The WTO and environmental and social standards, certification and labelling in agriculture

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ABSTRACT
This paper reflects on the GATT/WTO legal aspects of social and environmental standards and voluntary certification and labelling programmes in agriculture. The paper focuses on programmes with an international scope and with standards relevant for the crop production sector, including labelling of derived food products. The purpose of the paper is to advise governments and standard setting and labelling organizations alike by presenting the most relevant provisions in the WTO and indicating possible implications of these provisions.

RÉSUMÉ
Cet article reflète les aspects juridiques des normes sociales et environnementales du GATT/OMC et les programmes de certification et d'étiquetage volontaires dans l'agriculture. L'article se concentre sur des programmes ayant une portée internationale et sur les normes pertinentes pour le secteur de production des cultures, notamment l'étiquetage des produits alimentaires dérivés. L'objectif de l'article est de conseiller les gouvernements et les organisations chargées de la normalisation et de l'étiquetage en leur présentant les dispositions les plus pertinentes dans le cadre de l'OMC et en leur indiquant les éventuelles incidences de ces dispositions.

RESUMEN
El presente documento aborda los aspectos legales de GATT/OMC respecto de normas sociales y ambientales y los programas voluntarios de certificación y etiquetado en la industria agrícola. El análisis se centra en programas de espectro internacional y que involucran normas inherentes al sector de producción de cultivos, incluido el etiquetado de productos alimenticios asimilados. El objetivo de este documento es asesorar en forma coherente a los gobiernos y a las organismos de certificación y etiquetado al poner a su disposición las estipulaciones de mayor pertinencia de la OMC y al indicarles cuáles son las posibles consecuencias de las mismas.
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LIST OF ACRONYMS

CTE Committee on Trade and Environment
ETI Ethical Trade Initiative
EU European Union
FAO Food and Agriculture Organization of the United Nations
FLO Fairtrade labelling organizations International
GATT General Agreement on Tariffs and Trade
GMO Genetically Modified Organism
IEC International Electrotechnical Commission
IFOAM International Federation of Organic Agriculture Movements
ILO International Labour Organization
IOAS International Organic Accreditation Service
ISEAL Alliance International Social and Environmental Accreditation and Labelling Alliance
ISO International Organization for Standardization
MFN Most Favoured Nation
NGO Non-Governmental Organization
NT National Treatment
PPM Production and Processing Method
SAI Social Accountability International
SAN Sustainable Agriculture Network
SPS measures Sanitary and PhytoSanitary measures
TBT Agreement Technical Barriers to Trade Agreement
WTO World Trade Agreement
1. INTRODUCTION

Over the past twenty years, there has been growing public awareness of environmental and social issues in agricultural production and trade. Consumers’ concerns have given rise to a number of standard setting, certification and/or labelling initiatives, some led by NGOs and others led by the business sector. Social and environmental certification and labelling use market incentives to encourage management improvements above the minimum level required by law, to implement laws that are otherwise difficult to enforce, or to suggest a framework where formal laws may not exist. They often refer to international treaties and conventions, sometimes translating them into verifiable standards for direct implementation by producers and/or traders.

The complementary role of these initiatives to (inter) governmental regulatory frameworks and the success of some of these labelling initiatives in gaining a substantive market share have given rise to debates on the extent to which they are subject to WTO provisions and whether they violate them or not.

This paper reflects on the GATT/WTO legal aspects of social and environmental standards and voluntary certification and labelling programmes in agriculture. The paper focuses on programmes with an international scope and with standards relevant for the crop production sector, including labelling of derived food products. Standards from national industry bodies that only affect producers in that country fall outside the scope of this paper. For a description of the main international voluntary social and environmental standard setting and certification programmes in agriculture see Courville (2000).

The purpose of the paper is to advise governments and standard setting and labelling organizations alike by presenting the most relevant provisions in the WTO and indicating possible implications of these provisions. The final paragraph summarises the relevant issues currently under debate.

All literal transcriptions of WTO texts and dispute panel reports are provided in italics. If provisions are presented in normal font this means the text given here is a summary or interpretation by the author.

2. BASIC PRINCIPLES OF THE WTO

The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world’s trading nations and ratified in their parliaments. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible. The WTO, established in 1995, is the successor of the General Agreement on Tariffs and Trade (GATT). The GATT Agreement of 1994 is now the principal WTO Agreement for trade in goods. The WTO has more than 130 members. The system encourages countries to settle their differences through consultation. Failing that, they can follow a stage-by-stage procedure that includes the possibility of a ruling by a panel of experts, and the chance to appeal the ruling.

2.1 GATT Article I and III: Non-discrimination of like products

Article I and III of the General Agreement on Tariffs and Trade (GATT) are basic principles of the WTO and are advocating non-discrimination in trade.

Article I is titled “General Most-Favoured-Nation Treatment”, and includes the following lines:

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“1. With respect to customs duties and charges [..], and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, [..], any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

Article III is titled “National Treatment on Internal Taxation and Regulation” and includes the following text:

“1. [...] internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, [...] should not be applied to imported or domestic products so as to afford protection to domestic production.  
4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

The Most-Favoured-Nation (MFN) principle (Art. I.) means that WTO members are bound to treat the products of one country no less favourable than the like products of any other country. The National-Treatment (NT) principle (Art. III) means that once goods have entered a market, they must be treated no less favourably than like products of national origin.  

The term ‘like products’ has been defined in past dispute panel decisions to mean products with the same or similar physical characteristics or end uses. This has resulted in a debate on Production and Processing Methods (PPMs). The WTO allows countries to adopt trade measures regulating ‘product characteristics or their related processes and production methods’, but does not allow trade restrictions on the basis of unrelated PPMs (i.e. PPMs not related to product characteristics such as the quality or safety of a product).  

The report of 1991 of the GATT dispute settlement panel in the “Dolphin-Tuna” case interprets the MFN and NT principles for labelling rules regarding unrelated PPMs. Although the report was never adopted, it is one of the few Panel reports on PPM-labelling to guide further interpretation. The report states:

“… the labelling provisions of the DPCIA do not restrict the sale of tuna products; tuna products can be sold freely both with and without the “Dolphin Safe” label.” […] “provisions governing the right of access to the label [should meet] the requirements of Article I:1”.

So the report states that labelling on the basis of unrelated PPMs is allowed under the GATT, as long as the labelling is voluntary, because it does not restrict trade. The right to use the label was not considered an advantage granted from the government - any advantage would depend on the free choice of consumers. However, the criteria for certification and labelling should be applied in a non-discriminatory way to all applicants.

The panel report also makes clear that GATT Article I is relevant for labelling schemes. For Article III this is less clear. Appleton argues that it is not certain that Article III was meant to apply to voluntary

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schemes as they may not be regulations or requirements in the sense of Article III.1. And even if they are, it is not sure they will be viewed as affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, because of their voluntary nature. This should be determined on a case-by-case basis.

2.2 GATT Article XX: General Exceptions

In cases where standards, certification or labelling schemes would violate Article I or III they could still comply with GATT rules if one of the General Exceptions of Article XX applied. In Article XX the permitted exceptions to the implementation of the other GATT Articles are listed. Still such exceptions should not be applied arbitrarily or be unjustifiably discriminative between countries where the same conditions prevail.

The most relevant exceptions listed in GATT Article XX are:

..nothing in this Agreement shall be construed to prevent adoption or enforcement by any Member of measures:

(a) necessary to protect public morals;
(b) necessary to protect human, animal or plant life or health;
(d) [...] relating to the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

3. THE TBT AGREEMENT

The GATT has become the WTO’s umbrella agreement and applies in all cases. In addition specific agreements have been negotiated that address specific aspects of trade. The Agreement on Technical Barriers to Trade (TBT) is the most relevant agreement for standards and certification programmes. The TBT applies the MFN and NT principles to technical regulations and standard setting practices and to conformity assessment procedures. Of note is that the TBT comes before the GATT in the hierarchy of the WTO Agreement.8

3.1 Definitions of regulations and standards

The interpretation of the terms and their definitions as set out in Annex 1 of the TBT is crucial for understanding the other provisions of the TBT and has raised many debates. This paragraph examines the definitions of regulations and standards and whether environmental and social standards and certification programmes are covered by these definitions. The TBT sets different rules for “regulations” as opposed to “standards”, so it is necessary to determine whether a given standard or certification programme is covered by one of these terms in the TBT context.

3.1.1 The definitions.

TBT Annex 1 states:

“Technical regulation = Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory [emphasis added]. It may also include or deal exclusively with terminology, symbols,
packaging, marking or labelling requirements as they apply to a product, process or production method.’’

‘‘Standard = Document 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 [emphasis added]. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.’’

‘‘Explanatory note: [...] Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.’’

It should be noted here that although most of the following discussions concern cases of certification and/or labelling, the definitions also cover regulations and standards not associated with any claim or label.

3.1.2 Mandatory or voluntary?

Compliance with national regulations for organic agriculture and labelling of organically produced products is only mandatory if one chooses to label a product as organic. Hence one could argue compliance is voluntary, but also that compliance is mandatory if organic products are considered as a distinct product category. In a paper presented to the TBT Committee and the Committee on Trade and Environment (CTE) in 2001, Switzerland questioned the justification of the distinction between mandatory and voluntary standards/regulations. They argued that if a standard has the effect of market segregation, compliance with the standard becomes factually mandatory for a producer wishing to access the new market segment.9 Some countries agreed that in some cases voluntary schemes could be dubious in their voluntary or mandatory nature or that voluntary schemes could have a bearing on competitiveness Or the perception and choices of consumers. Many members, did not wish to consider this an issue for (re-)negotiation nor did they feel the need for clarifying documents, but they were prepared to discuss the issue for a better understanding.10

The notification by the EU in February 2001 on a draft regulation relating to imports of organic products11 means the EU probably considered it a mandatory technical regulation in the TBT sense (for more details on the notification see Ch. IV).

3.1.3 Unrelated PPMs labelling

Social and labour standards concern processing and production methods (PPMs) that do not affect the end characteristics of a product and also environmental standards normally contain such standards. In the TBT Committee it has been debated whether non-product related process and production methods (unrelated PPMs) labelling was covered by the definitions of regulations and/or standards. Some countries believe that this is not clear because the first sentence of each definition speaks of related PPMs, but the second sentence on labelling omits the word “related”.12 Others believe that unrelated PPMs were not the subject of the provision. Some countries were concerned on the proliferation of unrelated PPMs labelling requirements.

9 WTO. 2001. Committee on Trade and Environment. Marking and Labelling requirements, Submission from Switzerland. WT/CTE/W/192 and G/TBT/W/162.
11 WTO. 2001. Committee on Technical Barriers to Trade, Notification. G/TBT/N/EEC/2.
12 WTO. 2001. Committee on Trade and Environment. Marking and Labelling requirements, Submission from Switzerland. WT/CTE/W/192 and G/TBT/W/162.
Switzerland noted that this matter is further complicated because in practice it can be difficult to decide whether a label gives information on related or unrelated PPMs. For example, a large quantity of organically produced carrots will on average contain less pesticide residues than conventional carrots, but when comparing one single organic carrot with a conventional carrot, there might be no difference. Hence it is not clear whether the organic labels give information on related PPMs (affecting the product itself) or unrelated PPMs. 13

Appleton notes that during the negotiations the second sentence was never treated as a stand-alone provision. Therefore Appleton argues that unrelated PPMs labelling is not covered by the TBT. How schemes that concern both related and unrelated PPMs will be treated must be established by practice. One possibility would be that Members would apply the TBT to the product-related standards and the GATT to the not product-related standards. 14

### 3.1.4 NGO standards

A particularity is that the TBT defines a standard as *a document approved by a recognized body* but does not define the phrase “recognised body”. Webb argues that because the word “approved” is used, “recognised body” may mean the body developing the standards but may also mean another body using the standard. 15 However, in most of the literature it is understood that the standards developed by NGOs (at least those related to product characteristics) are covered by the TBT definition of standards.

### 3.2 Article 4: Preparation, adoption and application of standards

From the above discussion it could be concluded that voluntary environmental standards do fall under the TBT definition of a “standard”, at least for the product-related requirements within the standards. For labour standards that concern only requirements that are not linked to the end characteristics of the product the TBT would not apply. For certification and labelling schemes with reference to such labour standards it would depend if the second sentence of the TBT definition of a “standard” is read as a stand-alone-provision or not.

Because the TBT is applicable to at least part of the voluntary environmental and labour standard setting and certification initiatives, it is useful to examine the requirements set out in the TBT for standards.

TBT Article 4.1 reads:

> “Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the “Code of Good Practice”)” They shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring of encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance

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13 WTO. 2001. *Committee on Trade and Environment. Marking and Labelling requirements, Submission from Switzerland. WT/CTE/W/192 and G/TBT/W/162.*

14 Appleton, see note 6 above, p. 93-94 and 124. Appleton quotes Mr. Eglin, Director of the TBT and Environment Division during the Uruguay Round negotiations on the interpretation of the second sentence of the definitions.

of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.”

Although the definition covers NGO-standards, NGOs cannot be challenged directly before the WTO. The WTO can only regulate government action. In the event of a dispute, there could be questions whether a Member has taken ‘reasonable measures’ to ensure those NGOs comply with the Code of Good Practice. Analogous language found in the GATT requiring countries to take such ‘reasonable measures as are available to them’ has been interpreted by dispute panels to require governments to take all constitutionally-available measures. There is ongoing concern and debate about what the term “constitutionally available” actually requires of governments.16 At the other hand, NGOs, as any other organization, normally have to comply with a variety of national laws and regulations in the countries where they operate. Therefore, these ‘reasonable measures’ should not be of too great concern to NGOs, as they would already be operational and not mean anything new for them.

3.3 Code of Good Practice for the Preparation, Adoption and Application of Standards

Standardizing bodies are encouraged by the WTO to accept the Code of Good Practice (Annex 3 of the TBT) for the preparation, adoption and application of standards. The Code is discussed here and sometimes a comparison is made with the TBT Articles for technical regulations. The latter are presented in text boxes.

3.3.1 General provisions of the Code of Good Practice

The text of the Code of Good Practice starts with a few general provisions, among which:

“B. This Code is open to acceptance by any standardizing body [...] and bodies that have accepted or withdrawn from this Code shall notify this fact to the ISO/IEC Information Centre in Geneva.”

These provisions give directions on how standard setting NGOs should behave, but still only the member nations themselves can be held responsible for (non)compliance with the WTO agreement. (See the ‘reasonable measures’ discussion in par. II.1)

3.3.2 The MFN and NT principles

The first substantive provision of the Code reads:

“D. In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country”.

This provision combines the National Treatment (NT) principle with the Most Favoured Nation (MFN) principle and applies them to standards. This provision adds arguments to the view that unrelated PPMs labelling is not allowed because the label would differentiate between like products and in the market place this would almost always mean a less or more favourable treatment. However, the Dolphin-Tuna panel report (see Ch. II) argued that advantages are not given by the authority granting the label, but advantages might arise through the free choice of consumers.

The Code continues with:

“E. The standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.”

Because of the mandatory nature of technical regulations these are supposed to be more trade restrictive and hence more specific conditions have been set under which such regulations are allowed (see Box 1).

<table>
<thead>
<tr>
<th>Box 1. Legitimate objectives for trade-restrictive technical regulation</th>
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<td>According to Article 2 (2.2 and 2.3) technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective. Such legitimate objectives are inter-alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. And according to Article 2.5 a Member shall upon the request of another Member explain the justification of that technical regulation.</td>
</tr>
<tr>
<td>The “legitimate objectives” are referring to the General Exceptions of GATT Art. XX. In case regulations for the labelling of organically produced products were considered to be trade-restrictive it could still be argued that they are fulfilling the legitimate objective of preventing deceptive practices. The question has been raised whether the objective of “consumer information” is covered by “preventing deceptive practices”.</td>
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3.3.3 International harmonization

The Code of Good Practice states that a standardizing body shall adopt existing or imminent international standards where relevant; make reasonable efforts to harmonize standards at the international level; avoid duplication or overlap with the work of other standardizing bodies; and make every effort to achieve a national consensus on the standards they develop.

In Annex 4 of the report of the second triennial review of the TBT\(^1\), principles were formulated for the development of international standards. The annex contains provisions regarding publication and consultations, non-discriminatory membership rules of international standardizing bodies and non-discriminatory and impartial access to participation in standard development. The impartiality and openness of any international standardization process requires that developing countries are not excluded de facto from the process. In addition the Annex states that international standards need to be relevant and respond to market needs and they should not give preference to the characteristics or requirements of specific countries when different needs or interests exist in other countries.

It has been feared that the international harmonization principle would prevent the development of “higher” standards once an international standard existed and so ‘water down’ environmental and organic regulations. In the “beef hormone dispute” within the scope of the SPS Agreement the Dispute Settlement Body Panel had ruled that ‘based on’ international standards meant ‘conform to’ international standards. But the Appellate Body did not agree with that and ruled that “a measure based on a standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure”.\(^2\) See also Box 2 for interpretation of TBT “harmonization” Articles for regulations in light of this ruling.

Of particular note is that the TBT does not indicate with whom the burden of proof lays to decide whether there exists a relevant international standard and whether a regulation or standard is in

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\(^{17}\) WTO. 2001. Committee on Trade and Environment. Marking and Labelling requirements, Submission from Switzerland. WT/CTE/W/192 and G/TBT/W/162
\(^{18}\) WTO. 2000. Committee on Technical Barriers to Trade. Second triennial review of the operation and implementation of the Agreement on Technical Barriers to Trade. G/TBT/9
according with the international standard. If a dispute arises, there could be questions about what constitutes a relevant international standard.²⁰

With the increasing number of standards and certification programmes, the provision to avoid duplication and overlap becomes more important. It also raises the question whether this does prevent an environmental certification programme to adopt labour standards if such standards are already covered by another programme?

### 3.3.4 Publication and consultation provisions

The Code requires that a standardizing body shall publish work programmes every six months and shall indicate for each standard the international standards that have been taken as a basis. Before adopting a standard, the standardizing body shall allow a period of at least 60 days for the submission of comments by interested parties. On request the standardizing body shall promptly provide a copy of a draft standard that it has submitted for comments. Once the standard has been adopted it shall be promptly published. The standardizing body shall consider any complaints and make an objective effort to solve them with respect to the operation of this Code. ISO/IEC members shall make every effort to become member of ISONET²¹.

<table>
<thead>
<tr>
<th>Box 2. International harmonization of technical regulations</th>
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<tr>
<td>In Analogy of the Appellate Body interpretation of SPS Article 3.1, 3.2 and 3.3 in 1998 ²², the TBT articles 2.4, 2.5 and 2.9 could be interpreted as follow:</td>
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<tr>
<td>2.4 Members shall base technical regulations on relevant international standards, but this does not imply they should conform to or be in accordance with these standards</td>
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<tr>
<td>2.5 If they are in accordance with (or conform with) relevant international standards they will be presumed not to create an unnecessary obstacle to trade.</td>
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<td>2.9 If they are not in accordance with the international standards Members shall notify other Members and allow for comments.</td>
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</table>

The EU has noted that the international standardization process can be painfully slow and therefore not responding timely to regulatory needs. As a result the EU has made relatively limited use of international standards as the basis for technical regulations.²³

TBT Article 2.7 states that Members shall give positive considerations to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided that they are satisfied that these regulations adequately fulfil the objectives of their own regulations. (Emphasis added)

This suggests that provided the objectives are legitimate and are based on a risk assessment, which considers scientific information (Article 2.2), a Member is allowed to set ‘higher’ standards.

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²¹ ISONET is the information network of the ISO/IEC, and is monitored by the central ISO secretariat in Geneva. In many countries, the ISONET information centre and the WTO enquiry point for standards and regulations are one and the same.


3.4 Other TBT Articles relevant for standards

3.4.1 Articles 5 - 9: Conformity Assessment

Articles 5 to 9 of the TBT Agreement set out requirements for conformity assessment. The articles are preceded by the heading “Conformity with Technical Regulations and Standards” (emphasis added). Whereas Article 2 and 3 refer only to regulations and Article 4 only to standards, this heading above Article 5 to 9 refers to both regulations and standards. Therefore it has to be assumed that the requirements for Conformity Assessment apply to both regulations and standards. This means that for standard preparation, adoption and application Article 4 refers to the Code of Conduct and acceptance of the Code is optional but for conformity assessment of standards (i.e. including certification and labelling programmes), compliance with articles 5-9 is obligatory, at least for governmental bodies.

Article 5 and 6 of the TBT Agreement set out requirements for conformity assessment bodies of central governments.

Article 5 requires inter alia:
- Conformity assessment procedures by governmental bodies should be non-discriminatory for like products (MFN and NT principles), including processing time and fees, taking into account communication, transportation and other costs arising from differences between location of facilities and the conformity assessment body.
- Conformity assessment procedures shall not be more strict or be applied more strictly than necessary to give the importing Member adequate confidence that products conform to the applicable technical regulations or standards.
- Information requirements are limited to what is necessary to assess conformity and determine fees.
- Confidentiality is respected in the same way as for domestic products and in such a manner that legitimate commercial interests are protected.
- A complaints and corrective action procedure should exist.
- International harmonization is sought and notifications of procedures are made, similar as for technical regulations and standards.

Article 6 requires that Members shall accept conformity assessment procedures in other member countries provided they are satisfied with the level of equivalence. Prior consultations may be necessary to assess technical competence of the relevant conformity assessment bodies and agree on limitations of the acceptance of the conformity assessment results to those produced by designated bodies in the exporting member country.

Article 8 and 9 requires Members to take reasonable measures to ensure that also non-governmental bodies and international systems in which relevant bodies within their territory participate comply with Article 5 and 6. Central government bodies should rely on non-governmental bodies and international systems only if the latter comply with article 5 and 6. Non-governmental bodies are exempt from the obligation to notify proposed conformity assessment procedures.

3.4.2 Article 12: Information and differential treatment of developing countries

Each member shall have an enquiry point, which has to be able to provide information on any regulations, standards and conformity assessment procedures in its territory. They should also take reasonable measures to be able to provide information on those standards and conformity assessment systems developed, adopted or operated by non-governmental bodies and on relevant international bodies and systems.

Members shall in the preparation and application of technical regulations, standards and conformity assessment procedures take account of the special situation of developing countries to ensure that they do not create unnecessary obstacles to exports from developing countries. Members shall take
reasonable measures to facilitate active participation of developing countries in international standardizing bodies and conformity assessment systems and ensure that upon request, international standards are developed for products of special interest to developing countries. Members shall provide technical assistance to ensure that regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing countries.

The TBT Committee is enabled to grant specified time-limited exceptions from obligations under this Agreement [to developing countries].

3.4.3 Article 14: Dispute settlement

Article 14 of the TBT Agreement states that the settlement of disputes shall follow the normal GATT procedures. According to Article 14.4 the dispute settlement procedure can also be invoked in case a member has not achieved satisfactory results under Article 3, 4, 7, 8 and 9 (concerning local or non-governmental bodies or international bodies/systems), and its trade interests are significantly affected. In this respect, such results shall be equivalent to those as if the body in question were a Member.

It is not clear whether this means that Members could be held responsible for NGOs on their territory not complying with the TBT Agreement or for standards developed by international bodies. This would also depend on the interpretation of “reasonable measures as are available to them” in Article 4.1 (see page 4).

4. IMPLICATIONS OF TBT AND GATT PROVISIONS FOR VOLUNTARY ENVIRONMENTAL AND SOCIAL STANDARDS, CERTIFICATION AND LABELLING

The discussion in Chapter II and III can be briefly summarised as follows. Voluntary environmental standards do fall under the TBT definition of a “standard”, at least for the product-related requirements within the standards. For the preparation and application of labour standards that concern only requirements that are not linked to the end characteristics of the product the TBT would not apply. For conformity procedures and labelling schemes concerning non-related PPMs the TBT could still apply, this would depend if the second sentence of the TBT definition of a “standard” is read as a stand-alone-provision or not.

Standard setting bodies (at least governmental bodies) should comply with the Code of Conduct for the preparation, adoption and application of standards. The standards they develop should be non-discriminatory and not restrict trade, based on international standards where appropriate, efforts for international harmonization should be made and interested parties should be offered the possibilities to comment before adoption of the standard.

According to GATT Article I, non-product related standards should not grant any advantage to products of one country in comparison with products from another country. It is not sure if Article III also applies, requiring that once goods have entered a market they must be treated no less favourably than like products of national origin. In general voluntary standards are considered not to violate these provisions.

Conformity assessment and labelling procedures for product related criteria, and maybe even for non-product related criteria, should comply with articles 5 to 9 of the TBT Agreement. These inter alia require that the provisions governing the right of access to the label should be non-discriminatory, not be more strict than necessary, internationally harmonized as far as possible and a complaints and
corrective action procedure should exist. Non-governmental bodies are exempt from notification obligations.

4.1 National regulations

4.1.1 Organic agriculture regulations

It is not clear whether organic labelling regulations are considered to be about related or unrelated PPMs. Evidence is growing that on average organically produced products contain less pesticide residues than conventional products. Therefore organic labelling can be considered at least partially product-related and the TBT would apply.

National regulations for organic agriculture and the labelling of organically produced products could be either considered technical regulations or standards, depending on the interpretation of the word ‘mandatory’. In both cases they are likely to comply with the TBT and GATT. A parallel could be drawn with the Dolphin-Tuna case, where the Panel report (unadopted) stated that “the labelling provisions [...] do not restrict the sale of tuna products; tuna products can be sold freely with and without “Dolphin Safe” the label.” [...] “provisions governing the right of access to the label [should meet] the requirements of Article I:1” (the Most-Favoured-Nation Principle). Organic certification and labelling programmes would not be considered trade-restrictive because products can be sold freely with and without the organic label and they could be considered to fulfil legitimate objectives such as preventing deceptive practices. However, the provisions governing the right of access to the label should be non-discriminatory. The regulations should be based on international standards (the CODEX guidelines or IFOAM Basic Standards) whenever appropriate. Members should notify each other whenever they propose new organic regulations or review existing ones that are not in accordance with these international standards. Members may be allowed to set stricter standards than other Members provided they could justify this with a risk assessment using scientific information. This latter interpretation however is still highly debated and certainty can only be obtained by a dispute settlement on this matter.

The ongoing discussions on the notification by the EU in February 2001 on import requirements and certification of organic products could clarify what the TBT provisions will mean in practice for national regulations for labelling of organically produced products. “The draft Regulation aims to provide for traceability of consignments of organic products from the time they leave the inspection system in a third country until they are registered by the first consignee under the inspection system within the EU. A certificate accompanying imported consignments of organic products has to ensure that these consignments are effectively originating from a production/processing regime of which the equivalency has been recognized.”

The notification was made under Article 2.9.2 meaning the regulation was considered mandatory. The USA expressed concerns on the unclear procedures for implementation of the new certification requirements for countries which did not have an equivalency agreement with the EU.24

4.1.2 National regulations on social responsibility

In January 2001 Belgium notified the TBT Committee of a draft law aiming to promote socially responsible production. The aim of the law is to create a label which companies can (voluntary) affix their products if these products meet core labour standards recognized by the ILO. These criteria are to be monitored by accredited bodies and a committee for socially responsible production is to be set up to monitor the allocation of labels and procedures for assisting developing countries that wish to have the label. Control bodies should be accredited according against EN 45004/ISO 17020 criteria (criteria

24 The notification could also have been made under Article 5.6.2, because it deals mainly with conformity assessment procedures. Article 5.6.2 is relevant for both regulations and standards, whereas article 2.9.2 is only relevant for technical regulations. WTO. 2001 Committee on technical barriers to trade, Notification G/TBT/N/EEC/2.
for the operation of inspection bodies) and/or by Social Accountability International for the scope of the SA8000 norm.25

In subsequent TBT Committee meetings it was stressed that the labelling would be voluntary. It therefore should not have been submitted under Article 2.9.2 (as a regulation) but under Annex 3 for standards. However, Annex 3 stipulates that standard setting bodies should notify the ISO/IEC Information Centre. The Belgian Parliament did not consider itself a standardizing body and therefore had chosen to notify the TBT committee directly to fulfil the purpose of the notification procedures, i.e. to inform other Members.26

The ASEAN countries expressed their concerns that the law was based on an arbitrary requirement of adherence to certain ILO conventions that would result in discrimination of products based on non-trade criteria. They were concerned about the discriminatory nature of the law as it would only be applicable to imported products and thus violate the National Treatment principle.27

Indeed, the draft law was amended to allow also Belgian companies to request the label and comparable labels awarded by other countries or by international organizations can be recognised, provided these labels offer equal guarantees. The amended law was adopted and published in March 2002.28 Regulations on how the law will be executed in practice, especially inspection and certification procedures, are being developed.

Another example of a proposal for governmental regulation was a voter initiative in Berkeley that had qualified for the November ballot, but did not pass. The initiative proposed a coffee policy, requiring all coffee sold in Berkeley to be either fairtrade, shade grown or organic.29 This would have been mandatory, even if the cited certification initiatives themselves are voluntary, and hence would have been considered a regulation of a local government.

4.2 Standards and labelling systems developed by NGOs

Standards developed by NGOs (with or without labelling programmes) could be considered ‘standards’ in the TBT sense. Whenever an NGO publicly accepts the Code of Good Practice it should comply with it. Members should take reasonable measures to ensure that certification and labelling systems operated by NGOs comply with Article 5 and 6 of the TBT Agreement (on conformity assessment).

4.2.1 The ISO system

The ISO/IEC system is explicitly recognised in the TBT to provide international accepted standards. ISO declares itself to be a not-for-profit non-governmental organization. Its member bodies are either governmental, parastatal or non-governmental bodies, the latter often consisting of industry representatives. ISO has long been recognised as the major standard setting body for setting international harmonized industry standards.

Only recently has ISO started to develop environmental standards and has started work on social responsibility. Their environmental management system standard (ISO 14001) has very quickly been

26 WTO. 2001. Committee on Technical Barriers to Trade, Minutes of the meeting held on 9 October 2001. G/TBT/M/25.
27 WTO. 2001 Committee on TBT. ASEAN concerns regarding the proposed Belgian law for the promotion of socially responsible production G/TBT/W/159.
28 Belgisch Staatsblad / Moniteur Belge 26.03.2002 Ed.2 Wetten, decreten, ordonnanties en verordeningen / Lois, décrets, ordonnances et règlements.
implemented in a wide range of sectors. Critics from environmental and social oriented NGOs state that some interests such as those of workers and the environment are not well represented in the ISO system and therefore ISO would not be the best organization to set international standards in these fields. More widely it has been recognised that ISO 14001 has a limited scope because it deals only with management systems. In view of the harmonization requirements of the TBT it could be argued that standardizing bodies wishing to set environmental management system standards should consider to adopt the ISO 14001, but for more performance oriented standards ISO 14001 is less relevant.

ISO standards and guidelines on standard setting procedures and conformity assessment procedures are widely being adopted by other standard setting bodies and by accreditation and certification bodies.

4.2.2 **IFOAM**

As with national regulations on organic agriculture and labelling of organically produced products, certification and labelling programmes of IFOAM members would not be considered trade-restrictive. For the second revision of the IFOAM Basic Standards (August 2002) it has fulfilled the obligations on publication and consultation as it published the draft revision on the web and allowed for two rounds of public comments. IFOAM promotes the harmonization of standards at the international level by the Mutual Recognition Agreement of its IOAS accredited certification bodies; by its own active involvement in the preparation of the CODEX guidelines; and by its participation in the ISEAL Alliance and SASA project. With the international membership of IFOAM and international participation in the standards revision of August 2002 it can also be assumed that the provisions governing the right of access to organic labels administered by IFOAM members are nondiscriminatory by intent. So it seems IFOAM complies with all provisions of the Code, except one: the notification of acceptance of the Code to the ISO/IEC Information Centre in Geneva. They do not appear on the lists of bodies who notified the Centre.30 This might be due to the fact that only national standardizing bodies are registered on this list.

Compliance with Article 5 and 6 is not relevant for IFOAM as such because IFOAM does not perform conformity assessments. But it is relevant for all certification bodies operating organic certification programmes and for the IOAS. The IOAS and its accredited certification bodies probably comply to a large extent with Article 5 and 6 because the accreditation guidelines and criteria of the IOAS are based on ISO guidelines and have been developed through an international process.

Of note is that ISO listed IFOAM in its Directory of International Standardizing Bodies. This is a list of organizations having standardization activities which qualify as international standardizing bodies as defined in the ISO/IEC Guide, but it is not a formal recognition of those bodies.31 IFOAM stated in a press release on the ISO listing: “We have developed a transparent, democratic, and consensus-building process for international organic standards-setting which involves all key stakeholders and fulfils the criteria of the WTO Code of Good Practice.”32

4.2.3 **SAN, FLO, SAI and ETI**

Most of the Sustainable Agriculture Network (SAN) standards are environmental standards and also part of the standards of the Fairtrade Labelling Organization International (FLO) are environmental standards. Although these might have to be examined one by one, it could be assumed that at least part of these environmental standards would be somewhat product-related in which case the TBT would apply. On the other hand the Social Accountability standard (SA8000) of SAI ant the Ethical Trade

Initiative (ETI) Base Code are labour standards and entirely non-product-related. As discussed above, the TBT articles on conformity assessment might still apply, but for preparation, adoption and application of the standards the GATT Article I (and maybe also Article III) would apply.

SAN, FLO, SAI, and ETI have not made a public declaration of acceptance of the TBT Code. However, FLO, SAI and SAN are members of ISEAL Alliance. ISEAL is developing a peer review programme for accreditation and standard setting activities. For standard setting, a normative document is being developed based on Annex 4 (international standards development guidelines) of the Second Triennial Review of the TBT and based on related ISO Guides. Furthermore, the labour standards included in SAN, FLO, SAI and ETI standards are all based on ILO conventions, thereby fulfilling an important requirement of the Code. For the restrictions on pesticide use, FLO and SAN also refer to international fora, such as the Prior Informed Consent procedure.

SAN, FLO and SAI not only set standards; they are also directly involved in conformity assessments. SAI operates an accreditation system. SAN and FLO do the certification themselves and are both in a process of separating certification activities from their other functions. The FLO certification unit has become a legally independent body from January 2003 and will operate according to ISO guidelines for certification bodies. Members are obliged to take “reasonable measures as are available to them” to ensure the certification units of SAN and FLO comply with Article 5 and 6. Likewise they should ensure compliance by certification bodies that certify against SA8000 (if the TBT would apply). So far, no actions are known of governments urging or forcing NGOs to comply with the TBT, and this would also be unprecedented.

The ETI does not operate a conformity assessment programme. Companies involved in the ETI do internally assess compliance of their own facilities and sometimes of their suppliers to the ETI Base Code. But because these are internal business decisions, this does not fall under the TBT. A relevant discussion in this respect is on the increasingly global nature of some companies. How “internal” are decisions of companies if they affect thousands of suppliers worldwide?

Due to the voluntary nature of these initiatives they are not trade restrictive. They also do not grant an advantage as any advantage resulting from the label would be the result of the free choice of consumers. Therefore they are likely to comply with Article I of the GATT, and with Article III, in case the latter would be considered applicable.

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34 FLO and SAN. 2002. Personal communication.
5. ONGOING DEBATES

5.1 Latest discussions

During the last two years, labelling systems have been discussed in every session of the TBT Committee. Due to the proliferation of mandatory and voluntary labelling schemes, these discussions are expected to gain in importance. Also in the CTE (eco-)labelling was discussed but most representatives felt discussions on labelling should be held in the TBT Committee and only strict eco-labelling issues were to be discussed in the CTE. (Note: also discussions on trade-related environmental standards and regulations fall under the CTE mandate). In October 2001 Costa Rica submitted a paper on organic agriculture to the CTE. In general organic agriculture was seen as example of synergies that could exist between trade, development and environment. The need for (cost) effective and transparent certification systems was emphasized.

The Doha Ministerial Declaration instructed the Committee on Trade and Environment to give particular attention to labelling requirements for environmental purposes. Work should include the identification of any need to clarify relevant WTO rules. The CTE shall report to the fifth session of the ministerial Conference (to be held 2003 in Mexico). But the outcome of this work shall not add to or diminish the rights and obligations of members under existing WTO agreements, in particular the SPS Agreement. No instructions were given to discuss standard and labelling issues in the TBT Committee. In an unofficial explanation on the WTO web site it is explained that the CTE should examine whether existing WTO rules stand in the way of eco-labelling policies and that parallel discussions are to take place in the TBT Committee.

In the TBT Committee many Members have objected to any re-negotiation of the TBT provisions. However, in the TBT Committee as well as in the Committee on Trade and Environment some members have requested for more structured discussions on labelling issues and several papers have been submitted to this end. Informal workshops have been organized. In a paper submitted in June 2002 the EU asks explicitly that the TBT Committee examine the need to clarify the WTO rules with respect to labelling. Other Members however have expressed the opinion that no clarification was needed.

5.2 Outstanding issues

Considering past opinions expressed in the TBT Committee, discussions regarding social and environmental standards and certification will probably concentrate on labelling. Discussions may include the following issues:

- Whether labelling systems always fall under conformity assessment procedures and therefore have to comply with Article 5 and 6 or not. (If the answer is yes, also NGO administered voluntary labelling schemes should comply with Article 5 and 6)

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- The interpretation of the TBT in relation to unrelated PPM labelling systems. (Some argue the TBT gives provisions for related PPM labelling systems only, in which case GATT Article I and maybe Article III become relevant.)

- Whether organic and GMO labels contain information on related or unrelated PPMs. (If they are considered to be related to the quality and safety of the end-product, mandatory labelling might be justifiable. If they were considered to be an unrelated PPM, probably only voluntary labelling schemes would be allowed)

- If “consumer information” is covered by the legitimate objective of preventing deceptive practices. (If the answer is yes, and “the consumer” wants to be informed about unrelated PPMs used in the production process of the product, there seems to be a conflict of provisions. “Consumer information” could then be a permitted exception to the implementation of MFN and NT principles and hence allow mandatory labelling with unrelated PPM information.)

- The involvement of developing countries in international standard setting. (It requires many resources, both financial and in terms of knowledge, to participate effectively in standard setting bodies like the ISO system and the Codex Alimentarius. The danger exists that standards reflect the interest of richer countries that can afford to send delegations to the negotiations.) In relation to this subject a further discussion on what constitutes an international standard and who sets those standards can also be expected.

- The de facto mandatory nature of some voluntary labelling schemes. (Voluntary labelling schemes are considered not to be trade-restrictive, as imports of non-labelled products are not hampered. However, as several delegations in the TBT and CTE have noted, some voluntary schemes do have an impact on market access. With the growing market for organic products the differences in organic regulations between countries may develop into de facto trade barriers.)

So far, no discussion has taken place on what is required of Members with regard to compliance of NGOs involved in standard setting. However, the EU noted this issue briefly in its paper on labelling submitted in June 2002. The EU paper also asks for review of the Code of Good Practice to include provisions similar to those for regulations on equivalency agreements for standards and on withdrawing standards when the circumstances giving rise to their adoption no longer exist. Japan noted that bodies developing labelling requirements were not always the standardizing bodies that have already accepted the Code of Good Practice and this results in a lack of transparency.40

40 WTO. 2002. Committee on Technical Barriers to Trade. Submission from Japan. Labelling. 18 June 2002 G/TBT/W/176.
2 The WTO and environmental and social standards, certification and labelling in agriculture. Cora Dankers

1 The Brazilian ethanol programme: impacts on world ethanol and sugar markets Tatsuji Koizumi