

CANADIAN COMPETITION RECORD

REGULATORY AND TRADE DEVELOPMENTS

ECO-LABELLING & FREE TRADE PRINCIPLES: ARE THEY COMPATIBLE?

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There has been a growing recognition in recent years of the need to balance environmental concerns and benefits of free trade. This recognition has resulted from increased attention paid to conflicts, and perceived conflicts, between environmental measures and international trade rules. Such attention is now being focused on the issue of eco-labelling. In particular, the eco-labelling approach adopted by the European Union (the "EU") and several of its member countries has aroused concern because of its discriminatory impact on foreign products, in conflict with the free trade principles of the World Trade Organization (the "WTO").

Eco-labels are intended to convey information about a product's environmental attributes, in order to enable consumers to make purchasing choices based not only on price but on ecological values as well. The International Organization for Standardization (the "ISO") has described three categories of eco-labels. Type I labels are ostensibly voluntary schemes in which companies apply to public or private authorities for the right to display seals or symbols indicating that a product is environmentally "superior" to

products without the seal. Seals are awarded based on criteria developed by "consensus" panels of experts and stakeholders under the auspices of the seal-granting authority. This "eco-seal" approach forms the basis of the EU program. Type II labels are environmental information claims by manufacturers, which may be enforced for accuracy and relevance by governmental authorities. This approach has been adopted in the United States in connection with enforcement of U.S. consumer protection laws. Type III labels provide quantified product information using preset indices.¹

Eco-seal programs such as the EU program have garnered the greatest attention and have been the greatest source of contention. While all eco-label approaches seek to use market incentives to lead to environmental improvements, eco-seal programs are designed to guide consumer decisions through use on products of abstract symbols, such as a blue angel or a swan. Consumers are taught to look for the symbol, and to trust eco-seal panels to select products that are environmentally preferred. By contrast, Type II environmental information labels provide specific environmental information about a product. Rather than relying only on whether a seal is present, consumers may distinguish products bearing environmental information labels based on this specific information, and the counterclaims of competitors and third parties concerning this information.

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In addition to influencing consumer behavior domestically, eco-seal programs may be utilized as an instrument for influencing the environmental policies of other countries seeking to import their products. Exporting companies may need to make wholesale changes in product materials and manufacturing techniques in order to qualify for an eco-seal. Producers in developing countries in particular have expressed concern about losing their export markets in industrial countries when such changes are prohibitively expensive or technologically unfeasible.

From a trade perspective, eco-labelling programs differ from traditional government instruments that can become trade barriers (i.e. mandatory regulations or border measures) because eco-seal programs are ostensibly voluntary. They aid in enhancing a product's marketing appeal and do not directly bar the product from entering the market. However, to the extent that eco-seal programs are effective in training consumers to choose products bearing the seal, or become prerequisites for purchases by governmental or large retail organizations, these programs reduce the opportunities for market participation of products that do not have a label.

In 1977, Germany introduced the first eco-seal program entitled the "Blue Angel". Today 25 eco-seal programs exist worldwide. In recent years, there has been much focus on the program implemented by the EU.

On March 23, 1993, the European Council approved an EU-wide eco-seal scheme.² The program permits manufacturers to obtain an eco-seal for a product if its production process meets general and specific criteria which are established for that particular product. The stated purpose of the scheme is to

"promote the design, production, marketing and use of products which have a reduced environmental impact" and "provide consumers with better information on the environmental impact of product".³

Under the EU program, the formalized government procedure for awarding a seal begins with establishing different product groups for inclusion in the scheme. Criteria for awarding the eco-seal are defined by these product groups. The EU Eco-label Regulatory Committee coordinates the program by establishing the groups and criteria either on its own initiative or at the request of a competent body of a Member State. This process includes the consultation of local industry, commerce, consumer organizations, and environmental groups. While local interests may directly participate in decision-making, foreign interests may not.⁴ The designated authorities in each Member State then assess individual applications and determine whether the specific requirements for the eco-seals have been fulfilled. Finally, the national body informs the Commission of its decision. All participation by the manufacturers in this process is voluntary and they must pay a fee to apply for an EU eco-seal.

Under the EU scheme, five areas now have defined criteria. These are washing machines, dishwashers, soil improvers, bathroom tissues and kitchen rolls. Laundry detergents, paints and varnishes, light bulbs, insulation materials, textiles, hair sprays, and refrigerators are other areas waiting final approval.

Many arguments have been made for and against eco-seals. Supporters argue that consumers who are unwilling or unable to learn about the environmental characteristics of products and processes need an informational surrogate such as an eco-seal to make

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purchasing decisions on “environmentally friendly” products. They also argue that eco-seals influence companies to produce “environmentally friendly” products.

However, numerous concerns with eco-seals have been raised. One complaint is that eco-seal certification criteria cannot keep up with the fast moving consumer goods market. Every product category is diverse and complex. The initial criteria-setting process typically takes several years, during which production methods are constantly changing. Criteria are then revised only every two to three years. Another concern is that criteria are ultimately set through negotiations between different stakeholders including local industry, consumer and environmental groups, since there is little or no scientific basis for making trade-offs between environmental traits such as recyclability and energy usage. In addition, critics contend that by training consumers to look for symbols rather than concrete information, eco-seals fail to educate consumers.

From a trade perspective, eco-seals are viewed by many as a significant barrier to trade by placing companies without labels at a competitive disadvantage. This competitive disadvantage is especially true for developing countries where environmental circumstances differ from developed countries. These countries fear that their producers will be unable to meet the eco-seal standards the EU sets for product groups because they would involve modifications to production processes and materials that are either prohibitively expensive or technologically unfeasible.

The schemes also impose local environmental preferences on other nations. Panels frequently rely on local or regional experts that do not have a

complete understanding of environmental conditions in other countries or regions. Differences in global infrastructures and technologies are largely ignored. Therefore, the criteria usually favor national or regional environmental policies.⁵ This problem is exacerbated by the fact that foreign companies have difficulty participating in the local criteria-setting process.

Countries exporting goods to the EU thus fear that the labelling provisions discriminate against foreign products. Imports from countries that cannot meet labelling standards without significant product or process modifications must compete against local products perceived by consumers as “environmentally friendly” because of the seals. Thus, products without a seal can be discriminated against, leading producers to fear a decrease in market participation.

All of these concerns have made eco-seals an issue in the WTO. In a Ministerial Decision of 14 April 1994,⁶ members of the General Agreement on Tariffs and Trade (the “GATT”) agreed to establish a Committee on Trade and the Environment (the “CTE”) under the auspices of the WTO. Its formation was a significant change in the GATT approach and is viewed as an important opportunity to redirect the trade and environment analysis within the WTO.

The WTO hopes to find ways to prevent environmental regulations and free trade principles from clashing with each other. In late October 1995, the CTE held a meeting in Geneva with the goal of advising next year’s ministerial meeting on whether the WTO should change its rules in response to environmental concerns. The participants began to undertake an ambitious review of international and environmental measures in order to determine whether existing global trade rules are ecologically

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friendly or need modifications. They have been analyzing a group of sensitive issues including eco-labelling standards. Also, since the WTO Technical Barriers to Trade ("TBT") Agreement applies to eco-seal schemes by prohibiting measures that discriminate against foreign products and unnecessarily restrict trade, the CTE has agreed it would coordinate its work in the future with the TBT Committee.

In the U.S., eco-seals have also been a concern to exporting companies. In the September 1995 Super 301 Report, the EU eco-seal program was not determined appropriate for identification because it was already being addressed in trade negotiations. Yet the Report still named the program as a significant trade negotiating objective. "Without objecting to the concept of eco-labelling," the U.S. is concerned about the potential adverse impact of the EU scheme on U.S. exports.⁷ The U.S. is currently monitoring the EU program to ensure that it does not disadvantage U.S. producers and thus become trade barriers. Negotiations between the U.S. and the EU continue to address these issues.

One method offered in international negotiations as a preferred alternative to eco-seals is environmental information sharing. Instead of an eco-seal, product packaging would include environmental statements and facts consistent with the environmental marketing guidelines of the U.S. Federal Trade Commission. These guidelines provide that information must be factual and nondeceptive, verifiable, scientifically relevant, and non-trivial.⁸ There are several advantages to this type of information sharing. It recognizes the diversity of environmental issues and product choices and provides factual information to consumers based on key environmental attributes, government priorities,

and/or defined public interests. Consumers are thus able to make informed choices based on their personal values. This alternative also encourages continuing progress and innovation in the marketplace. The U.S. favors this approach. The September 1995 Super 301 Report advised that the EU program "should provide sufficient and accurate information to consumers regarding the relative environmental impacts of competing products".⁹

Notes

¹ "Business Plan of ISO/TC 207/SC 3 Environmental Labelling," ISO/TC 207/SC 3 N66 at 2 (Revised, September 1995).

² Council Regulation (EEC) No. 880/92 of 23 March 1992 on a Community eco-label award scheme, 1992 O.J. L 99.

³ *Ibid.* at Art. 1.

⁴ "Brazilian Pulp Industry Criticizes EU Ecolabelling Plans," *Environmental Watch Latin America*, August 1994. The official who heads the EU eco-labelling team in the EU environment directorate has stated that while access to information under the EU scheme would be improved so that foreign producers knew more about decisions being made and about where to address opinions, "what is not being offered is participation in the decision-making process".

⁵ For example, a requirement of a minimum percentage of recycled content in newsprint disfavors countries with small populations (i.e. that consume less newsprint), and ignores the resulting environmental costs of long-distance transport of recycled paper to meet the new requirement.

⁶ 32 ILM 1267 (1994).

⁷ Office of the U.S. Trade Representative, "Identification of Trade Expansion Priorities Pursuant to Section 310 of the Trade Act of 1974", (5 September 1995) (Super 301 Report).

⁸ See generally 16 C.F.R. Pt. 260.

⁹ Super 301 Report, *supra*, note 7 at 5.