



## Labelling for Environmental Purposes

A review of the state of the debate in the World Trade Organization

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# Introduction

Environmental labelling has long been the subject of discussion in the World Trade Organization (WTO). Questions on its status within WTO rules and the risk of its use for green protectionism have been batted around for almost eight years. The WTO Committee on Trade and Environment (CTE) first addressed the issue on September 15–16, 1994, at the newly formed body’s third meeting.<sup>1</sup> Six months later, at an April 1995 meeting of the Committee on Technical Barriers to Trade (CTBT), Canada noted that this was an area that “would need considerable work.”<sup>2</sup> Since that time, and despite a considerable amount of work and the continued increase in the number and scope of eco-labelling schemes in operation, WTO members have still not managed to resolve many of the key issues.

On November 14, 2001, WTO members adopted the Doha Declaration and initiated a new round of global trade talks. Trade and the environment was one of the issues that was singled out for attention and, in particular, paragraph 32 of the Doha Declaration mandates the CTE to give particular attention to “labelling requirements for environmental purposes.”<sup>3</sup> The CTE continues to discuss the issue with the view to submitting a report and recommendations for future work, including possible negotiations, to the next WTO Ministerial in Cancun, Mexico, September 10–14, 2003.

At the same time, the CTBT, which has sole negotiating authority over the TBT Agreement, is also conducting talks on labelling in the context of its review of the implementation of the Agreement. Although these discussions are now being driven by the CTE’s timetable—its mandate to report to the Mexico Ministerial in September 2003—the CTBT is dealing with a host of its own, non-environmental, issues. Eco-labels are therefore only part of the political picture. Members of the CTBT asked the WTO Secretariat to develop a background paper on labelling in late 2002, and to host an informal workshop on the issue in early 2003. In response, the WTO Secretariat has prepared two background papers, which are available on the WTO web site:

- a list of notifications relating to labelling (1995-2002) – G/TBT/W/183; and
- a list of specific trade concerns related to labelling brought to the attention of the Secretariat since 1995 – G/TBT/W/184.

The present paper considers whether there is any reason to believe that WTO members might finally resolve an eight-year old debate on eco-labelling. It reviews the history of discussions and singles out some particularly important issues. It also considers the obstacles facing the CTE. A review of the main issues and the history of discussions, as well as a consideration of the state of the current debate, suggests

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<sup>1</sup> PC/SCTE/M/3/Rev.1\*, September 15–16, 1994.

<sup>2</sup> G/TBT/M/1 TBT/M/48 June 28, 1995: para 88.

<sup>3</sup> WT/MIN(01)/DEC/1; para 32 (iii).

that there are significant structural and substantive obstacles in the way of a resolution. It is not yet possible to predict a positive outcome from the work in the CTE on eco-labelling.

## Structural obstacles: the politics of labelling in the WTO

Eco-labelling has been on the CTE's work plan since 1994. The third item of its original work plan is to investigate:

"The relationship between the provisions of the multilateral trading system and: charges and taxes for environmental purposes; requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling and recycling."<sup>4</sup>

The third meeting of the CTE, held September 15–16, 1994, was dedicated to this agenda item, and much of the discussion focused on eco-labelling. It was noted from an early stage of discussions that the mandate of the CTE was not to assess the relative effectiveness of labelling, packaging and other programs. Rather, its mandate was to identify conflicts and complementarities between eco-labelling programs and multilateral trading rules, and to seek ways to make the two objectives mutually supportive.

The scope of discussions was to include, *inter alia*, packaging and labelling requirements including re-use, recycling and recycled content requirements; disposal, and deposit refund systems; and requirements for life cycle analysis. It is interesting to note that the discussions at the September 1994 meeting covered almost all of the same issues that would crop up over and over again in the next eight years: like products; process and production methods; extraterritoriality; international standards; technical assistance; and a host of others.

Over the course of the next eight years, labelling and related issues would be discussed in the CTE and CTBT; in the Committee on Sanitary and Phytosanitary Measures (CSPS); during two Triennial Reviews of the TBT Agreement; at a number of informal WTO symposia; in external conferences attended by WTO Secretariat staff; and in dispute settlement panels and appellate bodies. However, until the Doha Development Agenda, which gave the CTE its mandate to address eco-labelling, no WTO body had a formal mandate, *with a strict reporting deadline*, to make recommendations, including possibly calling for new negotiations. This is the major difference between then and now, and the reason that some are hopeful that a solution might finally emerge.

It is important to note, however, that the likelihood of success is not only influenced by the complexity of the substantive issues—to be addressed later in the

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<sup>4</sup> PC/SCTE/M/3/Rev.1\*; para 2.

paper—and the willingness of WTO members to move the agenda forward. It is also influenced by the political and structural aspects of the discussions, and the links between labelling and a number of other agendas. Although this paper will not investigate these *structural* issues in detail, it is important to remember that the discussions on eco-labelling will be hampered by at least five structural and political realities:

1. CTE: a mandate, but no authority;
2. wider issues of labelling in the CTBT;
3. the ongoing agriculture negotiations;
4. labelling of genetically modified organisms; and
5. labour standards.

### **The mandate, but not the authority**

Although it has the mandate to discuss eco-labels, the CTE does not have any negotiating authority. The CTE can act solely as a convener for discussions on eco-labelling that might recommend actions to be taken by other committees. Two WTO agreements address labelling requirements directly: the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)—which addresses food safety issues—and the Agreement on Technical Barriers to Trade (TBT Agreement), which addresses all other types of labelling issues. Both the CTE and the TBT Agreement have unique negotiating authority over their respective Agreements. As a result, decisions taken within the CTE do not in themselves change anything if they are not then adopted by the TBT Agreement or SPS Agreement. For all intents and purposes, the TBT Agreement is the more relevant of the two committees, since it addresses the broadest range of issues.

### **Labelling in the CTBT**

The CTBT is facing a host of issues related to labelling practices that have nothing to do with environmental requirements. As a result, the CTBT must balance the discussions within the CTE with its own more general discussions on labelling and other types of standards and technical regulations. Labelling requirements have no legally distinct meaning in the TBT Agreement: labelling requirements are treated as a subset of standards (if the labelling requirements are voluntary) or as a subset of technical regulations (if the requirements are mandatory). Because it is a legally indistinct term, any changes made to provisions in the TBT Agreement to address issues relating to labelling will also impact on standards and technical regulations in general. The implications of this are unclear, but it adds a level of complexity to the discussions: the impacts of recommendations or policy changes made to accommodate eco-labelling must be traced along a broader path that generally includes standards and technical regulations.

### **Agriculture negotiations**

It is generally accepted that the prominence of environmental issues on the Doha Development Agenda is due to the persistent efforts of the European Union. It has been suggested that one of the reasons that the European Union placed such importance on the inclusion of environmental issues in the Doha Declaration is



that it was looking forward to the reform of its Common Agricultural Policy (CAP) and the ongoing WTO negotiations on the liberalization of trade in agricultural products. The publication of the EU Agricultural Commission's first draft proposals on reform for the CAP made it clear that the EU was planning to restructure its financial support for farmers, but not necessarily to reduce it immediately. Although a recent sideline agreement between France and Germany seems likely to reduce the importance of environmental labelling to CAP reform, the draft plan called for a shift away from production-linked subsidies and a move towards subsidies linked with food quality and environmental conservation. The recent U.S. farm-support bill also included provisions that tie farm aid more directly to environmental conservation. Although this paper will not address in detail the role of labelling in the WTO's agriculture negotiations, it is important to note that, to the extent that labelling can be used as tool for linking environmental performance with market access for agricultural products, discussions on labelling in the CTE and CTBT will be influenced by the agriculture talks.

## **Genetically modified organisms**

It has been suggested by some sources close to the debate that the current discussions on labelling are being driven, in large part, by a single issue: the mandatory labelling of Genetically Modified Organisms (GMOs). Were WTO rules to be considered consistent with the restriction of GMO imports, this could have an enormous impact on global agricultural trade. When assessing the rationale behind a delegation's position on the eco-labelling question, it will be important to place it within the context their domestic agricultural policies and their adoption of GMO technologies. Exporters of genetically modified (GM) crops believe that countries that do not use, or do not have access to, GM technology are using GMO-labelling as an unjustified form of protectionism<sup>5</sup>. Countries that are seeking to restrict imports of GM crops say that there remains doubt regarding the health and environmental impact of GM-technology, and that the scope of possible impacts justifies taking actions in the absence of conclusive scientific information. The debate centres on a number of issues, including: the role of science in public policy; the definition of scientific certainty; the precautionary principle; the role of mandatory versus voluntary labelling; the marketing implications of negative versus positive labelling; who sets the standards and criteria; and the length of time for which a country can restrict trade in the absence of scientific certainty.

At the foundation of many of the differences in the GMO debate is the difference among national approaches to regulation. Trans-Atlantic differences have emerged in the assessment of the need to legislate: the U.S. and Canada appear to favour voluntary measures in some cases, whereas the EU sees a need to legislate. Also, there are differences in the kind of information that countries think should be included on labels. Canada believes, for example, that, while it is justified to include information on health "effects"—such as the presence of allergens—this does not justify labelling of "causes"—the use of GMOs for example. The fundamental conflict between different approaches to regulation, and the problems that this can

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<sup>5</sup> Of note, however, it has been suggested that, were the European Union to make its labelling regime for GMOs voluntary, rather than mandatory, very few members would have such strong objections to the regime.

create for the trading system, has led some to suggest that there is a need for standards of good regulatory practice. Others argue that this would mean sacrificing far too much national sovereignty at the altar of trade liberalization.

Because it encapsulates so many of the relevant issues, it is appropriate that so many delegations are developing their approach to labelling on the GMO issue. Unfortunately, the stakes in agricultural trade are so high for many countries that the cost of compromise on this issue is just too high to make without a protracted fight.

### **Labour standards**

The final issue on the back of many members' minds is that of labour standards. Low labour costs, which are closely related to flexible labour standards, are seen by some developing countries as their last significant comparative advantage, particularly in key export sectors such as textiles and agriculture. However, the policy mechanisms and legal interpretations that could bring environmental standards and labelling into the WTO could also open the door to the use of labour standards in trade measures.

Just as the environmental community has multilateral environmental agreements (MEAs) that set out internationally-agreed objectives, so, too, exist the International Labour Office's (ILO) Core Labour Standards; just as environmental labelling has grown in popularity, so, too, have social accountability and fair-trade labelling initiatives; just as the entry of environmental issues into the WTO requires a particular interpretation of "process and production methods," so, too, could this interpretation open the door to labour issues.

Sources close to the discussions in the WTO have suggested that, unless a clear line can be drawn that brings environmental standards into the WTO and keeps labour standards out, at least for the time being, developing countries will see very little interest in pushing the eco-labelling agenda forward in the Doha Round.

The five issues outlined above are some of the structural and procedural issues that will make it harder for WTO members to resolve the eco-labelling debate. However, even if they did not exist, there would still be considerable difficulty in addressing the substantive issues. The following section addresses these substantive issues, and is split into two sub-sections: issues that seem politically irresolvable; and those that might be practically resolvable. The penultimate section considers the state of the debate today, looking at recent submissions on labelling to the CTBT and CTE. The final section identifies possible scenarios leading up to the next WTO Ministerial, to be held in Cancun, Mexico, September 10-14, 2003.

# Substantive obstacles – politically irresolvable

## Are they covered, or aren't they?

One of the most protracted debates on eco-labels is whether they are even covered by the WTO rules at all. If they are covered, then they are subject to its disciplines; if not, then the question is whether new disciplines are needed to reduce the impact of eco-labels on trade.

It has long been accepted that labelling requirements fall under the scope of the TBT Agreement, but members have questioned whether eco-labels are specifically covered. The debate centers on the TBT Agreement's definitions of "standard" and "technical regulation," and the legal interpretation of the term "like product."

The terms "technical regulation" and "standard" are defined in Annex 1 of the TBT Agreement:

### 1. 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**. It may also include or deal exclusively with terminology, symbols, packaging, marking or **labelling requirements** as they apply to a product, process or production method. [Emphasis added]

### 2. 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**. It may also include or deal exclusively with terminology, symbols, packaging, marking or **labelling requirements** as they apply to a product, process or production method. [Emphasis added]

The main distinction in the TBT Agreement between the two terms is that a technical regulation is mandatory (i.e., required by law), whereas a standard is voluntary. Both of these definitions explicitly include "labelling requirements" under their scope. As a result, mandatory labelling programs are subject to the same provisions as (mandatory) technical regulations; voluntary labelling programs are subject to the same provisions as (voluntary) standards.

It is important to note that, because they are mandatory, technical regulations are presumed potentially more trade-restrictive and are therefore subject to stricter provisions than are voluntary standards. The differences in the relevant provisions are discussed elsewhere in this paper, but include the following:

members must review technical regulations to ensure that they are not maintained if the circumstances under which they were developed have changed (Article 2.3);  
if requested, a member must explain the justification for the technical regulations (Article 2.5);

members must give positive consideration to accepting as technical equivalent other members' technical regulations that differ but that achieve the same objective (Article 2.7); the procedural requirements for developing technical regulations are more onerous and legally binding (Article 2.9); and members must give positive consideration to requests for technical assistance from other members to assist them in implementing technical regulations; this is not the case with standards (Article 11.2).

Although it has been generally accepted that labels fall under scope of the TBT Agreement, there remain some questions regarding the status of different types of eco-labels. There are three types of eco-labels, as defined by the International Organization for Standardization:

**Type I environmental labelling program:** voluntary, multiple-criteria-based, third-party program that awards a licence that authorizes the use of environmental labels on products, indicating overall environmental preferability of a product within a product category based on life cycle considerations. (*ISO 14024*).

**Type II environmental labelling (self-declared environmental claims):** environmental claim that is made, without independent third-party certification, by manufacturers, importers, distributors, retailers or anyone else likely to benefit from such a claim. (*ISO 14021*).

**Type III environmental declaration:** quantified environmental data of a product under pre-set categories or parameters, [based on a life cycle assessment and] set [and verified] by a qualified third party. (*ISO/TR14025*).<sup>6</sup>

The debate on eco-labels arises primarily due to the fact that many programs address the environmental impacts of a product over its entire life cycle, from cradle to grave. As a result, many eco-labels address not only the environmental impacts associated with consumption or use of a product, but also those associated with its production (referred to in WTO terminology as “process and production methods,” or PPMs). An additional distinction is drawn between PPMs that have an impact on the physical characteristics of the product (referred to as product-related PPMs, or prPPMs) and those that have no discernable impact on a product's characteristics (referred to as non-product-related PPMs, or nprPPMs).

To date, it has been generally accepted that labelling programs that address physical characteristics and product-related PPMs are included under the scope of the TBT Agreement; the present debate focuses on nprPPMs.<sup>7</sup>

### NprPPMs

Assessing the full range of environmental impacts associated with the production and consumption of a product must necessarily include a consideration of its

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<sup>6</sup> For more on the different types of labelling, see WT/CTE/W/114, May 31, 1999.

<sup>7</sup> Some commentators have suggested that there is no legal basis for suggesting that measures that address nprPPMs should be treated any differently from those that address product characteristics. For a comprehensive review of the issues and debate surrounding PPMs, please see Howse, Robert (2000), “The Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy,” *European Journal of International Law*, 11, No. 2, 2000; and Charnovitz, Steve (2000), “Solving the Production and Processing Methods Puzzle,” WTO Series No. 5, Occasional paper of the Program for the Study of International Organizations, Graduate Institute of International Studies, Geneva.

design, production and consumption. This range of impacts can be assessed through a life cycle assessment (LCA) of the product. Any eco-label that focuses on the life-cycle of a product will necessarily include criteria that address PPMs. As mentioned above, most WTO members agree that PPMs that affect the physical characteristics of a product, prPPMs, are included in the scope of the TBT Agreement. There is less certainty, however, whether PPMs that do not affect the physical characteristics, nprPPMs, of the final product are also included. At the heart of the debate over nprPPMs is the interpretation of a single word—“related”—that appears in the Annex 1 definition of both “technical regulation” and “standard.”

1. 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. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements **as they apply to a product, process or production method.** (Emphasis added)

2. 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. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements **as they apply to a product, process or production method.** (Emphasis added)

Most members believe that the word “related,” which appears in both definitions, implies that the scope of the terms “technical regulation” and “standard” does not include nprPPMs. They suggest that the terms cover only those standards and technical regulations that are “related” to a product’s characteristics. Up until recently, this was an almost unanimous interpretation; it remains the preferred interpretation for most developing countries.

However, others have suggested that the fact that the second sentence in each definition refers to requirements “as they apply to a product, process or production method” —without including the word “related” —creates enough ambiguity to permit either interpretation. Countries that subscribe to this argument note that there are real technical barriers to trade created by nprPPMs and that the focus should be on ensuring that the WTO rules help to reduce them.

A third group points to the fact that, whereas the definition of “technical regulation” refers in its first sentence to “their related” PPMs, the definition of “standard” refers in its first sentence only to “related” PPMs. They claim that the use of the term “related” in the definition of “standard” qualifies both product and PPMs, and so should be taken to suggest that, although the definition of technical regulation does not include nprPPMs, the definition of “standard” does.

According to the representative of the U.S., speaking during the CTBT meeting of March 1, 1996:

“[I]t was generally accepted that eco-labels not involving unincorporated [npr] PPMs were covered by the TBT Agreement.<sup>8</sup> Since most eco-labels were of a voluntary nature, they would be considered to be standards. Delegations who had suggested that eco-labels involving unincorporated PPMs fell outside the scope of the agreement relied on the first sentence of the definition of standard. However, [the U.S.] delegation believed that, following the second sentence of the definition, eco-labels based on unincorporated PPMs fell under the TBT Agreement. He recalled the Tokyo Round TBT Committee decision on the coverage of the agreement with respect to labelling that labelling was covered regardless of the content of the label. The WTO TBT Committee had subsequently reaffirmed that Decision. The TBT Agreement provided sufficient flexibility to cover unincorporated PPMs and WTO rules could permit the application of innovative environmental policy tools.”

This is not a semantic issue: many members claim that the nprPPMs issue strikes to the heart of the multilateral trading system, with important implications for the use of trade measures that discriminate between “like products.”

### **Like product and protectionism**

The concept of “like product” is inherent in GATT Article 1 (General Most-Favoured Nation Treatment) and Article 3 (National Treatment on Internal Taxation on Regulation). These two Articles are cornerstones of the WTO rules and many countries fear that blurring the clear distinction between “like products” will weaken the foundations of the multilateral trading system and open the door to uncontrollable protectionism.

Basically, Article 1 says that a member must treat all “like product” imports from one country no less favourably than imports from any other member; Article 3 says that members must treat imported goods no less favourably than they treat domestically-produced “like products”. The interpretation of the term “like product” is therefore one of the cornerstones of the WTO rules. If members were able to decide on what basis they define “like products,” then they would be able to distinguish between products based on any criteria they want. For example, if the European Union was able to integrate into its definition of “Bordeaux wine” the number of residents of the Bordeaux region involved in wine production, then it could easily discriminate between New World imports and domestically-produced wines.

It is widely agreed that international trade rules must be based on a strict definition of “like product”. On the other hand, it has also been recognized that eco-labels are an effective way to help consumers to distinguish between “like products” on the basis of whether they have been sustainably produced, and that governments should be able to use eco-labels in pursuit of a legitimate public policy objective, i.e., promoting sustainable consumption. The Plan of Implementation agreed by governments at the World Summit on Sustainable Development (WSSD) in September 2002 recommends that governments continue to pursue market-based approaches to promote sustainable production and consumption. So it is very

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<sup>8</sup> NprPPMs are also referred to as “unincorporated PPMs” in some of the minutes of early CTE and CTBT meetings.

unlikely that the conflicts between labelling in trade and sustainable development policy will go away on their own any time soon.

### **Determination of “likeness”**

The likeness of products is determined on a case-by-case basis in the WTO.<sup>9</sup> The most recent ruling on issues of “like product” arose in the EU-Asbestos Case. Canada claimed that asbestos fibers, which were banned under a French dDecree, were “like” other similar non-asbestos fibers, which were not banned. The Panel Report in the Asbestos Case clearly defined four criteria for the determination of likeness. These are:

- (a) the properties, nature and quality of the product;
- (b) the end use;
- (c) consumers’ tastes and habits, which change from country to country;<sup>10</sup> and
- (d) tariff classification.<sup>11</sup>

The Dispute Panel ignored the relative health risks associated with asbestos when assessing its likeness with other types of fibers. It suggested that, although the concept of risk is relevant to the justification of a trade policy measure’s objective, it couldn’t be used in the assessment of “likeness” of products. However, the Appellate Body overturned this finding, indicating that health risks may be taken into account when determining “likeness.” It can safely be presumed that this approach would also apply to instances where the associated risk was to animal or plant health, which is more relevant to the issue of eco-labels.

The importance of the interpretation of “like product,” especially as it relates to labelling, cannot be understood in isolation from a range of other issues of significant importance to member countries. One recent example is the issue of product names that arise in the EU-Sardines case.

### **Liikeness, geographic indications and the EU-Sardines case**

The EU-Sardines case was the first-ever dispute involving the TBT Agreement. One of the main issues that were addressed had to do with the naming of products. The EU argued that European consumers expect a certain species of sardine—different from that which is exported from Peru—when they purchase canned sardines. As a result, its regulation sought to limit the use of the word “sardine” on labels of Peruvian sardines. The EU described its regime for regulating the naming of products, and indicated that it used the following hierarchical approach when assessing product names:

- 1. product descriptions and names set out in EU legislation;
- 2. those set out in member state legislation;

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<sup>9</sup> Report of the Working Party on Border Tax Adjustments, adopted on December 2, 1970, BISD 18S/97, p. 22.

<sup>10</sup> These first three tests were established in the Report of the Working Party on Border Tax Adjustments (1970).

<sup>11</sup> This fourth test was established in The Panel and the Appellate Body in Japan – Alcoholic Beverages (1987).

3. those in customary use within member states; and
4. “true nature”—description of foodstuffs and their use.

Both the Dispute Panel and the Appellate Body found that the EU was in violation of Article 2.4 of the TBT Agreement, and therefore requested that it amend its regulations. However, this case demonstrates the interconnectedness of the “like product” issue: were the EU able to restrict product labelling based on what it or its member states legislate in terms of the “name” of a product category—i.e., to establish their own definition of a product category based on consumer expectations of product type or quality—this could effectively create a loophole in the determination of like products. This would have important implications for other areas, including geographical indications of products such as wines, spirits and foodstuffs.

The Sardines case is the first WTO dispute involving the TBT Agreement and provides a series of very important clarifications on its provisions that would also have potential implications in disputes on labelling. It is beyond the scope of this paper to go into too much detail, but several issues mentioned in the Appellate Body report are worth flagging, including: the role of consensus in the drafting of international standards; the determination of “inappropriateness” and “ineffectiveness” of international standards; the burden of proof on parties; legitimate objectives for standards and technical regulations; and the assessment of whether technical regulations have been “based on” international standards.

### **A shift in focus: removing unnecessary barriers to trade**

The debate over whether nprPPMs are included under the scope of the TBT Agreement is complicated by the fact that the interpretation of “like product” has important implications in many other, more important, areas of trade law. For all intents and purposes, this debate will not be resolved within the CTE or CTBT, and will particularly not be resolved in discussion on eco-labels. Indeed, it is probably politically irresolvable. Member states will not negotiate interpretations of “like product,” but will continue to seek guidance from Dispute Panel and Appellate Body Reports. Politically irresolvable as it is, the nprPPMs debate has been holding up discussions on a host of other, resolvable issues that relate to eco-labels. It has also been suggested that countries refer to the nprPPMs issue not because they are fundamentally opposed to them, but rather because it is a useful device for limiting the scope of application of the TBT Agreement—an agreement that many countries do not have the capacity to implement or benefit from as it is.

Fortunately, the debate on nprPPMs has faded recently as members have recognized that standards and labels that incorporate life cycle assessments are a fact of life. Instead of concentrating on how to keep these types of standards outside of the WTO, some members are expressing interest in how they can be brought inside the framework of the TBT Agreement so as to reduce their trade impacts. It should be noted that members have extended this leniency only to voluntary standards, and not to mandatory technical regulations. This could lead to a split stream of



discussions, where voluntary nprPPM labelling programs are dealt with differently than mandatory nprPPM labelling.

As a result, voluntary eco-labels that integrate life cycle assessment may be creeping out from under the “like product” blanket and could be considered by WTO members in a new light. If, as seems possible but by no means certain, the CTE and the CTBT can agree to focus on making all types of standards less trade-restrictive rather than dwelling on the legal implications of nprPPMs, then they will achieve two things:

1. They will assist members by helping to reduce the very real barriers to trade that can be associated with eco-labelling requirements; and
2. By extracting themselves from the “like product” debate, they will make it easier for WTO members to tighten the focus of discussions in other areas where the political and economic stakes are higher.

The next section will focus on some of the other, perhaps more resolvable, issues that will receive the attention of the CTE and CTBT leading up to the Mexico Ministerial.

## **Practically resolvable: reducing barriers to trade**

### **Legitimate objectives for labelling programs**

One of the questions that have arisen, particularly in the context of GMO labelling is: what is a legitimate objective for labelling? This issue is complicated by the fact that members have fundamentally different approaches to the issue, and also by the fact that there is a degree of uncertainty in the text of the WTO agreements themselves.

### ***Do consumers have a right to information?***

It has been reported that the European Union, in informal discussions on its mandatory GMO labelling regime, has stated that the objective of their measure is to provide information to the consumer. Other countries (most of them influenced by their desire to export GMO commodities to the EU) have argued that, in their view, consumer information is better seen as a useful tool in pursuit of other legitimate objectives, but that provision of information to consumers is not itself a legitimate objective. The fundamental issue is whether consumers have a right to certain information, and who decides to what information they have a right.

Although it has not been mentioned in the discussions within the CTE or CTBT, the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters<sup>12</sup> is indicative of

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<sup>12</sup> For more information see <http://www.unece.org/env/pp/documents/cep43e.pdf>. The Aarhus Convention is open for signature and ratification by state members of the Economic Commission for Europe as well as

the different approaches to access to information. At the moment, there is no consensus on whether provision of information should be considered a legitimate objective in the context of the TBT Agreement. But this issue has opened an informal discussion on what objectives should be considered legitimate.

### *What is a legitimate objective for labelling?*

The text of the TBT Agreement has not helped to clarify whether the provision of information should be considered a legitimate objective. There are two relevant articles in the TBT Agreement.

Article 2.2 deals with the question of legitimate objectives for technical regulations, and states that:

“[T]echnical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.” [Emphasis added]

Article 2.5 deals with the assessment of whether technical regulations are unnecessary obstacles to trade, and states that:

“Whenever a technical regulation is prepared, adopted or applied for one of the legitimate objectives *explicitly mentioned* in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessary obstacle to international trade.” [Emphasis added]

The inclusion of the term “*inter alia*” in Article 2.2 suggests that members recognized that there are legitimate objectives for technical regulations other than the ones explicitly listed. However, the inclusion of the term “*explicitly mentioned*” in Article 2.5 effectively nullifies the broadening of the scope in Article 2.2. The negotiating history of the TBT Agreement does not provide any insight into whether this conflict was intentional or not. However, the obvious legal significance of the phrase “*explicitly mentioned*” suggests that it was intentional.

### *The prevention of deceptive practices*

It has been noted by some members that Article 2.2 explicitly mentions the “prevention of deceptive practices.” They suggest that the provision of information to consumers through labelling measures can be justified in the context of this legitimate objective. On the surface, this seems reasonable. The most compelling articulation of this argument is made by Switzerland in its June 2001 submission to the CTBT and CTE. The Swiss argued that, because consumers are willing to pay a premium for certain labelled goods, there is incentive to try to misinform

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states having consultative status with the Economic Commission for Europe. At the moment, only European and CIS states have signed or ratified the Convention.

consumers to gain additional rents even though the product may not be in compliance.<sup>13</sup> There is therefore a clear need to restrict deceptive practices.

But other members claim that the “deceptive practices” knife cuts both ways. They argue that the mere existence of a label for certain types of information creates a consumer expectation. They claim that a labelling program can itself be a deceptive practice because of the implication that non-labelled products are not in compliance with the criteria and, therefore, of a lower quality. A related issue that has been raised frequently since 1994, in particular with regard to tropical timber, deals with the danger that the existence of a labelling regime in a certain product category may shift consumption to substitutes that have even more negative environmental impacts. For example, it has been suggested that the labelling regime for sustainably-produced timber has shifted some users in the construction industry towards non-renewable substitutes, such as plastics and metals, which are not as environmentally friendly as timber.

### *Is labelling the least trade-restrictive measure available?*

Some members have also claimed that labelling may not be the “least –trade-restrictive” way of providing information to consumers. Canada, among others, has suggested that toll-free hotlines and informational brochures might achieve the same objective with fewer trade impacts. Although members have not yet formally debated the effectiveness of eco-labelling measures, the discussions may lean this way in the future. Studies have found that, in some situations, eco-labels may not be as efficient a means of providing information to consumers as originally thought, and therefore neither as effective at influencing consumption nor as useful in achieving public policy objectives.

The debate over whether consumers have a right to certain information is of contextual importance to the eco-label debate in the WTO, but it is not of substantive importance. It is very unlikely that the WTO will wade into the deep-end of these issues and try to resolve them. If WTO members recognize that consumers have a fundamental right to information, and note that the provision of this information is a legitimate objective under TBT Article 2.5, this will simply shift the debate to other issues; it will not solve it. The next level of debate—how to determine what kinds of information consumers have a right to—can be expected to be at least as protracted.

As a result, and as is appropriate given the WTO’s trade-facilitation mandate, discussions in the CTE and CTBT are likely to leave considerations of the legitimacy of objectives to Dispute Panels and the Appellate Body, and will instead focus on defining how legitimate objectives can be pursued through least –trade-restrictive means. This means that the discussions can be expected to focus on whether, and in what circumstances, eco-labels are the least trade-restrictive means of achieving a legitimate objective, and how eco-labelling programs can be prepared, adopted and applied in a least trade-restrictive manner.

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<sup>13</sup> WT/CTE/W/192 (G/TBT/W/162).

## Transparency in standard-setting

Developing countries expressed concern from the earliest stages of discussion in the CTE and CTBT on the transparency and openness of standards bodies. These concerns were expressed, in particular, in the context of environmental standards and eco-labelling. Echoing the sentiments of a number of his colleagues, one developing country delegate concluded in a 1994 meeting of the CTE that:

“in order to make environmental objectives and trade mutually compatible, some basic principles should be observed in developing eco-labelling schemes. These included:

compliance of governments or related bodies and voluntary standardization organizations with the ISO "Code of Good Practices," to provide the necessary transparency and timely notification requirements and to ensure that labelling schemes are not set in such a way as to cause barriers to trade or to accord imported products less favourable treatment than that accorded to like products of national origin or originating in another country.”<sup>14</sup>

The Code of Good Practice for the Preparation, Adoption and Application of Standards (the Standards Code<sup>15</sup>) was added to the TBT Agreement during the Uruguay Round and contains procedural guidelines for standards bodies. By increasing transparency and giving all interested parties access to the development of standards, it helps to ensure that standards take into consideration possible trade impacts and are not more trade-restrictive than necessary. The main provisions of the Standards Code are similar to those that relate to technical regulations in the main text of the Agreement, and state, among other things, that:

standards should be based on relevant international standards;  
standards should not overlap with others, and should be developed based on a national consensus;  
standards bodies must keep a register of all existing and planned work items, and make their standards readily available at an early stage; and  
standards bodies should provide 60 days for submission of comments on new standards.

Although the procedural guidelines in the Standards Code are generally considered robust, there is a fundamental flaw in their implementation: the WTO cannot impose requirements on private bodies, only on governments. As a result, the Standards Code only has legal weight if member governments have effective control over national standards bodies. This is not always the case. Even many of the traditional standards bodies in developed countries are private bodies. The best a WTO member can do in this case is to urge the standards bodies to voluntarily adopt the Standards Code. As the number of private bodies developing standards has increased, and particularly those developing environmental standards and labelling schemes, this has become an important issue. Furthermore, as will be discussed later, the Standards Code does not apply to any international standards bodies.

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<sup>14</sup> PC/SCTE/M/3/Rev.1\*

<sup>15</sup> Annex 3 of the TBT Agreement.

Beyond the adequacy of the guidelines and rules for standard setting is the question of whether all countries have the capacity and resources required to participate in the setting of standards, and international standards in particular.

### **International standards and international standards bodies**

The basic theoretical underpinning of the TBT Agreement is that technical barriers to trade are best reduced by the harmonization of different requirements. At the pinnacle of this harmonization are international standards. Article 2.4 states:

“Where technical regulations are required and relevant international standards exist or their completion is imminent, members shall use them, or the relevant parts of them, as a basis for their technical regulations (...).”

In addition, paragraph F of the Standards Code states:

“Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops, except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.”

Following the TBT objectives, in a perfect world, harmonization would proceed until all national and regional standards had been harmonized at the international level, meaning that all members would use the same international standards, including as the basis for regulations.

As a result of this focus on international standards, early discussions in the CTE and CTBT focused, among other things, on the relationship between eco-labels and the disciplines relating to international standards. There are three main issues that may arise in the CTE with regard to international standards and eco-labelling:

- the need for technical assistance;
- the definition of “international standards”; and
- the appropriateness of international environmental standards.

### **Technical assistance**

In a meeting of the CTE on September 15–16, 1994,<sup>16</sup> delegates agreed that, in order to make environmental objectives and trade mutually compatible, some basic principles should be observed in developing eco-labelling schemes, including:

“full and effective participation of developing countries in the selecting and setting of criteria, particularly for products of export interest to them.”

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16 PC/SCTE/M/3/Rev.1\*

It had long been recognized that that a significant amount of technical assistance would be needed, not only to help developing countries implement technical regulations, but also to help them to participate effectively in the development of international standards. This is an issue that has been discussed in the CTBT in relation to all types of standards, and not just eco-labels. Article 11 of the TBT Agreement is quite explicit in requiring members to give favourable consideration to requests from other members for technical assistance to help other members participate in international standardization activities. In reality, very little technical assistance has been provided. This is expected to be one of the implementation issues on which developing countries will wait to see progress before agreeing to move forward on new issues in the Doha Round.

### *Defining international standards*

Although the TBT Agreement requires that members use international standards, it does not indicate what an international standard is. Because some national standards become *de facto* international standards, and because the scope of the TBT Agreement is so broad—covering everything except food safety issues—it was decided that the CTBT could not simply enumerate a list of recognized international standards bodies. Therefore, members decided to move away from defining international standards bodies and towards defining the process through which international standards should be developed.

The only procedural guidance on standard setting in the TBT Agreement is the Standards Code, but this does not apply to international standards bodies. As a result, members included an informative annex in the Report of the Second Triennial Review of the TBT Agreement that contains a set of process criteria for international standard setting<sup>17</sup>. However, just as with the Standards Code itself, the power of this document is unclear because the WTO has no authority to impose rules on the international standards bodies. Early in the discussions within the CTE, several delegates suggested that what was needed was a multilateral guideline document on procedures for the development of eco-labels that would apply to national and international standards. The earlier suggestion—that there was a need for a procedural guidelines document specifically for the development of eco-labels—has since disappeared from discussions in the CTE. Perhaps it will resurface now.

### *Are international environmental standards appropriate?*

Another discussion that has faded away, perhaps in light of the growing number of such standards and labels being developed, was on the fundamental value of international environmental standards. Given the subjective and variable natures of environmental preferences and environmental carrying capacities, members questioned whether it was even possible to develop international eco-labels that are

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<sup>17</sup> Annex 4 of the Report of the Second Triennial Review is a set of principles for the development of international standards. Although these principles were primarily intended as a guide to those bodies wanting to develop international standards, it is possible that Dispute Panels will use the principles in Annex 4 by as a test for “international” standards.

universally relevant. Related to the issue of international standards was the fact that the International Organization for Standardization (ISO) had, in 1994, just begun to develop international standards on eco-labels and life cycle assessment. Many developing countries questioned whether ISO had the necessary competence to undertake this work. It is possible that this issue may resurface as an argument against the use of international standards and in favour of a stronger focus on technical equivalence agreements (discussed later in the paper).

### Extraterritoriality

One of the more pernicious criticisms of eco-labels is that they effectively impose the environmental preferences of consumers in one country onto the producers of another. It is suggested that this “green imperialism” —or extraterritoriality— impinges on the sovereignty of the producer nation. When objecting to extraterritorially-applied requirements, many countries have referred to Principles 11 and 12 of the Rio Declaration.

Principle 11 states:

“States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. *Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.*” (Emphasis added)

Principle 12 states that:

“(…) Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. *Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.* Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.” (Emphasis added)

These statements are related to the observation that, because different countries have different environmental carrying capacities and their consumers have different preferences for environmental preservation, they necessarily have different environmental priorities. If water scarcity is neither a problem nor a concern in country A, then an eco-label developed in country B that prioritizes water conservation in the production process may be inappropriate and of unwarranted cost if it is required of producers in country A. Members that question the appropriateness of international environmental standards also quote these observations.

Interestingly, early commentaries in the CTE and CTBT on extraterritoriality were relatively solutions-based, and suggested that the issue could be resolved through the concept of technical equivalence, which was already contained in the TBT Agreement. Technical equivalence is a mechanism for establishing that two different standards achieve the same objective, but in different ways. In the case of eco-labels, different countries would apply levels of environmental protection that

are suitable to their different environmental, cultural and economic context. So, although the level of protection is different, it is recognized that they both attain the same objective.

Discussions on technical equivalence largely disappeared after the decisions in the Tuna-Dolphin II and Shrimp-Turtle cases. These cases brought a degree of consistency to the treatment of extraterritoriality, which both rulings accepted in some limited forms. The focus shifted from how the measures could be made suitable to different contexts to when measures with extraterritorial impacts could be justified.

### **Justified unilateralism**

At the moment, in particular following the Appellate Body ruling in the Shrimp-Turtle case, the common understanding among WTO members seems to be that measures can have extraterritorial impacts as long as they are:

1. aimed at protecting an exhaustible natural resource;
2. taken pursuant to a multilateral environmental agreement (MEA);
3. imposed only after bilateral attempts at resolution have failed;
4. applied in a least trade-restrictive manner; and
5. consistent with the principles of Most-Favoured Nation and National Treatment.

There may be cases where extraterritorial measures are deemed consistent with WTO rules without satisfying all of these conditions, but it is now *almost* safe to say that if these five conditions are justified, then extraterritorial measures may be justified. The value of the Appellate Body ruling is that it has defined a relatively narrow set of circumstances when GATT Article XX (g)<sup>18</sup> can be used to justify unilateral trade measures, maintaining a reasonable balance between the WTO's dual objectives of trade liberalization and sustainable development.

### **Multilateral environmental agreements**

As suggested above, multilateral environmental agreements play an important part in the eco-labelling debate. The Shrimp-Turtle case seems to have suggested that members can look to the objectives and principles contained in MEAs to justify the objectives of certain environment-related trade measures. Some commentators have suggested that MEAs could be considered “international standards” for

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<sup>18</sup> Article XX(g) of GATT states: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (...) (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”



environmental policy objectives. In this light, the evolution of the debate on MEAs in the WTO, and the evolution of the way that MEAs themselves address trade policy issues, could have important implications for eco-labelling.

Contributing to this likelihood is the fact that parties to some MEAs have floated the idea of creating MEA-specific eco-labels. The Animals Committee of the Convention on International Trade in Endangered Species of Flora and Fauna (CITES) has discussed on several occasions the desirability of a labelling regime for caviar, to be applied in relation to endangered species of sturgeon.<sup>19</sup> It seems almost certain, especially considering the Appellate Body report in the Shrimp-Turtle case, that any such labelling regime set up through CITES would be deemed acceptable under the WTO rules.

CITES is, at its heart, a trade-related MEA. However, there are discussions on labelling in other MEAs as well. A representative of the Ramsar Convention<sup>20</sup> on Wetlands indicated, at a joint UNEP/UNCTAD meeting in Geneva in early 2002, that parties had discussed informally the idea of developing an eco-label. This is consistent with a larger trend where efforts are being made to link the requirements in MEAs directly with the activities of private companies. Eco-labels are, certainly, one of the more developed tools for linking environmental issues to economic activity; if this trend continues, it is possible that other MEAs will also consider the development of eco-labels. It is not difficult to imagine an eco-label developed in the context of the Basel Convention, for example. The Cartagena Protocol on Biosafety, which was negotiated under the aegis of the Convention on Biological Diversity, also contains important provisions relating to labelling and is, at its core, a trade-related protocol.

The CTE is also mandated by the Doha Declaration to consider the relationship between MEAs and the WTO. This overlap between MEAs and eco-labelling may be an interesting area for future work and, if it appears that eco-labels will increasingly be developed under the aegis of MEAs, or in pursuit of their objectives, may help to narrow the focus on finding a solution to the trade impacts of eco-labels.

### **Technical equivalence**

Technical equivalence has been discussed since 1996 as having the potential to resolve the problem of extraterritoriality and the lack of participation in international standards setting. The attraction of technical equivalence from a trade and environmental policy perspective is that it can be seen as a restatement of Principle 11 of the Rio Declaration, and is consistent with the theory of subsidiarity in sustainable development policy: importing countries define a policy objective that they would like to pursue through an eco-label and establish a rough framework outlining the specific areas of concern (e.g., water quality, endangered species), but then leave the exporting country with the flexibility to define

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<sup>19</sup> <http://www.iisd.ca/linkages/vol21/enb2118e.html>

<sup>20</sup> The Ramsar Convention on Wetlands; [www.ramsar.org](http://www.ramsar.org)

performance criteria within their own specific environmental, social and economic context.

The minutes of the CTBT meeting of March 1, 1996, attributes the following statement to the representative from the United States:

“It would be useful for members to reflect and share views on the implications of various types of eco-labelling programs and on the considerations that designers and implementers of eco-labelling schemes might take into account; for example, to adequately recognize differing environmental conditions in the home country and other parts of the world, and *to accommodate different approaches that produce an equivalent, environmentally beneficial result.*” [Emphasis added]

It is important to note that the provisions of the TBT Agreement only address the technical equivalence of technical regulations (Article 2.7). Therefore, there is nothing in the TBT Agreement that would require, encourage or facilitate members’ consideration of the negotiation of technical equivalence agreements for voluntary labelling measures. The EU has suggested that Article 2.7 could be extended to voluntary labels, and that international standards could be a useful tool to facilitate a comparison of different labelling requirements.<sup>21</sup>

In practice, however, the little experience that exists suggests that the negotiation of technical equivalence agreements is extremely complicated and time consuming. They require a high degree of institutional and technical capacity, something that just does not exist in most developing countries. Without significant technical assistance investments in developing countries, and without a policy framework to facilitate them, technical equivalency agreements are unlikely to bear much fruit.

### **Mutual recognition of conformity assessments**

There is little value in implementing the environmental requirements that your customers demand if you are then unable to demonstrate credibly your conformance with its requirements. Even an international standard is of very little value if you cannot convince people that you are following it. The mutual recognition of conformity assessment procedures is one of the most important issues for developing countries exporters—and of more practical value than technical equivalence agreements.

The TBT Agreement contains provisions that require members to accept conformity assessments done in other countries according to different procedures (Article 6.1), and encourages members to enter into formal agreements for the mutual recognition of conformity assessment. The CTBT has also addressed the issue of mutual recognition in the Second Triennial Review of the TBT Agreement, where members agreed to include in Annex 5 an “Indicative List of Approaches to Facilitate Acceptance of the Results of Conformity Assessment.”<sup>22</sup> This is the first

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<sup>21</sup> G/TBT/W/175 (WT/CTE/W/212).

<sup>22</sup> G/TBT/9/.

attempt to facilitate the implementation of the relevant articles in the TBT Agreement.

It is important to note, however, that mutual recognition can only be established if both parties are either using a common international standard or the same national standard, or have agreed to treat each other's different national standards as equivalent. As a result, without a framework for technical equivalence, the establishment of a well-functioning mutual recognition framework may actually increase the pressure on developing countries to adopt international standards, which they may not have helped to develop, or other members' national standards, which may not be appropriate for their unique environmental, social and economic context.

### **Technical assistance: opening the door to broader negotiations**

Providing a complete summary of the history of discussions on technical assistance in the CTBT is an easy task. It is one of the least controversial issues related to the trade impacts of eco-labels: all things being equal, developing countries will suffer greater restrictions to market access in the absence of technical assistance than if technical assistance is provided. Despite almost unanimous agreement on this point, and despite repeated statements of encouragement from the WTO and its members, there has still been relatively little action to address it. The Doha Declaration states, rather blandly:

“33. We recognize the importance of technical assistance and capacity building in the field of trade and environment to developing countries, in particular the least-developed among them.... A report shall be prepared on these activities for the Fifth Session.”

The lack of technical assistance for TBT implementation is particularly surprising given the fact that Article 11 of the TBT Agreement explicitly requires that members give positive consideration to providing technical assistance to other members and, in particular, to developing countries. Article 11 addresses many aspects of TBT implementation: if developing countries need help on any aspect of standards setting, the development of technical regulations, conformity assessment, participation in international standards setting or other relevant fora, or with the development of any of the institutions involved in TBT implementation, Article 11 requires members to have a reasonable justification for not providing this help.<sup>23</sup>

There are some signs that this inactivity in technical assistance is beginning to change. Several initiatives have been started since the year 2001, including within the WTO itself.<sup>24</sup> It has been suggested that the reason for this is that developed countries have realized that developing country willingness to consider their issues

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23 For a discussion of the role of “Article 11: Technical Assistance” of the TBT Agreement, see: Rotherham, Tom: “Political Rights – Legal Obligations: the implementation of Article 11 of the TBT Agreement,” paper prepared for the OECD Global Forum on Trade and Environment, November 23–24, 2002, New Delhi, India. Available from the author: trotherham@iisd.ca.

24 The TBT Committee will convene a workshop on Trade-Related Technical Assistance (TRTA) on 19 March 19, 2003, in Geneva, Switzerland.

in the WTO agenda in the Doha Round will depend on building up good will—particularly through technical assistance and implementation of the existing agreements. Progress on dealing with eco-labels will depend on progress on providing the technical assistance needed for developing countries to implement the TBT Agreement effectively.

Apart from the relative lack of technical assistance given to developing countries, there is one specific issue that might be raised in the CTE discussions on eco-labels: Although Article 11 is quite explicit in requiring members to give favourable consideration to requests for technical assistance on the implementation of *technical regulations*, there are no similar such on the implementation of *standards*.

Some members, most notably Switzerland, have argued that voluntary eco-labels can have as much impact on market access as mandatory technical regulations. If this is the case, then technical assistance to help developing country members to implement standards is, in some circumstances, as important for market access as are technical regulations. With the growth in the number of private bodies developing voluntary eco-labels—and the growth in consumer interest in these issues—technical assistance for standards implementation will become more important. That said, it is inconceivable that the WTO could ever require private standards bodies to provide technical assistance to companies that are struggling to implement their standards requirements. This is beyond the scope of the WTO's influence, which is limited to its member governments. This is likely to remain a problem that developing country members bring to the discussions in the CTE.<sup>25</sup>

## State of the debate: submissions from members

With that background, we can now consider the state of the debate, as indicated by recent submissions to the CTE and CTBT. It is important to note that no formal submissions have been made by developing country members. At the moment, the formal discussions on eco-labelling are being directed by developed country submissions. Since the beginning of 2001, submissions have been received from Canada,<sup>26</sup> Japan,<sup>27</sup> the United States,<sup>28</sup> Switzerland,<sup>29</sup> and the European Union.<sup>30</sup>

These submissions do not take positions on any of the issues but rather seek to identify areas where discussions are needed. There are four general areas that are identified in most of the submissions:

1. transparency;

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25 Although this is an issue that the WTO cannot possibly address on its own, it has been suggested that the TBT Committee can play an important role in catalyzing attention to this by other bodies and official development assistance agencies.

26 G/TBT/W/174, submitted March 12, 2002.

27 G/TBT/W/176, submitted June 2002.

28 G/TBT/W/165, submitted June 25, 2001.

29 G/TBT/W/162 (WT/CTE/W/192), submitted June 19, 2001.

30 G/TBT/W/175 (WT/CTE/W/212), submitted June 12, 2002.

2. mandatory vs. voluntary labeling;
3. harmonization of standards; and
4. nprPPMs.

These are examined below, as are several other issues that are particular to one or two countries.

### **Transparency**

Everyone agrees that increasing transparency, both in the preparation of labelling requirements and in the provision of information to exporters, is a priority issue. There are three elements to this: first, there is a need to increase developing country involvement in international standards setting, and to ensure that developing countries have access to other members' national standards setting processes. This includes all sorts of technical issues, such as when labels need to be affixed, and how comments on draft labelling requirements are addressed. Second, there is a need to clarify the transparency provisions as they relate differently to voluntary and mandatory requirements. Third, as identified by the EU, there is a need to investigate how the Standards Code applies to the growing number of private standards bodies.

### **Mandatory vs. voluntary labelling**

Each of the submissions also notes that attention needs to be given to how members decide to use either mandatory or voluntary labelling requirements. The suggestion is that, in some cases, members may be using mandatory requirements, which are presumed to have greater impact on trade, when it would be sufficient to use a voluntary approach. Also, there is general agreement on the need to investigate more closely the differences between the provisions that address technical regulations and those that address standards. The EU has identified two issues in particular: the lack of an Article 2.3 (regular review of technical regulations) and Article 2.7 (encouragement of technical equivalence) in the Standards Code. The Swiss question whether there should be any distinction made at all.

### **Harmonization of standards**

The harmonization of standards is seen as an important part of the solution to the labelling debate. To varying degrees, members want to investigate how international standards can be used to harmonize labelling requirements. Japan and Canada place a strong focus on international standards; the EU also discusses the role of regional labelling schemes, as well as technical equivalence and mutual recognition.

### **NprPPMs**

The Canadian and Swiss submissions explicitly raise the importance of the non-product-related PPMs issue. The U.S. hints at it, in relation to mandatory labelling and possible conflicts with Most-Favoured Nation Treatment, and the EU and

Japan ignore the issue completely. The clearest submission, from the Swiss, notes that there is a high degree of ambiguity with the legal interpretations of the TBT Agreement and that there is a need to clarify this. The Canadian submission subtly suggests that the CTBT address this issue rather than the CTE.

#### **Other issues raised: the U.S.**

The U.S. submission raises the issue of how to determine if the objective of a labelling measure is legitimate, or is disguised protectionism. It also suggests the need to consider the technical requirements for conformity assessment procedures.

#### **Other issues raised: Canada**

Canada raised the issue of whether guidelines are needed for the development of labelling programs, the importance of conformity assessment, and identified the need to focus on how to provide effective technical assistance to developing country members.

#### **Other issues raised: Japan**

Japan highlighted the importance that private standards bodies follow the Standards Code, and recommended that they communicate more regularly with the relevant international standards bodies. Japan also called for the use of more performance-based labelling requirements, as recommended in TBT Article 2.8 and Paragraph I of the Standards Code).

#### **Other issues raised: Switzerland**

Switzerland noted that its negotiations proposals on agriculture were linked to some of the issues being discussed on labelling and urged the CTE and CTBT to address these issues. It highlighted the growing importance of voluntary labelling requirements, and the difficulties that these pose to developing countries.

#### **Other issues raised: the European Union**

The EU suggests that the CTE could usefully identify where “win-win-win” situations exist, linking cooperation on technical equivalence, regulatory cooperation and technical assistance. It also believes that there is a need to establish a more systematic work program on labelling with a view to the conclusion of the Third Triennial Review.

## **What might the CTE recommend in Mexico?**

Despite the EU’s warning that, unless significant progress has been made, it may try to push labelling issues onto a fast-track like Paragraph 31, the current state of the discussions on labelling in the CTE and CTBT suggests that there is unlikely to be much substantive progress by the Mexico Ministerial. One of the problems is that, although the CTE has a deadline by which it must make its recommendations,

the CTBT has an easy escape route: the upcoming Third Triennial Review of the TBT Agreement, due to begin in October 2003.

Given the prolonged history of the discussions on eco-labelling in the CTE, the ongoing discussions on labelling in the CTBT, the fact that these issues are tied to many other negotiating agendas, and the overall consensus that the TBT Agreement should not be re-opened for negotiation, it can be presumed that the CTE will recommend that eco-labelling continue to be addressed in the Third Triennial Review, which already seems likely to include a review of labelling in general.

Although the CTE will probably pass off discussions to the CTBT, which consists of many of the same delegates anyway, the nature of its recommendations could have an influence on how the CTBT progresses. In particular, it is likely that the CTE will try to isolate those elements that can be practically resolved from those that seem politically irresolvable. Of foremost importance is that members agree to stop discussions on nprPPMs, leaving that to Dispute Panels and the Appellate Body rulings to clarify over time. If that can be agreed, then there are three main issues that may be given priority:

1. coverage of private standards;
2. mandatory vs. voluntary standards; and
3. the need for technical assistance.

### **Public and private standards bodies**

The TBT Agreement aims to ensure that standards and technical regulations, including voluntary and mandatory labelling requirements, continue to play an important role in trade and public policy but do not create unnecessary barriers to trade. Over recent years, however, there has been a rapid increase in the number and scope of eco-labelling programs created by private bodies. There has also been an increase, although less marked, in the development of international eco-labelling programs.

As mentioned, the provisions in the WTO Agreements place legal obligations on countries' governments, not on private actors. As a result, unless a government has direct control over private standards bodies, the provisions in the TBT Agreement have no influence on the development of private standards. In addition, there are no provisions in the TBT Agreement that address international standards bodies. The guidelines for the development of international standards listed in Annex 4 of the Report of the Second Triennial Review are of uncertain legal status. As a result, there is a massive category of eco-labels that are not at all covered by the terms of the TBT Agreement.

If the CTE and CTBT decide to forgo discussions on the politically irresolvable issues, such as nprPPMs and "like products," and instead focus on how the TBT Agreement can be used to reduce barriers to trade, then members recognize that this gap in its application will have to be addressed. There is a need to increase

transparency in the development of standards; there is a need to provide technical assistance to developing countries struggling to implement standards; and there is a need to ensure that standards are only applied where they are appropriate for the specific environmental, social and economic context of the member country.

Because the WTO cannot decide to start imposing its rules on private bodies, the CTE is likely to recommend that members encourage relevant external bodies to address some of these issues in cooperation with the WTO. As a result, the set of actions under this item will have to include partnerships with organizations such as the International Organization for Standardization, the UN Environment Programme, the Global Ecolabelling Network (GEN), the International Social and Environmental Accreditation and Labelling (ISEAL) Alliance, the International Accreditation Forum and a host of multilateral and bilateral development assistance organizations, such as the UN Industrial Development Organization (UNIDO).

There is also some scope for additional guidance in a future Report of the Third Triennial Review of the TBT Agreement. Just as it adopted a set of guidelines to promote mutual recognition of conformity assessments, the CTBT could develop guidelines on how to facilitate the negotiation of technical equivalence agreements. This would not hold legal weight, but would contribute to the development of common practice and greater predictability. It could also stimulate additional action outside of the WTO.

### **Mandatory and voluntary measures**

It has been noted that the main objection that members have informally expressed with regards to the EU's labelling regime for GMOs is that it is mandatory. Were it to be made voluntary, many objections would be dropped. This sheds some insight into the future of the eco-labelling debate, and suggests that members may focus some effort on clarifying a process for determining when a mandatory labelling program is justified and when a voluntary measure may suffice. Again, this is the kind of guidance that could be developed during the Third Triennial Review, and included as an annex in the final report.

However, as mentioned in this paper, voluntary labels are subject to far fewer provisions than mandatory ones. In particular:

- voluntary labels are not subject to the same provisions on transparency;
- members are not expected to give positive consideration to technical equivalency agreements for voluntary labels;
- there is no requirement for the standards body to keep the measure under review to ensure the applicability and effectiveness of the labelling program; and
- members are not expected to provide technical assistance to members who have difficulty implementing standards.



It is recognized, therefore, that by shifting focus towards measures that involve voluntary environmental requirements, members risk creating a different problem. The CTE could therefore be expected to recommend that members also address some of the differences between the treatment of voluntary measures and the treatment of mandatory measures. Members are unlikely to go as far as recommended by the Swiss, who have suggested the distinction between voluntary labels and mandatory labels may be unjustified.<sup>31</sup> However, the CTBT could consider the effectiveness of the Standards Code, and the possible need for clarifications. Also, as recommended by the EU, the CTBT could consider how the Standards Code applies to private standards bodies, which develop most of the existing eco-label programs.

### **Technical assistance**

The final area where the CTE can be expected to focus attention is on technical assistance. Politically, this is an absolutely straightforward issue: everyone acknowledges the need for technical assistance for TBT implementation; developing countries have demanded that implementation be given due regard in the new Round; and, with tariff levels coming down, it is widely accepted that technical barriers to trade are an important impediment to market access. The question is how the CTE can contribute most effectively.

One recommendation could be to use the Third Triennial Review to assess experience with technical assistance as part of an analysis of the effectiveness of Article 11. This would review the total amount of assistance requested and offered, as well as draw some lessons learned from the initiatives. By framing the review in the context of an analysis of the Article 11, the CTE would raise the specter of possible amendments to the TBT Agreement, something that most members would go a long way to avoid.

## **Conclusion: politics of the Fifth Ministerial**

Discussions on eco-labelling have been going on in the CTE and CTBT since the committees were created in 1995. The mandate given the CTE in the Doha Development Agenda to address labelling for environmental purposes could help to resolve the impasse, but it is unlikely. Many of the fundamental issues behind the debate are also of fundamental importance to other areas of WTO law, and to other negotiation agendas, including agriculture. For all intents and purposes, little can be expected from the CTE by the time of the Fifth Ministerial. One of the contributing factors is that the EU may have already gone as far as it is willing to go to push the agenda.

Eco-labels are in the Doha Agenda because the EU put them there. At the same time, the EU has a strong interest in the negotiations on agriculture and the Singapore Issues: competition and investment. As the hard bargaining begins, the

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<sup>31</sup> See: WT/CTE/W/192 G/TBT/W/162; para. 21.

eco-labelling issue may well fall by the wayside if the EU cannot muster the political will to push it through. Recent developments in the CAP reforms process may also reduce the urgency of this issue for the EU. This would leave no clear champion for the issue, leaving it to be taken up in the regular course of the Third Triennial Review. This could eventually move the issue forward but reliance on existing processes in the WTO to resolve the issue can in no way be considered a resounding success by the CTE, or for the Doha Development Agenda.

Despite this, there are those in the WTO and in the trade community who suggest that the existing rules on labelling are sufficient, and that the real test will be the way that the provisions are interpreted by Dispute Panels. This is similar to the arguments that some have made with regard to the dangers of formally addressing the relationship between the WTO and MEAs. At the moment, although there have been several cases that suggest the direction that WTO-MEA cases would be resolved, there is just too little WTO jurisprudence in the area of labelling to suggest how the relevant provisions would be applied. In the absence of any clear evidence of the problems created by labelling provisions, and the absence of any formal complaints made to the WTO, it is possible that both the political will and the political necessity of resolving the labelling issue will continue to be lacking.