



Global Organic Market Access
a project of FAO, IFOAM and UNCTAD

Trade Agreements as Potential Mechanisms for Mutual Recognition of National Organic Regulatory Systems

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Acronyms

ACP	African, Caribbean and Pacific states
CAC	Codex Alimentarius Commission of FAO and WHO
CARIFORUM	a subgroup of ACP states around the Caribbean
EPA	Economic Partnership Agreement
FAO	Food and Agriculture Organization of the United Nations
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GOMA	Global Organic Market Access
IFOAM	International Federation of Organic Agriculture Movements
ITF	FAO/IFOAM/UNCTAD International Task Force on Harmonization and Equivalence in Organic Agriculture
Mercosur	<i>Mercado Común del Sur</i> (Southern Common Market)
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
PPM	Process and Production Method
SPS agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT agreement	Agreement on Technical Barriers to Trade
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

Definitions²

Equivalence

The acceptance that different standards or technical regulations on the same subject fulfil common objectives.

Harmonization

The process by which standards, technical regulations and conformity assessment on the same subject approved by different bodies establishes the interchangeability of products and processes. The process aims at the establishment of identical standards, technical regulations and conformity assessment requirements.

Recognition Arrangement

Unilateral, bilateral, or multilateral arrangement for the use or acceptance of results of conformity assessments.

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.

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. Technical regulations can refer to, or be based on, standards.

² Source: Strategy on Solutions for Harmonizing International Regulation of Organic Agriculture, International Task Force on Harmonization and Equivalence in Organic Agriculture, UNCTAD/DITC/TED/2005/15.

Executive Summary

The purpose of this paper is to clarify if regional or bilateral trade agreements can be a useful, complementary path for facilitation of market access for organic products. In exploring this, the paper first gives an outline of the global system for trade agreements in the World Trade Organization (WTO). Regional agreements are bound to follow the rules set in these agreements. The paper describes how regional and bilateral agreements relate to the global agreements, how such agreements normally deal with issues related to the WTO Agreement on Technical Barriers to Trade (TBT), and if and how mutual recognition is dealt with in these agreements. In order to be relevant to the scope of this paper, regional trade agreements also need to deliver more, in terms of reduction of barriers, than the WTO agreement already does.

Technical barriers to trade are often regulated in trade agreements. According to the WTO, there are 91 trade agreements in force that include or refer to technical barriers to trade in different variations. Only one trade agreement, the EU-Swiss Agreement on Agriculture, encompasses mutual recognition of organic products. In general, mutual recognition is part of trade agreements only to a limited extent, and there are only a few that go beyond the National Treatment concept of the General Agreement on Tariffs and Trade (GATT). Some agreements simply state that the rights and obligations shall be governed by the TBT agreement or that the standards among the member states shall be applied in accordance with the TBT agreement. Further, it is often agreed that the parties involved should strive to harmonize product standards or attempt to enter into an agreement on mutual recognition of conformity assessment. But the commitments in the agreements are mostly quite limited, meaning that parties may recognize the results of conformity assessment. Wine, in particular the protection of certain indications, is an example of something often being part of trade agreements.

Including mutual recognition of organic products in trade agreements can be less resource-demanding than forging separate equivalence or mutual recognition agreements. By raising the issue to a political level, requirements will, perhaps, be less onerous and developed in the spirit of the WTO agreements, rather than being based on a line-by-line comparison of standards, which seems to dominate in the separate organic agreements. Preferential treatment and special consideration of developing countries are possibly more likely to happen in the context of a larger trade agreement than in a separate organic agreement. The preconditions for the inclusion of organic products in trade agreements are that the sector and the trade have substantial volume that the sector is regulated and that proper enforcement is in place.

Here are some recommendations for further action: ensuring more notifications of organic equivalence agreements; including organic products in trade agreements based on the Enabling Clause; and including organic products in existing agreements, for instance, pursuing organic equivalence under the Canada-Peru Free Trade Agreement.

Introduction

The Global Organic Market Access (GOMA) project³, a joint FAO, IFOAM and UNCTAD initiative, works towards reducing the barriers to trade in organic products. In seeking to reduce those barriers, GOMA works to facilitate harmonization and especially equivalence between different countries', and private sector, systems for organic standards and conformity assessment.

There are many different ways that a country, which has chosen to regulate its organic claim in the marketplace, can deal with imports. The systems that currently exist in various regulations are⁴:

1. direct approval of foreign producers by (national or foreign-based) approved/accredited certification bodies based on compliance;
2. direct approval of foreign producers by approved/accredited certification bodies based on equivalence;
3. recognition of another country's system as being (unilaterally) equivalent;
4. organic equivalence agreements (essentially the same as 3, but mutual); and
5. inclusion of mutual recognition of organic products in trade agreements.

In the period 2003–2008, the joint FAO/IFOAM/UNCTAD International Task Force on Harmonization and Equivalence in Organic Agriculture⁵ (ITF) analyzed most of the options and developed a tool to facilitate equivalence determination⁶ and a common standard for certification⁷.

This paper looks into the fifth option mentioned above. The purpose is to clarify if regional or bilateral trade agreements can be a useful, *complementary* path for the facilitation of market access for organic products. In exploring this, the paper first gives an outline of the global system for trade agreements in the World Trade Organization (WTO). Regional agreements are bound to follow the rules set in those agreements, at least for the WTO members, which include most important global trading powers except for Russia. In order to be relevant for the scope of the paper, regional trade agreements also need to deliver *more*, in terms of reduction of barriers, than the WTO agreement already does.

Trade barriers caused by organic market regulations fall under the WTO Agreement on Technical Barriers to Trade (TBT). The paper describes how regional and bilateral agreements relate to the global agreements, how such agreements normally deal with issues related to the TBT agreement, and if and how mutual recognition is dealt with in those agreements. Finally, the paper discusses the situation and gives recommendations.

³ <http://www.goma-organic.org/>.

⁴ This is a simplified and schematic list.

⁵ See http://r0.unctad.org/trade_env/itf-organic/meetings/itf8/ITF_Summary_Report_080908db_%20final%20%20.pdf.

⁶ EquiTool, later complemented by GOMA with Common Objectives and Requirements of Organic Standards (COROS).

⁷ International Requirements for Organic Certification Bodies (IROCB).

Having government regulations in place is a pre-requisite for the inclusion of organic products in trade agreements. This paper does not discuss the merits of having government regulations in the first place. The ITF project endorsed some recommendations in that regard in the paper *Best practices for organic marketing regulation, standards and conformity assessment: Guidance for developing countries*⁸.

This paper is based mainly on research of written sources, but some officials have also been interviewed. In order to allow them to speak more freely, they are not identified in this report.

⁸ http://r0.unctad.org/trade_env/itf-organic/meetings/misc/ITF_Reg_Guide_Final_20070116.pdf.

The Global Trade Agreements

The World Trade Organization

The Marrakesh Agreement establishing the World Trade Organization (the WTO agreement) is the most far-reaching international trade agreement concluded. Although the WTO came into being only in 1995, the General Agreement on Tariffs and Trade (GATT) had been providing the rules for the system since 1948. The GATT 1994 sets out the basic rules for trade in goods. The WTO is the only international organization dealing with the rules of trade between nations. The WTO provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all, with the objective of contributing to economic growth and development. The WTO also provides a legal and institutional framework for the implementation and monitoring of these agreements, as well as for settling disputes arising from their interpretation and application. The current body of trade agreements under the WTO consists of 16 multilateral agreements (to which all WTO members are parties) and two plurilateral agreements (to which only some WTO members are parties).⁹

The WTO Secretariat is located in Geneva, Switzerland. Decisions in the WTO are generally taken by consensus among the entire membership. The WTO's highest institutional body is the Ministerial Conference, which meets roughly every two years. A General Council conducts the organization's business in the intervals between ministerial conferences. The WTO's founding and guiding principles remain the pursuit of open borders, the guarantee of Most Favoured Nation (MFN) principle (explained later) and non-discriminatory treatment by and among members, and a commitment to transparency in the conduct of its activities.

The legal texts defining the rules comprise about 60 agreements, annexes, decisions and understandings. There is one umbrella agreement (the agreement establishing the WTO, mentioned above) and three other main agreements—the General Agreement on Tariffs and Trade (GATT) (for goods); the General Agreement on Trade in Services (GATS); and the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement. Several additional agreements and annexes are developed under the GATT and the GATS.

For goods (under GATT)

Agriculture
Health regulations for farm products (SPS agreement)
Textiles and clothing
Product standards (TBT agreement)
Investment measures
Anti-dumping measures
Customs valuation methods

For services (GATS annexes)

Movement of natural persons
Air transport
Financial services
Shipping
Telecommunications

⁹ www.wto.org (as on 20 June 2011).

Pre-shipment inspection
 Rules of origin
 Import licensing
 Subsidies and countermeasures
 Safeguards

The table below gives an overview of the different levels of the WTO and the three main areas of authority— goods, services and intellectual property.

<i>Umbrella</i>			
AGREEMENT ESTABLISHING WTO			
<i>Basic principles</i>	Goods GATT	Services GATS	Intellectual property TRIPS
<i>Additional details</i>	Other goods agreements and annexes	Services annexes	
<i>Market access commitments</i>	Countries' schedules of commitments	Countries' schedules of commitments (and MFN exemptions)	
<i>Dispute settlement</i>	DISPUTE SETTLEMENT		
<i>Transparency</i>	TRADE POLICY REVIEWS		

Non-discrimination principles in WTO law

Some fundamental principles of non-discrimination can be found across all the agreements. The most important principles are the two non-discrimination principles in the GATT, namely the principle of MFN and that of Non-discrimination/National Treatment. The MFN principle is defined in Article I and states that:

“... 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.”

Accordingly, Article I prohibits discrimination between “like products” originating in, or destined for, different countries. The MFN obligation ensures equality of opportunity to import from, or export to, all WTO members.¹⁰ National Treatment (or the non-discrimination principle) as defined in Article III means that imported and locally produced goods shall be treated equally at least after the goods have entered the market.

Some exceptions from these fundamental principles are, however, allowed for, such as free trade agreements that apply only to goods traded within the group; special access for developing countries to their markets, barriers against products that are considered to be traded unfairly (i.e., anti-dumping or countervailing duties); in circumstances where there are import surges (safeguard measures) and general exceptions, such as necessity to

¹⁰ Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press, page 310.

protect public morals, human, animal or plant life or health etc., as defined in Article XX of the GATT. The non-discrimination principle can also be found in Article 2.1 in the TBT agreement, which establishes that members shall ensure that in respect of technical regulation, products imported from the territory of any member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country. Also, technical regulations shall not be prepared, adopted or applied to create unnecessary obstacles to international trade.

Organic products and the WTO

WTO members can implement trade-related measures in order to protect the environment and human health and life as long as such measures comply with WTO law. The measures can be exempted from GATT provisions if they are justified under Article XX of the GATT. Article XX allows governments to use measures in order to protect human, plant or animal life or health as long as they are not discriminatory. The basis of organic product markets is the differentiation of organic products from non-organic (conventional) products. Certification programmes deliver credibility to the consumers based on production practices defined in organic standards or technical regulations.¹¹ In order for organic products to be placed under Article XX, there must be necessary measures to protect the environment and health. But as long as no country states that *all* products sold have to be organic, this apparently does not apply. Therefore, barriers to trade in organic products cannot be seen as falling under Article XX.

The TBT agreement

In addition to Article XX there are two specific WTO agreements dealing with food safety and animal and plant health or safety as well as product standards in general namely the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures (TBT and SPS agreements).¹² Regulations of organic products falls under the TBT agreement, as they are not sanitary or phytosanitary rules but marketing regulations. The TBT agreement allows for technical regulation and standards such as those for organic products. Technical regulations and standards set out specific characteristics of a product such as its shape, size, design, functions and performance, or the way it is packaged or labelled before it is put on sale. There has been substantial controversy among WTO members on whether the TBT agreement or the GATT applies to standards and technical regulations based on non-product-related Processes and Production Methods (PPMs), such as environmental or social requirements. This would affect organic agriculture as it is, to a large extent, about PPMs. However, Annex 1 of the TBT explicitly defines both technical regulations and standards as setting “characteristics for products or related processes and production methods”, and today there is widespread agreement that PPMs are covered by the TBT.¹³

¹¹ International Task Force on Harmonization and Equivalence in Organic Agriculture, Discussion paper, Objectives of organic standards program, Exploring approaches to common regulatory objectives, page 7.

¹² See www.wto.org (as on 18 May 2011).

¹³ See for example the technical explanation for the Technical Barriers to Trade at www.wto.org (as on 14 September 2011); UNICE *Labelling schemes for environmental purposes*, UNICE updated position paper, (12 June 2003); Symposium on issues confronting the world trading system—summary reports

Notifications under the TBT

The TBT agreement describes certain conditions in which a WTO member must notify other members through the WTO Secretariat. Article 2.9 states that if a technical regulation may have a significant effect on the trade of other members, members shall notify other members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of the objective and rationale. Such notifications should be at an early stage, when amendments can still be introduced and comments taken into account. Article 5.6 has similar requirements for conformity assessment procedures. Article 10.7 states that a WTO member shall notify other members when it has reached *an agreement with any other country* on issues related to technical regulations, standards or conformity assessment procedures which may have a significant effect on trade. According to the WTO, 86 documents related to organic agriculture have been notified between 1999 and 2011.¹⁴ There is only one notification under Article 10.7 under the TBT agreement, which includes organic agreements signed by WTO members—the Japanese Recognition of U.S. Organic Standards for Plant-Based Agricultural Products, which is a non-reciprocal agreement in the sense that the Japanese Ministry of Agriculture, Forestry and Fisheries recognizes that the grading system of organic agricultural products and processed organic foods from the US National Organic Program (NOP) is equivalent to the grading system of organic products under the Japanese Agricultural Standard (JAS), with some limitations.¹⁵ The other organic equivalence agreements that have been concluded have apparently not been notified.

In the report of the Committee on Technical Barriers to Trade (2003), it is mentioned that the members of the WTO often fail to notify and that the regulatory authorities must be made aware of the notifications in order to enforce compliance with obligations.¹⁶ One explanation why there are no notifications of other agreements could be that not all WTO members have submitted statements on implementation and administration under Article 15.2 of the TBT agreement.¹⁷ Another explanation could be that the agreements are not estimated to have a significant effect on trade as stated in Article 10.7. However, Article 10.7 encourages members to enter into consultation with other members in order to conclude similar agreements or for arranging their participation in such agreements.

by the moderators, 6 and 7 July, World Trade Organization, Geneva, Switzerland and the 11 October 2004 Workshop on Environmental Goods, paragraph 31(III) of the DDA at the website of the WTO.

¹⁴ TBT Information Management System, <http://tbtime.wto.org/web/pages/search/notification/Results.aspx> (as on 15 September 2011); “Organic agriculture” exists as a pre-defined keyword for the searches.

¹⁵ WTO, Committee on Technical Barriers to Trade, an agreement reached by a member with another country or countries on issues related to technical regulations, standards or conformity assessment procedures, G/TBT/10.7/N/36 (18 April 2002).

¹⁶ WTO, G/L/657, (11 November 2003), (03-6000), Report (2003) of the Committee on Technical Barriers to Trade, paragraph 19–20.

¹⁷ WTO, G/L/940, (8 November 2010), (10-5965), Report (2010) of the Committee on Technical Barriers to Trade.

Disagreements and disputes

If a country has national laws and regulations on organic products which could constitute a barrier to trade, other members of the WTO may bring this to the attention of the WTO. There have been discussions in the TBT Committee about technical barriers to trade in organic products. For example, at the TBT Committee in November 2010, an issue was raised about the Korean Regulation for Food Industry Promotion Act because it does not appear to envisage equivalence mechanisms. Instead, all organic foods have to be certified by Korean authorities. The measure is currently postponed until 31 December 2012.¹⁸ If the government of a WTO member believes another government is violating an agreement or commitment that has been made in the WTO, such disputes can be dealt with through the Dispute Settlement Body. There have been no cases specifically on organic products (with regard to the TBT agreement) at the WTO Dispute Settlement Body. This may be because trade volumes of organic produce are rather small and there are other trade issues that WTO members consider more important to resolve.

Organic products as environmental goods

Environmental goods and services are part of the limited package of ‘trade and environment issues’ that were mandated for negotiation as part of the current Doha Round¹⁹ (originally placed on the agenda by the United States in the lead up to the Third WTO Ministerial in Seattle). Reduction of tariffs and a subsequent increase in trade for environmental goods and services hold the possibility of an increase in both economic development and environmental protection—at least that is the idea. However, defining environmental goods or services is a complex task, one that has not seen much progress. At the special session of the WTO Committee on Trade and Environment in 2007, Brazil and Peru put forward a proposal that biofuels and organic food products be considered environmental goods subject to tariff cuts or elimination. Brazil suggested in the proposal that the WTO and the Codex Alimentarius Commission²⁰ (CAC) act in cooperation with a view to harmonizing those standards and also reducing non-tariff barriers.²¹ The proposal was supported by other developing countries like Colombia, Chile, Egypt and South Africa. Developed member states such as Australia, the EU, Japan and the US expressed reservations about including agricultural products in the trade and environment negotiations. If organic products were to benefit from lower tariffs or tariff elimination, imported organic products could end up being cheaper than non-organic domestic products and therefore take substantial market share (without even claiming to be organic). In such a case, it is possible that the matters of technical barriers to trade caused by organic regulations would get greater attention, as much more than just the use of the word ‘organic’ would be at stake for those involved.

¹⁸ http://www.wto.org/english/news_e/news10_e/tbt_03nov10_e.htm(as on 28 May 2011).

¹⁹ The Doha Round is the latest round of trade negotiations among the WTO membership. The Round was officially launched at the WTO’s Fourth Ministerial Conference in Doha, Qatar, in November 2001.

²⁰ A joint body of Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO).

²¹ WTO, TN/TE/R/21 29 April 2008, Committee on Trade and Environment Special Session, 1–2 November 2007.

Regional Trade Agreements under WTO Law

The main purpose of a regional trade agreement is normally the elimination of tariff, import quotas and other barriers in order to support free trade; they can thus be seen as a complement to the multilateral trading system. At best they can also help speed up the process of the current WTO Doha Round negotiations. But in case of an inconclusive outcome of the Round, they could form the backbone of further trade liberalization, influencing the rules of the international trading system. Regional trade agreements cover more than fifty percent of international trade and they function parallel to the multilateral agreements under the WTO.²² By June 2011, only one WTO member—Mongolia—was not party to a regional trade agreement. As of 15 May 2011, 489 trade agreements had been notified to the WTO.²³ The WTO classifies regional trade agreements into four groups.

1. A Free Trade Agreement (FTA), as defined in paragraph 8(b) of Article XXIV of the 1994 GATT (e.g., NAFTA and Turkey-Jordan); FTAs are by far the biggest group of agreements.
2. A Customs Union (CU), as defined in paragraph 8(a) of Article XXIV of the 1994 GATT, e.g., the EU or Mercosur.
3. an Economic Integration Agreement (EIA), as defined in Article V of the GATS, i.e., for services (e.g., India-Malaysia and Peru-Singapore).
4. A “Partial Scope” Agreement (PS). PS, which is not defined or referred to in the WTO agreement, means that the agreement covers only certain products. PS agreements are notified under paragraph 4(a) of the Enabling Clause.

Many agreements combine several of these categories. For example, all EIAs are also FTAs (but not vice versa) and CUs are mostly also EIAs. Most of the regional trade agreements are bilateral. Cross-regional and cross-continental trade agreements increase the most.²⁴ Regional trade agreements often support the multilateral system and they allow groups of countries to negotiate rules and commitments that go beyond the scope of multilateral ones.

There are two options for notifying regional trade agreements within the WTO framework on goods, either under Article XXIV of the GATT or the Enabling Clause. Article XXIV, which provides a common ground, provides the possibility of creating customs unions and FTAs among a limited number of member countries; reciprocal preferences are also accorded to the participating countries. The customs unions generally have important political objectives above the trade aspects, such as regional integration, conflict management or reduction, all of which are issues beyond the WTO mandate.

²² In this report we use "regional trade agreement" as a general term that encompasses regional, multilateral and bilateral agreements. If there are reasons to make a distinction between them, we do so in the relevant cases.

²³ www.wto.org (as on 3 June 2011).

²⁴ Roberto V. Fiorentino, Luis Verdeja and Christelle Toqueboeuf, *The Changing Landscape of Regional Trade Agreements*, http://www.wto.org/english/res_e/booksp_e/discussion_papers12a_e.pdf.

The Enabling Clause entails a permanent exception from the MFN principle for certain developing country arrangements.²⁵ It enables developed WTO member countries to offer a differential and more favourable treatment to imports from developing countries. The developed countries should not expect reciprocity for commitments made by them in trade negotiations with developing countries, i.e., the developed countries should not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, and financial and trade needs. Article XXIV mentions that trade coverage should be “substantially all trade”; there is no such requirement in the Enabling Clause. One option for the inclusion of organic products in trade agreements could be under the Enabling Clause regime.

Mutual recognition or equivalence in regional trade agreements

Technical barriers to trade are often addressed in regional trade agreements. According to the WTO there are 91 trade agreements in force that include or refer to technical barriers to trade in different variations.²⁶ Out of these, 27 agreements also deal with environmental issues.²⁷ Some of these agreements are presented briefly below. Some agreements only refer to the TBT agreement and simply state that the rights and obligations shall be governed by the TBT agreement or that the standards among the member states shall be applied in accordance with the TBT agreement. Further, it is often agreed that the parties (or the member states) should strive to harmonize product standards or attempt to enter into an agreement on mutual recognition of conformity assessment.²⁸

The agreements signed by the United States, as one part, are rather similarly established. The chapters in the agreements on technical barriers to trade are applied to technical regulations as defined in the TBT agreement. As an example, the United States-Singapore Free Trade Agreement states that each party shall take steps to implement phases I and II of the APEC Mutual Recognition Arrangement for Conformity Assessment of the Telecommunications Equipment.²⁹ This recognition arrangement is a voluntary arrangement intended to rationalize the conformity assessment procedures for a wide range of telecommunications and telecommunications-related equipment and thus facilitate trade among the APEC countries. It provides for mutual recognition by the importing economies and mutual acceptance of the results of testing and equipment

²⁵ Paragraph 1 of the Enabling Clause establishes that “Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries (1), without according such treatment to other contracting parties”.

²⁶ Some of these agreements are also notified under General Agreement on Trade in Services (GATS) Article V.

²⁷ RTA Database at www.wto.org (as on 24 May 2011).

²⁸ See the FTA between the government of Canada and the government of the State of Israel, Article 4.2, the Southern African Customs Union Article 28 and the Euro-Mediterranean Agreement establishing an association between the European Communities and their member states on the one part and the Republic of Tunisia on the other part, Article 40.

²⁹ APEC means the Asia-Pacific Economic Cooperation Forum; US-Singapore, chapter 6.

certification procedures.³⁰ Even though it is not explicitly stated anywhere, it is possible to recognize organic products in the same way..

When examining other agreements in this area, it appears as if it is rather common for parties to use “*may* recognize” instead of “*shall* recognize”. For instance, in the US-Morocco Free Trade Agreement and the US-Peru Trade Promotion Agreement, it is stated that the importing party *may* recognize the results of conformity assessment and *may* enter into a voluntary arrangement.³¹ The parties *shall*, however, intensify the exchange of information in the area. There is also a committee or a coordinator monitoring the implementation and cooperation.³²

Technical barriers to trade are also included in the North American Free Trade Agreement (NAFTA), chapter 9. It is stated that each party shall follow relevant international standards or international standards whose completion is imminent. Also, the parties shall work jointly to enhance the level of safety and of protection of human, animal and plant life and health, the environment and consumers. If certain criteria are fulfilled, each party shall treat a technical regulation adopted or maintained by an exporting party as equivalent to its own. The Canada-US Organic Equivalence Import and Export Agreement recognizes the respective national organic systems as equivalent. It is rather interesting that these two parties to the NAFTA decided to sign a separate organic equivalence agreement without the third party, Mexico.

The objective of the Canada-Peru FTA is to improve the implementation of the TBT agreement, and it applies to the preparation, adoption and application of all standards, technical regulations and conformity assessment procedures. Each party shall use relevant international standards and encourage its national standardizing bodies to cooperate with the relevant national standardizing bodies of the other party. Such cooperation may occur through the parties’ activities in regional and international standardizing bodies of which they are both members. In matters relating to conformity assessment, one of the parties *may* recognize and rely on the other party. In accordance with Article 604, the parties *shall* strengthen their joint cooperation on standards, technical regulations and conformity assessment. To do that, the parties shall, for example, “seek to identify, develop and promote bilateral initiatives regarding standards, technical regulations and conformity assessment procedures that are appropriate for particular issues or sectors, taking into consideration their experience in regional and multilateral arrangements or agreements”. This article could be seen in relation to the incentive in Article 10.7 of the TBT agreement; this also affords the possibility of concluding a bilateral agreement on organic products. Also, according to Article 606, the parties shall give positive consideration to accepting technical regulations of the other party as equivalent to its own, *even if the regulations differ from its own*, provided it is

³⁰ See the Office of the Telecommunications Authority at http://www.ofta.gov.hk/en/tec/apectel_mra.html (as on 28 May 2011).

³¹ See also the Canadian FTAs and the Australian FTAs such as the Canada-Costa Rica Free Trade Agreement and the Australia-Chile one.

³² US-Morocco Free Trade Agreement and Economic Integration Agreement and the US-Peru Trade Promotion Agreement.

satisfied that the regulations adequately fulfil the objectives of its own regulations. This indicates that mutual recognition can be established even if the standards for organic products may differ. Article 607 states about conformity assessment that “[t]he Parties recognize that a broad range of mechanisms exists to facilitate the acceptance in a Party’s territory of the results of conformity assessment procedures conducted in the other Party’s territory”.

The EU-Chile Association Agreement states that in trade in services mutual recognition shall be applied if certain requirements are fulfilled.³³ According to Annex V the parties shall take all necessary steps in accordance with the agreement to ensure mutual protection of the names used for wine, traditional expressions etc.³⁴ Wine is an example of a product for which trade agreements often includes aspects of harmonization or mutual recognition of standards, technical regulations or conformity assessment. Wine is mentioned in other trade agreements such as the US-EC Wine Trade Agreement which include recognition of winemaking practices, recognition of names of places in the US and in Europe and the use of semi-generic names. Article 4 states that each party shall recognize that the laws, regulations and requirements of the other party relating to winemaking fulfil the objectives of its own law, regulations and requirements.³⁵ There is also an agreement between Canada and the EC which includes mutual recognition of oenological practices, processes and product specifications.³⁶

The African, Caribbean and Pacific (ACP) countries have long been granted special trade preferences by the EU.³⁷ Since the waiver relating to the Cotonou Agreement expired on 31 December 2007, new Economic Partnership Agreements (EPAs) have been signed between the EU and the ACP countries in accordance with Article XXIV of the GATT. The EPAs consist of six regional negotiation groups with one full agreement (EU-CARIFORUM³⁸) and five interim agreements. The former agreements were non-reciprocal while the EPAs are reciprocal. The agreement between the European Community on the one part and the Fiji Islands and Papua New Guinea on the other states that the parties agree to cooperate in providing necessary information on TBT-related and SPS measures and to avoid difficulties that might arise. The parties recognize the importance of enabling the Pacific States to have equivalence of their SPS measures recognized by developed importing countries. In the EU-CARIFORUM agreement, there are recommendations that negotiations on mutual recognition should begin in accounting, architecture, engineering and tourism. CARIFORUM states shall also be assisted in

³³ Agreement establishing an association between the European Community and its member states, on the one part, and the Republic of Chile, on the other part, Article 103, 30.12.2002.

³⁴ Agreement establishing an association between the European Community and its member states, on the one part, and the Republic of Chile, on the other part, Article 5 and Article 8, Annex V, 30.12.2002.

³⁵ Agreement between the European Community and the United States of America on trade in wine, Official Journal of the European Union, L 87/2, 24.3.2006.

³⁶ Agreement between Canada and the European Community on trade in wines and spirit drinks.

³⁷ The initial agreement, the first Lomé Convention, was signed in 1975, comprising trade, aid and political aspects. Special trade preferences for bananas and sugar were included in the form of separate protocols for primary products. During the period 1975–2000 a total of four further Lomé Conventions were signed. In June 2000 their successor, the Cotonou Agreement, was signed and it covers the three areas of trade and financial cooperation, cooperation and developmental aid.

³⁸ A subgroup of ACP states around the Caribbean.

establishing intra-regional SPS measures with a view to facilitating recognition of equivalence of such measures with those existing in the EC.³⁹

Trade agreements that include organic products

Switzerland is listed as an approved “third country” in the Commission Regulation (EC) 1235/2008, which regulates imports of organic products. Switzerland attained this status as a result of a trade agreement, while the other countries did so by applying for approval as “third country” according to the procedures laid down in the regulation. In the agreement between the European Community and the Swiss Confederation on trade in agricultural products,⁴⁰ it is stated that the elimination of barriers affecting the bulk of their trade in accordance with the provisions for the establishment of free-trade areas in the agreement establishing the WTO be *gradually* resolved, which suggests a focus on a process of harmonization. It is not very lengthy except for the annexes. Annex 9 deals with organically produced agricultural products and foodstuff:

“The Parties hereby recognize the laws and regulations listed in Appendix 1 to this Annex as equivalent. The Parties may agree to exclude certain aspects or products from the equivalence arrangements. They shall specify this in Appendix 1 (article 3)”.

Appendix 1 excludes Swiss products certified as being under conversion to organic production. The parties shall also do their utmost to ensure that the laws and regulations specified are developed along similar lines.⁴¹ The agreement, which is also applicable since 2007 to Liechtenstein,⁴² also includes an annex on mutual recognition on wine and mutual recognition of certificates on seeds. Annex 8 states that the parties shall mutually recognize and protect the names of spirit drinks and aromatized wine-based drinks.

The Agreement on the European Economic Area (EEA) is a FTA which allows Iceland, Liechtenstein and Norway to participate in the EU internal market. The EEA agreement provides for the free movements of goods, services, persons and capital. The EEA agreement does not apply to the common trade policy, the common agriculture and fisheries policy or the customs union.⁴³ The EEA agreement is not based on mutual recognition but is rather a unilateral harmonization with EU law by the countries concerned, i.e., the EU regulation on organic farming is also directly applicable in Iceland, Liechtenstein and Norway.

³⁹ Economic Partnership Agreement between the CARIFORUM states, on the one part, and the European Community and its Member States, on the other part, Official Journal of the European Union, L 289/I/3, (30.10.2008), Chapter 7, Article 53(c).

⁴⁰ Agreement between the European Community and the Swiss Confederation on trade in agricultural products, Official Journal of the European Communities, L 114/132, 30.4.2002.

⁴¹ Ibid.

⁴² Additional agreement between the European Community, the Swiss Confederation and the Principality of Liechtenstein extending to the Principality of Liechtenstein, the agreement between the European Community and the Swiss Confederation on trade in agricultural products, Official Journal of the European Union L 270/6, 13.10.2007.

⁴³ See <http://efta.int/eea/eea-agreement.aspx> for more information (as on 29 June 2011).

Trade in conformity assessment services

Other than recognizing organic products as being “like products”, one could also view mutual recognition of certification services as a step towards lowering market entry barriers. Organic certification services have been supplied by European and American service providers in many parts of the world. However, when organic regulations were introduced, not only did they affect the flow of goods but also the provisions of certification services. Almost all organic regulations have been drafted in a way that certification is seen as part of government control over the sector, a situation rather typical of how food safety is managed, but contrary to how most industrial sectors are regulated. Even within the EU, the provision of organic certification services across the borders of the member states is not free, seemingly in contradiction to the idea of free trade in services. This is because the regulation treats certification of organic products as part of government duties. Most other regulations have mimicked this construction and this resulted in barriers to trade in organic certification. A trade agreement could allow certification bodies from the parties to provide their services freely.

“The government's role would mainly involve oversight based on truthful marketing (labelling) claims and a focus on fraudulent and deceptive practices. Failing changes in regulations or a multilateral solution, regional trade agreements and other regional cooperation, both in the private sector and between governments, could facilitate regional trade in organic products and certification services.”⁴⁴

⁴⁴ Rundgren, Gunnar, The Role of Certification Services in Organic Produce Market in Standards and Conformity Assessment in Trade: Minimising Barriers and Maximising Benefits, OECD Berlin, 21–22 November 2005.

Discussion

In general, mutual recognition is part of trade agreements only to a limited extent and there are only few that go beyond the National Treatment concept. In only one case, EU-Switzerland, has a trade agreement established mutual recognition for organic products.

What are the possible merits of using trade agreements for establishing mutual recognition as compared to the other available options for improved market access, in particular, using the various options for unilateral or bilateral equivalence that exist in (most) organic regulations?

Organic products can be part of a trade agreement only if both parties involved have regulated the sector, which means that voluntary organic standards will not be included in the agreement. Also, in order to be acceptable to both parties, it is assumed that the level of enforcement must be substantial; it should at least be as effective as that for a special organic agreement or unilateral approval such as the EU third country list.⁴⁵ It is quite clear that organic trade itself has far too little value for being the centrepiece of a trade agreement, and that it is only if such a trade agreement is under development that the question will even arise. In this context, it is hard to see that organic products being part of a bigger agreement would be a bigger challenge than if a country were to engage in separate organic equivalence agreements or seek third country recognition by the EU. All those measures are realistic only when organic trade has reached some prominence. With smaller trade flows, other options (as outlined in the introduction) are certainly more realistic.

By raising the issue to a political level, requirements will, perhaps, be less onerous and developed in the spirit of the WTO agreements, rather than being based on a line-by-line comparison of standards, which seems to be the norm in the separate organic agreements. Preferential treatment and special consideration of developing countries as mandated in the TBT agreement⁴⁶ or in the Enabling Clause are possibly more likely to happen in the context of a larger trade agreement than in a separate organic agreement. Linked to this is the fact that it is perhaps more likely for a weak organic sector to convince its government to include it as one of many issues in the negotiation of a trade agreement than to embark on a separate process. To include a developing country's organic systems in agreements developed under the Enabling Clause would provide the justification for a differential and more favourable treatment to imports from developing countries.

⁴⁵ Lack of enforcement, rather than differences in standards, appears to be the stumbling block for most applications for recognition as a third country by the EU, according to David Crucefix, *Experiences of Equivalence and Recognition Mechanisms in the Regulation of Organic Agriculture*, in *Harmonization and Equivalence in Organic Agriculture*, Volume 3, UNCTAD/DITC/TED/2007/1.

⁴⁶ For example, Article 12.3: "Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members."

There are elements in the organic movement that dislike free trade in general, and therefore also resent free trade in organic products. For these groups, efforts to reduce trade barriers are potentially negative. Although this paper does not engage in that discussion, it is worth noting that these groups could campaign against organic products in trade agreements as being a “sell-out” of organic values and a threat to organic consumers or producers. The concern is that a country could make “concessions” on their organic standards, i.e., approve products produced according to an “inferior” standard, in order to gain an advantage in something else, e.g., market access for their cars. Trade negotiations are, to some extent, about giving and taking, so perhaps one cannot totally discard that concern. On the other hand, because organic standards are mainly for the protection of the marketing of organic products, one can assume that organic producers will be vigilant in this context, and would make very dramatic concessions difficult. The general agreement among organic standards experts is also that there are very few striking differences between organic standards and that the acceptance of other countries’ products is largely about political will and communication. In that context, concessions can be a good thing as well.

In the fifth meeting of the International Task Force on Harmonization and Equivalence in Organic Agriculture, 4–7 December 2005 in Hammamet, Tunisia, some other concerns were raised:

“... the relatively small economic value of the organic sector would keep it from playing a significant role in trade negotiations. Furthermore, it was argued that developing countries do not have the bargaining power to engage their target countries *in equivalency negotiations.*”

One issue could be how the organic stakeholders in the respective countries are engaged in the process. Negotiations of trade agreements are normally very closed procedures, even in countries with a normally high level of transparency because they are about relationships with other countries. This means that organizations in the organic sector are not likely to be invited to the negotiations. There are, perhaps, somewhat bigger chances for stakeholder involvement in a dedicated organic equivalence agreement. The participation of the organic sector in the US and Canada in the development of the Canada-US organic agreement was seemingly rather high.

One possible reason why organic equivalence is not signed into trade agreements more often is that trade agreements are already complex enough, and it is difficult to reach an agreement. Other measures such as *safeguard measures*,⁴⁷ which are considered a safety valve, are sometimes necessary to even sign the agreement.

Trade agreements will influence relations with other parties not part of the agreement, which is the reason why they should be notified to the WTO. For example, Article 6 of

⁴⁷ “Safeguard measures” is in simple words an action to protect a specific domestic industry from an increase in imports of any product which is causing, or which is threatening to cause, serious injury to the industry, if the industry is producing the like product.

Annex 9 of the EU-Swiss agreement states: “With a view to ensuring equivalence in practice as regards recognition in the case of third countries, the Parties shall consult each other before they recognize and include any third country in the list drawn up to that end in their laws and regulations.” There are substantial “lock-in” effects of equivalence agreements in general. There will be higher thresholds for changing the system as there may be implications for the other party and for third parties. If two parties have approved each others’ systems, there will be provisions for notification and possible approval of changes by the parties or a joint body (a committee or a similar body). This would also apply to when equivalence is established by means of a trade agreement. In addition, if acceptance extends also to products of other origin that are re-exported either whole or as ingredients, import approval procedures of the parties would be subject to mutual agreement, and any extension of such approvals might have to be agreed between the parties.

Conclusions

Including mutual recognition of organic regulations in trade agreements is no silver bullet, and it does not stand out as a radically different alternative to the signing of separate technical agreements establishing mutual recognition. It can be one of several tools to enhance market access. Some recommendations for future consideration follow.

Increasing notifications by WTO members

Under Article 10.7 in the TBT agreement, there is an incentive, as mentioned earlier, for other WTO members to enter into consultation with other members for the purposes of concluding similar agreements or for arranging their participation in such agreements. However, only one such agreement has been notified under the article. One of the reasons why more agreements are not notified could be the definition of “significant effect on trade” as stated in Article 10.7. Perhaps, if there was a clear definition, more notifications would occur, triggering consultations for similar agreements. Lobbying can be an instrument to enhance initiatives based on the incentive in Article 10.7.

Piloting the concept

Chapter VI in the Canada- Peru FTA, which concerns technical barriers to trade, can be seen both as a model for other potential trade agreements for the inclusion of organic products and also as the way to proceed with equivalence for technical regulations and conformity assessment systems for organic products. It could be useful to explore how mutual recognition for organic products could be improved under this agreement since it has the basic requirements in place for moving forward and removing all obstacles to trade in organic products. This could be a pilot project, and the process—including the possible hurdles— could be documented and shared with other parties.

Inclusion in trade agreement reviews

Most trade agreements include annual or periodic reviews of their implementation. Parties to the agreement could agree to include potential equivalence of organic products in such reviews.