INSTITUTE OF SOCIAL STUDIES

Working Paper Series No. 185

ENVIRONMENTAL POLICY: FROM REGULATION TO ECONOMIC INSTRUMENTS: INTERNATIONAL LEGAL ASPECTS OF ECO-LABELS.

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February 1995

WORKING PAPERS

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ENVIRONMENTAL POLICY: FROM REGULATION TO ECONOMIC INSTRUMENTS: INTERNATIONAL LEGAL ASPECTS OF ECO-LABELS

- Dr Surya P. Subedi*

Abstract

It has widely been realised in recent years that regulatory measures for the protection of the environment need to be complemented by economic instruments designed to induce market forces to adopt more environmentally-friendly practices and environmental labelling or eco-labelling is one of such instruments. Eco-labelling - a market-based instrument - is receiving increased attention as an exciting and innovative environmental protection instrument in national environmental policy in many mainly developed and certain developing countries around the globe.

This rise of eco-labelling has created some concern, especially among developing countries, that eco-labelling may become yet another device for imposing the environmental standards of the developed world on the developing countries and pose a danger to the export of certain goods from developing countries to the developed countries. Although voluntary eco-labelling programmes are not presently likely to pose any serious trade implications, mandatory ones may have serious implications for international trade, based on the GATT system. Therefore, there is a need for an international agreement to harmonise the eco-labelling programmes of different countries and to effectively use this instrument for the protection of the environment.

I. INTRODUCTION

The prospect of a long-term global and sometimes irreversible harm to the environment by certain economic activities of our generation has brought the environmental issues from the periphery to the centre of the international political agenda. Consequently, the world has entered a new age of

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environmental diplomacy, resulting in a rapid evolution of the international law of environment. The political awakening and the rising level of public concern over the state of our environment during the past few decades has resulted in the adoption of a number of international instruments designed to limit the harm to the environment from human activity. While most measures adopted in the first few decades of the second-half of this century concentrated primarily on end-of-pipe solutions, many measures adopted in the recent past have sought to identify and arrest the environmental problems before they occur.

In accordance with this precautionary approach which demands that attention be paid to the sources of the problem, States started exploring various possibilities of creating economic incentive for industry for producing environmentally less damaging products rather than imposing the will of the State on industry. Although traditionally market forces have been perceived as environmentally unfriendly actors, certain experiences have evinced that well thought out economic incentives to industry can play a significant role in programmes for the protection of the environment and the sustainable use and development of the resources of the earth. Accordingly, it was as early as in 1971 that Germany's national environmental plan put forward the concept of eco-labels for consumer products; the eco-labelling programme was launched in 1978 as the first programme of its kind in the world which has served since then as a model for all other efforts of similar character of other

countries.[1] Since then eco-labelling programmes, of putting labels on products to inform consumers of their environmentally-friendly character, have become increasingly popular.

Currently, such environmental labelling schemes, which can be described as 'positive labelling programmes', exist in some 22 or so countries.[2] In an effort to harmonise the eco-labelling programmes within the member countries of certain organisations joint measures have been undertaken to adopt a unified system of granting such labels. Examples are the decisions of the Nordic Council and the European Union on this matter.[3] Thus, the labelling programmes are apparently becoming increasingly popular in many industrialised countries as well as the fast-growing economies of the world; the potential usefulness of labelling requirements aimed at protecting the environment has been recognised by a growing number of States.

Eco-labelling programmes are the programmes designed to help consumers identify those products and packaging which during use and disposal are considered environmentally better than similar products. The products may be environment-friendly for a number of reasons. For instance, some of the products may be bio-degradable or free of chemicals that deplete the ozone layer,

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[1] See OECD, Environmental Labelling in OECD Countries (Paris, 1991) (hereafter 'the OECD Report'), p.43 and Veena Jha, Rene Vossennar, and Simonetta Zarreli, Eco-labelling and International Trade: Preliminary Information from Seven Countries (1993), UNCTAD Discussion Paper No.70, UNCTAD/OSG/DP/70, Geneva.

[2] There are a variety of environmental labels, ranging from hazard warnings on chemicals and pesticide packaging (which could be defined as 'negative labelling programmes') to 'recycled paper' self-claims on publications and stationary.

[3] The ASEAN is also working in this direction (see below).

while others may have been packaged in recycled or recyclable material. By awarding an easy-to-identify eco-label to such products governments hope to help 'green consumers' to make informed decisions when buying goods. What is more, the 'green labels' are supposed to encourage ecologically safe merchandise through innovation, leading ultimately to an ecologically sound lifestyle.

The main objective of such eco-labelling programmes is to harness market forces and channel them towards promoting more environmentally friendly patterns of production. Since the labels provide consumers with an easily-recognised symbol indicating that a products's environmental friendliness has been assessed and approved by a credible body of experts, the label is supposed to improve the sales or image of a labelled product. It is hoped that by creating awareness of consumers of environmentally less damaging products and helping them to make informed purchasing decisions, labelling schemes will eventually encourage manufacturers to incorporate environmental aspects into their entire product development process.

However, this growth of national and regional organisational labelling programmes, albeit voluntary, may raise international concern because these programmes are likely to have repercussions on the existing international trading system based mainly on the GATT system. This is because while the GATT system is designed to remove barriers to trade, the national and regional eco-labelling systems could be viewed by other States as new non-tariff barriers to free trade. It is this international legal and

trade aspect of eco-labelling system that this paper aims to examine.

Although present labelling programmes are, for the most part, voluntary, discrimination may result, particularly when employing the cradle-to-grave assessment method when assessing foreign goods by a national eco-label awarding body. Therefore, it is necessary briefly to examine the existing major labelling schemes before examining the international legal aspects of such schemes. Other types of environmental labelling, e.g., negative labelling which indicates a product's dangers or hazardous properties, will not be discussed in this paper as its aim is to examine international legal aspects of eco-labelling schemes which are designed to base the award of a label on a life-cycle analysis of a product. Moreover, the focus of this paper would be the eco-labelling programmes of the OECD countries since there are very few non-OECD countries which have official eco-labelling programmes.

II. AN OVERVIEW OF EXISTING ECO-LABELLING PROGRAMMES[4]

As stated earlier, the first environmental label was issued in Germany in 1978. By 1991 the programme had 3,600 labelled products in 64 product categories.[5] Similar programme was launched in Canada in 1988 and in Japan in 1989. Under a

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[4] See generally, Peter H. Sand, Lessons Learned in Global Environmental Governance (World Resource Institute, Washington, D.C., 1990), pp.26-28; The OECD Report, 1991; A.L. Salzhauer, 'Obstacles and opportunities for a consumer eco-label', in 33(9) Environment (1991), p.10; Owen McIntyre, 'Environmental labelling - clean conscience for the consumer or missed opportunity?', Journal of Business Law (May 1994), pp.270-279.

[5] The OECD Report, 1991, p.13.

harmonised Nordic Council Programme, Norway, Sweden and Finland began their labelling scheme in 1991. They were followed in the same year by Austria, Portugal and France. The European Union launched its unified scheme in 1992 when it adopted a Community Regulation authorising national bodies within the member countries to issue eco-labels under the general supervision of Brussels. Programmes are currently under consideration in certain other OECD countries. Among the developing countries India,[6] the Republic of Korea and Singapore have already launched their eco-labelling programmes while Brazil, Colombia, Malaysia and the ASEAN are exploring the possibility of developing eco-labelling systems.[7]

Under all programmes currently existing or proposed, it is a committee with broad representation, with members from the government department concerned, consumer, environmental and industry interests, which determines, or suggests to a government minister which product categories are eligible for labelling. Within each category, the scope of products is defined, and the threshold criteria a product must meet are established with the help of experts.

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[6] Under the Indian eco-labelling programme an 'Eco-mark' label is to be awarded by the Bureau of Indian Standards (BIS) to products meeting national environmental and pollution control standards. A non-phosphate laundry detergent became the first product to receive the 'Eco-mark' from the BIS in March 1994. The Bureau seems to have worked out the criteria and standards for awarding the Eco-mark label to 16 different groups of products. See in World Consumer, No.214, p.7. See also M.van Amelrooy, Indian Environmental Policy and the Use of Economic Instruments (ICSSR, New Delhi and the NUFFIC, The Hague, IDPAD Occasional Papers and Reprints, 1994-1).

[7] See generally in Vinod Rege, 'GATT law and environment-related issues affecting the trade of developing countries' 28(3) Journal of World Trade (June 1994), pp.95, at 132 ff.

Manufacturers, whether national or foreign, may, if they so wish, submit products for consideration and, if they meet the criteria set for the product category, they can obtain a label which they can use, under the terms and conditions of the contract concluded with the committee or administering body, when marketing the product. Since the German scheme is the oldest and perhaps the most developed scheme of all eco-labelling programmes, a close examination of this scheme and of the relatively recent attempt of the EC to harmonise the eco-labelling programme within the EC would help understand how the labelling schemes operate.

1. The German Blue Angel Programme

The German eco-labelling scheme is a voluntary, government-sponsored scheme which works with the private sector and non-governmental organisations.[8] Anyone may propose a product category for the award of a German eco-label - a "Blue Angel" label.[9] Once the application is submitted for the award of the label, three bodies are involved in the process of awarding: (i) the Federal Environment Agency (FEA) (it is a governmental environmental protection authority), (ii) the 11-member non-governmental Environmental Label Jury (ELJ) (it includes

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[8] See generally, The OECD Report, 1991, pp.43-49; Informationszentrum Umwelt (IZU), A-Z of Environmental Protection in Germany (Dusseldorf, 1992), pp.52-54, 122-124.

[9] The 'Blue Angel' is the official emblem of UNEP, although pursuant to correspondence dating back to 1978 the UNEP Secretariat authorised its use for the German eco-labelling scheme. In 1991, UNEP unsuccessfully tried to obtain protection of the emblem under Article 6 *ter* of the *Paris Convention for the Protection of Industrial Property* (refused on the grounds that UNEP is 'not an independent intergovernmental organisation').

representatives from environmental and science organisations, consumer associations, industry, trade unions and the media, and (iii) the non-profit scientific organisation Institute for Quality Assurance and Labelling (RAL) whose members are 140 private-sector associations.

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

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

Germany uses the Blue Angel symbol of the UNEP as its eco-label together with the word, 'Umweltzeichen' ('environmental label') above, the explanatory phrase, 'weil ...' ('because ...') below, and the words 'Jury Umweltzeichen'.[10] The idea behind this

[10] When the programme was launched in 1978 the word, 'Umweltfreundlich' ('environmentally-friendly') was used rather than the word 'Umweltzeichen'. However, when the goods produced

German initiative was to reduce pollution in the environment by encouraging industry to produce environmentally friendly consumer products through technological innovation; since the programme would help provide more accurate information in guiding consumer choices, the 'green' consumer would opt for environmentally friendly products even if it meant paying a higher price for such products.

2. The EC Eco-Label Award Scheme

With a view to harmonising the environmental labelling efforts under way in several EC countries, the Council of the EC introduced, through the adoption of the Council Regulation (EEC) No.880/92 of 23 March 1992, a Europe-wide Eco-label Award Scheme. The scheme is in keeping with the Fifth environment action programme of the EC which stresses the importance of subsidiarity and of market based instruments.[11]

The eco-label award scheme has been hailed as a good example of both these approaches. The EC eco-label, the official logo of the EC, a flower with the letter 'e' and Community's star

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in Germany and abroad began to enter market in the 1980s with the self-proclaimed words, 'environment-friendly' and 'ozone-friendly' etc., the word 'Umweltfreundlich' was replaced by the word 'Umweltzeichen' in 1988 in the German eco-label.

[11] See Council Regulation (EEC) No. 880/92 of 23 March 1992 on a Community eco-label award scheme in the Official Journal (O.J.) of the E, L.99, vol.35 of 11 April 1992; Commission Decision (93/326/EEC) of 13 May 1993 on establishing indicative guidelines for the fixing of costs and fees in connection with the Community eco-label in O.J., L.129 of 27 May 1993; Commission Decisions of 28 June 1993 (93/430, 431/EEC) on establishing the ecological criteria for the award of the Community eco-label to washing machines and dishwashers in O.J., L.198 of 7 August 1993 and the Commission Decision (93/517/EEC) of 15 September 1993 on a standard contract covering the terms and use of Community eco-label in O.J., L.243 of 29 September 1993.

symbolism, is to be awarded to products which have a reduced impact on the environment. It is the national competent body appointed by each Member State rather than the EC in Brussels itself that actually awards the EC label rather than the Commission itself in Brussels.

The task of defining the product group and establishing ecological criteria for a product group is perhaps the most important aspect of any eco-labelling programme because it is this criteria that a product must meet to qualify for an eco-label. Therefore, it is during the development of ecological criteria for a product group that the EC Commission works in close co-operation with the Member States.

A national body sets off the process by preparing a report on the definition of product groups and the criteria to be applied to a product within the product group in consultation with the various national interest groups and submits it to the Commission which in turn seeks the opinion of the Consultation Forum composed of representatives from industry and trade as well as consumer and environmental organisations. After this consultation, the Commission presents its proposal to the Regulatory Committee composed of representatives from Member States.

Once Community agreement is reached on the definition of the product group and the criteria for a product, the Commission formally adopts the criteria and publishes them in the Official Journal. The establishment of ecological criteria applicable to each product is based on the study of the entire product life cycle of the product. In other words, it involves examining in

detail the cradle-to-grave aspects of the raw materials used, manufacturing process, distribution, end use and final disposal.

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

Like the German scheme, the EC scheme is also voluntary and open to both EC and non-EC manufacturers. What is important about this scheme is that once approved by one Community Member State, it can be used throughout the other 11 States (perhaps 15 States in the near future because of the ongoing enlargement of the EU) without having to make separate application in every country.

3. Other Schemes

Although the Canadian programme is largely based on the German scheme, the former is different in certain respects from the latter in that the organisation which is responsible for handling the whole project, Environmental Choice, is a government organisation. It is administered by a secretariat on behalf of an independent Advisory Board, consisting of 16 members appointed by the Environment Minister among which include representatives

from environmental, industry and consumer groups. The Environmental Choice logo is a maple leaf representing Canada's environment, composed of three doves, symbolising the three major partners joining to protect the environment: government, industry and commerce.[12]

Japan launched its eco-labelling programme in 1989 under the semi-government Project for the Promotion of the Ecologically Safe Merchandise, known as the Eco-Mark programme. The Eco-Mark symbol is two arms embracing the world, symbolising the protection of the earth with our own hands. The two arms spell out the letter, 'e', which stands for 'environment', 'earth' and 'ecology.'[13]

The Nordic Council's eco-labelling programme began in 1989 when the ministers from the five Nordic countries, namely, Denmark, Finland, Iceland, Norway and Sweden, agreed to introduce a harmonised Nordic environmental label. The symbol of the Nordic label is a white swan in a green background with the words 'environmentally-labelled' above in Swedish, Norwegian or Finnish languages. The Nordic scheme is similar to the EC scheme; in fact, the former could have provided a model for the latter.

The situation in the United States is different altogether. No legislative measures have been adopted on this matter at the federal level. Although the federal Environmental Protection Agency has published federal procurement guidelines on certain materials with recycled content, these guidelines are not

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[12] See EcoLogo, The Environmental Choice Newsletter, Issue No. 1, August 1989 and Issue No. 2, October 1989, Canada.

[13] See Japan Environment Summary, Vol.17/No.3, March 1989, Environment Agency, Government of Japan, pp.1-2.

binding. However, a number of legislations have been adopted at the state level to regulate certain labelling activities. A great deal of such activity is taking place also in the private sector.[14]

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

III. INTERNATIONAL LEGAL IMPLICATIONS OF ECO-LABELS

1. Trade implications

First of all, it should be made clear that eco-labelling programmes differ significantly from traditional government instruments which might be regarded as trade barriers. Hence, it has been a generally perceived view[15] that current environmental labelling programmes, which are voluntary, do not presently pose serious trade implications. Second, labelling programmes are by very nature discriminatory because the goal is to select only those products which have significantly less

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[14] See generally, The OECD Report, 1991; Glenn Israel, 'Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims' in 20(2) Boston College Environmental Affairs Law Review (1993), pp.303-333.

[15] See, for instance, a report submitted by the Chairman of the GATT Group on Environmental Measures and International Trade to the 49th Session of the Contracting Parties, GATT Doc.L/7402 of 2 February 1994, p.4, para.17.

environmental impact than other products in their category. This is the only way that labelling programmes can identify more environmentally friendly products in any given category.

Nevertheless, the trade impact of ever growing environmental labelling programmes will depend substantially on how the schemes are administered. As stated in the 1991 OECD Report on environmental labelling,

> "Because all existing labelling programmes seek to employ a cradle-to-grave perspective in establishing criteria ... one could imagine national discrimination as a result of criteria calling for differing production methods, cultivation practices, or raw material use."[16]

"For example," the report goes on to say that, "out of concern for tropical deforestation, product criteria might require that the wood in a product be selected from timber grown in a sustainable manner." This is what Austria actually did in 1992 through a Federal piece of legislation. Austria was later forced to amend the Federal law when Indonesia and Malaysia threatened legal action before the GATT panel.[17] Moreover, international trade could be adversely affected by the environmental labelling programmes to the extent that imported products do not have access to national schemes on the same terms as domestically produced goods.

Another concern raised in this context is that when the eco-labelling programmes grow, trade effects not inherent to environmental purpose of the scheme can arise, particularly for small foreign suppliers and those from developing countries. For

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[16] The OECD Report, 1991, p.33.

[17] This issue is discussed below in greater detail.

instance, under certain labelling schemes the manufacturing plant is visited by the administrators of the scheme before a label is granted to ensure that the plant is in compliance with environmental standards relevant to the product category.

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

Similarly, the life-cycle analysis perspective of a national labelling scheme may have trade implications on foreign States, and especially on developing countries, as they might use process and production methods that are judged environmentally unsound in developed eco-label awarding countries. Not the unwillingness on the part of foreign manufacturers to produce more environmentally-friendly products, but mere absence of such capacity both in terms of capital and know-how could be behind the production of environmentally unsound products. The question as to whether certain process and production methods are or are not environmentally sound would depend on how a national label awarding body defines the criteria for a product to be eligible for a label. If the national body makes such decisions under the influence of domestic environmental standards, it may run the risk of imposing domestic values and standards on exporting

countries, raising the international trade issue of 'extraterritoriality'.

Another problem is that a labelling programme could be viewed as a trade barrier if it involved requirements that put small and foreign producers at a disadvantage because of the costs involved or other reasons. Every eco-labelling programme, even voluntary one, would have to be consistent with the provisions of Article 2 to 7 of the 1994 Agreement on Technical Barriers to Trade (TBT), including the Code of Good Practice for the Preparation, Adoption and Application of Standards. Article 2.1 of the Agreement requires that States must ensure that "in respect of technical regulations, products imported from the territory of any Member State shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."[18]

Similarly, Article 2.2 requires all contracting parties to ensure that "technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade." Although under this provision of the TBT Agreement, States can adopt technical regulations necessary to fulfil a legitimate objective, which includes the environment, such technical regulations must not be more trade-restrictive than necessary to fulfil such a legitimate objective.

Articles 2.9 provides that when a State adopts a technical regulation with regard to a product, it must fulfil a number of requirements stipulated in the Agreement. For instance, it must

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[18] See in The Results of the Uruguay Round of Multilateral Trade Negotiations: the Legal Texts (GATT Secretariat, 1994), pp.138, 139.

publish a notice in a publication to this effect at an early appropriate stage and allow reasonable time for other contracting parties to make comments in writing and take these comments into account.

Therefore, it would be necessary to ensure that effective access to labelling schemes are granted to overseas suppliers in order to provide them with an opportunity to participate in the selection process of products category for consideration of labelling and in establishing the criteria and threshold levels that such products must meet to qualify for a label.

Moreover, in order not to undermine the provisions of GATT Article (X)(1) and reduce the adverse impact of eco-labelling on third countries it would be necessary to increase transparency of eco-labelling programmes, including the details of the product categories covered, their criteria and threshold levels.

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

2. The GATT Rules and Eco-labels

(i) GATT implications

If eco-labelling programmes have trade implications, they are also likely to have GATT implications. That is not to say that such programmes would necessarily be inconsistent with GATT rules. The fundamental principles of national treatment and non-discrimination of GATT require every Contracting Party to accord to foreign products

> "treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."[19]

If foreign products cannot achieve the criteria set by a national label awarding body for reasons explained in the preceding section, labelling programmes could run the risk of violating the above provision of GATT. However, as pointed out in the 1991 OECD Report on environmental labelling, "it is difficult to view this as discrimination on the basis of national origin, per se."[20] The argument runs thus: under the existing eco-labelling programmes a product may not get an eco-label not because of its geographic or national origin but because of it not meeting the criteria set for the product category.

Nevertheless, it is submitted that such market-based instruments may result in trade effects distinct from their environmental objectives, altering the competitive position of small and foreign manufacturers. Of course, the GATT does not prevent countries from following environmental policies such as eco-labelling, provided that such policies do not constitute

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[19] Article III(4) of GATT.

[20] The OECD Report, 1991, p.34.

hidden barriers to trade. At the same it is also doubtful whether GATT permits eco-labelling programmes by individual Contracting Parties.

The main principles of GATT are enshrined in Articles 1 (MFN treatment) and 2 (national treatment). These provisions ensure that international trade between the Contracting Parties does not suffer from any discriminatory practices of any contracting State against the product of another State party to the GATT. However, Article XX provides for certain general exceptions under which a contracting party may derogate from its obligations undertaken under the GATT:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> (a) necessary to protect public morals;
> (b) necessary to protect human, animal or plant life or health;
> ...
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption ..."[21]

In the Tuna/dolphin case the GATT Panel held that the GATT allows, under certain conditions, eco-labelling, i.e. measures by individual States permitting or requiring labels referring to environmental aspects of production and process methods, provided that such schemes do not undermine the main principles of the GATT. The Panel held that the primary aim of any environmental

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[21] See generally, GATT, Guide to GATT Law and Practice (6th Edition, Geneva, 1994), pp.517-552.

measures affecting trade should be to protect the environment rather than domestic market.[22] Accordingly, the GATT panel found that provisions of the U.S. legislation on Tuna/dolphin were not only intended to protect the species but also to protect the U.S. fishing industry. Thus, the U.S. law violated GATT Article III because it discriminated between the imported product and the like domestic product and it could not be defended under exceptions in GATT Article XX because in the Panel's view, the exceptions applied only to measures with internal or domestic objectives.[23]

A similar view was taken by the second tuna panel of the GATT which examined the measures taken by the U.S. prohibiting imports of tuna harvested through methods that killed dolphins.[24] Under the U.S. Marine Mammal Protection Act (MMPA) of 1972, no country, whether primary or intermediary, is allowed to export tuna products to the U.S. unless they certify that they do not import tuna from countries which harvest tuna through methods that kill dolphins. The EC and the Netherlands (on behalf of the Netherlands Antilles) lodged a complaint against this measure of the U.S. The issue before the panel was not the competence of the U.S. to take environmental measures to protect dolphins, but the propriety of the U.S. trade embargoes on the import of tuna products from other countries designed to secure changes in the

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[22] See text of panel report of 1991 in 30 ILM 1594 (1991).

[23] See Christopher Thomas and Greg A. Tereposky, 'The evolving relationship between trade and environmental regulation', 27(4) Journal of World Trade (August 1993), p.23 at 40.

[24] See text of panel report in 33 ILM 839 (1994).

policies which other GATT members pursued within their own territories.

The panel held that the measures included in the U.S. MMPA were inconsistent with the obligations of the U.S. undertaken under the GATT; the panel declared that the U.S. measures were not covered by exceptions in Article XX of the GATT. The panel stated that

> "Article XX provides for an exception to obligations under the General Agreement. The long-standing practice of panels has accordingly been to interpret this provision narrowly, in a manner that preserves the basic objectives and principles of the General Agreement. If Article XX were interpreted to permit contracting parties to deviate from the obligations of the General Agreement by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If however Article XX were interpreted to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired. Under such an interpretation the General Agreement could no longer serve as a multilateral framework for trade among contracting parties."[25]

This evinces that while a State's ability to conserve its own natural resources is unfettered by the GATT, its ability to take environmental measures to conserve resources outside its borders is doubtful. The Austrian Federal legislation of 1992 on the labelling of tropical timber and timber products is an illuminating example. Although timber certification scheme is different from eco-labelling scheme since timber certification deals with the origin of timber and timber products and not with

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[25] Ibid, para.5.26, p.894.

life-cycle analysis of every timber and timber product, the Austrian move is significant for this study as it raised certain interesting legal questions concerning the compatibility of national environmental measures with the GATT rules.

(ii) The Austrian experience

In the height of growing public concern within and outside Austria over the destruction of tropical forests and their global long-term impact on the change of world climate, the Austrian parliament adopted a piece of legislation in 1992[26] with the aim of stopping all imports of tropical timber and tropical timber products from areas which were not sustainably managed.[27] What is significant about this Federal law was that it provided for mandatory labelling of tropical timber and tropical timber

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[26] See Lilly Sucharipa-Behrmann, 'Austrian legislative efforts to regulate trade in tropical timber and timber products' 46 Austrian Journal of Public and International Law (1994), pp.283-292; Brian F. Chase, 'Tropical forests and trade policy: the legality of unilateral attempts to promote sustainable development under the GATT', 17(2) Hastings International and Comparative Law Review (Winter 1994), pp.349-388.

[27] Owing to the growing international concern for the preservation of tropical forests a new International Tropical Timber Agreement (ITTA) was concluded in January 1994 at Geneva. This Agreement, which replaces the earlier (1983) ITTA, is the first internationally binding instrument on tropical timber that emphasizes sustainable management of tropical forests. See the text of the Agreement in 33 ILM 1014 (1994). See also Karl G. van Orsdol and Jean-Pierre Kiekens, Environmental Labelling: A Market Based Solution for Promoting Sustainable Forestry Management in the Tropics (World Bank Environment Paper No.1: Conservation of West and Central African Rainforests, 1992); Chris Elliot, 'The Forest Stewardship Council and Timber Certification', in The Report of the Informal Workshop on Timber Certification (Ministry of Environment, The Hague, 1994), pp.42-45; The Report of the Informal Workshop on Timber Certification (the Ministry of Environment, The Hague, the Netherlands, 1994); Ronnie Taylor, 'Positive incentives, sustainable commodity production and the OECD: a constructive approach to the integration of trade, environment and developing policies', OECD, 1993.

products being placed on the market with a quality mark, written 'made of tropical timber' or 'containing tropical timber' and imposed a 70% imports tariff on all tropical timber and tropical timber products.

Permission to carry this quality mark were to be issued by the Federal Ministry for Environment upon application, provided that the applicant can prove that the tropical timber and the tropical timber products meet the criteria set by the Federal law. That is to say that the tropical timber or the tropical timber product had to be exclusively from sustainably managed forests. For the purposes of this Law, sustainable forest management meant, inter alia, economic and ecologically sustainable exploitation of the raw material timber, diversified exploitation, reforestation in accordance with the criteria of economic and ecologically sustainable exploitation and preservation of all functions of the forest.[28]

Shortly after the Law entered into force, the ASEAN countries, especially Malaysia and Indonesia, expressed their concern about the compatibility of the Austrian law with the obligations of Austria under GATT. The main arguments of the ASEAN countries advanced through their communication to the GATT-Council was that the Austrian law was discriminatory, unjustifiable and an unnecessary obstacle to trade.[29] The ASEAN countries complained that the law which did not require mandatory labelling of other types wood and wood products imported into

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[28] See Sucharipa-Behrmann, op.cit. note 26, pp.285-286.

[29] Ibid., p.287. See the communication from the ASEAN contracting parties dated 22 October 1992, GATT Council doc. L/7110 (1992).

Austria or produced domestically,[30] Austria was not honouring its obligations under GATT, especially those relating to the most favoured nation treatment and the national treatment. They also challenged the Austrian decision to levy a 70% import tariff on tropical timber and tropical timber products.

Defending its law, Austria stated that its move was not induced by any economic or protective motivation but by strictly environmental concerns. Austria argued that the labelling requirement did not constitute an obstacle to trade since product labelling per se was not trade restriction and the law did not impose any quantitative or qualitative restrictions on imports from any destination. One of the interesting arguments advanced by Austria was that the law was not discriminatory in nature since it applied to any tropical timber or tropical timber product, including its own tropical timber products (it should be noted that this country has no tropical forest), irrespective of the country of export or origin. Austria also rejected the allegations of extra-territorial action since the law applied exclusively to the Austrian territory.[31]

However, faced with such criticism from tropical timber exporting countries and the likelihood of loosing the case if it

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

[31] Sucharipa-Behrmann, op.cit. note 26, pp.288-289.

were to referred to the GATT Panel, Austria amended its law, abolishing the mandatory labelling requirement for tropical timber and tropical timber products as well as the 70% imports tariff imposed on them. Under the amended law the labelling requirement is, like any other eco-labelling programmes, voluntary and the quality mark can now be issued to all kinds of timber and timber products from sustainably managed forests. Analysts have stated that if the Austrian move had subjected all kinds of timber from unsustainably managed areas to the regime introduced and levied a much lower tariff on all timber imports, it would have been a successful pioneering move rather than an counter-productive move as the amendment to the original Federal Law strengthened the arguments advanced by the ASEAN countries; by introducing a much lower import tariff on all timber and timber products from unsustainably managed areas, Austria would have been in a position to help internalise environmental and social costs and increase export revenues in countries implementing sustainable forestry techniques.[32]

3. Unresolved Legal Issues

If Austria had not amended the law and the ASEAN countries had taken the dispute before the GATT Panel, we would have witnessed a very interesting development. The Panel would have been left with two questions to answer: (i) was the Austrian law in violation of Article I and/or Article III of the GATT? (ii) If the answer was in the affirmative, could the law be still

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[32] See Taylor op.cit. note 27, p.7 and Chase, op.cit. note 26, p.374.

defended under the general exceptions provided for in Article XX of the GATT? Since such an opportunity was aborted by the amendment in the Austrian law, these two questions have remain unresolved.

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

The answer therefore depends on whether or not all kinds of timber can be regarded as "like products" in the sense of the GATT. Austria had argued that since tropical timber and other timber were not 'like products', the original Austrian law was not discriminatory in nature since it applied to all tropical timber or tropical timber products regardless of the country of origin. If all timber and timber products are to be considered as "like products", the original Austrian law was perhaps in violation of the GATT. But if tropical timber and tropical timber products are to be considered as different products from other

kinds of timber and timber products, the original Austrian law was not in violation of the GATT.[33]

With regard to the answer to the second question, it is, of course, possible for a State to take measures derogating from its obligations under GATT, provided that such measures do not result in "arbitrary or unjustifiable discrimination" between products from other contracting parties themselves or between domestic products and products from such countries.[34] The general exceptions contained in Article XX(b) and (g) permit exceptions from GATT obligations for measures which are "necessary to protect human, animal or plant life or health" or which relate "to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

Therefore, it is doubtful whether the unilateral measures regarding the protection of tropical forests by a non-tropical country Austria were "necessary" in the sense of Article XX.[35] Since the original Austrian legislation did not require mandatory labelling for other kinds of timber and timber products imported

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[33] According to Chase, since temperate softwood and tropical hardwood logs directly compete in the plywood, construction, and furniture industries, tropical and non-tropical timber are considered to be 'like' products in a number of different industries worldwide. Chase, op.cit. note 26, p.383.

[34] See generally, Steve Charnovitz, 'Exploring the environmental exceptions in GATT Article XX', 25(5) Journal of World Trade (October 1991), pp.37-55.

[35] Chase maintains that "At least tentatively, mandatory labelling laws as applied to tropical timber appear to be prohibited under GATT because they unjustifiably discriminate between 'like' timber products under the 'soft' MFN and NTO [national treatment obligation] requirements contained in the preamble of Article XX." Chase, op.cit. note 26, p.386.

from other contracting parties or produced domestically, it could be argued that the Austrian law was not in accordance with Article XX either.

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

4. The Dutch initiative to protect tropical rainforests

The Government of the Netherlands, through a policy paper on tropical rainforests of 1992, adopted a policy that from 1995 onwards the use of tropical timber should be limited to timber from countries or regions with a forest management system geared to protection and sustainable production.[36] It could be said to be in keeping with the objective of the 1990 Bali meeting of the International Tropical Timber Council (ITTC) that by the year 2000 all tropical timber is to be derived from sustainable logging practices.[37] The intention of the policy paper seems to be to use trade in tropical timber as an instrument to promote sustainable forest management since the Netherlands is the second largest importer of tropical hardwood, after Japan. With a view to achieving this objective the Dutch Government concluded a Netherlands' Framework Agreement on Tropical Timber in June 1993

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[36] See The Dutch Government's Policy Paper on Tropical Rainforests (Department of Nature, Forests, Landscape and Wildlife of the Ministry of Agriculture, Nature Management and Fisheries, December 1992, The Hague).

[37] However, it should be noted that no international instrument defines what constitutes sustainable logging of tropical timber.

with various umbrella organisations of commercial entities, individual companies and other organisations involved in trade in tropical timber as well as in the protection of tropical rainforests.[38]

The Agreement stated that "a properly functioning market-oriented system to distinguish sustainably from non-sustainably produced timber can be an effective incentive to promote sustainable forest management, since the costs of sustainable production can be passed on to the consumer."[39] Under Article 2 of the Agreement, the Dutch Government and other contracting parties undertook "to ensure that from 31 December 1995, the trading and processing of tropical timber in the Netherlands shall be limited to timber supplied from countries or regions with a forest policy and management system geared to protection and sustainable production." (The deadline has since been extended to 31 December 1996).

The Agreement includes a plan of action to prepare the conditions necessary to achieve the objective of the Agreement that all tropical timber supplied on the Netherlands market from 1995 onwards is sustainably produced. Accordingly, from 1996 onwards, tropical timber can be imported into the Netherlands only after ascertaining that the timber came from a sustainably managed forest, the origin of the tropical timber has been established and a certificate has been awarded.

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[38] A copy of this Framework Agreement was kindly supplied to the author by the Ministry of Environment of the Netherlands.

[39] Paragraph 8 of the Preamble to the Agreement.

The Dutch initiative differs from the Austrian move in a number of ways: first, unlike the latter, the former does not seek to ban the import of tropical timber products even if they are from non-sustainably managed forests. Second, it will not be the Government of the Netherlands that unilaterally imposes a ban on tropical timber; under the Framework Agreement the Dutch Government has undertaken to explore the possibility of concluding bilateral agreements with tropical timber producing countries for bilateral cooperation in the field of sustainable forest management, trade in, and processing of sustainably produced timber. Third, the Dutch Government aims to achieve the objectives stipulated in the Agreement through co-operation with NGOs and companies involved in tropical timber trade rather than impose its will on the importers of such timber. The signatories of the Framework Agreement will only purchase their timber from those exporters and importers who have met the requirements of the certification scheme.

Fourth, the ban envisaged on tropical timber from countries and regions from unsustainably managed forests will come into effect in 1996. The legislation required for the achievement of the objectives of the Agreement have not yet been adopted. The legal problems concerning the compatibility of the envisaged measures with the GATT rules and other rules of international law may arise only when the State of the Netherlands adopts necessary legislation designed to achieve the objectives of the 1993 Framework Agreement and a ban is in place on tropical timber from unsustainably managed forests.

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

IV SUGGESTED MEASURES FOR STRENGTHENING ECO-LABELLING

The discussions in the preceding paragraphs demonstrate that the legal ramifications of eco-labelling programmes are far from clear. The impact of such economic measures on the world trading system represented in the GATT merit a closer examination. Unfortunately, not much has been done in this direction at the inter-governmental level, albeit there exists quite a substantial amount of literature on the subject.[40] A GATT working group on trade and environment was established as early as in 1972. However, its first meeting took place only in 1991, and it continued to work until 1993. Nevertheless, the objectives set

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[40] See generally, Ralf Buckley, 'International trade, investment and environmental regulation', 27(4) Journal of World Trade (August, 1993), pp.101-148; Christopher Thomas and Greg A. Tereposky, 'The evolving relationship between trade and environmental regulation', in Ibid., pp.23-45; Steve Charnovitz, 'Exploring the environmental exceptions in GATT Article XX', in Ibid., Vol 25(5), October 1991, pp.37-55; Eliza Patterson, 'GATT and the environment: rules changes to minimize adverse trade and environmental effects', Ibid., vol.26(3), June 1992, pp.99-109; Jan Klabbers, 'Jurisprudence in international trade law: Article XX of GATT', in ibid., vol. 26(2), April 1992, pp.63-94; Ernst-Ulrich Petersmann, 'International trade law and international environmental law: prevention and settlement of international environmental disputes in GATT', in Ibid., vol.27(1), February 1993, pp.43-81.

by the group were somewhat lopsided since it was concerned only with the effect of environmental policy on trade, not vice versa.

When the Contracting Parties of the GATT gathered in Marrakesh, Morocco, to conclude the new trade agreement in April 1994, they established a Sub-Committee on Trade and Environment to look into the trade aspects of environmental measures. One of the topics that the Sub-Committee was scheduled to discuss in its meeting beginning in 12 September 1994 was labelling.[41] One can hope that this Sub-committee, which will become a Committee after the entry into force of the instruments signed at Marrakesh, will address the lacunae that presently exist on the matter. Perhaps, the time has come for a Green Round of GATT after the conclusion of the Uruguay Round.

As pointed out in the 1992 study by the GATT Secretariat on Trade and Environment, GATT places hardly any limits on the freedom of countries to apply non-discriminatory regulations to protect their environment.[42] With regard to the measures that are discriminatory but at the same time necessary for the protection of the environment, it may be a good idea to amend Article XX by inserting a provision allowing a country to impose measures relating to the protection of the environment, both its own and that of the world at large or to negotiate a new international Code or Agreement containing such provisions. The agreements concluded at the end of the Uruguay Round have in effect tried to ensure that voluntary standards such as voluntary labelling

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[41] GATT, 'Trade and the Environment: News and Views from the General Agreement on Tariffs and Trade', TE 007 of 26 July 1994.

[42] International Trade in 1990-91, GATT 1992, Vol. I, pp.19ff.

programmes aimed at the environment do not create unnecessary obstacles to trade.[43] Although, as mentioned earlier, Article 2.2 of the TBT Agreement includes the environment as a legitimate objective for the achievement of which States can adopt certain technical regulations and standards, such measures should not be more trade-restrictive than necessary to fulfil the objective and the overall and perhaps the overriding objective of the instruments adopted at the conclusion of the Uruguay Round of trade negotiations seems to be to limit trade restrictions to an absolute minimum.[44]

With the proliferation of national eco-labelling programmes, a number of other transnational trade-related problems are likely to arise. Environmentally friendly products are likely to gain an increasing share of not only domestic but also international market. For instance, German exports carrying the 'blue angel' are already quite popular among 'green consumers' in many EC countries. In this state of affairs, as stated by Sand, "(t)o avoid unfair trade practices, arrangements for mutual recognition

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[43] For example, see the new Code of Good Practice for the Preparation, Adoption and Application of Standards appended to the Agreement on Technical Barriers to Trade in GATT Secretariat, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (June 1994), p.138, at pp.159-162.

[44] This was also the position taken at the Rio World Conference on Environment and Development. For instance, Principle 12 of the 1992 Rio Declaration on Environment and Development declares that "Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing trans-boundary or global environmental problems should, as far as possible, be based on an international consensus." 31 ILM 874 (1992), at 878.

of national environmental labels, possibly including harmonized standards and procedures of product selection and identification, will become necessary."[45]

Indeed, as discussed earlier, the Nordic Council's harmonised eco-labelling programme encompasses five countries and the EC's harmonised programme presently includes 12 countries with a prospect of 16 in the near future. Both economic efficiency and consumer confusion may warrant harmonisation. Consumer confusion may arise not only from several official and semi-official eco-labels but also from 'ozone-friendly' like non-substantive claims of manufacturers. Government sponsored eco-labelling programmes may help curb false advertising claims by manufacturers to exploit 'green consumers'. Deceptive and unsubstantiated claims such as labels carrying 'environmentally-friendly' or 'ozone-friendly' words have appeared in many products available in the market. Such claims confuse consumers and dilute the significance of genuine attempts to encourage consumers to buy more environmentally friendly products.

Another possibility of achieving harmonisation would be through the establishment of an international body empowered to approve product groups and criteria. Like the EC and the Nordic system, the actual certification and awarding of labels could take place at the national level. It could be a body like the newly created World Trade Organisation (WTO). Alternatively, it should also be possible to entrust the WTO itself with such powers through a protocol and establish a division within this

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[45] Peter H. Sand, Lessons Learned in Global Environmental Governance (World Resource Institute, Washington, D.C., 1990), p.28.

organisation. In fact, the International Organisation for Standardization seems to be working towards creating international, voluntary standards for environmental labelling terms and definitions, labelling symbols, testing and verifications methodologies, and advertising. An international agreement could be concluded defining the criteria to be used in the life-cycle analysis of a few selected products in every State party to such an agreement.

However, as pointed out in the OECD report, one must not overlook the possibility that "Given different composition of product markets and the varying environmental concerns in countries, the final product criteria established in supra-national system may be either too high or too low from a member country's perspective."[46] Indeed, it is a matter which will have to be judged in light of the practice of the EC countries in the years to come.

Yet another approach suggested in this connection is the mutual recognition of labels, based on reciprocity. A State could automatically award its national label to products which had been awarded a label by another country and vice versa. This will not only reduce confusion among consumers but would also help minimise the costs involved, especially for small and foreign manufacturers. It should be emphasized that in order for such a rule based on reciprocity to be effective it is desirable that the criteria between the two countries must be very similar. However, the danger envisaged above with regard to possible lowering of standards under an international agreement would also

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[46] OECD Report, 1991, p.37.

apply here. One way of safeguarding against such risk is to require that every country should award labels to such products whose quality is higher than normal environmental attributes among similar products.

V. CONCLUSIONS

Labelling programmes appear to hold promise as effective market-based tools for environmental protection. Except for food products and pharmaceutical, for which there is separate mechanism of labelling, almost every product can be brought within the voluntary eco-labelling programme through economic incentives. For instance, varnishes, coatings, gas burners, recycled paper-products, washing machines, dishwashers, batteries, engine oil, plastic products and household detergents are among the products that have already been subjects for eco-labelling in different countries.

However, it should be admitted that the role of such programmes can after all be a modest one because first, they are part of a broader environmental policy and second, a labelled product will still harm the environment in one manner or another. All labelling schemes acknowledge that a labelled product is only relatively more benign than others in the same category. The modern man, who has come a long way from natural life, needs industrial products and every such product is likely to do some harm to the environment. So, what these labelling programmes aim to do is to capitalise on the growing concern of this modern man over the environment around him and make him pay more to buy environmentally-friendly products. In short, the eco-labelling

programmes, like most environmental measures, can be described as a damage limitation exercise, which, of course, can function as a very useful economic instrument for the protection and improvement of the environment.

However, one should not lose sight of the reports that claim that eco-labelled products are in many cases not environmentally friendly as claimed by the manufacturers. Indeed, during the rapid expansion of green marketing in the recent past many manufacturers have tried to exploit the situation by making non-substantive, unsupported, vague or misleading green claims. Many misleading green claims are technically true but not necessarily environment-friendly or not to the degree claimed by the producers. If internationally accepted norms and standards are developed to address such problems eco-labels will work. If the matters are left unregulated in the hands of market forces eco-labels may not work up to our expectations.

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