Interaction Between National Environmental Marketing Regulations and International Trade

Pirkko-Liis Harkmaa

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INTERACTION BETWEEN NATIONAL ENVIRONMENTAL MARKETING REGULATIONS AND INTERNATIONAL TRADE

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by

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INTERACTION BETWEEN NATIONAL ENVIRONMENTAL MARKETING REGULATIONS AND INTERNATIONAL TRADE

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INTRODUCTION

Environmental marketing\(^1\) is an international phenomenon of the 1990s that is considered to be an effective market-based method for promoting genuine environmental improvements in product design.\(^2\) Among the various types of market-based methods in environmental protection, environmental marketing has an important place as a complement to traditional regulatory and command-and-control methods serving as an additional way in which the government can reduce environmental degradation.\(^3\) Environmental marketing belongs into the category of market based methods called eco-information policy.\(^4\) Eco-information policy consists of several programs the goal of which is to inform consumers about the environmental impact of their lifestyle, purchasing and disposal decisions, and the manufacturers about the ways to reduce the environmental impact of their products and manufacturing processes.\(^5\) So far

\(^1\)Herein the term "environmental marketing" is used to comprise all marketing or advertising activities that are used to promote environmentally superior qualities of a product and it is interchangeable with the terms "green marketing", "green advertising", "environmental advertising," etc.

\(^2\)Jamie A. Grodsky, Certified Green: The Law and the Future of Environmental Labeling, 10 YALE J. ON REG. 147, 149-150 (1993). For general comparison between market based methods and traditional command and control methods in environmental protection see also Stephanie A. Goldfine, Using Economic Incentives to Promote Environmentally Sound Business Practices: A Look at Germany's Experience with its Regulation on the Avoidance of Packaging Waste, 7 GEO. INT'L ENVT'L. L. REV. 309, 310-315 (1994) (stating that market based methods are based on self-regulative nature of the market motivated by the desire to maximize profits and to achieve the most optimal outcome for the society, as opposed to command and control methods that are based on the obligation to meet centrally determined fixed standards for specifically identified pollutants).


\(^4\)Id. at 1437.

\(^5\)Id.
environmental marketing has been the principal approach to eco-information policy on both national and international level.  

Environmental marketing was created by the key players in the market - consumers and manufacturers - who have the ability to influence the market situation by the principles of demand and supply. Consumers started to realize and acknowledge the connections between their actions, behavior and life-style and the surrounding environment and they started to seek for the so-called "green" products and as many surveys have shown they were even willing to pay more for the products with qualities that were supposed to be environmentally sound.  

Manufacturers on the other hand responded to a newly emerged social trend known as "green consumerism", i.e. the consumers' growing demand for environmentally friendlier goods, by supplying goods that met the needs and tastes of the consumer seeking for environmentally responsible goods. Manufacturers eliminated, reduced, or changed the environmentally harmful elements of their products and packaging and started to promote their goods by making green claims.

The first chapter of the present thesis gives an overview of the environmental marketing phenomenon in general describing the essence and the forms of environmental marketing, as well as the advantages and disadvantages of it and outlines the general

6 Id. at 1441.
11 Terms "environmental claims" and "green claims" are interchangeable and are used herein to describe any representation, advertisement or label on a product that refers to the environmental attributes or benefits of the product.
recommendations for making meaningful green claims. The second chapter focuses on one type of environmental marketing, namely, eco-labeling\textsuperscript{12} exploring its nature and positive and negative sides. It also gives an overview of the national application of eco-labeling schemes in the world. Since both consumers and manufacturers are increasingly engaged in activities that cross the borders of their countries, they have to face different national eco-labeling schemes. This has become burdensome and trade-restrictive. Therefore the third chapter overviews the intersection between trade and environment and analyses the regulation of eco-labeling programs on the international level. And furthermore, to be effective, eco-labeling schemes of each separate country have to be a part of an international environmental program.\textsuperscript{13} Thus the third chapter also analyses the current attempts in harmonizing eco-labeling strategies on the international level and points out the weaknesses and strengths of the international harmonization concept.

\textsuperscript{12}Terms "eco-labeling scheme" or "eco-labeling program" are used herein to describe third-party operated seal of approval programs.

CHAPTER 1
ENVIRONMENTAL MARKETING

A. Essence

Environmental marketing is one of the information strategies in the environmental protection that tries to encourage consumers concerned about environmental issues to choose and to prefer products that are less polluting than others or are made by less polluting processes. It incorporates a broad range of activities, including product modification, changes to the production process, packaging changes, as well as modifying advertising, but despite of that it is not easy to give a comprehensive definition to it and there exists no universally accepted definition or terminology. The easiest way to define it would be to say that environmental marketing is product marketing through the use of environmental quality claims.

The environmental quality, i.e. environmental attributes and environmental impact of products, as well as their manufacturing processes, packaging, use or disposal, may be represented in the market place in various ways and in different scope. The claims used in environmental marketing can provide textual information that can be either descriptive

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15 I. Leo Motiuk, Diane M. Miller, Giving the Green Light to Green Marketing, 761 PLI/CORP 729, 731 (1991); see also proposed Environmental Claims Act of 1991 S. 615 and H.R. 1408, 102nd Congress, 1st Sess., § 3(4) (1991) ("environmental marketing claims [are] any symbols or terms that are on a label, package, or product that are used in promotion or advertising to inform consumers about the environmental impact or environmental attributes of a product or package during its life cycle").

or comparative: positive, neutral or negative; it can promote a single attribute or several attributes of the product, and they can take the form of symbols, seals of approval or report cards. There is a diversity of environmental marketing schemes also in administration. Environmental marketing may be coordinated by producers themselves as first parties or by third parties such as governments or independent certifiers, and environmental marketing can be voluntary or mandatory.

Several types of claims are used in environmental marketing. Comparative claims assert that a product is environmentally superior to other products or that other products have more harmful impact to the environment. Descriptive claims point out an environmentally beneficial characteristic or quality of a product. A seal of approval is a logo or emblem used on the product, its packaging and advertising usually awarded by an independent third-party organization based on evaluation of comparable environmental impacts of products and meeting the criteria selected on the basis of such evaluation. Report cards on the other hand do not generally judge which criteria are more important in assessing the environmental impact of products, but usually indicate product's environmental burdens, including depletion of natural resources, energy use, release of pollutants into air and water, and generation of solid waste and are given to the product regardless of their impact on the environment. Positive claims usually state the

17Id. See also COMMUNITY NUTRITION INSTITUTE DISCUSSION DRAFT, ENVIRONMENTAL LABELING IN THE TRADE & ENVIRONMENT CONTEXT [hereinafter: CNI Draft] 2 (1996).
18Bartenhagen, supra note 16, at 54.
20Id.
beneficial aspects of products. Neutral claims simply disclose the consumer all information relating to a product that the government has determined to be of importance and that may or may not reveal negative facts concerning the product. Neutral claims are designed to provide the consumer reliable information about the product, which might not be otherwise disclosed, with the purpose of facilitating purchasing decisions and influencing the consumer to choose more energy efficient product, as well as to encourage manufacturers to improve product design so as to achieve more than the minimum required efficiency rating. Negative claims include warnings of the hazardous nature of products that contain environmentally harmful substances, or were produced utilizing environmentally harmful substances or methods. Such claims are meant to warn consumers of the adverse health or environmental attributes of a particular product or to persuade manufacturers to switch to more environmentally benign product ingredients or processes. Single attribute claims offer "positive" environmental information about one attribute of a product by pointing out its biodegradability, recyclability or ozone friendliness and are primarily made by manufacturers themselves. Multi-criteria claims takes account of several environmental attributes of a product that are based on the criteria established for a certain product or a group of products applying "from cradle to grave" life-cycle assessment.

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23EPA Status Report, supra note 21, at ii.  
24Id.  
25Id. at 24.  
26Id.  
28EPA Status Report, supra note 21, at 24.  
29Id. at ii.  
30Id. at 25.  
31Staffin, supra note 13, at 211.  
32Id. at 215.  
33Id. at 221.
There are also several sources of such claims. First-party claims or self-declaration claims are made by the manufacturers themselves about the environmentally friendliness of products.\textsuperscript{34} Self-declaration claims are labels "placed on products by the producer, retailer, or marketer of the product" or by particular trade industries, i.e. by those who would benefit directly from the environmental claim.\textsuperscript{35} These claims can be both comparative or descriptive and also in the form of symbols.\textsuperscript{36} Third-party claims are made by an independent third party, i.e. a government or a neutral private organization and involve usually an evaluation of the environmental nature of a particular product and its manufacturing process followed by awarding a seal of approval.\textsuperscript{37} Government-sponsored environmental marketing schemes can be either voluntary or mandatory and have either informative nature or warning nature.\textsuperscript{38} Among the various eco-labeling programs, government-sponsored voluntary programs are the most numerous and their common characteristic is that each respective government takes an active part in their formation and administration.\textsuperscript{39} Programs are funded, developed and managed typically through environmental agencies or ministries.\textsuperscript{40} The government usually establishes certain environmental criteria that it would like to promote, either at the individual product level or market-wide, and then awards "seal of approval" labels to products

\textsuperscript{34}EPA Status Report, \textit{supra} note 21, at ii.
\textsuperscript{36}Bartenhagen, \textit{supra} note 16, at 54-57. \textit{E.g.} "made from recycled material," "biodegradable," symbol "chasing arrows."
\textsuperscript{37}\textit{Id.} at 54-59.
\textsuperscript{38}\textit{Id.} at 54-57. \textit{E.g.} Germany's "Blue Angel" program is a voluntary government sponsored program; program of issuing corporate average fuel economy (CAFE) standards for automobiles sold in the United States that are established under the Energy Policy and Conservation Act (EPCA), 42 U.S.C. \textsection 6201-6422 (1994), is a mandatory government sponsored program of informative nature; pesticide warning labels required under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. \textsection 136-136y (1994), is a mandatory government sponsored program of warning nature.
\textsuperscript{39}\textit{Id.} at 54-57.
\textsuperscript{40}CNI Draft, \textit{supra} note 17, at 5.
which embody such criteria. Usually governments rely to life-cycle assessment upon awarding such criteria. Industry supported environmental labeling schemes are non-governmental and organized and administered by bodies other than governments and are also based on pre-selected criteria and use life-cycle assessment in their analyses.

B. Advantages

There are a lot of reasons why environmental marketing is supported by the government and widely used by manufacturers, as well as appreciated by the consumers. First of all from the government's and policy makers' point of view environmental marketing is a good complement to environmental laws and regulations helping to achieve the goals of environmental protection. Moreover, there are no significant regulatory costs related to it. As consumers are very interested in reducing environmental impacts by making environmentally responsible purchase decisions, the policy-makers have an attractive opportunity to let the environmental degradation issues to be regulated by market itself and in this way no regulatory costs are raised.

Second, environmental marketing provides appropriate information about environmental impact of certain products. It thereby educates and informs consumers about environmental issues leading to heightened consumer awareness of how their behavior and life-style can affect environment and what they can do to help to protect it. Environmental marketing also serves as a way to inform the businesses about the ways they can reduce pollution by urging them to find more environmentally suitable manufacturing processes or product ingredients and raw materials if they want to remain competitive in the market. It forces companies to become innovators and adopt new technologies and processes to create products which will meet consumers' tastes and the

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41 Id. at 5-6.
42 Bartenhagen, supra note 16, at 54-57.
43 Id. at 57-59. E.g. program run by Scientific Certification System, Inc.
44 Menell, supra note 3, at 1435.
45 Id.
established standards of seal of approval schemes.46 And this leads to reduction in environmental impacts of products. If the consumers demand for products changes, it will give a competitive incentive to suppliers and manufacturers to raise the level of environmental quality of their products.47 Such market changes will result in less harm and danger to the environment.48

Third, if environmental marketing is based on strong regulatory scheme or a good eco-labeling program, there is also going to be a reduction in misleading advertisements.49 If consumers gain trust in an eco-label, they will begin distrust the claims that are not based on a credible labeling scheme and this would cause purchasing demand to shift away from products that are making unsubstantiated claims.50 This would force manufacturers trying to present unverifiable claims to change their marketing practices.

C. Disadvantages

In addition to the advantages of environmental marketing discussed above, there are also many disadvantages of environmental marketing for both consumers and manufacturers, as well as in general.

The first one likely to be affected by the disadvantages of environmental claims is the consumer. There are several consumer concerns related with green claims. As manufacturers try to respond to the demand of the consumers for "greener" products and to the increased competition between manufacturers themselves, the manufactures sometimes get swept away by the urge for competition and popularity of its products. Many companies have admitted that "competitive pressure [takes] precedence over their

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46 Richards, supra note 22, at 247.
48 EPA Status Report, supra note 21, at 12, 29.
49 Richards, supra note 22, at 248.
50 Id.
concerns about whether the information contained in the environmental claim [is] useful and valuable to the consumer.\textsuperscript{51} As a result of that there has been a lot of false and deceptive advertisement leading to consumer confusion. A part of it is also happening due to lack of uniform or sufficient regulation of environmental marketing and green claims. Consumers face a lot of different terms indicating different environmental attributes and advantages, but at the same time they do not have sufficient scientific or technical knowledge or information to evaluate these, and furthermore these terms have varying and broad definitions.

At first there is the issue of lack of sufficient information about the environmental impact of products due to scientific uncertainty. There are many surveys showing that most consumers' are concerned over environmental issues while making their purchasing decisions, and that they are favoring products and packaging that are indicated to have less harmful environmental impacts.\textsuperscript{52} The focus of consumer concern is on the sufficiency of the information about the environmental impact of the product appearing on the label to make good purchase decisions.\textsuperscript{53} Manufacturers often describe the environmental benefits of their products in vague terms such as "environmentally responsible", "ozone friendly," "non-polluting", or "lighter environmental formula".\textsuperscript{54} It is


assumed that a representation in an advertisement or label contains the implicit promise that the manufacturer has a valid basis for making the representation and despite its ambiguity, the representation implies that it is based upon objective scientific investigation. But often manufacturers do not have any factual data to support claims about product's environmental "friendliness" or "responsibility" and this due the high subjectivity of such claims. "Friendliness" cannot be measured and there are only varying degrees of impact and only a few of those can be measured or compared objectively. It is important and useful to substantiate environmental claims, because in this sphere it is very difficult for an "individual consumer to test, investigate, or experiment for himself" the accuracy of the claim being made. A truly reasonable consumer might realize the deceptive nature of vague green marketing claims and be more skeptical of them, but many consumers wishing to be more environmentally responsible, will be easily induced to choose a product bearing such a claim over an otherwise indistinguishable product without one. But it is hard even for a reasonable consumer to understand all technical environmental phrases and therefore such vague green marketing claims seem to be easier for them to understand and they are more attractive to them than the ones stating specific environmental attributes.

Another consumer concern is the lack of uniformity in definitions and terminology. In addition to confusing vague green marketing terms discussed above, consumers, producers, environmental groups, and other experts have not provided concrete definitions of more specific terms such as "degradable", "compostable",

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56 Wynne, supra note 54, at 792.
57 Id.
58 Id. at 791.
60 Wynne, supra note 54, at 793.
61 WARWICK BAKER & FIORE, INC., supra note 52, at 6-7, 12.
"recyclable", "recycled", "reusable/refillable" and "ozone friendly" either. These terms often paint an unclear picture or false picture of the product's physical composition and its likely effect on the environment or state or imply that the physical characteristics of a product are somehow "good" for the environment when, in fact, the benefits often turn out to be dubious. Consumers can also be misled by the way of displaying these labels on the products. It can be difficult to determine whether a label or a sticker providing environmental information on a product refers to its package or the product itself.

Proceeding from the concerns discussed above, the consumers are likely to face deceptive, misleading or unfair advertising. As defined by FTC "an act or practice is deceptive if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material." Some eco-labels, especially eco-seals, could also result in misleading and unfair advertising, as these are simple symbols connoting environmental preferability. Even the most educated and aware consumers cannot test most of the environmental-benefits claims made about products. There are several ways a product may affect environment and deciding whether a product is environmentally safe requires determining whether the product has any adverse impact on non-renewable resources, whether it causes any form of pollution, and how its disposal may affect the landfills. Most of the consumers usually do not stop to analyze in making purchases, but are governed by appearances and general impressions. Deception and misleading can be also caused upon promotion of preexisting environmental attributes of

62 Wynne, supra note 54, at 794.
63 Id.
64 Green Report II, supra note 51, at 8.
66 Sussman, et al., supra note 53, at 170.
67 Gardner, supra note 55, at 41.
68 Id. at 41.
69 Id. at 40.
a product. For example, if a product has had a positive environmental attribute for years, but it has not been advertised, then sudden promotion of this attribute gives an impression that the product has been improved recently and therefore leads to deception, because actually nothing was changed in the manufacturing process of this product. The same is true about representations saying that the product is now completely safe for environment, because one harmful ingredient was removed.

The second one who has to face problems in connection with environmental marketing is the manufacturer and there are many potential problems that a manufacturer has to overcome. Several of these concerns are related to the consumers or their behavior and several to the competition and trade. One of the main problems that is related to consumer concerns, is that using green marketing does not mislead or deceive the consumers and that it does not violate any of the laws or regulations dealing with environmental marketing. Manufacturers also have to acknowledge that consumers' perceptions are sometimes incorrect. Consumers can press manufacturers to substitute the ingredient of their product that is known as environmentally harmful for another one, but often manufacturers trying to respond to the demand of consumers may choose the more environmentally harmful option. When manufacturers are responding to competitive pressures, blind "followers" of competitors practices can make the same mistake as the "leader".

Manufacturers may also face the risk that the environmentally responsible action of today will be found to be harmful in the future. This is mostly due to the fact that

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70Green Report II, supra note 51, at 6.
71Id. at 7.
72See An Introduction to Green Marketing, supra note 14.
73See id.
74See id.
75See id.
76See id.
77See id.
updating of environmental marketing standards and eco-labeling criteria is slow, but technological development of new pollution reduction technologies is quick. Given the limited scientific knowledge at any point in time, it may be impossible for a manufacturer to be certain they have made the correct environmental decisions. Some firms, for example Coca-Cola and Walt Disney World, are very environment orientated and have environmentally responsible corporate policies, but choose not to publicize it protecting themselves from the potential future negative backlash, if it appears that they made a wrong environmental decision in the past.

Environmental marketing may also in some case lead to discrimination against certain domestic products and create trade barriers for certain imported products from countries with different standards of environmental marketing or criteria for eco-labeling. In case of eco-labels it is difficult to determine sometimes objective and non-discriminatory product group definitions and award criteria and this has created a lot of inadequacies is some eco-labeling criteria. As a result there is a concern that eco-labels can be used, either intentionally or unintentionally, to discriminate against other domestic products and raise trade barriers against imported products from countries where the criteria is different. With regard to the interests of industry that wishes to import its goods eco-labels are often seen as "protectionism to keep out imports that compete with domestically produced goods." However, some authors see eco-labeling schemes as means to resolve much of the conflict between trade and environment debate. Eco-labeling schemes allow the consumer to be the ultimate determinant of which product and process methods will prevail and thereby have a less trade-restrictive impact than the

78 See id.
79 Id.
80 Sussman, et al., supra note 53, at 170.
81 Id.
83 Staffin, supra note 13, at 267.
"command and control" measures and even mandatory eco-labels have less of a de facto discriminatory effect than import tax or ban.

One concern in environmental marketing is also the lack of industry participation and this is due to several reasons. For example, the eco-labeling programs are usually based on voluntary participation by the industry. Sometimes it turns out to be impossible and economically nonfeasible for the companies to participate in voluntary government sponsored or private programs, as the cost of obtaining an eco-label can be too much for mid-size and small companies. Many companies acknowledge also that in many cases the consumer eventually will take into account the price of the product and not the environmental benefits. There are also many competing labels and regulatory schemes and the companies can get confused.

Although environmental marketing is considered to be an incentive for innovation, it can sometimes reduce it instead. This may be because of the insufficient consumer demand or the companies may stop innovation at the level of established standards creating only sufficiently innovative technology to meet the criteria threshold.

Sometimes environmental benefits may come at the expense of performance or safety due to the criteria of awarding eco-labels that are too difficult to meet and this

86 Richards, *supra* note 22, at 250.
90 Richards, *supra* note 22, at 250-251.
91 *Id.* at 251.
may affect the decision of the consumer. The consumers may be unwilling to buy a certain product knowing that its safety has been sacrificed in order to gain an eco-label, but sometimes they could be willing to give up some level of safety or performance for lessened environmental impact. But there is a point beyond which the price of such lessened environmental impact becomes too great for consumers to bear.

And finally there is a potential ethical conflict between enhanced consumerism and environmental values. It seems rather paradoxical to enhance consumerism in order to reduce impact on the environment. It is true that eco-labeling programs help to create a society focused on the needs and benefits of the consumer enhancing purchasing of certain products. but it does not necessarily mean that eco-labels will indeed increase consumer purchasing. Instead, the policy behind eco-labels and sustainable use of resources is similar and these two concepts should complement each other. They are both focused on reducing environmental impact of consumerism. Eco-labels are meant to heighten consumer awareness about the adverse environmental impacts of certain products and in the ideal world they should encourage consumers to make wiser and more informed purchase decisions and eventually to begin to use less.

Because of the several discussed disadvantages, there have been proposed couple of alternatives to environmental marketing. One alternative approach to eco-information policy has been the establishment and dissemination of environmental principles to guide consumers' purchasing, use and disposal decisions. EPA for example has issued a consumer handbook, where it outlines the main household priorities, such as reduce,
reuse, recycle and respond. Green consumerism principles have been also disseminated through the environmental education program of EPA targeted principally toward schoolchildren. Another alternative for eco-information policy would also be the price system. Price differentials between products reflect the relative scarcity of the inputs such as raw materials, labor, capital and land, as well as the costs of complying with applicable regulatory requirements, pollution charges and potential environmental liabilities.

D. Regulation of Environmental Marketing - the Way out of Confusion

Without regulating environmental marketing manufacturers will continue to make questionable environmental claims, consumers will become disillusioned, and the consumer market will fail to serve as a mechanism of genuine environmental innovation and improvement. In other words, without general guidelines and rules environmental marketing will not benefit the environment.

To provide the manufacturers with a so-called "safe harbor," national governmental bodies and agencies have adopted certain general guidelines and recommendations that are not "themselves enforceable regulations and do not have the force and effect of law," but which line out the ways and possibilities to make meaningful and substantial environmental claims and provide the standards for environmental marketing. The compliance with the guidelines is voluntary, but conduct that is inconsistent with the positions set out in these guidelines may result in corrective
action. In the United States such guidelines and recommendations can be found in the Green Report II compiled by the Task Force of the National Association of Attorneys-General and the Guides for the Use of Environmental Marketing Claims developed by the Federal Trade Commission.

In general environmental claims should be as specific as possible and not contain general, vague, incomplete or overly broad terms. made in a manner that clearly discloses the general availability of the advertised disposability or recovery options of a particular product where this product is sold, as well as they should be substantive and supported by competent and reliable scientific evidence. The Federal Trade Commission of the United States, for example, has developed the "prior substantiation" doctrine requiring that marketers be able to substantiate their claims at the time they make them. Consumers expect that the marketer has a "reasonable basis" for all express product claims and for all reasonable interpretations given by consumers to those express. The "reasonable basis" will vary depending on "the type of the claim, the product, the consequences of a false claim, the benefits of a truthful claim, the cost of developing substantiation for a claim, and the amount of substantiation experts in the field believe is reasonable." Expert opinions, consumer surveys, and other extrinsic evidence may be used to determine either consumer expectation of the level of substantiation or the adequacy of the evidence. In addition to this it is also desirable to make a clear distinction between the environmental

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105 Id. Sect. A. ("Conduct inconsistent with the positions articulated in these guides may result in corrective action by the Commission under Sect 5 [of the FTC Act] if, after investigation, the Commission has reason to believe that the behavior falls within the scope of conduct declared unlawful by the statute").
107 FTC Guides, supra note 104.
111 Id.
attributes of a product and those of its packaging and it should be also kept in mind that previously existing but previously-unadvertised positive environmental attributes of a product should not be promoted in a way that creates either direct or indirect impression that the product has gone through modification or improvement very recently. Sometimes confusion is also created by source reduction claims, such as stating that the size of the product as well as the amount of packaging has been reduced or that a container is reusable or the refills are concentrated. Source reduction claims should be specific, clear and complete and whenever possible include percentages. It is suggested not to overstate the environmental attribute or benefit, i.e. advertising of significant environmental benefits should be avoided if the benefit is in fact negligible. Environmental certifications and seals of approval should be also designed very carefully, to protect consumers from misleading information. This requires a system of proper evaluation of the environmental soundness of the product so that the consumers will not be misled or deceived by the seal on the package. Deception can be also prevented by more objective labeling criteria of products, which helps in determining whether the label is meaningful, potentially confusing or deceptive. Sometimes manufacturers use seals to imply that their products are superior to others that lack the seal, when, in reality, other manufacturers simply may have chosen not to pay for the seal or could not afford it. Therefore the comparative claims have to be meaningful and presented in a

\begin{footnotes}
112 Id. at 8.
113 Id. at 6.
114 Id. at 17.
115 Id.
119 Sussman, et al., supra note 53, at 170.
120 Green Report II, supra note 51, at 14.
121 Watman, supra note 118, at 178.
122 Green Report II, supra note 51, at 11.
\end{footnotes}
manner that makes the basis for the comparison sufficiently clear avoiding thereby consumer deception. Comparative claims, whether between two products or a product and a former version of it, should be supported by stating a full comparison and the basis for that comparison. If one manufacturer claims its product is better for the environment than another simply because it had a seal of approval, it would be an unfair practice with regard to other manufacturers.

Thus, it can be concluded that environmental marketing cannot achieve beneficial environmental goals alone. It is obvious that environmental marketing and legal regulation have to complement each other to some extent. The problem here is the determination of the proper level of regulation that would provide protection for the consumer and induce the protection of environment, because environmental marketing as a market based tool can be effective only if consumers get adequate and reliable information from the label or the package of the product upon making their purchase decisions. There should be created a level standard for environmental claims, so that the manufacturers making legitimate claims would not be forced to compete against the marketers making deceptive or false claims. However, policymakers should avoid over-regulation, because this will result in the distortion of the balance of the market forces and elimination of industry incentives to use environmental claims.

\[123\text{FTC Guides, supra note 104, Sect. F 4.}
\[124\text{Green Report II, supra note 51, at 11.}
\[125\text{Id. at 11.}
\[127\text{Id.}
\[128\text{Id.}
CHAPTER 2
ECO-LABELING SCHEMES

A. Eco-Labeling Schemes in General

It is likely that if there is going to be any internationally uniform standard in environmental marketing, it will be a third-party operated eco-labeling scheme. Therefore it would be useful to take a look at the nature of such programs, as well as their advantages and disadvantages.

As the whole concept of environmental marketing, eco-labeling programs are also based on the assumption that if consumers have better information on the environmental impact of products, they will choose those products that are more environmentally-friendly.\(^\text{129}\) The trend to favor third-party eco-labeling schemes over first-party claims can be explained by the fact that manufacturers themselves are unlikely to be motivated to assess the environmental impacts of their products and they usually lack any expertise to do it.\(^\text{130}\) Another reason for preferring third-party certification is that first-party claims have often proven to be deceptive and confusing for consumers. Even if there are centrally established definitions of green marketing terms used by manufacturers, they will be too complex or technical for consumers to understand.\(^\text{131}\) It is easier for consumers upon making their purchase decision to seek for products having a label certifying that the product is environmentally less harmful issued by a trustworthy entity, who has

\(^{129}\)Sussman, et al., supra note 53, at 169.

\(^{130}\)Grodsky, supra note 2, at 193.

\(^{131}\)Wynne, supra note 54, at 818.
already weighed the technical and complex environmental issues involved. Many surveys have revealed that consumers prefer products that have an "eco-label". So, to test products for a broad range of complex environmental attributes both governmental and private third-party eco-labeling schemes have been developed. If operated effectively, these schemes, could provide, in addition to meaningful information for consumers, incentives for manufacturers to develop products that are environmentally less harmful in several different ways.

1 Nature of Eco-Labeling Schemes

There are usually identified three broad categories of eco-labeling schemes that are particularly relevant in the international trade area: (1) mandatory, government-sponsored schemes; (2) voluntary, government-sponsored schemes; (3) non-governmental schemes, that are already in general described in Chapter 1 herein. The most innovative and prolific eco-labeling programs are considered to be voluntary either governmental or non-governmental programs using multiple criteria principle. Most numerous are voluntary government-sponsored schemes that have originated from Germany's "Blue Angel" program established in 1978. Currently all but three of the twenty-four member countries of the Organization for Economic Cooperation and Development, as well as South Korea, India, Singapore and Thailand have such programs. A notable exception

132 Id.
134 Grodsky, supra note 2, at 193.
135 Id. at 193.
136 Bartenhagen, supra note 16, at 54.
137 Staffin, supra note 13, at 219.
138 Bartenhagen, supra note 16, at 56.
139 Staffin, supra note 13, at 220. Also Brazil, Columbia, Poland, China, Indonesia and Malaysia have shown interest in establishing such programs. Id. at 220.
among these countries is the United States which does not have a governmental eco-labeling program, but has two active private third-party eco-labeling programs.\textsuperscript{140}

Both governmental or non-governmental eco-labeling programs exist in the format of either "seal of approval" or "report-card."\textsuperscript{141} And with limited exceptions, such programs use the life-cycle assessment method to determine the environmental costs of products during their whole life-cycle\textsuperscript{142} and follow generally the same procedure of awarding eco-labels. The only notable difference lies in the government involvement in formation and administration of such programs.

\textbf{ii Advantages}

Consumer mistrust creates a serious problem for advertisers\textsuperscript{143} and therefore the most important advantage of eco-labeling is that it has greater consumer acceptance. A manufacturer who advertises a third-party seal of approval or certification gains greater acceptance by consumers, because consumers find messages accompanied by third-party evaluations more trustworthy.\textsuperscript{144} Third-party evaluators do not have any incentive to distort the facts or steer the consumer to a particular product.\textsuperscript{145} Because it's difficult and sometimes even impossible for consumers to weigh and evaluate a product's various environmental impacts, an analysis or assessment of the impacts of a product by an entity with the expertise and capability to weigh these variables is seen as necessary for any regulation or standardization of environmental claims.\textsuperscript{146} Consumers may see a third-

\begin{footnotesize}
\begin{enumerate}
  \item Id. at 220.
  \item EPA Status Report, supra note 21, at 9-13.
  \item Thomas L. Parkinson, The Role of Seals and Certifications of Approval in Consumer Decision-Making, 9 J. CONSUMER AFF. 1, 7-10 (1975).
  \item Church, supra note 143, at 287-289.
  \item Howett, supra note 126, at 411-412.
\end{enumerate}
\end{footnotesize}
party label more credible because it has the support of major environmental organizations in addition to the government.\textsuperscript{147}

In case of private third-party eco-labeling programs the advantage is reduction in political oversight and in cost to the government.\textsuperscript{148} If an eco-labeling program is operated privately without oversight by the government or legislature, the industry has less chance to use political pressure to receive a label.\textsuperscript{149} A private label also means a reduction for government in time, staff, effort, and cost involved in operating and supervising the program.\textsuperscript{150} Third-party programs also have an advantage of spreading the cost of producing evaluations among large numbers of consumers and so they are able to keep the cost to individual purchasers low.

\textbf{iii Disadvantages}

The first disadvantage of eco-labeling schemes is probably that there are several third-party organizations who issue eco-labels under different criteria and standards and this is the source for the lack of credibility and potential for confusion. There is no uniform system for the use of emblems or official seals, but the success of such a eco-labeling scheme is based on widespread uniformity.\textsuperscript{151} An eco-label must be automatically recognizable, familiar, and trustworthy, if it wants to gain significant importance in the eyes of consumers.\textsuperscript{152} With a lot of different eco-labels, consumers get confused and unsure of whom to trust.\textsuperscript{153} Although consumers seem to prefer an eco-label on a product and not to worry about figuring out how to evaluate the different

\begin{enumerate}
\item Environmental Labeling of Consumer Products: Hearings Before the Subcomm. on the Consumer of the Comm. on Commerce, Science and Transportation, 101st Cong., 2d Sess. 45-46 (testimony of Dennis Hayes, Chairman of Green Seal).
\item Richards, supra note 22, at 254-255.
\item \textit{Id.}, at 254.
\item \textit{Id.} at 255.
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
environmental impacts of it, they sometimes want to get more information about the environmental attributes of a product and an exclusive use of one type of scheme would not be the most effective method.\textsuperscript{154} There have been suggestions that it would be wise to have both eco-labels and regulated green terms on a product to give consumers some added flexibility, so that the eco-label could alert them to an environmentally good product and the green terms could help them to explain why.\textsuperscript{155}

The second disadvantage is posed by the potential adverse reaction by industry. Seal of approval programs enable centralized decision makers to decide which products are deemed to be less environmentally harmful, as opposed to regulated green marketing terms that would give the ultimate decision power to ecologically conscious consumers.\textsuperscript{156} The idea behind the governmentally regulated green marketing terms is to give consumers information describing the environmental benefits of a product according to which information the consumer is supposed to make the purchase decision. However, sometimes such information tends to be too complex and technical for a consumer to understand. Seals of approval on the other hand are supposed to make the purchase decision for the consumer easier, because a third-party which is usually an expert has already passed the decision that a product is environmentally good. A manufacturer might therefore refuse to participate in third-party operated programs because it may prefer that the consumer has the power to decide upon the environmental harmlessness of a particular product and not some third-party organization. Such adverse reaction could result in decreased participation of industries in eco-labeling programs and this could lead to the reduction of third-party claims that are generally deemed to be more credible.

\textsuperscript{154}Id. at 1371.

\textsuperscript{155}Wynne, supra note 54, at 819-820.

\textsuperscript{156}Mcclure, supra note 151, at 1371.
And finally, in case of private eco-labeling schemes obtaining a label can be too costly for companies, especially for small and medium-sized company. And companies may be afraid that there will be additional costs involved in connection with disclosing information regarding their compliance or non-compliance with environmental regulations that can be required during the procedure of evaluating the environmental qualities of a product, because such information may result in enforcement proceedings of civil or criminal nature if the non-compliance is serious.

Ix How the Programs Work

In most cases the eco-labeling organization, whether governmental or private, has a decision-making or an advisory committee or body that usually has a broad representation of members from consumer, environmental, industry, governmental and public interest groups. Such broad-based representation decreases the risk and appearance of domination by any particular interest group. At first the committee or body suggests the product categories that should be eligible for labeling. Then experts help to define the scope of such categories and determine the criteria a product has to meet in order to qualify for the label. Usually the focus is on a few specific aspects and the criteria are set forth as relatively objective standards. The labeling committee has to determine how high the criteria for obtaining the label could be set and to decide how many products in the given category will receive a label. Usually eco-labeling

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157 Richards, supra note 22, at 256.
158 Id. at 257.
159 OECD Report, supra note 133, at 32.
160 Id.
161 Id. at 17-18.
162 Id. at 22.
163 Id. at 19. Such "single attribute" approach has been criticized as overly simplistic. Selecting only one most important environmental criterion that will allow comparison with other products results in excluding equivalent or even superior environmental performance from the scheme. See Denis Hayes, Harnessing Market Forces to Protect the Earth, ISSUES IN SCI. & TECH., Winter 1990-91, at 46-47.
164 OECD Report, supra note 133, at 19.
165 Church, supra note 143, at 317.
programs have a goal to set high threshold criteria to ensure "a significant environmental benefit."¹⁶⁶ There can be distinguished two different approaches. The basic difference is in the amount of the products eligible for the label. The first approach requires the labeling body to examine the market share of a product within the product category in order to determine whether there will be enough consumers to use the product to generate a sufficient impact on the environment.¹⁶⁷ The product must have a potential to gain a major benefit from the label and when such benefit is identified a certain market share threshold is being set as a guide for selecting products eligible for a label. This approach limits the range of products that would qualify for the label and creates strong competitive incentives. The alternative approach is based on consumer information regardless of the market share and competitive incentives and enables more products to get the label and would affect more consumer purchases.¹⁶⁸ According to this approach a label simply identifies which products are environmentally friendly without paying any attention to the market share and major benefits from the label at the time of awarding the label. However, the products having a label will eventually have a competitive advantage over other products and will increase their market share forcing other products to improve their environmental attributes. The danger of this approach is that products that do not have significant environmental impact get the label and this would make the labeling program less meaningful.

Most of the eco-labeling schemes use some form of the product life-cycle assessment [hereinafter: LCA] method to establish these criteria¹⁶⁹ or in other words to measure the relative green of various products¹⁷⁰ and to determine their environmental

¹⁶⁶ OECD report, supra note 133, at 21.
¹⁶⁷ Church, supra note 143, at 317.
¹⁶⁸ Id. at 317.
¹⁶⁹ OECD Report, supra note 133, at 32.
¹⁷⁰ Mary Ann Curran, Broad-Based Environmental Life-Cycle Assessment, 27 ENVTL. SCI. & TECH. 430, 432 (1993).
costs from "cradle to grave." The United States Environmental Protection Agency has defined LCA describing it as "a concept and methodology to evaluate the environmental effects of a particular product or activity holistically, by analyzing the whole life cycle of a particular product, process or activity." It develops quantitative measures for energy and material consumption, wastes released to the environment and environmental impact throughout a particular product's or package's entire life-cycle. The entire life-cycle usually encompasses the extraction and processing of raw materials, manufacturing, transportation, distribution, use, reuse, recycling and final disposal. A complete LCA usually has three stages: inventory analysis, impact analysis and improvement analysis. Inventory analysis identifies and quantifies the major raw material and energy inputs, as well as environmental releases that occur at different points along a product's life-cycle. The impact analysis is a systematic process identifying, characterizing and evaluating potential ecosystem, human health, and natural resource impacts associated with the inputs and outputs of a product or its process of manufacturing. In this stage the various inputs and releases are identified and classified according to their respective "environmental harm" categories. The process of characterization requires determining the potential of each assigned pollutant for causing the corresponding environmental harm, which is a difficult task since the chemical processes underlying certain

171 Candice Stevens, supra note 142, at 7.
173 Howett, supra note 126, at 412. Grodsky, supra note 2, at 151-152.
174 SETAC Technical Framework for LCA, supra note 172, at 1.
175 EPA Inventory Guidelines, supra note 172, at 5.
176 Use of LCA in Environmental Labeling, supra note 172, at 4.
177 Id. at 4-5.
178 See id. at 5.
environmental problems can be complex and uncertain.\textsuperscript{179} During the evaluation various aggregate environmental impacts are weighed against each other in order to determine their relative magnitude of threat, which might be a largely subjective process involving invocation of social, economic and cultural value preferences.\textsuperscript{180} The last stage, the improvement analysis is the culmination of LCA process and yields results that are very complex and seldom provide definitive answers.\textsuperscript{181} It entails determining whether any of the negative environmental impacts can be reduced through product or process redesign.\textsuperscript{182} If so, various options should be identified and weighted in light of their environmental costs and benefits.\textsuperscript{183} Products are submitted by the manufacturers on voluntary basis for consideration and if the a product satisfies established criteria, they sign a contract for a certain period of time and pay a fee for the use of the label.\textsuperscript{184} The developed criteria may be changed from time to time if the product category as a whole has improved its environmental performance.\textsuperscript{185}

A crucial aspect in the process of awarding eco-labels seems to be the utilization of LCA. The supporters of it see that by utilizing LCA, the eco-labeling schemes are useful in encouraging producers to focus on and internalize the costs of environmental impacts implicit in the production process as well as in stimulating the production of "greener" goods.\textsuperscript{186} And in theory, indeed, it would be a highly effective tool for increasing citizen awareness of the environmental affects of consuming.\textsuperscript{187} Unfortunately, the current methodology of LCA depends too much on assumptions and is not precise in

\begin{itemize}
  \item \textsuperscript{179}Id. at 5-6.
  \item \textsuperscript{180}Id.
  \item \textsuperscript{181}Church, supra note 143, at 260.
  \item \textsuperscript{182}Use of LCA in Environmental Labeling, supra note 172, at 6.
  \item \textsuperscript{183}Id.
  \item \textsuperscript{184}Church, supra note 143, at 315.
  \item \textsuperscript{185}OECD Report, supra note 133, at 48, 52.
  \item \textsuperscript{187}Grodsky, supra note 2, at 152.
\end{itemize}
enough for making consistent and reliable comparisons between different products and brands. Therefore LCA has received a lot of criticism.

It is said that the method simply measures the amount of impact failing to assess the differences in effects on human, animal and plant health caused by various impacts and thus it results in an inventory impacts rather than an actual risk assessment. Furthermore, the environmental impacts are usually difficult or even impossible to measure. LCA simplifies the reality by looking at a select set of attributes and ignores others that are too difficult to quantify. There are so many variables involved that it probably will give rise to subjective biases and arbitrary assumptions producing vastly different results. There is no uniform basis for defining the reasonable limits of boundaries and scope of performing a "complete" LCA. Manufacturers also like to modify and improve their product from time to time and changes in products characteristics and in information and technology regarding environmental impacts could quickly make the LCA for a given product obsolete. The initial assumptions may not be accurate anymore and so a complete update would be required. Performing an LCA could also turn out to be rather expensive. It is impossible to undertake a thorough LCA for the thousands of products in the market without spending huge amount of money. To compare the impacts of competing products, "functional equivalency" ratios or

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188 Id.
189 Howett, supra note 126, at 412.
190 EPA Says Life-Cycle Analysis May Hold Key To Assessment of True Environmental Costs, Env'T Rep. (BNA), Apr. 12, 1991, at 2222-2223.
191 Howett, supra note 126, at 412.
194 Howett, supra note 126, at 412.
195 Choices for A Cleaner Environment, supra note 191, at 61.
"equivalent use" ratios should be developed to account for different patterns of use. 197 This requires obtaining meaningful data about consumer behavior, which sometimes can be complicated. 198 Meaningful data that could be used in LCA process is often not available, because manufacturers may choose to keep some of the information regarding its products or manufacturing process confidential or there is no necessary methodology or resources to gather all such data. 199 And it is hard to compare the environmental burdens of two competing products even if the LCA has accurate results, because different localized conditions may change the conclusions of LCA. 200 And finally, it is being suspected that in many cases interest groups sponsoring the expensive LCA procedure may try to emphasize the aspects most favorable to them, especially if these groups provide funding for performing LCAs. 201 Due to many deficiencies in LCA methodology, it is easy to model assumptions, data and results so that one can have exactly the desired result and this would give a competitive advantage to a product that might not have the expected benefit for the environment.

Many of the current eco-labeling programs have tried to overcome the difficulties resulting from the LCA method by using a stream-lined LCA instead of a full-blown LCA and place more emphasis on some parts of LCA than on others. 202 It is also suggested that a more practical alternative to LCA would be a more limited multiple-attribute form of product evaluation should be used relying on pre-determined, easily verifiable standards. 203 But at the time being LCA seems to be the only evaluation

197 EPA Inventory Guidelines, supra note 172, at 21-23.
198 Church, supra note 143, at 262.
200 Church, supra note 143, at 262-263.
201 Id. at 263.
203 Grodsky, supra note 2, at 219.
methodology that is used by third-party certifiers and until there is no other alternative, an emphasis should be put on improving the LCA process so that it would not enable interest groups to influence the results and so that the procedure would not be based on mere assumptions about the potential adverse environmental effect of the products.

**B Trends in National Eco-Labeling Schemes**

On national level there are both voluntary and mandatory eco-labeling schemes. Voluntary programs are either private initiatives or government sponsored schemes. Mandatory programs are usually always governmental programs. Most of the voluntary government sponsored eco-labeling programs have originated from their German predecessor "Blue Angel" program that was introduced by the Federal Ministry of the Interior in 1977 and that started in 1978 years before other programs. Germany's "Blue Angel" program is operated by the Federal Environmental Agency (hereinafter: FEA). The first 48 labels were awarded already in 1979. The program was designed to be a market-oriented environmental policy instrument with the purpose of encouraging the development of positive environmental attributes in products. The general rule is that products that are more environmentally acceptable when compared to other similar products are eligible for the label. The product categories can be presented for testing to the FEA by either industry, consumer, public interest groups or any other interested party. FEA reviews the proposals and suggestions and appoints a committee of experts called the "Environmental Label Jury" (hereinafter: "ELJ") that consists of representatives from environmental groups, industry, consumer associations and union

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205 Salzman, supra note 47, at 28.
207 Hayes, et al., supra note 204, at 231.
208 Id.
organizations.\footnote{EPA Status Report, \textit{supra} note 21, at 44.} The task of the ELJ is to decide which of the proposed categories are worth further consideration and testing\footnote{Staffin, \textit{supra} note 13, at 225.} and to define the criteria for these product categories.\footnote{Menell, \textit{supra} note 3, at 1438-3149.} Then the FEA performs a streamlined LCA and determines which stages of the product's life-cycle have the most significant affect on the environment.\footnote{EPA Status Report, \textit{supra} note 21, at 45-46.} The following step is that the FEA, taking account of these significant impacts, drafts the criteria that the products applying for the label should meet.\footnote{Staffin, \textit{supra} note 13, at 225.} The criteria covers a broad range.\footnote{Menell, \textit{supra} note 3, at 1438-39. See Amy L. Salzhauer, \textit{Obstacles and Opportunities for a Consumer Ecolabel}, \textit{ENVIRONMENT}, Nov. 1991, at 10, 11-12.} The basic criteria include examination of product's manufacturing, use, consumption and disposal, as well as all environmental impacts caused by the product.\footnote{Hayes, et al., \textit{supra} note 204, at 231-232.} However, the program has also received some criticism with regard to focusing only on couple of significant environmental impacts of a product, which usually occur during using it, rather than environmental burdens associated with the manufacturing process.\footnote{See Hartwell & Bergkamp, \textit{supra} note 92, at 6-7.} The criteria are selected so that the label can awarded for approximately 15\% of the products in each category and are subject to periodical review in order to decide upon required updates.\footnote{Menell, \textit{supra} note 3, at 1438 -1439. Staffin, \textit{supra} note 13, at 226.} Such rather stringent criteria are set to keep the percentage of manufacturers who initially qualify for the label small.\footnote{Salzman, \textit{supra} note 202, at 42-43.} The selected criteria is forwarded to the Institute for Product Safety and Development that is an independent testing institution.\footnote{Menell, \textit{supra} note 3, at 1438-1439.} The institute reviews the criteria and is responsible for testing the potential candidates for the label\footnote{\textit{Id}.} and forwards the results to the ELJ that has the final
authority to approve or reject the new eco-labeling criteria. The entire process of determining criteria, evaluating products and establishing a new eco-label can take from six months up to two years. When the new eco-label is approved the manufacturers may present their products for testing and evaluation. A manufacturer is eligible for the right to display a label on its product if he complies with environmental standards and his product meets the selected criteria. The manufacturer then enters into a contract that entitles the manufacturer to use the label on the packaging of its product and in direct product advertising. Manufacturers have to pay also an application and licensing fee to cover the administrative costs of the eco-labeling program. The term for using the eco-label is three years and the manufacturer may re-apply for another award. If during the three year term the eco-label has served its purpose by compelling manufacturers to meet its criteria and so becoming the industry norm, the FEA reviews the criteria and sets higher standards to encourage greater product improvement.

Japan, however, has taken an approach that differs from Germany's "Blue Angel" program. Japan initiated its eco-labeling scheme called "Eco Mark" in 1989, making it the second-oldest eco-labeling scheme after "Blue Angel." The program is operated by the Japan Environment Association of the Environment Agency. "Eco Mark" has also been the fastest growing eco-labeling program. The difference from the other programs is that instead of assessing the relative environmental impacts of the products on a

\[\text{Staffin, supra note 13, at 225.}\]
\[\text{EPA Status Report, supra note 21, at 46.}\]
\[\text{Id.}\]
\[\text{Menell, supra note 3, at 1438-1439.}\]
\[\text{EPA Status Report, supra note 21, at 46.}\]
\[\text{Menell, supra note 3, at 1438-1439.}\]
\[\text{Menell, supra note 3, at 1438-1439.}\]
\[\text{Staffin, supra note 13, at 226.}\]
\[\text{EPA Status Report, supra note 21, at 46-48.}\]
\[\text{Genevieve Mullett, ISO 14000: Harmonizing Environmental Standards and Certification Procedures Worldwide, 6 MINN. J. GLOBAL TRADE 379, 384 (1996).}\]
\[\text{EPA Status Report, supra note 21, at 44, 56.}\]
\[\text{Id. at 56.}\]
category-by-category basis throughout their life-cycle, the products are tested on the basis of being "inherently environmental."\textsuperscript{235} Products are deemed to be inherently environmental when they can form part of an ecological lifestyle.\textsuperscript{236} Manufacturers who want to apply for the Eco Mark have to ensure that their products are a minimal environmental burden and have minimal environmental impact during both use and disposal, improve the environment, and make a contribution to the protection of environment.\textsuperscript{237} In the beginning the program did not involve any kind of LCA method, but after its revision in 1996 the operator of the program decided to include LCA procedure into the process. Since then Japan's "Eco Mark" program is more similar to the German approach.\textsuperscript{238}

There are also a few countries that have eco-labeling programs run by private organizations and have no government involvement\textsuperscript{239} A good example are the private eco-labeling programs of the United States.\textsuperscript{240} There are two independent private organizations in the United States who operate eco-labeling programs: Green Seal and Scientific Certification Systems, Inc. (former Green Cross).

Green Seal is a non-profit organization that is supported by several major environmental groups.\textsuperscript{241} Its program is similar to the foreign government-sponsored

\textsuperscript{234}Id. at 44.

\textsuperscript{235}Id. at 56.

\textsuperscript{236}Id. \textit{E.g.} composting containers or kitchen sink stainers with fine mesh. \textit{Id.}


\textsuperscript{238}Sussman, et al., \textit{supra} note 53, at 177.

\textsuperscript{239}Another such country, for example, is Norway, that has established an eco-labeling scheme administered by an independent non-profit organization and has no government involvement. Hayes, \textit{supra} note 163, at 48.

\textsuperscript{240}However on the federal level there exist guides providing basic standards for making environmental claims. See FTC Guides, \textit{supra} note 104.

programs, but without government involvement.\textsuperscript{242} The mission of Green Seal is similar to the mission of all eco-labeling programs, namely, to promote environmentally responsible consumer purchasing.\textsuperscript{243} The basic philosophy underlying the program is that results beneficial for the environment can be achieved through an informed consumer population.\textsuperscript{244} The Green Seal is a seal of approval program and is favored by consumers who agree with the judgment of environmental groups.\textsuperscript{245} They feel secure to buy a product with such a seal, because it indicates that the product has been reviewed and tested.\textsuperscript{246} The goal of Green Seal is not to simply verify an environmental claim of a manufacturer, but to grant a seal of approval to products that meet the environmentally preferable standards set by Green Seal.\textsuperscript{247} Anyone, including industry, consumer and environmental groups, can propose new product categories.\textsuperscript{248} Once the new category of products has been approved, the relevant criteria is set by identifying the most important environmental impacts of the product.\textsuperscript{249} The seal is awarded to products meeting the criteria for multiple attributes, including its total environmental impact during its entire life cycle, on a category-by-category basis.\textsuperscript{250} The products are tested by Underwriters Laboratories that has been contracted for that purpose by Green Seal.\textsuperscript{251} Underwriters Laboratories has a good reputation for setting product safety standards and Green Seal's association with it gives more value to its seal of approval both in the eyes of the industry

\textsuperscript{243}\textit{Id.}
\textsuperscript{244}GREEN SEAL QUESTIONS AND ANSWERS, at 2.
\textsuperscript{245}Church, \textit{supra} note 143, at 291.
\textsuperscript{246}\textit{Id.}
\textsuperscript{247}Howett, \textit{supra} note 126, at 448.
\textsuperscript{248}EPA Status Report, \textit{supra} note 21, at 73.
\textsuperscript{249}\textit{Id.}
\textsuperscript{251}Hamilton, \textit{supra} note 241, at B11.
and consumer groups. Green Seal initially was planning to use the LCA method upon testing the products from their manufacturing to their final disposal. But as the LCA method has received a lot of criticism and it is turned out to be very expensive, they based the product standards on a modified and shortened version of LCA called "Environmental Impact Evaluation" that is very similar to the "stream-lined" LCA method used by other countries and the European Union. During the process of identifying environmental impacts and drafting the criteria for the respective product category often an advisory panel consisting of industry, government, academia, and environmental groups representatives is consulted. The formulated standards are then released for public comment to representatives from industry, consumer, environmental and governmental institutions, as well as to any other interested party if a request is submitted. There can be also public hearings. This "public comment" period is very similar to the "notice and comment" period under federal regulatory schemes. If necessary, the criteria are revised in response to the public comments. Any party who disagrees with the judgment of Green Seal may appeal to its Environmental Standards Council consisting of scientists, academicians and other experts. The established standards and criteria are subject to review and updating in every three years to ensure that new technology and information is incorporated. Green Seal has also started a project of providing consumers with brochures describing the standards and their significance.

252 EPA Status Report, supra note 21, at 72. Staffin, supra note 13, at 232.
255 EPA Status Report, supra note 21 at 73.
256 Id. Howett, supra note 126, at 449.
257 Id.
258 EPA Status Report, supra note 21, at 73.
259 Staffin, supra note 13, at 232.
260 Howett, supra note 126, at 449.
261 Green Seal, Proposed Criteria and Standard for Toilet and Facial Tissue 3 (June 17, 1991).
262 Id.
Scientific Certification Systems, Inc. (hereinafter: SCS) eco-labeling program was initiated by four Western retailers\(^ {263} \) and got its start by certifying pesticide residue levels for several California supermarkets.\(^ {264} \) The environmental labeling program was started in 1989.\(^ {265} \) SCS provides two levels of certifying products.\(^ {266} \) The primary focus is on verifying the accuracy of specific environmental claims made by manufacturers.\(^ {267} \) But they have also interest in awarding general eco-labels\(^ {268} \) and are now offering a modified LCA to provide information that compares the environmental attributes and impacts of a product to those of its competitors at various stages in the product's life-cycle.\(^ {269} \) SCS's eco-labeling program is a report card type program displaying its results in a bar chart called "Environmental Report Card."\(^ {270} \) It is a content-neutral labeling program designed solely to provide the consumer with information about the significant environmental impacts of the product without stating that the product is environmentally less harmful than other products in the same category.\(^ {271} \) It is up to the consumer to make the value judgment.\(^ {272} \) The SCS report-card program is generally favored by consumers who do not defer to or even distrust the judgment of environmental groups and who value the additional information they find on the report card upon making their choice.\(^ {273} \)

\(^ {263} \)Elizabeth Chute, No EPA "Green" Labels Planned, SUPERMARKET NEWS, Oct. 8, 1990, at 1
\(^ {264} \)Hamilton, supra note 241, at B11.
\(^ {265} \)SCIENTIFIC CERTIFICATION SYSTEMS, INC., SCIENTIFIC CERTIFICATION SYSTEMS' ENVIRONMENTAL CERTIFICATION PROGRAM: FREQUENTLY ASKED QUESTIONS 1 (1992).
\(^ {266} \)Id.
\(^ {268} \)Holmes, supra note 196, at 47.
\(^ {270} \)Id.
\(^ {271} \)EPA Status Report, supra note 21, at 144-146.
\(^ {272} \)Id. at 145.
\(^ {273} \)Church, supra note 143, at 291.
categories can be proposed to SCS for initial review by manufacturers and other interested parties. Then SCS decides which product categories are going to be tested. After an evaluation procedure shall be conducted that is similar to LCA's "inventory analysis. At this stage product's significant inputs and releases during each stage of its life-cycle are identified. The received information is classified according to the contribution of inputs and releases to resource depletion, energy expenditure, air pollution, water pollution and solid waste generation. To each discovered environmental burden a numerical value is assigned and this information is displayed in the bar graph form. One end of this bar chart is designated for better or lower environmental burdens and the other end for worse or heavier environmental burdens. In order to get the permission to display the Environmental Report Card on its product, a manufacturer has to be in compliance with all relevant federal and state environmental regulations. All manufacturers who have been issued the report card are subject to subsequent annual monitoring process by SCS to ensure that the reported environmental information remains accurate. Manufacturers are not asked to pay any licensing fees, but they have to pay the testing fee and other expenses to SCS.

The activities of SCS have received serious criticism from its competitor Green Seal and the Environmental Defense Fund. The main accusations have been that SCS fails to apply state-of-the-art standards upon certifying the products, provides limited

275 *Id.*
276 *EPA Status Report, supra* note 21, at 144-145.
277 *Id.*
278 *Id.* at 145.
279 *Id.*
280 *Id.* at 143.
281 *Id.* at 147.
282 *Id.* at 147-149.
283 *Id.* at 149.
public access to its standards and procedures, and does not allow any opportunities for public comment. \( ^{285} \) SCS is also said to fail to monitor the manufacturers and how they use the eco-label. \( ^{286} \) As SCS awards its logo on certification of only one claim, it has allowed it to appear on products in a manner suggesting the verification of additional product claims. \( ^{287} \)

However, there are two voluntary federal energy-saving programs in the United States awarding certain labels. These two programs are operated by the United States Environmental Protection Agency and are called Green Lights and Energy Star. The participants of Green Lights program agree to survey their facilities and install lighting that is energy-saving wherever it is deemed to be profitable to do so. \( ^{288} \) The Green Lights logo can be used by the participants in long-term marketing and advertising strategies as an easy and cost-effective public relations tool. \( ^{289} \) The Energy Star program is designed to promote the use of energy-saving office equipment. \( ^{290} \) Major manufacturers take part in this program by manufacturing office equipment meeting the requirements established by the Environmental Protection Agency. \( ^{291} \) To identify the energy-saving office equipment, manufacturers are allowed to use the Energy Star label on their products. \( ^{292} \) Peculiar to this program is that in addition to the United States there are also other countries, including Japan, Sweden, Australia and New Zealand, who participate in and use the label of the Energy Star program. \( ^{293} \) In order to promote energy-efficient office

\( ^{285} \) See id.
\( ^{286} \) See id.
\( ^{287} \) See id.
\( ^{288} \) Sussman, et al., supra note 53, at 179.
\( ^{289} \) Id.
\( ^{290} \) Id.
\( ^{291} \) Id.
\( ^{292} \) Id.
\( ^{293} \) Id.
equipment. Executive Order 12845 requires all federal agencies to purchase office equipment that meets the requirements of the Energy Star program.\textsuperscript{294}

Also some eco-labeling programs exists on the state level in the United States. The states that have their own eco-labeling statutes include New York,\textsuperscript{295} New Hampshire\textsuperscript{296} and Rhode Island.\textsuperscript{297} These state programs are rather similar to the voluntary government-sponsored programs of other countries. In each state the standards for granting, overseeing and enforcing the awarding of the label are established by a state agency.\textsuperscript{298}

The New York law, for example, foresees the creation of waste reduction and recycling bureau that is to "assist in the development and promotion of local waste reduction, source separation and recycling programs."\textsuperscript{299} The responsibility of the bureau is to create an official state recycling label and conduct a consumer education program to establish consumer identification of the label.\textsuperscript{300} After establishing the label, the bureau has to develop standards for the terms recyclable, recycled and reusable.\textsuperscript{301} The manufacturers who advertise their product within the limits of these terms can use the state recycling label on their products.\textsuperscript{302} The bureau has also the power to prohibit the unauthorized use of such label.\textsuperscript{303}

The first major regional multinational voluntary eco-labeling program was established in the European Union. The Council of the European Communities

\textsuperscript{294}48 C.F.R. 1532.7000 (1993).
\textsuperscript{298}Church, supra note 143, at 314.
\textsuperscript{299}N.Y. ENVTL. CONSERV. LAW § 27-0717(1) (Consol. 1991).
\textsuperscript{300}N.Y. ENVTL. CONSERV. LAW § 27-0717(2).
\textsuperscript{301}N.Y. ENVTL. CONSERV. LAW § 27-0717(2)(a)-(c).
\textsuperscript{302}Id.
\textsuperscript{303}Id.
established the uniform system of eco-labeling in 1992. The purpose of the program is to promote the design, production, marketing, and use of products which have a reduced environmental impact during their entire life-cycle, and to provide consumers with better information on the environmental impact of products.

Adoption of a uniform eco-label can be also seen as a part of drive toward a single European market. Although initially the European Union system supplements rather than replaces the individual eco-labeling programs of the member states, its ultimate goal is to establish the uniformity of evaluation criteria behind the various labels. This will avoid duplication and conflict of eco-labels among the member states, and thereby simplify marketing in the European Union.

There are serious concerns, however, that the European Union eco-labeling standards may lead to disadvantaging of imports. The program works on voluntary basis without any minimum standards for manufacturers and the eco-label is awarded to products on the basis of their "cradle to grave" environmental impact. Originally the labels were meant to be awarded only to the most environmentally sound products in each category, but then it was decided to adopt general sets of standards that many products are able to satisfy. The evaluation of the environmental performance of the products and awarding labels is the responsibility of individual member states and is carried out in

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304 Council Regulation 880/92, 1992 O.J. (L 99) 1 (Community Eco-Label Award Scheme).
305 Id. at art. 1.
307 Hartwell & Bergkamp, supra note 92, at 623.
308 Havemann, supra note 306, at H7.
309 Id.
accordance with uniform principles and product-specific criteria. Each member state is assigned certain products or product groups for which it has to develop the evaluation criteria. Each member state has to establish a competent body whose task is to accept product category proposals for the eco-labeling program from any interested party. The states are assisted upon reviewing and commenting of the proposals by environmental, industry and consumer groups of the respective country. The proposal is then forwarded to the European Union Commission that discusses each proposal with consultation forum consisting of representatives from industry, commerce, consumer, and environmental groups from across the European Union. If the proposed product category is approved by the commission, then the member state who was responsible for establishing the criteria for that particular product category is assigned to perform the LCA and set the appropriate criteria. The significant environmental impacts of the product are evaluated in seven areas: waste production, soil pollution and degradation, water contamination, air contamination, noise, energy consumption and effects on ecosystems. The evaluation has to be carried out with regard to each stage of the product's life-cycle. The set criteria are subject to review and accepting or rejecting by the European Commission assisted by the consultation forum. Then the proposed criteria are forwarded to the Regulatory Committee of Member States for final consideration. If the criteria are approved by the Committee, the eco-label is

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312 Council Regulation 880/92, supra note 304, at art. 10.
313 Hayes, et al., supra note 204, at 230.
314 Council Regulation 880/92, supra note, 304, at art. 4.
316 Council Regulation 880/92, supra note 304, at art.7(3).EPA Status Report, supra note 21, at 98.
317 EPA Status Report, supra note 21, at 99
318 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THE USE OF LIFE-CYCLE ASSESSMENT IN ENVIRONMENTAL LABELING 10 (1993).
319 Id.
320 EPA Status Report, supra note 21, at 99. Staffin, supra note 13, at 229.
321 EPA Status Report, supra note 21, at 99.
automatically adopted by the Commission.322 If the Committee does not accept the criteria, the Council of Ministers has the final decisive vote.323 After final approval the criteria become the established program criteria to be used by all member states while evaluating that particular product or product groups and the respective eco-label becomes official.324 The product categories and criteria are defined so that in the eyes of the consumer all products in the group are equivalent and are set so that only twenty to thirty percent of any product will be able to earn the label.325 Manufacturers may apply for the eco-label in the European Union country where the product is manufactured, first marketed or first imported.326 Upon applying for the label the manufacturers have to pay both an application and a licensing fee.327 The term of the right to use the eco-label is three years.328 For a manufacturer the most important advantage of using the European Union eco-label is that it can be used in all member states, allowing to gain a manufacturer acceptance throughout the European Union while only applying for it once.329

The European Union program has also received some criticism. It is said that it does not provide enough guidance on product evaluation procedures, lacks adequate definition of its underlying concepts, and merely adds another eco-label to the market place leading to potential confusion and conflict with the programs of the member states.330 It has been also accused of the political nature of the criteria, because the different member states have different interests and in the industry and therefore

322 Staffin, supra note 13, at 229.
323 EPA Status Report, supra note 21, at 100.
324 Council Regulation 880/92, supra note 304, at art. 7(3). EPA Status Report, supra note 21, at 100.
325 McCown, supra note 310, at 493.
326 EPA Status Report, supra note 21, at 100.
327 Id.
328 Id.
329 Id.
330 Hartwell & Bergkamp, supra note 92, at 624.
compromise and weakening of legislation is likely to occur. The industry has usually criticized the overly bureaucratic and strict nature of the program. As the response to some of the criticism the European Union Commission finalized in 1996 the proposed regulation to revise the European Union eco-label scheme with the purpose of increasing the visibility of the European Union eco-label in the European market and improving the process of awarding eco-labels. The revision proposes a graded label indicating that some qualifying products are environmentally more responsible than others, thereby giving manufacturers incentives to make improvements and expanding the use of the European Union eco-label. The revision also calls for the privatization of the eco-labeling program to streamline the development of criteria and the process of application, as well as to allow easier and more frequent access by interest groups. The new eco-labeling scheme was expected to be structured by spring 1998. Under the revision proposal the retailers would be allowed to use the eco-label on products sold under their own brand name, thereby greatly increasing the potential impact of the label, given the pressure that retailers can exert on suppliers.

Mandatory eco-labeling programs, as already mentioned above, are usually government run and represent the content-negative type of labels. In the United States, for example, the Environmental Protection Agency has established mandatory registration and labeling requirements for pesticides. Any pesticide that is considered to be an

331 McCown, supra note 310, at 493.
332 Id.
334 Id.
335 Id.
336 Id.
337 Id.
environmental hazard must be labeled "This Pesticide Is Toxic To Wildlife" or "This Pesticide Is Toxic To Fish."

Most of today's eco-labeling schemes focus on evaluating and certifying environmentally sound products, but there is emerging the trend of certifying companies as having environmentally sound operations. The first to establish the standards for companies was Great Britain. The British Standards Institute developed in 1992 the Environmental Management System (hereinafter: EMS) standards called BS 7750. The purpose of these standards is to encourage companies to reduce their environmental impacts and to use resources by implementing a single management system designed to address all environmental concerns. Following the lead of Great Britain, also other countries have started to work on their own national EMS standards. The European Union, for example, established its Eco-Management and Audit Scheme (hereinafter: EMAS) in 1993. EMAS was established on the British BS 7750 program. The purpose of EMAS is to encourage companies to introduce sound environmental management policies and programs voluntarily. The purpose of using environmental auditing and public disclosure statements is to give the companies an incentive to incorporate sound environmental management practices into their corporate policy. Participating companies are listed officially as participants in EMAS and are granted the

339 Labeling Requirements for Pesticides And Devices, 40 C.F.R. § 156.10 (1988).
342 Id. at 37. Companies have discovered that such integrated systems minimize the time, money and personnel required to deal with numerous environmental requirements imposed upon them. Id. at 38.
344 Council Regulation 1836/93, O.J. (L 168) 1 (Community Eco-Management And Audit Scheme).
346 Council Regulation 1836/93, supra note 344, at 1.
347 See id.
right to use an emblem indicating the extent of their participation.\textsuperscript{348} The EMAS program, like the product eco-labeling programs, is designed to achieve its goals by using market forces rather than governmental regulation.\textsuperscript{349} The most significant effort to establish uniform EMS standards has been made by the International Standardization Organization.\textsuperscript{350}

\textsuperscript{348}\textit{See id.}

\textsuperscript{349}Mullett, \textit{supra} note 231, at 386.

\textsuperscript{350}\textit{The ISO Handbook, supra} note 343, at 14.
CHAPTER 3
INTERNATIONAL ASPECTS OF ECO-LABELING PROGRAMS

A. Trade and Environment

On the international level eco-labeling programs play a role in the ongoing conflict between trade and environment. Earlier environmental issues caught attention on the international level mostly due to transboundary air and water pollution. Now environmental concerns have taken on an international dimension as different national environmental protection measures start to have extraterritorial effects on international trade. Moreover, there is a variety of different environmental laws and regulations both on international and national levels, often redundant or conflicting, that have made it difficult for the global companies to do business in different countries. There exist different beliefs and values about the importance of economic development and protection of environment and this has led to inevitable conflicts about the possibility of their co-existence. Therefore, the environmentalists and advocates of international trade are often found to be on the opposite sides of the dispute between trade and environment. The main purpose of this dispute has been finding a solution or a balance that would enable economic growth through free trade without threatening the environment. The first time the concerns of these two interest groups were officially

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352 Mullett, supra note 231, at 379.
354 Hartwell & Bergkamp, supra note 351, at 10109.
355 Id.
recognized was at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992.\textsuperscript{356} Agenda 21, the document articulating UNCED's vision for sustainable development in the twenty-first century, endorses officially that environmental protection is an integral part of the development process and environmental concerns cannot be looked at in isolation from economic policies.\textsuperscript{357}

\textbf{i Eco-Labels As Potential Trade Barriers}

Dissimilar national environmental laws and policies have created international trade barriers by banning products considered to be environmentally harmful from national markets or by requiring the products to be in compliance with specific national requirements.\textsuperscript{358} Accordingly different national eco-labeling laws and programs are also considered as trade barriers affecting international trade.\textsuperscript{359}

UNCED viewed eco-labels as part of changing consumption patterns to be more sustainable, but since 1992, eco-labels have been seen more and more as a trade issue.\textsuperscript{360} This is largely due to the fact that many of the heavily traded products carry eco-labels.\textsuperscript{361} Having or not having an eco-label on the product started to influence the manufacturers' access to foreign markets and therefore many countries consider eco-labels as potential trade-barriers. As environmental labeling is considered to be an important tool in environmental protection, there should be found a way to use eco-labels without allowing them to become barriers to trade.

On the international level, using of eco-labels raises several disputes between different countries. It is the subject of the dispute between developed and developing

\begin{footnotes}
\item[358] Hartwell & Bergkamp, \textit{supra} note 351, at 10109.
\item[359] \textit{Id}.
\end{footnotes}
countries, the so-called North v. South debate, and between the United States and the European Union.

1) North-South Debate

The developing countries tend to see the initiatives of integrating environmental issues with trade as originating from and reflecting the priorities of the developed countries. Developing countries have been waiting for the great economic benefits from trade liberalization and are cautious with regard to the accommodation of environmental priorities of developed countries to trade rules. One of the primary concerns of the developing countries is that environmental considerations in trade rules can create a new sophisticated kind of disguised protectionism in order to keep out imports from other countries which have a better competitive advantage. To justify their concerns and the right to get protection from discrimination the developing countries refer to the broader political commitments of theUNCED summit from which the trade-environment issues cannot be isolated. UNCED called for avoiding the use of trade policy measures for environmental purposes that result in arbitrary or unjustifiable discrimination or disguised restriction on international trade, especially if such measures are unilateral. Moreover, one of the principles laid down by UNCED declares that the special situation and needs of developing countries shall be given special priority and international environmental efforts should address the interests and needs of all countries, whether developed or developing.

361 ld.
363 ld.
364 ld.
365 ld. at 594-595.
367 ld. at 877.
A good example of the trade-environment related concerns of developing countries is the issue of environmental standards. Developing countries are concerned that they will be expected to attain higher international standards in a relatively short period and this cannot be done without transfer of know-how, capital and technology. They do not consider compliance with higher standards set by developed countries as legitimate means of achieving sustainability. Instead, developing countries argue that key for changing and improving the environment rests with the developed countries, who need to change their unsustainable consumption patterns. Adoption of universal standards is seen by many developing countries as an unacceptable means of integrating trade and environment, because there are significant differences in the economic situations, development needs and consumption patterns of the developing and developed countries.

On the request of the developing countries, the United Nations Conference on Trade And Environment (UNCTAD), which is charged with overseeing the economic well-being of such countries, conducted a study about using eco-labels. The study contained a warning that developing countries face many difficulties in meeting the eco-labeling requirements of developed countries. Although eco-labeling in developing countries could help enhance the exports of environmentally friendly products, the cost of complying with the required standards could be too high for developing countries and therefore the relevant costs and benefits should be considered carefully. Generally UNCTAD favors the development of universal guidelines for eco-labeling and is of the

368 Vaughan, supra note 362, at 596.
369 Id. at 597.
370 Id. at 597-598.
371 Id. at 598.
373 Id.
374 Id.
opinion that developed countries should accept the difficulties of developing countries upon meeting the eco-labeling standards.\textsuperscript{375}

Many developing countries are worried about the potentially negative trade effects of the European Union eco-label program. Brazil, for example, has expressed the fear that it could reduce access of some of Brazil's major export products, such as paper, shoes, and furniture, to the European Union, which is Brazil's most important export market.\textsuperscript{376} There have also been objections to the restricted and closed nature of the sectorial meetings for drafting the eco-labeling guidelines.\textsuperscript{377} The Brazilian Association of Pulp Exporters have tried to make contact with relevant industries from the United States and Canada to start cooperation in order to gain access to European Union working group meetings. They have also suggested the representation of non-European Union industries through the International Chamber of Commerce.\textsuperscript{378} The exporters feel reluctant to comply with the criteria in drafting of which they have not had the opportunity to participate.\textsuperscript{379}

Another example is Colombia, which recently expressed concerns over Germany's eco-label program operated by the non-governmental organization First Food Information And Action Network for cut-flowers. The purpose of this program is to address consumer concerns regarding the excessive use of pesticides in the flower industry.\textsuperscript{380} Colombia argues that the requirements of the program apply only to flowers grown in Colombia.

\textsuperscript{375}Id.
\textsuperscript{376}Latin America: EC Eco-Label Program Raises Concerns For Brazilian Pulp, Furniture Industries, 10 ITR 127, January 27, 1993.
\textsuperscript{377}Id.
\textsuperscript{378}Id.
\textsuperscript{379}Id.
\textsuperscript{380}Standards: EU Criticizes U.S. - Korean Trade Agreement on Car Safety Standards For Violating MFN, 15 ITR 557, April 1, 1998.
and Ecuador and is discriminatory, leading to a sharp drop in Colombian exports of cut flowers to Germany.\textsuperscript{381}

There are however developing countries that have started their own eco-labeling programs in order to comply with international or foreign requirements and respond to the international pressure. Indonesia, for example, began eco-labeling trials on tropical hardwoods that comply with new environmentally-based timber export requirements applying principles of sustainability in the management of tropical forests, attempting thereby to secure their position in the overseas timber market.\textsuperscript{382} Indonesia's Association of Forest Concessionaires would like to see the government to revoke the licenses of those timber companies which are not making any preparations for eco-labeling and do not show any intent to improve their performance even after relevant notice.\textsuperscript{383} If no improvement is made, the companies will lose their market share, because by the turn of the century the eco-label will become a prerequisite for tropical timber producers to gain market access to certain countries.\textsuperscript{384}

\textbf{2) United States - European Union Debate}

Eco-labels are also at issue in the trade relations between the United States and the European Union. The position of the United States is that the current European Union eco-labeling scheme is in violation of the international law.\textsuperscript{385} The use of eco-labels promoted by the European Union is seen by the United States industry as frequently

\textsuperscript{381}Id.

\textsuperscript{382}Indonesia's Eco-Labeling Practice Gains First Trial, DEUTSCHE-PRESSE AGENTUR, January 22, 1997. The International Tropical Timber Organization has stipulated that by the year 2000 all exports of tropical timber from its member countries will come from sustainably-managed forests. Id.

\textsuperscript{383}APHI To Recommend License Revocation For Timber Coys Not Preparing For Ecolabeling, ANTARA INDON. NAT'L NEWS AGENCY, September 5, 1997.

\textsuperscript{384}Id.

\textsuperscript{385}Trade Policy: Eizenstat Sees Room For Investment in United States' Relations With EU, 13 ITR 11, March 13, 1996.
discriminatory and protectionist in nature.\footnote{\textit{Environment: U.S. Proposes Expanding Public Role in National Programs on Eco-Labeling}, 13 ITR 1445, September 18, 1996.} The United States is not opposed to the idea of eco-labels as such, but is concerned with two main problems related to them. First, the insufficient transparency in the process of awarding European Union eco-labels and the inability of non-European Union industries to participate in the process; and second, the discrimination between equivalent environmentally benign products.\footnote{\textit{Trade Policy, supra note 385.}}\footnote{\textit{Environment, supra note 386.}} The United States industry is especially concerned with the eco-labels issued by third-party certifiers worrying that they might favor local manufacturers over foreign competitors.\footnote{\textit{Environment: Controversial EU Eco-Label Scheme Covers 166 Products, Commission Says}, 14 ITR 1348, August 6, 1997.} In this respect there are dialogues held between the United States and the European Union concerning the right choice of methods and criteria being used in the LCA process to determine who gets the label so that the discrimination of foreign products could be avoided.\footnote{\textit{Environment: EU To Push Ahead With Eco-Labels For Paper, Despite U.S. Objections}, 13 ITR 23 d38, June 5, 1996.} The United States has warned that the European Union eco-label program could trigger a complaint by the United States to the World Trade Organization.\footnote{\textit{Id.}} But the European Union officials argue that they have done everything possible and impossible to accommodate the concerns of the United States, but at this point their fear that some European Union member states start to complain that the European Union officials pay too much attention on how to meet the concerns of the United States and neglects the concerns of the member states.\footnote{\textit{Id.}} However, the European Union and the United States have agreed to hold a technical meeting in order to resolve the dispute over eco-labels.\footnote{\textit{Environment: U.S., EU Agree to Hold Technical Meetings Aimed At Resolving Labeling Disputes}, 13 ITR 1602, October 16, 1996.} The primary issue to be solved in the meeting would be the question of
transparency through finding a way how foreign companies could have a clear and open way to make their contribution to the criteria of eco-labeling.\textsuperscript{393} The United States is also concerned whether the eco-labels should address production processes.\textsuperscript{394} In order to create an even playing field, the eco-labels should address products and not processes.\textsuperscript{395} This particular issue, for example, has appeared to be of concern to the United States paper manufacturers. The European Union eco-label guidelines for copying paper promote recycling and United States manufacturers fear that the benefits of the United States who process paper from both virgin and recycled paper will be overlooked.\textsuperscript{396} Most trade rules take into account only the end product and not the process of making it and if eco-labels take account of processes and production methods, it could challenge the legal definition of "like" products found in trade pacts.\textsuperscript{397} However, despite of the fierce dispute between the United States and the European Union, damages to the sales of the products of the United States have so far been mostly theoretical.\textsuperscript{398} But the United States government is concerned that the damages will become more real, when the span of product categories eligible for eco-label expands.\textsuperscript{399}

\textbf{ii Eco-Labels Under the Regime of General Agreement on Tariffs and Trade}

\textbf{1) Environmental Aspects of GATT Regime}

The General Agreement on Tariffs and Trade (hereinafter: GATT)\textsuperscript{400} entered into force in 1948. The main goal of the GATT is to provide secure and predictable environment for international trade, as well as a continuing process of market opening, in

\textsuperscript{393} Id.
\textsuperscript{394} Mary Greczyn, Paper Serves As Test, WASTE NEWS 2, February 3, 1997.
\textsuperscript{395} Id.
\textsuperscript{396} Greczyn, supra note 394.
\textsuperscript{397} Environment, supra note 360.
\textsuperscript{399} Id.
order to promote worldwide economic growth. At the time of drafting the GATT, environmental issues were not given great significance in relation with trade. Thus, the GATT does not refer to environmental measures as such, but applies to them just as it applies to other policy measures. But as world trade had changed and became more complex in many aspects, it became apparent in early 1980s that the GATT was not adequate to address the new realities of world trade. Thus in 1986 trade ministers of the GATT contracting parties, meeting in Uruguay, agreed to start multilateral trade negotiations known as the Uruguay Round of the Multilateral Trade Negotiations. After more than seven years of negotiating the agreement was reached and in 1994 the final Uruguay Round Agreements were signed. The Uruguay Round is the largest and most comprehensive set of trade agreements in history covering all major areas of trade. In order to ensure the efficient and balanced implementation of the Uruguay Round agreements a new World Trade Organization (WTO) was created to bring them under one institutional umbrella. The WTO explicitly recognizes the links between trade and environment and the preamble of the Agreement Establishing the WTO recognizes sustainable development as a guiding principle. This was the first time that a broad multilateral trade agreement recognized the importance of the relationship between trade

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402 Id.
403 Id.
405 Report on Environmental Issues, supra note 401.
406 Id.
407 Id.
408 Id.
and environment and establishes environmental protection as an overall objective of the parties to the agreement.\footnote{Id.}

In 1995 the General Council of the WTO created the Committee on Trade and Environment (CTE) which will be in charge of the work concerning the changes to the rules of trade in order to foster positive interaction between trade and environment measures and to avoid protectionist measures.\footnote{Id.} During its meetings in 1996 the CTE also discussed among other things issues related to eco-labeling.\footnote{Id.} In fact, the CTE has selected eco-labeling as one of its chief agenda topics as response to criticism about the legitimacy of eco-labeling programs.\footnote{World Trade Organization Already Embroiled in Controversy Over Trade, Environment Link, Int'l Env't Daily (BNA) (Aug. 10, 1994), available in LEXIS, Envim Library, BNAIED File.} Eco-labeling is being increasingly used to address global environmental problems, such as global warming, deforestation, and loss of biodiversity, and it has become apparent that most of the programs are making use of LCA as a tool for eco-labeling not focusing only on harmful product characteristics but also on the production processes and methods (hereinafter: PPM).\footnote{Veena Jha & Simonetta Zarrilli, Eco-Labeling Initiatives as Potential Barriers to Trade, in LIFE CYCLE MANAGEMENT AND TRADE, at 69-70.} The latter has drawn the most serious criticism as many eco-labeling programs target PPMs that are used to harvest certain natural resources in developing countries.\footnote{Steffin, supra note 13, at 234} This criticism comes not only from developing countries, but also from some industry groups of developed countries that have joined to attack government sponsored eco-labeling programs as trade barriers.\footnote{Stevens, supra note 142, at 8-10.} The CTE has acknowledged these concerns, but there are different opinions within the CTE with regard to such eco-labeling schemes, particularly as to whether such

\footnote{\textsuperscript{409}Id.\textsuperscript{410}Jennifer Haverkamp, \textit{WTO Committee On Trade And Environment}, SB79 ALI-ABA 147, 149 (1997).\textsuperscript{411}Id.\textsuperscript{412}\textit{World Trade Organization Already Embroiled in Controversy Over Trade, Environment Link, Int'l Env't Daily (BNA) (Aug. 10, 1994), available in LEXIS, Envim Library, BNAIED File.}\textsuperscript{413}\textit{Veena Jha & Simonetta Zarrilli, Eco-Labeling Initiatives as Potential Barriers to Trade, in LIFE CYCLE MANAGEMENT AND TRADE, at 69-70.}\textsuperscript{414}Steffin, supra note 13, at 234
schemes are covered by the Agreement of Technical Barrier to Trade.\textsuperscript{416} The United States, for example, is of the opinion that all forms of eco-labeling, including those containing PPM-type elements, are subject to the Agreement of Technical Barriers to Trade.\textsuperscript{417} Developing countries on the other hand disagree with such interpretation.\textsuperscript{418} In order to try to avoid the trade restrictive nature of the eco-labeling programs, the CTE has also discussed the possibility of including the transparency requirement into the formulation of eco-labeling programs.\textsuperscript{419} The representatives of Argentina, for example, have suggested that in order to avoid trade protectionism eco-labeling programs should have a clear environmental purpose, the importers should be allowed to express their opinions before a country establishes an eco-label, and the process of deciding which products qualify for the label should take account of the environmental situation of the exporting country.\textsuperscript{420} There have also been calls for mutual recognition and eventual harmonization of eco-labeling programs.\textsuperscript{421}

2) General Description of GATT System

In order to analyze the legality of eco-labeling programs under the GATT regime, it is necessary to take a look at the general system of GATT. The body of rules which make up the current GATT system is composed of two elements: the General Agreement itself that lays out several fundamental trade principles and the series of associated agreements, which cover rules of conduct in a number of nontariff areas.\textsuperscript{422}

\textsuperscript{416} Haverkamp, supra note 410, at 150.
\textsuperscript{417} Id.
\textsuperscript{418} Id.
\textsuperscript{419} Id.
\textsuperscript{421} Id. at 7.
\textsuperscript{422} Report on Environmental Issues, supra note 401.
Among the fundamental principles of the General Agreement two are especially relevant with regard to eco-labeling. These are most-favored-nation principle\(^4\) and national treatment principle.\(^5\) The most-favored-nation (MFN) principle requires that GATT parties are required to extend to all other contracting parties the most favorable treatment with respect to tariffs and related matters granted to any trading partner.\(^6\) The national treatment principle requires that GATT parties must give imported goods treatment no less favorable than that accorded to comparable domestic goods in domestic markets.\(^7\) Exceptions to these general obligations can be made in certain circumstances among other things for such considerations as protection of human, animal or plant life or health and conservation of exhaustible natural resources.\(^8\)

Among the associated agreements the Agreement on Technical Barriers to Trade (hereinafter: TBT Agreement)\(^9\) relates to issues concerning eco-labeling. The TBT Agreement deals comprehensively with product standards, technical regulations and conformity assessment procedures distinguishing between technical requirements that are meant to achieve legitimate objectives from those which are disguised barriers to trade.\(^10\) The goal of TBT Agreement declared in its preamble is to ensure that technical regulations and standards, including ... labeling requirements, do not create unnecessary obstacles to international trade.\(^11\)

As mentioned above, the TBT Agreement regulates three types of measures - standards, technical regulations and conformity assessment measures - establishing different rules

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\(^4\) See GATT, supra note 400, art. I.
\(^5\) See id. art. III.
\(^6\) Report on Environmental Issues, supra note 401.
\(^7\) Id.
\(^8\) Id.
\(^9\) GATT Doc. II-AIA-6 (Dec. 15, 1993) [hereinafter: TBT Agreement].
\(^10\) Report on Environmental Issues, supra note 401.
\(^11\) Id. at preamble.
for the development and application of these.\footnote{Office of the United States Trade Representative, Executive Office of the President, The Uruguay Round Agreements Act, Statement of Administrative Action: Agreement on Technical Barriers to Trade, 1994 WL 761641 (G.A.T.T.), September 27, 1994, available in Westlaw, GATT database.} In short, standards refer to voluntary product standards, technical regulations refer to mandatory product standards and conformity assessment measures are the methods used to determine that a product satisfies a standard or technical regulation.\footnote{A "standard" is 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, with which compliance is not mandatory. It may also include or deal exclusively with ... labeling requirements as they apply to a product, process or production method." TBT Agreement, supra note 428, art. IV. A "technical regulation" is a "document which lays down product characteristics or their related process and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with ... labeling requirements as they apply to a product, process or production method." Id. art. II. A "conformity assessment procedure" is "any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled." Id. art. V and VI.} The TBT Agreement applies to all products, including industrial and agricultural products, and to PPMs that relate directly to, and affect, a product's characteristics.\footnote{Report on Environmental Issues, supra note 401.} It does not apply to environmental measures unrelated to product standards, to sanitary and phytosanitary measures and to purchasing specifications prepared by governmental bodies for the production or consumption requirements of those bodies.\footnote{Id.} The TBT Agreement requires that measures falling within its scope meet certain basic requirements, including that measures not discriminate against imports, that measures be no more trade restrictive than necessary, and that they may be established in a transparent process that provides an opportunity for comment on proposed new measures.\footnote{Id.} The TBT Agreement promotes the use of international standards as the basis for domestic standards, while protecting the right of governments to adopt and maintain more stringent standards than those agreed upon internationally if the relevant international standards would be an ineffective or inappropriate means for the legitimate objectives pursued, such as protection of human health or safety, animal or
plant life or health, and the environment.\textsuperscript{436} The TBT Agreement specifically lists fundamental climatic or geographical factors or fundamental technological problems as examples of bases for departing from international standard.\textsuperscript{437} However, more stringent measures should be consistent with the requirements of the TBT Agreement, i.e. the measures should be non-discriminating, transparent and non-restrictive to trade.\textsuperscript{438} To show that a government uses trade restrictive practices, the challenging member would need to show that there was another measure that is reasonably available, fulfills the legitimate objectives and is significantly less restrictive to trade.\textsuperscript{439}

3) Eco-Labeling Programs under the Scrutiny of GATT and TBT Agreement

a) Eco-Labeling Programs under GATT

The initial focus of inquiry under GATT should be whether an eco-labeling program is consistent with the MFN and national treatment principles.\textsuperscript{440} The consistency of eco-labeling schemes with these principles was examined by a GATT panel in the first Tuna-Dolphin case (hereinafter: Tuna/Dolphin I).\textsuperscript{441} In this case Mexico challenged the United States' primary embargo of tuna authorized by the Marine Mammal Protection Act\textsuperscript{442} prohibiting the import of tuna harvested using methods resulting in the death or serious injury of ocean mammals in excess of U.S. standards.\textsuperscript{443} In addition Mexico also challenged the actions of the United States prohibiting the use of a "dolphin safe" label on tuna that did not meet U.S. criteria for being considered "dolphin safe" under the Dolphin Protection Consumer Information Act.\textsuperscript{444} This was a voluntary government-sponsored

\textsuperscript{436}\textit{Id.}
\textsuperscript{437}\textit{Id.}
\textsuperscript{438}\textit{Id.}
\textsuperscript{439}\textit{Id.}
\textsuperscript{440}Bartenhagen, \textit{supra} note 16, at 65.
\textsuperscript{441}United States -- Restrictions on Imports of Tuna, GATT Doc. DS21/R, reprinted in 30 I.L.M. 1594 (1991) [hereinafter Tuna/Dolphin I].
\textsuperscript{443}Staffin, \textit{supra} note 13, at 246.
labeling scheme. The GATT panel found that the labeling provisions were consistent with the obligations of the United States under GATT since they were applied on a non-discriminatory basis and in accordance with the MFN principle. The label was accessible to all tuna sold in the United States regardless of the country of origin and did not make the right to sell tuna or its products conditional upon the use of tuna harvesting methods. The voluntary labeling scheme would have been also in accordance with the national treatment principle as it did not distinguish between domestic and foreign tuna and its products, but in the Tuna/Dolphin I case the panel did not analyze this possibility in eco-labeling context. However, the panel found that the embargo violated the national treatment principle that is only applied to internal regulations and does not allow distinctions based on PPMs or other non-product-related criteria. Furthermore, the panel found that imposing the embargo did not fall under the exceptions to GATT general obligations, as the exceptions could not be applied "extrajurisdictionally."

Tuna/Dolphin I was followed by another case concerning the method of harvesting tuna (hereinafter: Tuna/Dolphin II). In this case a different GATT panel found illegal U.S. embargo against "intermediary nations", which import tuna from primary embargo countries and then export it to the United States. The panel found similarly to Tuna/Dolphin I that the embargo violated the national treatment principle.

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445 Bartenhagen, supra note 16, at 65.
446 Report on Environmental Issues, supra note 401.
447 Tuna/Dolphin I, supra note 441, at 1622-1623.
448 Bartenhagen, supra note 16, at 66.
449 See Tuna/Dolphin I, supra note 441, at 1618.
450 Id. at 1620-1621.
452 Id. at 899.
453 Id. at 889-890.
and the exceptions to general obligations of the GATT were inapplicable to the U.S. embargoes.\textsuperscript{454}

As the most important factor in complying with the MFN principle in Tuna/Dolphin I case was non-discriminatory access to the consumer and not the identity of the administering body, the decision can be considered to condone both public and private, voluntary eco-labeling schemes.\textsuperscript{455} The Tuna/Dolphin I decision has also been interpreted to mean that under the GATT regime the eco-labeling programs can use only product-related criteria unless the scheme is purely voluntary.\textsuperscript{456} However, it is not certain if the future panels of GATT would rule in accordance with the Tuna/Dolphin I decision and permit voluntary eco-labeling schemes that use some kind of LCA and take account of either product-related or non-product-related PPMs.\textsuperscript{457} Thus, there is much uncertainty under current GATT regime about the future of the voluntary PPM based eco-labeling schemes.\textsuperscript{458}

The reasoning of the GATT panel in the Tuna/Dolphin I also calls into question if any mandatory labeling scheme based on non-product-related PPMs and applied equally to domestic and foreign goods is legitimate under GATT.\textsuperscript{459} A country could implement such labeling scheme to help enforce a unilaterally enacted trade ban against product manufactured or harvested by an objectionable PPM.\textsuperscript{460} This type of mandatory labeling presents the most GATT-related problems.\textsuperscript{461} Although originally voluntary, the "dolphin safe" labeling scheme of the United States was rendered mandatory by the International Dolphin Conservation Act amending the Marine Mammal Protection Act to prohibit the

\textsuperscript{454}\textit{Id.} at 898.
\textsuperscript{455}Bartenhagen, \textit{supra} note 16, at 66.
\textsuperscript{456}\textit{Id.}
\textsuperscript{457}\textit{Id.} at 67.
\textsuperscript{458}\textit{Id.} at 67-68.
\textsuperscript{459}Staffin, \textit{supra} note 13, at 251.
\textsuperscript{460}\textit{Id.}
\textsuperscript{461}\textit{Id.}
sale, purchase, or distribution of any tuna or its product, which is not dolphin safe, in the United States after June 1, 1994.\textsuperscript{462} So now all tuna products sold in the United States should bear the label "dolphin safe." Under Tuna/Dolphin I decision such a scheme cannot be justified through GATT's national treatment principle, because the labeling criteria are based on PPMs not related to product's physical characteristics and therefore not subject to this principle.\textsuperscript{463} The mandatory labeling scheme will not qualify as an exception from the GATT's general obligations either, because it enforces a unilateral ban that attempts to change the environmental policies of another jurisdiction.\textsuperscript{464} The reasoning of Tuna/Dolphin II would not allow such a labeling scheme either under these exemptions, because it is primarily aimed at forcing the exporting country to change its PPMs.\textsuperscript{465} Although the mandatory labeling scheme could seem as a necessary measure to protect the recourses in the global commons, the GATT panel would likely find that there was a less trade restrictive measure available, such as a voluntary labeling scheme.\textsuperscript{466} Thus, according to the current interpretation of GATT any mandatory eco-labeling scheme based on non-product related PPM, will be regarded as a unilateral attempt to enforce national environmental laws and policies extrajurisdictionally on another country and this will not be acceptable under GATT regime.\textsuperscript{467} 

Similarly, the mandatory labeling laws passed by a country in lieu of a trade ban in an effort to convince producers, who wish to sell their goods in its market, to change to a more environmentally benign PPM would not pass muster under GATT.\textsuperscript{468} Once again, such labeling scheme would not fall under the national treatment principle of GATT, because it relates to PPMs not related to the product and the government of another

\textsuperscript{463}Tuna/Dolphin I, supra note 441, at 1603.
\textsuperscript{464}Id. at 1606-1608.
\textsuperscript{465}Tuna/Dolphin II, supra note 451, at 893-894.
\textsuperscript{466}Tuna/Dolphin I, supra note 441, at 1619-1620.
\textsuperscript{467}Staffin, supra note 13, at 253.
\textsuperscript{468}Id. at 253-255.
country, especially of a developing country, could argue that its products are suffering a disadvantage.\textsuperscript{469} After the decisions of Tuna/Dolphin I and Tuna/Dolphin II, it is uncertain if such mandatory labeling schemes would fall under the exceptions from GATT's general obligations because of the extrajurisdictionality issue.\textsuperscript{470} And it is unlikely that a mandatory labeling scheme constitutes the "least trade restrictive" measure reasonably available.\textsuperscript{471} However, the status of a mandatory labeling law would be somewhat different, but still uncertain, if it is enacted by a country in order to fulfill partially its obligations under a multilateral environmental treaty.\textsuperscript{472} If a mandatory labeling scheme is authorized pursuant to a highly regarded, international environmental agreement, and is intended to remedy a serious global environmental problem acknowledged by widespread, international, scientific consensus, it is likely that a GATT panel would uphold its legality.\textsuperscript{473} The language in Tuna/Dolphin I suggests that if there is a multilateral environmental agreement authorizing a mandatory trade measure taking account of PPMs, it would render such a trade measure legitimate under GATT regime.\textsuperscript{474}

\textbf{b) Eco-Labeling Programs under TBT Agreement}

Because of the uncertainty involved in GATT analysis with regard to PPM-based distinctions and national treatment principle, the viability and status of eco-labeling programs is threatened and uncertain until there is provided some protection for them on the international level.\textsuperscript{475} It is proposed and debated that the TBT Agreement should provide such protection.\textsuperscript{476} According to the CTE discussions the main factors for determining whether an eco-labeling program can be regarded as an illegal non-tariff

\textsuperscript{469}Id. at 253-254.

\textsuperscript{470}Id. at 254.

\textsuperscript{471}Tuna/Dolphin II, supra note 451, at 893-894.

\textsuperscript{472}Staffin, supra note 13, at 251, 255-257.

\textsuperscript{473}Id. 257.

\textsuperscript{474}See Tuna/Dolphin I, supra note 441, at 1620.

\textsuperscript{475}Bartenhagen, supra note 16, at 68.

\textsuperscript{476}Id.
barrier under the TBT Agreement are whether the program is mandatory or voluntary and whether it uses product related or PPM related criteria.  

- **Mandatory and Voluntary Product-Related Eco-Labels**  

Most mandatory eco-labeling programs have not posed serious trade barrier concerns because they have been usually related to product characteristics, such as safety and quality of performance requirements that are of importance upon the consumption and disposal of a product and that can yield health or environmental externalities within the jurisdiction of the labeling country. Under the GATT regime a country can impose such requirements on an imported products characteristics as long as it is in compliance with the principles of GATT. It is universally accepted that mandatory eco-labeling programs based on product characteristics are subject to the TBT Agreement's requirements for technical regulations. Article 2 of the TBT Agreement applies GATT's "MFN" and "national treatment" obligations and requires that the technical regulations are not prepared adopted or applied with a view or with the effect of creating unnecessary obstacles to international trade. Thus, technical regulations cannot be more trade restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. In case of a dispute about the legitimacy of a technical regulation, the country whose technical regulation is challenged has to prove that there is no other measures reasonably available that would fulfill the legitimate objectives of the government and that would be significantly less restrictive to trade. And if the technical regulation uses stricter standards that the relevant available international standards the use of which is required by the TBT Agreement, the technical regulation will be still legitimate if such international standards are proven to be an ineffective or inappropriate

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477 Staffin, supra note 13, at 235.  
478 See Adams, supra note 84, at 172.  
means for the fulfillment of the legitimate objectives pursued. However, when a country adopts technical requirements not complying with international standards or when relevant international standards do not exist, and the technical regulation can have a significant impact on trade, it has to abide by the notice and transparency requirements imposed by the TBT Agreement.

As mentioned above, most mandatory eco-labeling programs are in conformity with the requirements of GATT, but there have been cases where such programs have not passed the GATT's scrutiny. This was the case with the Austrian mandatory "tropical timber" labeling law enacted in June 1992 that raised trade related concerns of several tropical timber-producing developing countries. The law required that all tropical timber, as well as product containing tropical timber, had to be marked with a label stating either "made of tropical timber" or "containing tropical timber." if "placed on the market" in Austria. It also established a separate voluntary eco-labeling program, the purpose of which was to identify tropical timber products that derived from "sustainable forestry practices" and to draw up criteria for "sustainable forestry" according to the guidelines developed by the International Tropical Timber Association. The complaint about the Austrian law was brought to the GATT Council by Indonesia and Malaysia with the support of their partners from the Association of South East Asian Nations. The Austrian law was accused of being a unilateral act violating the "MFN" and "national treatment" principles of the GATT and not abiding by the notice and transparency requirements of the TBT Agreement. The Austrian law required that only tropical timber and its products be labeled and not the "like products" imported from temperate

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481 Id. at 55.
482 Id. at 56.
483 Frances Williams, ASEAN Condemns Timber Labeling, FINANCIAL TIMES, Nov. 6, 1992, at 4.
484 Sucharipa-Behrmann, supra note 480, at 56-57.
forest countries and it did not require the labeling of Austrian own timber products.\textsuperscript{485} It was also clear that the law was subject to the TBT Agreement as a technical regulation and therefore fell under the notice and transparency requirements.\textsuperscript{486} Thus, by failing to include all forest products into the scope of its mandatory labeling program, Austria violated the GATT's non-discrimination principle. Faced with the possibility that the tropical timber-producing countries would boycott Austrian companies doing business there motivated Austria to rescind its tropical timber labeling law\textsuperscript{487} and it was never formally defended before an arbitral panel of GATT.\textsuperscript{488} The voluntary labeling law was not challenged and therefore remained in place.\textsuperscript{489}

Voluntary product-related eco-labeling schemes are universally deemed to be subject to the TBT Agreement as standards,\textsuperscript{490} because they are voluntary and refer to "characteristics for products or related processes and production method."\textsuperscript{491} According to Article 4 of the TBT Agreement such programs must meet the Code of Good Practice for the Preparation, Adoption and Application of Standards (hereinafter: Code) set forth in Annex 3 of the TBT Agreement.\textsuperscript{492} Many provisions of the Code are similar to those imposed on technical regulations.\textsuperscript{493} The Code applies the MFN and national treatment principles to all voluntary standards,\textsuperscript{494} imports the "unnecessary obstacle to trade test"\textsuperscript{495} imposing a number of "notice and transparency" requirements,\textsuperscript{496} and requires that

\textsuperscript{485}Id.
\textsuperscript{486}Report on Environmental Issues, supra note 401.
\textsuperscript{487}Tropical Wood Labeling Law Rescinded Threats to Ban All Imports, INT'L ENV'T DAILY (BNA) (Apr. 12, 1993), available in LEXIS, Envim Library, BNAIED File.
\textsuperscript{488}Staffin, supra note 13, at 244.
\textsuperscript{489}Tropical Wood Labeling Law, supra note 487.
\textsuperscript{490}Bartenhagen, supra note 16, at 71.
\textsuperscript{491}TBT Agreement, supra note 428, at 18 (annex, art. 2).
\textsuperscript{492}Id. at 5 (art. 4, art. 4.1).
\textsuperscript{493}Bartenhagen, supra note 16, at 71.
\textsuperscript{494}TBT Agreement, supra note 428, at 21 (annex 3, art. D)
\textsuperscript{495}Id. annex 3, art. E
\textsuperscript{496}Id. at 22 (Annex 3, art. L).
international standards if available be used, unless such standards would be "ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems."^497

An additional similarity of voluntary standards with mandatory technical regulations is that the TBT Agreement foresees that the members have to take "such reasonable measures as may be available to them" to make sure that local governments and non-governmental bodies comply with the provisions of the TBT Agreement concerning both mandatory and voluntary programs.^498 This enables the TBT Agreement to expand its provisions to local government and private eco-labeling schemes, regardless of the fact that only activities of national governments are generally subject to the GATT regulation.^499 Up to now, the applicability of the TBT Agreement to mandatory and voluntary product-related eco-labeling schemes has been relatively uncontroversial.^500

- Mandatory and Voluntary PPM-Related Eco-Labels

The applicability of the TBT Agreement to PPM-related eco-labeling schemes has been the most controversial.^501 The language in the TBT Agreement defines both technical regulations and standards as measures relating to product characteristics and to product related processes and production methods.^502 Moreover, the definitions also state that technical regulations or standards "may also include or deal exclusively with marking and labeling requirements as they apply to a product, process or production method."^503 Although it is clear that TBT Agreement covers labeling, this language, however, can be given two different meanings.^504 It can be read either as incorporating only product-

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^497 Id. at 21 (Annex 3, art. F).
^498 Id. art. 4.1.
^499 Bartenhagen, supra note 16, at 72.
^500 Id. at 73.
^501 Id.
^502 TBT Agreement, supra note 428, at annex 1, art. 1-2.
^503 Id.
^504 Bartenhagen, supra note 16, at 74.
related PPMs or as incorporating non-product-related PPMs for certain specific types of rules or guidelines, including labeling requirements.\textsuperscript{505} Although, the negotiating history of the TBT Agreement and the policy considerations behind it seem to show that the TBT Agreement can be interpreted to include non-product-related, PPM-based eco-labeling programs, there is no certainty.\textsuperscript{506} The uncertainty arising from the not so specific language of the TBT Agreement caught the attention of the WTO and the TBT Agreement's coverage of PPM-related eco-labeling scheme was placed on the agenda of CTE.\textsuperscript{507} But the CTE failed to provide a solution. Part of the members were of the opinion that the negotiating history is clear that the TBT Agreement was not intended to legitimize the use of measures based on non-product-related PPMs. Other members argued that the TBT Agreement was meant to cover all forms of eco-labeling and the inclusion of non-product-related PPM-based elements in an eco-labeling program is not \textit{per se} violation of the GATT rules.\textsuperscript{508} The CTE provided in its report only a non-committal statement advising members who wish to adopt eco-labeling schemes based on non-product-related PPMs to follow the TBT Agreement's notice and transparency requirements, but did not say if such eco-labeling programs are actually subject to the TBT Agreement.\textsuperscript{509} Therefore, the status of such eco-labeling programs is still not clear and certain.

\textbf{B Harmonization of Standards and Procedures of Eco-Labeling Programs}

There is a proliferation of standards for industry with regard to products and processes used to demonstrate "good" environmental credentials to consumers or

\textsuperscript{505} See id.
\textsuperscript{506} See id, at 74-78.
\textsuperscript{507} Id. at 78.
\textsuperscript{508} WORLD TRADE ORGANIZATION, REPORT OF THE WTO COMMITTEE ON TRADE AND ENVIRONMENT 14 (1996).
\textsuperscript{509} Bartenhagen, supra note 16, at 79.
governments and few of these standards are international. Such proliferation leads to increase in costs, complications, potential liabilities, and outright barriers for organizations operating internationally. The work of harmonizing such standards worldwide was started in 1993 and is currently continued by International Standards Organization (ISO). The ISO standard series of environmental performance have been taken up both by companies from less regulated countries who want to penetrate more environmentally conscious markets and by global companies who need operating guidelines when doing business in less regulated regions. These standards constitute a basic set of environmental standards on which individual countries or regions may base their certification programs. The goal is to encourage countries to use the same environmental standards and certification procedures that would ensure consistency and predictability between processes and standards.

i Organization and Work of ISO

ISO is a non-governmental consortium of national standardization organizations from over 100 different countries formed in 1947. The goal of the organization is to promote the development of standardization and related activities in the world with a view to facilitating the international exchange of goods and services and to developing cooperation in the sphere of intellectual, scientific, technological, and economic activity.

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513 Howard, *supra* note 510.
The traditional international standards developed by ISO include standards relating to manufacturing, trade, and communication. In 1987 ISO expanded its coverage and adopted the ISO 9000 series of international quality assurance and management standards. The environmental standards called ISO 14000 are the counterpart to the ISO 9000 series. The ISO standards-setting process relies upon several ISO technical committees that develop international standards in their respective fields of expertise. ISO international standards usually complement standards developed by nationally-based standard-setting organizations. ISO international standards are not themselves legally binding, but can come obligatory, if ISO registration is required or expected by private contracts, national or regional legislation, or international agreements.

**ii ISO 14000 Series**

The ISO 14000 series are similar to ISO 9000 series. Like ISO 9000, the ISO 14000 series provide a generic set of standards and guidelines that organizations can use in order to establish and maintain sound environmental operations and procedures, and that customers can use to evaluate their suppliers, rather than imposing any specific

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517 Id. at 2-3.
518 Id. at 2.
519 Id. Mullett, supra note 231, at 388. ISO 9000 series define the elements necessary for companies to establish and maintain quality management systems and provide generic standards from which customers can evaluate the effectiveness of their suppliers' quality controls. The purpose of establishing ISO 9000 standards was the harmonization of international trade by providing a set of standards that has worldwide credibility and acceptance. Compliance with ISO 9000 standards has become a condition for business in order to be competitive. See BRIAN ROTHERY, ISO 14000 AND ISO 9000 10 (1995). THE ISO 9000 HANDBOOK, supra note 343, at 10. Kenneth A. Freeling, Implementing an Environmental Management System in Accordance with the ISO's Draft Standards Is Not Necessarily Costly And Could Yield Benefits As Well, NAT'L L.J., July 24, 1995, at B8. GREG HUTCHINS, ISO 9000 IMPLEMENTATION MANUAL: TEN STEPS TO ISO 9000 IMPLEMENTATION ix (1994).
520 Rozell D. Hunter, Standardization And Environment, INT'L ENV. REP. (BNA) No. 16, at 186 (March 10, 1993).
522 Id. at 193.
measures or direct requirements on organizations.\textsuperscript{523} Like the ISO 9000 series, the ISO 14000 series was also developed to facilitate international trade by supplying a set of standards that have worldwide credibility.\textsuperscript{524} Upon providing companies with uniform environmental standards and procedures, the ISO 14000 series recognizes that each organization is unique in its environmental situation regulatory pressures, and current level of environmental management.\textsuperscript{525} ISO 14000 standards encourage companies to adopt environmental management systems that will bring them in line with existing regulations and voluntary codes of practice while promoting continual improvement in their environmental practices.\textsuperscript{526} The standards may be applied to the operations of all types and sizes of businesses from developed or developing countries.\textsuperscript{527}

The current environmental standard setting process was initiated by five events.\textsuperscript{528} These were: 1) the European Community's approach to technical regulation, coupled with other European initiatives in the areas of eco-auditing and labeling; 2) the negotiation of the Uruguay Round of the GATT, together with emerging controversy over the role of trade agreements in environmental protection; 3) the uncoordinated proliferation of corporate environmental quality programs and eco-labeling schemes; 4) the success of ISO 9000 quality control series; and 5) the principles of sustainable development outlined in UNCED.\textsuperscript{529} Approximately sixty ISO member countries are involved in developing the

\textsuperscript{524}Mullett, supra note 231, at 388.
\textsuperscript{525}ld.
\textsuperscript{527}Freeling, supra note 523, at B5.
\textsuperscript{528}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, 490 (1995).
\textsuperscript{529}ld. at 488.
ISO 14000 standards.\textsuperscript{530} To develop the ISO 14000 series ISO formed a Technical Committee on Environmental Management (hereinafter: TC 207). In June 1983 six subcommittees and one working group were established by the TC 207 to prepare draft standards for both product and company evaluation.\textsuperscript{531} The subcommittees are responsible for environmental management systems, environmental performance evaluation, environmental auditing, environmental labeling, LCA and terms and definitions.\textsuperscript{532} The working group deals with exploring the environmental aspects of product standards.\textsuperscript{533} Each of the countries involved in the ISO process has a subcommittee for all pending standards, with final decisions left to agreements among international participants.\textsuperscript{534} The standards related to company evaluation were developed more quickly than the product standards\textsuperscript{535} and in 1996 ISO released the first set of standards for environmental management.\textsuperscript{536} The product standards covering eco-labels and recycled-content claims are expected to be released in the near future.\textsuperscript{537}

Product standards or eco-labeling standards are meant to bring consistency to the use of different national and regional eco-labels all over the world, reducing thereby nontariff trade-barriers.\textsuperscript{538} Besides labeling they will cover LCA, environmental aspects in product standards, and terms and definitions.\textsuperscript{539} There are four sets of standards under consideration for eco-labeling that aim to provide a consistent approach to environmental

\textsuperscript{531} Mullett, \textit{supra} note 231, at 389.
\textsuperscript{532} Rodgers, \textit{supra} note 521, 202.
\textsuperscript{535} Mullett, \textit{supra} note 231, at 389.
\textsuperscript{536} Environmental management standards address environmental management systems, environmental auditing, and environmental performance evaluation. \textit{Id.}
\textsuperscript{537} Greczyn, \textit{supra} note 534, at 1.
\textsuperscript{538} \textit{Id.}
\textsuperscript{539} Mullett, \textit{supra} note 231, at 390.
labeling on the international level: ISO 14020, 14021, 14024 and 14025. ISO 14020 would establish basic goals and principles for eco-labeling. ISO 14021 would establish requirements for organizations making first-party claims with regard to environmental aspects of a product or service. ISO 14024 would provide evaluation criteria for eco-labeling programs and should serve as a guide for the national and regional programs. The subcommittee is not attempting to create a single labeling standard, but aims to develop and harmonize methodologies, terms, and principles for the various types of labeling. In general there are three types of eco-labels under consideration. Type I labeling standards would address third-party certifiers and involve summarizing all the environmental aspects of a product into a single mark or label that would indicate whether the product is environmentally friendly and superior. Type II labeling would involve the use of generic labels to describe the attributes of the product, for example recyclability or degradability. These labels would include first-party claims and require these to be proven. Type III labeling would envision environmental report card type labels that would list environmental effects associated with the manufacture, use, and disposal of a product. With regard to eco-labeling criteria for symbols, standards have been proposed that would harmonize and clarify the confusion surrounding the three-chasing-arrows logo. Up to now the mentioned logo has not given a clear picture for

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540 Mullet, supra note 231, at 390.
541 Saunders, supra note 345, at 11.
542 Id. at 5.
543 Id.
544 Roht-Arriaza, supra note 528, at 512.
546 Greczyn, supra note 534, at 1.
547 Bell & Connaughton, supra note 533, at S2. General Policy, supra note 545.
548 Id.
549 Greczyn, supra note 534, at 1.
550 Bell & Connaughton, supra note 533, at S2. General Policy, supra note 545.
551 Greczyn, supra note 534, at 1.
the consumers whether the product with such a logo is recyclable itself or is made from recycled material. Therefore it has been proposed that three arrows on a dark background would indicate the product contains recycled content and three arrows alone would indicate that the product can be recycled.\(^{552}\) There are also proposals that the symbol should be accompanied by a short line of text indicating the meaning of the symbol.\(^{553}\)

Four other sets of standards - ISO 14040, 14041, 14042 and 14043 - would deal with LCA and aim at standardizing the process.\(^{554}\) ISO 14040 establishes general principles and procedures for compiling and examining the environmental impacts of a product or service throughout its lifetime.\(^{555}\) ISO 14041 provides specific guidelines and requirements for developing the scope of LCA.\(^{556}\) ISO 14042 proposes three major categories for consideration in an impact assessment: resource depletion, human health, and ecological impacts.\(^{557}\) ISO 14043 provides guidelines for assessing improvement through continuous monitoring.\(^{558}\) The proposed LCA standards will examine the cradle-to-grave environmental impact of all phases of production, including solid-waste disposal and recycling, as well as waste management alternatives.\(^{559}\)

During the process of developing standards for eco-labeling schemes two major approaches have emerged.\(^{560}\) On one side there are countries that want to adopt labeling standards which harness market forces to achieve environmental improvements, and on the other side there are countries, who would be satisfied with standards that merely help

\(^{552}\) Id.
\(^{553}\) Id.
\(^{554}\) Mullett, supra note 231, at 391.
\(^{556}\) Id.
\(^{557}\) Id.
\(^{558}\) Id.
\(^{559}\) Grezyn, supra note 534, at 1.
convey truthful information about the environmental attributes of products.\textsuperscript{561} To settle the dispute and find a balance between these two approaches, ISO working groups have outlined a number of principles on which eco-labeling programs should be based.\textsuperscript{562} These are: 1) equal consideration of the objectives of communicating environmental attributes of products and services and stimulating market forces; 2) linking the process of awarding eco-labels to demonstrated and proven benefits; 3) transparency in both the design and the implementation of the program; 4) non-discrimination in the treatment of domestic and foreign products and services; and 5) pragmatic rather than rigid use of LCA due to scientific uncertainty.\textsuperscript{563}

Like all international standards of ISO, the environmental standards are not considered to be legally binding, but are considered to be voluntary standards for corporations and other entities, the adoption of which was influenced primarily by business interests from large countries.\textsuperscript{564} However, the process cannot be considered fully private nor fully voluntary.\textsuperscript{565} In many cases they become obligatory for companies as global and regional trade agreements may explicitly recognize them; government regulations may refer to them for definition of terms; and government procurement rules may adopt them.\textsuperscript{566} Obligatory compliance with the standards can also be influenced by market pressure from consumers, financiers, insurers, and competitors, who may use them as a prerequisite for companies wishing to do business in large markets.\textsuperscript{567}

\textsuperscript{561} Id.
\textsuperscript{562} Id.
\textsuperscript{563} Id.
\textsuperscript{564} Roht-Arriaza, supra note 528, at 486.
\textsuperscript{565} Id.
\textsuperscript{566} Id.
\textsuperscript{567} Id.
Advantages and Disadvantages of International Harmonization of Eco-Labeling Programs

i Advantages

The success of eco-labels has been largely created by market demand, and eco-labels are often viewed as a preferred means of achieving environmental improvements. Uniform international standards for eco-labeling programs would facilitate the use and acceptance of eco-labels and moreover, the voluntary international standards could encourage the movement towards market-based incentives instead of command-and-control environmental regulation. The harmonized eco-labeling standards can be also incorporated into binding law and may be used by national authorities or courts in construing the meaning of terms. Compliance with the standards will be presumed to be compliance with the law, and the standards may become mandatory from a commercial or public relations standpoint. This is likely happen to the voluntary standards of ISO, as the compliance with them will become a necessity for a company if it wishes to remain competitive in the international marketplace. Businesses may also find harmonization of eco-labeling standards useful, because it will enable them to improve their environmental performance and to reduce costs, as well as to enhance their public credibility and image. Eventually this will help them to increase their market share. Other advantages of internationally harmonized standards are rather similar to the

568 EPA Status Report, supra note 21, at 7, 33-35.
569 General Policy, supra note 545.
570 Hunter, supra note 520, at 185.
571 Id.
572 Mark J. Bennett, ISO 14000: New standard for Environmental Integrity, PROB. & PROP., July/Aug. 1995, at 30. The experience with the ISO 9000 standards has shown that companies that are not certified have a competitive disadvantage compared to their certified competitors. Flanagan, supra note 526, at 35.
573 General Policy, supra note 545.
574 Mullett, supra note 231, at 393.
advantages of well regulated national eco-labeling schemes, including, for example, reduction in confusion and promotion of environmental innovation.\textsuperscript{575}

Harmonization would result in reduction of confusion that is caused by having a range of different national labels.\textsuperscript{576} The advantage for potential consumers, as well as for manufacturers, would be the same as upon regulating differing domestic environmental claims, except international harmonization would lead to reduction in confusion on the global level.\textsuperscript{577} Although different national programs would remain, the standards upon which each of these would be based on would be similar and the existence of several different eco-labeling programs would not be a problem.\textsuperscript{578} If there is less confusion, the acceptance and use of eco-labels in the marketplace would be greater.\textsuperscript{579}

Through international harmonization, the eco-labeling standards are expected to reduce the burden on trade and to reduce the risk that environment-related measures are used as trade barriers.\textsuperscript{580} For example, voluntary non-governmental third-party eco-labeling programs are not considered to be a trade-barrier, as the issuance of such labels is not a unilateral governmental action\textsuperscript{581} and is not subject to various trade agreements.\textsuperscript{582} Moreover, if the criteria under which a product is judged is harmonized, the trade in goods and services will be enhanced, because countries will be more willing to accept a product with a foreign eco-label, if they know that the standards for awarding such labels are similar.\textsuperscript{583}

\textsuperscript{575} Richards, supra note 22, at 257. Mullett, supra note 231, at 391.
\textsuperscript{577} Richards, supra note 22, at 258.
\textsuperscript{578} Id.
\textsuperscript{579} Id.
\textsuperscript{580} Id. Roht-Arriaza, supra note 528, at 488.
\textsuperscript{581} EPA Status Report, supra note 21, at 7, 33-35.
\textsuperscript{582} Richards, supra note 22, at 258.
\textsuperscript{583} Id. 258-259.
Harmonization of eco-labeling standards ensures also consistency in the development of market.\textsuperscript{584} Achieving the consistency in the market was one of the reasons why European Union was interested in a uniform eco-labeling scheme.\textsuperscript{585} The conflict between different national schemes will be reduced and this will help to avoid duplication of effort and save time and money.\textsuperscript{586} For example, the ISO standards are considered to have many potential benefits for individual companies being in market relations in different countries,\textsuperscript{587} because they will

avoid multiple registrations, inspections, certifications, labels, and conflicting requirements and provide a single system for global organizations to implement everywhere they operate.\textsuperscript{588}

In this way the burden, namely financial burden, on individual company compliance will be reduced.\textsuperscript{589} When the companies do not have to reorient the manufacturing processes for entering the market they would like to export their product to and when exchange of the research and expert information will be facilitated, the costs will be reduced.\textsuperscript{590} The saved financial resources can be used for reaching and exceeding the national eco-label criteria and this can lead to environmental innovation.\textsuperscript{591}

But there are also other benefits for individual companies. Internationally uniform standards will also encourage companies who do not like that a third-party assesses the company's products and processes to give greater acceptance to such third-party labels if

\begin{footnotesize}
\begin{enumerate}
\item[584] Richards, \textit{supra} note 22, at 259.
\item[587] Roht-Arriaza, \textit{supra} note 528, at 488.
\item[589] Richards, \textit{supra} note 22, at 260.
\item[590] \textit{Id. EPA Status Report}, at 33-35.
\item[591] Richards, \textit{supra} note 22, at 260.
\end{enumerate}
\end{footnotesize}
these are awarded on the basis of internationally recognized standards. Uniform standards also produce a level playing field that will not discriminate small companies as the costs of obtaining a label will be reduced in the long term. Harmonized eco-labeling programs will also protect individual companies producing truly environmentally sound products from unfair competition from companies operating in other countries that have less strict environmental standards. Upon developing harmonized global eco-labeling standards, also the LCA problems will be addressed more effectively due to the combined international resources. Up to now the method used for evaluating and comparing environmental across products has been one of the most important issues under dispute.

Global harmonization of eco-labels can also produce a vast quantity of environmental impact information derived from eco-label awards and methodology. Such information could be gathered into a international data bank and used as a basis for judging products and processes. If such information is gathered into and is available from a international data bank, it would make it easier to exchange and understand it on the global level and this will lead to greater acceptance of eco-labels. The data bank would serve as a means to obtain previously unknown information about the impact of practices or products on the environment. It will also facilitate monitoring of state compliance with treaty obligations as enforcement of international environmental law.

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592 Richards, supra note 22, at 260.
593 Id.
594 Id.
595 Id. at 259.
597 Richards, supra note 22, at 259. Bell & Connaughton, supra note 553, at S2.
599 Richards, supra note 22, at 259-260.
600 Roht-Arriaza, supra note 528, at 517.
takes partially place through monitoring. Information about the environmental impact of certain products and processes will also provide basis for their control or phase-out.

The process of setting international standards would also enable more transparency than the development of national and regional eco-labeling standards that often took place "behind closed doors." If the development process of international standards is open to every interested party, the standards would take into account the differences in the environmental condition in different countries and would not overlook them as many unilateral national eco-labeling programs do.

**ii Disadvantages**

Although consistent eco-labeling standards seems a worthy goal, the harmonization of these standards has raised a lot of questions and created many controversies that may be difficult to work out and that could even jeopardize the standards' future. The disadvantages center around the problems in reaching an international consensus. As in many international negotiations there will be a number of different points of view and the process of setting international standards can be cumbersome and bureaucratic, as well as time-consuming. Many countries already have their own national eco-labeling programs based on different processes and criteria and it would be hard to decide which program is the most effective one and how much consensus is required for adopting uniform standards. Reaching consensus will be difficult especially with regard to third-party certification, because the industrial sector

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601 *Id.* at 518.
602 *Id.*
603 Latin America, *supra* note 376, at 127.
604 *Id.*
606 Richards, *supra* note 22, at 257.
607 *Id.* at 261.
609 *ISO Plan*, *supra* note 605, at 8.
may seek to block independent third-party eco-labeling standards as they do not want any third-party intervening in the market.\footnote{Greczyn, supra note 534, at 1.} Companies are afraid that the new standards may cause them to lose their market share.\footnote{ISO Plan, supra note 605, at 8.} Therefore one of the issues under discussion is whether to use third-party certification or first-party certification.\footnote{General Policy, supra note 545.} The other concern expressed for example by American Forest & Paper Association is that it is difficult to label some types of products because there are so many variables.\footnote{ISO Plan, supra note 605, at 8.}

It is also said that the ISO standards could give certain countries unfair advantage.\footnote{Id.} There is a concern particularly expressed by the developing countries that the standards could become potential nontariff barriers to trade.\footnote{General Policy, supra note 545.} In theory uniform standards would eliminate discrimination and trade barriers, but in practice the situation would not change much.\footnote{Id.} On one hand the countries who have higher national standards would not give them up if the international standards are set too low and would not serve their specific environmental interests, and on the other hand the developing countries may not have sufficient resources to comply with higher international standards.\footnote{Mullett, supra note 231, at 397.} So, even the internationally harmonized standards would still remain a non-tariff trade barrier to some extent.\footnote{Id.} It will be difficult to decide which standards would receive wide acceptance among both developing and developed countries and which not. Thus there are strong concerns that negotiations may reduce the eco-label’s effectiveness and reduce national standards to the lowest common denominator.\footnote{Richards, supra note 22, at 257-258.}
are worried that after the adoption of uniform international standards, they would have to give up their national eco-labeling programs or to reduce their standards.\textsuperscript{620}

Although international eco-labeling standards could reduce the confusion created by different eco-labeling programs, there are still concerns that these uniform standards would not be more reliable, since local differences in environmental impacts are likely to become more extreme.\textsuperscript{621} The reason for this is that differences in climate, landscape and habitat mean that the environmental impact of any activity, as well as the perceptions of the seriousness of the environmental impact, will vary from country to country.\textsuperscript{622} This concerns particularly developing countries, because of their lack of economic and technical resources and their urgent need for economic development that causes them to place a lower value on protecting environment.\textsuperscript{623}

Another key issue is how much documentation and disclosure should be required of businesses,\textsuperscript{624} and if that information could be later used against a company in an enforcement procedure. A major controversy has emerged over the proposed environmental effects register, in which companies would map out the environmental impacts of all their processes, and what to do with the data in it.\textsuperscript{625}

These disadvantages and differences in opinions can be overcome and none of them would counsel against attempting to come to an agreement about the acceptable international standards.\textsuperscript{626} But it will be time consuming and complicated.

\textsuperscript{620}Id. at 261-262.


\textsuperscript{622}Id.

\textsuperscript{623}Richard B. Stewart, Environmental Regulation And International Competitiveness, 102 YALE L. J. 2039, 2099 (1993).

\textsuperscript{624}General Policy, supra note 545.

\textsuperscript{625}Id.

\textsuperscript{626}Richards, supra note 22, at 258.
CONCLUSION

It is obvious that environmental marketing has become a valuable tool for environmental protection and is here to stay. While in the past environmental policy mostly focused on regulatory methods, now non-regulatory alternatives have become increasingly important. In most part they have proven themselves as useful complements to regulatory methods. It is now common that regulatory legislation requires information disclosure to public, especially to consumers, who then can use their power to influence the market and prevent environmental damage. Market forces have turned out to be more flexible and they can give a quicker response than regulatory methods to discourage consumption of products causing environmental damage. However, such information policy can only be effective, when environmental claims are meaningful and based on accurate scientific data. Only a well-informed consumer can make a true environmentally sound and responsible decision acknowledging the link between a product and the environmental damage it may cause. Consumer can use the market forces to generate remarkably effective pressure to stop environmentally harmful practices.

In order to achieve the set goals, environmental marketing has to be enough regulated both on national and international levels. However, at the present time the main

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628 Id. at 134.
focus should be on international regulation that should establish basic uniform principles for national environmental marketing programs. The reason for the need of international regulation is that both consumers and manufacturers increasingly engage in activities crossing national borders and face a lot of difficulties caused by different national environmental marketing programs. The differences in such programs have become burdening to globally active corporations and have started to adversely influence free trade between countries.

In order to solve the conflict between trade and environment many trade agreements attempt to address also issues concerning environmental marketing, particularly the legitimacy of eco-labeling programs. The widely debated issue concerning the eco-labeling programs is whether they constitute a trade barrier and have a discriminative character. The debate mainly focuses on the issue of whether or not to allow the use of non-product-related PPM-based criteria in eco-labeling schemes. Current GATT practice indicates that eco-labeling programs can use only product-related criteria unless the scheme is purely voluntary and does not allow discrimination among imports based on the process or manner in which they were produced or harvested.\textsuperscript{633} Any mandatory eco-labeling scheme based on non-product-related criteria will be regarded as a unilateral attempt to enforce national environmental laws and policies extrajurisdictionally and therefore unacceptable under the GATT regime. Product-related mandatory and voluntary eco-labels on the other hand have universally been accepted to be subject to GATT regime, particularly the TBT Agreement, as long as they are in compliance with the MFN and national treatment principles. The most controversial issue has been whether the TBT Agreement can provide protection for mandatory and voluntary non-product-related eco-labels. Many commentators have pointed out that any move toward sustainable development requires the ability to differentiate among goods

\textsuperscript{633}Roht-Arriaza, supra note 528, at 519.
based on the environmental impacts involved in their production, use, and disposal. This premise underlies the whole idea of LCA and eco-labeling. But so far there has been no definite decision whether to include non-product-related PPM-based eco-labeling programs to the TBT Agreement. And there still remains uncertainty about the future status of such eco-labeling programs.

Establishing of voluntary and uniform international standards would mitigate the trade barrier problem. As long as such international standards are voluntary and are used by consumers and businesses to inform purchasing decisions without government interference, there should be no issue raised of GATT compatibility. Indeed, one of the major advantages of voluntary, private standards is that they allow consideration of process-based impacts without running afoul of GATT.

Although the harmonization process of eco-labeling standards may be time-consuming and result in the lowest common denominator as the standard, it will still be beneficial in many aspects. Thus many scholars have called for international harmonization of environmental standards, as it

would benefit consumers in all nations by eliminating differences in environmental standards that undercut producers' ability to achieve economies of scale, increase the transaction costs of complying with different state regulations, and hinder trade and its attendant benefits.

Although, at the time being, the implementation of the internationally uniform standards seems to be a logical step to be taken, it still remains to be seen if they would serve their purpose and eliminate the trade concerns related to current eco-labeling standards.

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635 Roht-Arriaza, supra note 528, at 519.
636 Id. at 520.
637 Id.
638 Stewart, supra note 623, at 2045-2046.
639 Id. at 2098.