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# Environmental Labelling Schemes: WTO Law and Developing Country Implications

*Arthur E. Appleton*

## 1. Introduction

Product labelling schemes are rapidly becoming more common. Traditionally labels have been employed to alert consumers to health and safety considerations. Increasingly labels are also being employed to provide information reflecting social policy concerns, for example environmental or labour characteristics associated with a particular product. This chapter explores the developing country implications of environmental labelling schemes. Labour-related labelling issues are also touched upon when relevant.

Environmental labelling schemes alert consumers to particular environmental issues and serve to popularize environmental issues among producers, consumers, and government officials. Examples include eco-labelling schemes (labels reflecting environmental characteristics associated with various stages in a product's life cycle) and single-issue labels (labels that relate to one aspect in a product's life cycle), e.g. that a can of tuna is "dolphin safe" or a product recyclable.

The proliferation of environmental labelling schemes has raised economic concerns among developing countries. There is fear that meeting the norms furthered by foreign labelling schemes will be technically difficult. There is

also concern that it will be financially costly—particularly if labelling standards differ among importers. Finally, there is a preoccupation that the labelling of certain products will result in consumer discrimination against unlabelled products, and that many of these products will be from countries in the developing world that have not met certain environmental or labour standards strongly supported by the developed world. This is expected to have adverse economic implications for developing countries. Indeed, the purpose of many labelling schemes is to make it easier for consumers to discriminate against products that do not meet selected environmental or labour norms. Because such norms, or higher norms, are often more likely to be found in the developed world, manufacturers of products in the developing world, as well as their government officials, are inclined to view such measures as potentially protectionist. Opinions are therefore split, frequently along North–South lines, concerning the acceptability of labelling schemes for social policy purposes.

For some time there has been a growing likelihood of a trade dispute wherein the legality under the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement")[1] of an eco-labelling scheme will be tested. The battle lines in the WTO are generally drawn along economic lines. A preliminary legal analysis of the problem has been undertaken by the WTO's Committee on Trade and Environment. Now it is only a matter of time before a WTO member launches an attack on an eco-labelling programme that it views as discriminatory. Such a dispute would pose risks to the WTO as an institution, pitting developing country growth, consumer rights, environmental and social norms, free speech considerations, and trade rules against one another. Regardless of the outcome, respect for the WTO will diminish, either among developing countries or in the environmental and labour communities of the developed world. The alternative is that the members negotiate a solution to labelling questions before the Appellate Body is asked to find one.

In this chapter, relevant terms are defined, policy issues examined, applicable WTO rules discussed, and suggestions offered on how labelling questions might be addressed in future multilateral trade negotiations. In order to prevent the discussion from becoming too technical, legal issues are simplified. Nevertheless, certain important trade law concepts are addressed.

## 2. Terminology

### Labelling terminology

There is no agreed terminology applicable to environmental labelling schemes. Recent experience with environmental labelling schemes and studies of such schemes by various organizations have however begun to yield some accord on the use of terms.[2] Environmental labelling schemes, whether voluntary or mandatory, are often divided into three groups: single-issue labels, negative labels, and eco-labels. These terms are explained below.

1. *Single-issue labels:* alert consumers about a particular issue, for example whether a product is recyclable, biodegradable, or "dolphin safe." They can also inform consumers about a particular performance-related characteristic; for example, automobile gas mileage, emissions, or electricity consumption.
2. *Negative labels:* alert consumers about dangerous or other negative characteristics; for example, "cigarettes are dangerous to your health," "drinking during pregnancy can cause foetal damage," "poison," or "do not inhale fumes."
3. *Eco-labels:* are granted by a public or private body to particular products based on a life-cycle analysis.[3] Eco-labels are awarded to what a granting authority deems to be environmentally superior products in a particular category (usually not more than 10–15 per cent of the products in a category). In theory, eco-labels rely on market forces (consumers) to promote products determined to be environmentally friendlier. Participation in eco-labelling schemes is assumed to be voluntary. The first eco-labelling scheme, the "Blue Angel," was created in Germany in 1977. Eco-labelling programmes, in various forms, are now prevalent throughout the developed world and increasingly in the developing world.[4] They remain controversial, in part because domestic schemes have the potential to influence foreign production practices.

The above terminology, although frequently repeated in the literature, is not entirely satisfactory. First, there is potential for overlap between single-issue and negative labels. Should a label reading "Made from genetically modified organisms" or "Cattle fed natural hormones" be

classified as a single-issue or a negative label? The answer to this question may depend on scientific analyses that are not yet conclusive. Secondly, there is a growing realization that the term "environment" is now being applied very broadly. Growth in scientific understanding has led to an expansion of what is considered to be environmental in nature. The result is an increase in what is perceived scientifically to relate to the environment and what might be reflected on a label. Thirdly, there is no guarantee that the life-cycle analysis used in a given eco-labelling scheme will take into consideration only social factors that are strictly environmental in nature; for example, certain labour issues (perhaps with distant environmental implications) might be assessed. It is easy to imagine a labelling authority examining production-related working conditions (e.g. employee exposure to hazardous chemicals or child labour issues) when deciding whether to award an eco-label. One reason certain developing countries oppose eco-labelling schemes is fear that the continued growth in the popularity of eco-labelling schemes will open the door wider for other forms of labelling, in particular labels that reflect labour-related issues. This fear is reinforced by the realization that certain child labour practices are already the subject of labelling campaigns. This point will be returned to when policy issues are discussed.

## PPM terminology

Among the most controversial trade issues is whether a WTO member should be permitted to apply its trade policy to influence the selection of manufacturing processes in other countries—so-called foreign "processes and production methods" (PPMs). Certain environmental labelling schemes provide a means of discriminating between products based on how they are made by informing consumers when production methods do not meet particular environmental, labour, or other criteria. Changes in demand for a product may influence the selection of production methods.

From the trade law perspective, this issue is intertwined with the "like product" distinction made, among other places, in Articles I:1 and III:4 of the 1947 General Agreement on Tariffs and Trade (GATT 1947).[5] The concept of "like products" is critical for an understanding of the PPM question because the GATT Agreement restricts the right to

discriminate between and among foreign and domestic like products, and past GATT/WTO practice has generally relied upon an examination of a product itself (as opposed to how it is made) in determining whether two products are alike ("like products").[6] The result has been that "processes and production methods" that cannot be detected in the final product are generally not examined in the like product determination.

If a PPM causes a change detectable in the product itself, trade experts classify the PPM as "product related" or "incorporated." If a PPM cannot be found in the product itself, it is said to be "non product related" (NPR-PPM) or "unincorporated." PPM questions must be seen against the fact that, with a few notable exceptions (e.g. intellectual property matters and products made by prison labour), goods have not generally been distinguished for purposes of the WTO Agreement based on PPMs unless the PPMs are detectable in the final product ("product related"). In other words, a widget is a widget regardless of how it is made, unless the manufacture of the widget changes some important characteristic detectable in the widget itself. More specifically, for WTO purposes trade lawyers would distinguish automobiles based on fuel efficiency or exhaust emissions, but not based on the sulphur dioxide emissions used to make the steel in a given vehicle.

Whereas from an environmental or labour perspective the disregard for non-product-related PPMs in the like product determination may be subject to criticism, from the trade perspective it is justified on the grounds that differentiating between goods based on NPR-PPMs would increase trade barriers and result in increased trade discrimination. Treating a car differently based on how it is made, as opposed to how efficiently it operates, would provide a new basis for trade discrimination. Developing countries have been particularly adamant in opposing trade restrictions based on NPR-PPMs out of fear that they would lose economically. In part this is because the technical capacity and capital to meet the stringent production standards that exist in certain developed countries may be lacking. This opposition is also based on the realization that, if standards for NPR-PPMs differed greatly among countries, economies of scale would diminish. If Countries A and B establish different production-related environmental standards for widgets, a widget producer in Country C might have to build two separate factories in order to export to both Country A and Country B.

WTO members have little problem with the idea that a particular state can regulate production processes within its own jurisdiction, or that a member can establish performance-related environmental standards applicable to products within its own jurisdiction. Controversies arise when a member seeks to apply its laws to influence production processes and methods outside its jurisdiction. These problems tend to be more serious when the member seeking to apply its standards abroad is a major market for the product in question.

Eco-labelling schemes (schemes based on a life-cycle analysis) have aroused particular concern among developing countries because they provide a means of permitting consumers to discriminate against goods based on NPR-PPMs. This issue will be returned to in the discussion of policy issues that follows.

## 3. Policy issues

Several important policy issues have already been noted. It should be evident by now that, in theory, eco-labelling schemes rely on market forces (changes in consumption patterns) to influence production practices. Products are labelled to affect consumer purchasing habits, i.e. demand. By affecting demand, changes may occur relative to supply—producers and suppliers may choose to become more environmentally "responsible" when consumers become environmentally more discerning. Thus viewed, one goal of eco-labelling schemes is demand-side discrimination against certain products in order to alter the supply side of the economic equation.

Most evidence on the effectiveness of eco-labelling schemes is anecdotal in nature. Nevertheless, developing countries fear the potential discriminatory implications of labelling schemes. Providing consumers with the ability to discriminate against products perceived to be less environmentally sound is a source of worry for developing countries for the technical and financial reasons alluded to above. Producers in developing countries may also lack the resources and political expertise to influence the development of foreign labelling criteria, and may find it difficult from a linguistic and cultural perspective to inform themselves about the requirements of foreign labelling schemes and to par-

ticipate in these schemes.[7] In other words, information asymmetries may influence participation in particular schemes. Local manufacturers are more likely to be aware of the criteria being applied in a particular scheme, and are often better positioned politically to influence the selection of applicable criteria.

Developing countries are also concerned because of the perceived tendency of developed countries to formulate eco-labelling criteria based on conditions in the developed world, or only in the labelling state.[8] Flexibility is necessary to assure that labelling criteria also reflect the conditions prevailing in developing countries. This flexibility may be lacking in certain developed country programmes, particularly when protectionist interests influence the drafting of labelling criteria.

Complicating the problem are questions of comparative advantage. Wage considerations, regulatory requirements, and the enforcement of regulations are often viewed as sources of comparative advantage. Labelling schemes that alert consumers to serious discrepancies in the above may disadvantage certain developing countries.

Another potential problem is that eco-labelling schemes are likely to be of greater interest to the residents of developed countries—from the perspective of both demand and supply. From the demand perspective, increased discretionary income brings the luxury of selecting products based on factors other than price, including social and moral considerations. Assuming that many labelled products are more expensive to produce, and that they may command a premium price, it is probable that labelled products will be more expensive than competing unlabelled products, and as a result less likely to attract consumer interest in developing countries that have labelling schemes. On the supply side, to the extent that products labelled by a developed country are of interest to a developing country (often not the case because primary goods and agricultural products are frequently not labelled), for reasons mentioned above it may be difficult for developing countries to participate in foreign labelling schemes.

From the developing country perspective, eco-labelling schemes are particularly problematic. This is because, by definition, eco-labelling programmes evaluate environmental aspects of production processes—an area of potential weakness in some developing countries. Although the overall goal of such labelling schemes (using market forces to im-

prove the environment) is laudable, certain risks exist for producers arising from what can be very subjective factors. For example:

- What should receive a greater weighting in a life-cycle analysis—factors associated with a product's production, use, or disposal?
- Should one evaluate transport-related criteria, given that this would seem to discriminate against many imports?
- How do you evaluate products produced using dirty or dangerous sources of energy?
- How do you evaluate foreign production processes that may be more suitable given a particular country's geographical, climatic, and other circumstances?
- More specifically, how do you evaluate products coming from countries at different levels of development and with different levels of technology?

Concern about the implications of single-issue labelling schemes is also present in certain special interest communities in the developed world, particularly those in industrial sectors, such as agribusiness, which fear labelling schemes will be used to discriminate against products in which they have invested heavily. For example, the labelling of foodstuffs produced with the aid of hormones or genetic engineering has those in the agribusiness, chemical, and biotechnology sectors worried. More generally, products with health risks, in particular tobacco and alcohol, have long been affected by various single-issue labelling schemes.

The policy considerations presented above are serious, but at this point there is little evidence to suggest that eco-labelling schemes have significantly altered consumer buying habits or manufacturing practices. Instead, fears concerning labelling schemes currently appear exaggerated. From the developing country perspective, the strong opposition in many quarters to labelling schemes may be a strategic decision. By keeping the attention of the trade community focused on eco-labelling, other more important issues, such as the internalization of environmental externalities and labour-related labelling, have been kept off the agenda.

Government officials and businessmen in the developing world and certain constituencies in the developed world may be preoccupied with the trade effects of environmental labelling schemes, but this is not to

suggest that labelling schemes have received universal opposition, or that there are not important arguments in support of these schemes. Many in the environmental, labour, and consumer advocacy communities strongly support labelling schemes. The potential environmental advantages seem clear. To the extent that labelling informs consumers, influences consumption habits, and changes production processes in favour of environmentally superior products, labelling can play a beneficial role. The success of such schemes will, however, depend on many variables, including consumer acceptance, the willingness of manufacturers to change production processes, the availability of reasonably priced products of sufficient quality, adequate publicity, and effective developing country participation.

The potential benefits of eco-labelling programmes have led environmentalists to question uncertainties that arise pursuant to the WTO Agreement concerning the legal treatment of these schemes, in particular with respect to the treatment of NPR-PPMs. Environmentalists, as well as labour activists, would like states to have the freedom to use trade as a means of influencing foreign environmental and labour practices. They do not see why a consumer should be forced to buy a product manufactured in a manner that he or she would find objectionable if the PPMs were revealed through labelling.

Environmentalists have a second concern that is also rooted in a criticism of the WTO Agreement. They recognize that many environmental problems are trans-boundary or global in nature. This is because resources such as air and water are migratory, and production processes in one state may affect resources in another state. For example, forest resources, animal resources, and coastal and marine resources can be affected by environmental decisions taken in other countries. Environmentalists tend not to accept what they view as a jurisdictional limitation present in interpretations of the GATT/WTO Agreement (even if from the WTO perspective the limitation is framed otherwise) restricting a state's use of trade measures to protect the environment.

Consumer sentiment also favours environmental labelling programmes. From the consumer perspective, labelling furthers consumer awareness, empowers consumers to make better-informed choices, satisfies certain moral, political, and social convictions, and provides economic and social pressure, which may compel manufacturers to change produc-

tion processes. Furthermore, some consumers view labelling as a form of advertising supported by freedom of speech considerations.

To what extent should those in one state be able to influence production methods in another state? From the perspectives of state sovereignty and trade policy, one might be inclined to take a restrictive view. Trade policy remains an essentially state-centric system. From an environmental or consumer perspective, however, the scope for action is arguably broader. Environmental issues, like human rights issues, challenge fundamental notions of state sovereignty and jurisdiction, owing in part to their cross-border implications. The intersection between trade and environmental issues is, from a strictly legal perspective, an instance of two cultures colliding. Environmental labelling, or more correctly the questions of international trade and environmental law that lie beneath labelling questions, is not necessarily clear or logical when viewed from the perspective of the other system or culture. The WTO perspective, including the uncertainties that have arisen in the application of international trade law to labelling, is examined below.

## 4. Legal issues—The WTO Agreement

No eco-labelling scheme has ever been challenged before the GATT or the WTO, although a single-issue labelling scheme was challenged in the first *Tuna-Dolphin* dispute,[9] and labelling did arise as an issue in the *Malt Beverages* panel.[10] In light of the limited GATT/WTO practice concerning labelling, the comments that follow are somewhat speculative in nature but should offer insight into various potential challenges and possible results. They are meant to provide an overview of the applicable law and the points left to be resolved, either through dispute settlement proceedings or, preferably, through future negotiations.

One starting point in an analysis of the legality of eco-labelling schemes is the Report of the WTO Committee on Trade and Environment (CTE) produced for the 1996 Singapore Ministerial Meeting. Paragraph 183 of this report (containing Conclusions and Recommendations applicable to labelling programmes) reads in part: "Well-designed eco-labelling schemes/programmes can be effective instruments of environmental policy to encourage the development of an environmentally-

conscious consumer public."[11] This statement is both non-binding and carefully drafted. Not only does it say nothing about the WTO-legality of eco-labelling schemes, but paragraph 185 of the same report reveals the discord in the CTE with respect to the treatment of the NPR-PPM component of eco-labelling schemes.

Three other points of departure offer better starting points for an analysis of the legality of eco-labelling schemes: the Preamble to the WTO Agreement,[12] the relevant provisions of GATT 1947, which is now a part of GATT 1994,[13] and the Agreement on Technical Barriers to Trade (TBT Agreement).[14] The Preamble will be discussed first. Then the legality of labelling schemes will be addressed first from the perspective of GATT (where many of the principles found in the TBT Agreement originate), and then from the perspective of the TBT Agreement. This mirrors the approach of recent WTO dispute settlement reports, which have avoided examining TBT issues despite the fact that the TBT Agreement enjoys a higher legal precedence than GATT 1994 in the event of a conflict between the two.

## Preamble

The Preamble of the WTO Agreement acknowledges the need to allow "for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment."[15] In an earlier work, I concluded that the inclusion of environmental language in the Preamble was probably not intended to alter the fundamental balance of rights and obligations that existed pursuant to GATT 1947, in particular with respect to developing country members.[16] This conclusion must now be re-examined in light of the Appellate Body's decision in the *Shrimp-Turtle* dispute.[17] In *Shrimp-Turtle,* the Appellate Body found that the Preamble's environmental language "reflects the intentions of negotiators of the WTO Agreement" and "must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994."[18] It then took account of the Preamble's language as part of the context of GATT Article XX's chapeau.[19]

It is difficult to second guess to what extent the Appellate Body will be influenced by the Preamble's language when confronted with a

challenge to an environmental labelling scheme. Suffice it to say that the Appellate Body is now on record as having recognized the importance of the Preamble when interpreting the rights and obligations of members under the WTO Agreement (which includes the TBT Agreement) and under GATT 1994 (which includes GATT 1947). This would suggest that, in borderline situations, environmental labelling schemes may receive the benefit of the doubt.

## GATT Article I ("General Most-Favoured-Nation Treatment")

GATT Article I, which provides for most-favoured-nation (MFN) treatment, ensures that a trade privilege extended to one member is extended to all members. Article I:1 prohibits a member from using financial and regulatory measures as a means of discriminating against "like products" from one member in favour of like products from another member. With respect to mandatory labelling requirements, the effect of Article I:1 is to assure that labelling requirements applicable to the imports of one member are applicable to like products imported from all members. Likewise, a voluntary labelling programme open to one member must generally be open to like products from all members on similar terms.[20]

A voluntary environmental labelling scheme reflecting an NPR-PPM (whether or not tuna was "dolphin safe") withstood a challenge based on Article I:1 in the 1991 *Tuna-Dolphin* report.[21] The panel found that the voluntary US scheme at issue, which was promulgated by federal law, did not prevent tuna products from being sold freely with or without the "dolphin-safe" label; nor did the scheme establish requirements that had to be met to obtain an advantage from the US government. Any advantage that occurred was due to consumer choice.[22]

The 1991 *Tuna-Dolphin* report was never adopted by the GATT contracting parties. Unadopted GATT panel reports have been found by the Appellate Body to have "no legal status in the GATT or WTO system," but the Appellate Body has found that a panel "could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant."[23]

## GATT Article III ("National Treatment on Internal Taxation and Regulation")

GATT Article III contains the "national treatment" obligation. This provision is intended to ensure that imported like products are treated no less favourably than like domestic products with respect to the application of internal taxes, charges, "laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products." The goal is to prevent internal measures from being applied so as to afford protection to domestic production.[24] The Appellate Body noted in the *Alcoholic Beverages* report that:

> The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production.'" Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. "[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given." . . . Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. Members of the WTO are free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the WTO Agreement.[25]

Article III:4 has particular relevance for mandatory labelling schemes. This provision assures that laws, regulations, and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use are not applied so as to accord less favourable treatment to imported over domestic like products. The concepts of "like products" and "treatment no less favourable" are essential elements of Article III:4, and are also found in the TBT Agreement.

*Like products*

In determining whether two products are like products, the test set forth by the Working Party on Border Tax Adjustments[26] regained favour in the *Alcoholic Beverages* report. This test consists of determining likeness based on a case-by-case examination of factors such as a "product's end-uses in a given market; consumers' tastes and habits, which change from country-to-country; [and] the product's properties, nature and quality."[27] The like products test applied in the *Alcoholic Beverages* report leaves panels with less discretion to use the likeness determination as a means of protecting a member's domestic policy autonomy. Although the Appellate Body found in the *Alcoholic Beverages* report that the likeness standard "stretches and squeezes" like an "accordion" in different places in the WTO Agreement,[28] there is little reason to believe that this test, which was applied in conjunction with Article III:2 (taxes), would not be applied in an Article III:4 case (regulations), particularly in light of what appears to have been a conscious decision on the part of the Appellate Body to distance itself from the "aim and effect" approach taken by the *Malt Beverages*[29] and *Automobiles*[30] panels.

Article III:4 is applicable to product-related labelling requirements. Many in the environmental community would also like to see NPR-PPMs included in an Article III:4 assessment of "likeness." Past and recent GATT/WTO practice suggests that this is not a realistic expectation. This conclusion is supported by the findings of the unadopted 1991 and 1994 *Tuna-Dolphin* panels,[31] whose reasoning is at best a source of "useful guidance." Nevertheless, the reasoning of these panels appears to have won some acceptance from the United States, as evidenced by its decision not to argue at the panel stage that Article III:4 was applicable in the *Shrimp-Turtle* dispute.[32]

Excluding NPR-PPMs from the Article III:4 determination of likeness prevents members from arguing that a mandatory or voluntary labelling scheme reflecting NPR-PPMs that is applied equally to domestic and foreign products ("like products") would be in conformity with the national treatment obligation (and would not instead be subject to the requirements of GATT Article XI). From the perspective of international trade, this is a prudent outcome. If all products could be differentiated for likeness purposes based on NPR-PPMs, the WTO would become an international arbitrator of a broad range of "trade-

related" social and political differences, be they environmental, labour, religious, or political in nature. This could rapidly undermine the effectiveness of the international trading system.

*Treatment no less favourable*

Assume we are dealing with a product-related labelling requirement applicable to two like products, one domestic and one imported; for example, the mandatory labelling of domestic and imported automobiles based on fuel consumed or emissions produced. Pursuant to Article III:4, there is an obligation to assure that the imported product is accorded "treatment no less favourable" than the like domestic product. This requires an examination of the conditions of competition—whether imported products are afforded "effective equality of opportunity" (treatment at least equal to that accorded like domestic products).[33]

Do labelling requirements affect the conditions of competition and have implications for the maintenance of effective equality of opportunity? This problem can be viewed from two perspectives: in terms of the general labelling requirements, and in terms of the specific information yielded by these requirements. Strictly speaking, mandatory product-related labelling requirements designed to reveal information, if applied in a fair, open, non-discriminatory, and transparent manner, do not *directly* affect the conditions of competition, nor do they have *direct* implications for the maintenance of effective equality of opportunity. This is because they do not prevent the sale of the good in question provided that it is labelled. They also do not have a *direct* effect on price, as would a tax. Furthermore, they do not impose less favourable regulatory treatment on imported products. All products, whether domestic or imported, would be subject to the same regulatory regime—they would each be required to bear a label revealing the same product-related characteristics.

Questions arise only when the analysis is taken one step further and the contents of the label are examined. Mandatory product-related labelling requirements are likely to reveal information that could result in consumer discrimination against a particular product (domestic or imported) based on performance-related characteristics. Viewed in this light, labelling schemes can have an *indirect* effect on price and competi-

tiveness, and might *indirectly* affect the conditions of competition. Developing countries might find it particularly difficult to compete in such an environment if they lack the necessary financial and technical resources to manufacture products that meet the environmental expectations of consumers in the developed world.

Such a labelling requirement would not prevent products from being sold freely, nor would it establish requirements needed to procure a government-accorded advantage. It would only further the ability of consumers to make an informed decision based on product-related characteristics, and to discriminate against products based on this information. Successfully challenging such a scheme could be difficult. One approach might be to prove that a particular labelling requirement was purposefully designed by a government to reveal environmental deficiencies in foreign like products, with the expectation that consumers would accord these products less favourable treatment. This might require a showing of intentional abuse, in the form of a government attempt to protect or actively promote domestic production based on environmental superiority.

This is not necessarily a surprising result. WTO members have historically recognized the need to retain a certain degree of domestic policy autonomy. For example, there is acceptance among members that states must be able to apply domestic regulations to preserve natural resources and to protect the health and safety of their citizens.[34] In the *Malt Beverages* and *Automobiles* reports, this autonomy was assured by ruling that certain goods, distinguished on the basis of product-related characteristics for reasons other than protectionism, were not like products (therefore Article III did not apply). As a result of the Appellate Body decision in the *Alcoholic Beverages* dispute, this line of argument now appears to be closed,[35] but the need to retain a degree of domestic policy autonomy still exists, and it is possible that such autonomy may be preserved in the interpretation and application of the "treatment no less favourable" test.[36]

The GATT Article III legality of voluntary product-related labelling schemes, including the product-related portion of eco-labelling schemes, has been treated to some extent above, but requires a few additional

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comments. It has been argued that, like mandatory labelling requirements, voluntary labelling can discriminate against members with fewer technical and financial capabilities and thus affect the conditions of competition.[37] Although certain developing countries will find this argument attractive, it would probably be difficult to sustain before a panel or the Appellate Body.

First, it would need to be proven that voluntary labelling schemes constitute regulations or requirements for the purposes of Article III:4. This has not been established. Secondly, for the reasons noted above, it seems unlikely that a panel or the Appellate Body would find that likeness can be dependent on an NPR-PPM. This would suggest that NPR-PPMs in eco-labelling schemes would not be considered for Article III purposes in the event that the regulations or requirements establishing a voluntary eco-labelling scheme were deemed to fall within Article III. Thirdly, if certain mandatory labelling schemes are GATT consistent, it is probable that even more voluntary schemes would also be GATT consistent. Voluntary labelling programmes do not prevent products from being sold freely, nor do they establish requirements needed to procure a government-accorded advantage. They are designed to further the ability of consumers to make informed decisions. They are therefore less likely to affect the conditions of competition than mandatory schemes are.

In conclusion, without a showing of purposeful abuse of a voluntary labelling scheme, in particular purposeful government abuse, a finding by a dispute settlement body against such a scheme based on Article III:4 is unlikely. Given the large number of eco-labelling schemes already in existence, and the reputation of the WTO concerning environmental issues, ruling against an eco-labelling scheme based on Article III could pose political risks for the WTO system. In light of the above, a member that chooses to oppose a voluntary labelling scheme should instead be prepared to give greater emphasis to arguments arising under the TBT Agreement, particularly technical arguments concerning necessity, harmonization, notice, and transparency (discussed below), as opposed to broad policy arguments that are likely to raise controversial political issues.

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## GATT Article XI ("General Elimination of Quantitative Restrictions")

GATT Article XI sets forth a general prohibition on import and export restrictions other than duties, tariffs, and other charges. The intent of Article XI is to limit import restrictions to tariff-based measures, and to prohibit "most non-tariff measures from being applied against imports at the point of importation."[38] GATT Articles III and Article XI are mutually exclusive. Article III governs internal measures, including internal measures applied against imports at the point of importation,[39] whereas Article XI governs the importation of products. Article XI is generally deemed to be comprehensive, and is even applicable to non-mandatory measures where sufficient government incentives exist to encourage implementation.[40]

As noted in the discussion of Article III, it is probable that it is GATT Article XI and not GATT Article III that is applicable to non-product-related environmental labelling requirements. If this is the case, import restrictions, such as a requirement that NPR-PPMs be labelled as a prerequisite to import, would violate Article XI. Prohibiting the import of products that do not bear an eco-label would also violate Article XI to the extent that NPR-PPMs are part of the labelling criteria.

Voluntary labelling schemes, including the NPR-PPM component of eco-labelling schemes, are unlikely to violate Article XI. The only conceivable exception would be when there are sufficient government incentives to discourage the import of goods that do not bear the label in question—perhaps in the form of a government programme that stigmatizes the import of unlabelled goods.

## GATT Article XX ("General Exceptions")

Much has already been written about Article XX, so it will be only briefly mentioned here. Assuming that a labelling scheme has been alleged to violate one of the Articles discussed above, the scheme would probably be defended on the basis of GATT Article XX (b) or (g), two of the general exceptions to the GATT Agreement.

GATT Article XX(b)[41] has never been successfully invoked and panel reports have cast doubt on its viability. The interpretation of the term

"necessary" is so strict that it is virtually impossible to satisfy.[42] Article XX(g)[43] has instead been the focus of recent attention.

Two recent Appellate Body reports, *Shrimp-Turtle* and *Reformulated Gasoline,* have demonstrated the viability of Article XX(g),[44] but in each case the environmental measure at issue was found not to satisfy the conditions present in Article XX's chapeau. The fact that the *Shrimp-Turtle* case concerned NPR-PPMs was not an express barrier to the application of Article XX(g) or the chapeau. Were an Article XX(g) labelling case to arise, it is likely that the decision would rest on the application of the chapeau. This makes the Appellate Body's decisions in *Shrimp-Turtle* and *Reformulated Gasoline,* each of which interprets the chapeau, important for the "application" of labelling schemes that take NPR-PPMs into consideration. Both reports stress the need for a co-operative resolution to international environmental problems, suggesting that labelling schemes that conform with international standards might be more acceptable.

## The Agreement on Technical Barriers to Trade

The TBT Agreement is the most important instrument applicable to environmental labelling in the WTO Agreement. The TBT Agreement was drafted with labelling regulations and standards in mind. There has been a general reluctance on the part of both panels and the Appellate Body to rule based on the TBT Agreement when confronted with the possibility of basing a decision on the GATT Agreement. Given the unanswered questions arising from the GATT Agreement with respect to labelling schemes, a developing country seeking to challenge a labelling scheme would be better served by basing its challenge on both the GATT and the TBT Agreements. This being said, there is also a degree of uncertainty concerning the application of the TBT Agreement to labelling schemes.

The principal uncertainty concerns the treatment of labels reflecting NPR-PPMs.[45] This point is of particular importance for voluntary eco-labelling schemes and for other voluntary schemes that reflect environmental and labour-related considerations. This confusion arises from the definitions of "technical regulation" and "standard" provided in

Annex 1 of the Agreement. The generally accepted rule is that only product-related PPMs are covered by the TBT Agreement, but this point remains open to debate. Some developing countries have taken the view that the TBT Agreement prohibits the labelling of NPR-PPMs, and therefore eco-labels, whereas other members have taken the view that eco-labels fall within the TBT Agreement.[46] A middle position—that only the product-related portion of an eco-label falls within the TBT Agreement—is tenable, but from a practical viewpoint unworkable.

The TBT Agreement is important and complex, and because of its potential "rigidity" a politically sensitive instrument. Much of the foundation required for an understanding of this agreement has been set forth in the above discussion of GATT Articles I, III, and XI. It is not possible to undertake a thorough analysis of the TBT Agreement in a short chapter of this nature, but the provisions of greatest interest for developing countries are outlined below.

The TBT Agreement differentiates between technical regulations (mandatory provisions) and standards (voluntary provisions) and establishes provisions applicable to both. Environmental labelling programmes can fall into either category depending upon whether or not a label is mandatory or voluntary. The distinction between mandatory and voluntary labelling requirements is important for ascertaining which provisions of the TBT Agreement apply.

Article 2 of the TBT Agreement is applicable to mandatory labelling requirements. Many important GATT principles that have already been discussed are incorporated into this provision. Article 2.1 provides for MFN and national treatment (treatment no less favourable for like products). Article 2.2 requires that technical regulations do not create "unnecessary" obstacles to international trade, and that such regulations are not more trade restrictive than necessary to fulfil legitimate objectives, taking account of the risks that non-fulfilment would create. Certain legitimate objectives are identified, including the protection of human, animal, and plant life or health and the environment. Article 2.4 requires the use of relevant international standards as a basis for technical regulations, unless they would be ineffective or inappropriate for the fulfilment of a legitimate objective. Article 2.5 provides that technical regulations that are in conformity with the international standards mentioned in Article 2.4 are "rebuttably presumed not to create

unnecessary obstacles to international trade." Other portions of Article 2 set forth important notice and transparency requirements. In Article 3, rules for the application of these provisions by local governments and non-governmental bodies are set forth.

Article 2 recognizes the protection of human, animal, and plant life and health as legitimate objectives that might justify technical regulations, but trade measures to protect such legitimate objectives may not constitute "unnecessary" obstacles to international trade. This parallels the necessary test applied in conjunction with GATT Article XX(b), as evidenced by the fact that Article 2.2 incorporates a "least trade-restrictive measures" provision.[47] This provision is designed to minimize the burden to technical regulations and to prevent the abuse of technical regulations for protectionist purposes. The earlier characterization of the TBT Agreement as "rigid" is due to the incorporation of this "necessary" test. Past GATT/WTO experience with this standard suggests that certain non-protectionist measures may not satisfy this test owing to the frequent availability of a less trade-restrictive alternative.

This raises the question of whether or not mandatory labelling requirements are particularly trade restrictive. By their very nature, labelling requirements that simply provide product-related information, even if mandatory, are not a particularly trade-restrictive measure. Instead, product-related labelling tends to play an informative role. Despite the fact that labelling may result in consumers choosing not to purchase certain products based on the information provided, as noted above, such product discrimination is indirect and, for many people (particularly those in the developed world), well within what they would view as necessary for informed decision-making and consumer choice.

From the developing country perspective, one point should be noted. Article 2 places considerable emphasis on the promulgation of technical regulations in accordance with international standards. Although this provision is intended to encourage international harmonization, developing country interests will be served only if they participate actively in the harmonization process. If they do not, it is conceivable that harmonized standards may be promulgated that are significantly more difficult for developing countries to meet. This means the capacity of developing countries to participate in the international harmonization process must be enhanced, and developing country resources must be

directed toward participation in such activities. This will mean participation in certain international harmonization activities that may have no immediate benefit for certain developing countries.

With respect to voluntary labelling schemes, including eco-labelling schemes, the situation is somewhat less straightforward. These schemes fall under Article 4 of the TBT Agreement, which incorporates the "Code of Good Practice for the Preparation, Adoption and Application of Standards" (Annex 3 of the TBT Agreement). The Code of Good Practice contains the principal TBT obligations applicable to voluntary labelling schemes. Pursuant to Article 4.1, *only* central government standardizing bodies are bound by the provisions contained in the Code. Other standardizing bodies have the option to accept and apply the Code. However, members are obligated to take "reasonable measures" to assure that local and non-governmental standardizing bodies do indeed accept and comply with the Code. This leaves a risk that labelling standards that do not comply with the Code will be promulgated by various subnational governmental authorities (or non-governmental bodies), particularly in countries with decentralized political systems. If the intent of the members is to widen the application of the Code, a goal that is probably in the interest of developing countries, attention should be given to defining what constitutes the "reasonable measures" required by a member to assure that subnational governmental and non-governmental bodies accept and comply with the Code.

With respect to voluntary labelling schemes, the obligations set forth in the Code generally parallel those of Article 2 of the TBT Agreement: MFN and national treatment provisions exist, standards are not permitted to create unnecessary obstacles to international trade, deference is given to international standards,[48] harmonization is encouraged, and notice and transparency obligations receive considerable attention.

As already noted, the treatment of NPR-PPMs for the purposes of the Code is a point of contention that the members have not been able to resolve. The area of greatest preoccupation for developing countries has, not surprisingly, been the labelling of non-product-related environmental criteria, particularly the criteria found in eco-labelling schemes. Although the problem is not serious yet, if eco-labelling schemes become a well-accepted marketing tool, and if eco-labelling schemes attribute particular importance to NPR-PPMs, labelling could eventually

undermine what some perceive to be a comparative advantage in certain countries. This means that the concern of developing countries with respect to the NPR-PPM question is legitimate, but that present fears are overstated given the paucity of data demonstrating the effectiveness of eco-labelling schemes in increasing a product's market share.

Other concerns revolve around the fact that few products from developing countries are currently labelled, and that the industries that tend to be found in the least developed countries are frequently not those that will benefit, at least for now, from labelling schemes. This again suggests that much of the fear that developing countries have about eco-labelling schemes is not warranted. Yet, the vigorous opposition to eco-labelling programmes on the part of some developing country members is not without purpose. Opposition to voluntary eco-labelling schemes has slowed down progress in the WTO's Committee on Trade and Environment (CTE), preventing more controversial issues (such as internalization) from receiving serious consideration. It has also made members realize that environmental issues are a stalking horse for labour-related issues, in particular "core labour standards." By blocking the resolution of the environmental questions now on the CTE's agenda, some countries are hoping that they are also blocking the advancement of labour issues up the WTO's agenda.

## 5. Concluding comments

Environmental issues transcend national borders and are not solely a developed country concern. Developing countries are beginning to experience serious environmental difficulties, and these problems will grow. The continued deterioration of environmental conditions world-wide means that eco-labelling and other product-related labelling programmes are not going to disappear from the international trade agenda. Yet the polarized manner in which environmental issues are being addressed in the CTE has left little hope for progress in this forum. Although this may be in accord with certain developing country interests, it is inevitable that pressure will increase on developing countries during the next round of trade talks to reach a compromise, particularly with respect to less controversial environmental issues, such as eco-labelling.

For many developing countries, environmental issues remain a luxury, and green protectionism is a legitimate concern. They realize that environmental agreements are possible only if all sides are willing to make concessions, and they are waiting for movement from the members in the developed world. If, as is likely, certain environmental issues are going to be on the agenda of the next round of trade talks, it may be time for the developing countries to take advantage of this fact, and to begin to line up concessions from the developed country members, perhaps in areas such as agriculture and textiles, in exchange for movement on environmental issues such as eco-labelling.[49] Despite opposition among many developing countries to eco-labelling programmes, negotiating a solution where trade concessions are won for developing countries may be preferable to "rolling the dice" and letting the Appellate Body resolve the unanswered GATT Article III and TBT questions.

Uncertainty concerning the treatment of NPR-PPMs in the TBT Agreement will remain the focus of attention for the developing world. This is not because eco-labelling poses an economic threat, but instead because of the "slippery slope" argument. Authorizing an evaluation of foreign NPR-PPMs for labelling purposes could open the door to other more effective means of influencing foreign NPR-PPMs. Going further down the "slippery slope," it could even open the WTO's doors to labour-related issues, human rights issues, and other sensitive social and political concerns. This is something most members want to avoid. Neither the use of trade as an economic lever to compel social change nor the use of the WTO's dispute settlement mechanism as a means of resisting social change is perceived as being in the best interests of the WTO, or of most of its members.[50]

Returning to voluntary eco-labelling programmes, with the exception of some uncertainty regarding the treatment of NPR-PPMs, the TBT Agreement seems adequate to prevent most cases of "green protectionism." There are nevertheless improvements, already discussed at length in the CTE, that could lead to broader support for eco-labelling schemes. For example, assuming that they are permissible, voluntary eco-labelling schemes that reflect NPR-PPMs should take local geographic, environmental, economic, and developmental conditions into consideration. Furthermore, the need for developing country input in the drafting of criteria for labelling schemes is important. Lastly, maxi-

mum transparency in all stages of the labelling process must be assured. Progress on labelling issues is possible only if all sides recognize that legitimate aspirations and concerns are at stake and are prepared to work together towards a compromise that reflects these mutual interests.

## Notes

1. Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994 (hereinafter WTO Agreement); reprinted in GATT, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts,* 5, 1994.
2. The International Standards Organization (ISO) has a system of classification that utilizes a different nomenclature. "Type I" labels are voluntary life-cycle labels based on pre-set criteria established by third parties. "Type II" labels are based on manufacturers' claims concerning individual environmental characteristics. "Type III" labels do not imply a product preference. They are based on an independent scientific assessment of environmental information. Arthur E. Appleton, *Environmental Labelling Programmes: International Trade Law Implications,* London: Kluwer Law International, 1997, p. 4.
3. A life-cycle analysis ("LCA" or "cradle-to-grave analysis") is an assessment of environmental factors present in the production, use, and disposal of a product. By definition it includes the production processes used to make a product, use of the product (emissions, noise, etc.), and disposal (recyclability, biodegradability, etc.). From an environmental perspective the concept of life-cycle analysis is of considerable importance, given that every stage in a product's life can have environmental consequences.
4. Schemes exist or have existed in Austria, Canada, Croatia, the Czech Republic, the European Union, Finland, France, Germany, Iceland, India, Israel, Japan, the Netherlands, New Zealand, Norway, Republic of Korea, Singapore, Spain, Sweden, and the United States. Schemes were under consideration (and may have now been implemented) in Brazil, Chile, Colombia, Indonesia, Poland, and Thailand. An attempt to implement a scheme failed in Australia. Appleton, *Environmental Labelling Programmes,* op. cit., p. 6. The most famous schemes are probably the Nordic White Swan and the German Blue Angel.
5. The General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 *UNTS* 187, entered into force 12 January 1948; reprinted in GATT, *Basic Instruments and Selected Documents* [*BISD*] 4/1, 1969.
6. GATT Article I provides for most-favoured-nation (MFN) treatment. GATT Article III provides for national treatment. Together these provisions make up GATT's "non-discrimination" obligation.
7. This being said, certain developing country products may qualify for a label based on their naturalness, lack of chemical processing, etc. Stores such as the Body Shop and Magasins du Monde and certain "fair trade" organizations are capitalizing on the marketing potential of developing country products.
8. Depending on geological or climatic considerations, certain production or disposal techniques may be adequate in one state but not in another. For example, the

suitable use of hydrological power and the safe disposal of hazardous chemical substances may require geological or climatic considerations that can vary region by region.

9. *United States–Restrictions on Imports of Tuna,* Report of the Panel, GATT Document DS21/R, 3 September 1991 (unadopted), *BISD* 40S/155 (hereinafter *Tuna* Panel Report); reprinted in 30 *ILM* 1594 (1991), paras. 5.41–5.44.
10. *United States–Measures Affecting Alcoholic and Malt Beverages,* Report of the Panel, GATT Document DS23/R, adopted 19 June 1992, *BISD* 39S/206 (hereinafter *Malt Beverages* Panel Report), paras. 5.70–5.76.
11. WTO Document Press/TE 014, 14 November 1996.
12. WTO Agreement, op. cit., p. 6.
13. Ibid., p. 485.
14. Ibid., p. 138.
15. Ibid., p. 6.
16. Appleton, *Environmental Labelling Programmes,* op. cit., p. 91.
17. *United States–Import Prohibition of Certain Shrimp and Shrimp Products,* AB-1998-4, WT/DS58/AB/R, 12 October 1998 (hereinafter *Shrimp-Turtle* Appellate Body Report).
18. Ibid., para. 153.
19. Ibid., para. 155.
20. Appleton, *Environmental Labelling Programmes,* op. cit., pp. 141–142.
21. *Tuna* Panel Report, op. cit., paras. 5.41–5.44. See also Appleton, *Environmental Labelling Programmes,* op. cit., pp. 142–145.
22. *Tuna* Panel Report, op. cit., para. 5.42.
23. *Japan–Taxes on Alcoholic Beverages,* AB-1996-2, WT/DS8, 10 & 11/AB/R, 4 October 1996 (hereinafter *Alcoholic Beverages* Appellate Body Report), §E.
24. Appleton, *Environmental Labelling Programmes,* op. cit., p. 147. GATT Articles III and XI ("General Elimination of Quantitative Restrictions") are mutually exclusive. Article III applies even if the internal measures at issue are applied at the point of importation against like imported products. See GATT Annex I, "Notes and Supplementary Provisions," ad Article III.
25. *Alcoholic Beverages* Appellate Body Report, op. cit., §F (footnotes omitted).
26. *Border Tax Adjustments, Report of the Working Party,* GATT Doc. L/3464, adopted 2 December 1970, *BISD* 18S/97, para. 18.
27. *Alcoholic Beverages* Appellate Body Report, op. cit., §H(1)(a), quoting *Border Tax Adjustments,* op. cit., para. 18. This test differs from the approach set forth in the *Malt Beverages* Panel Report wherein the panel analysed the purpose (aim and effect) of the trade measure at issue.
28. *Alcoholic Beverages* Appellate Body Report, op. cit., §H(1)(a).
29. *Malt Beverages* Panel Report, op. cit.
30. *United States–Taxes on Automobiles,* Report of the Panel, GATT Doc. DS31/R, 11 October 1994 (unadopted), reprinted in 33 *ILM* 1399, 1994.
31. *Tuna* Panel Report, op. cit., para. 5.14; and *United States–Restrictions on Imports of Tuna,* Report of the Panel, GATT Doc. DS29/R, 16 June 1994 (unadopted), reprinted in 33 *ILM* 842, 1994, paras. 5.8–5.9. Both reports found that Article XI would be applicable because Article III (Note ad Article III) does not permit an assessment (in the determination of like products) at the point of importation of

policies and practices that do not have an effect on a product's physical characteristics (NPR-PPMs).

32. *United States–Import Prohibition of Certain Shrimp and Shrimp Products,* Report of the Panel, WT/DS58/R, 15 May 1998, para. 3.143.

33. Appleton, *Environmental Labelling Programmes,* op. cit., pp. 105 and 149.

34. See e.g. Agreement on Technical Barriers to Trade (hereinafter TBT Agreement), in Agreement Establishing the World Trade Organization, Marrakesh, 15 April 1994, Annex 1a, Article 2.

35. Mr. Lacarte signed both the *Malt Beverages* and *Alcoholic Beverages* reports. This change in practice is therefore somewhat surprising.

36. The Appellate Body recognized the right of members to pursue certain domestic goals in a WTO-consistent manner in the *Alcoholic Beverages* report (*Alcoholic Beverages* Appellate Body Report, op. cit., §F). In making such an evaluation, it is possible that considerations of domestic policy autonomy, in such areas as health, safety, and the environment, will enter into the analysis.

37. C. Tietje, "Voluntary Eco-labelling Programmes and Questions of State Responsibility in the WTO/GATT Legal System," *Journal of World Trade* 29(123), October 1995, 139–141.

38. Appleton, *Environmental Labelling Programmes,* op. cit., p. 159.

39. See GATT, Annex I, "Notes and Supplementary Provisions," ad Article III.

40. Appleton, *Environmental Labelling Programmes,* op. cit., pp. 159–160.

41. Article XX(b) provides an exception for measures "necessary to protect human, animal or plant life or health."

42. A measure is not "necessary" for GATT purposes if a GATT-consistent measure can be applied or if a trade measure that is less trade restrictive can be implemented.

43. Article XX(g) provides an exception for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

44. See *Shrimp-Turtle* Appellate Body Report, op. cit.; and *United States–Standards for Reformulated and Conventional Gasoline,* AB-1996-1, WT/DS2/AB/R, 29 April 1996.

45. See, generally, Doaa Abdel Motaal, "Eco-labelling and the World Trade Organisation," paper prepared for the International Conference Green Goods V: Eco-labelling for a Sustainable Future, Berlin, Germany, 26–28 October 1998 (on file with the author).

46. Ibid., p. 5.

47. TBT Agreement, Article 2.2, reads in part "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective."

48. Unlike TBT Agreement, Article 2.5, no rebuttable presumption of validity is created in the Code for national and subnational standards based on international standards, nor are legitimate objectives for standardization set forth as in Article 2.2.

49. To this list can be added the treatment of multilateral environmental agreements that incorporate trade measures.

50. A preferable solution would be to strengthen international and regional agreements governing areas such as environment, labour, and human rights, and to create effective enforcement mechanisms. There is, however, no consensus on such a step.

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