the environment, identifying environmentally less harmful products through a label furnishes consumers an additional basis for choice beyond price, performance and other attributes. If environmental qualities truly are important to consumers then the label, it is hoped, will strengthen the competitive position of the products, increase their sales, and put pressure on competitors to improve their environmental performance so they, too, can qualify for the label. As with most simple ideas, however, putting environmental labeling into practice has proven challenging and led to political involvement at the international level.

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<sup>6</sup> Energy Policy Conservation Act of 1976, as amended by the National Appliance Energy Conservation Act of 1987 and the Energy Policy Act of 1992. 42 USCA 6293, 6295, 6302(a)(5). *See also* 16 CFR 305.1-305.54 (1995) (c). The Act requires placing energy guide labels on certain new home appliances. These include refrigerators, freezers, air conditioners, furnaces, dishwashers, fluorescent lamp ballasts, faucets, etc. The labels provide an estimate of the annual operating cost and, in certain cases, the energy efficiency of the appliance. The CAFE standards were also established by EPCA, requiring the placement of labels on all new cars showing the miles-per-gallon of the vehicle for city and highway driving. *See generally*, EPA, Status Report On the Use Of Environmental Labels Worldwide 164-166 (1993).

The international relations conflict raised by environmental labeling is one of environmental protection versus trade distortion. A number of countries fear that markets will be shut to their companies' exports through the use of labels as non-tariff barriers to trade. Others are concerned that environmentally unsustainable practices will be misleadingly garbed in green as a result of weak certification programs. The contested question has been whether international trade rules do, or can, discipline these potential distortions.

A useful theoretical model to analyze trilateral interests in this issue has been developed by James and Lake in their theory of hegemonic coercion.<sup>7</sup> In addressing the question of how hegemonic powers develop and maintain an open international economy, James and Lake argue that three separate and complementary strategies are employed and call these the "three faces of hegemony." The first face of hegemony employs direct action at foreign governments, both positive and negative, to influence their choice of policies. Such actions might include a trade embargo or military intervention. The second face of hegemony relies on the country's international market power to influence decisions in foreign countries. Here the influence might be exercised through consumer preferences and their indirect influence on actors (business and governments) in foreign markets. The third face of hegemony relies on propaganda, through export of ideologies and policies to the public agenda and opinions in third countries.

For purposes of analysis, on trade issues one might posit that there exist three major world powers: the European Union, Japan and the United States. As discussed elsewhere in the book, this clearly is the case in the electronics and automobile sectors, where all three powers are major exporters. Despite the fact that Japan does not export natural resources, it remains a world trade power in this sector, as well, because its dependence on imported natural resources is so high. Its raw material demands exercise important commercial influence within Asia (and indeed parts of Latin America).

If James and Lake's theory of hegemonic coercion is valid, resolution of the international debate over eco-labeling requires understanding the interests of these three powers and the potential for their cooperation. In order to determine and explore the strategies employed by the trilateral powers in the field of environmental labeling, Section II examines the development and application of eco-labels, as well as international trade concerns they have raised. Section III

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<sup>7</sup> Scott James and David Lake, "The Second Face of Hegemony: Britain's Repeal of the COrn Laws and the American Walker Tariff of 1846," 43 *International Organization* 1 (1989).

turns to resource-based labels and the status of certification programs for sustainably-harvested timber. This issue is of particular importance to ASEAN countries such as Malaysia and Singapore. Section IV examines opportunities and impediments for trilateral cooperation to achieve outcomes acceptable to all three great powers and applies the "three faces of hegemony" model. Section V concludes.

In brief, while the US, EU and Japan share similar interests in defending the use of process and production method requirements (PPMs) as the basis for environmental label requirements, it is not in their interest to resort to direct sanctions to force the issue at the World Trade Organization. Cooperation is thus likely but, surprisingly, occurs through effective inaction in order to maintain the unsteady status quo. In this manner, absent resolution of PPMs' status at the World Trade Organization, the second face of hegemony drives policy through the influence of the three great powers' consumers' demands in the marketplace. In the field of timber certification, interests diverge between the US on the one hand and the EU and Japan on the other. In particular, the US advocates a "go-slow" approach and emphasis on non-governmental programs while a number of EU nations wish to be seen as rapidly moving forward and endorsing certification schemes. While trilateral cooperation exercised through the first face of hegemony would effectively settle matters in the field of timber certification, national interests are too divergent. Given the rapid growth of environmental labels and their current expansion into service industries, this issue will continue to have important consequences for trade from Asia to US and EU markets.

## **II. Eco-Labels**

Ranging from the Blue Angel in Germany, the Nordic Swan in Scandinavia, and the Green Seal in America to the Eco-mark in Japan, the Environmental Sea in Taiwan, and the Ecomark in South Korea, both government-sponsored and private eco-labeling programs now truly circle the globe. Their growth has been explosive. While in 1989, only one eco-labeling program existed -- the Blue Angel in Germany, today eco-labeling programs can be found in over 25 countries.<sup>8</sup> In order to understand their inherent strengths and weaknesses, as well as the

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<sup>8</sup> Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and Its Role in the "Greening" of World Trade*, 21 Colum. J. Envtl. L. 205 (1996); June Camille Bush Raines, *The Green Giant: Environmental Marketing Claims*, 45 Okla. L. Rev. 689 (1992); K. Alexandra McClure, *Environmental Marketing: a Call for Legislative Action*, 35 Santa Clara L. Rev. 1351 (1995); Roger D. Wynne, *The Emperor's New Eco-*

criticisms leveled against eco-labels, it is important to understand clearly how eco-labels are developed and awarded.

In most programs, a multi-stakeholder jury makes decisions throughout the process. First, the jury selects from public submissions an initial product category for examination. The products within the category must cause significant environmental impacts and, importantly, certain products within the category must be less environmentally harmful than others. In order to identify these environmentally "less-harmful" products, programs then commission a life-cycle review to determine at which stages in the life cycle the product poses the greatest environmental burdens. These life-cycle reviews range from simple to complex multi-volume assessments but the goals are the same: identify a small number of distinguishing requirements which will effectively segregate the environmentally more benign products within the category. Known as "criteria," these requirements are generally stated as a threshold quantity or standard of performance. Ideally, the criteria will be set at a level that most products in the category cannot meet, thus creating a marketing advantage for those products which qualify for the label and a competitive dynamic within the product category.<sup>9</sup>

The Canadian eco-label for solvent-paints provides an illustrative example. The solvents (volatile organic compounds) keep the paint in a liquid state but also contribute to the formation of photochemical ozone, better-known as smog. The Canadian eco-labeling jury selected solvent-based paints as a potential product category for a label and commissioned a life-cycle review. The review identified the main environmental impacts of solvent-based paints as contribution to smog, heavy metal impacts on human health, and depletion of renewable resources. Criteria were then developed which identified the least harmful products in regard to these major impacts. Thus the eco-seal for solvent-based paints requires:<sup>10</sup>

- volatile organic compound content below 380 grams per liter;
- no pigments of lead, cadmium, chromium VI or their oxides;
- no production or formulation with formaldehyde, mercury compounds or halogenated solvents
- less than 10% aromatic hydrocarbons by weight.

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*logos?: a Critical Review of the Scientific Certification Systems Environmental Report Card and the Green Seal Certification Mark Programs*, 14 Va. Env'tl. L.J. 51 (1994).

<sup>9</sup> Most eco-labeling programs are sponsored by government with a multi-stakeholder jury though some are entirely government-administered. Most private eco-labeling programs are run by environmental groups and do not rely on a jury for decisions.

<sup>10</sup> Environmental Choice Category ECP-12-89. As another example, the Canadian eco-seal criteria for re-usable diapers require that the diapers be made of cloth, be home washable, and be able to endure a minimum of 75 uses.

Manufacturers whose products qualify for the eco-label may voluntarily submit their products for consideration by the program and, if successful, pay a licensing fee to place the label on the qualifying product. By creating an eco-seal for solvent-based paints, it is hoped that consumers will favor the eco-labeled paints and therefore apply competitive pressure on manufacturers of paints with high solvent levels to reformulate and qualify for the eco-label. In fact, the German eco-seal for solvent-based paints has been credited with improving the overall quality of the product category for, over time, the solvent content in German paints has come down.<sup>11</sup>

This eco-label, however, has also been criticized because it may encourage consumers to buy low-solvent paints instead of water-based paints (which are environmentally preferable). In selecting the scope of the product category, eco-labeling programs face a basic conflict. A broad category (e.g., paints) may favor the best environmental option (water-based paints) but the competitive pressure within the category is very narrow. That is, if water-based paints are the only products to qualify for the eco-seal there is no pressure on oil-based paints to lower their solvent levels. Thus programs must decide initially whether the environment is better served through encouraging solvent-based paints to reformulate or encouraging consumers to switch to water-based paints. There are similar difficult choices, discussed later, which together indicate clearly that despite their potential eco-labels are imperfect market instruments.

When the OECD's analysis of eco-labeling programs was published in 1991, it reflected the general optimism over the potential impact of eco-labels. At the time, eco-labels were viewed by governments and environmental groups alike as a powerful, high profile, low cost, market-based instrument to promote environmental protection. Since they were voluntary, eco-labels acted as "soft" policy instruments, complementing the more traditional command-and-control mandates. Eco-labels were embraced at the time by the trade community, as well, as a non-interventionist means to avoid trade and environment conflicts. In fact the "dolphin-safe" labeling provision of the challenged US legislation in the Tuna/Dolphin case was upheld by an international trade dispute panel. In 1992, the Earth Summit's consensus blueprint for action, *Agenda 21*, echoed this praise, stating: "Governments, in cooperation with industry and other relevant groups, should encourage expansion of environmental labeling and other

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<sup>11</sup> Salzman, *op. cit.* at 29.

environmentally related product information programs designed to assist consumers to make informed choices."<sup>12</sup>

Over the last five years, however, while the number of national eco-labels has increased the initial enthusiasm has waned. Indeed, at the international level the debate has significantly altered from speculation over how far eco-labels will 'green' the market to the very legitimacy of eco-labels as environmental policy instruments. This shift from optimism to survival has resulted from a number of developments including the problems plaguing the European Union's eco-labeling initiative, the poor market performance of green products, and a concerted attack by industry and some developing countries. As a result of these attacks, the appropriate trade disciplines for eco-labels has been placed on the agenda of the World Trade Organization. In particular, opponents of eco-labels have attacked on three fronts: effectiveness, potential violations of trade law, and conformity with international standards.

### ***Effectiveness***

The most basic question of eco-labeling programs, i.e. "do they work," still has not been answered empirically. The 1991 OECD study and those that followed have provided qualified answers. In some product categories, in certain countries, sales of eco-labeled products have increased.<sup>13</sup> But did the increased sales result from the eco-label or other factors? Overall, the impact of eco-labels on market sales remains uncertain. The OECD's ongoing study of eco-labeling programs has not yet produced evidence to the contrary.<sup>14</sup> One reason for this uncertainty is methodological. Traditional marketing tools such as advertising, packaging, and promotions are never held constant. As a result, eco-labels' impacts cannot be assessed in

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<sup>12</sup> *Report of the United National Conference on Environment and Development*, Annex II, Chapter 4.21, U.N. Doc. A/Conf.151.26, June 3-14, 1992.

<sup>13</sup> Since the German eco-label was granted for recycled paper, the average recycled content has increased from 50% to 100%. The German government attributed a reduction of 40,000 tons of solvent in the waste stream to the eco-label for low-solvent paints and varnishes. The government has also claimed that its eco-label for oil and gas heaters provided the impetus for 60% of the products on the market to qualify for the label within two years of its issuance. Salzman, *op.cit.* at 30. The EU claims that sales of Hoover vacuum cleaners have greatly increased since it qualified for the EU eco-label. "Business Group Urges European Commission to Halt Work on label," BNA International Environmental Reporter at 433, May 29, 1996.

<sup>14</sup> While not yet derestricted, the 1996 study's findings are remarkably similar to the OECD study conducted 5 years earlier. There is little empirical evidence of environmental labels' impact on the marketplace. The best evidence of their impact is inferred from the fact that manufacturers still apply for labels.



isolation. This lack of a control reduces evaluation of an eco-label's impact to an exercise in extrapolation.

Defining eco-labels' success solely by changes in product sales, however, largely misses the point. Even if sales of eco-labeled products do not increase, the labels can prove effective through their influence on design. Put another way, industry's concern throughout the 1990s has been more over the potential of eco-labels to influence consumer purchases than their actual impacts. Whether or not eco-labels have proven effective to date is interesting but largely irrelevant because tomorrow's eco-label may provide a significant competitive edge that no business wants to miss out. Thus competition between companies for eco-labels can remain intense even if consumer response will likely be small and, indeed, even if the companies choose not to apply for the label. This may seem counter-intuitive, but the author observed such competition on more than one occasion while working in the consumer products industry.<sup>15</sup> In short, eco-labels can influence product design because no one wants to be placed at a competitive disadvantage, even if the likelihood of lost sales is small. As an example, since the launch of eco-seal for household cleaning products by the private American eco-labeling program, Green Seal, the environmental profile of products throughout the household cleaning sector has improved (including products which did not apply for the seal). Green Seal has been told informally that its eco-label was a factor influencing this improvement in reformulation.<sup>16</sup>

Industry groups routinely threaten that their members will neither participate in the drafting nor apply for eco-labels in their sector. This threat has been hollow in the past since once the criteria were published individual companies inevitably would break ranks and apply for the label, hoping to seize a competitive edge. This occurred in Germany when the Blue Angel eco-label for recycled paper products was adopted. German paper manufacturers' initial uniform refusal to apply for the label evaporated when the American company, Scott Paper, applied for and received the label.<sup>17</sup>

The EU eco-label experience has been different, however. Four years into the program very few companies have applied for an eco-label. The success of industry opposition has likely been due to the public's ignorance of the EU eco-label. Unlike the situation with the Blue Angel

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<sup>15</sup> From 1990-1992, the author directed the OECD program on the Green Consumer and authored the first book on environmental labeling programs. From 1992-1995 he served as European Environmental Manager at Johnson Wax.

<sup>16</sup> Personal Communication, Arthur Weissman, Vice-President for Standards and Certification, Green Seal, November 8, 1996.

<sup>17</sup> Salzman, *op. cit.* at 30.

in Germany, there is no competitive benefit for individual companies to break ranks from the trade associations' boycott. This may change if the EU Member Countries publicize the eco-label and increase its recognition in the marketplace.

Eco-labels' most significant impact to date has occurred in Sweden where ICA, the nation's leading supermarket chain, has required its laundry detergent and home cleaning product suppliers to qualify for an eco-label or face de-listing (i.e., loss of shelf space). ICA has demanded that producers qualify for relevant eco-labels issued either by the government-sponsored Nordic Swan program or by the Swedish Society for the Conservation of Nature's "Good Environmental Choice" program. In the face of this ultimatum, major companies such as Procter and Gamble, Unilever and Johnson Wax have reformulated their products. ICA has justified its demands as responsible action on behalf of customer demands for more environmentally responsible products. The consumer product companies have similarly denounced this action both as limiting consumer choice (since they contend the reformulated products provide inferior performance) and as providing dubious environmental benefits. The net effect for the companies has been an increase in costs, since the economies of scale from producing a uniform European formula are lost.<sup>18</sup> Nonetheless, the companies have acceded to ICA's demands and reformulated the products in compliance with the eco-label criteria. To do otherwise would risk loss of market share to competitors.

Beyond its impact in the marketplace, the effectiveness of eco-labels as a policy instrument has come under recent attack by a well-funded American industry alliance known as the "Coalition for Truth in Environmental Marketing Information, Inc." The Coalition's trade association members represent collectively 2,900 companies that sell over \$900 billion annually of consumer goods. The Coalition argues that eco-labels are misleading, prevent consumers from making informed choices, do not improve the environment, and restrict international trade.

The Coalition's basic arguments are much the same as other critiques against eco-labels over the last few years. While addressing these criticisms in detail is beyond the scope of this chapter, the charges are serious and have been placed before policy-makers in the US and in Canada in a high-profile lobbying effort. In particular, the Coalition charges that:

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<sup>18</sup> Robert Shimp, Associate Director, Environmental Quality - Worldwide, Procter & Gamble, Presentation to Trade and Environment Policy Advisory Committee to the U.S. Trade Representative. October 9, 1996.

- *It is impossible to establish objective, scientifically defensible criteria that identify 'environmentally superior' products in a category;*<sup>19</sup>  
This charge reflects the inherent limitations of life-cycle assessment. While eco-label criteria cannot take into account all the environmental impacts of a product, eco-labeling programs contend that a small number of criteria can, by focusing on the most important impacts of a product, identify environmentally preferable products. To do this requires, at a certain level, subjective judgments over which types of impact (e.g., solid waste, energy consumption) are most significant. In this regard, the eco-labels function as 'soft law' as admittedly imperfect environmental instruments complementing 'hard' environmental regulations and general policies.
- *Eco-labels are an inherent barrier to product innovation for both the environment and other consumer values because criteria can only be based on today's understanding of products, technologies and environmental issues;*  
While potentially true, there is no empirical evidence to support this claim. Germany has had an eco-label program for almost twenty years yet the most innovative environmental improvements often appear first on the market there. Moreover, eco-label criteria are periodically reviewed to take into account marketplace developments. This charge may overstate the market impact of eco-labels.<sup>20</sup>
- *Eco-labels train consumers to look only for symbols and fail to inform consumers about the specific environmental aspects of the products they purchase;*  
This reflects the first criticism and represents a legitimate concern. Labels essentially give a "yes or no" judgment on the environmental quality of a product while the factual comparison is likely far more complicated. In this regard, 'report-card' labels are more appropriate, but there are serious questions whether consumers can use such labels in a meaningful manner.
- *Eco-labels create barriers by focusing on local or regional environmental priorities that may lack international relevance.*  
This criticism centers on whose environment should be protected. If the criteria reflect local environmental concerns that are irrelevant to a foreign country, why should the foreign country's products have to satisfy the local requirements? For example, a requirement of recycled paper content may reduce loss of forests in Country X but if Country Y relies on sustainable tree plantations why should it meet a recycled content requirement for a Country X eco-label? This problem concerns equivalency and is addressed below in more detail.

In place of eco-labels the Coalition favors the current practice of the U.S. Federal Trade Commission, issuing guidelines on the use of fact-based environmental claims.<sup>21</sup> The problem with this approach is its potentially misleading application. As an example, a detergent manufacturer might provide a positive environmental message with information that its detergent is 95% biodegradable after 7 days or that its packaging contains 75% recycled material. There will be no information, however, on other environmental issues concerning phosphate, EDTA, or

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<sup>19</sup> Coalition for Truth in Environmental Marketing Information, Inc., *Informational Brochure* at 2 (1996).

<sup>20</sup> The Coalition argues that the German market would have had even more innovative environmental products without eco-labels.

<sup>21</sup> *Ibid.*

optical brighteners. Eco-labels, despite their drawbacks, attempt to take these factors into account.

Beyond the details of this policy debate, it should be noted that arguments from American industry against the wisdom or effectiveness of other nations' eco-labeling programs are strategically difficult. At best, the Coalition might convince the U.S. federal government that eco-labels are bad policy; but the fact remains that the programs remain popular in their respective countries and are statutory based.<sup>22</sup> Clearly neither Germany, the Scandinavian countries, Japan nor the EU will simply scrap their programs because the U.S. thinks there is a better alternative. Thus the Coalition has focused its efforts on convincing the U.S. and Canadian governments to challenge eco-labels before the World Trade Organization (WTO) and to introduce trade rules (known as "disciplines") on eco-labels.<sup>23</sup> It is this effort, in particular, that is of importance to products from Japan and other Asian countries.

### *Trade Law*

As a result of eco-labeling countries' refusal to change their programs, the strongest international criticism of eco-labels has centered on their potential misuse as protectionist non-tariff barriers to trade. This concern over the trade impact of eco-labels is entirely new, however. When the OECD study was carried out in 1991, the only countries raising trade concerns were Australia and New Zealand.<sup>24</sup> It was the launch of the EU's program in 1992 that brought the trade issue to the fore. This is ironic since, by any objective measure, the EU eco-label has been a failure with few categories approved over the last four years and even fewer labels issued.<sup>25</sup>

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<sup>22</sup> To date, the U.S. government has generally been supportive of eco-labeling efforts in other countries. In response to concerns raised by American industry, particularly the pulp and paper industry, the U.S. Trade Representative's Office has entered into bilateral negotiations with the EU Commission in order to increase the transparency of, and American companies' access to, the EU's eco-labeling program. "EU, US Agree to Hold Technical Meetings," BNA International Environmental Reporter at 920, October 16, 1996.

<sup>23</sup> As described, *infra*, the Coalition engaged in a high-profile lobbying campaign throughout 1996 to persuade the government to support disciplines on eco-labeling at the WTO Ministerial Conference, retaining the former General Counsel of the EPA and a leading trade lawyer to present their position. In response, a number of environmental groups led a vigorous response on Capital Hill to maintain the status quo.

<sup>24</sup> The author wrote the 1991 OECD study and negotiated with the 24 OECD Member Countries over the study's content.

<sup>25</sup> The EU's eco-labeling program has been under periodic revision since its creation in 1992. The program has approved eco-labels in ten product categories, including copying paper, kitchen towels and washing machines; but prior to 1996 only two labels had been issued to companies. In the UK, a small number of manufacturers have now applied for labels in four of the categories. "Local Authorities Encourage Purchases of Goods Awarded Eco-Label Under EU Scheme," BNA International Environmental Reporter at 891, October 2, 1996. Ritt Bjerregaard, the EU's

While the Coalition is currently the most powerful voice opposing eco-labels, the Coalition's trade attacks were preceded by criticism from a number of developing countries. At the urging of the United Nations Conference on Trade and Development (UNCTAD), developing countries have held up eco-labels as a test case for the larger threat they believe domestic environmental measures pose as hidden protectionist barriers. UNCTAD has published a number of studies identifying hypothetical situations where eco-labels could be used as non-tariff protectionist barriers and three general points of concern emerge.<sup>26</sup> The first is the lack of meaningful participation by foreign parties in the establishment of product categories and criteria. By the time draft criteria are available for public review, it is charged, most of the important decisions have already been taken behind closed doors.

The second criticism concerns whose environment should be protected. Eco-labels have been developed and adopted by governments as soft domestic environmental policy instruments, reinforcing "harder" instruments such as regulations and taxes. As a result, both criteria and product categories typically address local concerns and issues. Foreign companies have objected to this approach, arguing that imported products which arguably are environmentally superior may be denied a label because of the labeling country's specific parochial concerns. As an example, Brazil complained that its paper would not satisfy the EU's proposed eco-label criteria requiring mandatory minimum recycled content, despite the fact that Brazil's pulp came from sustainably harvested plantations and was processed using hydroelectric power. Since eco-labels are first and foremost domestic environmental policy instruments, this potential discrimination is hard to avoid, though the EU has since modified its draft criteria to reflect Brazil's concerns.<sup>27</sup>

Third, some eco-label criteria, such as timber are based on process and production methods (PPMs). Made famous by the Tuna-Dolphin cases, PPMs have emerged as a heated point of conflict in international trade debates and are inherent in many eco-labels.<sup>28</sup> Indeed, the concern over PPMs goes to the heart of eco-labeling programs' reliance on life-cycle methodologies. As an example, a program may choose to award an eco-label to paper with very

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Environment Commissioner, has been reported describing the program as "an unmitigated failure." EU To Overhaul Eco-Labeling Program," BNA International Environmental Reporter at 154, March 6, 1996.

<sup>26</sup> Jha, V. and Simonetta, Z. "Eco-Labeling Initiatives as Potential Barriers to Trade," in OECD, Life-Cycle Management and Trade (1994).

<sup>27</sup> James Salzman, "The Trade Implications of Trends in Eco-Labeling," in OECD, Life-Cycle Management and Trade (1994).

<sup>28</sup> GATT Council, United States -- Restrictions on Imports of Tuna (1991), Report of the Panel; GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna (1994).

low wastewater effluent during its production. In all other respects, paper with and without a label may be identical, thus the low effluent criteria acts as a non-product related PPM. The environmental reasons for favoring 'clean' paper with an eco-label are obvious: encourage other companies to reduce their wastewater effluent so they, too, can qualify for the label. In fact, about 15% of the Canadian eco-labeling program's product criteria incorporate PPMs, mostly for paper.<sup>29</sup> The use of child labor, catching tuna with a high rate of dolphin mortality, and sustainable forestry practices are all PPMs and, in the context of international trade, extremely contentious. Many developing nations oppose the use of PPMs in any trade context out of fear they will be mis-used as non-tariff protectionist barriers. Most developed nations, particularly those with eco-label programs, support the use of PPMs in setting criteria because many products' greatest environmental impact occur during production. If international trade rules are amended or interpreted to forbid eco-labels from using PPMs, then eco-labeling programs will be unable to rely on life-cycle analysis as a meaningful tool because the production stage will be excluded.

The Coalition has echoed these three concerns, as well, charging that eco-labels pose barriers to free trade because "their criteria are generally protectionist in nature."<sup>30</sup> The EU program's eco-label for paper illustrates these problems well. During the initial definition of the product category scope and the drafting of criteria, non-EU governments and industry had no opportunity for direct participation. While foreign parties were invited to submit comments on the draft criteria, the American Forest and Paper Association decried the proposals as "pernicious," charging that the effluent limits for organic halogens and chemical oxygen demand "appear to make it impossible for the majority of integrated U.S. mills to qualify for the European paper label."<sup>31</sup> The eco-label has since been approved to the cries of protectionism and the threat of trade associations that their members will not apply for the label.<sup>32</sup> The supermarket chain, Co-op, however, has already applied for the label for its own-brand goods.

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<sup>29</sup> Personal Communication, John Polak, Director, Terra Choice, November 13, 1996.

<sup>30</sup> Coalition, *op. cit.*

<sup>31</sup> The American Forest & Paper Association has also called the eco-labeling program "an elitist scheme." It should be noted that the EU did revise its earlier draft criteria in response to comments from Brazil concerning pulp from sustainably managed plantations. "EU's new 'eco-label' Called Trade Barrier," *Pulp & Paper* at 19, October 1996.

<sup>32</sup> Very few European paper makers qualify for the label, either. Ritt Bjerregaard, the EU's Environment Commissioner, has been quoted as charging that, "some business circles in the United States and in Europe dislike the modest constraint placed on their marketing and the necessity of subjecting their claims to independent verification." "No Basis For a Trade War," *Newsweek* at 14, August 5, 1996.

At the World Trade Organization (WTO), eco-labeling is one of the major subjects under consideration by the Committee on Trade and Environment. The WTO was established by the most recent round of international trade negotiations, known as the Uruguay Round, and serves as the umbrella organization for major international trade treaties such as the well-known General Agreement on Tariffs and Trade (GATT). The Committee on Trade and Environment was established to examine and resolve potential conflicts between international trade law and environmental protection measures.

The international trade law status of eco-labels and their programs is currently unclear. Since eco-labels are voluntary, they would presumably have less discriminatory impact than more traditional non-tariff barriers such as bans or mandatory technical specifications. As the GATT is a contract among governments, private eco-labeling programs are not subject to its provisions at all. This status would likely change, however, if a government became directly involved in an eco-labeling program through, for example, funding of its operation. Public eco-labeling programs, such as the EU, Japanese and Canadian programs, are subject to GATT disciplines. In particular, Article I and Article III prohibit discrimination against imports from other GATT parties (i.e., most favored nation and national treatment disciplines). To date, no program has established criteria which explicitly discriminate on the basis of geographic origin.

While no programs have engaged in *de jure* discrimination, one could imagine criteria designed in such a manner which, while facially neutral, do discriminate against foreign products through disqualifying specific process or production methods (PPMs). Such *de facto* discrimination has been held by the CAFE dispute panel to be consistent with GATT so long as the basis for distinction serves a legitimate government policy rather than protectionism.<sup>33</sup> Moreover, even if Articles I or III are violated the protections of GATT Articles XX(b) and (g) are available if the measures can be shown necessary to protect human, animal or plant life and health or relate to the conservation of exhaustible natural resources.

The main area of dispute over international trade law's coverage of eco-labels centers not on the GATT but, rather, the Technical Barriers to Trade Agreement (TBT). Recently approved as part of the Uruguay Round agreements, the TBT's provisions extend the GATT's national treatment and most favored nation protections to the domain of technical regulations and

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<sup>33</sup> See generally, Process and Production Methods -- Issues and Preliminary Conclusions, OECD, COM/TD/ENV(95) 10 (2/95).

standards. The provisions in the main body of the TBT cover, "technical regulations," defined as mandatory specifications of product characteristics or PPMs.<sup>34</sup> Annex 3 of the TBT, known as the Code of Good Practice, covers "standards," defined as specifications for products or PPMs which are voluntary.<sup>35</sup>

Within the WTO's Committee on Trade and Environment, however, there is intense disagreement among national delegations over how, and if, the TBT covers eco-labels. The definitions of both standards and technical regulations explicitly include, "labeling requirements as they apply to a product, process or production method." Those countries arguing in favor of TBT coverage for eco-labels, such as the US, cite this definition as clear evidence for their position. Since all eco-labeling programs currently are voluntary, the argument goes, they would be subject to the requirements of the Code of Good Practice.<sup>36</sup> Its provisions require standardization bodies to treat products from WTO Member Parties equally, ensure that standards are not prepared, adopted or applied with the intention or effect of creating unnecessary obstacles to trade, allow 60 days for comments on draft standards, and adopt relevant international standards. In contrast to the main body of the TBT, there is no requirement that standards be "no more trade restrictive than necessary." Even among those countries who argue the TBT applies to eco-labels, there is disagreement over whether both product and non-product PPMs are covered.

A smaller number of countries, such as the EU and a number of developing countries, argue that the TBT does not cover eco-labels at all. This position is based on the absence of specific reference in the TBT to environmental labels and to the uncertain status of non-product PPMs. To date there have been no WTO or GATT challenges against eco-labels.

To clarify the status of eco-labels under international trade law, American trade associations (including the Coalition) engaged in a high-profile lobbying campaign for the U.S. Trade Representative to propose eco-labeling disciplines at the December, 1996, WTO

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<sup>34</sup> TBT Annex 1.1 defines a technical regulation as a "Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It also may include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a produce, process or production method."

<sup>35</sup> TBT Annex 1.2 defines a standard as a "Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods... For the purposes of this Agreement standards are defined as voluntary and technical regulations as mandatory documents..."

<sup>36</sup> While not addressed here, government procurement requirements incorporating eco-label criteria would likely be considered technical regulations and subject to the more stringent requirements of the TBT's main provisions.



Ministerial in Singapore.<sup>37</sup> Whether eco-labeling programs currently would comply with proposed disciplines such as 'sound scientific basis' or 'non-discrimination' is an open question, but environmental groups such as the National Wildlife Federation and the Sierra Club have strongly opposed proposing eco-label disciplines as both unnecessary and as placing the programs' survival in the hands of WTO Dispute Panels, administrative courts which have no environmental expertise and an avowedly pro-trade focus. Partly due to lack of time before the Ministerial, the Coalition's efforts were unsuccessful. The CTE's final Report to Ministers reached no conclusion, simply restating conflicting arguments raised by countries concerning TBT coverage, the validity of PPMs, and their potential use as non-tariff barriers to trade.<sup>38</sup> The trilateral concerns of this debate are discussed in the final section.

### *International Standards*

Apart from the WTO, the other important international development concerning eco-labels has been the drafting of International Organization for Standardization (ISO) voluntary standards. A private international organization, ISO has a membership of standardization associations from 118 countries and acts as an international standard-setting body for everything from film speed and nuts and bolts specifications to management practices. ISO standards are voluntary and developed through consensus procedures. Since 1991, ISO has been developing an environmental management series of standards. Called the ISO 14000 series, the standards address environmental management system certification, environmental auditing, life-cycle analysis, and eco-labeling. It is hoped the ISO 14000 series will become as widespread as the ISO 9000 series on quality, now practically a prerequisite for suppliers selling in Europe. The eco-labeling standards are 14020 -- general principles for environmental labels and declarations; 14021, 14022, and 14023 -- principles for self-declared environmental claims; and 14024 -- third-party eco-seals. ISO 14020 is in the process of being adopted and will have little effect on eco-labeling programs.<sup>39</sup>

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<sup>37</sup> "Business Group Urges European Commission to Halt Work on Label for Paper Products," BNA International Environment Reporter at 433, May 29, 1996.

<sup>38</sup> World Trade Organization, Committee on Trade and the Environment, WT/CTE/W/40. Item 3. November 7, 1996.

<sup>39</sup> See, Genevieve Mullett, *ISO 14000: Harmonizing Environmental Standards and Certification Procedures Worldwide*, 6 Minn. J. Global Trade 379 (1997); Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 Ecology L.Q. 479 (1995).

The language for 14024 is still under negotiation and, as currently drafted, faces strong opposition from eco-labeling programs. Nonetheless, the process is strongly influenced by the active participation of industry participants from developed countries. Addressing stakeholder participation, the draft requires that:

"at each significant step in the development [of eco-seals], the consultation process should arrive at consensus...(C)onsensus need not imply unanimity but the procedures must be decided at the onset of the consultation process."<sup>40</sup>

Most programs rely on a twelve to fifteen member multi-stakeholder jury to approve categories and criteria. No program provides for consensus, or even a vote, of all the interested stakeholders at every step of the process. To do so would not only be costly and time consuming, but a consensus (or even a super-majority) requirement could give an effective veto to industry opposition. Eco-labeling programs fear the draft ISO 14024 requirement of consensus could effectively take decisions out of the jury's hands or tie the programs down in endless voting.

If the draft ISO 14024 text is approved, it is likely that eco-labeling programs will refuse to adopt the ISO standard. This will not render it useless, however, because the TBT's Code of Good Practice requires that:

"Where international standards exist or their completion is imminent, the standardizing body shall use them, or relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems."<sup>41</sup>

This provision marks an important innovation in international law, providing for public enforcement of entirely private standards. In the context of eco-labels, failure to comply with the ISO 14024 standard could provide a basis for challenging eco-labeling programs before the WTO (i.e., as a violation of the TBT).<sup>42</sup> Whether programs could justify their noncompliance with ISO standards on the basis of the exceptions listed above is unclear. In any case, it places them on the defensive before a WTO Dispute Panel. The ISO 14024 standard remains under negotiation, however, and the current consensus language may change. The latest draft received over 200 written comments.

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<sup>40</sup> ISO/CD 14024, Second Committee Draft, Section 6.1.

<sup>41</sup> TBT, Annex III, Part F.

<sup>42</sup> Even if, for arguments sake, a dispute panel found that Green Seal's failure to comply with the ISO 14024 standard violated the TBT's Code of Good Practice, it is unclear how the U.S. government could force a private program such as Green Seal to change its practices.

### III. Resource-Based Labels

While eco-labels have drawn the most recent fire in the trade and environment debate, as observers of international environmental policy know well, the United States' ban of Mexican tuna first opened the conflict between international trade law and domestic environmental law. While most legal debate over the Tuna/Dolphin decisions have addressed the implications of the two GATT Dispute Panels on the issue of PPMs and unilateral trade sanctions, environmental labels also played a significant role.<sup>43</sup> The dispute centers on the high incidental dolphin mortality from the tuna fishery in the Eastern Tropical Pacific. In the late 1980s, recognizing a marketing opportunity and faced with threatened consumer boycotts on tuna, major US canners voluntarily started labeling their cans. Starkist was the first to announce that it would no longer purchase any tuna caught in association with dolphins and that it would begin labeling cans of tuna with "dolphin safe" symbols, bearing the message "no harm to dolphins." Other major US canners quickly followed suit. Congress responded, as well, with the "Dolphin Protection Consumer Information Act of 1990," (DPCIA) which established a labeling requirement.<sup>44</sup> The effect of this restriction has been to close the U.S. market to Latin American tuna imports.

The DPCIA required that all tuna caught in the Eastern Tropical Pacific and labeled dolphin-safe must be verified as not having been caught by intentionally deploying purse seine nets around dolphin. Absent that certification, tuna imported into the U.S. could not be marketed as dolphin-safe on US supermarket shelves. In its Tuna/Dolphin decision, the GATT Dispute Panel held that the labeling provisions were GATT-consistent because they were applied evenhandedly and did not have discriminatory effect.<sup>45</sup> Indeed, Director General of the GATT, Arthur Dunkel, praised eco-labels at the time as a means to avoid trade/environment conflicts.<sup>46</sup>

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<sup>43</sup> See, e.g., F. Kirgis, *Environment and Trade Measures After the Tuna/Dolphin Decision*, 49 Wash. & Lee L. Rev. 1221 (1992); R. Housman and D. Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 Hastings Int'l & Comp. L. Rev. 535 (1992).

<sup>44</sup> Daniel Esty, *Greening the GATT* 268-269 (1994).

<sup>45</sup> GATT, *op. cit.*

<sup>46</sup> In 1995, recognizing that dolphin mortality had reduced by 95% in the tuna fishery, following a series of negotiations and an informal agreement with Latin American countries, the US Congress proposed legislation to repeal the tuna ban and change the labeling provisions. In their place, the new law would permit the label, "dolphin safe," so long as no dolphins were observed to have died while catching tuna. In effect, this change would permit the use of "dolphin safe" labels on tuna caught by encirclement with purse seine nets, a practice which the DPCIA forbade. Despite strong support and passage in the House of Representatives, the bill died in the Senate without a floor vote as the session expired. Mexico has not ruled out a new challenge before the WTO on both the tuna ban and the labeling provisions. The Clinton Administration, to head this off, has promised to reintroduce the legislation before the new Congress. Esty, *op. cit.* at 134.

The resource-based label which has generated the most recent international activity, and with important consequences for a number of Asian countries concerns sustainably-harvested wood. In 1992 in response to concerns over tropical deforestation, Austria passed a law requiring labels on all tropical timber and tropical timber products stating, "made of tropical timber." The law also created a voluntary label identifying "sustainably harvested" timber. Fearful that their timber products would not qualify for the "sustainably harvested" label and suffer lost sales as a result, Malaysia and Indonesia (followed by the Association of Southeast Asian Nations (ASEAN)) denounced the plan as protectionist, threatened to challenge Austria before the GATT, and announced a boycott of all Austrian goods and companies. The ASEAN nations denounced the law as protectionist both because the term, "sustainably harvested," was not defined and, more important, because only tropical timber was subject to the labeling requirement. Temperate forest timber and products were not covered at all. In the face of this onslaught, the Austrian parliament rescinded the law within a year.<sup>47</sup>

Despite Austria's debacle, consumer groups in a number of Northern European countries have continued to clamor for action restricting the commerce of unsustainable-harvested tropical timber. Indeed, over the last five years there has been a dizzying amount of activity around the globe developing standards, indicators and certification systems for sustainably harvested timber. Currently there are three viable alternatives to label sustainably-harvested timber: third-party certification, international standards, and national programs.

Focusing on practical definitions of sustainable forestry, The Forest Stewardship Council (FSC) has relied on a model of "certifying the certifiers." Based in Oaxaca, Mexico, the FSC is a non-governmental organization which developed principles for certification and accredits organizations throughout the world which identify and label wood products from sustainably harvested forests. The FSC has approved ten Principles of Forest Management based on economic, social, and environmental dimensions such as compliance with international environmental agreements, indigenous people's rights, conservation of the forest's biological

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<sup>47</sup> The Dutch attempt to restrict imports has failed, as well. In 1993, the Dutch government declared its intention to limit imports of tropical hardwoods by 1995. This was a consensus decision reached by four government ministries, environmental groups, and members of the tropical trade sector. It was later announced, however, that the December 31, 1995, date for restricting imports was infeasible. "Ban on Unsustainable Produced Hardwood Unlikely by End of 1995, Dutch Commission Says," BNA Intl. Env. Rep. at 478, June 1, 1994; Lilly Sucharipa-Behrmann, "Eco-Labels for Tropical Timber: The Austrian Experience," in OECD, *Life-Cycle Management and Trade* (1994).

integrity, and management plans.<sup>48</sup> Once accredited, a producer pays a fee and may label its products with the Council or accreditor's mark. To date, the Council has accredited four certifiers: the Rainforest Alliance's Smart Wood Program (US), the Scientific Certification Systems Forest Program (US), the SGS Forestry Program, (UK), and the Soil Association's Responsible Forestry Program (UK).<sup>49</sup> The advantage of the Council's approach is its umbrella role, allowing local accreditation organizations to certify specific forests on the ground taking into consideration concerns relevant to, for example, boreal, tropical or temperate forests. In all, FSC-certified accreditors have certified over 9.88 million acres of forests in Malaysia, Indonesia, Papua New Guinea and other countries.<sup>50</sup>

The most successful implementation of FSC's efforts has been a British initiative known as "The 1995 Group." Founded in 1992, the Group's members number over 70 companies, including some of the UK's largest retailers. All members agreed by 1995 to purchase only sustainably harvested wood products certified by organizations accredited by the FSC. As a result of this purchasing commitment, suppliers were forced for the very first time to trace back the source of their timber products and require documentation on their forest management practices.<sup>51</sup> Thus forest owners, including many in Asia for the first time have needed to seek certification of their forest management.

A dizzying number of international institutions have entered the fray, as well. Following the recommendation of its Commission on Sustainable Development, the UN General Assembly created in 1995 the Intergovernmental Panel on Forests. One of its five tasks is to examine eco-labels for wood products. The International Tropical Timber Organization has been active establishing Criteria and Indicators for the Measurement of Sustainable Tropical Forest

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<sup>48</sup> For further information, the Council's internet home page may be accessed at: <http://antequera.antequera.com/FSC>. The Council claims 160 companies have agreed to sell only products certified by the FSC. A timber trade organization has accused the Council of forming a "cartel in order to create a monopoly." "WWF Asks Commission to Back FSC Scheme," BNA Intl. Env. Rep. at 542, June 26, 1996.

<sup>49</sup> National Wildlife Federation, *Guarding the Green Choice: Environmental Labeling and the Rights of Green Consumers* 20 (1997).

<sup>50</sup> One of the accredited certifiers, "Smart Wood," was founded by the Rainforest Alliance in 1989. Based in New York City, the Smart Wood program operates in 27 countries and certifies forest management practices. The program has certified over seven million acres of environmentally sensitive forest operations in Southeast Asia, Latin America, and the U.S. Over thirty companies use the Smart Wood label, including both timber producers and product manufacturers. For further information, the Rainforest Alliance internet home page may be accessed at: <http://www.rainforest-alliance.org/> A similar initiative, called the Marine Stewardship Council, is an alliance between the World Wildlife Fund and Unilever. One of the world's largest buyers of frozen fish, Unilever will work with WWF to adapt the Forest Stewardship Council model to fishing standards and fish products. John Lyke, "Forest Product Certification Revisited" *Journal of Forestry*, Oct. 1996.

<sup>51</sup> *Ibid.*

Management.<sup>52</sup> Thirty-six European nations have similarly developed indicators for forest management through the Helsinki Process. Twelve non-European countries (including the US) are currently developing criteria and indicators for boreal forests through the Montreal Process. The Tarapoto Proposal would apply to the Amazon basin countries and the UN's Food and Agriculture Organization is encouraging this process for other nations. To date, there has not been a clear link made between the development of standards and indicators with specific certification efforts, though the potential connection is obvious.

Canada and Australia have promoted a different approach, urging the International Organization for Standards to develop an ISO 14000 standard for forestry management systems. National certification bodies could accredit companies satisfying the ISO standard and this, in turn, would provide evidence to customers such as The 1995 Group that the timber company's forest was managed responsibly. This proposal was strongly opposed at an ISO technical committee meeting in 1995 primarily because a "systems" approach was not regarded as effective. That is, FSC's certification is performance-based -- each forest must show its compliance with concrete requirements. An ISO standard, by contrast, is systems-based -- so long as a system is in place demonstrating adherence to a management plan then operating on-the-ground measures are unnecessary. In the context of corporate management systems, such an approach has been criticized as "a six inch high jump" because of the absence of independent performance goals.

The final option, adopted by Indonesia, Malaysia and the Nordic countries, is a national or regional certification program. Concerned over potential loss of overseas markets, both Indonesia and Malaysia are developing their own certification standards of sustainably managed forests. While Indonesia has been open to the suggestions of foreign parties, the Malaysian schemes is government-sponsored and, as presently planned, allows no third-party oversight or accountability. Environmentalists are concerned these national Asian schemes will circumvent the more stringent certification requirements of the FSC. Whether either of these nations' seals of approval will influence consumers in OECD markets is, however, both the critical and, as yet, unanswered question.

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<sup>52</sup> Lyke, *op. cit.*

#### **IV. The Prospects for Cooperation on International Environmental Labeling Issues**

Environmental labels present a puzzling contradiction. Their influence in the marketplace is modest by any measure, and almost negligible by many, yet they are the subject of intense industry lobbying and government negotiation at international levels. Why are so many powerful constituencies so upset over a policy instrument with so little impact to date?

The answer appears to be two-fold. First is the fear of protectionism. In their lobbying, multinational corporations and developing countries have become strange bedfellows. The developing countries are much more concerned with resource-based labels, industry more concerned over eco-labels. Yet both fear that third party environmental labels will be regarded as a legitimate means for countries to favor domestic producers at the expense of imports, whether from America or Malaysia. Put another way, opposition to these labels are, at root, driven by the fear of exporter countries over bans or boycotts based on non-compliance with label standards, whatever they may be.

The second factor, of particular interest to industry, is concern over procurement and institutional purchasing. While green consumers are an important market force, the largest single consumer in any country is generally the government. The U.S. government, for example, accounts for 20% of GDP.<sup>53</sup> In Europe, local and regional authorities are explicitly promoting eco-labeled products in their procurement guidelines.<sup>54</sup> Both Green Seal and Canada's eco-labeling program, Environmental Choice, have launched institutional purchasing initiatives which provide specific recommendations and guidelines for environmentally responsible corporate purchasing. The Japanese government has established a 'Green Purchase Network,' an association of 400 businesses, 100 governmental bodies and 100 private agencies which adhere

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<sup>53</sup> President Clinton's Executive Order 12873 requires U.S. federal agencies to implement EPA guidelines on the purchase of environmentally preferable products. Executive Order 12873, "Federal Acquisition, Recycling and Waste Prevention," Oct. 20, 1993. Published in the Federal Register at pp. 54911-54919, Oct. 22, 1993. EPA is still in the process of developing guidelines and, while they will likely not require the Green Seal eco-label as a pre-requisite, they could incorporate many of Green Seal's criteria, thus effectively requiring an eco-label EPA Invitation for Comments, Sept. 29, 1995, in Federal Register pp. 50722-50726. Office of Technology Assessment, Green Products By Design 96 (1992).

<sup>54</sup> The British Association of Metropolitan Authorities has drafted procurement guidelines for its members to encourage their purchase of goods with the EU eco-label. Britain's local authorities procure over \$100 billion worth of goods annually. "Local Authorities Encourage Purchases of Goods Awarded Eco-Label Under EU Scheme," BNA Intl. Env. Rep. at 891, Oct. 2, 1996. Germany, as well, incorporates the Blue Angel criteria into some of its federal and regional procurement standards.

to product guidelines for environmentally responsible purchases.<sup>55</sup> This overall trend represents an important shift in the identity of the targeted green consumer. Hence eco-labels and their criteria are becoming significant not only to consumers but to Consumers, Inc., as well.

What are the implications and opportunities for a trilateral approach in the context of product eco-labels? It is in the mutual interests of Japan, the EU and the US to defend the use of PPMs as a legitimate basis under international trade law for environmental labels. The EU and Japan sponsor eco-labeling programs and the US government has voiced its support of eco-labeling programs which are transparent and allow meaningful participation of interested parties. Nonetheless, it is unlikely the three nations will work closely together at the WTO to support interpretations or disciplines favorable to non-product related PPMs. The US and EU, for example, both support the legitimacy of non-product PPMs yet disagree over their appropriate legal status. While the EU argues that the TBT does not cover eco-labels at all, the US contends that the TBT does apply and permits the use of PPMs so long as they avoid unnecessary barriers to trade.

While Japan has a national eco-labeling program, the Ecomark, it has kept a low profile during the Committee on Trade and Environment's deliberation on eco-labeling and PPMs. Presumably this strategy is due both to the negligible market impact of the Ecomark program in Japan and because the issue is not sufficiently important to justify antagonizing Asian developing country trading partners (such as Indonesia and Malaysia). Indeed given the high level of interest and commitment of the US and EU governments in the PPM issue, Japan suffers no harm from being a free rider on their diplomatic efforts.

In fact, open trilateral support of the legitimacy of PPMs would likely be counterproductive. Since the Tuna/Dolphin cases, many developing countries have expressed concern that OECD countries will join together and use PPMs as illegitimate non-tariff barriers to trade. Countries such as Malaysia and Indonesia have spoken out against unilaterally-declared PPMs (e.g., Austria's tropical timber label) and, instead, called for multilateral agreements to establish internationally accepted PPMs. Thus an open trilateral effort to create PPM-friendly WTO disciplines would likely be seen as evidence of the suspected OECD green protectionism and trigger concerted international opposition. Indeed, speaking on behalf of the G-77 group of

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<sup>55</sup> Nick Robins, *Unlocking the Trade Potential: Case Studies of Sustainable Consumption and Export Opportunities for Developing Country Producers* (1997).



developing countries, China recently declared in the UN General Assembly that 'covert protectionism' in the name of environmental protection has increased in recent years.<sup>56</sup> For these reasons, perhaps surprisingly, there is little benefit to US and EU interests in Japan taking a higher-profile role defending PPMs at the WTO.

Thus, as James and Lake's theory suggests, implicit cooperation *is* likely among the three powers, but the cooperation's goal is to maintain the status quo rather than force the world to adopt new WTO disciplines for eco-labeling. This may seem counter-intuitive given the US and EU activities in the CTE, but as described above, the consequences of forcing through PPM protective disciplines are not worth the cost -- the three great powers would be better off without rules on eco-labeling. By maintaining the status quo, unsettled though it be, eco-labeling can continue as before and the consumers in the great markets of the three powers can continue to influence the extraction and production of timber and other resources. In this manner, the second face of hegemony drives world policy, through the operation of markets, to an outcome preferred by the three great powers.

In the context of certification for sustainably harvested timber, trilateral parties agree on the goal of increased information for consumers and increased accountability for forest managers. Beyond this basic agreement, however, interests diverge. Strong consumer lobbies in Germany, Austria and the Netherlands have demanded government action to restrict the import of unsustainably harvested tropical timber. The response of the Austrian government in creating a national environmental label was, as described *infra*, a debacle. Domestic political interests, however, continue to demand visible action taken against unsustainably harvested tropical wood imports. In this regard, Northern European countries, acting through the EU, could be seen domestically as responding to calls for action either through support of an ISO standard, national certification schemes, or adoption of international criteria and indicators for forests.

Japan is the world's largest per capita consumer of wood products and tropical timber. Despite a low level of consumer pressure to ban unsustainably harvested timber, Japan has a poor reputation overseas for its involvement in tropical rainforest timber harvesting. Partly in response, Japan has contributed heavily to the work of the International Tropical Timber Organization (ITTO) which is developing indicators of sustainable forest management. Thus

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<sup>56</sup> Robins, *op. cit.*

Japan's interests are broadly similar to the EU's: it seeks both to ensure a supply of timber and improve its public image regarding tropical timber.

The US is concerned not only that the EU might be willing to adopt weak international standards as a symbol of action but, by doing so, legitimize the standards. It is important to note that, with the exception of the Scandinavian countries, the EU is effectively a timber customer. The US, on the other hand, must balance its interests as both a customer and producer. The American consumer lobbies demanding restrictions on the import of tropical timber are not as vociferous as in Northern Europe, so there is little pressure for a quick fix from the government. Moreover, unlike in other countries, the federal government has little regulatory authority over private forest lands since much of the law is in state forestry codes. Indeed, over half of the US timber comes from small, lightly-managed forests which change ownership every 20 years.<sup>57</sup> The US timber industry is wary that an international standard of indicators and criteria (e.g., developed through the ITTO or Helsinki Process) could be applied at the local forest level through a form of certification. Whether legally binding or simply a practical commercial requirement, these standards might work against the interests of the many small-holding forests which serve as the base for the timber industry.

From the American perspective, the worst outcome is an international standard or agreement which commits the US forest industry to specific management practices; the best outcome is likely a voluntary initiative like the FSC. As a result, the US government has taken a "go-slow" approach, opposing binding international standards and the ISO initiative, while arguing that the marketplace should be given time to determine the best certification system rather than forcing the issue through clumsy application international standards. The government has also been wary of endorsing national certification programs out of concern that they may misrepresent the environmental pedigree of the timber.

Is there a trilateral strategy for eco-labeling and timber certification which would serve US interests? The 'three faces of hegemony' model presents three alternative strategies. The first face, direct action, would work in the context of timber certification. Since the US, EU and Japan account for the most important timber customers, trilateral agreement on certification issues would be powerful and force the hand of producer states such as Indonesia, Malaysia and Brazil. Trilateral interests diverge, however. The solutions which provide a quick fix such as ISO

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<sup>57</sup> Personal Communication, Bruce Cabarle, World Resources Institute, March 12, 1997.

standards or weak national programs may work against the producer interests of the US and are opposed by environmental groups. In the context of eco-labeling and WTO treatment of PPMs, concerted trilateral actions would likely increase opposition within the Committee on Trade and Environment, not subdue it.

The third face of hegemony, propaganda and moral suasion, has characterized debates at the WTO and proven unsuccessful. Developing country mistrust and suspicion of green protectionism is both real and deep. Indeed, negotiations over international standards for forest product certification are currently stalemated both at ISO and at the UN's Commission on Sustainable Development.

The second face of hegemony, market power, actually describes well the operation of environmental labels. Eco-labels influence the margins of consumer markets, shaping domestic preferences, and in competitive sectors marginal gain or loss can be the measure of commercial success or failure. Given the growth of industry purchasing commitments such as the 1995 Plus Group, timber certification labels can operate more effectively, going to the heart of the market. The point of both types of labels is to change the behavior of producers both at home and abroad. The labels are voluntary yet clearly influence the actions of third parties. Since the second face of hegemony represents the status quo, deadlock or stalling at the international level maintains this strategy. Because the interests of the US, EU and Japan diverge in the field of environmental labels, new international trade disciplines are unlikely -- unlikely either to favor or harm the use of environmental labels.

## V. Conclusion

Environmental labels continue to grow rapidly around the world and are now expanding into service sectors. Resource-based labels are on the increase, as well, including one in Sweden for electricity generated from renewable resources<sup>58</sup> and one in New Zealand for food products.<sup>59</sup> The Dutch government has requested that industry provide comprehensive information on the environmental profiles of its products. The information will be held on file by the government and open to the public. The program is voluntary but if industry is not cooperative the

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<sup>58</sup> The eco-label is issued by the Swedish Society for the Conservation of Nature and has been awarded to six companies while generating a great deal of controversy.

<sup>59</sup> "Swedish Environmental Group Puts Brakes on Controversial Electricity Labeling Plan," BNA International Environment Reporter at 454, May 29, 1996; "Food Products Eco-Label Slated for 1998," BNA International Environment Reporter at 282, April 3, 1996.

government intends to introduce mandatory requirements in 1998.<sup>60</sup> At its heart, the debate over environmental labels reflects the truism that information is power, and neither the public's nor institutions' appetite for credible environmental information has yet been satiated. Given the divergence of trilateral interests, absent a challenge brought before a WTO Dispute Panel, the most likely disciplines on environmental labels will remain consumer preference in the trilateral markets rather than WTO rules.

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<sup>60</sup> The initial product groups include household cleaners, paints, consumer electronics and insulation materials. "Dutch Scheme Calls for Producers to Supply Environmental Information on Products," *Business & the Environment*, January, 1994.