

elni

REVIEW

Articles with focus on environmental law networks

- The Importance of International Environmental Enforcement Networks: INECE as an example
- European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL)
- NEEL: the Network of EU Environment Lawyers
- The Nordic Environmental Law Network (NELN)
- Networking in the Nordic Countries
- The Avosetta Group

Articles with focus on other topics

- Towards an integrated approach for sustainability labelling and certification
- REACH: How far will the chemicals legislation reach to protect human health and the environment from hazardous chemicals?
- Rethinking the Role of Information in Chemicals Policy: Implications for TSCA and REACH

CONTENTS

elni News	1
Introduction Networks	2
Articles	
Articles with focus on environmental law networks	
The Importance of International Environmental Enforcement Networks INECE as an example <i>Jo. J.A. Gerardu and Durwood Zaelke</i>	3
European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) <i>Terry Shears</i>	8
NEEL: the Network of EU Environment Lawyers <i>Gill Aitken</i>	10
The Nordic Environmental Law Network (NELN) <i>Helle Tegner Anker</i>	11
Networking in the Nordic Countries <i>Nicolas de Sadeleer</i>	12
The Avosetta Group <i>Gerd Winter</i>	12
Articles with focus on other topics	
Towards an integrated approach for sustainability labelling and certification <i>Dr. Mar Campins Eritja</i>	13
REACH How far will the new chemicals legislation reach to protect human health and the environment from hazardous chemicals? <i>Axel Singhofen</i>	17
Rethinking the Role of Information in Chemicals Policy: Implications for TSCA and REACH <i>Lars Koch and Nicholas A. Ashford</i>	22
New Books	38
Sources in the www	39
Imprint	40
Authors of this issue	40
elni Membership	40

Towards an integrated approach for sustainability labelling and certification

Dr. Mar Campins Eritja, Universitat de Barcelona

A European research project (EVG1-CT2000-00031) was started in 2000 with the aim of providing the European Union with an analytical framework for assessing ecologically, economically and socially responsible labelling and certification schemes, in order to present a conceptual and theoretical elaboration of the key issues in the international and supranational legal context. Such a project was co-ordinated by the *Department of Public International Law* of the University of Barcelona¹², and the other participant institutions, i.e. the *Institute for Environmental Studies* of the University of Amsterdam¹³ and the *Centro Interdepartamentale Ricerche sul Diritto delle Comunità Europee* of the University of Bologna¹⁴.

The present short paper is solely intended to present the main results of such a project, which consisted of five steps: a) Interdisciplinary framework for analysis; b) Analysis of the international legal, institutional and organisational framework for sustainability labelling and certification schemes; c) Global inventory of sustainability labelling and certification schemes; d) Six case studies focusing on specific schemes; e) The development of an analytical framework for assessing sustainability labelling and certification schemes.

Preliminary definition of the problem: The adoption of the evolving concept of sustainable development has led social participants to adopt various schemes in relation to product and service labelling and certification. During the last years we have been witnessing a multiplicity of initiatives by NGOs, industry, governments and by partnerships between NGOs and industry. All these initiatives indicate diverse systems with diverse objectives in diverse sectors and diverging approaches and interpretations of sustainable development. The key challenge to the European Union is that all these diverging systems may give rise to trade barriers within the context of the EU's internal market and within a North-North and a North-South context. This is specially so, since although these schemes are aimed at niche markets, opponents argue that these schemes may gradually become standard setting instruments and that the process of developing such labels is not fully transparent.

¹² Participant researchers were Dr. Victoria Abellán, Dr. Xavier Pons, Dr. Andreu Olesti, Dr. Jordi Bonet, Dr. Mar Campins, Dr. Jaume Saura, Dr. Xavier Fernández, and Dr. Victor Sánchez.

¹³ Participant researchers were Dr. Joyeeta Gupta, Mr. Nicolien van der Grijp, M. Onno Kuik, M. Joop de Boer and M. Luke Brander.

¹⁴ Participant researchers were Dr. Lucia Rossi, Dr. Elisa Baroncini, Dr. Lorenzo Gradoni and M. Francesco Montanari.

1 Interdisciplinary framework for analysis

In our study we used a pragmatic approach to the concept of sustainability, distinguishing environmental, social and economic dimensions and using several categories of potentially relevant aspects. Given the choice of relevant sustainability issues, a label or certificate can be considered a claim that a particular product or service complies with the corresponding standards. The claim that a certain product or service has an advantage over a conventional one from the perspective of sustainability is an important marketing tool, but it is also more than that. It is closely connected with the political force that is generated by all kinds of actions in society to change production and consumption patterns in a more sustainable direction. In addition, it is also important to consider labelling and certification in its role as an economic instrument. Therefore, it is essential to examine the market conditions under which sustainability labels can be successful or can lead to unwanted or "perverse" effects.

2 International legal, institutional and organisational framework

The international legal and institutional context for sustainability labelling and certification is being determined by a number of international governmental and non-governmental organisations. In this context, the UN performs a prominent role, as far as it has adopted a large number of principles, norms, and recommendations in the field of sustainable development, environmental protection, labour conditions, human rights and development. These standards constitute a global framework addressed to Member States, but also indirectly to other international participants.

Of direct relevance for sustainability labelling and certification within the WTO are the GATT 1947/94, the GATS, and the TBT Agreement. From the WTO rules perspective, the development of sustainability labelling and certification schemes is mainly conditioned by the persistent legal uncertainties regarding the legitimacy of schemes based on NPR-PPMs. Even though the principles of the GATT disallow, in principle, discriminations based on NPR-PPMs, the general exceptions of Article XX could justify such measures. In this sense, the principle of non-discrimination to "like products" is not an absolute principle and certain trade measures concerning NPR-PPMs can be accepted if the requirements established for general exceptions are

met. The calls to “cooperation” made by the Appellate Body as a requirement for the application of the general exceptions of the GATT should be particularly taken into consideration. On the other hand, if it is considered that the schemes based on NPR-PPMs are not covered by the TBT Agreement, its consideration in the light of the GATT 1994 will vary on the basis of whether the scheme is managed by public authorities or by non-governmental bodies.

The EU policy in this field is faced with both internal and external challenges that make sustainability labelling and certification quite difficult to handle as a policy tool. On the external front, the EU had been threading on the issue of the WTO-legality of sustainability labelling and certification schemes. It is exerting a continuous pressure in order to make them accepted as measures that are both legal and politically sensible. On the internal front, the business community stands against ‘regulation’ of commercial practices that refers to the concept of sustainable development. Other participants invoke an intervention of public powers aimed at safeguarding the integrity and the viability of certain labelling and certification schemes. With this objective in mind, the EU institutions have by now identified, at the political level, the labour standards that should act as a benchmark for sustainability claims. The early establishment of an EU-wide eco-labelling scheme and the political will to strengthen its influence, may indicate the course the EU policy on sustainability labelling and certification might take in the future. It seems, thus, that the EU appreciates the advantages of a uniform system, indistinctly applicable to all enterprises, and guaranteed by public authorities. However, setting up an EU sustainability labelling and certification scheme also means creating a reference point for consumers. From this standpoint, the EU policy wants to avoid the situation where consumers are overwhelmed by a multitude of sustainability claims, yet it allows them the self-confident agent of sustainable development. Furthermore, even though the EU describes sustainability labelling and certification schemes as “market-based instruments”, when the issue involved are of such purport and complexity, it appears desirable that the political institutions regain control of the situation.

Finally, several major organisations from the business community and civil society are also contributing to environmental and social governance. Some of these organisations are actually seeking corporate commitment to sustainable development through the creation of procedures for endorsement and participation. These initiatives differ in their level of detail and the need for further interpretation.

3 Inventory of sustainable labelling and certification schemes

For the inventory of sustainability labelling and certification a scheme, the field of research was demarcated as follows: Firstly, the project distinguished between multi-sector (schemes which potentially cover a range of different products and services) and sector-specific schemes (schemes which are specifically targeted at only one product or service group). Secondly, the inventory focused on voluntary labelling and certification schemes as opposed to mandatory ones. Finally, a further demarcation was based on the party that controls and verifies the claim, whether it is the first, second or third party. For the inventory partners decided to focus on third party verified claims, which means that corporate claims and self-declarations are excluded from the research.

The research findings about multi-sector and sector-specific labelling and certification schemes were mainly highlighting the following issues: Public and private involvement; products and services covered; geographical scope; sustainability aspects included; and North-South relations.

Amongst other issues, concerning the sustainability aspects that are covered by the different types of multi-sector and sector-specific schemes, the inventory showed that environmental impacts are in principle covered by all types of multi-sector schemes, although this counts to a lesser extent for fair trade schemes. Social aspects are less broadly covered by the different schemes. Fair trade schemes are the exception here, with their primary orientation on trade relations and labour conditions. When considering the inclusion of social and environmental criteria from a sectoral perspective, the dominance of environmental aspects in labelling and certification schemes is striking, as well as the non-inclusion of fair trade criteria.

4 Case studies

In order to assess sustainability labelling and certification schemes, we performed six case studies and analysed them in terms of sustainability content, compatibility with international law, market impacts, trade aspects, and good governance. Each case study referred to a sector in which stakeholders are actively seeking to address social and/or environmental issues through the development of labelling and certification schemes, and focused on one or more specific schemes. Two of the case studies focused on a fair trade initiative in the sectors of coffee and jeans. The other four case studies had more or less an environmental background, and included capture fisheries, fruit and vegetables, forestry products, and eco-tourism.

The six case studies were chosen for several reasons. Firstly, these are sectors which represent relevant and recent examples of areas where global cooperation between developed and developing countries are seriously needed. Secondly, stakeholders involved in these entire sectors seek to address social and environmental problems that are inextricably linked to wider economic and development issues. Thirdly, these sectors therefore confront the challenges faced in achieving sustainable development by both developed and developing countries. Fourthly, management of these sectors combine the existence of results leading to international tools to control and manage the globalisation trends in terms of commitments or institutions, with the emergence of a number of innovative issues which are not necessarily controlled by any international system.

The results of the case studies demonstrated that labelling and certification schemes use a variety of criteria to disclose differences between more sustainable and less sustainable products (or services). A complicating factor in assessing the sustainability level of these criteria is that the concept of sustainable development does not (yet) provide a minimum standard or a benchmark against which specific initiatives can be gauged. The analysis further showed that under certain conditions labelling and certification schemes may have beneficial impacts on developing countries by providing export opportunities for specific producers. However, they may also provide trade barriers for others, because, for example, small producers do not have easy access to financial and technological resources, or indeed to educational facilities. This makes it difficult for these producers to change their production practices.

5 Framework for assessing sustainability labelling and certification schemes

All case study results were integrated by analysing the cross-cutting issues to see if there are lessons to be learnt about the functioning of sustainability labelling and certification schemes. The overall conclusion was that sustainability refers to both content and procedure. It is not only the balanced inclusion of environmental, social, and economic aspects, but it also calls for: consistency with international law; conformity with overarching international programmes; the possibility to adjust standards to local circumstances; reasonable requirements concerning infrastructure and costs; not excluding specific producers, and adherence to democratic principles, such as transparency, participation, coherency, flexibility, and accountability.

Based on these criteria, a list was elaborated using indicators for evaluating specific sustainability

labelling and certification schemes in relation to sustainability content and impact (environmental and social justice), interaction with public international and national law (legality), implementation in practice (coherence, flexibility, proportionality), trade impacts on producers (equity), and good governance (legitimacy). This list was meant as a tool for all stakeholders who are interested in raising the quality of sustainability labelling and certification schemes.

6 Key controversies

The elaboration of such a framework also allowed for identification of key controversies in the debate on environmental and social labelling and certification, including the adequacy of standards in relation to the environmental and social issues at stake; the market success of labelling and certification schemes; the trade impacts for producers in developing countries, compatibility with international law and the need for public intervention.

a) Adequacy of standards: Concerning the three dimensions of sustainable development – environmental, social, and economic – and the question whether it is necessary to aim for a balanced coverage in sustainability standards, our research assumed that labelling and certification schemes moved from a one-dimensional focus to a more integrated approach by incorporating a wider range of sustainability aspects and demonstrated a trend towards convergence of the different aspects. However, dealing with several sustainability issues in one scheme is economically efficient, but may be neither feasible nor appealing to customers.

b) Market success: The case studies showed that at present consumer demand for certified products and services is largely linked to higher levels of income and education, and that these markets have, even in the richest countries, still a niche character. On the supply side, labelling and certification programs commonly use the incentive of increased market access and premium prices. Certification programs, however, may also deliver other secondary benefits to participating producers. They may be an extra impetus for participation in a labelling and certification scheme, and as long as producers internalise the economic, social, and environmental dimensions, the goals may be achieved.

c) Trade impacts for developing countries: Sustainability standards generally fit the interests or the sensitivities of the developed countries, and frequently do not address the issues that affect the ability of the exporting developing countries to participate in such schemes. Furthermore, the consolidation of these standards may limit the access of the developing country exporter to the international market. The absence of an adequate balance between the different goals pursued under sustainable

development may result in contradictions, which has become an issue of significant concern for the developing countries. However, the case studies did not provide evidence of serious negative impacts on the trade options for developing countries. The main reasons are that certified products and services still occupy market niches and that, most importantly, there are other, much more trade distorting mechanisms in place.

d) Compatibility with international law: It is a critical question as to what extent labelling and certification schemes are compatible with international environmental and social law. As long as such schemes are in line with international rules, they reinforce international law by promoting values that have been adopted by consensus globally. There is a need to achieve a fine balance between two apparently conflicting objectives: to allow regulatory autonomy in order to protect the legitimate interests of the environment and social justice, while assuring that standardisation and conformity assessment procedures do not become unnecessary obstacles to international trade.

e) The need for public intervention: Private labelling and certification schemes fill in the gaps where international and national regulatory systems conflict, remain silent, or lack adequate mechanisms for compliance. However, the scope of such schemes is limited, enforcement and accountability is often weak, and there is not always a guarantee of meaningful participation of all stakeholders involved. Due to these shortcomings, public authorities may be in the best position to provide an enabling environment for discussing and defining sustainability policy frameworks and guidelines and criteria for good governance, for providing legal frameworks to enable multinationals to operate and for dealing with the tensions generated by the asymmetrical outcomes between the North and South. Though it seems appropriate that in the short term all stakeholders concerned will take action, government intervention may be a preferable option in the long run.

7 Final conclusion

The controversies are all related to the legitimacy and effectiveness of sustainability labelling and certification, and depend on factors, such as the design of the instrument, the instrumental setting, and the actors involved. Following from this, the overarching challenge is how to enhance the legitimacy and effectiveness of sustainability labelling and certification in the short and in the longer term.

In the longer term, the focus needs to be on the development of sustainability law and policy at the international and national levels in line with basic democratic principles. Such law and policy should provide a framework including definitions of sus-

tainable management practices and production methods and indicate objectives and means. Furthermore, it should establish clear rights and responsibilities for those involved. In the short term, the focus should be on improving the quality of sustainability labelling and certification by stimulating multi-stakeholder approaches, harmonisation initiatives, and sector-specific accreditation programs, preferably at the international level. These initiatives may provide several benefits, such as enhanced credibility with producers and consumers, the use of common certificates and logos, and the facilitation of international trade by providing a mechanism for mutual recognition.

The consequences for the EU of the longer and short term approaches sketched above are as follows. First, the EU could consider making an extra effort to ensure that environmental and social issues are adequately dealt with in international *fora*. This could be *inter alia* undertaken by a process of seeking to "legalise" labelling and certification schemes under the WTO rules, subject to strict conditions that indeed protect the interests of developing countries such as ensuring a preferential treatment for developing countries (by establishing flexible conditions for the mutual recognition of their own eco-labelling schemes, and effectively promoting mechanisms for the transfer of technology). Second, the EU could consider giving priority to the definition of the fundamentals of sustainable production, consumption, and trade in the EU context. In addition, the EU should translate these fundamentals at the level of specific sectors. Many steps further, this could ultimately lead to the launching of an EU sustainability label that incorporates an integrated approach to environmental and social issues. As a first step, we have compiled a list of international and EU law and policy documents that could provide a basis for defining sustainability standards. Third, the EU could consider promoting and facilitating multi-stakeholder approaches, harmonisation initiatives and sector-specific accreditation programs. Fourth, the EU could consider stimulating consumer awareness and education about environmental and social issues with the aim of stimulating informed consumer choice. In this respect, the application of misleading advertising law may be useful to avert some evident market failures in the last resort, yet it cannot by itself guarantee the smooth functioning of the market for sustainable products. Fifth, the EU could consider assisting developing countries in establishing an infrastructure that helps them cope with the requirements in labelling and certification schemes. Such assistance may include the training of people, the preparation of legislation, the establishment of codes of practice, the creation and maintenance of certification services and laboratory facilities.

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

Contact

Freiburg Head Office:

P.O. Box 50 02 40
D-79028 Freiburg
Phone +49 (0)761-4 52 95-0
Fax +49 (0)761-4 52 95 88

Darmstadt Office:

Rheinstrasse 95
D-64295 Darmstadt
Phone +49 (0)6151-81 91-0
Fax +49 (0)6151-81 91 33

Berlin Office:

Novalisstrasse 10
D-10115 Berlin
Phone +49 (0)30-280 486 80
Fax +49 (0)30-280 486 88
www.oeko.de

The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research:

- **European environmental policy**
 - Research on implementation of European law
 - Effectiveness of legal and economic instruments
 - European governance
- **Environmental advice in developing countries**
 - Advice for legislation and institution development
 - Know-how-transfer
- **Companies and environment**
 - Environmental management
 - Risk management

Contact

Prof. Dr. jur. Gerhard Roller
University of Applied Sciences
Berlinstrasse 109
D-55411 Bingen/Germany
Phone +49(0)6721-409-363
Fax +49(0)6721-409-110
roller@fh-bingen.de

www.fh-bingen.de

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the

- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

Contact

Darmstadt Office

Prof. Dr. Martin Führ – sofia
University of Applied Sciences
Haardtring 100
D-64295 Darmstadt/Germany
Phone +49-(0)6151-16-8734/35/31
Fax +49-(0)6151-16-8925
fuehr@sofia-darmstadt.de
www.fh-darmstadt.de

Göttingen Office

Prof. Dr. Kilian Bizer – sofia
University of Göttingen
Platz der Göttinger Sieben 3
D-37073 Göttingen/Germany
Phone +49-(0)551-39-4602
Fax +49-(0)551-39-19558
bizer@sofia-darmstadt.de

www.sofia-research.com

elni

In many countries lawyers are working on aspects of environmental law often with environmental initiatives and organisations or as legislators, but have limited contact with other lawyers abroad, although such contact and communication is vital for the successful and effective implementation of environmental law.

In 1990 a group of lawyers from various countries therefore decided to initiate the Environmental Law Network International (elni) to promote international communication and cooperation worldwide. Since then elni has grown to a network of about 350 individuals and organisations from throughout the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities:

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by the Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit making research institute. The Bureau is currently hosted by the University of Applied Sciences in Bingen. The Bureau acts as an information centre where members can obtain information about others working in certain areas thus promoting the development of international projects and cooperation.

elni Review

The elni Coordinating Bureau produces and sends to each member the elni Review twice a year containing members' reports on projects, legal cases and developments in environmental law. elni therefore encourages its members to submit such articles to be published in the Review in order to allow the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and Fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to bring together scientists, policy makers and young researchers, giving the opportunity to exchange views and information as well as developing new perspectives.

Publication Series

The elni publications series contains 12 volumes on different topics of environmental law.

- Environmental Law and Policy at the Turn to the 21st Century, Liber amicorum, Betty Gebers, Ormond/Führ/Barth (eds.) Lexxion 2006.
- Access to Justice in Environmental Matters and the Role of NGOs, de

Sadeleer/Roller/Dross, Europa Law Publishing 2005.

- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd. London 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd. London 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wil-mowsky/Roller, P. Lang 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

elni Website: elni.org

The elni website at <http://www.elni.org> contains news about the network and an index of elni articles, gives an overview of elni activities, and informs about elni publications. Internships for young lawyers/law students at the Öko-Instituts environmental law division are also offered on the web.