Applying Trade Rules to Timber Ecolabeling

A Review of Timber Ecolabeling and the WTO Agreement on Technical Barriers to Trade

CIEL Discussion Paper

Draft
February 1997

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Summary

This discussion paper reviews a selection of leading wood product certification and ecolabeling schemes, and analyzes the rules of the World Trade Organization that are most relevant for such efforts, specifically the provisions of the Agreement on Technical Barriers to Trade (the TBT Agreement).

The political challenges of ecolabeling wood production are many. This discussion describes a number of existing certification and ecolabeling schemes, as well as schemes that are under development, to show how parties are attempting to meet these challenges. This provides the background for an analysis of the potential impact international trade rules might have on labeling of wood products for environmental purposes.

Decisions in past trade disputes concerning analogous provisions of other international trade agreements raise troubling questions as to whether the TBT Agreement permits timber certification and ecolabeling schemes to distinguish among products according to non-product-related criteria, for example through reference to the environmental impact of a producer's logging practices.

This paper concludes, however, that under the best interpretation of the TBT Agreement, there is no inherent conflict between the Agreement's requirements and the typical ecolabeling schemes' use of non-product-related criteria.

In recent years, a number of voluntary schemes relating to product certification and ecolabeling have been developed for timber and other wood products, as well as at least one government-sponsored scheme. The stated purpose of these certification schemes is to help reassure consumers of the reliability of ecolabels on wood products.

Ecolabeling is of interest to environmentalists, consumers and industry as a mechanism to help consumers exercise preferences for products whose production, use and disposal impose a lighter burden on the environment and natural resources compared to competing products. Consumers get better information about the impacts of the products they buy, helping them use their purchasing power to encourage environmental protection. Green producers stand to benefit through expanded market shares and possible price premiums. Environmentalists hope that this market-based incentive will increase protection of forests and other natural resources, and reduce pollution.

When ecolabels are placed on products moving in international trade between members of the World Trade

Organization (WTO), they may come within the scope of the WTO Agreement that binds the WTO's 128 members, specifically, the Agreement on Technical Barriers to Trade (TBT Agreement), The TBT Agreement applies to both mandatory disciplines (termed "regulations") and voluntary disciplines (termed "standards") relating to products, whether the disciplines are developed by governmental or non-governmental bodies. It also applies to regulations and standards concerning at least some product labels.

The TBT Agreement requires that government-sponsored technical regulations and standards must not discriminate between domestic products and foreign products that are alike ("national treatment") and must not discriminate between "like" products from different WTO members ("most-favored-nation"). In addition, such standards and regulations must not constitute unnecessary obstacles to trade. Furthermore, governments must ensure that central governmental standardizing bodies improve transparency, involve interested parties in standard setting, and make reasonable efforts to harmonize technical rules at the international level.

Most existing ecolabeling schemes are private and voluntary; they are not governmental schemes. Contrary to the widespread assumption that such programs would fall outside the scope of the WTO's requirements, however, they may in fact be regulated by the TBT Agreement, including its Code of Good Practices (the Code). Governments with territorial jurisdiction over a private voluntary program are obligated to "take such reasonable measures as may be available to them" to ensure compliance with the TBT rules, including the Code and its most-favoured-nation (MFN) and national treatment (NT) obligations. Analogous language in other trade agreements has been interpreted to require governments to take all constitutionally available means.

While the language of the TBT Agreement is not entirely clear, some governments argue that its coverage extends to labels relating to all process or production methods (PPMs) used to produce the product. This would include most, if not all, timber ecolabels. At first glance, coverage of PPMs would not appear to raise concerns for many of the voluntary schemes now underway. Ecolabeling distinctions among products based on differences in PPMs do not seem to involve discrimination according to the product's country of origin. In addition, the broad-based international participation in some initiatives surveyed in this report suggests that protectionist motivations are unlikely. For example, the membership of the Forest Stewardship Council (FSC), an international organization seeking to "certify the certifiers," is composed of 120 non-governmental organizations and companies from twenty-eight developed and developing countries.

Because it is unclear how the TBT Agreement may be interpreted, however, there is a risk that its application could hinder the development of ecolabeling schemes, even those that are voluntary. The problem arises because dispute panel decisions under the General Agreement on Tariffs and Trade (GATT) — the predecessor to the WTO — suggest that there is an inherent conflict between distinctions based on non-product-related process or production method or other non-product-related criteria, and the most favoured nation and national treatment obligations found in the GATT. The TBT

Agreement and its Code both contain most favored nation and national treatment obligations similar to those found in the GATT. Consequently, these TBT obligations could hinder both voluntary and mandatory labeling schemes.

One GATT panel decision, Tuna/Dolphin I, ruled that a purely voluntary scheme for ecolabeling based on a process or production method distinction did not violate the most favored nation obligation of the GATT. However, this case may not be a reliable indicator of how future WTO panels would interpret the TBT Agreement's most favoured nation requirement. First, the TBT Agreement, which was not in existence when Tuna/Dolphin I was decided, explicitly covers voluntary standards, as well as private parties, which it regulates indirectly through their governments. Second, the Tuna/Dolphin I panel's reasoning is murky and represents a departure from an otherwise consistent line of GATT jurisprudence on the most favored nation and national treatment obligations. Perhaps most importantly, many WTO members now oppose ecolabeling schemes that rely upon non-product-related criteria, whether those schemes are voluntary or mandatory. This opposition may influence the outcome of panel decisions.

An interpretation of the TBT Agreement that found ecolabeling schemes using non-product-related criteria to be inconsistent with its rules would, however, be misguided. First, the textual support is debatable. In addition, there is no inherent link between non-product related process or production methods and protectionist motivation. In fact, another WTO Agreement, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), explicitly *requires* WTO members to enact and enforce legal mechanisms that distinguish between like products according to non-product-related criteria, for example by enabling patent holders to prevent infringement of their rights by competing manufacturers.

Similarly, the international community has apparently seen no protectionist problems in the negotiation and implementation of widely supported multilateral environmental agreements such as the Montreal Protocol and the Convention on International Trade in Endangered Species (CITES). Those agreements provide for distinctions among like products (including trade restrictions) based on non-product related criteria. Under CITES, for example, species threatened by trade are listed on Appendix I and may not be traded commercially, while trade in specimens of unlisted species, however similar, is unaffected.

Market-based measures to encourage sustainable use of natural resources will inevitably involve non-product-related criteria. The use of market will inevitably expand in order to integrate simultaneous trends toward sustainable development and the growth of the private sector and market economies. It is time to find a better principle for identifying protectionist measures. Not only is the non-product-related criteria rule too crude a method for detecting protectionism, it encourages a continuing conflict between important objectives of the international community.

The harmonization requirements of the TBT Agreement, if used to promote equivalent environmental protection standards in various regions around the world, could help to achieve both trade and environment objectives. Ecolabeling and

certification will succeed only if they are based on standards and procedures that effectively identify less environmentally destructive alternatives. Development of such standards and procedures will require interdisciplinary efforts, based on sound principles of sustainable development, involving a range of stakeholders in open forums.

In the forest products area, the Forest Stewardship Council offers such a relatively well-balanced, broad-based, open forum. Another international forum that could play a role is CITES, which has developed expertise and experience in evaluating the sustainability of trade in wildlife products. The Convention on Biological Diversity also has potential, in light of its explicit mandate to combine development and conservation through sustainable use. To varying degrees, these forums share several advantageous characteristics: they include in their mandates the objective of reconciling economic activity with environmental protection; they are structured to encourage balanced public participation in official meetings; and they make special efforts to involve stakeholders, often including governments, from developing countries. ISO (the International Organization for Standardization) has sometimes been promoted as an appropriate forum, but it is seriously lacking on all three counts.

I. Background

The rapid destruction and degradation of forests around the world is one of today's most pressing global environmental concerns.

Unsustainable commercial extraction of timber is one of a variety of causes of the destruction and degradation of forests. Other causes include the expansion of subsistence farming, grazing, and wood extraction, the conversion of forest for large-scale settlement projects, and the establishment of plantations (WRI 1996, p. 211). While not the largest threat world-wide, commercial extraction is a major threat in many areas (Dudley, Jeanrenaud, and Sullivan 1995). In developed countries, commercial use of timber — whether for domestic use or for export — is often the main cause of forest loss or degradation. Old-growth temperate forests in North America, Eastern Europe, and Chile are increasingly at risk from the expansion of logging activities (WRI 1996, p. 209). In the tropics, extensive logging has significantly reduced forests in many countries, such as Malaysia, Papua New Guinea, and others. Logging has impacts beyond the area actually deforested by timber-cutting, because ranchers and agriculturalists often follow roads opened for logging to gain access to and convert forest land (Sugal 1996).

World trade in timber doubled from 1981 to 1992, from US $51 billion to US $103 billion.[1] Developed countries account for 84% of this trade, and about 80% of developed country imports originate in other

[1] These and subsequent figures are taken from FAO 1994 as cited in U.N. C.S.D. 1996a and 1996b. Further research is necessary to confirm these figures, as FAO is reportedly correcting and updating its statistics.

developed countries. Among developed countries, Canada, Finland, Germany, Sweden and the USA are the largest exporters.

Worldwide, production (for both domestic and foreign consumption) of roundwood amounted to 3.5 billion cubic meters in 1992, increasing more slowly than did the increase in value of traded timber products (up 21% from 1981 production). The increase was due largely to increased extraction in developing countries. Total roundwood production included about 1.6 to 1.7 billion cubic meters produced annually in the early 1990s for industrial purposes. Of that amount, about 6-7 % entered international trade. In addition, significant amounts of other wood products entered international trade, including nearly 20% of wood pulp, and 20-25 % of sawnwood, wood-based panels, and paper products.

In developing countries as a whole, about 25% of the roundwood that is not used for fuel is exported. Malaysia and Indonesia combined account for about 86% of total exports from tropical countries. In some developing countries, logging for export is the largest contributor to deforestation or forest degradation; in Sarawak state in Malaysia, for example, approximately 80% of logs eventually become exports (Elliott).

It is widely held that a major part of the solution to forest degradation and destruction will involve the replacement of unsustainable uses of forests with sustainable uses that conserve forest's diverse values. Sustainable forest management goals are consistent with the goal of sustainable development to which the international community has committed in a series of international agreements, such as those signed at the 1992 Earth Summit in Rio de Janeiro. Conservation of forests will be promoted if those who use them without damaging their long-term productivity, biodiversity, or ecosystem functions receive rewards for their efforts through economic and other incentives. The development of standards for sustainable forest management (SFM) must be combined with incentives and/or regulatory requirements to encourage or mandate the application of those standards. Given the current trend toward market solutions, future policies are likely to emphasize economic incentives rather than regulatory restrictions, although there is growing recognition that both regulations and incentives must be included in the mix of tools used to solve environmental and conservation problems (OECD 1996).

One of the economic incentives for forest protection currently receiving a great deal of attention is ecolabeling of timber and other forest products. Ecolabeling involves the labeling of products with labels containing information on the environmental impacts of their production, use and/or disposal. For timber products, the emphasis is generally on the extent to which harm to the ecological integrity of forests, biodiversity, and other environmental values is minimized in the production process. The goal is to help producers gain an advantage in the market with consumers seeking to exercise their preferences for "green" products. To be effective, an ecolabeling initiative must be linked to a system for independent certification of labeled products, so that buyers have assurance of the accuracy and good faith of producers' representations.

In a number of countries, ecolabeling schemes have been developed for a range of consumer products involving varying degrees of government participation. In

recent years, several initiatives have developed standardized ecolabels for timber and timber products, generally involving cooperation between the private sector and environmental non-governmental organizations. Some of these labels are now being applied to a small but growing volume of products on the market. Governmental and inter-governmental consideration of ecolabeling for timber, in contrast, is developing more slowly, although the European Community has recently adopted criteria for ecolabeling of certain paper products (EC 1996).

II. Timber Certification and Ecolabeling Initiatives

A. General Background on Ecolabeling

The high profile of certification and ecolabeling in the context of international trade in timber and wood products stems from several factors. One is the widely held premise that "green" markets — i.e. significant concentrations of consumers willing to pay a premium for green products — are currently found in developed countries. Furthermore, a number of developing countries depend heavily on timber exports for foreign exchange. In addition, many "green" consumers are sensitized to the problem of tropical deforestation. As a result of consumer interest, some of the best-known timber ecolabeling initiatives gave early emphasis to tropical timber. However, now most aim to apply to all timber, whether from temperate forests or tropical forests.

Most of the world's governments, meeting in Rio in 1992, agreed in Agenda 21 to "encourage expansion of environmental labeling and other environmentally related product information programs designed to assist consumers to make informed choices" (Agenda 21, Chapter 4, '4.21). Ecolabeling can be an effective tool for sustainable development in a market economy. Buyers in a free market need ready access to information about the ecological impacts of the life cycles of products to be able to select green products. There is some evidence that a segment of the public is willing to pay a premium for products produced in an environmentally friendly manner, which could recompense producers for the extra costs of implementing more sustainable production methods.

By the same token, environmentally

conscious producers need accurate, widely recognized ecolabeling schemes, so that they can both easily inform consumers of the green values of their products, and guard against unfair competition from less scrupulous producers that purport to produce environmentally friendly products or to use sustainable methods, but in fact do not.

Voluntary ecolabeling does not require producers to conduct their activities in a particular way. Rather, it promotes truthful communication from producers to consumers about the environmental impacts of products and their production processes. Participation in the ecolabeling and certification process does, however, impose costs on participating producers; compliance with periodic monitoring after certification, and application of labels are among these costs. Indirectly, ecolabels are associated with the costs of implementing more sustainable production methods.

Widely recognized labels for consumer products already exist in numerous countries. Of these labels, those that are government-mandated most often focus on characteristics of the products themselves. Such labels include listing of ingredients and nutritional value of foods and identification of pharmaceuticals, dosage and side effects. Independent organizations also offer labels certifying that manufacturers have demonstrated compliance with certain safety or reliability standards.

Labels providing information about non-product related criteria — in particular a product's source or manner of production — are ubiquitous in global markets. These include, for example, trademarks, appellations of origin or geographic indications, and collective marks. The design of some marks, such as trademarks, is typically at the discretion of the producer. Appellations of origin and collective marks typically conform to a standard format or text that is established by a trade association, cooperative, union or government agency. In both cases, governments provide legal mechanisms for owners of such marks to prevent unauthorized use. At the international level, most governments are now obligated to provide legal protections for private control of such marks, including their use in labels, under the Agreement on Trade-Related Aspects of Intellectual Property Rights, one of the 1994 agreements establishing the WTO.

Beginning in the mid-1970s, government-sponsored labels containing information on the environmental qualities of products began to emerge. In 1975, for example, in an attempt to promote energy conservation through increased efficiency in response to the dramatic rise in energy prices, the U.S. government began to require manufacturers to place labels on appliances describing the products' annual energy consumption. In 1977, the government of West Germany established the Blue Angel program, the first environmental labeling program of its kind. A multi-stakeholder effort, the Blue Angel program developed environmental criteria for specific categories of products. For a fee, manufacturers could submit their products to testing for compliance. If the product passed, the manufacturer, for an additional fee, could obtain the right to display the Blue Angel logo in marketing their product, as a government sanctioned "seal of approval" for the product's environmental performance. "Seal of approval" ecolabels based on this model were established in Canada, Japan and a number of Western European countries over the next fifteen

years. During the late 1980s, as consumer awareness of the environmental impacts associated with the production, use and disposal of certain products continued to grow, a number of non-governmental entities began developing ecolabels as a voluntary means for distinguishing among products.

The terms "first-party" "second-party" and "third-party" (each discussed below) are used to make an important distinction among labeling initiatives based on the identity of the entity that develops and authorizes use of the label. This report focuses on so-called third-party ecolabels. Third-party ecolabels are awarded by bodies that are fully independent from the product's manufacturer. The awarding body conducts an independent evaluation of a particular product utilizing previously established criteria and indicators to measure the environmental impacts of the product or its production. If the product meets the its established standards, the body will *certify* the product as having met the external standards of the ecolabeling program. Third-party ecolabeling initiatives also tend to develop criteria for awarding labels through a multi-stakeholder process that includes a range of interest groups and relevant experts and that is open to public scrutiny. However, not all third party ecolabels are equal. There are significant differences among many such ecolabels for forest products, based upon the objective of the scheme, the degree of transparency of the labeling process, and the rigor of the criteria used to measure acceptable forest management.

First party ecolabels are established by the firm that produces the product — the same party that will benefit economically from the making of the environmental claim. There is no independent verification of the environmental characteristics being claimed. The lack of independent criteria or evaluation has led to complaints that such labels are used to "greenwash" unsustainably produced products, by making claims of environmental benefits that are either misleading or false.[2]

A second-party ecolabel is one that has been developed by a trade association for the products of its business members. As with first-party ecolabels, the awarding of such labels lacks assurances of objectivity or independence. Both the establishment of eligibility criteria and the awarding of the ecolabel is left to the membership of the trade association, which generally consists of the same product manufacturers who will receive the direct benefit from the use of the ecolabel.

The amount and format of information in ecolabels varies. Some ecolabels consist simply of a "seal of approval." Others provide more detailed

[2] In response, a number of governments began establishing content requirements for environmental claims made through voluntary ecolabels. In the United States, for example, the Federal Trade Commission (FTC), acting under federal truth in advertising laws, has brought enforcement actions against several manufacturers for misleading claims made through ecolabels. However, disciplining of voluntary ecolabels has proven difficult in the absence of detailed criteria to evaluate the accuracy of claims involving specific products. In 1992, the FTC established guidelines for making environmental claims to assist manufacturers in developing acceptable ecolabels. *See* 16 C.F.R 260 (*Guides for the Use of Environmental Marketing Claims).* These guidelines were revised in 1996, *see* 61 Fed. Reg. 53,311 (Oct. 11, 1996), but remain of limited utility because of their generality.

information in the form of an "environmental scorecard," with the label listing information on how the production of the product affected the environment in several categories.

B. Forest Product Certification and Ecolabeling – Examples of Current Initiatives

Public concern about the environmental impacts of products and their production extends to a range of products, including forest products. For example, schemes have been developed in a number of countries to label paper products indicating the extent to which recycled paper or certain chemicals were used in their production, in response to consumer concerns about the extent to which paper consumption encourages logging that contributes to forest loss, and about the impact of chemicals on aquatic ecosystems, air quality, and human health.

Some logging and forest product firms are seeking to respond to this public concern by developing and marketing forest products as "sustainably produced," in the hopes of gaining a competitive market advantage. A number of environmental groups are also interested in such production and marketing techniques, as a way of channeling private sector activity to support sustainable development and conservation.

This section reviews some recent activities in this area. The main active labeling initiatives focusing on timber products are voluntary schemes developed under the aegis of non-profit organizations and involving cooperative efforts among environmental groups, commercial firms, and other stakeholders. To date, government initiatives in this area are still in early stages of development, with the exception of the recent guidelines issued by the European Community for the application of its voluntary ecolabeling system to office paper.

Certification programs generally have three principal goals: to identify guidelines for forest management striving toward sustainable forest management (SFM); to establish systems for assessing and certifying whether a producer is following such SFM guidelines, and "chain of custody" procedures for certifying whether products come from certified forests; and to help create economic incentives for SFM practices, by building market confidence in forest product ecolabels.

Forest management certification involves the evaluation and assessment of a particular forest area against specific standards for forest management, defined in terms of ecological, social or economic impacts. Forest product certification involves examining the chain of custody of products harvested from certified forests, through all stages of transport, processing, and marketing, to the point of sale. Products are awarded certification after an examination of their chain of custody documentation systems and procedures verifies their origin in certified forests.

1. The Forest Stewardship Council: "Certifying the Certifiers"

The FSC is a non-profit, independent association established in 1993 and headquartered in Oaxaca, Mexico. Its mission is to promote environmentally

responsible, socially beneficial, and economically viable management of the world's forests through the establishment and application of an international standard of recognized and respected principles for forest management. Members are drawn from the major stakeholder groups, including environmental institutions, timber producers, retailers, forestry professionals, indigenous peoples' organizations, and certification organizations. The FSC now has 178 members from thirty-six developed and developing countries, with nearly equal representation from environmental, economic, and social interests. Funding comes from donations, membership dues, and fees for accreditation services.

Day-to-day operations are handled by a Secretariat. The board of directors appoints the executive director and oversees the Secretariat. The membership meets periodically to elect board members and review FSC policies. To avoid domination by commercial enterprises, the membership is divided into three voting chambers, representing social, economic and environmental interests. Each chamber holds one third of the voting power. Within each chamber, there are also northern and southern sub-chambers, with each holding 50% of the voting power of that chamber. Decisions are to be taken by two-thirds majority vote of the whole membership (FSC 1996a).

The FSC's current work program covers three principal areas: (1) accrediting and monitoring independent certifiers of forest management and wood products; (2) promoting the development of FSC working groups at the national and sub-national level to facilitate the development of forest management standards suited to the particular country or region; and (3) collecting and disseminating information on certification.

Criteria for accreditation of certifiers are based on ten principles and corresponding criteria for management of forests, including plantations. These principles and criteria were developed through an extensive international consultation involving a great number of stakeholders. The FSC Principles and Criteria serve as broad guidelines for the development of more detailed forest management standards on both the regional and forest unit level. The FSC Principles and Criteria do not set *forest level* standards for certifying that a particular forest is sustainably managed. Rather, they establish minimum certification standards to which certification organizations must adhere in order to be accredited by the FSC.

Certification organizations may apply to the FSC for accreditation of their systems of certification of forest management or "chain of custody." Certification organizations must perform chain of custody certification only for those forest producers and retailers who intend to communicate the certification to the public. FSC guidelines require chain of custody certification for the FSC trademark to be used as an on-product label.

The accreditation process involves:

- A desk study of the applicant's organizational structure and certification system. This includes an evaluation of the applicant's certification standard compared to the FSC Principles and Criteria;
- An evaluation visit to the applicant's premises, to ensure that the applicant has the institutional capacity to implement

the defined certification system; and

- Evaluation of a site (forest management organization and/or chain of custody) certified by the applicant. The evaluation phase includes a detailed appraisal of the site evaluation report, and a field evaluation to test the veracity of the report.

If these evaluations are favorable, a detailed report and recommendation is submitted to the FSC Board of Directors for approval. The board determines whether the applicant should be accredited by FSC, and finalizes any associated conditions.

If the Board rejects the application for accreditation, the certifier has the right to receive a written explanation of the reasons why. A certifier denied accreditation may either reapply for certification after having corrected the problems identified by the Board, or it may appeal the Board decision to the FSC Dispute Resolution Committee. FSC members in good standing may also appeal a Board decision for accreditation, either positive or negative, to the FSC Dispute Resolution Committee.

In addition to their use in evaluating certification systems, the FSC is promoting the use of its Principles and Criteria as guidelines by regional working groups developing more specific forest management standards on the regional, national, local, and forest management unit levels. Because the nature of forest resources and the threats they face can differ significantly based on the region and country, FSC coordinates such standards for certification of specific forest types through multi-stakeholder working groups within each region. These standards are submitted to the FSC Board of Directors for approval. Official FSC working groups have already been organized to develop local standards in several countries.

To date, four certification organizations have received FSC accreditation. They are: Rainforest Alliance's Smartwood Program (U.S.); Scientific Certification System's Forest Conservation Program (U.S.- see discussion below); SGS-Forestry Qualifor Programme (U.K.); Soil Association's Responsible Forestry Programme (U.K.).

2. The Forest Conservation Program (Scientific Certification Systems)

Scientific Certification System (SCS) is a for-profit, multi-disciplinary scientific organization, based in California, United States. Its mission is to promote more environmentally sustainable policy planning, production, product design, and management in both the private and public sectors. Founded in 1984, it was one of the first independent organizations to evaluate products based on their environmental characteristics and to verify environmental claims about products. SCS has established a number of independent certification initiatives, including: the Environmental Claims Certification Program, which is responsible for verifying specific claims made by manufacturers; the Environmental Report Card, which utilizes a cradle to grave approach in developing an environmental profile of products and their packaging; the Forest Conservation Program (see below); and the NutriClean Program, which provides recognition to farmers who grow produce utilizing low pesticide techniques.

SCS's *Forest Conservation Program* (FCP) is one of four programs accredited by the Forest Stewardship Council (FSC).

Established in 1991, the FCP has established uniform guidelines for assessing the management of temperate, tropical, and boreal forests, and provides an independent basis of verification for potential marketplace claims. As of November 1996, SCS had certified twelve forest tracts, representing forest holdings exceeding 2.6 million acres, in Brazil, Costa Rica, Paraguay, Mexico, and the United States. SCS had also certified twenty-one manufacturers and retailers as satisfying "chain of custody" standards, verifying their claims that they produce or sell products from certified forest tracts.

Products from certified forests that are distributed in certified chain of custody systems (see below) may carry a label that the wood comes from a "well managed" forest. Forests that score over 80 (out of 100) in each of the three evaluation categories discussed below are designated as "well managed." In addition, a certified organization has the option of divulging the score received in each of the three program areas in the label. An executive summary for each certified project and a copy of the standards applied during the analysis are available from SCS upon request.

a. Criteria and Standards for SFM

FCP evaluations involve extensive field analysis of the condition of forest ecosystems and forest level management practices. Management practices are evaluated against objective and regionally appropriate standards of forest management by an interdisciplinary team of regional resource professionals. The evaluation team has the authority to make marginal changes to FCP scoring guidelines for one or more criteria if necessary to improve the fit of these criteria to the regional context in which they are being applied. As a base requirement, forest management must be in full compliance with all applicable local, state or provincial, national, and international laws and regulations, including those that address matters such as workers safety, endangered species, and chemical use and disposal. FCP performs an in-depth evaluation of three program elements of management of specific forested areas, termed "management units."

- *Timber Resource Sustainability***.** Evaluation of the extent to which current and prior management practices and policies have maintained and will maintain forest conditions compatible with a model of sustainable resource utilization. Baseline data for purposes of this evaluation is taken initially from inventory data provided by the forest company, which is then checked for veracity.

- *Forest Ecosystem Maintenance***.** Assessment of the effects of harvesting on natural forest ecosystems, and whether there has been minimal alteration. The extent to which non-timber resource values are factored into management practices is also reviewed. Effects are measured according to the professional judgment of the evaluation team during field analysis, as well as data from other sources.

- *Financial/Socio-Economic Factors.* Assessment of the project's financial viability and its likely socio-economic effects on the local community.

b. Evaluation Process

The FCP's forest management

evaluation process includes the following steps:

- Collection of information supplied by owner that is verifiable through observation and field sampling (e.g. timber inventory data, long-term timber management plans, wildlife surveys, business management plans).

- Evaluation of data, focusing on the three program elements listed above.

- Periodic monitoring of management plans and/or chain of custody procedures of products, including annual on-site audits.

- For those companies who wish to communicate their certification directly to the public through the use of an on-product label, a chain of custody certification of all participants involved in manufacturing and distribution (see below).

c. Product Certification and Chain-of-Custody

For forest producers and retailers that wish to identify certified products through the use of labels, FCP provides for three levels of product labeling:

- *Specific point-of-purchase claims by sellers.* Certified companies may use labels to designate specific forest products as certified to the end consumer, where they receive all of their wood products from certified sources, or implement adequate procedures to segregate products from certified sources;

- *General non-point-of-purchase claims by producers.* Certified forest producers may make general claims in annual reports or brochures regarding the percentage of forest management units that are certified, without implementing chain of custody procedures for distinguishing products from certified forests; and

- *General point-of-purchase claims not attached directly to the product.* Sellers may make general claims as to the percentage of total supply obtained from certified sources, without designating particular products as certified, where the seller does not have a chain of custody procedure and receives products from both certified and non-certified sources.

In order to reduce the cost for smaller forest producers, SCS has developed different certification requirements for small and medium sized producers, as well as aggregations of small forest owners.

d. Appeal Procedures

Appeals concerning a FCP decision may be brought by either a participating forest producer, mill owner, or retailer, or an interested third party. Participant appeals must be made in writing within 60 days of the notification of certification status. If the matter is not easily resolved, an appeal hearing will be convened. The FCP Chief Operations Officer will serve as the Appeals Officer, and must render a written finding within 90 days of the appeal.

Third party appeals may be brought by interested outside parties who feel a certification was inappropriately granted. Third party appellants are initially kept anonymous, but their identity will be disclosed to the certified party if the SCS finds that their allegations merit

investigation. Investigations will be conducted confidentially, with the final decision to be rendered by the FCP Chief Operations Officer. As required by all FSC accredited certifiers, FCP procedures allow for parties to appeal FCP decisions to the FSC, who would act as an independent arbiter. For both participant and third party appeals, the appellant may choose to go to the national or regional office of the FSC, unless there is no such office, in which case appeals may be brought directly to the Executive Director of the FSC.

3. The Canadian Standards Association (CSA)

At the behest of the Canadian timber industry, the Canadian Standards Association (CSA) began in 1994 to develop a voluntary, independent certification program, the Sustainable Forest Management System (SFMS). The CSA is a non-governmental, independent non-profit organization based in Toronto, Canada. Founded in 1919, CSA has worked to develop quality, safety, and performance standards of a wide variety of products both in Canada and internationally. In addition, the CSA provides certification, testing and registration services. CSA's stated goals are to improve public safety, to preserve the environment, and to help manufacturers become more competitive in global markets.

The SFMS is modeled on the environmental management standards that ISO is currently developing in its series 14000 (see box). SFMS standards are developed and written by volunteer committees with representatives of government, industry, academia, special interest groups, consumer groups, and the public. SFMS standards are monitored and updated by committees when it is necessary to respond to new industry needs and technologies. SFMS standards are all voluntary, but they have frequently formed the basis for government legislation.

The SFMS standards were developed by a thirty-two member technical committee comprised of various stakeholder groups formed in 1994. The committee approved the final SFMS standards in June 1996, which were then approved by the Standards Council of Canada as national standards in October 1996. No forest management operation has yet been certified under this program.

In contrast to other certification approaches, the CSA's SFMS does not utilize independently established performance-based criteria (Crossley 1995, p.16). Instead, the program establishes general management system standards for forest operations that must be followed to qualify for certification.[3]

[3] The CSA prefers the word "registration" to describe the activity of the SFMS, as it involves the review of a system, and not the product itself. Organizations whose management system meets the requirements of the SFMS receive a certificate of registration. Nevertheless, the CSA has explicitly stated that the SFMS is an alternative to other timber certification schemes. Thus, this discussion uses the term certification to describe the awarding of the certificate of registration.

Background on ISO 14000

ISO, the International Organization for Standardization, is an international federation of national standardization bodies from some one hundred countries, who work together to set standards for a wide range of goods and services. The ISO system, on which the Canadian Standards Association has based its approach to certification, is a series of industry wide standards that are designed to facilitate trading by establishing global standards for goods and services. Compliance with these standards is strictly voluntary. Participating producers volunteer to be inspected and certified by certification bodies. Such standards are particularly useful in the exchange of goods where face to face transactions between buyer and seller are not possible because they provide assurance to the end purchaser that the ISO certified product will be suitable for their needs. One of the most noted among the ISO systems is the 9000 series of standards, which establish uniform product quality standards. ISO 9000 was the first series to design generic quality control standards for physical facilities, rather than for a product, and was the precursor for the continued expansion of such generic standards in the 14000 environmental series.

Following the 1992 UNCED conference and in response to the growing international concern regarding industry's environmental impacts, ISO began developing a series of standards relating to the environment, the 14000 Environmental Management Standard series. The ISO 14000 standards seek to create general environmental management standards that an organization in any industry could draw upon to better manage its environmental impacts and risks. Within the ISO 14000 series is 14001, which provides for the establishment and certification of an environmental management system for participating organizations. ISO audits participants in 14001 to determine if their environmental management practices will enable them to meet their stated environmental policy commitments. In 1995, the Standards Council of Canada and Standards Australia proposed that one of ISO's technical working groups (TC 207) develop standards for the application of ISO 14001 to the forest sector. The proposal was withdrawn, in part, because it represented a deviation from the generic, non-sector specific nature of the 14000 series (Hauselmann 1996), and was developed with little NGO participation. However, a year later, TC 207 agreed to create a formal Working Group, administered by Standards New Zealand, to develop a "bridging document" (rather than a standard). The bridging document would be designed to assist forest producers in applying the 14000 EMS standards to the forest sector.

Series 14000 certification is significantly different from an FSC accredited certification. ISO certification of forest managers only verifies that a company's forest management system is likely to meet the environmental goals set by the forest management company itself. Certification/auditing of the management system may be conducted by an independent third party, but it is not a requirement. The only requirements for compliance with a ISO 14001 EMS are that the company has an effective system in place to meet its own environmental goals, that it has a commitment to achieving compliance with applicable legislation/regulation, and that it demonstrates the capacity for continual improvement in meeting its environmental goals. Thus, under ISO 14001, two companies performing the same activity but with significantly different environmental performance could both comply with the EMS requirements. A forest company could be certified as compliant with ISO's standards for environmental management, yet apply any standard of forest management it chose, even if the result in the forest were clearly unsustainable. It is also notable that a company can obtain ISO certification even if its practices fail to comply with applicable environmental laws. Because of these limitations, environmental NGOs do not view ISO as a credible forest certification option.

Under this approach, the company seeking certification (termed a "forest management organization") develops and implements performance based standards developed for each defined forest area (DFA). The SFMS requires the company seeking certification to implement a generic environmental management system (EMS) that meets CSA's standard and audits to ensure that a management system incorporating a commitment to SFM is in place for each DFA.

Performance standards are to be based on the framework of six criteria established by the Canadian Council of Forest Ministers, which include: conservation of biological diversity; maintenance and enhancement of forest Ecosystem condition and productivity; conservation of soil and water resources; forest ecosystem contribution to global ecological cycles; multiple benefits to society; and accepting society's responsibility for sustainable development. The company must also undertake consultations with the local community to identify indicators for each criterion, and to develop long range performance goals and forecasts of forest conditions. However, the SFMS standards for the consultation process have been criticized by environmental groups on the basis that the company is not bound by the results of this consultation, and is free to determine its environmental goals and objectives.[4]

Once the company has established, as part of its EMS, goals and objectives for the DFA, the EMS must be designed and maintained to promote, monitor and assess continuously progress toward those goals and objectives. The EMS must provide for an implementation plan, periodic auditing, and adjustments to correct identified deficiencies.

Forest management organizations seeking certification must apply to have an audit of the EMS as applied to the DFA. Audits are to be performed by an independent registrar, accredited by the Standards Council of Canada to perform certification under the SFMS. The auditors will evaluate the EMS to determine:

- If the objectives of the EMS for each of the SFM criteria were established.
- If public consultations on the EMS for the DFA were held. [5]
- If the EMS is being implemented according to the plan for achieving the objectives.
- If progress toward achieving the objectives is being monitored and new knowledge is used to improve the EMS.
- If the EMS is achieving its defined performance requirements for the DFA.

A DFA can be certified for compliance with the SFMS only if all system and performance aspects of the EMS are met. A significant difference in the CSA

[4] The CSA claims that the output of the public participation process is binding upon the forest management organization, and that no one party has a right of veto over decisions reached through this process. However, support for such a binding process cannot be found within the text of the final standard. (CSA 1996, § 6.3).

[5] The auditor is to assess whether the public participation process allowed for input into the development and design of the EMS, and that all input was considered and responded to. However, the standards do not require that the objectives of the EMS be established through the public participation process, only that it "was involved" in setting the objective (CSA 1996, §§ 6.3 and 6.4).

SFMS is that an on-product ecolabel is not awarded. Instead, organizations will receive an official "certificate of registration," which can be used to inform consumers of the company's compliance with CSA forest management standards. The manner by which the certificate of registration may be communicated has not yet been clarified. It would likely provide for point of sale advertisement, although not in the form of an on-product label.

The principal limitation of the CSA approach is that it does not require certified organizations to implement forest management according to independently established performance based standards. Because of this, it has been severely criticized by Canadian environmental groups. Since CSA requirements focus on the extent to which the EMS measures impacts on the environment, rather than the actual health of the forest, critics argue that it cannot function as a real alternative to performance-based efforts such as those of SCS and the FSC. In addition, due to the absence of a chain of custody verification, system based certification initiatives, such as the CSA, cannot provide an adequate guarantee as to the environmental impacts associated with the production of the forest product sought by the consumer.

C. Examples of Government-Sponsored Initiatives

1. Austria

Austria was the first and last country to take unilateral action to reduce imports of tropical timber with the stated goal of promoting the use of sustainable management in tropical timber producing countries. In 1992, the Austrian parliament enacted legislation that required all tropical timber to be labeled "Made From Tropical Timber," while simultaneously imposing a 70% tariff increase on the importation of tropical timber, with tariff proceeds pre-designated for projects promoting sustainable forest management of tropical timber. The law also called for a voluntary ecolabel to identify the quality of the wood in terms of sustainability management.

This legislation was strongly denounced by a number of tropical timber producing countries, which argued that it was inconsistent with GATT, and threatened retaliatory action. In the face of this pressure, Austria repealed both the import duty and the mandatory labeling scheme. In its place, a voluntary ecolabeling program was enacted, and was expanded to include all timber, not just that of tropical origin. The government established an advisory board, including environmental NGOs, with the mission of developing principles and criteria for SFM certification.

2. Bolivia

A draft forestry law would establish a mandatory certification program for all Bolivian forests, utilizing a FSC based performance driven standard for measuring SFM. The proposed certification program would utilize a scorecard ecolabeling scheme, similar to the SCS label, with numerical scores in three areas: sustainable management; ecosystem health; and community benefit. An overall score from 1 to 5 would be awarded to the forest manager, with a score of 1 signifying non-certifiable and 5 indicating that the forest is "well managed."

D. Regional Initiatives

1. European Union Ecolabeling Criteria for Copying Paper

The ecolabel program of the European Community (EC) was established in March 1992 by the Commission of the European Communities (the Commission), as one element of a broader Community initiative to promote sustainable production and consumption. The present EC label primarily utilizes a "seal of approval" approach. The Commission has the discretion to decide, on a case by case basis, whether to include additional information on the label.

The stated objectives of the EC's ecolabel regime are: to promote the design, production, marketing, and use of products that have a reduced impact on the environment during their entire life cycle; to provide consumers with better information on the environmental impact of products; and to do so without compromising product or workers' safety, or significantly altering the properties which make a product fit for use. Ecolabels may be awarded only to those products produced in compliance with EC health, safety, and environmental requirements. Ecolabels shall not be awarded to products classified as dangerous by EC directives, or manufactured by processes likely to significantly harm humans or the environment.

a. Development of Criteria

Specific ecological criteria for awarding the ecolabel are defined according to product groups. The process for developing criteria for a particular product group is initiated upon the request of an independent and neutral competent body, as designated by each EC member, or the Commission. Specific ecological criteria, utilizing a cradle-to-grave approach, are to be developed by the European Commission through a consultative forum with the principal interest groups, including industry, consumer, and environmental organizations (the Ecolabel Forum). Draft criteria developed in this forum are then to be forwarded to a special review committee composed of Community representatives (the Regulatory Committee). If the committee rules favorably on the draft criteria, they may be adopted by the Commission. If the review committee notes objections, the Commission must then submit the criteria to the Council. If the Council does not act within three months the criteria shall be adopted by the Commission.

b. Application Process

Manufacturers or importers apply for an ecolabel through the competent body designated by the member in which the product is manufactured or first marketed. The competent body shall assess the product for compliance with both the general principles and the specific product group criteria. If the competent body decides that an ecolabel award is merited, it shall notify the Commission of its decision along with the results of the assessment. The Commission is then responsible for informing all EC members of such approval within five days of such notification. If after thirty days no objections have been received, the member may implement the award. If the Commission receives objections from members that cannot be resolved informally, then the Commission shall forward the decision to the Regulatory Committee, which will then report findings back to the Commission.

c. Appeals

If an application for an award is rejected, the competent body shall notify the applicant of the reasons for rejection and notify the Commission of such rejection. The Commission shall keep a register of all applications received, approved, and rejected by the competent bodies of each member. Competent bodies are to check the Commission registrar before assessing each application to determine if the product has been rejected for an ecolabel award by another member. If a member awards an ecolabel to a product previously rejected by another member, it must notify the Commission. The Commission must then bring the application before the Regulatory Committee for its opinion.

d. Proposed Revision

The EC is considering significant revisions to the ecolabeling scheme. Proposed changes include modification of the label to incorporate a graduated scorecard approach, noting key environmental aspects associated in the production of the product, with numerical scores for each aspect. The process of developing new ecolabel criteria would be streamlined through administration under a new European Ecolabel Organization (EEO), an independent organization composed of the competent bodies of each member. The EEO would also serve as a coordinating and harmonizing framework for the implementation of the ecolabel criteria.

e. Copying Paper Ecolabel Criteria

The Commission adopted this new ecolabel standard in July 1996. Applicants must meet production criteria in four areas:

- *Water pollution*, taking into account the size of chemical oxygen demand (COD) and absorbable organic halogens in the discharges from production;
- *Sulfur emissions*, based on the amount of sulfur (AOX) released into the air from the production of both pulp and pulp and paper;
- *Energy efficiency*, sets both energy consumption and purchase limits on a per unit basis for pulp and paper; and
- *Commitment to forest management*, must be able to produce declaration from the operators of the source forest reflecting a commitment to forest management according to the principals taken from the Helsinki Ministerial Conference on the Protection of Forests in Europe (the Helsinki Process).

Several non-EU governments, including the U.S., Canada, and Brazil, have complained that these criteria discriminate against foreign producers and act as a barrier to trade. The American Forest and Paper Association (AFPA) claims that the ecolabel criteria for AOX and COD emissions unfairly favors European producers because these pollutants are not currently measured in the US. Some environmentalists, on the other hand, are pleased to note that the EC label might provide an incentive for upward harmonization. The EC scheme's critics also argue the requirement that the producer be able to demonstrate that its paper/pulp has come from sources implementing principles of sustainable forest management discriminates against smaller, non-integrated mills, who often purchase their wood from multiple sources.

2. Nordic Countries

The Nordic Countries of Finland,

Norway, and Sweden have recently agreed to develop joint SFM standards and certification procedures for the region's forests. All three countries are in the process of testing criteria developed by the Swedish Society for Nature Conservation and WWF Sweden. Each country may develop additional criteria to address unique aspects and priorities of their forests.

3. African Timber Organization

The African Timber Organization (ATO) decided in 1993 to develop a certificate of origin, called the African Timber of Controlled Origin, in an effort to offset growing concern in Europe with unsustainably harvested tropical timber. Members agreed to develop forest management standards that could be used to evaluate forest operations. The ATO "green" label would carry one of two classifications: Category A - Plantations and "managed forests" according to guidelines developed by the International Tropical Timber Organization; or Category B - Forests under management. Criteria for Category B were subsequently developed in 1994, but focused almost exclusively on sustained yield and land tenure issues. No consideration was given to biodiversity, indigenous populations, or other environmental impacts associated with timber extraction. These principles and criteria will now undergo testing in certain ATO countries.

E. International Policy Discussions

The loss and degradation of the world's forests has received considerable attention at the international level over the past ten years. There have been extensive discussions on the underlying causes of deforestation and the policy options for preventing future forest loss. A major effort of the 1980s was the Tropical Forest Action Plan (TFAP), coordinated by FAO in partnership with the World Bank, the U.N. Development Programme, and the World Resources Institute. Efforts to negotiate an international convention on forests during the period leading up to the 1992 Rio Earth Summit led instead to agreement on the Rio Forest Principles, a set of non-binding principles on the management, conservation and sustainable development of all types of forests.

In 1995, the U.N. Commission on Sustainable Development, established to monitor the implementation of the Rio agreements, established a special Inter-Governmental Panel on Forests (IPF), which is presently scheduled to hold its final meeting in February 1996. At the 1996 meeting of the Conference of the Parties to the Convention on Biological Diversity, governments adopted a preliminary scientific work program on forests, and cited the need to wait for the outcome of the IPF before taking further action. Other forums and instruments undertaking or considering relevant activities include the International Tropical Timber Trade Agreement (ITTA) and the Convention on International Trade in Endangered Species (CITES).

The implementation of sustainable forest management (SFM) practices has been promoted in international forums as a principal means of curbing deforestation and protecting forest ecosystems. The guiding objective of the Rio Forest Principles, for example, is to contribute to the "management, conservation and sustainable development of forests and to provide for their multiple and complementary functions and uses" (Preamble, & (b)). Both the 1983

and the renegotiated 1994 ITTA identify sustainable management of tropical forests as a goal; and consumer countries have also made a non-binding commitment to sustainable management of their own forests by 2000.

Defining SFM in sufficient detail is an essential prerequisite for achieving it, and for implementing economic incentives to encourage it, including ecolabeling schemes. So far, governments have been able to agree only on very general definitions of SFM at the international level.[6] A number of international discussions, at both the political and technical levels, have sought to elaborate more detailed definitions of SFM that could be put into operation in various regions or types of forest. These include:

- The Helsinki Declaration, the 1993 outcome of a series of Ministerial Conferences on Protection of Forests in Europe, in which European governments sought to develop guidelines for implementing the Rio agreements' requirements relating to forests (Nollkaemper, in press);
- The Santiago Statement on Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests, issued in 1995 by the Working Group on Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests (the "Montreal group"), comprising Australia, Canada, Chile, China, Japan, Korea, Mexico, New Zealand, Russia and the United States, which together contain about 90% of the world's temperate and boreal forests (Nollkaemper, in press);
- The Tarapoto Proposal of the Regional Workshop on the Definition of Criteria and Indicators For Sustainability of Amazonian Forests, held in Tarapoto, Peru in 1995, involving experts and government representatives from the Parties to the Amazon Cooperation Treaty, comprising Bolivia, Brazil, Colombia, Peru, Suriname and Venezuela; and
- The Report on the FAO/ITTO Expert Consultation on the Harmonization Of Criteria and Indicators for Sustainable Forest Management, held in Rome, Italy in 1995.

In such international discussions, certification and labeling are receiving increasing attention. The terms of reference established by the CSD for the IPF include the following point under "trade and environment relating to forest goods and services":

> Examine relevant factors affecting trade in forest products and other forest-trade issues in an integrated and holistic approach that promotes a supportive relationship between trade and environment. In this connection, identify opportunities and recommend measures for improving market access for forest products on a

[6] The Rio Forest Principles, for example, provide that "[f]orest resources and forest lands should be sustainably managed to meet the social, economic, ecological, cultural and spiritual human needs of present and future generations. These needs are for forest products and services, such as wood and wood products, water, food, fodder, medicine, fuel, shelter, employment, recreation, habitats for wildlife, landscape diversity, carbon sinks and reservoirs, and for other forest products. Appropriate measures should be taken to protect forests against harmful effects of pollution, including air-borne pollution, fires, pests and diseases in order to maintain their full multiple value" (2(b)).

> non-discriminatory basis, examine the issue of voluntary certification and labeling of forest products to contribute to a better understanding of the role of voluntary certification with regard to the sustainable management of forests including the impact of certification on developing countries.

Additionally, Australia hosted an International Conference on Certification and Labeling of Products from Sustainably Managed Forests, in Brisbane, Australia from 27-30 May 1996. Subsequently, a joint initiative by Germany and Indonesia led to a meeting of an International Experts Working Group on Trade, Labeling of Forest Products and Certification of Sustainable Forest Management, held on 12-16 August 1996 in Bonn. The workshop produced a number of recommendations (International Experts Working Group 1996).

III. The Agreement on Technical Barriers to Trade and Ecolabeling Initiatives

A number of trade-related concerns have been raised regarding ecolabeling in general and ecolabeling of timber in particular.[7] These include the fear that ecolabeling will be used as a disguised protectionist measure and discriminate against imported products. There are also concerns that national or regional criteria may work to the advantage of domestic or regional producers, even absent protectionist motivations, because the criteria were developed on the basis of the specific conditions in that region. For example, European standards that penalize harvesting from old growth forests will likely work in favor of European producers and against many foreign producers, because Europe has almost no old-growth forest remaining, in contrast to other timber-producing regions (Nollkaemper, in press, at n. 61). In addition, the development and implementation of SFM, certification and labeling all impose financial costs and require technical expertise, which are likely to be less available to developing country producers as compared to those in developed countries. Finally, some commentators also argue that certification and ecolabeling could, if structured identically for all types of producers, work unfairly to the detriment of small producers, each of whom will be obliged to assume the same fixed costs as larger competitors (International Experts Working Group 1996).

The Committee on Trade and

[7] Ecolabeling and certification, to the extent that they affect imported products, can be characterized as trade-related environmental measures (TREMs). Among the range of TREMs available, voluntary ecolabeling is relatively unintrusive; nevertheless, ecolabeling programs have excited significant opposition and hostility. Yet, in the timber trade, more drastic measures have been proposed and used. For example, a number of countries have maintained bans or quotas on the export of raw logs. Others have proposed bans on the import of tropical timber (Nollkaemper, in press).

Environment (CTE) of the World Trade Organization (WTO) has ecolabeling on its agenda. It recently presented a report of its first two years of work for the WTO Ministerial Conference in Singapore. The report noted that "[w]ell-designed eco-labeling schemes/programmes can be effective instruments of environmental policy to encourage the development of an environmentally-conscious consumer public." It also noted that ecolabeling schemes/programmes "have raised, in certain cases, significant concerns about their possible trade effects" (WTO/CTE 1996, ¶¶ 183-186). The CTE could reach no agreement on the legal relationship between WTO member obligations and voluntary ecolabeling schemes. It did, however, agree that the development of all ecolabeling schemes, including voluntary ones, should be adequately transparent (*Ibid.*).

Discussions of the relationship between WTO rules and ecolabeling have centered on the Agreement on Technical Barriers to Trade (the TBT Agreement). The TBT Agreement is one of the Agreements Establishing the World Trade Organization (WTO Agreements), which were concluded in the Uruguay Round of negotiations of the General Agreement on Tariffs and Trade (GATT). As of November 1996, the WTO had 128 members.

In addition to the TBT Agreement, the GATT 1994 — that is, the provisions of the original GATT Agreement as incorporated into the 1994 WTO Agreements — might apply to ecolabeling schemes. It is also possible that the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) could affect ecolabeling schemes. However, this paper addresses only the TBT Agreement, which is the WTO Agreement likely to have the most significant impact.

A. Objectives and Scope of the TBT Agreement

The TBT Agreement is generally understood to have two main objectives. First, it seeks to ensure that WTO members do not use technical regulations and standards as disguised protectionist measures to protect domestic industries from foreign competition. Second, the TBT Agreement aims to reduce the extent to which technical regulations and standards operate as barriers to market access, primarily by encouraging their harmonization. Among other issues, these harmonization efforts address obstacles to international trade occasioned by the existence of numerous, sometimes incompatible, disciplines in various countries.

These objectives should, however, be considered in context. The preambular language to the TBT Agreement explicitly states that "no country should be prevented from taking measures necessary to ensure…the protection of human, animal or plant life or health, [or] of the environment…at the levels it considers appropriate." Thus, the TBT's objectives are not superior to legitimate environmental policies of member governments; they simply impose some constraints upon how these policies can be pursued. Environmental protection is consistent with, even protected by, the TBT Agreement.

The TBT Agreement creates obligations for each of two categories of disciplines: technical regulations and standards. A "technical regulation" establishes mandatory requirements for

products or related processes and production methods (PPMs). A "standard," in contrast, establishes voluntary requirements for products or related processes and production methods (PPMs). Both regulations and standards may also relate, either in whole or in part, to "terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method."[8]

The TBT Agreement, including its Code of Good Practice for the Preparation, Adoption and Application of Standards (the Code) applies to voluntary labeling schemes in two different ways, depending on the nature of the body that is setting the standards. Generally, where a central government body of a WTO member is setting standards, the WTO member shall "ensure" that the body accepts and complies with the obligations. If a standard-setting body is either a local government or a non-governmental body within a WTO member state's territory, the member shall take "such reasonable measures as may be available" to ensure compliance. In addition, members shall take such reasonable measures as may be available to them to ensure compliance of regional standard setting bodies of which they or one or more bodies within their territories are members.

In other words, the TBT Agreement, including its Code, applies directly to central government standard setting bodies, while it reaches private and other governmental standard setting bodies indirectly through their central governments. Thus, the impact of the TBT Agreement may vary depending principally on the level of central-government involvement. The precise degree of involvement that triggers direct application of the TBT Agreement, including the Code, to the labeling scheme is not clear.

A "central government body" is defined as the "[C]entral government, its ministries and departments *or any body subject to the control* of the central government in respect of the activity in question" (emphasis added, Annex 1, ¶ 6). The critical question, then, is what constitutes central governmental "control" of the standard-setting process under the Agreement. The term is not defined, and no guidance can be gleaned from interpretation of the term as used in other WTO Agreements because none exists. However, U.S. national law may offer some useful tests.

In the United States, the Supreme Court has analyzed when an entity is controlled by the federal government as a matter of U.S. law. Central issues appear to be whether: the body is acting for the government (i.e., performing a traditional government function) (*San Francisco Arts & Athletics v. U.S. Olympic Committee*); government officials have decisional authority for the entity (e.g., a majority of the board of a corporation is composed of government officials or appointed by them) (*Pennsylvania v. Bd of Directors of City Trusts of Philadelphia*); or the entity depends upon a government benefit, financial or otherwise, to undertake the activity (*Regional Rail Cases*; *Edmonson v. Leesville Concrete Co.*). That the body is closely regulated, performs a public service, or is merely subsidized by the government is not enough (*Jackson v. Metro. Edison Co.*; *Olympic Committee*).

If the WTO dispute settlement

[8] The ambiguity of these definitions is discussed in depth below in part C(1).

system were to employ similar standards, they probably would not consider standardizing bodies developing ecolabeling programs to be under government control unless the government could dictate how the program runs, either through governmental or governmentally appointed management or because the program depends upon receipt of governmental benefits, such as financial support.

It is also unclear what degree of responsibility Member governments have to prompt private and local governmental standardizing bodies to comply with relevant provisions of the TBT Agreement. What does it mean for governments to be required to "take such reasonable measures as may be available to them"? The interpretation of that clause will also be the responsibility, in the final analysis, of the dispute settlement system of the WTO.

At least one panel has interpreted the same language — as it appears in a provision of the GATT — to require governments to take all available measures except those that are outside their "jurisdiction under the constitutional distribution of power" (US-Measures Affecting Alcoholic and Malt Beverages). In contrast, at least one other panel has interpreted "reasonable" to require only a balancing test, that the "consequences of . . . non-observance . . . for trade relations with other parties . . . be weighed against the domestic difficulties of securing observance" (Canada-Measures Affecting the Sale of Gold Coins).

In the absence of more definitive guidance, and given the growing opposition to ecolabeling in the international trade community, it seems possible that a fairly rigorous standard will be applied. That means that national governments could be required to take every constitutionally available measure to ensure that private standardizing bodies abide by the TBT Agreement and its Code of Good Practice.

Even if a Member takes reasonable measures, however, the Member could be found to have violated the requirements of the TBT Agreement if these measures do not effectively mitigate the negative trade effects private ecolabeling schemes have upon any other Members. The TBT Agreement apparently grants to Members the right to seek a remedy if "another Member does not achieve satisfactory results" when taking "reasonable measures" to ensure the compliance of private (as well as local governmental and regional) bodies with the obligations of the TBT Agreement (Article 14.4). Although no Member has relied upon this provision to date, and it could be interpreted differently, the provision seems to have been intended to provide a right to seek a remedy for Members whose "trade interests are significantly affected," by the failure of another Member to ensure that private standardizing bodies comply with the relevant provisions of the TBT Agreement.

In a successful "unsatisfactory results" claim, the challenged Member might compensate the affected Member for the consequences of the failure of the non-central governmental body to act consistently with the relevant provisions of the TBT Agreement, or the affected Member might be permitted to retaliate for the trade impairment by suspending concessions — even though the challenged Member did all that it constitutionally could do to minimize trade impairment caused by the private body. Such remedies would, in effect, make Members with constitutional systems of

government unavoidably liable for trade effects that they are incapable of preventing under their constitutions.[9] Ironically, such unavoidable liability is precisely what one might assume the "reasonable measures" provisions were intended to prevent.

In the United States, the free speech provisions of the First Amendment of the U.S. Constitution may limit the power of the federal government to restrict the use or content of environmental ecolabels. It is questionable, however, whether strong constraints on the U.S. government's ability to regulate ecolabeling claims is in the best interest of the environment in the long run. Such constraints might also apply to the government's ability to regulate industry labels, as the First Amendment might equally protect schemes developed through both business and environmental NGOs. Some claims made on labels by some businesses about their products could be misleading or confusing, and the environmental community would want the United States to be able to regulate the content of those labels as a result.

Still, it may be possible to have industrial labeling regulated while protecting third-party ecolabels from such governmental intrusion. "Commercial speech" can be more heavily regulated than "political speech." Third-party labels might be considered to be forms of political speech and, therefore, more substantially protected from government regulation than first and second-party "commercial" speech. The primary purpose of third-party labeling, arguably, is to promote environmental protection while that of first and second-party labels, arguably is to promote a commercial transaction. Supreme Court precedent suggests that courts might rely on this distinction to rule that third-party ecolabels should be treated as political speech while first and second-party labels should not (*Ohralik v. Ohio State Bar Assn.*). The law in this area, however, is uncertain.

Similarly, the consequences for third-party labeling if it is treated as commercial speech, are also unclear. On the one hand, Supreme Court decisions have promoted regulation of commercial speech that encourages clarification of misleading information rather than censorship of content (*Central Hudson Gas & Electric Corp. v. Public Service Comm. of N.Y.*). This suggests that regulatory bodies might only be able to demand more information be provided to the public in the event that an ecolabel is found to be misleading. Recent decisions seem to lend support for such an interpretation (Tarsney 1994). However, Supreme Court jurisprudence on the protection to be afforded commercial speech is not sufficiently clear to preclude the possibility that the US could constitutionally limit the content of ecolabels to ensure that ecolabeling does not run afoul of TBT

[9] If so interpreted, this provision would also be remarkable for the increased scope that it would provide for challenges to measures that, while not inconsistent with the terms of the WTO Agreements, nonetheless, impair trading rights under these Agreements. Until now, such "nonviolation nullification and impairment" challenges have been based upon the negative effects of measures taken, not upon the failure of measures taken *to prevent* negative effects (such as the effects of the actions of private parties). This provision of the TBT Agreement, by providing a basis for the latter type of "failure to succeed" challenge, broaden the obligations of Members affirmatively to protect the rights of one another.

Agreement requirements.[10]

Furthermore, for the United States to regulate the content of ecolabels it would have to base its regulation on standards, and those standards, arguably, would have to comply with the TBT Agreement. This may be of little consequence for third-party labels. However, if a business could point to an internationally recognized standard as the basis for the environmental claim it makes in its label, the United States might have much greater difficulty regulating the content of the label.

B. Basic Requirements of the TBT Agreement

Article 4 of the TBT Agreement imposes the Code of Good Practice (the Code) on standard-setting bodies (either directly for central government standard setting bodies or indirectly for other bodies, as discussed above). The obligations imposed in the Code concern the process of creating and implementing standards themselves (as opposed to related processes, such as conformity assessment, discussed below) and the substantive content of these standards. Standards, it should be remembered are voluntary disciplines, as opposed to mandatory regulations. Under the Code standard-setting bodies must meet several obligations:

- Standardizing bodies must apply the most favoured nation (MFN) principle, which requires a government to treat like products of all WTO trading partners equally, and they must apply the principle of national treatment (NT), under which imported products must be treated no less favorably than like domestic products. In contrast to the GATT 1994, these obligations are not explicitly tempered by the environmental exceptions of Article XX;[11]

[10] Compare *City of Cincinnati v. Discovery Network* and *Fred H. Edenfield v. Scott Fane* with *United States v. Edge Broadcasting* and *Board of Trustees of the State University of New York v. Todd Fox.*

[11] The question of whether the Article XX exceptions in GATT 1994 would apply to the TBT Agreement did not arise in formal negotiations, and informal discussions among negotiators were inconclusive. GATT's Article XX states that it applies to "this Agreement." As of 1994 the GATT became part of the Agreement establishing the WTO, so the language could be read to mean that Article XX applies to all of the Agreement. The GATT, however, is its own agreement, so the reach of Article XX may be limited to the GATT as intended by its drafters. Yet, the preamble of the TBT Agreement includes language similar to language found in Article XX, providing that WTO members "recogniz[e] that no country should be prevented from taking measures necessary to ensure ... the protection of ... the environment ... at the levels it considers appropriate ...."

While not conclusive, this language lends credence to the position that the TBT Agreement could be interpreted to provide for application of the Article XX exceptions. However, the General Interpretive Note to Annex 1A of the Final Act provides that the TBT Agreement prevails in the event of a conflict with the GATT 1994, suggesting that the Article XX exceptions could not be "read into" the TBT Agreement. In addition, at least one other WTO Agreement explicitly provides for the application of the GATT 1994 exceptions to it (the Agreement on Trade-Related Investment Measures or TRIMs). That the Membership explicitly imported the exceptions into one agreement suggests that they may have consciously chosen not to import them into the others. However, the TRIMs Agreement is unusual among the WTO agreements in that it incorporates by reference

- Standards must not be unnecessary obstacles to trade;

- Standards must be consistent with international standards unless this would be ineffective or inappropriate;

- Standardizing bodies must pursue national consensus on the content of standards;

- Standardizing bodies must participate in preparation of international standards by relevant standardizing bodies, working through a single national delegation wherever possible;

- Standardizing bodies must avoid duplicative and overlapping standards;

- Standardizing bodies must publish information about their activities, and consider comments made by interested parties on proposed standards; and

- Standardizing bodies must use performance-related standards where appropriate.

The TBT Agreement also imposes obligations for related bodies and activities beyond those for standards and standard-setting bodies presented in the Code.

- Bodies that ensure that specific products conform with standards must meet a variety of obligations similar to those imposed upon standards-creating bodies in the Code, including: ensurance of equal treatment, avoidance of unnecessary obstacles to trade, pursuit of harmonization and reciprocity of procedures, and provision of certain procedural rights to those applying for certification of product conformity (Articles 5-9);

- Members must provide for information sharing through establishment of national focal points for regulations and government standards and take reasonable measures with respect to other standards (Article 10); and

- Members must make certain efforts to assist other members, especially developing countries, through advice and technical assistance (Article 11).

In addition, the TBT Agreement provides for special and differential treatment of developing countries through clauses modifying or softening the above-mentioned requirements in the Code and the rest of the TBT Agreement (Article 12).

C. Key Issues

As discussed, the focus of recent discussion on trade policy and ecolabeling has revolved around the TBT Agreement. Timber labeling schemes to date have primarily been voluntary and non-governmental. Thus, this analysis emphasizes the implications of the TBT Agreement's provisions regarding *standards* (which are voluntary) which are developed and applied by non-governmental bodies. It does not discuss ecolabeling *regulations* (which are mandatory and imposed by governmental bodies) because it appears unlikely that such regulations will be proposed seriously in the foreseeable future.

1. The Most Favoured Nation (MFN) and National Treatment (NT) Principles: Process and Production

many provisions from the GATT.

Method (PPM) Distinctions

The most problematic of the TBT Agreement's standards may be the MFN and NT obligations (Annex III, ¶ D). On their face, these requirements would not seem to raise concerns. Distinctions among timber products that provide for labeling according to certain criteria for determining whether or not a product was produced sustainably need not involve discrimination on the basis of the product's country of origin. (That is, criteria for labeling can be applied according to the manner of production of a specific product or shipment, or according to the practices of the producing firm, without reference to the national policies or laws of the country of origin).

Nevertheless, a problem may arise from the way in which the analogous principles of MFN and NT found in the GATT have been interpreted in the past. Neither the MFN nor the NT obligations in the Code (or any other provisions of the TBT Agreement) have been interpreted by a WTO Dispute Settlement panel or by a GATT panel. But the almost identical obligations found in the GATT have been interpreted by GATT and WTO panels.[12]

Several past panels have concluded that the MFN and NT standards do not allow distinctions to be made between products based upon non-product-related criteria. This would include distinctions based upon aspects of the process or method by which those products were produced (known as process and production methods, or PPM) that are unrelated to characteristics of the product itself.[13]

A bar against using non-product-related criteria would have significant impacts on the ecolabeling of forest products. All labels based upon life cycle analysis and many single issue labels use non-product related criteria. A salient example would be labeling concerning the management system of the forest from which a wood product originated. These types of schemes would come into conflict with the TBT Agreement's MFN and NT obligations, if these obligations are interpreted in the way they have been in past GATT decisions, and as some countries advocate.

The language of the TBT Agreement, unlike that of the GATT, explicitly encompasses production and process methods (PPMs), [14] in its definition of the term "standard." This language could be

[12] The wording of the MFN and NT obligations in the TBT Agreement differs slightly from that in the GATT, but not in any obviously significant way.

[13] This approach might permit PPM-based distinctions that relate to product characteristics. For example, a standard may make distinctions between products according to the production method, if the different method results in safer product characteristics. The PPM regulation would then provide a short hand means for assessing the safety of the product. In such a case, a standard would be using a *product related* PPM distinction as a proxy for distinguishing between physical characteristics of the products themselves.

[14] The TBT Agreement defines "standard" as a "[d]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products *or related processes and production methods*, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, *marking or labeling requirements as they apply to a product, process or production methods*." Art. 1, Ann.1. (Emphasis added).

read to imply that some non-product-related PPMs would be acceptable under the TBT rules. However, a debate is currently underway among WTO Members on this question, revolving around the scope of the PPM coverage that can be read into the definition.

At least one country currently argues that the definition brings non-product-related PPMs within the scope of the TBT Agreement. This argument points to the second sentence of the TBT Agreement's definition which specifically mentions standards that "include or deal exclusively with ... labeling requirements as they apply to a product, process or production method."

Other countries, including many developing countries, however, argue that non-product related PPM standards are not covered. This contrary view has textual support in the language of the preceding sentence in the definition, which states that "standard" includes rules for "products *or related* processes and production methods." This initial sentence of the definition limits the TBT Agreement's application only to requirements for products and *related* PPMs, it does not include non-product-related PPMs as standards. Under this argument, it is unreasonable to suppose that the second sentence of the definition should make the Agreement applicable to a broader class of requirements for labeling and other auxiliary concerns than the class of requirements the first sentence makes applicable to matters more directly connected to the product. Thus, the second sentence's reference to PPMs is simply a shorthand for the formulation already expressed in the first sentence.

The debate does not seem to be fueled by this sort of textual or policy analysis however. Rather, the European Community believes that such measures are permissible under the GATT, and therefore, does not want them to be covered by the TBT Agreement, so as to ensure that its Members have the right to use them. The developing countries pushing for the latter interpretation, on the other hand, seem to believe that simply recognizing that non-product-related criteria are covered by the TBT Agreement will implicitly legitimize their use, a result they oppose. The unexpressed implication is that they consider such measures to be GATT-inconsistent, presumably relying on the line of past GATT panel decisions ruling that non-product-related criteria for distinguishing among products are in violation of the MFN and NT rules.

There is one important exception to that line of GATT panel decisions however. The first Tuna/Dolphin panel looked at the MFN obligation with respect to a voluntary, governmental ecolabeling scheme and concluded that the scheme did not violate GATT's MFN obligation. While the reasoning of the panel was obscure, it seemed to hinge on the fact that access to the label was not based upon the country of origin of the product. A similarly favorable conclusion as to the consistency of the program with NT (which was not raised) might be predicted based upon this decision.

It must be emphasized, however, that the Tuna/Dolphin I panel's interpretation of the MFN obligation conflicts with the interpretation offered by several other GATT panels which identified the product-relatedness of the regulation as problematic irrespective of whether the regulation distinguished between products based on country of origin. Furthermore, this decision came before the conclusion of the Uruguay

Round negotiations and the adoption of the present TBT Agreement, which specifically regulates at least some voluntary ecolabeling schemes, and before ecolabeling became a politically sensitive issue in the WTO. Considering these facts in light of a growing concern among developing countries with respect to ecolabeling and a growing insistence of the U.S. business community that ecolabeling schemes be disciplined (prompted largely by the European Community's paper products labeling decision discussed in Part II above), it would be unwise to rely heavily upon the Tuna/Dolphin I ruling.

The WTO's Committee on Trade and Environment (CTE) has discussed the issue of whether non-product-related standards may be legitimate criteria for ecolabels. Developing countries are almost uniformly opposed. Canada tabled a proposal that would have restricted the use of such standards in ecolabels to those developed through an international process (apparently intended to refer to standards developed by ISO, discussed above). But even this very restrictive proposal was soundly rejected by a majority of the CTE. The WTO's view of ecolabels is likely to be quite different from the environmental community's tendency to see them as non-intrusive, pro-market tools.

The blanket opposition to non-product-related distinctions, including PPM-based distinctions, exhibited in GATT Panel decisions and elsewhere is untenable from the perspective of environmental policy. Distinguishing among products on the basis of how they are produced and disposed of will be an essential part of a market-based shift to sustainable production. In fact, the international community has already agreed in multilateral environmental agreements that PPMs may sometimes be exactly the right basis for distinguishing among products in order to accomplish environmental goals through trade-related measures. For example, the Montreal Protocol provides for consideration of a ban by Protocol Parties of imports of products produced with, but not containing, controlled substances, if they determine that such a ban is feasible (Goldberg 1995, p. 65).

The assumption that non-product-related criteria, including PPM-based criteria, are violations per se of GATT/WTO rules is equally untenable as a matter of trade policy. The category of standards and regulations based on non-product-related criteria is a bad proxy for identifying and eliminating protectionist measures, which is the main underlying objective of the NT principles of the GATT and the TBT Agreement. For example, the Convention on International Trade in Endangered Species (CITES), with over 126 Parties, places species of animals and plants into its appendices according to biological determinations of the definition and range of the relevant species, subspecies, or population, and its status in terms of population size, viability, and degree of threat from trade. These are indisputably non-product-related-criteria, in the sense that they are not directly linked to specific characteristics of the wildlife products themselves. Commercial trade in specimens of a species listed in a CITES appendix is limited or banned, while trade in specimens of related, unlisted species is unaffected. Yet the listing of animals is not motivated by protectionist impulses, nor do they operate so as to protect domestic industries.

On the contrary, the classic wildlife specimen whose trade is banned under

CITES is valuable precisely because it is unique and there are no domestic substitutes in the importing country. In the traditional importing countries, there are no competing manufacturers of ivory, rhinoceros horn, vicuña wool, tiger skins, or leopard pelts. A challenge to a CITES trade ban based upon the notion that non-product-related criteria violate the principle of national treatment would be harmful from an environmental perspective, and both unnecessary and erroneous from a trade perspective.

In fact, in another area the WTO Agreements themselves explicitly provide that non-product related criteria are not only *permissible,* they are *required.* The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) requires WTO members to extend legal protection to a range of intellectual property rights (IPR), including copyrights, patents, trademarks and geographic indications. They must extend this protection to rights relating to products from both domestic and foreign producers. Protection includes measures to prevent the unauthorized use by non-rights-holders of patented inventions, trademarks, and geographic indications.

Intellectual property rights are legal mechanisms specifically designed to make distinctions between like products according to non-product related criteria (von Moltke, 1996). Under the TRIPS Agreement the WTO member state must establish remedies to prevent infringements of remedies of IPRs. For example, the Member must establish a procedure by which a company holding the utility patent for a pharmaceutical can seek to legally block a competing firm from selling that pharmaceutical. The products offered by the patent holding firm and its competitor may be absolutely identical, but the non-product-related distinction that one product was produced by the patent holder, and the other product was produced by a competitor, mandates that the two products to be treated differently under the law.

Appellations of origin, termed geographic indications under the TRIPs Agreement, are a good example for the context of ecolabeling. Appellations of origin are terms associated with certain geographic regions that can only be used by producers situated in those regions, and typically only by producers using approved traditional techniques. For example, the appellation of Bordeaux can be used to identify wine only if it comes from the Bordeaux region of France. Similar wines from other regions, whatever their quality, may not be called Bordeaux.

Similarly, trademarks give the owner the right to use a distinctive, recognizable mark or name to distinguish its products from those of its competitors. Protection of trademarks requires that like products are distinguished solely on the basis of who produced them. The distinction is not based upon characteristics of the products themselves. In fact, the asserted rationale for discriminatory treatment is strongest precisely when the "counterfeit" and original are most similar. WTO members must implement these distinctions at the border with respect to goods intended for import. Specifically, Article 51 provides that members shall adopt procedures to enable a right holder to request customs authorities to seize goods that infringe upon a trademark.

In sum, non-product related criteria for environmental measures, if challenged on the basis of trade policy, must be evaluated case by case, regardless of whether they involve PPMs, to determine whether they are motivated by protectionist

intent or constitute arbitrary discrimination.

2. Unnecessary Obstacles to International Trade

Under the Code, standards should not be nor be intended to be unnecessary obstacles to international trade (Annex III, ¶ E). The concern here is how the concept "unnecessary obstacle" will be interpreted. Although it is not defined in the Code for standards, it is defined for regulations (mandatory measures) in Article 2.2 of the TBT Agreement. That article defines as an "unnecessary obstacle" any regulation that is more trade-restrictive than necessary to achieve a "legitimate objective," such as the environmental protection objective of a labeling scheme (environmental protection is specifically listed as a legitimate objective in the Article).

It is likely that this definition will be imported into the Code as well. This would be consistent with established principles of construction for legal texts. Furthermore, this definition appears to be derived from prior interpretations of similar GATT language. Past GATT decisions have interpreted the term "necessity" under GATT's Article XX environmental exceptions to mean "least GATT inconsistent." This makes it appear all the more likely that the Membership intended for this definition to be applicable not only to Article 2, but the Code as well.

According to this interpretation developed by past panels, a standard would be "necessary" only if no less trade restrictive measure "reasonably" could be employed to achieve its goals (Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes; United States-Restrictions on Imports of Tuna). Since ecolabeling is arguably the least restrictive means by which to promote a form of environmental protection, this principle should not pose a threat to ecolabeling *per se*. However, this "least trade-restrictive" rule could provide a basis for challenging particular standards in ecolabeling schemes as more burdensome than alternative standards, especially if WTO-recognized international standard-setting bodies (like ISO) have established competing standards. In fact, as discussed below, the Code explicitly calls for standardizing bodies to make every effort to avoid duplication and overlap.

The critical issue will likely be the identity of the decision-maker granted the authority to determine whether a "reasonable" alternative is available. WTO panels have shown little deference to governments in this respect, however, and little interpretive discretion would be granted to Members, let alone private bodies, if future panels followed past GATT approaches.

3. Consistency with International Standards

The Code calls for the use of relevant international standards unless their use would be "ineffective" or "inappropriate" (Annex III, ¶ F). There are no panel decisions to offer any guidance as to the possible interpretations of "ineffective" or "inappropriate," or for the standard of review for determining compliance with this obligation, but it is readily apparent that narrow interpretations of either term could leave little leeway for inconsistent standards.

Again, a critical question is whether interpretation of these terms is to be left to the standardizing body or is within the competence of WTO dispute settlement panels. If the latter answer prevails, this provision could interfere with the setting of standards by private ecolabeling programs that are more stringent or merely different from international standards. Dispute settlement panels could establish narrow interpretations of "ineffective" and "inappropriate," and make it extremely difficult for ecolabeling schemes to use standards inconsistent with internationally established ones.

4. National Consensus, Avoidance of Duplication and Overlap, and Consideration of Comments Made by Interested Parties

The Code further constrains the standard-setting process by promoting the harmonization of standards in three additional ways (Annex III, ¶s H, L, N). It calls upon standardizing bodies to:

- Avoid duplicating the work of other standardizing bodies;
- "[M]ake every effort" to achieve national consensus with regard to the content of their standards; and
- "[T]ake into account" the comments of interested parties before implementing standards (*see* Notice and Comment discussion below).

None of these provisions seem especially rigid, leaving discretion to standardizing bodies when complying with them. Nevertheless, they press for national consistency of standards and the avoidance of multiple labeling schemes, and in practice the harmonization process almost always tends toward the lowest common denominator.

5. Use of Performance Related Standards

The Code calls for standardizing bodies to use performance-related standards, as opposed to "design or descriptive" standards "wherever appropriate" (Annex III, ¶ I). Further research is required to assess the implications of this provision for ecolabeling.

6. Procedural Requirements for Standard Setting

The procedural rules for standard-setting delineated in the Code:

- Demand limited participation by individual standardizing bodies in the development of international standards;
- Impose notification and publication obligations upon these bodies; and
- Require standardizing bodies to adequately provide for consultation on the operations of the Code and to take these consultations seriously.

a. Limiting Participation in the Development of International Standards

Where an international standardizing body is planning to establish standards, the Code demands that all interested standardizing bodies in a Member's territory be represented, by one delegation "whenever possible" (Annex 3, ¶ G). Consensus certainly is not a new idea to the environmental community. However, allowing no more than one delegation per country raises the possibility of having to achieve consensus not just among relatively

like-minded environmental organizations, but between the environmental and business communities. This rule could potentially force standardizing bodies with fundamentally inconsistent positions to participate in negotiation of international standards through a shared delegation. This would surely affect the nature of the debate in these international standardizing bodies. Whether the effect would be negative from the perspective of environmentalists, however, is unclear.

b. Notice and Comment and Publication Requirements

The Code requires that standardizing bodies publish every six months a work program discussing their standard-setting activities, including translations of the titles of specific draft standards upon request (Annex 3, ¶ J). In addition, it demands that they provide interested parties sixty days notice prior to establishing standards and the opportunity to comment upon them (Annex 3, ¶ L). Finally, it states that standardizing bodies must promptly publish any standards once they have established them (Annex 3, ¶ O).

As discussed above, the notice and comment provisions require standardizing bodies to take into consideration the comments of interested parties. Other than this single requirement which could affect the substantive content of standards, all of the ramifications of the notice and comment provisions as well as publication provisions appear financial. Publishing a work program, notifying interested parties, and publishing final standards could be an expensive undertaking, depending upon the extent of these obligations.

c. Consultations on the Operation of the Code

Standardizing bodies are expected to "afford sympathetic consideration to, and adequate opportunity for, consultation" with other standardizing bodies, concerning the operation of the Code (Annex 3, ¶ Q). Essentially, this provision appears to require standardizing bodies to be transparent about their work program and processes, facilitate consultation with other standardizing bodies, and consider objections raised by them concerning compliance with Code obligations. The significance of this provision depends in part on the interpretation of "sympathetic consideration." (Potentially, this provision could require standardizing bodies to consider abiding by the interpretations of Code obligations recognized by other standardizing bodies.) It is too early to say how this provision might be implemented. In any case, the requirement to provide "adequate opportunity" for consultation poses another potential financial problem for private ecolabeling programs with limited financial resources.

7. Conformity Assessment Procedures

In addition to regulating the development and use of standards themselves, the TBT Agreement, in Articles 5-9, imposes obligations for the development and application of conformity assessment procedures for these standards. Conformity assessment procedures are used to determine whether standards have been met. The treatment that they receive in the TBT Agreement is significant because, as a practical matter, a standard can be no more rigorous than the methods used to ensure conformity with it. The requirements for conformity assessment, like those for standards, apply directly to bodies controlled by the central governments of Members.

Similarly, Members are once again obliged to take "reasonable measures" to ensure the compliance of international, regional, local governmental, and private bodies.[15] The analysis offered above as to what may be deemed to constitute "reasonable measures" is also applicable here.

a. Most-Favored Nation & National Treatment

The MFN and NT obligations for conformity assessment procedures (Article 5.1.1) are much the same as those for standards, discussed above. Essentially the same analysis applies. One distinction bears noting however. Unlike the MFN and NT obligations for standards, these obligations are qualified to apply only to conformity assessment undertaken "in a comparable situation." The meaning of the phrase "in a comparable situation" is not explained, but whatever the exact interpretation, it allows for some variation of assessment procedures in light of particular circumstances.

b. Unnecessary Obstacles to Trade

Here again, the obligation for conformity assessment procedures (Article 5.1.2) is much the same as for standards themselves. The analysis offered above of how "necessity" is likely to be interpreted and the discussion of the importance of who enjoys the right to determine what is "necessary" apply with equal force here. However, the "unnecessary obstacle" requirement may be more onerous as applied to conformity assessment.

This provision, like that in the Code, does not include the definition of "unnecessary obstacle" included in Article 2 on regulations (a barrier more trade restrictive than necessary to fulfill a legitimate objective). However, unlike the Code, Article 5 gives an example of a situation in which conformity assessment procedures constitute unnecessary obstacles: when they are more strict than necessary to give "adequate confidence" that the product conforms. This seems to reflect a deliberate decision not to have the Article 2 definition apply to conformity assessment procedures. Instead, this example is offered, as a basis for interpretation, in place of a full-blown definition. This is significant, first, because this example leaves room for finding procedures to be unnecessary obstacles to trade for other, additional reasons not mentioned in the Agreement. Second, an overly inclusive interpretation of "adequate" would diminish the strength of the "adequate confidence" standard. This could impair the ability of Members to ensure compliance with the standards they set for products and the methods by which they are produced.

c. Information Gathering and Control

The information demanded of applicants must be limited to what is necessary to the assessment process (Article 5.2.3). In addition, the confidentiality of such information must be protected as for domestic products and also so as to ensure "that legitimate commercial interests are protected" (Article 5.2.4).

The effects of these requirements are unclear. The impact of the first depends upon the interpretation given to "necessary" and must remain uncertain at this point. If the term is narrowly interpreted, it might

[15] Articles 7-9 establish these obligations.

make conformity assessment more difficult by forcing conformity assessment bodies to use less efficient means to obtain relevant information rather than demanding it directly of the applicant.

The confidentiality requirements may pose a threat to ecolabeling by precluding access to information for private (and even local government) conformity assessment bodies. For instance, "protection of legitimate commercial interests" might be understood to preclude private bodies — as part of the public – from obtaining information that they need to determine whether a product or production method complies with their standards even though under domestic law that information would not be confidential. The national treatment obligation itself could pose a threat where domestic law limits access to information that is needed for proper assessments to be made.

d. Development of International Standards; Consistency and Inconsistency with Them

Pursuit of harmonization, a central precept of the TBT Agreement in general, motivates many of the provisions on conformity assessment. The methods relied upon are much the same as for harmonization of standards, but with some significant distinctions.

The TBT Agreement calls upon Members to develop and join international systems of conformity assessment, "wherever practicable" (Article 9.1). The exact meaning of this provision remains unclear, dependent upon the understanding of "practicability" that is adopted. In any case, this obligation poses no direct threat to ecolabeling schemes and the conformity assessment systems upon which they rely. Still, it promotes harmonization, and that, as discussed above, often tends to promote devolution to the least common denominator.

In addition, all conformity assessment bodies must participate to the limit of their resources in the development of international guides and recommendations for conformity assessment programs (Article 5.5). The related obligation to coordinate such participation through one national representative, imposed upon standardizing bodies, is not applied here however.

Similar to the requirement to apply internationally recognized standards unless they are ineffective or inappropriate, the TBT Agreement also demands the use of internationally recognized guides or recommendations as a basis for conformity assessment procedures, unless they are inappropriate. This requirement appears less strict than that for standards since it only calls for the use of international guides as a "basis" for procedures; it seems other factors can be considered as well. This is important, in part, because it allows ineffectiveness, which is not recognized as a basis for rejecting international guidance (as it is for standards) to be taken into consideration when determining whether to follow such international recommendations.[16]

Finally, where international

[16] The term "inappropriate" could be defined to encompass ineffectiveness. However, to maintain consistency with the use of the term earlier in the Agreement (where it is used in conjunction with the separate term "ineffective"), it may well not be.

guidance does not exist or is not followed, and the procedure may have a significant effect on trade, bodies must:

- Publish a notice to enable interested parties to become familiar with the proposed process (Article 5.6.1);

- Notify the Membership (this requirement applies only to central government bodies and local government bodies on the level directly below them)[17] (Article 5.6.2);

- Provide copies upon request;[18] (Article 5.6.3);

- Allow reasonable time for comments to be made, discuss these comments and take these comments and discussions into account;[19]

- In the event of an urgent problem (of safety, health, environment or national security) which precludes such prior notice and comment, fulfill the above obligations immediately after adoption of the procedure (Article 5.7);

- Ensure that all procedures are made available upon adoption to enable interested parties to become familiar with them (Article 5.8); and

- Allow a reasonable delay between adoption and application to allow producers time to adjust accordingly, unless an urgent problem precludes such a delay (Article 5.9).

None of these notice and comment requirements appears to pose a significant threat to ecolabeling schemes, but they all increase the costs of maintaining these schemes. As a result, they promote harmonization, not only by furthering communication, but also by making compliance with internationally recognized processes financially attractive.

e. Recognition of Conformity Assessments by other Bodies

Article 6 of the TBT Agreement calls upon bodies to recognize the results of conformity assessments undertaken by bodies in the territories of other Members. Members are also "encouraged" to be "willing" to enter into negotiations to conclude agreements for the mutual recognition of results. Such recognition could result in reduced levels of enforcement of standards upon which ecolabeling programs rely. However, the language of the Article appears to provide conformity assessment bodies with breathing room.

First, these bodies are called upon to recognize the assessments of others only "whenever possible" (Article 6.1). While the interpretation of this phrase will

[17] It is possible that requirements in addition to this one among those in this list do not apply to private bodies. The drafting of the Agreement is ambiguous. However, the interpretation offered here, treating all of the other requirements as applicable to private bodies, is reasonable and ensures that the full range of potential consequences are recognized.

[18] It is unclear whether this obligation demands provision of copies (1) to other Members exclusively and by all bodies, (2) to all corresponding conformity assessment bodies only (e.g., to private bodies by a private body, local governmental bodies by a local governmental body, etc.), or (3) something else.

[19] As with the above obligation to provide copies; it is unclear to whom this obligation applies.

determine the amount of flexibility it actually provides, its inclusion establishes, at least, a limited right to reject assessments made by others.

In addition, the obligation only applies if the body is "satisfied" that the procedures used by the other "offer an assurance of conformity with applicable . . . standards equivalent to their own procedures" (Article 6.1). What constitutes an "equivalent assurance" is an important question, but its answer is practicably, if not explicitly, left to the discretion of the reviewing conformity assessment body since it is the "satisfaction" of the reviewing body that is determinative. Therefore, this qualification of the obligation could provide substantial protection to ecolabeling programs. However, at the same time, by leaving the interpretation to the assessment body (rather than to the WTO dispute settlement system), this provision enables these bodies to recognize assessments that are not as effective as their own. Where a body is under financial pressure due to budgetary constraints, for instance, such an unfortunate decision might well occur.

Similarly, Article 6 recognizes that prior consultations may be "necessary" both to ensure the adequate and enduring nature of the procedures used and that recognition is limited only to assessments made by designated bodies (Article 6.1). In the event that negotiations are deemed "necessary," the Article leaves it to the interested bodies to come to a "mutually satisfactory understanding," again making the judgments of assessment bodies definitive, for better or worse. Under what circumstances such consultations would be "necessary," and who decides whether such circumstances exist, however, are not made clear. These could be important limitations on the right to call for such negotiations and on the derivative right to point to their failure as the basis for denial of recognition. However, necessity may prove a mere formality. The TBT Agreement offers no additional guidance.

Another, rather ambiguous provision, requires parties to ensure that their conformity assessment procedures facilitate conformity assessment recognition "as far as practicable" (Article 6.2). Again, the operative term "practicable" is not defined or explained. This provision could be understood to demand that bodies seeking recognition for their assessments maintain procedures that will stand up to the scrutiny of other bodies. On the other hand, it also could be interpreted to demand that the procedures relied upon by assessment bodies not be too difficult to approximate, an interpretation that could initiate a race to the bottom.

Finally, conformity assessment bodies are "encouraged" to permit bodies in the territories of other Members to take part in their conformity assessment processes (Article 6.4). This provision could have unfavorable effects for ecolabeling. It is non-binding so conformity assessment bodies need not ever permit other bodies to participate in their assessment processes. Still, for reasons such as those suggested above for why inadequate assessments might be recognized, bodies may choose to permit such participation even when the quality of assessment by bodies in the territories of other Members is not as high.

f. Fees and Other Costs

The TBT Agreement imposes several requirements designed to minimize the financial and other costs borne by applicants in the conformity assessment process:

- Fees charged must be equitable, taking into account any special costs associated with assessment of a particular facility (Article 5.2.5);
- Selection of samples and siting of facilities used for assessment must not cause unnecessary inconvenience to applicants (Article 5.2.6); and
- Assessment procedures for products, the specifications of which have changed subsequent to an initial assessment, must be limited to what is necessary to determine if the product still meets the standards at issue (Article 5.2.7).

It is unclear whether any of these requirements will pose significant risks for ecolabeling schemes. The impact of each depends upon its interpretation. How the concept of equity with regard to the first or of necessity with regard to the last two will be interpreted remains an open question. Necessity, for instance, might be interpreted narrowly and, as a result, limit the ability of conformity assessment bodies to function in an efficient manner. In any case, all these requirements could increase the costs of conformity assessment and, thereby, limit the ability of some bodies to maintain ecolabeling programs.

g. Procedural Requirements

Various procedural requirements also apply to conformity assessment. The competent body must:

- Publish the general processing period or inform an applicant of the anticipated period for its product upon request;
- Review each application for completeness and inform the applicant of any deficiencies;
- Inform the applicant of the results of the assessment as soon as possible in a complete and precise manner;
- Inform the applicant of the stage of the procedure without delay upon request;
- Proceed as far as practicable with an assessment, though the applicant has already failed, upon request (Article 5.2.2); and
- Review complaints concerning the operation of the system and take corrective action where appropriate (Article 5.2.8).

None of these requirements seems particularly onerous or threatening to ecolabeling. Of course, they all have associated costs that increase the financial burden of maintaining a conformity assessment system.

8. Information, Technical Assistance & Advice, and Special Treatment for Developing Country Members

In addition to the detailed substantive and procedural requirements for standards and conformity assessment discussed above, the TBT Agreement establishes several classes of broader, more general obligations. These call upon Members to:

- Provide information about standard-setting programs and related issues;
- Assist and advise other Members in their efforts to develop their own programs, to participate in the international development of standards and conformity assessment systems, and to help their producers gain access to conformity assessment programs; and
- Give differential and more favorable treatment to developing country Members.

a. Access to Information

Article 10 of the TBT Agreement promotes access to general information concerning standard-setting programs and related activities. The article calls upon Members, unless "they consider [its disclosure] contrary to their essential security interests," to:

- Ensure access to information concerning established and proposed standards and conformity assessment procedures by governmental, regional or private bodies[20] (Articles 10.1.2, 10.3.1, 10.3.2);
- Disclose their membership and the membership of any body within their territories in any international or regional standardizing body or conformity assessment system[21] (Articles 10.1.4, 10.3.3);
- Inform other Members of any standards-related agreements having significant trade effects they have reached with other countries (Article 10.7);
- Take reasonable measures to make copies of documents available, (Article 10.4); and
- Make translations (into French, Spanish, or English) available to developing country Members, upon request (Article 10.5).

By ensuring access to pertinent information, these requirements minimize potential discrimination and market access impairment, whether intentional or unforeseen, that could arise from standard-setting programs and related activities of Members and other bodies in their territories. The "essential security interests" exception (Article 10.8.3) seems to give Members some flexibility when absolutely necessary, but does not appear significantly to diminish these informational obligations.

None of these obligations appears to threaten ecolabeling significantly. Even the costs are of relatively little concern to private bodies since they are borne by the Member governments themselves rather than the individual standard-setting bodies.

b. Advice and Technical Assistance

In addition to the general information obligations discussed above, Members must, under Article 11, provide technical assistance, upon mutually agreed terms, and advice to other Members, especially developing country Members, to aid them in:

- Establishing national standardizing bodies and conformity assessment systems[22] (Articles 11.2, 11.4);
- Participating in international standardizing bodies and conformity assessment systems[23] (Article 11.2); and

[20] Members need only take reasonable measures with regard to private bodies and regional bodies in which they participate.

[21] Members need only take reasonable measures with regard to private bodies.

[22] Members need only take reasonable measures to assist the establishment of conformity assessment systems.

[23] Members are also obliged to "encourage," if requested, bodies within their territories that are members of international or regional conformity assessment systems to assist other Members to establish institutions necessary for bodies within their territories to participate in these international bodies (Article 11.7). The term "encourage" is not defined and, as a result, the scope of this obligation is unclear. However, it is almost certainly less

- Helping their producers to gain access to and satisfy the requirements of the conformity assessment systems operated within the territories of the Members offering assistance (Article 11.5).

In fulfilling these obligations Members are supposed to give priority to assisting least-developed country Members.

Implementation of these obligations should promote standard-setting and, therefore, may encourage ecolabeling programs. It should also help right the imbalance of developing country and developed country input during international standard-setting.

The first requirement encourages development of national standards programs and, arguably, creates a mandate to assist the development of ecolabeling programs among other standards-based schemes. The TBT Agreement is intended to further the goals of the GATT 1994. These goals include promotion of sustainable development. In light of this objective, it could be argued that this provision calls upon Members to help other Members to establish ecolabeling programs as standards-based programs that promote sustainable development.

The second of these provisions, by promoting broader participation in the international development of standards and conformity assessment systems, fosters the involvement and influence of all Members. This may increase commitment to ecolabeling in general and to any standards and assessment procedures developed internationally. The third serves to minimize market access restrictions associated with the maintenance of standards, including any standards relied upon for ecolabeling. This too may increase support for ecolabeling by making it easier to adjust to the demands of ecolabeling programs. Again, the one obvious concern associated with these provisions, cost, is mitigated by their applicability to Members only. Individual standard-setting bodies are not within their scope.

c. Special Treatment of Developing Countries

Finally, Article 12 clarifies and establishes requirements for special treatment of developing country Members in light of their special circumstances. Some of these obligations may prove beneficial for ecolabeling efforts. Others could pose serious threats to ecolabeling of products from developing countries, especially in the near future.

Members must give particular attention to "the special development, financial and trade needs of developing country Members" (Article 12.2) and are obliged to give these countries "differential and more favorable treatment" under the Agreement (Article 12.1). In addition, the Article imposes more specific, delineated obligations for treatment of developing country Members. Furthermore, the Committee on Technical Barriers to Trade currently has the authority to grant developing countries time-limited partial and complete exemptions from the obligations of the TBT Agreement (Article 12.8).

Exactly what the general obligation to give "differential and more favorable

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extensive than that to "take reasonable measures," discussed above.

treatment" entails must remain an open question. It might be interpreted to allow developing countries to avoid complying with measures—including those necessary to ecolabeling programs— established by others if these measures conflict with their "special needs."

The more specific obligations imposed by Article 12 similarly could have mixed effects. Several assistance obligations could have salutary effects such as those of similar obligations discussed above. These provisions call upon Members to:

- Take reasonable measures to ensure that international and regional standardizing bodies and conformity assessment systems are organized and managed so as to facilitate the participation of developing countries (Article 12.5);
- Take reasonable measures to ensure international standardizing bodies develop, upon request, standards for products of particular interest to developing countries (Article 12.6);
- Take into account, with regard to technical assistance provided in accordance with Article 11, the stage of development of the developing country Member when determining the terms and conditions for the assistance (Article 12.7); and
- Take into account "in their desire to assist them" the special financing, trade and development needs of these Members (Article 12.9).

Another provision, however, could pose a threat to ecolabeling, demanding that Members take account of the special needs of developing countries when preparing and applying standards with a view to avoiding the creation of unnecessary obstacles to trade for goods from these countries (Article 12.7). This obligation, by calling upon developed country Members to pursue programs that better suit developing country needs, could discourage Members from giving priority to the environmental purposes of ecolabeling programs.[24]

Two final provisions offer mixed possibilities. The first of these states that Members must recognize that these countries may adopt standards inconsistent with internationally established ones "aimed at preserving indigenous technology and production methods and processes compatible with their development needs" (Article 12.4). This could provide developing countries the freedom to establish particularly rigorous standards, including for ecolabeling programs. However, it could also allow developing countries to institute standards lower than those internationally recognized.

[24] What may constitute "unnecessary obstacles to trade" for developing countries in light of this provision could differ from what would be deemed unnecessary measures to take against products from developed country Members. Since the issue is probably what is "necessary" *to* the objective (*see* discussion of unnecessary obstacles with regard to standards above), the definition of "necessary" need not change, and should not for the sake of clarity and consistency. However, what is an appropriate objective for measures taken against products from developed countries may not, without qualification, be appropriate for products from developing ones. It seems that this provision may call upon Members to adopt promotion of the special needs of developing countries as an automatic, universal objective for all measures they take, in addition to whatever other objectives they wish to pursue through such measures. The consequences of this for ecolabeling could be substantial and negative.

The second calls for Members to take fully into account the special problems and needs of developing countries which may affect their ability to establish and maintain standardizing programs and to comply with the obligations of those established by other Members. On the one hand, this obligation exacerbates the risks associated with the mandate to avoid unnecessary obstacles to trade for developing countries. By calling for Members to give special consideration to developing countries difficulties in complying with standards, it may prompt granting of exemptions from ecolabeling schemes, in part or even in their entirety. On the other hand by calling for recognition of the special problems and needs of developing countries in maintaining standards-based programs, this provision arguably obliges other Members (as do the provisions in Article 11 discussed above) to assist developing country Members in developing standards-based programs in general and ecolabeling programs in particular in furtherance of sustainable development which the GATT 1994 is intended to promote.

IV. Conclusion

The primary concern driving the WTO's approach to technical standards such as ecolabeling programs is that they neither operate in a protectionist manner nor erect unnecessary barriers to market access for foreign producers. The specter of multiple, competing sets of standards imposed on producers trying to reach markets world wide has prompted a search for a structure that would lower the costs of producing for a global market. However, this push for the most fluid possible global trading system emerges from only one perspective among a number of relevant perspectives, and one area of expertise among several relevant areas.

The TBT Agreement itself recognizes implicitly the need for multiple standard-setting bodies. There is a need for cooperative consultations among relevant international and national institutions to develop policy on ecolabeling and other market based instruments for environmental policy that consider, but are not completely determined by, global market concerns. Ecolabeling will succeed as a tool to promote environmental protection only if programs are based on standards that effectively identify the least environmentally destructive alternatives.

That is not at all to say, however, that trade concerns should be ignored in the development of ecolabeling schemes. On the contrary, such schemes can be improved by taking into consideration the fundamental concerns of the global trading system. Ecolabeling schemes should neither be protectionist nor impose unjustified market barriers. To help guard against these twin evils, ecolabeling schemes should be developed through interdisciplinary efforts that consider input from a wide range of stakeholders in open forums. Moreover, they should, to the greatest extent possible, tailor their standards to address the many different regional and local factors relevant to forest conservation and management.

Labeling schemes developed by standardizing bodies located within a single country that address environmental impacts of production in other countries are widely perceived as inimical to the underlying tenets of free trade. Through such labels, bodies from one country, often governments, hold out market access as an incentive to

encourage producers outside the governments' territories to meet their standards. Without input from all interested parties, many WTO members argue, such schemes run the risk of developing biased criteria that reflect a parochial concept of what is environmentally sound, increasing the potential for protectionist abuse. Moreover, the environmental benefits derived from employing the stipulated methods with respect to imported products would result outside the country where the standards were developed. Many WTO members consider that the use of such measures inappropriately interferes with their national sovereignty.

A call for the mutual recognition of labels and labeling schemes, not surprisingly, has emerged as an alternative. Ecolabeling certification programs such as the Forest Stewardship Council's (which certifies the certifiers) have adopted an approach that incorporates the mutual recognition concept. While FSC employs non-product related criteria in determining eligibility for its label, the program modifies its criteria according to the features of a particular area through a process that involves the local stakeholders as well as international representatives of consumers and producers. In light of the widely divergent conditions in forests around the world, mutual recognition — based on principles strongly focused on sustainable forest management, such as those adopted by the FSC — very likely constitutes the most realistic approach to harmonization possible in this sector.

A recognition by the WTO that international certification and labeling programs such as the FSC – which strive for mutual recognition of different yet comparable standards — are consistent with the TBT Agreement's provisions, would be a significant step toward reconciling trade and environment objectives.

References

Crossley, Rachel. 1995. *A Review of Global Forest Management Certification Initiatives: Political and Institutional Aspects.* Background Paper prepared for the UBC-UPM Conference on Certification.

(CSA) Canadian Standards Association 1996. *A Sustainable Forest Management System: Specifications Document*, CAN/CSA-Z809-96.

Elliott, David P. [1996.] *Certification and Ecolabelling of Timber and Timber Products.* N.d.: n.p. Manuscript on file with CIEL.

(EC) European Commission. 1996. Decision 96/467, 16 July 1996.

Food and Agriculture Organization of the United Nations (FAO). 1994. *FAO Yearbook on Forest Products 1981-92.* FAO Forest Series No. 27, FAO Statistics Series No. 116. Rome: FAO.

(FSC) Forest Stewardship Council. 1996a Statutes, June 1996

_____. 1996b. Document No. 1.2, *Forest Steward Council Principles and Criteria for Natural Forest Management.*

Goldberg, Donald M. 1995. "The Montreal Protocol." In Robert Housman, et al., eds. *The Use of Trade Measures in Select Multilateral Environmental Agreements.* Nairobi: UNEP.

Hauselmann, Pierre 1996. *Certification and Labeling of Forest Products; Complementarily between Trade and Forest Policy*. Geneva. UNEP/IUCN.

International Experts Working Group: Joint German-Indonesian Initiative. 1996. *Report of Meeting on Trade, Labeling of Forest Products and Certification of Sustainable Forest Management, 12-16 August 1996, Bonn.*

Nollkaemper, Andre. In press. "Protecting Forests through Trade Measures: The Search for Substantive Benchmarks." *Georgetown International Environmental Law Review* 8:___.

(OECD) Organisation for Economic Co-operation and Development. 1996. *Saving Biological Diversity: Economic incentives.* Paris: OECD.

Sugal, Cheri. "Labeling Wood: How timber certification may reduce deforestation." *World Watch* 9(5): 29-34.

Tarsney, Peter J. 1994. "Regulation of Environmental Marketing: Reassessing The Supreme Court's Protection of Commercial Speech" *Notre Dame Law Review.* 69:533.

(U.N. C.S.D.) United Nations. Economic and Social Council. Commission on Sustainable Development. Ad-Hoc Intergovernmental Panel on Forests. 2d Session. 1996a. Secretary-General's Report for initial discussion on category IV: trade and environment in relation to forest goods and services. New York: UN. Doc. No. E/CN.17/IPF/1996/11.

(U.N. C.S.D.) United Nations. Economic and Social Council. Commission on Sustainable Development. Ad Hoc Intergovernmental Panel on Forests. Third session. 1996b. Trade and Environment Relating to Forest Goods and Services, Programme element IV: Report of the Secretary-General. E/CN.17/IPF/1996/22.

von Moltke, Konrad. 1996. Remarks made at Workshop on Trade and Sustainable Development, World Conservation Congress, Montreal, October 17, 1996.

(WRI) World Resources Institute et al. 1996. *World Resources 1996-97.* New York: Oxford University Press.

(WTO/CTE) World Trade Organization. Committee on Trade and Environment. 1996. *Report of the WTO Committee on Trade and Environment.* Geneva: WTO.