

# Supermarket Labels and the TBT Agreement:

## “MIND THE GAP”

Arthur E. Appleton<sup>1</sup>



Consumers are increasingly faced with supermarket labels that reflect whether a product meets various environmental criteria, whether it is organic, whether and how far it was air-freighted (Air Miles), and some supermarkets are debating whether to label the distance that produce has traveled from its source (Food Miles).<sup>2</sup> In addition to being shrewd marketing schemes, these private labeling and certification schemes often have protectionist motives. For example, in Switzerland, “Bio Suisse”

refuses to grant “organic” certification for products imported by air.<sup>3</sup> Hence, the “Bio Suisse” scheme favors Swiss farmers and their neighbors, to the detriment of more distant developing countries. Likewise, in the United Kingdom, the Soil Association is examining whether to assess the impact of airfreight when it grants its “organic” certification.<sup>4</sup> The result would also be the same—protection of local farmers.

Supermarkets in the United Kingdom are in the forefront of this effort and claim to be targeting health and environmental concerns, particularly climate change. *Is this really the case?* This article summarizes policy implications that arise from private labeling schemes and identifies “gaps” in the World Trade Organization (WTO) Agreement on Technical Barriers to Trade (TBT Agreement)<sup>5</sup> that may result in private labeling schemes falling outside TBT disciplines.

### Policy Issues

Private labeling schemes—including supermarket labeling schemes—exist for legitimate objectives such as environmental protection, but also to further protectionism. They raise several policy issues:

① **Neutrality:** Private labeling schemes are seldom neutral and often support commercial or special interests.

For example, while the Bio Suisse scheme and the Soil Association proposal appear neutral on their surface, both emphasize a sensitive portion of a product’s life-cycle<sup>6</sup> that appeals to local agricultural producers.<sup>7</sup>

② **Effect on developing countries:** By emphasizing one stage in a product’s life-cycle, private labeling schemes, including those based on Air Miles and Food Miles, provide a misleading view of a product’s environmental implications. When environmental and organic labeling schemes take transport considerations into account, the result is often de facto discrimination against exports from developing country farmers. Such schemes may therefore cause economic damage that leads to other environmental problems.<sup>8</sup>

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③ **Evaluation of relevant criteria:** Sophisticated environmental labeling schemes depend upon an assessment of a product’s entire life cycle. This is a new form of accounting without a generally accepted methodology. Should certain phases in a life-cycle analysis receive greater weight for accounting purposes? How does one evaluate transport-related criteria which may discriminate against imports? How does one evaluate products produced using polluting or non-renewable forms of energy? Potential considerations include emissions from: farm equipment, plants manufacturing fertilizer, pesticides and greenhouses; fuel to heat greenhouses, emissions from vehicles used by employees to get to the farm and their manufacturing jobs, and landfill emissions from associated waste. The list is almost endless, however, and the risk exists that without agreed accounting standards consumers will face deceptive labeling practices.

④ **Effectiveness:** Private labeling is an imperfect tool to address environmental problems. Private labels usually

focus on narrow issues, only influence a limited number of consumers, and fail to provide a comprehensive regime to address environmental concerns. For example, schemes such as Food Miles and Air Miles are not as effective as taxes and other pricing policies to force polluters (and ultimately consumers) to bear the full cost of pollution.

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### Legal Issues

The TBT Agreement is the most specific of the WTO's "covered agreements" applicable to environmental and organic labeling schemes. It governs mandatory "technical regulations," voluntary "standards" and "conformity assessment" (testing) covering a wide range of goods. If applicable, a WTO panel seized with a labeling dispute would turn first to this Agreement before addressing GATT issues.<sup>9</sup>

Compliance with a private labeling scheme is almost always voluntary. If a scheme falls within the TBT Agreement, Article 4 and Annex 3 (the Code of Good Practice for the Preparation, Adoption and Application of Standards) would be applicable. Standardizing bodies that are bound by the Code or have accepted its obligations are required to accord most-favored-nation and national treatment to like products.<sup>10</sup> Their standards must not create unnecessary obstacles to international trade,<sup>11</sup> and they are required to use relevant international standards when they exist or their completion is imminent.<sup>12</sup>

Article 4 provides that central government standardizing bodies are bound by the Code and that other standardizing bodies have the option to accept and apply the Code. Members are obligated to take "reasonable measures" to assure compliance with the Code by regional, local and non-governmental "standardizing bodies." Nevertheless, Members are responsible for the compliance of standardizing bodies whether or not a standardizing body has accepted the Code. The important term is "standardizing bodies." Members have no responsibility under Article 4 if the body in question is not a "standardizing body."



Four TBT issues with relevance to private labeling schemes are discussed: (1) whether product labels reflecting non-product-related processes and production methods (NPR-PPMS) fall within the Code, (2) whether private bodies are promulgating "standards" and qualify as "standardization bodies," (3) whether private standardization bodies qualify as non-governmental bodies, and (4) whether Members have responsibility for conformity assessment procedures operated by non-governmental bodies.

#### (1) The PPM Question

If a production or process method (PPM) causes a change detectable in the product itself, WTO Members classify the PPM as "product-related" or "incorporated." If a PPM cannot be detected in the product itself, WTO Members classify it as "non-product-related" ("NPR-PPM") or "unincorporated." Pursuant to the WTO Agreement, Members are permitted to regulate manufacturing processes and production methods (e.g., PPMs such as factory emissions) when production occurs within their jurisdiction. Members are also able to regulate, subject to conditions set forth in the TBT and GATT Agreements, the transport, use and disposal of goods within their territory. Controversy arises when a Member applies its laws to influence the production or transport of a product (NPR-PPMs) outside its jurisdiction.<sup>13</sup>

*Does the TBT Agreement apply to NPR-PPMs?* This question is of environmental importance as pollution is emitted in the production and transport of many products. If NPR-PPMs fall within the TBT Agreement, Members could condition import on compliance with technical regulations governing NPR-PPMs (subject to TBT disciplines). Likewise, voluntary labeling standards applicable to NPR-PPMs could be subject to the Code.

Uncertainty related to the application of the TBT Agreement is a result of ambiguity in the definitions of a "technical regulation" and a "standard" in Annex 1 of the Agreement. Annex 1(1) and Annex 1(2) both use the phrase "related production methods" in their first sentence, but fail to use the term "related" in their second sentences which governs the "labeling" of a product, process or production method.<sup>14</sup> This omission leaves room to argue that labeling requirements need not be "product-related."

The interpretation accepted by most WTO Members is that Annex 1(1) and (2) signify that only "product-related" PPMs are covered by the TBT Agreement, and that only labeling requirements that are product-related fall within the Agreement,

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however, this point remains open to debate and is a source of contention among Members.<sup>15</sup> No WTO disputes have examined whether NPR-PPMs fall within the TBT Agreement. The Article 21.5 decision in *United States—Shrimp* approved without relevant discussion a U.S. import ban against Malaysian shrimp based on an NPR-PPM, but like earlier decisions the *Shrimp* case did not offer guidance regarding the interpretation of the TBT Agreement, and avoids comments on the underlying PPM issue.<sup>16</sup>

## (2) Questions Related to “Standards” and “Standardization Bodies”

What is a “standard” and what are “standardization bodies” for purposes of the Code? The definition of a “standard” in Annex 1(2) uses the phrase “document approved by a recognized body,” meaning that a standard must be reduced to writing. The phrase “recognized body” is undefined and the TBT Agreement does not state who must recognize such bodies. If a WTO panel is called upon to determine whether an entity is a recognized standardization body, it will first ascertain whether the entity is identified in the WTO Agreement as a standardization body (e.g., ISO, IEC, IOE, Codex Alimentarius and the IPPC). If not, the panel will consider whether the entity falls within the scope of paragraphs 4-8 of TBT Annex 1 defining international, regional, central, local and non-governmental standardization bodies. For an entity not identified in the WTO Agreement, a panel is likely to determine whether the entity is: (i) recognized by one or more WTO Members as a standardization body, (ii) involved with the activities of international standardization organizations (ISO, IEC, etc.), (iii) open to involvement from other WTO Members, and (iv) has accepted the Code. It will also determine (v) whether any WTO Members apply “standards” promulgated by the entity, and (vi) if the aim of its “standards” further a legitimate objective within TBT Article 2.2.<sup>17</sup>



Are supermarkets, Bio Suisse and the Soil Association promulgating “standards” within the meaning of the Code?

Are supermarkets, Bio Suisse and the Soil Association promulgating “standards” within the meaning of the Code? No WTO case has examined this question, but the answer is almost certainly “no.” Although these companies put their criteria in writing, they are unlikely to meet the six requirements of a “recognized body” proposed above.<sup>18</sup> Instead, their activities are commercial in nature—directed at product marketing. *Are these entities “standardizing bodies” entitled to accept the Code within the meaning of TBT Annex 3:B?* Again, the answer is probably “no.” Although the term “standardizing bodies” is used more than 55 times in the TBT Agreement without a precise definition, the related terms, “standard,” “standardization body,” and “body,” are each defined, albeit not well, and the different types of bodies are identified in Annex 3:B.<sup>19</sup> If an organization or business is not promulgating “standards” within the definition of Annex 1(2), it is unlikely that a WTO panel would classify it as a standardizing bodies. If an organization or business does not have “recognized activities” in standardization based on the criteria enumerated above, a WTO panel is unlikely to deem it a standardizing body for TBT purposes.

## (3) Scope of the Code with respect to Non-Government Bodies

*The third question is whether supermarkets and private certification entities such as Bio Suisse and the Soil Association are “non-governmental bodies” pursuant to Annex 1(8).* The answer again is probably “no,” but Annex 1(8) is poorly drafted and it is difficult to say with certainty. Annex 3:B provides that the Code is open to non-governmental bodies and approximately 70 non-government bodies have notified their acceptance of the Code.<sup>20</sup> However the definition of a “non-governmental body” in Annex 1(8) is vague: a “Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.” *Does paragraph 8 cover all “bodies”<sup>21</sup> or only bodies that have the power to enforce a technical regulation?* If so, then the second clause (“including a...”) has no meaning. A comma could be read into the otherwise meaningless second clause (before “which”) resulting in a definition establishing that “non-governmental bod[ies]” must have legal power to enforce a technical regulation for the Code to apply.<sup>22</sup> The latter interpretation is preferable but would limit the scope of the Code, excluding supermarket and other private labeling schemes.

#### (4) Responsibility for Conformity Assessment by Non-Governmental Bodies

The fourth question is whether Members are responsible for conformity assessment procedures operated by “non-governmental bodies.” In the unlikely event that supermarket labeling schemes fall within the Code, would a Member bear responsibility under the Code for such schemes? Again, the answer is probably “no.”

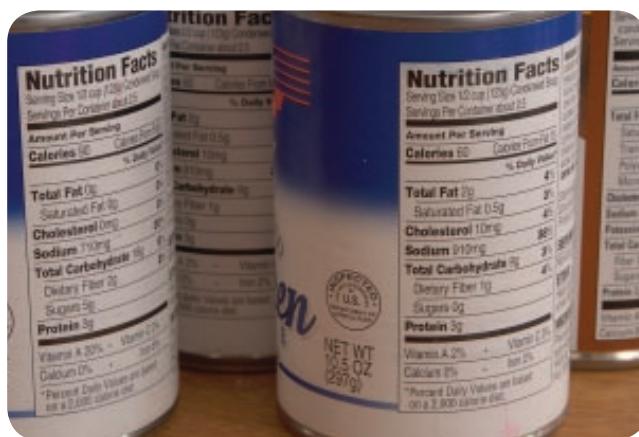
The Code is silent with respect to conformity assessment, but this subject is addressed, albeit unsatisfactorily, in Article 8 of the Agreement. Article 8 requires Members to take “reasonable measures” to ensure that non-governmental bodies within their territories that operate conformity assessment procedures comply with the provisions of Articles 5 and 6.<sup>23</sup> Article 8 also prohibits Members from requiring or encouraging such bodies to act in a manner inconsistent with the provisions of Articles 5 and 6.

Yet, there are at least three problems. First, Article 8 provides no indication of what “reasonable measures” are. Second, the scope of Article 8 with respect to standards appears limited to the activities of non-governmental bodies that have accepted the Code. Third, while Members must take reasonable measures to ensure that non-governmental bodies comply with Articles 5 and 6, the obligations in Articles 5 and 6 only rest on central government bodies. This reference is therefore either meaningless within the context of standards, or the Members intended that “non-governmental bodies” stand in the same position as “central government bodies.” In fact, the Members’ intention was probably the latter, but the language is unclear. Regardless, for the reasons enumerated above and in the previous sections, it is unlikely that WTO Members would bear responsibility under the Code for the conformity assessment procedures of organizations (e.g., supermarkets, Bio Suisse and the Soil Association) pursued in conjunction with their private environmental and organic labeling schemes.

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### Conclusions

Important gaps exist in the TBT Agreement with respect to the treatment of private labeling schemes, including those of supermarkets and private organic certification organizations. It is probable that most private sector labeling schemes fall outside the Code of Good Practice and that Members are not responsible under the Code for these private sector activities. As a result, such labeling schemes will be less transparent (not notified to WTO Members) and less uniform (not based on international standards). They will also be more likely to confuse consumers, result in protectionism by distorting international trade in favor of local producers and disadvantage developing countries. **BLB**



## ENDNOTES: Arthur E. Appleton

- <sup>1</sup> Arthur E. Appleton, J.D., Ph.D. is a Partner at Appleton Luff–International Lawyers (Geneva). The expression “mind the gap” will be familiar to those who have ridden the London underground. This work is adapted from a longer paper presented in September 2007 at the World Trade Institute’s World Trade Forum in Bern, Switzerland. I am grateful for the research assistance of Marcia Aribela de Lima Gomes Pereira. Any errors that remain are my own.
- <sup>2</sup> Marks & Spencer announced in January that it would label air-freighted products. Simon Bowers, *M&S Promises Radical Change with £200m Environmental Action Plan*, THE GUARDIAN (LONDON), Jan. 15, 2007 (Guardian Financial Pages), at 26. On 18 January 2007 Tesco announced that it would introduce a label identifying indirect greenhouse emissions given off during production and processing. Sir Terry Leahy, Speech at Forum for the Future and Tesco (18 January 2007) available at <http://www.tesco.com/climatechange/speech.asp>; see David Adam, *G2: Ethical Living: Emission Impossible?* THE GUARDIAN (LONDON), January 25, 2007 (Guardian Features Pages), at 18.
- <sup>3</sup> BIO SUISSE STANDARDS FOR THE PRODUCTION, PROCESSING AND MARKETING OF PRODUCE FROM ORGANIC FARMING 36, ¶ 5.10.1 (2007) available at [www.biosuisse.ch/media/en/pdf2007/import/rl\\_2007\\_e.pdf](http://www.biosuisse.ch/media/en/pdf2007/import/rl_2007_e.pdf). Bio Suisse favors local organic farm products, and farm products from neighboring and Mediterranean countries. See Bio Suisse, Bio Suisse Import Restrictions, [www.biosuisse.ch/en/biosuisseimportpolicy.php](http://www.biosuisse.ch/en/biosuisseimportpolicy.php) (last visited October 16, 2007).
- <sup>4</sup> See Soil Association, *10 ways to buy local*, [www.soilassociation.org/web/sa/saweb.nsf/GetInvolved/buy.html](http://www.soilassociation.org/web/sa/saweb.nsf/GetInvolved/buy.html) (last visited October 16, 2007). The Soil Association favors local producers and is considering whether to refuse organic certification for air-freighted produce.
- <sup>5</sup> Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Agreements on Trade in Goods [hereinafter TBT Agreement].
- <sup>6</sup> A life-cycle analysis examines the environmental effects of each stage in a product’s life (potentially including production, transport, use and disposal).
- <sup>7</sup> An article in The Times (London) suggests Jonathan Clayton, *Organic Farmers Face Ruin as Rich Nations Agonise over Food Miles*, THE TIMES (LONDON), August 2, 2007 (Overseas News), at 27 (arguing that English agricultural producers support the Soil Association and stand to benefit from trade measures that keep cheaper African organic products off the English market thus sustaining Northern farming methods which may be more greenhouse gas intensive.). See also Soil Association, *The Soil Association Initiates Action For Climate Friendly Food And Farming*, [www.soilassociation.org/web/sa/saweb.nsf/848d689047cb466780256a6b00298980/3263a3366e5940108025726f00402c29?OpenDocument](http://www.soilassociation.org/web/sa/saweb.nsf/848d689047cb466780256a6b00298980/3263a3366e5940108025726f00402c29?OpenDocument) (last visited October 16, 2007). Likewise, Bio Suisse standards favor Swiss producers first, and European and Mediterranean producers if Swiss production is insufficient. See Bio Suisse, *supra* note 3.
- <sup>8</sup> For example, farmers in developing countries may turn to charcoal production and use when they can no longer afford more efficient cooking fuel. Deforestation may result.
- <sup>9</sup> See Report of the Appellate Body, European Communities—Trade Description of Sardines, WT/DS231/AB/R (Sept. 26, 2002), at ¶ 7.15, citing Report of the Appellate Body, European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R (Sep. 25, 1997) ¶ 204; Arthur Appleton, *The Agreement on Technical Barriers to Trade*, THE WORLD TRADE ORGANIZATION: A LEGAL, POLITICAL AND ECONOMIC ANALYSIS 406 (Macrory, Appleton and Plummer, eds., Springer, 2005). The WTO Agreement on Sanitary and Phytosanitary Measures and the General Agreement on Tariffs and Trade (GATT) may be relevant in labeling disputes. Pursuant to TBT Article 1.5, if the SPS Agreement applies, the TBT Agreement is inapplicable. Space does not permit treatment of these agreements.
- <sup>10</sup> TBT Agreement, *supra* note 5, Annex 3: Code Of Good Practice For The Preparation, Adoption And Application Of Standards ¶ D at 135.
- <sup>11</sup> *Id.* at ¶ E.
- <sup>12</sup> *Id.* at ¶ F.
- <sup>13</sup> The WTO Agreement permits a Member to label an automobile based on product-related attributes such as fuel efficiency and exhaust emissions. Controversy exists as to whether a Member may label an imported automobile based on pollution associated with its manufacture or means of importation.
- <sup>14</sup> See ARTHUR APPLETON, ENVIRONMENTAL LABELLING PROGRAMMES: INTERNATIONAL TRADE LAW IMPLICATIONS 92–93 (Kluwer Law International 1997). The accompanying *Explanatory Note* is also ambiguous. It states that “This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods.” (emphasis added) The Note suggests that despite the language of the second sentence, only standards that are product-related fall within the TBT Agreement. However, this interpretation depends on the meaning of the word “related.” Does “related” mean product-related (detectable in the final product)? Or does “related” have a broader meaning, such as “associated” with a product, process or production method?
- <sup>15</sup> Despite the controversy and to further transparency, many WTO Members notify life-cycle eco-labeling schemes covering NPR-PPMs to the WTO.
- <sup>16</sup> See TBT Agreement, *supra* note 5. (discussing the relevant provision). *US–Shrimp* dealt with a U.S. requirement that shrimp be harvested with devices that allow turtles to escape from shrimp nets. See WTO Panel Report, United States—Import Prohibition on Certain Shrimp and Shrimp Products, WT/DS58/R (May 15, 1998), Report of the Appellate Body WT/DS58/AB/R (Oct. 12, 1998), Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (Jun. 15, 2001). A voluntary environmental labeling scheme reflecting an NPR-PPM (whether tuna was “dolphin-safe”) withstood a challenge based on GATT Article I:1 in the unadopted 1991 *Tuna–Dolphin* report. See United States—Restrictions on Imports of Tuna, Report of the Panel, DS21/R–39S/155, ¶¶ 5.41–5.44 (Sept. 3, 1991); see also APPLETON, *supra* note 14, at 142–145. Unadopted panel reports have no legal status in the WTO other than as a source of guidance. See Japan—Taxes on Alcoholic Beverages, § E, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/R (Nov. 1, 1996).
- <sup>17</sup> The list in Article 2.2 is not exhaustive. Compare the criteria applied by the ISEAL Alliance and CIEL in their opinion on whether the Forest Stewardship Council Principles and Criteria constitute “standards.” See Letter from ISEAL to Forest Stewardship Council (January 20, 2006), available at [www.fsc-deutschland.de/infocenter/docs/info/studien/iseal\\_01.pdf](http://www.fsc-deutschland.de/infocenter/docs/info/studien/iseal_01.pdf). The FSC standards are NPR-PPMs.
- <sup>18</sup> These companies do not cooperate with the ISO and have not notified their acceptance of the Code to WTO Members. See Organizations in Cooperation with ISO, [http://www.iso.org/iso/organizations\\_in\\_liaison\\_details](http://www.iso.org/iso/organizations_in_liaison_details) (last visited October 16, 2007); WTO Document G/TBT/CS/2/rev.13 (Mar. 2, 2007).
- <sup>19</sup> The term “Standard” is defined in Annex 1(2). The terms “Body” and “Standardization body” are defined in paragraph 4.1 and 4.3 of ISO/IEC Guide 2 respectively. See *General Terms and their Definitions Concerning Standardization and Related Activities* in ISO/IEC GUIDE 2 (1991). A 2004 version of Guide 2 exists but the TBT Agreement references the 1991 text. Annex 3:B draws Annex 1(4)–(8).
- <sup>20</sup> Supermarkets, Bio Suisse and the Soil Association are not among these organizations. WTO Document G/TBT/CS/2/rev.13 (Mar. 2, 2007).
- <sup>21</sup> “Bodies” are defined as a “Legal or administrative entity that has specific tasks and composition.” ISO/IEC Guide 2, *supra* note 19.
- <sup>22</sup> This would raise a second question: what is the meaning of the phrase “legal power to enforce a technical regulation.” Does it imply a government grant of power to enforce a regulation, or just the power to bring a complaint in a court of law?
- <sup>23</sup> See TBT Agreement, Art. 5: Procedures for Assessment of Conformity by Central Government Bodies, *supra* note 5 at 121; TBT Agreement, Art. 6: Recognition of Conformity Assessment by Central Government Bodies, *supra* note 5 at 123.