codex alimentarius commission

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

WORLD HEALTH ORGANIZATION

JOINT OFFICE: Viale delle Terme di Caracalla 00100 ROME Tel: 39 06 57051 www.codexalimentarius.net Email: codex@fao.org Facsimile: 39 06 5705 4593

Agenda Item 5 **CX/FICS 03/5**
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JOINT FAO/WHO FOOD STANDARDS PROGRAMME

CODEX COMMITTEE ON FOOD IMPORT AND EXPORT INSPECTION AND CERTIFICATION SYSTEMS

Twelfth Session

Brisbane, Australia, 1 – 5 December 2003

DISCUSSION PAPER ON THE JUDGEMENT OF EQUIVALENCE OF TECHNICAL REGULATIONS ASSOCIATED WITH FOOD INSPECTION AND CERTIFICATION SYSTEMS

Governments and international organizations wishing to submit comments on the following subject matter are invited to do so **no later than 7 November 2003** to: Codex Australia, Australian Government Department of Agriculture Fisheries and Forestry GPO Box 858, Canberra ACT, 2601 (fax: 61.2.6272.3103; E-mail: codex.contact@affa.gov.au), with a copy to the Secretary, Codex Alimentarius Commission, Joint FAO/WHO Food Standards Programme, Via delle Terme di Caracalla, 00100 Rome, Italy (Fax No + 39.06.5705.4593; E-mail: codex@fao.org).

BACKGROUND

1. The 10th session (February 2002) of the Codex Committee on Food Import and Export Inspection and Certification Systems (CCFICS)[1] considered the *Proposed Draft Guidelines on the Judgement of Equivalence of Technical Regulations Associated with Food Inspection and Certification Systems* which had been prepared by Australia in co-operation with the France, South Africa, the United States and the European Commission.

2. At that meeting several delegations considered that it was not clear how the judgement of equivalence of technical regulations could be usefully applied to food inspection and certification. The Committee decided that further development of a guidance document should be deferred, and sought a discussion paper to assist the Committee in assessing the need for continued development of guidance on this topic.

3. The Committee examined the discussion paper at the 11th session[2] and agreed to revise the draft on the basis of:

- written comments submitted at the current meeting;
- comments to be submitted in response to a request for specific or potential examples of problems in trade that were or could be solved through the application of equivalence and mutual recognition agreements;
- clarification from the WTO/TBT Committee, through the Codex Secretariat, on the operation of equivalence and mutual recognition within the TBT Agreement.

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1 ALINORM 03/30 paras 69 - 75
2 ALINORM 03/30A paras 40 - 45

4. It was noted that the revised Discussion Paper should be prepared so as to facilitate the Committee's discussions related to the potential elaboration of Guidelines in the future.

5. A drafting group comprising Australia (lead), with the assistance of Brazil, Canada, France, Norway, Switzerland and the United States, was appointed.

6. The revised discussion paper is attached for the Committee's consideration.

JUDGEMENT OF EQUIVALENCE OF TECHNICAL REGULATIONS ASSOCIATED WITH FOOD INSPECTION AND CERTIFICATION SYSTEMS

DISCUSSION PAPER

Prepared by drafting group convened by Australia including Brazil, Canada, France, Norway, Switzerland and the United States.

INTRODUCTION

1. The issue of the judgement of equivalence of food inspection and certification systems has been discussed in CCFICS since its 5th session in 1997. The Committee has noted that:

- there was support for development of guidelines to address WTO and Codex elements related to equivalence and this was included in the Medium Term Plan[3];
- priority for this work should be in respect of sanitary measures and assisting countries in determination of equivalence as per Article 4 of the SPS Agreement[4];
- while it examined several draft versions, the value of a guideline with the aim of addressing the judgement of equivalence for other than sanitary measures was not so apparent to CCFICS members.

2. The previous discussion paper[5] provides background to the current discussion paper. CX/FICS 02/11/6 discussed the equivalence of technical regulations and conformity assessment procedures separately. Under the discussion of technical regulations, the document noted that where technical regulations are not specified in terms of performance, the application of equivalence is not straightforward. The mandate for CCFICS to create guideline material on this issue was not clear.
In respect of conformity assessment procedures the relevant section in the TBT Agreement is Article 6.1. The lack of acceptance of importing countries of results of tests undertaken by foreign conformity assessment bodies is a recognised problem in international trade, and has been raised often in TBT Committee discussions.

3. The 11th meeting of CCFICS also considered a paper by Norway titled "Equivalence and Mutual Recognition Agreements in Relation to Technical Measures" This paper deals with the notion of mutual recognition as a mechanism for facilitating trade.

4. The redrafted discussion paper is required to take into account :

- written comment provided to CCFICS 11th session[6] (See Annex 1 for a brief summary)
- comments submitted in response to circular letter[7] (examples of specific or potential problems that were or could have been solved by application of equivalence or mutual recognition agreement) (See Annex 2)
- clarification from the TBT Committee on the operation of the TBT Agreement in relation to equivalence and Mutual Recognition Agreements (MRA). (Not attached – as it was still pending at the time of preparation of this paper).

5. The paper also provides actual examples of food trade issues that invoked the TBT Agreement or were raised in the TBT Committee (see paras 30 – 32).

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3 The medium term plan includes : "*application of guidelines on the judgement of equivalence for specific purposes such as equivalence of measures to ensure food hygiene or measures to ensure conformity with essential quality requirements*" Annex 1 to CL 2001/26, Project ID 27.

4 Agreement on the Application of Sanitary and Phytosanitary Measures. Published by the GATT Secretariat, Geneva, June 1994.

5 CX/FICS 02/11/6

6 CX/FICS 02/11/6 Add. 1

7 CL 2002/54-FICS and CL 2003/17-FICS

6. This paper has been prepared to present for the further consideration of the Committee, issues surrounding the notion of equivalence as it applies to technical regulation and conformity assessment procedures relevant to inspection and certification of food, and to pose several questions to focus the Committee's discussion in regard to the issues.

EQUIVALENCE OF TECHNICAL REGULATIONS AND CODEX

The purpose of equivalence - Article 2.7 of the TBT Agreement

7. The TBT Agreement Article 2.7 states, WTO Members "*shall give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations"*.

8. The reason the TBT Agreement includes the notion of equivalence is summarised in the following extract from a WTO training package[8]:

> *The process leading to the preparation of an international standard can be lengthy and costly. Reaching consensus on technical details can take several years. The time gap between the adoption of an international standard and its implementation by national regulators can also be significant. For these reasons, negotiators introduced in the TBT Agreement a complementary approach to technical harmonization, known as equivalence. Technical barriers to international trade could be eliminated if Members accept that technical regulations different from their own fulfil the same policy objectives even if through different means. This approach, based on the European Community's 1985 "new approach" to standardization, is contained in Article 2.7 of the TBT Agreement.*

9. The now finalised Guidelines on the draft Guidelines for the Judgement of Equivalence of Sanitary Measures Associated with Food Inspection and Certification Systems, was developed with the ongoing support from the SPS Committee. This was in response to recognition of the need for specific guidance to assist in the application of equivalence (Article 4 of the SPS Agreement) in relation to food trade, together with the special status given to Codex under the SPS Agreement. The TBT Committee has focussed less on the application of equivalence as formulated in Article 2.7 and 6.1 of the TBT Agreement, and has not actively engaged any ISSO in the same way that occurred with the SPS Committee and Codex.

10. Codex is formally recognised in the SPS Agreement as the international standards setting organisation for food safety in areas related to food additives, veterinary drugs and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice; this however, is not the case in the TBT Agreement[9]. While the Codex Medium Term Plan for 2003 – 2007 included work on *"application of guidelines on the judgement of equivalence for specific purposes such as equivalence of measures to ensure food hygiene or measures to ensure conformity with essential quality requirements"*, (Codex) (CCFICS) may wish to reconsider whether it is within the scope of the Committee's work to provide guidance on elements of the TBT Agreement, unless the TBT Committee has sought the assistance of Codex on the matter.

11. CCFICS SHOULD CONSIDER THE FOLLOWING FUNDAMENTAL QUESTIONS –
. IS THERE A NEED FOR PRACTICAL GUIDANCE ON HOW TO JUDGE EQUIVALENCE OF TECHNICAL REGULATIONS?
. SHOULD WORK ON EQUIVALENCE ON TECHNICAL REGULATIONS BE DEPENDENT ON THE REQUEST OF THE TBT COMMITTEE?

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8 Located at http://www.wto.org/english/thewto_e/whatis_e/eol/e/default.htm.

9 The WTO case involving trade description of sardines (May 2002) affirmed that Codex is a relevant international standards setting body for the TBT Agreement

Technical regulations and food

12. The European Commission in comments to CX/FICS 02/11/6 makes a distinction in the application of equivalence as described in Articles 2.7 and 6.1 of the TBT Agreement, on the basis of the mandate of CCFICS. The European Commission stated .. "*The mandate of the CCFICS is to deal with the inspection and certification systems including the equivalence aspects of these systems. The discussion paper maintains confusion between a proposal for guidelines to judge the equivalence of technical TBT regulations, which does not appear to be the mandate of the CCFICS Committee and a proposal for guidelines to judge the equivalence of the inspection and certification systems, which is indeed in its mandate.*
The proposed draft guidelines should therefore cover the judgement of equivalence of the conformity procedures and not the judgement of equivalence of the technical regulations which does not seem to be in the mandate of the CCFICS, but which falls within the competence of the TBT Committee.

13. The mandate of CCFICS is indeed limited to inspection and certification systems. It would not, therefore, be appropriate for CCFICS to address the issue of equivalence of technical regulations in a general way. However, if there is the possibility that technical regulations may incorporate food inspection and certification requirements, then presumably the mandate of CCFICS would cover the issue of equivalence to that extent. From a practical perspective, the issue is whether technical regulations as defined in the TBT Agreement[10] and applied by countries may encompass food inspection and certification systems, and whether as a consequence, the issue of how to determine equivalence of an alternative system may arise.

14. CCFICS might consider whether there are technical regulations (as defined in the TBT Agreement) concerning food and which incorporate requirements for inspection and/or certification. If so, might the issue of equivalence arise in relation to such inspection and certification requirements and in that event, would it be valuable to have guidance on the judgement of equivalence, formulated through the Codex system.

15. CCFICS SHOULD CONSIDER
. ARE FOOD INSPECTION AND CERTIFICATION SYSTEMS, IN SOME CIRCUMSTANCES, COMPONENTS OF TECHNICAL REGULATIONS?
. CAN JUDGEMENT OF EQUIVALENCE USEFULLY APPLY TO TECHNICAL REGULATION IN THESE CIRCUMSTANCES?

16. In CX/FICS 02/11/6, (example 2) illustrated that judgement of equivalence of technical regulations may bring in elements concerning the formulation of technical regulations, which may be outside the mandate of CCFICS.

17. CCFICS SHOULD CONSIDER
. CAN THE PROCESS OF JUDGEMENT OF EQUIVALENCE OF TECHNICAL REGULATIONS BE SEPARATED FROM FORMULATION AND LEGITIMATE OBJECTIVE OF TECHNICAL REGULATIONS?

EQUIVALENCE OF CONFORMITY ASSESSMENT PROCEDURES[11] AND CODEX

18. As noted in CX/FICS 02/11/6 the TBT Agreement obliges recognition of the equivalence of conformity assessment procedures wherever possible.

19. Article 6.1 states "*Members shall ensure, whenever possible, that results of conformity assessment procedures in other Members are accepted, even when they differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulation or standards equivalent to their own procedures*".

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[10] "Document which lays down product characteristics or their related processes and production methods, including the administrative provisions, with which compliance is mandatory. It may also include or deal with exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." TBT Agreement (Annex 1).

[11] Conformity assessment procedures: Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled. *TBT Agreement (Annex 1*)

20. CCFICS should note that equivalence of the conformity assessment procedures is related to the procedures themselves (methods of analysis, compliance checks etc) and not the technical regulations that are the subject of the assessment. This could range from a method of analysis for fat determination in milk products, through to the complexity of conformity assessment procedures (inspection and certification system) to ensure that food described as being from particular country of origin has been produced according to requirements that make the attestation accurate.

21. The test for equivalence is whether the procedures of one Member offers an assurance of conformity that is reliably equivalent to the procedures of the other Member.

22. Article 6.1 recognises the need for prior consultation. This is described in the Norwegian paper[12], which states: *"Article 6.1 of the TBT Agreement recognises the need for prior consultations in relation to establishing equivalence of conformity assessment procedures. However, an important element in these consultations mentioned in article 6.1.1, is assessment of the competence of conformity assessment bodies through e.g. accreditation with international guides or standardising bodies. The parties may accept each other's certificates, marks or test reports after thoroughly examining whether the performance of the conformity assessment bodies complies with the requirements of international standards or guides (for instance the requirements to get ISO accreditation)".*

23. CCFICS MAY WISH TO CONSIDER:
. IS THERE A NEED FOR FURTHER PRACTICAL GUIDANCE FOR THE JUDGEMENT OF EQUIVALENCE OF CONFORMITY ASSESSMENT PROCEDURES?

24. IF A NEED IS EVIDENT CCFICS, (IN LIGHT OF ITS TERMS OF REFERENCE) SHOULD CONSIDER WHAT ITS ROLE IS, IN PROVIDING GUIDANCE TO CODEX MEMBERS IN THE DETERMINATION OF THE EQUIVALENCE OF THE COMPETENCE OF CONFORMITY ASSESSMENT BODIES, (IN TERMS OF THE TBT AGREEMENT) OR WHETHER THIS IS SUFFICIENTLY COVERED BY OTHER RELEVANT CODEX COMMITTEES (EG CCMAS) OR OTHER RELEVANT INTERNATIONAL AGENCIES, FOR EXAMPLE THE INTERNATIONAL LABORATORY ACCREDITATION CO-OPERATION (ILAC), AND THE INTERNATIONAL ACCREDITATION FORUM (IAF).

OTHER OPTIONS FOR DEALING WITH TBT RELATED TRADE ISSUES

Mutual Recognition Arrangements (MRAs)

25. Article 6.3 of the TBT Agreement states .. "*Members are encouraged, at the request of other Members, to be willing to enter into negotiations for the conclusion of agreements for the mutual recognition of results of each other's conformity assessment procedures….*"

26. In terms of the TBT Agreement this is restricted to MRAs covering the conformity assessment procedures of technical requirements, and may include arrangements that cover an exporting country performing conformity assessment of products prior to export, according to the requirements of the importing country.

27. Where conformity assessment procedures are regarded as equivalent under an MRA, the exporting country would be required to operate the conformity assessment procedures attesting to the technical requirements of the importing country. The advantage in trade facilitation terms would be through more rapid border processing upon arrival at the importing country, as the need to perform conformity assessment procedures would be removed, providing certification of the (assessed) product was accepted under the arrangement. This does not presuppose that the underlying technical regulations of the parties are in themselves equivalent.

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[12] Equivalence and Mutual Recognition Agreements in Relation to Technical Measures No. 2002 –36. Norwegian Agricultural Economic Research Institute.

28. CCFICS has prepared *Guidelines for the Development of Equivalence Agreements Regarding Food Import and Export Inspection and Certification Systems* CAC/GL 34-1997. The stated the purposes for developing agreements[13] include:

> *"1. provide an enhanced means of assuring that exported products conform to importing country requirements;*

29. CCFICS should note that the scope of the agreements as intended in CAC/GL 34-1997, specifically includes one way recognition agreement, where an importer recognises an exporter, and so facilitates trade. These agreements, covering trade in one direction only, may be more commonly used for official recognition of inspection and certification systems and should be included in the scope of discussion.

30. Some WTO Members[14] have suggested that while MRA can be valuable in facilitating trade, there may be methods of building sufficient confidence in the rigour and efficacy of conformity assessment procedures, that do not necessarily involve development of formal MRAs.

31. CCFICS SHOULD CONSIDER WHETHER THERE IS A NEED FOR DEVELOPING MATERIAL TO DEAL WITH TBT RELATED ISSUES THAT
. IS WITHIN ITS TERMS OF REFERENCE AND DOES NOT DUPLICATE EXISTING WORK
. INVOLVES MECHANISMS SUCH AS ONE WAY RECOGNITION, MUTUAL RECOGNITION, EITHER FORMALLY OR INFORMALLY.

SOME ACTUAL EXAMPLE OF TRADE ISSUES IN THE TBT ARENA THAT INVOLVE FOOD[15]

32. The OECD Joint Working party on Agriculture and Trade issued a paper entitled "*Agro-food products and technical barriers to trade: A survey of issues and concerns raised in the WTO's TBT Committee.* The attention of CCFICS is drawn to the summary of the report which states in part:

> *The Committee's evaluation of the operation and implementation of the TBT Agreement did not differentiate between sectors or product groups. But the description of TBT issues and concerns in this study suggests that problems associated with technical barriers to trade might be particularly pertinent for agro-food products. Agriculture and food products account for about nine per cent of world merchandise trade (WTO, 2001), but were specifically targeted in 28 per cent of all notified TBT measures during 2001. Moreover, 32 per cent of all specific trade concerns raised in the TBT Committee have concerned agrofood products, as well as 62 per cent of all TBT-related disputes. Hence, technical measures and their possible trade impacts seem to be more controversial for agro-food products than for other merchandise. However, most TBT-related disputes also involve and are often mainly about alleged violations of other parts of international trade law, so that the absolute number of disputes should be interpreted with care. Nevertheless, the finding of an increasing trend in the number of specific trade concerns raised in the TBT Committee suggests that trade policy makers and technical experts at standardising bodies might want to devote particular attention to contentious issues concerning agro-food products, such as food labelling, in order to minimise the risk of future disruptions of international trade.*

33. Many of the specific trade concerns discussed involve labelling (GMO, "traditional expression", eco-labelling, requirements beyond international standards) Other issues include, marketing standards, failure to use international standards. Annex 3 is a list of trade disputes raised in WTO invoking the TBT agreement, and Annex 4 is a list of concerns raised in the TBT Committee that involve technical regulations for food.

34. Annex 3 and 4 are presented here to illustrate that TBT related issues do cause trade problems. However the individual matters have not been subject to further analysis in respect of the mechanism(s) including equivalence that may have been used to solve the problem. CCFICS may wish to consider further analysis of the issues in this regard.

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13 Guidelines for the Development of Equivalence Agreements Regarding Food Import and Export Inspection and Certification Systems CAC/GL 34-1997 – Section 3

14 Submission by NZ to the 3rd Triennial Review of TBT Agreement.

15 These examples are taken from OCED paper COM /TD/AGR/WP(2002)70/FINAL.

35. The responses to the CL 2002/54 are included here as Annex 2. Responses were received from Australia, the Czech Republic, Iran, Paraguay and the United States.

SUMMARY OF ISSUES FOR DISCUSSION

(a) Is there a need for practical guidance on how to judge equivalence of technical regulations?

(b) Should work on equivalence on technical regulations be dependent on the request of the TBT committee?

(c) Are food inspection and certification systems, in some circumstances, components of technical regulations?

(d) Can judgement of equivalence usefully apply to technical regulation in these circumstances?

(e) Can the process of judgement of equivalence of technical regulations be separated from formulation and legitimate objective of technical regulations?

(f) Is there a need for further practical guidance for the judgement of equivalence of conformity assessment procedures?

(g) If a need is evident CCFICS, (in light of its terms of reference) should consider what its role is in providing guidance to Codex members in the determination of the equivalence of the competence of conformity assessment bodies, (in terms of the TBT Agreement) or whether this is sufficiently covered by other relevant Codex Committees (eg CCMAS) or other relevant international agencies, for example the International Laboratory Accreditation Co-operation (ILAC), and the International Accreditation Forum (IAF).

(h) CCFICS may consider developing material that is useful in assisting trade facilitation that

- is within its terms of reference and does not duplicate existing work
- involves mechanisms such as one way recognition, mutual recognition, either formally or informally.

ANNEX 1

Country	**Summary of comments provided to 11th CCFICS (December 2002)**
Canada	Technical and editorial comment on discussion paper The necessary resources to develop guidelines on the equivalence of technical regulations or conformity assessment procedures would greatly outweigh the benefits at the present time
Mexico	Question the need for guideline Offer alternative that includes consideration of the legitimate objective of technical regulations Note that the determination of procedures to establish technical regulation is not within the terms of reference of CCFICS.
New Zealand	Does not support development at this time. Considers that mechanism other than equivalence have been successful in dealing with trade related problems.
Philippines	"The Philippines recognises the importance of equivalence in international trade. However, we suggest that more specific guidelines on the application of equivalence be addressed rather than the general one. Further studies on the draft guidelines should also be done. In doing so, distinction between SPS and TBT Agreements should be maintained".
USA	Does not consider specific need for work has been identified Acknowledge the point in the discussion paper that it is not within the mandate of CCFICS to deal with question of "legitimate objective"
European Commission	Makes the point that Article 2.7 in the TBT Agreement is about equivalence of technical regulations while the Terms of reference for CCFICS is limited to inspection and certification systems. Suggest that CCFICS should confine work to judgement of equivalence of conformity assessment (Article 6.1). Note that some existing Codex work refers to equivalence
IACFO	No demonstrated need

ANNEX 2

Comments from Australia, Czech Republic, Iran, Paraguay and United States in response to CL 2002/54-FICS and CL 2003/17-FICS - Part B 1 "Request for Comments and Information – Discussion Paper on the Judgement of Equivalence of Technical Regulations Associated with Food Inspection and Certification System"

AUSTRALIA

Preliminary Comments

Australia acknowledges that it is the role of Codex to promulgate international standards for food, which may, in terms of the SPS and TBT Agreement, be sanitary measures, technical regulation or conformity assessment procedures. Australia acknowledges that the harmonisation of food standards, through adoption of international standards is a commitment under the SPS and TBT Agreements. However, Australia also notes that the development of international standards can be a very slow process and that the adoption of international standards by countries is not automatic. For these reasons Australia considers that the notion of equivalence of standards can be an important mechanism to facilitate trade.

Australia has compiled the following examples of issues where food inspection and certification systems relating to technical regulations have created trade problems that could possibly be solved by the application of equivalence.

The particular technical regulations represented here listed may or may not be subject of an international (Codex) standard.

CERTIFICATION OF ORGANIC AND BIO-DYNAMIC PRODUCTS

The stimulus to introduce an organic export program in Australia was created following an increase in world demand for organic produce and the need to provide assurances about the integrity of the product.

For this reason the Australian organic industry has worked closely with the Australian Quarantine and Inspection Service (AQIS) to develop an export program and the *National Standard for Organic and Bio-dynamic Produce* (the National Standard). This ensures that any export produce labelled as "organic" or "biodynamic" satisfies importing country requirements.

The National Standard details minimum requirements for production, processing and labelling of organic produce. It also requires all exporters, as well as producers and processors, to be certified with an accredited industry organisation. This procedure ensures the integrity of the organic product from production to the consumer.

The *Export Control (Organic Certification) Orders 1997* (the Orders) make it illegal to export organic produce without a government-to-government certificate that verifies the nature and trade description of the product. The Orders allow for Approved Certifying Organisations to issue Organic Produce Certificate(s) that accompany the produce to their overseas destination.

To ensure the integrity of the export program and hence maintain overseas market access, AQIS audits each Approved Certifying Organisation to ensure they comply with the requirements of the National Standard, *Export Control (Organic Produce Certification) Orders 1997* and importing country requirements.

To date market access has been gained on the basis of acceptance of the Australian standard as meeting importing country requirements. The judgement of equivalence *per se*, has not been an issue, primarily because the Australian standard is based on the Codex standard.

However there are issues now arising with certification of organic produce which could distort trade through forcing suppliers to have official certification (an importing country requirement) and commercial certification on the basis of compliance with differing requirements.

Australian organic producers are increasingly being persuaded to adopt the International Federation of Organic Agricultural Movements (IFOAM) standards, inspected and certified by IFOAM. At the same time, to meet importing country requirements official certification supplied by government is mandatory, and this is conducted by AQIS as described above. The effect is a duplication of certification requirement that must be met by suppliers.

The application of equivalence could be useful in dealing with:

- importing country acceptance of organic standards; and,
- within the industry where different standards could be judged as providing the same outcome, therefore products carry certification to one standard could be deemed equivalent one (or more) other standards.

The terms of Reference of CCFICS would confine any future work to the first of these issues, but do not preclude consideration of commercial certification systems that protect the health of consumers, ensure fair trading practices and facilitate international trade in foodstuffs.

The issue is whether the commercial (ie non official) systems can deliver sufficient assurance that the product as certified, meets importing country requirements. Currently there is no defined framework to evaluate the equivalence of technical requirements. The TBT Agreement has included the notion of equivalence, but as with the SPS Agreement there is not, within the Agreement, a defined mechanism through which this could be achieved.

Australia considers that the development of such a framework could be usefully applied in the case of organic certification.

GRADING OF MEAT CUTS

Market access has been restricted on the basis of the process by which meat cuts are graded (rather than the description of meat cuts). The grading activity is restricted to only those officers qualified and trained by the importing country officials. The application of equivalence of the conformity assessment procedures that could be an alternative to the rigorous demands of the importing country could facilitate trade, while enabling the technical regulations (description of meat cut and grades) to be met.

REGISTRATION PROCEDURES

Australia has rigorous export legislation requirements that *inter alia*, require registration of export premises. Importing countries, for various legitimate objectives, now demand further registration with officials in the importing country and in some cases, with commercial contractors. There are no international standards governing the registration requirements, and the application of equivalence (where for example, registration with the exporting country authority) would greatly facilitate trade.

CERTIFICATION REQUIREMENTS

The provision of certification of product exported from Australia is prepared to meet the importing country requirements (sanitary measures and technical regulations). In some cases the importing country processes the Australian product and exports to a third country. The third country seeks direct certification from Australia in regard to the product exported from the second country, where processing was conducted out of the control of the competent authority of Australia. As Australia is unable to provide such certification market access is threatened. The notion of equivalence could be applied, if a mechanism was available that enabled the recognition of certification supplied to the first importing country as sufficient to meet the legitimate objective of the final destination country.

LABELLING

Labeling requirements including excessive level of detail, multiple language requirement and repetition on all levels of packaging – particularly on non-retail packs, have been implemented by importing countries as a legitimate objective. The determination of equivalence of, for example, the provision of the required information about the food, through alternative means, could be useful in negotiating equivalence in meeting the objective.

The way in which information is presented in Nutrition Information Panels (NIP) provides an example of a potential problem in trade where the application of equivalence may be helpful. Nutrition Information Panels vary internationally. Whilst in some cases there is a marked difference between the format of the NIP of two countries and therefore little scope for comparison, in others such differences are relatively minor (eg. the transposition in the order of two nutrients in the panel). In the latter case the application of the principle of equivalence and mutual recognition has the potential to facilitate trade.

THE CZECH REPUBLIC

Comments on the Discussion Paper on the Judgement of Equivalence of Technical Regulations Associated with Food Inspection and Certification Systems - specific or potential examples of problems in trade that were or could be solved through the application of equivalence and mutual recognition agreement

ad EXAMPLE 1

"**Consideration to determine equivalence**"

In this case the technical regulations are specified in terms of performance *rather than direct compositional characteristics.*

It should be considered whether the second part of the sentence could be omitted because the compositional characteristics of non-processed products, especially fresh fruit and vegetables differ according to growing conditions.

ad EXAMPLE 2

Technical regulations of the importing country are probably restricting the free market. It is not clear from what reason the requested fruit content of the jam is 50 % when the Codex standard in case of "Extra" jam is 45 %.

ad EXAMPLE 4

a printing error in the second sentence: "that" instead of "than"

OTHER EXAMPLES which could lead to problems with application of technical regulations equivalence:

- use of non-meat protein products (milk protein products, vegetable protein products) in processed meat and poultry products – the presence of non-meat protein products in processed meat and poultry products must be clearly indicated on the label
- cooked ham – the product shall be made of meat from the hind leg of a pig
- terms such as "natural", "pure", "fresh", "home made" – when they are used, should be in accordance with the national practices in the country where the food is sold
- using ozone-enriched air for the treatment of natural water and spring water should be indicated on the label
- products described as "sugar-free " shall have no more than 5 g/kg of sugars (sugars mean all mono-saccharides and disaccharides present in food)
- products described as "low in energy" shall have no more than:

  40 kcal (170 kJ) per 100 g (solids)

  20 kcal (80 kJ) per 100 ml (liquids)

A general remark:

Equivalence in this sense would mean that the importing country must accept technical regulations of the exporting country (quite often this would be under the pressure of "the free market approach" which may verge on blackmailing). This would result, in case of a similar kind of foodstuffs, in a reduced quality of the food product (or will the quality not matter any more?) in the importing country – strictly speaking, the importing country will have to soften its own quality requirements.

HYPOTHETICAL EXAMPLES OF THE APPLICATION OF EQUIVALENCE/RECOGNITION FOR TECHNICAL REGULATIONS OR CONFORMITY ASSESSMENT PROCEDURES

Hypothetical Example 1:

There is a fictitious Czech company and the Czech Republic is a member state of EC.

The Czech company introduced two exceptional delicacies – a yoghurt product with spinach-onion flavour, which is sold frozen, and an ice-cream product with carrots-parsnip flavour, with an unusual but delicious taste achieved through newly developed chemical additives.

The two products achieve a great success both within and outside the Czech Republic. Therefore the company decide to export the products to other EC member states.

The first problem that occurs when exporting is following:

Spain decides to prohibit import of the frozen yoghurt due to the fact that the Spanish law does not allow the sale of the frozen yoghurt labelled as yoghurt. Such a decision touches the free movement of goods issue. Spain does not prevent import of the frozen yoghurt either as a result of introducing an import duty or any tariff of a similar impact, or the internal discriminatory taxation. The import is not restricted by Spain either by any quantitative measures (no quotas are being introduced). The measure made by Spain infringes trade within EU. It would be admissible only in case of a measure necessary to protect a Spanish categorical request (Consumer Protection – Spanish consumers who buy yoghurts are used to unfrozen yoghurts). Consumer Protection could be in this case assured through a modification of information on the product – such a modification would have a less negative effect on the movement of goods. The prohibition of import means breaking the article no. 28 of the Treaty.

The above procedure would be admissible only in case that the measure made by Spain would fall under some of the exemptions of the article No. 30 of the Treaty, such as health and human life protection. However this is not the case.

Another problem will occur in case of the above ice-cream import to Italy – when the law was passed in Italy prohibiting any import of ice-cream containing any chemical additives. The prohibition is justified by a public health protection and is based on a scientific study made by a known Italian research institute. However the results of the study are highly controversial both in and outside Italy. Prohibiting ice-cream import into Italy is inadmissible (breaking all trade rules accepted by member states that may infringe trade within EC either directly or indirectly, or that may represent either a real or potential threat to the market). But it has to be considered whether any of the exceptions described in the Article no. 30 of the Treaty could be applied in this case.

It might be the case of the exception due to health and human life protection. Italy could probably plead the fact that according to some scientists chemical additives in ice-cream harm health and therefore the measure was made with respect to the consumer health protection. In such case when the harmful effects are not evident and there is no harmonizing EU law, it is in the competence of the EC member state to decide to what degree protect life and health of its population. However the measures made must be adequate, i.e. the sale of ice-cream with the chemical additives will be permitted on condition that the quantity of the additives will correspond with nutritional needs.

Hypothetical Example 2:

Technical regulation of Country IM

Honey must not contain more than 40 mg/kg of hydroxymethylfurfural.

Legitimate objective

Consumer protection, the preservation of product quality.

Formulation of technical regulation

This technical regulation is not based on an international standard. Some requirements are different from requirements of international standard. Country IM want to preserve nutritional value of honey.

Scenario for application of equivalence

Country EX would like to export honey to country IM. The products of country EX contain 70 mg/kg of hydroxymethylfurfural. Its own technical regulation is based on CODEX STANDARD FOR HONEY (CODEX STAN 12-1981, Rev. 1 (1987)). According to the technical regulation of the exporting country honey must not contain more than 80 mg/kg of hydroxymethylfurfural.

Considerations to determine equivalence

Country IM has different technical regulation from country EX.

In respect of Article 2.7 of the TBT Agreement, Members should give positive consideration to accepting as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations.

The requirement of the country IM is stricter than requirement determined by CODEX STANDARD. If the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, it may have a significant effect on trade of the other Members.

Technical regulations of Members shall not be more trade-restrictive than necessary to fulfil a legitimate objective. (The Article 2.2 of the TBT Agreement).

In this case the application of the concept of equivalence of technical regulations could facilitate market access or simplify trade.

Hydroxymethylfurfural – is a substance that occurs in honey in case that a right technological process is not followed. The temperature under which honey is heated should not exceed the level of 40 °C. Detecting the hydroxymethylfurfural serves to prove that natural enzymes are not destroyed or that their activity is not disturbed.

IRAN

We believe that examples, either specific or potential, of problems in trade that could be solved through the application of equivalence and mutual recognition agreements exist and are observable in IRAN, and a few of them will be mentioned below:

Example 1:

Technical regulation of IRAN:

Food colours permitted to be used in certain food stuffs are according to Iranian standards.

Legitimate objective:

Protection of human health or safety Formulation of technical regulation:

Iranian standards and technical regulation about food colours are based on FAO/WHO and Codex alimentarius standards, according to them tartarazine, for example, is not allowed to be added to food products.

Scenario for application of equivalence:

Exporting countries and some consumers are more interested in trade and use of food colours based on FDA regulations because in FDA list of food colours, more variety of colours such as tartarazine are allowed.

Consideration to determine equivalence:

Cooperation and harmonization between Codex standards and FDA regulation on food colours based on common objectives are proposed.

Other examples:

To be brief we will just refer and name some other examples of the same nature as below:

- Maximum amount of level of total ash in alkalised cocoa powder not exceeding 10%.
- Maximum amount of level of Aflatoxin in pistachio, almond fig, and peanut not exceeding 5 ng/g.

Examples about mutual recognition agreements:

We have applied many cases of mutual recognition agreements between Iran and other countries especially with our neighbour this activity has been found very helpful and facilitating in trade. These mutual agreements have been mainly applied between the testing laboratories and inspection bodies of Iran and other countries.

Accreditation:

Accreditation of testing and calibration laboratories and accreditation of certification bodies including product or system certification bodies has also been practiced in Iran and has been found very helpful in creating trust, which will conclude to be facilitation of trade.

PARAGUAY

EXAMPLE OF THE APPLICATION OF THE EQUIVALENCE/RECOGNITION OF COMPLIANCE ASSESSMENT TECHNIQUES OR REGULATIONS

Technical regulations of the exporting country

Milk products – UHT milk.

Legitimate objective

Protection of human health.

Formulation of the Technical Regulation

Based on the MERCOSUR (Southern Common Market) Resolution, for the specific product.

Situation for the application of the equivalence

The exporting country requests recognition of the compliance assessment that must provide a compliance guarantee equivalent to the Technical Regulation.

Considerations in determining the equivalence

- Principles, Guidelines, Criteria and Parameters for the recognition of the equivalence of the Food Inspection Systems between the State parties.
- MERCOSUR/GMC/RES No 59/99 – of the Sub-Working Group No 3 “Technical Regulation and Compliance Assessment”.
- Principles, Guidelines, Criteria and Parameters for equivalence agreements for Animal and Plant Health Inspection Systems between the State parties.
- MERCOSUR/GMC/RES No 60/99 – of the Sub-Working Group No 8 (Agriculture).

UNITED STATES

The following are comments submitted by the United States of America to the Codex Committee on Food Import and Export Inspection and Certification Systems in response to CL 2002/54-FICS (part B) and CL 2003/17-FICS relating to the *Discussion Paper on the Judgment of Equivalence of Technical Regulations Associated with Food Import and Export Inspection and Certification Systems.*

The United States notes that CL 2002/54-FICS (part B) and the follow-up CL 2003/17-FICS request comments on specific or potential examples of problems in trade that were or could be solved through the application of equivalence and mutual recognition agreements. In prior submissions the United States has indicated that we are not aware of problems in trade that could be solved through the application of equivalence agreements relating to technical regulations and associated conformity assessment systems. We continue to hold that view. With respect to mutual recognition agreements, we view this area as a discussion that should be held separate and apart from the discussion relating to equivalence.

ANNEX 3

LIST OF TRADE DISPUTES RAISED IN WTO INVOKING THE TBT AGREEMENT

(Extracted from OECD paper COM/TD/AGR/WP(2002)70/FINAL)

USA's complaint against Korea's shelf-life requirements for frozen processed meats and other products (1995)

Peru, Chile and Canada's complaint against EU's trade description of scallops (1995).

Canada's complaint against Korea's restrictions on treatment methods for bottled water (1995)

Canada and USA's complaint against EU's import prohibition for meat produced with growth-promoting hormones (1996)

Philippines' complaint against USA's import prohibition of certain shrimps (1996)

New Zealand's complaint against EU's measures affecting butter products (1997).

EU's complaint against USA's restrictions on imports of poultry products (1997).

India's complaint against EU's restrictions concerning rice imports (1998).

Canada's complaint against USA's restrictions on imports of live animals and grains (1998).

USA's complaint against Mexico's measures affecting trade in live swine (2000).

USA's complaint against Belgium's administration of measures establishing customs duties for rice (2000).

Peru's complaint against the EU's trade description of sardines (2001).

ANNEX 4

LIST OF CONCERNS RAISED IN THE TBT COMMITTEE INVOLVING FOOD TRADE.

(Extracted from OECD paper COM/TD/AGR/WP(2002)70/FINAL)

This list is a representation of issues that the TBT Committee deals with, and does not imply that a formal dispute ensued. Many of the issues were raised in anticipation of formal notification of technical regulations through the TBT process

NZ questioning acceptability of affixing adhesive Spanish language labels to product upon arrival in Mexico.

EC questioning USA on non use of international standards for tea.

USA (with others) question EC's mandatory labelling of foods containing GMO's.

EC and USA questioned Egypt on the labelling requirements (duplicate labelling inside and out of packages and excessive detail) for meat.

USA raised the "traditional expression" restriction on wine imported to EC, on the basis that the terms were descriptive and in wide use around the world.

Canada questioned the reason for the requirement of Australia and NZ to label products derived from gene technology where the products are substantially equivalent to traditional product. Details on how the requirements satisfied international requirements and the means of application and monitoring.

Brazil sought clarification from the USA on status (mandatory or voluntary) of "eco-labelling" for tuna that related to fishing methods engaged.

Canada sought clarification from NZ in regard to the extended temporary ban on importing of trout.

NZ and Egypt raise concerns about the Japanese requirement for mandatory labelling of food in respect of quality parameters and country of origin, which were claimed to be out of alignment with international requirements.

Brazil and Egypt sought information about the system notified by the EC for the identification and registration of bovine animals as well as the labelling of beef and beef products.

Canada questioned the EC about the marketing standards applying to eggs, involving labelling variations according to the operating conditions.

The EC raised the potential of Indonesian requirements for labelling of food, wine and spirits as being restrictive to trade.

USA raised the issue of EC standards for bottled wine including the restriction on "traditional expressions" and reservation on the type of bottle permitted for other than EC.

Canada questioned Chile's regulation on system of labelling GM foods on the basis of scientific justification, implementation and binding nature of regulations.