

# **Applying Trade Rules to Organic Ecolabeling: A Discussion of the International Federation of Organic Agricultural Movements and the WTO Agreement on Technical Barriers to Trade**

## *Executive Summary*

This paper addresses the overlap between the certification and labeling activities of the International Federation of Organic Agricultural Movements (IFOAM) and its accredited bodies and the rules of the World Trade Organization. It explains what the relevant rules are, explores how IFOAM might benefit from a strategic use of those rules, and determines whether IFOAM could encounter any conflicts with the multilateral trading rules. This paper also provides specific recommendations to IFOAM for maximizing the benefits to the organization provided by the WTO rules, for avoiding conflicts with the WTO, and for influencing and educating the WTO.

## *The International Federation of Organic Agricultural Movements*

IFOAM represents the worldwide movement of organic agriculture and provides a platform for global exchange and cooperation in the development of international standards for the production, processing and sale of organic agricultural products. One set of IFOAM's primary functions is to establish and regularly revise Basic Standards of Organic Agriculture and Food Processing (Basic Standards), to recognize regional and national standards that adhere to the Basic Standards, and to accredit organizations world wide that can certify conformity to organic agricultural standards by specific producers, processors and merchants of organic products.

IFOAM accredits certification organizations throughout the world, which in turn establish their own standards for organic agricultural products. IFOAM accredits a certifying organization based in part on whether its standards comply with IFOAM's more general Basic Standards. The national and regional standards often differ from one another based on relevant differences in regional or national factors. Thus IFOAM effectively recognizes as equivalent standards for organic agricultural production and processing that have been developed in a decentralized manner, involving the direct input of interested parties from all over the world.

In most cases, the standards that IFOAM and the bodies it accredits develop and apply ultimately to products pertain not to qualities or characteristics of a physical agricultural product but rather to the process and production methods (PPMs) used to produce the product. These non-product-related standards may form the basis of labels that the certifying organizations IFOAM accredits grant to agricultural products. To the extent that these labeled agricultural products are bought and sold internationally, IFOAM's activities may fall under the scope of the rules of the WTO, and the standard-setting and labeling activities of the organizations IFOAM accredits surely will fall within their scope.

The non-product-related standards also guide IFOAM's decision whether to accredit certification bodies. It is unclear whether IFOAM's accreditation activity is too far removed from having an effect on a product to fall within the range of activities regulated by the TBT Agreement. However, the conformity assessment activities of the organizations that IFOAM accredits will fall under the purview of the TBT Agreement.

*Is IFOAM Governed by the TBT Agreement?*

Although IFOAM is a private program that develops voluntary guidelines for products, and not a governmental entity, they may, nevertheless, lie within the reach of certain international trade rules. This is because governments with territorial jurisdiction over a private voluntary program are obligated to "take such reasonable measures as may be available to them" to ensure compliance with these rules.

Language analogous to "available reasonable measures" in another WTO agreement has been interpreted to require governments to take all constitutionally available means. Thus, the TBT rules, including the most favoured nation and national treatment obligations, the prohibition against unnecessary obstacles to trade, and the harmonization requirement may be applied indirectly to IFOAM by national governments. On their face, these requirements may not seem onerous, but there is reason to anticipate that in practice they will be interpreted in a manner to conflict with the fundamental nature of IFOAM's program.

*The World Trade Organization's Technical Barriers to Trade Agreement*

The World Trade Organization (WTO) has established the most comprehensive set of existing global rules governing trade in products. The scope of these rules covers many aspects of trade in organic agricultural products. In particular, the Agreement on Technical Barriers to Trade (TBT Agreement), which includes a Code of Good Practice (the Code), governs the processes of setting standards, ensuring conformity with those standards, and the labeling of products pursuant to those standards.

The TBT Agreement is designed to eliminate and prevent protectionist trade measures, as well as unnecessary obstacles to international trade. Protectionist measures are those which provide an advantage to domestic industries over their foreign competitors. Unnecessary obstacles to international trade are measures imposed on international trade that do not serve legitimate policy purposes or that do so in an unnecessarily complicated or expensive manner.

The TBT Agreement requires that government-sponsored standards not discriminate between "like" products from different WTO Members ("most-favoured-nation" obligation) or between domestic products and foreign products that are alike ("national treatment" obligation). In addition, such standards must not give rise to unnecessary obstacles to trade. Furthermore, governments must ensure that central governmental standardizing bodies make reasonable efforts to harmonize technical rules at the international level.

IFOAM's system, which provides for international recognition of a decentralized standard setting process, careful consideration of the concerns of parties from developing countries, and extensive technical expertise in the field of organic production and processing, in many ways makes IFOAM the ideal standard-setting organization from the WTO perspective. However, there are specific TBT rules which may give rise to conflicts with IFOAM standards.

#### *Non-Product Related Criteria*

IFOAM and the bodies it certifies rely extensively on non-product-related criteria in setting standards for organic agricultural production and processing. Some examples of non-product-related criteria include a requirement to:

- have produced the product under a system which employs crop rotation
- have produced the product by means which minimize waste and save energy
- have produced the product by means which prevents soil erosion

The potential conflict between these requirements and an unfavorable interpretation of the most favoured nation and national treatment obligations arises from the fact that the labels developed from these criteria would *not* be based exclusively on qualities, characteristics or end uses of a product that can be identified by a customs official at the time of the product's import or export. There is no way to distinguish whether these criteria have been met strictly by examining a product. For example, at the time of import one cannot distinguish between an ear of corn that has been grown through energy-saving and soil-preserving methods and an ear of corn that has not. Thus, these criteria are non-product-related PPMs (production and processing methods). If the use of non-product-related criteria were prohibited under the Code, a number of IFOAM's standards and the product labels that are developed using those standards could be prohibited under the rules of international trade.

The problem arises because *past* dispute panel decisions under the General Agreement on Tariffs and Trade (GATT) — the predecessor to the WTO — have suggested that distinctions based on PPM or other non-product-related criteria inherently conflict with the most favoured nation and national treatment obligations found in the Code of Good Practices of the TBT Agreement. The TBT's Code contains most favoured nation and national treatment obligations similar to those found in the GATT. Because the TBT Agreement may be interpreted similarly to the GATT, there is a risk that its application could thwart the development of standards and ecolabeling schemes, such as those of IFOAM and the bodies it certifies, to the extent that they apply non-product-related PPM-based criteria to products in international trade.

While a 1992 GATT panel decision "*Tuna/Dolphin I*," upheld a voluntary labeling scheme for dolphin safe tuna (based on a non-product-related PPM distinction), that decision pre-dated the TBT Agreement and was based on murky reasoning. Moreover since the decision, many WTO members, especially those from developing countries, have expressed concern about ecolabeling schemes that rely upon non-product-related

criteria, whether those schemes are voluntary or mandatory. This concern was not as widely-developed at the time of the *Tuna/Dolphin I* decision, but now it may influence the outcomes of future panels. Consequently, the WTO's resistance to PPMs still poses a potentially serious threat to ecolabeling.

### *Recommendation*

IFOAM can and should seek to inform the development of interpretations and jurisprudence of the TBT Agreement respecting the application of the most favoured nation and national treatment obligations to voluntary ecolabeling schemes that use non-product-related criteria. IFOAM should use its global network to educate trade, environment and development officials in key countries about IFOAM's Basic Standards, the process for developing its regional and national organic agricultural standards, and the importance of using non-product-related criteria, including PPM criteria, as the basis for organic agricultural labels. IFOAM should also educate its local partners about the potential problems that an unfavorable interpretation of the Code would create, and about the legal and policy arguments that support an organically sound interpretation of the Code. The goal would be to create a grassroots movement which would both educate and place pressure on national capitals in key countries to press for appropriate interpretations of the TBT Agreement at the WTO's Technical Barriers to Trade Committee (TBT Committee).

This grassroots effort is key, but not alone enough. IFOAM should also engage and educate the WTO Member State representatives in Geneva and the WTO Secretariat. A strategy that operates on two, mutually reinforcing fronts will ensure that IFOAM is able to cover all possible pressure points that could influence the WTO.

### *Unnecessary Obstacles to International Trade*

Another part of the TBT's Code requires that standards not create unnecessary obstacles to international trade (Annex III, ¶ E). The concern here is how the concept "unnecessary obstacle" will be interpreted. Although it is not defined in the Code for standards, it is defined for regulations (mandatory measures) in Article 2.2 of the TBT Agreement. That article defines as an "unnecessary obstacle" any regulation that is more trade-restrictive than necessary to achieve a "legitimate objective" (which explicitly includes an environmental protection objective). It is likely that this definition will be imported into the Code as well.

This "least trade-restrictive" rule could provide a basis for challenging particular criteria in ecolabeling schemes as more burdensome than alternatives. To the extent that the ecolabeling scheme is governmental, a failure to meet the least trade restrictive test could be fatal to its use. To the extent that a private body grants the label, regulation would have to be achieved indirectly through a government. The critical issue will be the standard of review that WTO panels will use to determine whether a "reasonable" alternative is available. WTO panels have shown little deference to governments in this respect, however, so little interpretive discretion can be expected for Members, let alone private bodies.

### *Recommendations*

Although the standards of review used by the WTO are often strict, IFOAM can take specific steps to help ensure it satisfies this requirement. IFOAM and the bodies it accredits should demonstrate that during the process of developing standards and labels they have considered different means and chosen the least trade restrictive means available that would achieve their goals. In many ways, IFOAM processes operate to facilitate trade, a fact which IFOAM should emphasize in talks with trade officials. The process for developing regional and national standards is an equivalency process, meaning that standards which differ from one another based on relevant differences in regional or national factors are recognized as "equivalent" to one another and treated equally. Given IFOAM's rigorous processes for developing standards and ensuring the integrity of its accredited bodies, the unnecessary obstacles to trade requirement should not raise significant problems, although there are no guarantees.

Moreover, if a regulation is based on an international standard, it is presumed not to create an unnecessary obstacle to international trade. Although reference to this presumption is oddly absent in the discussion of standards, it stands to reason that international standards, themselves, would be afforded this same presumption. To the extent that IFOAM is deemed an international standardizing body (discussed below), its standards should be considered international standards, in which case they will enjoy this presumption of legitimacy. Thus, WTO recognition of IFOAM as an international standardizing body would provide some insurance against the unnecessary obstacles requirement (See Recommendations made under Consistency with International Standards, discussed below).

### *Consistency with International Standards*

The Code calls on standardizing bodies to use relevant international standards unless their use would be "ineffective" or "inappropriate" (Annex III, ¶ F). There are no panel decisions to offer any guidance as to the possible interpretations of "ineffective" or "inappropriate," or as to the standard of review for determining compliance with this obligation. An interpretation of this provision that set a high threshold for standardizing bodies to demonstrate that international standards would be "ineffective" or "inappropriate" would leave little leeway for use of inconsistent standards.

One key question is what constitutes an "international standard." This term is not defined, however, and has not been interpreted by a WTO panel. The common sense definition of an international standard would be a standard developed by an international standardizing body. In that case, the critical question is whether IFOAM is an international standardizing body under the TBT Agreement. The TBT Agreement requires that membership in international bodies be open to all "relevant" bodies of WTO Member States. Again there is an absence of official guidance for the definition of "relevant," so it is unclear whether IFOAM's membership would qualify IFOAM as an international standardizing body.

### *Recommendations*

IFOAM should promote adoption with in the WTO of a favourable understanding or interpretation of the meaning of the term “relevant bodies” as used in the TBT Agreement, which would embrace IFOAM’s criteria for membership. Such an understanding or interpretation would support the establishment of favourable criteria for recognizing standardizing bodies as international. IFOAM and its partners should educate policy makers in key national capitals about the need for standardizing bodies organized to achieve specific policy goals, such as IFOAM, which is organized to promote organic agricultural practices, to discriminate, at least for purposes of granting voting memberships, between parties that do and do not have a vested interest in conflict with those policy goals. In addition, IFOAM should explore the feasibility of obtaining official recognition through the TBT Committee as a recognized international standardizing body for the purposes of establishing organic agricultural standards.

If IFOAM does obtain formal recognition as an international standardizing body for the purpose of establishing organic agricultural standards, then its standards might provide the benchmark against which the WTO will judge all other organic agricultural standards, although standards developed by institutions such as Codex Alimentarius could also play a role. *Thus the TBT Agreement could provide a benefit to the organic agricultural movement, especially to the extent that recognition of IFOAM prevents the International Organization for Standardization (ISO) from appropriating this role.*

### *Adopting the Code of Good Practice*

A final question that IFOAM will want to address as it considers how to structure its relations with the the WTO in the foreseeable future is whether to formally adopt the Code of Good Practice of the TBT Agreement and, thereby, declare their commitment to comply with its terms. Private ecolabelers and certifiers of ecolabelers, such as IFOAM and the programs it accredits, have the right to adopt the Code. Given that the Code may not permit ecolabelers to rely upon non-product-related criteria, adoption could be a mistake at this time. Adopting the Code might lend the WTO credibility in this area. On the other hand, if it appears in the future that IFOAM stands a reasonable chance of being recognized by the WTO as an international standardizing body for the purpose of standardization of organic agricultural production and processing, then IFOAM may want to explore whether formally adopting the Code would constitute an important good faith gesture to the WTO.

Were IFOAM to adopt the Code, it could do so with reservations. Therefore, should IFOAM adopt the Code, it should attach an understanding that the Code permits IFOAM to use non-PPM criteria in establishing its standards and that the requirement to accommodate interested parties does not impose an obligation on IFOAM to broaden its voting membership to include parties which do not adhere to basic IFOAM principles. At this stage, however, it is unclear what benefits IFOAM would gain from adoption. Thus we would recommend that IFOAM monitor developments relating to the Code without adopting it at this time.

### *Conclusion and Summary of Recommendations*

In light of Member governments' concerns, the substantial uncertainties associated with interpreting the TBT Agreement, and the significant constraints that the Agreement could impose upon private ecolabelers, we recommend IFOAM adopt a cautious approach to the WTO and its rules and policies. IFOAM's strategy should combine reasonable efforts at compliance with WTO rules and active efforts to influence WTO policy making on selected key issues, through education, analysis and organized interventions on behalf of IFOAM's membership. IFOAM and the bodies it certifies should comply with all of the reasonable requirements set forth in the TBT Agreement, meaning those that would not impair their ability to accredit certification programs or to evaluate products for organic labeling. Respecting the more problematic provisions of the TBT Agreement, IFOAM should adopt a policy of active engagement in international trade policy making. The goals of IFOAM's engagement should include, among other things:

- Using its global network to educate trade, environment and development officials in key countries about IFOAM's Basic Standards, the process for developing its regional and national organic agricultural standards, and the importance of using non-product-related criteria, including PPM criteria, as the basis for organic agricultural labels;
- Educating its local partners about the potential problems that an unfavorable interpretation of the Code would create, and about the legal and policy arguments in favour of an interpretation of the Code that allows effective application of IFOAM standards;
- Creating a grassroots movement which would both educate and place pressure on national capitals in key countries to press for appropriate interpretations of the TBT Agreement at the WTO's TBT Committee;
- Establishing a favourable understanding of the meaning of 'relevant bodies' and thus of the criteria for recognizing standardizing bodies as international;
- Educating policy makers in key national capitals about the need for standardizing bodies organized to achieve specific policy goals to discriminate, at least for purposes of granting voting memberships, between parties that do and do not have a vested interest in conflict with those policy goals;
- Obtaining official recognition through the TBT Committee as an international standardizing body for the purposes of establishing organic agricultural standards.

# **Applying Trade Rules to Organic Ecolabeling: A Discussion of the International Federation of Organic Agricultural Movements and the WTO Agreement on Technical Barriers to Trade**

## **I. Introduction to Ecolabeling and International Trade**

Ecolabeling is one mechanism to help consumers exercise preferences for products whose production, use and disposal impose a lighter burden on the environment than competing products. Ecolabeling provides consumers with better information about the impacts of the products they buy, helping them use their purchasing power to encourage better environmental practices. Environmentally sound producers stand to benefit through expanded market shares and possible price premiums. Environmentalists hope that this market-based incentive will increase protection and more thoughtful use of natural resources.

## **II. The International Federation of Organic Agricultural Movements**

The International Federation of Organic Agricultural Movements (IFOAM) is a democratic federation which currently has over 600 members and associates in 100 countries. Its members are organizations of producers, consumers, processors and merchants of organic products, as well as interested universities and other training and research institutions. IFOAM's membership includes only organizations that predominantly accept the Principle Aims of Organic Agriculture and Processing (Principle Aims - see Appendix 4) and, where relevant, IFOAM's Basic Standards. Any organization fulfilling this criteria can become a voting member organization of IFOAM. IFOAM's General Assembly made a conscious choice to require its voting membership to be actively interested in promoting the basic underlying principles of organic agriculture.

IFOAM's major aims and activities include:

- a. sharing knowledge and expertise among its members
- b. informing the public about organic production
- c. representing the organic agricultural movement in public policy-making forums
- d. developing and maintaining its organic principles and standards for organic production
- e. accrediting bodies that certify production methods as organic.
- f. promoting organic production as an alternative to non-sustainable production methods.

The latter three of its aims and activities are the concern of this paper.

### **A. The Creation and Early Development of IFOAM**

IFOAM came into existence in 1972 during an international congress on organic agriculture in Versailles, France. The five founding members: The Soil Association (UK), The Swedish Biodynamic Association (Sweden), The Soil Association of South Africa (South Africa), Rodale Press (U.S.), and Nature et Progrès (France) of IFOAM drafted and adopted the Principle Aims and began to build IFOAM's membership. Adherence to the Principle Aims constituted the criteria for voting membership. Individual non-voting members may also join as supporters. Over the years, this fledgling organization has grown into the premier international federation of individuals and institutions concerned with the promotion of organic agricultural production and processing.

## B. The Structure and Operations of IFOAM

The current executive body of IFOAM, the World Board (World Board) has appointed a Standards Committee to be responsible for the ongoing development and maintenance of IFOAM's standards for organic production (the Basic Standards). This Committee suggests alterations to the Basic Standards which are then communicated to the membership. The recommendations of the Committee, enriched and modified with the input of the member organizations, are then submitted to the governing body of IFOAM, the General Assembly, to decide upon by vote.

The Principle Aims and Basic Standards serve both as guidelines for the development of standards by national and regional organic certification programs world wide and as one basis, among several detailed in an Operating Manual, for assessing certification programs by the IFOAM Accreditation Programme (IAP).

National or regional certification organizations use IFOAM's Basic Standards to develop local standards to be applied by actual producers and other users of organic agricultural produce in specific areas of the world. IFOAM assists these national and regional organizations in developing their standards.

An independent expert board, the International Organic Accreditation Services (IOAS), appointed by the World Board, operates the IFOAM Accreditation Programme. The responsibilities of the IOAS include maintenance of a register of approved Evaluators, deemed competent to monitor organic certification bodies accredited by IFOAM. The IOAS also appoints an Accreditation Programme Manager, who is responsible for administrating the Accreditation Programme.

The application process for certification programs seeking accreditation by IFOAM has three parts. The IOAS first conducts a preliminary screening of program documentation to ensure that it satisfies of the Operating Manual criteria. In addition to the Basic Standards, these criteria include: standards for administrative capacity, professionalism, inspectors and inspection of licensees, independence from vested interests, the certification process (including structure, appointment of decision-makers,

the decision-making process, application procedures, documentation, appeals and internal review), and documentation that the program and its licensees should maintain. In assessing the national or regional standards that certification bodies seeking IFOAM accreditation have developed, IFOAM appraises to what extent their standards are equivalent to IFOAM's Basic Standards. IFOAM expects local standards to differ from the Basic Standards because in developing them national organizations will have taken into account the unique ecological and cultural aspects.

If the certification program passes the initial screening, an inspection follows, which includes interviews with program officials, a review of the program's files, and visits to licensees of the program by a registered IFOAM Evaluator to ensure the accuracy of program inspection reports. The IOAS decides whether to accredit the program based upon the information obtained from this multifaceted inspection. If the IOAS approves accreditation, the certification program must sign a contract detailing the terms and conditions of accreditation to complete the process.

The programs that IFOAM accredits gain the right to identify the products they certify as having attained the quality of performance known to be associated with IFOAM. Currently IFOAM does not confer to accredited bodies the right to grant labels that identify the certifier as IFOAM accredited, but IFOAM is developing such a seal.

Accreditation lasts for one year, but is renewable through acceptance of an annual update detailing any changes to the certification program and its activities for the year. The IOAS may demand reevaluation at any time, however, and will typically call for one every three years. Disciplinary measures may be taken against accredited bodies, including revocation of accreditation. Appeals can be brought to the IFOAM Court of Arbitration. The IFOAM accreditation program is subject to periodic internal review.

### **III. The Relevance of the Multilateral Trading System to IFOAM**

IFOAM considers its role as an originator of international standards for organic agriculture and processing important, not only to its goal of establishing an international guarantee of organic quality, but also as a means to avoid international trade problems through maintaining equivalency of national organic standard systems. This concern for the potential international trade implications of its activities and those of the programs IFOAM accredits is appropriate. Careful consideration of these implications is prudent.

Discussions of the relationship between WTO rules and ecolabeling have centered on the Agreement on Technical Barriers to Trade. The TBT Agreement is one of the agreements annexed to the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), which were concluded in the Uruguay Round of negotiations of the General Agreement on Tariffs and Trade (GATT).

#### **A. Trade Concerns Regarding Ecolabeling**

When standards for ecolabels are developed and ecolabels are placed on products moving in international trade between the 130 Members of the World Trade Organization (WTO), they may be regulated by the WTO's Agreement on Technical Barriers to Trade (TBT Agreement). This paper offers an analysis of the Agreement on Technical Barriers to Trade (TBT Agreement), the multilateral trade agreement of greatest consequence to IFOAM's effort to promote labeling of organic products world-wide. This analysis should assist IFOAM better to understand potential problems that could arise due to international trade law. The recommendations offered based upon this analysis may help IFOAM to avoid such problems.

A number of trade-related concerns have been raised regarding ecolabeling. These include the fear that ecolabeling will be used as a disguised protectionist measure and discriminate against imported products. There are also concerns that national or regional criteria may work to the advantage of domestic or regional producers, even absent protectionist motivations, because the criteria were developed on the basis of the specific conditions in that region. In addition, the development and implementation of certification and labeling all impose financial costs and require technical expertise, which are likely to be less available to developing country producers as compared to those in developed countries. Finally, some commentators also argue that certification and ecolabeling could, if structured identically for all types of producers, work unfairly to the detriment of small producers, each of whom will be obliged to assume the same fixed costs as larger competitors (International Experts Working Group 1996). Some of these concerns are more salient in the context of ecolabeling for organic production than others.

The Committee on Trade and Environment (CTE) of the World Trade Organization (WTO) has ecolabeling on its agenda, and it has explicitly considered the relationship of the TBT rules to voluntary ecolabeling schemes. It recently prepared a report of its first two years of work for the WTO Ministerial Conference in Singapore. The report noted that "[w]ell-designed ecolabeling schemes/programmes can be effective instruments of environmental policy to encourage the development of an environmentally-conscious consumer public." It also noted that ecolabeling schemes/programmes "have raised, in certain cases, significant concerns about their possible trade effects." (WTO/CTE 1996, ¶¶ 183-186) The CTE could reach no agreement on the legal relationship between WTO Member obligations and voluntary ecolabeling schemes. It did, however, agree that the development of all ecolabeling schemes, including voluntary ones, should be adequately transparent (*Ibid.*).

In addition to the TBT Agreement, the GATT 1994 — that is, the provisions of the original GATT Agreement as incorporated into the WTO Agreement as an annex, which was adopted in 1994 — might apply to ecolabeling schemes. Another of the annexed agreements that could possibly affect ecolabeling schemes is the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement). Finally, the Agreement on Government Procurement may impose some restrictions, similar to those in the TBT Agreement, upon use of ecolabeling in government purchasing policy. These restrictions may limit the ability of governments to impose ecolabeling

requirements upon the goods they buy or upon the producers they qualify to bid for jobs. This is an important issue for ecolabelers, as governments may be a market that they hope to affect. Please see Appendix I for additional discussion of this Agreement. This paper, however, focuses upon the TBT Agreement, which is the WTO Agreement likely to have the most significant impact on ecolabeling.

#### B. Objectives of the TBT Agreement

The TBT Agreement is generally understood to have two main objectives. First, it seeks to ensure that WTO members do not use technical regulations and standards as disguised protectionist measures to protect domestic industries from foreign competition. Second, the TBT Agreement aims to reduce the extent to which technical regulations and standards operate as barriers to market access, primarily by encouraging their respective harmonization. Among other issues, these harmonization efforts address obstacles to international trade occasioned by the existence of numerous, sometimes incompatible, disciplines in various countries.

These objectives should, however, be considered in context. The preambular language to the TBT Agreement explicitly states that "no country should be prevented from taking measures necessary . . . for the protection of human, animal or plant life or health, [or] of the environment . . . at the levels it considers appropriate." Thus, the TBT's objectives should not be understood as superior to legitimate environmental policies of member governments; they simply impose some constraints upon how these policies can be pursued. Environmental protection is consistent with, perhaps even protected by, the TBT Agreement.

#### C. Scope of the TBT Agreement

The TBT Agreement addresses both mandatory disciplines (termed "regulations") and voluntary disciplines (termed "standards") that relate to products, including product labels, whether the disciplines are developed by governmental or non-governmental bodies. While the question has not been definitively answered through official interpretation of the TBT Agreement in the WTO dispute settlement system, it is generally accepted by the Membership that, at least some of the criteria used in voluntary ecolabeling programs to determine whether to grant a label are "standards" for purposes of the TBT Agreement. The TBT Agreement addresses standards established by private as well as governmental bodies. Therefore, the standard-setting and conformity assessment practices of private ecolabelers and accreditors of ecolabelers, such as IFOAM and the bodies it accredits, could well fall within the scope of the TBT Agreement. The exact manner and extent to which the TBT Agreement regulates private ecolabeling bodies is, however, unclear.

##### 1. *TBT Regulation of IFOAM Activities*

It is, for example, not clear whether the TBT Agreement is intended to regulate the activities of IFOAM, an accreditor of both certifiers and other accreditors, or just the activities of the certifiers and accreditors that IFOAM accredits.

The definition of "standard" (discussed in detail below) in the TBT Agreement would seem to include the Basic Standards established by IFOAM and used to determine whether to accredit certification programs. Further, all of the requirements in the TBT Agreement for standards and assessing conformity with them could logically be applied to an accreditation body like IFOAM.

However, it might be argued that the standards established by accreditors, such as IFOAM, are too far removed from the process of labeling a product to be considered sufficiently related to the labeled product to fall under the TBT definition of a standard, which is a "document ... that provides ... rules, guidelines or characteristics for products or related processes and production methods." IFOAM's standards are directed at the way in which other organizations apply standards to products, not to the products themselves. There has yet to be any consideration of this question however. It may be prudent for IFOAM to assume, given this uncertainty and the plausibility of an interpretation which would include accreditors within the scope of the Agreement, that its activities (and those of the accreditors it accredits) will fall within the scope of the TBT Agreement. Furthermore, if IFOAM eventually permits certifiers to label products as certified by an IFOAM accredited certifier, as it intends to do, this additional labelling activity might be viewed to substantially increase the strength of the relationship between IFOAM's accreditation activities and the products affected by these activities.

## 2. *International Standardizing Bodies*

One additional consideration must be entertained. IFOAM may be considered by the TBT Agreement to be an international body or system. International bodies and systems are defined in the TBT Agreement as entities "whose membership is open to the relevant bodies of at least all [WTO] Members." This definition contrasts with that for regional bodies and systems, "whose membership is open to the relevant bodies of only some of the [WTO] Members." This distinction seems important because the limited membership in regional bodies may be the basis for a difference in the extent to which the TBT regulates international and regional bodies and systems.

The provisions of the TBT Agreement governing the standard-setting process apply only to central, local, non-governmental and regional standard-setting bodies, international standard-setting bodies are conspicuously left unregulated.

The motivation for the distinction may be a concern that regional bodies could establish standards without the input of relevant bodies from all WTO Members. As a result, the Membership apparently deemed them (like central governmental, local governmental and non-governmental bodies) to be potential sources of parochial

requirements that could be injurious to the trading interests of producers in some Member states and, therefore, necessary to regulate.

International bodies, in contrast, offer relevant bodies from at least all Member states the opportunity to participate in their activities. Therefore, the Membership may not have deemed them necessary to regulate, and, in contrast, judged them entities whose activities should be promoted by the Agreement.

This explanation is undermined, however, by the fact that the provisions of the TBT Agreement regulating conformity assessment procedures treat international and regional systems similarly. This difference is curious and not readily explained. Moreover, many WTO member states have expressed the opinion that the standards developed in ISO, which clearly is an international standardizing body, reflect a strong Northern bias.

Nevertheless, it is important, when assessing the status of IFOAM, to determine whether it satisfies the definition for international body. Central to this analysis is the term "relevant." It would appear that IFOAM would be considered an international body if its membership is open to all "relevant bodies." Unfortunately, the term "relevant" is not defined in the Agreement and has not been officially interpreted.

IFOAM's membership includes organic producers and consumers, and entities that trade in organic goods, and not governmental bodies or private entities associated with non-organic agriculture or food processing. The exclusion of governmental bodies and of private bodies that are not participants in the organic movement, but which arguably have an interest in the development of standards for organic products, may pose a barrier to IFOAM's being considered an "international body." The standards and assessment procedures used by IFOAM in its accreditation of certifiers indirectly affect the competitiveness of non-organic producers and bodies that trade in non-organic goods. These bodies, therefore, may have an interest in participating in the development of these requirements (that interest being of a kind IFOAM expressly wishes to exclude). The term "relevant" could be interpreted to include bodies with such economic interests in the activities of the body at issue. Governmental bodies (e.g., that regulate agriculture and food processing) may also have an interest in participating (for instance, to ensure protection of public health) in the activities of a program like IFOAM's. Governmental bodies too, then, due to this regulatory interest, might be deemed "relevant" bodies. If such interpretations are given to the term "relevant," IFOAM would presumably not be considered an international body. Obviously, IFOAM could change its membership requirements, but such a change might interfere with IFOAM's pursuit of its mandate, a concern that seems to have informed IFOAM's current membership requirements.

However, it could also be argued that a shared interest in the pursuit of particular goals, such as promotion of organic production methods, could be the basis for determining whether a body is "relevant" to the activities of the entity in question. Mere interest in the goals of the entity due to economic or other concerns without a sharing of

these goals would be deemed insufficient. Bodies sharing alternative goals (such as promotion of non-organic production methods) could work together through their own entity, dedicated to their goals. Similarly, mere regulatory interest would be deemed insufficient since such concerns could be addressed through other means than participation in the IFOAM.

This interpretation of "relevant" would have merit; in particular, because it would seem to protect trading rights, by promoting harmonization of standards. At the same time, such an interpretation would permit coordinated, international pursuit of legitimate goals (such as promotion of organic practices) to occur without unnecessary governmental intrusion or interference from bodies that do not have as their interest promotion of these goals.

Without official interpretation, the status of IFOAM must remain an open question. If IFOAM is not considered an international body, it will probably be treated as a non-governmental body, due to the private nature of its membership. In this case, as discussed in the next subsection, any country in which IFOAM as an entity or in which its members undertake its activities would presumably be responsible for taking "reasonable measures" to ensure that these bodies comply with the obligations in the TBT Agreement when pursuing both standard-setting as well as conformity assessment activities.

### 3. *Governmental versus Private Standardizing Bodies*

The TBT Agreement, including its Code of Good Practice for the Preparation, Adoption and Application of Standards (the Code), applies to voluntary labeling schemes in different ways, depending on the nature of the body that is setting the standards. Generally, where a central government body of a WTO member is a standardizing body (i.e., responsible for setting or assessing conformity with standards), the WTO member shall "ensure" that the body accepts and complies with the obligations. If a standardizing body is either a local government or a non-governmental body within a WTO member's territory, the member shall take "such reasonable measures as may be available" to ensure compliance by the body. In addition, members shall take such reasonable measures as may be available to them to ensure compliance of regional standardizing bodies of which they or one or more bodies within their territories are members.

Most ecolabeling and certification activities associated with IFOAM are voluntary programs developed by private organizations, and not run by central governments. However, contrary to the widespread assumption that such programs would fall outside the purview of the WTO, they may lie within the reach of the TBT Agreement. Governments with territorial jurisdiction over a private voluntary program are obligated to "take such reasonable measures as may be available to them" to ensure compliance with the TBT rules. Language analagous to "available reasonable measures" in the GATT has been interpreted to require governments to take all constitutionally available means.

In other words, the TBT Agreement, including its Code, applies directly to central government standardizing bodies, while it reaches private and other governmental standardizing bodies indirectly through their central governments. Thus, the impact of the TBT Agreement may vary depending on the level of central-government involvement. The precise degree of involvement that triggers direct application of the TBT Agreement to an ecolabeler is not clear.

A "central government body" is defined as the "[C]entral government, its ministries and departments *or any body subject to the control* of the central government in respect of the activity in question" (emphasis added, Annex 1, ¶ 6). The critical question, then, is what constitutes central governmental "control" of the standardizing process under the Agreement. The term is not defined, and no guidance can be gleaned from interpretation of the term as used in other WTO Agreements because none exists. However, IFOAM, with a membership which does not include governmental bodies of any kind, would probably not be considered to be controlled by a central government standardizing body.

If IFOAM is not treated as controlled by a governmental body, it should be considered either an international body or a non-governmental body. The activities of such bodies are controlled indirectly by the TBT Agreement through Member states. However, it is unclear what degree of responsibility Member governments have to prompt private and local governmental standardizing bodies to comply with relevant provisions of the TBT Agreement. What does it mean for governments to be required to "take such reasonable measures as may be available to them"? The interpretation of this clause, like the term "control," will be the responsibility, in the final analysis, of the dispute settlement system of the WTO.

At least one panel has interpreted the same language — as it appears in a provision of the GATT — to require governments to take all available measures except those that are outside their "jurisdiction under the constitutional distribution of power" (*US-Measures Affecting Alcoholic and Malt Beverages*). In contrast, at least one other panel has interpreted "reasonable" to require only a balancing test, that the "consequences of . . . non-observance . . . for trade relations with other parties . . . be weighed against the domestic difficulties of securing observance" (*Canada-Measures Affecting the Sale of Gold Coins*).

In the absence of more definitive guidance, and given the growing opposition to ecolabeling in the international trade community, it seems possible that a fairly rigorous standard will be applied. That means that national governments could be required to take every constitutionally available measure to ensure that private standardizing bodies abide by the TBT Agreement and its Code of Good Practice.

However, at least some at the WTO believe either that this language will be interpreted less stringently in the context of private, voluntary ecolabeling schemes or will be ignored as a practical matter, leaving private ecolabelers essentially beyond the

scope of the Agreement, *unless* their efforts have a significant market impact. In other words, successful ecolabeling efforts may be more closely monitored than those that have only a limited effect on consumer preferences.

As a practical matter, the "all constitutionally available means" provision may not carry too much consequence. For example, in the United States, the free speech provisions of the First Amendment of the U.S. Constitution may limit the power of the federal government to restrict the use or content of environmental ecolabels. Of course, the extent to which a government will be able to regulate the content of a private entity's label or the process by which the label is developed will vary from country to country, but freedom of speech is a fundamental right that is protected in international human rights texts reaching as far back as the Universal Declaration of Human Rights and the consumer's right to know should resonate well at the WTO. Consequently, the ecolabeler should enjoy at least some level of protection from censor.

Even if a Member takes reasonable measures, however, it still could be found to have violated the requirements of the TBT Agreement if these measures do not effectively mitigate the negative trade effects private ecolabeling schemes have upon any other Members. The TBT Agreement apparently grants to Members the right to seek a remedy if "another Member does not achieve satisfactory results" when taking "reasonable measures" to ensure the compliance of private (as well as local governmental and regional) bodies with the obligations of the TBT Agreement (Article 14.4). Although no Member has relied upon this provision to date, and its interpretation is still open, the provision seems to have been intended to provide a right to seek a remedy for Members whose "trade interests are significantly affected" by the failure of another Member to ensure that private standardizing bodies comply with the relevant provisions of the TBT Agreement.

In a successful "unsatisfactory results" claim, the challenged Member might compensate the affected Member for the consequences of the failure of a private standardizing body to act consistently with the relevant provisions of the TBT Agreement, or the affected Member might be permitted to retaliate for the trade impairment by suspending concessions — even though the challenged Member did all that it constitutionally could do to minimize trade impairment caused by the private body. Such remedies would, in effect, make Members with constitutional systems of government unavoidably liable for trade effects that they are incapable of preventing under their constitutions. Ironically, such unavoidable liability is precisely what one might assume the "reasonable measures" provisions were intended to prevent. In any case, such potential exposure to retaliation or need to provide compensation could prompt Member governments to regulate even private ecolabeling schemes such as IFOAM's closely to ensure that they comply with all of the obligations established in the TBT Agreement.

Although these legal analyses might seem alarming, as a political if not legal matter, many of the WTO member states currently view the TBT Agreement as not

directed toward private ecolabelers, at least so long as a labeling scheme does not substantially affect consumer preferences. They believe that "reasonable measures" should be interpreted not to demand strict enforcement of the TBT Agreement against private labelers unless their schemes succeed in substantially altering consumer preferences. In other words, Member governments will not be expected to demand that all private ecolabelers satisfy the requirements of the TBT Agreement. Rather, Members may only be pushed by their trading partners to regulate highly successful private schemes.

This interpretation of "reasonable measures" could find support in the definition of standard which restricts the scope of the Agreement to "recognized" standard-setting bodies. The term "recognized" is not defined and has not been officially interpreted. However, issues of concern to Members in discussion of its interpretation included whether the standards set by a body have been accepted by many Members or widely adopted, or have had significant effects on international trade (this could include substantially influencing consumer preferences). However, since the term is not defined in this manner, other interpretations could apply. For instance, adoption of the Code of Good Practice might be deemed a basis for recognition of a standard-setting body.

#### 4. *Definition of Standard and the PPM Issue*

The TBT Agreement creates obligations for each of two categories of disciplines: technical regulations with which compliance is mandatory (i.e., if they are not satisfied, access to the market will be denied the product) and standards with which compliance is merely voluntary (i.e., access to the market is not dependent upon fulfillment of them, though competitiveness may be affected -- in fact, it is by influencing product competitiveness that voluntary ecolabeling promotes whatever environmental purposes it is intended to advance). Mandatory ecolabeling schemes are rare, politically difficult to maintain, and unlikely to be of consequence to IFOAM. Therefore, this discussion will focus upon issues relevant to voluntary schemes, addressing requirements for mandatory programs only incidentally when helpful to the analysis of voluntary ones.

A "standard," establishes voluntary requirements for products or related processes and production methods (PPMs) and may also relate, either in whole or in part, to "terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method." The language of the TBT Agreement, then, unlike that of the GATT, explicitly encompasses production and process methods (PPMs), in its definition of the term "standard." Note that in the first sentence of the definition, the words used are "related processes and production methods," while in the second sentence (which refers explicitly to labeling) the word "related" is dropped. This language could be read to imply that some non-product-related PPMs would be acceptable under the TBT rule as "terminology, symbols, packaging, marking or labeling requirements." However, a debate is currently underway among WTO Members on this question of the scope of the PPM coverage that can be read into the definition.

At least one country, the United States, currently argues that the definition brings non-product-related PPMs within the scope of the TBT Agreement. Other countries, including many developing countries, however, argue that non-product related PPM standards are not covered. This initial sentence of the definition, which states that "standard" includes rules for "products *or related* processes and production methods," is read to limit the TBT Agreement's application only to requirements for products and *related* PPMs. Under this argument, it is unreasonable to suppose that the second sentence of the definition should make the Agreement applicable to a broader class of requirements for labeling and other auxiliary concerns than for products themselves and for production and process methods directly connected to the product. Thus, the second sentence's reference to PPMs is viewed as simply a shorthand for the formulation already expressed in the first sentence.

The debate does not seem to be fueled by this sort of textual or policy analysis, however. Rather, the European Community, for instance, seems to believe that such measures are permissible under the GATT, and therefore, does not want them to be covered by the TBT Agreement, so as to ensure that its Members have the right to use them. The developing countries pushing for the same interpretation, on the other hand, seem to believe that simply recognizing that non-product-related criteria are covered by the TBT Agreement will implicitly legitimize their use, a result they oppose. The unexpressed implication is that they consider such measures to be GATT-inconsistent, presumably relying on past GATT panel judgment of non-product-related criteria for distinguishing among products as violative of the most favoured nation and national treatment rules.

Of course, if the Agreement is ultimately interpreted to exclude non-product-related standards as beyond its scope, the TBT Agreement may be of substantially less consequence to ecolabelers, as it would regulate only the use of product-related criteria. However, if the scope of the TBT Agreement is determined to cover such standards, the Agreement may be of significant consequence to ecolabelers, even determinative of the legitimacy of their ecolabeling schemes under international trade law. If such standards were not permissible, many ecolabeling schemes, including that of IFOAM and the bodies it certifies, could be at risk. As discussed below, the interpretation which is given to the most-favored-nation and national treatment obligations in the TBT Agreement may determine the permissibility of non-product-related PPMs as criteria for ecolabels if these standards are found to fall within the scope of the Agreement.

To summarize, the TBT Agreement regulates central government standardizing bodies directly and all other standardizing bodies indirectly by requiring member states to take all reasonable measures to ensure standardizing bodies in their jurisdictions comply with the Code. However, it is unclear what control governments will want or be able, consistent with the dictates of national constitutional and international human rights law, to exert over the activities of private standardizing bodies. IFOAM is almost certainly a private standardizing body for WTO purposes. It is, therefore, probably fairly well insulated from the most intrusive of the TBT's mandates. Nevertheless, both to avoid

unnecessary problems in the future and out of respect for the legitimate concerns which the TBT Agreement was designed to address, IFOAM should benefit from respecting those provisions of the Code, with which compliance would be consistent with IFOAM's goals and not pose unreasonable burdens on the organization.

### C. Basic Requirements of the TBT Agreement

The TBT Agreement treats standardizing bodies as two separate types of bodies, standard-setting and conformity assessment bodies. The former establish the standards which must be met to obtain the ecolabel. The latter ensure that producers satisfy these standards. These two tasks may be performed by the same body in fact. For instance IFOAM, and, perhaps, some of the bodies it accredits are both. When they establish, adopt and apply standards, they are acting as standard-setting bodies. When they assess conformity with standards, they are acting as conformity assessment bodies. Nonetheless, the activities of these two types of "bodies" are regulated separately (though similarly) in distinct parts of the Agreement.

Article 4 of the TBT Agreement imposes the Code of Good Practice on standard-setting bodies (either directly for central government standard setting bodies or indirectly for other bodies, as discussed above). It should be recalled that the Code is an Annex to the TBT Agreement, which sets forth obligations concerning the substantive content of standards and the process of creating and applying them. These obligations pertain to standards established by bodies, such as IFOAM and any ecolabelers (that set standards for grant of ecolabels) or accreditors (that establish standards for assessment of other bodies involved with ecolabeling) it accredits. Standards, it should be remembered are voluntary disciplines, as opposed to mandatory regulations.

The Code requires that:

- . Standard-setting bodies apply the most favoured nation principle, which requires a government to treat like products of all WTO trading partners equally, and they must apply the principle of national treatment, under which imported products must be treated no less favorably than like domestic products.
- . Standards not create unnecessary obstacles to trade;
- . Standards be consistent with international standards unless consistency would be ineffective or inappropriate;
- . Standard-setting bodies pursue national consensus on the content of standards;
- . Standard-setting bodies participate within the limits of their resources in the preparation of international standards by relevant standard-setting bodies, working through a single national delegation wherever possible;

- . Standard-setting bodies avoid duplicative and overlapping standards;
- . Standard-setting bodies publish information about their activities, and consider comments made by interested parties on proposed standards; and
- . Standard-setting bodies use performance-related standards where appropriate.

The TBT Agreement also imposes obligations for conformity assessment bodies, bodies which ensure that specific products or processes conform to the standards established for them by standard-setting bodies. These bodies must meet a variety of obligations similar to those imposed upon standards-setting bodies in the Code, including: ensurance of equal treatment, avoidance of unnecessary obstacles to trade, pursuit of harmonization and reciprocity of procedures, and provision of certain procedural rights to those applying for certification of product conformity (Articles 5-9).

In addition, the TBT Agreement establishes more general obligations relating both to the standard-setting and conformity assessment processes: to provide information (Article 10) and advice and technical assistance (Article 11), and to give special treatment to developing country Members (Article 12). These obligations apply only to Member governments, however, not to private bodies.

#### D. Requirements of the TBT Agreement for Private Ecolabeling Programs

The schemes that IFOAM may certify would be private as well as voluntary. Thus, this analysis emphasizes the implications of the TBT Agreement's provisions regarding *standards* (which are voluntary) that are be developed and applied by non-governmental bodies and assessment of fulfillment of such standards (related conformity assessment). Ecolabeling *regulations* (which are mandatory) will not be the focus of this discussion.

##### 1. *The Most Favoured Nation and National Treatment Principles: Process and Production Method Distinctions*

The most problematic of the requirements of the Code may be the most favoured nation and national treatment obligations (Annex III, ¶ D) because these obligations may be interpreted to bar the use of non-product related processes and production methods as criteria for the granting of ecolabels. On their face, these requirements do not seem to pose such a threat. Distinctions drawn among products for labeling, based upon assessment of whether the products were produced sustainably, need not involve discrimination on the basis of the product's country of origin (i.e., criteria for labeling can be applied according to the manner of production of a specific product or shipment, or according to the practices of the producing firm, without reference to the national policies or laws of the country of origin).

Non-product related criteria are often relied upon to distinguish among products for ecolabeling purposes. Such criteria would include distinctions based upon aspects of the process or method by which those products were produced (known as process and production methods, or PPM) that are unrelated to characteristics of the product itself. Making such distinctions can be essential to ecolabeling, a prime example being ecolabeling designed to identify organically produced agricultural products. In the case of organic agriculture, whether organic methods for raising the product have been used or not can be determinative of whether the product is environmentally sound. If non-product-related PPMs were found to be inconsistent with the TBT Agreement, such ecolabeling efforts could be threatened.

Neither the most favoured nation nor the national treatment obligations in the Code (nor any other provisions of the TBT Agreement) have been interpreted by a WTO Dispute Settlement panel or by a GATT panel. But the almost identical obligations found in the GATT have been interpreted by GATT and WTO panels many times.

The ecolabeling of a product based on a non-product-related standard has been addressed by a GATT panel. The decision of the first Tuna/Dolphin GATT panel, *United States–Restrictions on Imports of Tuna* of 1991, considered the legitimacy of the labeling scheme under the most favoured nation obligation of the GATT.

The panel concluded that use of a non-product-related PPM (capture of tuna in a "dolphin-safe" manner) as the basis for granting a label in a voluntary, governmental ecolabeling scheme did not violate the GATT's most favoured nation obligation. While the reasoning of the panel was obscure, it seemed to hinge on the facts that access to the label was not based upon the country of origin of the product, that market access did not depend upon grant of the label, and that a grant of the label was not necessary to the conferral of a government advantage. A similarly favorable conclusion as to the consistency of the program with national treatment (which was not raised) might be predicted based upon this decision.

This panel decision is almost directly on-point, and it seems to offer support for an interpretation of the most favoured nation and national treatment obligations in the TBT Agreement as permitting use of non-product-related criteria, at least when used to draw distinctions for purposes of voluntary ecolabeling schemes. Nonetheless, two points must be emphasized. First, the Tuna/Dolphin I panel relied upon poorly articulated argument. It never set forth how it interpreted specific terms of the most favoured nation provision. Consequently, the reader is forced to infer or even construct the lines of the panel's most favoured nation analysis. The panel's focus on the factors noted above, namely the market access and government advantage issues, indicates that perhaps voluntary schemes, because they are voluntary, would not be deemed to grant an advantage to a product or to treat like products less favourably. Essentially, the panel seemed to indicate that any advantage that might be connected to a label should be ascribed purely to consumer preferences, not treated as conferred by the labeler. In light of this decision, it can be concluded that voluntary labeling schemes, even those

employing non-product-related criteria might survive a TBT most favoured nation and national treatment analysis.

However, it would be a mistake at this time to rely too heavily on the Tuna/Dolphin panel decision. First, the decision failed to address in a straight-forward manner the impacts upon competitiveness that even voluntary ecolabeling schemes might have, and this issue has since become more politically charged at the WTO. Products that either choose not to obtain a label or do not qualify for one may lose market share to products with such labels due to consumer preferences. And, some WTO members argue that consumer preferences can be skewed by the existence of a label.

Another consideration that argues for discounting the precedent established in this decision is the fact that it was rendered before the new TBT Agreement was written and adopted by all of the WTO Member states. The existence of a new agreement might make a panel feel even less obliged to follow what is in any case unbinding precedent found in the 1991 Tuna/Dolphin decision. Considering these facts in light of a growing concern among developing countries with respect to ecolabeling and a growing insistence of the U.S. business community that ecolabeling schemes be disciplined (prompted largely by the European Community's paper products labeling decision), it would be unwise to rely unskeptically upon the Tuna/Dolphin I ruling.

The WTO's Committee on Trade and Environment (CTE) has discussed the issue of whether non-product-related standards may be legitimate criteria for ecolabels. Developing countries are almost uniformly opposed. Canada tabled a proposal that would have restricted the use of such standards (which means voluntary) in ecolabels to those developed through an international process (apparently intended to refer to standards developed by ISO, which will be discussed in our subsequent paper). But even this very restrictive proposal was soundly rejected by a majority of the CTE. The WTO's view of ecolabels is likely to be quite different from that of the environmental community which tends to see them as non-intrusive, pro-market tools.

A final reason for treating the precedent of Tuna/Dolphin I with caution is a subsequent panel decision. *United States–Taxes on Automobiles*, may be read to have concluded that, under the national treatment article of the GATT, a regulation of like products based on non-product related criteria necessarily constitutes less favourable treatment (and, by extension, confers an advantage for purposes of an most favoured nation analysis). The panel reviewed a regulatory measure that distinguished between cars based upon the company that produced them. The panel concluded that permitting the use of such non-product-related criteria would defeat the purpose of the tariff concessions made by parties to the GATT, concessions designed to prevent discriminatory, protectionist treatment of foreign products.

If a similar interpretation were to be given to the most favoured nation or national treatment obligation in the TBT Agreement as some WTO Members currently advocate, ecolabeling programs could be severely impaired. Two points should be noted however.

First, the panel addressed criteria relied upon for a mandatory regulatory program (i.e., a program with which compliance was necessary to avoid a government-imposed penalty), not criteria relied upon to distinguish between products for a voluntary program. It might have reacted differently to the use of such standards by a voluntary program. Second, the panel did not address in its article III analysis whether a legitimate regulatory purpose (such as environmental protection, which is identified as a legitimate regulatory objective in the TBT Agreement) could serve as a basis for limiting this general rule that the use of non-product-related criteria necessarily constitutes unfavourable treatment. In light of these two factors, it might be argued that the decision was not intended to establish a universal rule that the use of non-product-related criteria constitutes unfavorable treatment or confers an unjustified advantage on a product.

Further the panel did address the latter issue in its analysis of the GATT's environmental exceptions to the national treatment obligation. There it seemed to accept the possibility that a regulation based on the fuel economy an entire fleet (arguably not a product-related criteria) would have been GATT consistent. The measure at issue was struck down solely because it differentiated how the fleet's fuel economy would be calculated based on the existence of foreign ownership, a clearly discriminatory basis.

Even this more positive view of the panel ruling that indicates a sympathy for the use of non-product-related criteria must be tempered by an awareness that the criteria at issue were not PPMs. Non-product-related criteria that are not PPMs have their effect in the regulatory country. Non-product related PPMs have their effect in the place where the product is produced or processed. Therefore, the environmental impact addressed by the criteria at issue in Auto Taxes would be felt in the regulating country. Since the panel did not address non-product-related PPMs, its discussion does not factor into its somewhat accepting analysis of non-prod related criteria the politically charged sovereignty concerns and the concerns over the appropriateness of imposing measures designed to address one set of conditions in one country on entities in another where similar conditions may well not exist.

### *Recommendations*

As discussed above, the most-favoured-nation and national treatment obligations could potentially be interpreted to forbid use of non-product-related PPMs as criteria for labeling or accreditation programs. IFOAM and its accredited bodies should avoid treating producers and products differently *on any basis other than their satisfaction of standards of organic practice or in any manner not necessary to the determination of their satisfaction of these standards*. Moreover, IFOAM should ensure that the requirements it does place on producers and products do not discriminate based on the product's country of origin to the extent that IFOAM certifies organizations that employ different standards. This does not mean that IFOAM should not tailor its criteria as necessary to respond to the particular circumstances of a given body or area. But in doing so, IFOAM should take great care to avoid making such distinctions unless they are imperative.

In short, in order to respect to the greatest extent possible the most-favoured-nation and national treatment obligations, IFOAM and the bodies it accredits should:

- Avoid adopting production or process requirements that organic practice does not demand;
- Justify any differences in the criteria used to accredit organizations from different regions on clear and sound scientific and policy bases; and
- Avoid establishing procedural requirements (such as filing requirements) that impose burdens upon some bodies that are not imposed on others without clear justification.

## 2. *Unnecessary Obstacles to International Trade*

Under the Code, standards should not create unnecessary obstacles to international trade (Annex III, ¶ E). The question is how the concept "unnecessary obstacle" will be interpreted. Although it is not defined in the Code for standards, it is defined for regulations (mandatory measures) in Article 2.2 of the TBT Agreement. That article defines as an "unnecessary obstacle" any regulation that is more trade-restrictive than necessary to achieve a "legitimate objective," such as the environmental protection objective of a labeling scheme (environmental protection is specifically listed as a legitimate objective in the Article).

It is likely that this definition will be imported into the Code as well. This would be consistent with established principles of construction for legal texts. Furthermore, this definition appears to be derived from prior interpretations of similar GATT language. Past GATT decisions have interpreted the term "necessity" under GATT's Article XX environmental exceptions to mean "least GATT inconsistent." This makes it appear all the more likely that the Membership intended for this definition to be applicable not only to Article 2, but the Code as well.

If the term "necessary" is interpreted as it has been for Article XX by past panels, a standard would be "necessary" only if no less trade restrictive measure "reasonably" could be employed to achieve its goals (*Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes*; *United States-Restrictions on Imports of Tuna*). Since ecolabeling is arguably the least restrictive means by which to promote a form of environmental protection, this principle should not pose a threat to ecolabeling *per se*. However, this "least trade-restrictive" rule could provide a basis for challenging particular standards in ecolabeling schemes as more burdensome than alternative standards, especially if WTO-recognized international standard-setting bodies (like ISO) have established competing standards. In fact, as discussed below, the Code explicitly calls for standardizing bodies to make every effort to avoid duplication and overlap.

The critical issue will likely be the identity of the decision-maker granted the authority to determine whether a "reasonable" alternative is available. WTO panels have shown little deference to governments in this respect, however, and little interpretive discretion would be granted to Members, let alone private bodies, if future panels followed past GATT approaches.

### *Recommendations*

The advice here is similar to that provided in the context of the most favoured nation and national treatment obligations. IFOAM and the bodies it accredits should strive, and records its efforts, to not create unnecessary obstacles to trade for *any* producers or products. To achieve this goal, IFOAM and its accredited bodies should:

- *seek to make substantive and procedural requirements as simple and easy to satisfy as possible, across the board.*
- *recognize comparable alternative practices, meaning those that fulfill the organic goal equally well.*

As IFOAM already does this, it is difficult to imagine that the “unnecessary obstacles” requirement will pose significant problems for IFOAM in the future.

One additional consideration to bear in mind is the provision in the TBT Agreement which establishes a presumption that a regulation based on an international standard does not create an unnecessary obstacle to international trade. Although reference to this presumption is oddly absent in the discussion of standards, it stands to reason that international standards, themselves, would be afforded this same presumption. To the extent that IFOAM is deemed to establish international standards for organic agricultural products, the WTO should presume these standards to comply with the “unnecessary obstacles” requirement. Consequently, and this point will be taken up again in the next subsection, IFOAM should:

- create a grassroots movement which would both educate and place pressure on national capitals in key countries to press the WTO’s TBT Committee to officially recognize IFOAM as an international standardizing body for the purposes of establishing organic agricultural standards;

### 3. *Consistency with International Standards*

The Code calls for the use of relevant international standards unless their use would be "ineffective" or "inappropriate" (Annex III, ¶ F). There are no panel decisions to offer any guidance as to the possible interpretations of "ineffective" or "inappropriate," or as to the standard of review for determining compliance with this obligation. An interpretation of this provision that set a high threshold for standardizing bodies to

demonstrate that international standards would be “ineffective” or “inappropriate” would leave little leeway for use of inconsistent standards.

One question this requirement raises for IFOAM and the bodies it accredits, as a result, is what constitutes an "international standard." The term is not defined however. It might be assumed that the standards established by IFOAM are international standards since they are established by a body with an international membership. The most reasonable definition of international standard would be a standard developed by an international body. In such case, the critical question would be whether IFOAM would be considered an international body and therefore setting international standards. As discussed above, in order to be considered an international body, IFOAM's membership must be deemed open to all "relevant" bodies. Due to the absence of official guidance for the definition of "relevant," it is not possible to determine whether the standards IFOAM develops and utilizes are international for purposes of the TBT Agreement.

If IFOAM's standards are considered international (i.e., IFOAM is considered an international body), their use would not only be permissible under the Agreement, but under this provision, their use would be urged on others wishing to engage in trade in organic agriculture. Thus the TBT Agreement actually could work to the benefit of IFOAM.

In addition, in the event that other international standards exist, or exist in the future, with which IFOAM and the bodies it accredits do not want to comply, a critical question is whether interpretation of these terms is to be left to the standard-setting body or is within the competence of WTO dispute settlement panels. If the latter answer prevails, this provision could interfere with the setting of standards by private ecolabeling programs that are more stringent or merely different from international standards. Dispute settlement panels could establish narrow interpretations of "ineffective" and "inappropriate," and make it extremely difficult for ecolabeling schemes to use standards inconsistent with internationally established ones.

### *Recommendations*

A primary goal, considering the benefits accorded by the WTO to international standardizing bodies, is to obtain official recognition of IFOAM as an international body. As a result, the standards IFOAM develops would likely be considered "international" under the TBT Agreement and would be those that the TBT Agreement seeks to promote in furtherance of international harmonization. One strategy to achieve this goal would be for IFOAM to build the necessary political support in key WTO Member States and then have one Member propose in the TBT Committee to recognize IFOAM as an international standardizing body for the purposes of establishing organic agricultural standards.

Even if IFOAM is considered to be an international standardization body, the TBT Agreement requires IFOAM to work with all other international organic standardization bodies or bodies with similar standard-setting and conformity assessment needs. To the

extent it can do so in a manner that is consistent with its objectives and within its financial means, IFOAM *should cooperate with such international bodies in the development of its standards and conformity assessment processes for accreditation.*

Probably this is a difficult point because of the high costs involved. IFOAM has to limit itself. The WTO seems to have a central position and therefore IFOAM should focus its lobbying on the WTO.

In any case, the bodies IFOAM accredits should attempt to comply with international standards and conformity assessment guidance. In the absence of other international standards if the guidance developed by IFOAM is deemed international, they should be viewed as having satisfied this requirement if they comply with the standards set by IFOAM and rely, in the development of their conformity assessment programs, upon any guidance IFOAM offers for conformity assessment. This mandate could prove to be a boon to IFOAM. In so far as it is seen as establishing the international standard for organic agricultural production, it will be greatly assisted in meeting its mission to: inform the public about organic agriculture; represent the organic agricultural movement in public policy-making forums; and develop and maintain international standards for organic agriculture and food processing.

#### *4. National Consensus, Avoidance of Duplication and Overlap, and Consideration of Comments Made by Interested Parties*

The Code further constrains the standard-setting process by promoting the harmonization of standards in three additional ways (Annex III, ¶s H, L, N). It calls upon standard-setting bodies to:

- . Avoid duplicating the work of other standard-setting bodies;
- . "[M]ake every effort" to achieve national consensus with regard to the content of their standards; and
- . "[T]ake into account" the comments of interested parties before implementing standards (*see* Notice and Comment discussion below).

None of these provisions seem especially rigid, leaving discretion to standardizing bodies when complying with them. Nevertheless, they press for national consistency of standards and the avoidance of multiple labeling schemes, and in practice the harmonization process often tends toward the lowest common denominator.

#### *5. Use of Performance Related Standards*

The Code calls for standardizing bodies to use performance-related standards, as opposed to "design or descriptive" standards "wherever appropriate" (Annex III, ¶ I). Further research is required to assess the implications of this provision for ecolabeling.

## 6. *Procedural Requirements for Standard Setting*

The procedural rules for standard-setting delineated in the Code:

- Demand limited participation by individual standard-setting bodies in the development of international standards;
- Impose notification and publication obligations upon these bodies; and
- Require standard-setting bodies adequately to provide for consultation on the operations of the Code and to take these consultations seriously.
  - a. Participation in the Development of International Standards

Where an international standardization body is planning to establish standards, the Code demands that any interested standard-setting body in a Member's territory participate "within the limits of its resources" and that any such participating bodies be represented, by one delegation "whenever possible" (Annex 3, ¶ G). The first requirement to participate is, therefore, qualified to allow bodies that do not have the resources to do so not to participate. The consequences of the second are less certain; the experience of complying with them may be necessary for a proper assessment.

Consensus certainly is not a new idea to the environmental community. However, allowing no more than one delegation per country raises the possibility of having to achieve consensus not just among relatively like-minded environmental organizations, but between the environmental and business communities. This rule could potentially force standard-setting bodies with fundamentally inconsistent positions to participate in negotiation of international standards through a shared delegation. This would surely affect the nature of the debate in these international standardization bodies. Whether the effect would be negative from the perspective of environmentalists, however, is unclear.

### b. Notice and Comment and Publication Requirements

The Code requires that standard-setting bodies publish every six months a work program discussing their standard-setting activities, including translations of the titles of specific draft standards upon request (Annex 3, ¶ J). In addition, it demands that they provide interested parties sixty days notice prior to establishing standards and the opportunity to comment upon them (Annex 3, ¶ L). Finally, it states that standard-setting bodies must promptly publish any standards once they have established them (Annex 3, ¶ O).

As discussed above, the notice and comment provisions require standard-setting bodies to take into consideration the comments of interested parties. Other than this single requirement which could affect the substantive content of standards, all of the ramifications of the notice and comment provisions as well as publication provisions

appear financial and administrative. Publishing a work program, notifying interested parties, and publishing final standards could be an expensive, time-consuming undertaking, depending upon the extent of these obligations.

c. Consultations on the Operation of the Code

Standard-setting bodies are expected to "afford sympathetic consideration to, and adequate opportunity for, consultation" with other standard-setting bodies, concerning the operation of the Code (Annex 3, ¶ Q). Essentially, this provision appears to require standard-setting bodies to be transparent about their work program and processes, facilitate consultation with other such bodies, and consider objections raised by these other bodies concerning compliance with Code obligations. The significance of this provision depends in part on the interpretation of "sympathetic consideration." (Potentially, this provision could require standard-setting bodies to consider abiding by the interpretations of Code obligations recognized by other standard-setting bodies.) It is too early to say how this provision might be implemented. In any case, the requirement to provide "adequate opportunity" for consultation poses another potential financial and administrative problem for private ecolabeling programs with limited resources.

*7. Conformity Assessment Procedures*

In addition to regulating the development and use of standards themselves, the TBT Agreement, in Articles 5-9, imposes obligations for the development and application of conformity assessment procedures for these standards. Conformity assessment procedures are used to determine whether standards have been met. The treatment that these procedures receive in the TBT Agreement is significant because, as a practical matter, a standard can be no more rigorous than the methods used to ensure conformity with it. The requirements for conformity assessment, like those for standards, apply directly to bodies controlled by the central governments of Members. Similarly, Members are once again obliged to take "reasonable measures" to ensure the compliance of international, regional, local governmental, and private bodies. The analysis offered above as to what may be deemed to constitute "reasonable measures" is also applicable here.

a. Most-Favored Nation & National Treatment

The most favoured nation and national treatment obligations for conformity assessment procedures (Article 5.1.1) are much the same as those for standards, discussed above. Essentially the same analysis applies. One distinction bears noting however. Unlike the most favoured nation and national treatment obligations for standards, these obligations are qualified to apply only to conformity assessment undertaken "in a comparable situation." The meaning of the phrase "in a comparable situation" is not explained and has not been officially established, but whatever the exact interpretation, it allows for some variation of assessment procedures in light of particular circumstances.

## b. Unnecessary Obstacles to Trade

Here again, the obligation for conformity assessment procedures (Article 5.1.2) is much the same as for standards themselves. The analysis offered above of how "necessity" is likely to be interpreted and the discussion of the importance of who enjoys the right to determine what is "necessary" apply with equal force here. However, the "unnecessary obstacle" requirement may be more onerous as applied to conformity assessment.

This provision, like that in the Code, does not include the definition of "unnecessary obstacle" included in Article 2 for (mandatory) regulations (a barrier more trade restrictive than necessary to fulfil a legitimate objective). However, unlike the Code, Article 5 gives an example of a situation in which conformity assessment procedures constitute unnecessary obstacles: when they are more strict than necessary to give "adequate confidence" that the product conforms. This seems to reflect a deliberate decision not simply to have the Article 2 definition apply to conformity assessment procedures. Instead, this example is offered, as a basis for interpretation, either in place of a full-blown definition or as an additional guide. This is significant, first, because the use of an example leaves room for finding procedures to be unnecessary obstacles to trade for other, additional reasons not mentioned in the Agreement. Second, an overly inclusive interpretation of "adequate" could impair the ability of conformity assessors to ensure compliance with the standards they set for products and the methods by which they are produced.

## c. Information Gathering and Control

The information demanded of applicants must be limited to what is necessary to the assessment process (Article 5.2.3). In addition, the confidentiality of such information must be protected as for domestic products and also so as to ensure "that legitimate commercial interests are protected" (Article 5.2.4).

The effects of these requirements are unclear. The impact of the first depends upon the interpretation given to "necessary" and must remain uncertain at this point. If the term is narrowly interpreted, it might make conformity assessment more difficult by forcing conformity assessment bodies to use less efficient means to obtain relevant information rather than demanding it directly of the applicant.

The confidentiality requirements may pose a threat to ecolabeling by precluding access to information for private (and even local government) conformity assessment bodies. For instance, "protection of legitimate commercial interests" might be understood to preclude private bodies — as part of the public — from obtaining information that they need to determine whether a product or production method complies with their standards even though under domestic law that information would not be confidential. The national treatment obligation itself could pose a threat where domestic law limits access to information that is needed for proper assessments to be made.

d. Development of International Standards; Consistency and Inconsistency with Them  
(Consideration of International Conformity Assessment Guidance??)

Pursuit of harmonization, a central precept of the TBT Agreement in general, motivates many of the provisions on conformity assessment. The methods relied upon are much the same as for harmonization of standards, but with some significant distinctions.

The TBT Agreement calls upon Members to develop and join international systems of conformity assessment, "wherever practicable" (Article 9.1). The exact meaning of this provision remains unclear, dependent upon the understanding of "practicability" that is adopted. In any case, this obligation poses no direct threat to ecolabeling schemes and the conformity assessment systems upon which they rely. Still, it promotes harmonization, and that, as noted above, may tend to promote devolution to the least common denominator.

In addition, any conformity assessment body must participate "to the limit of its resources" in the development of international guides and recommendations for conformity assessment programs (Article 5.5). The related obligation to coordinate such participation through one national representative, imposed upon standardizing bodies, is not applied here however.

Similar to the requirement to apply internationally recognized standards unless they are ineffective or inappropriate, the TBT Agreement also demands the use of internationally recognized guides or recommendations as a basis for conformity assessment procedures, unless they are inappropriate. This requirement appears less strict than that for standards since it only calls for the use of international guides as a "basis" for procedures; it seems other factors can be considered as well. This is important, in part, because it allows ineffectiveness, which is not recognized as a basis for rejecting international guidance (as it is for standards) to be taken into consideration when determining whether to follow such international recommendations.

Finally, where international guidance does not exist or is not followed, and the procedure may have a significant effect on trade, bodies must:

- . Publish a notice to enable interested parties to become familiar with the proposed process (Article 5.6.1);
- . Provide copies upon request; (Article 5.6.3);
- . Allow reasonable time for comments to be made, discuss these comments and take these comments and discussions into account;

- . In the event of an urgent problem (of safety, health, environment or national security) which precludes such prior notice and comment, fulfil the above obligations immediately after adoption of the procedure (Article 5.7);
- . Ensure that all procedures are made available upon adoption to enable interested parties to become familiar with them (Article 5.8); and
- . Allow a reasonable delay between adoption and application to allow producers time to adjust accordingly, unless an urgent problem precludes such a delay (Article 5.9).

None of these notice and comment requirements appears to pose a significant threat to ecolabeling schemes, but they all increase the costs of maintaining these schemes. As a result, they promote harmonization, not only by furthering communication, but also by making compliance with internationally recognized processes financially attractive.

### *Recommendations*

A preliminary question that needs to be answered when considering these requirements is whether IFOAM is an international body and, as a result, the standards and conformity assessment guidance it develops will be considered "international" under the Agreement themselves. The answer to these questions can be found out by applying. If IFOAM is an international body, then its own standards and conformity assessment guidance would be an example of those that the TBT Agreement seeks to promote in furtherance of international harmonization.

Even if IFOAM is considered to be an international standardization body, the TBT Agreement requires IFOAM to work with all other international organic standardization bodies or bodies with similar standard-setting and conformity assessment needs. To the extent it can do so in a manner that is consistent with its objectives and within its financial means, IFOAM *should cooperate with such international bodies in the development of its standards and conformity assessment processes for accreditation.*

Probably this is a difficult point because of the high costs involved. IFOAM has to limit itself. The WTO seems to have a central position and therefore IFOAM should focus its lobbying on the WTO.

In any case, the bodies IFOAM accredits should attempt to comply with international standards and conformity assessment guidance. In the absence of other international standards if the guidance developed by IFOAM is deemed international, they should be viewed as having satisfied this requirement if they comply with the standards set by IFOAM and rely, in the development of their conformity assessment programs, upon any guidance IFOAM offers for conformity assessment. This mandate could prove to be a boon to IFOAM. In so far as it is seen as establishing the international standard for organic agricultural production, it will be greatly assisted in meeting its mission to: inform the public about organic agriculture; represent the organic

agricultural movement in public policy-making forums; and develop and maintain international standards for organic agriculture and food processing.

e. Recognition of Conformity Assessments by other Bodies

Article 6 of the TBT Agreement calls upon bodies to recognize the results of conformity assessments undertaken by bodies in the territories of other Members. Members are also "encouraged" to be "willing" to enter into negotiations to conclude agreements for the mutual recognition of results. Such recognition could result in reduced levels of enforcement of standards upon which ecolabeling programs rely. However, the language of the Article appears to provide conformity assessment bodies with breathing room.

First, these bodies are called upon to recognize the assessments of others only "whenever possible" (Article 6.1). While the interpretation of this phrase will determine the amount of flexibility it actually provides, its inclusion establishes, at least, a limited right to reject assessments made by others.

In addition, the obligation only applies if the body is "satisfied" that the procedures used by the other "offer an assurance of conformity with applicable . . . standards equivalent to their own procedures" (Article 6.1). What constitutes an "equivalent assurance" is an important question, but its answer is practicably, if not explicitly, left to the discretion of the reviewing conformity assessment body since it is the "satisfaction" of the reviewing body that is determinative. Therefore, this qualification of the obligation could provide substantial protection to ecolabeling programs. However, at the same time, by leaving the interpretation to the assessment body (rather than to the WTO dispute settlement system), this provision enables these bodies to recognize assessments that are not as effective as their own. Where a body is under financial pressure due to budgetary constraints, for instance, such an unfortunate decision might well occur.

Similarly, Article 6 recognizes that prior consultations may be "necessary" both to ensure the adequate and enduring nature of the procedures used and that recognition is limited only to assessments made by designated bodies (Article 6.1). In the event that negotiations are deemed "necessary," the Article leaves it to the interested bodies to come to a "mutually satisfactory understanding," again making the judgments of assessment bodies definitive, for better or worse. Under what circumstances such consultations would be "necessary," and who decides whether such circumstances exist, however, are not made clear. These could be important limitations on the right to call for such negotiations and on the derivative right to point to their failure as the basis for denial of recognition. However, necessity may prove a mere formality. The TBT Agreement offers no additional guidance.

Another, rather ambiguous provision, requires parties to ensure that their conformity assessment procedures facilitate conformity assessment recognition "as far as practicable" (Article 6.2). Again, the operative term "practicable" is not defined or explained. This provision could be understood to demand that bodies seeking recognition for their assessments maintain procedures that will stand up to the scrutiny of other bodies. On the other hand, it also could be interpreted to demand that the procedures relied upon by assessment bodies not be too difficult to approximate, an interpretation that could initiate a race to the bottom.

Finally, conformity assessment bodies are "encouraged" to permit bodies in the territories of other Members to take part in their conformity assessment processes (Article 6.4). This provision could have unfavorable effects for ecolabeling. It is non-binding so conformity assessment bodies need not ever permit other bodies to participate in their assessment processes. Still, for reasons such as those suggested above for why inadequate assessments might be recognized, bodies may choose to permit such participation even when the quality of assessment by bodies in the territories of other Members is not as high.

#### f. Fees and Other Costs

The TBT Agreement imposes several requirements designed to minimize the financial and other costs borne by applicants in the conformity assessment process:

- Fees charged must be equitable, taking into account any special costs associated with assessment of a particular facility (Article 5.2.5);
- Selection of samples and siting of facilities used for assessment must not cause unnecessary inconvenience to applicants (Article 5.2.6); and
- Assessment procedures for products, the specifications of which have changed subsequent to an initial assessment, must be limited to what is necessary to determine if the product still meets the standards at issue (Article 5.2.7).

It is unclear whether any of these requirements will pose significant risks for ecolabeling schemes. The impact of each depends upon its interpretation. How the concept of equity with regard to the first or of necessity with regard to the last two will be interpreted remains an open question. Necessity, for instance, might be interpreted narrowly and, as a result, limit the ability of conformity assessment bodies to function in an efficient manner. All these requirements could increase the costs of conformity assessment and, thereby, limit the ability of some bodies to maintain ecolabeling programs. On the other hand, they could encourage participation in ecolabeling schemes by making compliance less expensive

#### g. Procedural Requirements

Various procedural requirements also apply to conformity assessment. The competent body must:

- . Publish the general processing period or inform an applicant of the anticipated period for its product upon request;
- . Review each application for completeness and inform the applicant of any deficiencies;
- . Inform the applicant of the results of the assessment as soon as possible in a complete and precise manner;
- . Inform the applicant of the stage of the procedure without delay upon request;
- . Proceed as far as practicable with an assessment, though the applicant has already failed, upon request (Article 5.2.2); and
- . Review complaints concerning the operation of the system and take corrective action where appropriate (Article 5.2.8).

None of these requirements seems particularly onerous or threatening to ecolabeling. Of course, they all have associated costs that increase the financial burden of maintaining a conformity assessment system.

#### *8. Information, Technical Assistance & Advice, and Special Treatment for Developing Country Members*

In addition to the detailed substantive and procedural requirements for standards and conformity assessment discussed above, the TBT Agreement establishes several classes of broader, more general obligations. These call upon Members to:

- . Provide information about standard-setting programs and related issues;
- . Assist and advise other Members in their efforts to develop their own programs, to participate in the international development of standards and conformity assessment systems, and to help their producers gain access to conformity assessment programs; and
- . Give differential and more favorable treatment to developing country Members.

##### a. Access to Information

Article 10 of the TBT Agreement promotes access to general information concerning standard-setting programs and related activities. The article calls upon Members, unless "they consider [its disclosure] contrary to their essential security interests," to:

- . Ensure access to information concerning established and proposed standards and conformity assessment procedures by governmental, regional or private bodies (Articles 10.1.2, 10.3.1, 10.3.2);
- . Disclose their membership and the membership of any body within their territories in any international or regional standardizing body or conformity assessment system (Articles 10.1.4, 10.3.3);

- Inform other Members of any standards-related agreements having significant trade effects they have reached with other countries (Article 10.7);
- Take reasonable measures to make copies of documents available, (Article 10.4); and
- Make translations (into French, Spanish, or English) available to developing country Members, upon request (Article 10.5).

By ensuring access to pertinent information, these requirements minimize potential discrimination and market access impairment, whether intentional or unforeseen, that could arise from standard-setting programs and related activities of Members and other bodies in their territories. The "essential security interests" exception (Article 10.8.3) seems to give Members some flexibility when absolutely necessary, but does not appear significantly to diminish these informational obligations.

None of these obligations appears to threaten ecolabeling significantly. Even the costs are of relatively little concern to private bodies since they are borne by the Member governments themselves rather than the individual standard-setting bodies. However, as will be discussed below, these obligations suggest that Members will establish corresponding obligations for ecolabeling bodies necessary to the Members' fulfillment their own obligations.

#### b. Advice and Technical Assistance

In addition to the general information obligations discussed above, Members must, under Article 11, provide technical assistance, upon mutually agreed terms, and advice to other Members, especially developing country Members, to aid them in:

- Establishing national standardizing bodies and conformity assessment systems (Articles 11.2, 11.4);
- Participating in international standardizing bodies and conformity assessment systems (Article 11.2); and
- Helping their producers to gain access to and satisfy the requirements of the conformity assessment systems operated within the territories of the Members offering assistance (Article 11.5).

In fulfilling these obligations Members are supposed to give priority to assisting least-developed country Members.

Implementation of these obligations should promote standard-setting and, therefore, may encourage ecolabeling programs. It should also help right the imbalance of developing country and developed country input during international standard-setting.

The first requirement encourages development of national standards programs and, arguably, creates a mandate to assist the development of ecolabeling programs among other standards-based schemes. The TBT Agreement is intended to further the goals of the GATT 1994. These goals include promotion of sustainable development. In

light of this objective, it could be argued that this provision calls upon Members to help other Members to establish ecolabeling programs as standards-based programs that promote sustainable development.

The second of these provisions, by promoting broader participation in the international development of standards and conformity assessment systems, fosters the involvement and influence of all Members. This may increase commitment to ecolabeling in general and to any standards and assessment procedures developed internationally. The third serves to minimize market access restrictions associated with the maintenance of standards, including any standards relied upon for ecolabeling. This too may increase support for ecolabeling by making it easier to adjust to the demands of ecolabeling programs. Again, the one obvious concern associated with these provisions, cost, is not of consequence to private ecolabelers since these obligations apply to Members only. Individual standard-setting and conformity assessment bodies are not subject to them.

#### c. Special Treatment of Developing Countries

Finally, Article 12 clarifies and establishes requirements for special treatment of developing country Members in light of their special circumstances. Some of these obligations may prove beneficial for ecolabeling efforts. Others could pose serious threats to ecolabeling of products from developing countries, especially in the near future.

Members must give particular attention to "the special development, financial and trade needs of developing country Members" (Article 12.2) and are obliged to give these countries "differential and more favorable treatment" under the Agreement (Article 12.1). In addition, the Article imposes more specific, delineated obligations for treatment of developing country Members. Furthermore, the Committee on Technical Barriers to Trade currently has the authority to grant developing countries time-limited partial and complete exemptions from the obligations of the TBT Agreement (Article 12.8).

Exactly what the general obligation to give "differential and more favorable treatment" entails must remain an open question. It might be interpreted to allow developing countries to avoid complying with measures—including those necessary to ecolabeling programs—established by others if these measures conflict with their "special needs." It might even call upon Members to take reasonable measures to ensure that private ecolabelers similarly allow developing country producers not to fulfill criteria inconsistent with their "special needs."

The more specific obligations imposed by Article 12 also could have mixed effects. Several assistance obligations could have salutary effects such as those of similar obligations discussed above. These provisions call upon Members to:

- . Take reasonable measures to ensure that international and regional standardizing bodies and conformity assessment systems are organized and managed so as to facilitate the participation of developing countries (Article 12.5);
- . Take reasonable measures to ensure international standardizing bodies develop, upon request, standards for products of particular interest to developing countries (Article 12.6);
- . Take into account, with regard to technical assistance provided in accordance with Article 11, the stage of development of the developing country Member when determining the terms and conditions for the assistance (Article 12.7); and
- . Take into account "in their desire to assist them" the special financing, trade and development needs of these Members (Article 12.9).

Another provision, however, could pose a threat to ecolabeling, demanding that Members take account of the special needs of developing countries when preparing and applying standards with a view to avoiding the creation of unnecessary obstacles to trade for goods from these countries (Article 12.7). This obligation, by calling upon developed country Members to pursue programs that better suit developing country needs, could discourage Members from giving priority to the environmental purposes of ecolabeling programs and to regulate private programs to similar effect.

Two final provisions offer mixed possibilities. The first of these states that Members must recognize that these countries may adopt standards inconsistent with internationally established ones "aimed at preserving indigenous technology and production methods and processes compatible with their development needs" (Article 12.4). This could provide developing countries and private ecolabelers within them the freedom to establish particularly rigorous standards, including for ecolabeling programs. However, it could also allow developing countries to institute standards lower than those internationally recognized.

The second calls for Members to take fully into account the special problems and needs of developing countries which may affect their ability to establish and maintain standardizing programs and to comply with the obligations of those established by other Members. On the one hand, this obligation exacerbates the risks associated with the mandate to avoid unnecessary obstacles to trade for developing countries. By calling for Members to give special consideration to developing countries difficulties in complying with standards, it may prompt granting of exemptions from ecolabeling schemes and requirements for private ecolabelers to provide exemptions from their schemes, in part or even in their entirety. On the other hand by calling for recognition of the special problems and needs of developing countries in maintaining standards-based programs, this provision arguably obliges other Members (as do the provisions in Article 11 discussed above) to assist in the development standards-based programs in general in developing Member countries and of ecolabeling programs in particular in furtherance of sustainable development which is a purpose of the WTO.

### III. The TBT Agreement and IFOAM; Recommendations

The evaluation offered above shows that the TBT Agreement may have important implications for accreditation bodies and ecolabelers. Most importantly, the TBT rules may preclude the use of non-product-related PPMs as criteria for labels granted to goods. In addition, by prohibiting unnecessary obstacles to trade and promoting harmonization of standards, the Agreement could impair the ability of ecolabelers to establish rigorous certification requirements for products. On the other hand, private ecolabeling programs that have insubstantial impacts upon international trade may not be regulated by the TBT Agreement at all.

With such substantial uncertainty as to the scope of coverage of an Agreement that could nevertheless have profound negative effects upon ecolabeling, the most prudent course may be a conservative one of risk-minimization that would lead IFOAM to follow the dictates of the WTO rules.

Please fill in which problems IFAM might have.

- a global labelling scheme for non product related standards.

In addition, to the extent that IFOAM is viewed by the WTO as establishing international standards, its regime could be further shielded from certain WTO disciplines. For this reason as well, it may be in IFOAM's best interest to adhere to as many of the mandates of the international trade regime as possible.

IFOAM need not ignore the goals of the TBT Agreement, and it probably should satisfy any TBT obligations that it can meet without undermining the objectives of its programs. However, if IFOAM and the programs it accredits are to continue to pursue their labeling objectives they may have to use methods which future interpretation of the TBT Agreement may forbid. Consequently, it is probably unwise for IFOAM to legitimate prematurely the role of the WTO in imposing disciplines on private accreditation and ecolabeling schemes. Therefore, IFOAM may not want to adopt the Code of Good Practice formally.

IFOAM could try out a conditional application via third world countries (Argentina, Mexico, Brazil, Egypt, India, Korea and others preferably at the same time). Please work out what "conditional" should imply. We could imagine that if IFOAM is not implementing enough the environmental objective of the TBT, that the TBT indicates who is doing better.

With regard to adoption of the Code of Good Practice, in particular, two additional issues may be worth keeping in mind. First, as an additional political consideration. Adoption of the Code, by demonstrating some degree of commitment to respect the goals of the TBT Agreement and the WTO system as a whole, might be a politically astute gesture. Some WTO Members may find this gesture important as a token of good faith, so adoption of the Code could prove useful in arguing for treatment

under the Code that does not interfere with the standard-setting body's pursuit of its objectives. Adoption of the Code could be pointed to demonstrate a willingness and an effort to work with the WTO which the WTO should honor by making an effort to accommodate the needs of the standard-setting body in return. Finally, as noted above, adoption of the Code may be recognized as a basis for considering a standard-setting body a "recognized" body under the Agreement. In considering these last two issues, however, it should, again, be remembered that premature legitimization of the Code may be counter-productive.

Ifoam, its members, and the bodies Ifoam accredits should try to influence how the Agreement will be interpreted in the future ensuring their continued ability to pursue their ecolabeling objectives effectively (see Appendix III for discussion of how to influence the WTO).

#### A. Addressing the Objectives of the TBT Agreement

As discussed above, the TBT Agreement has two primary objectives, to prevent the use of regulations and standards for protectionist purposes and to minimize their potential to act as barriers to market access.

Firstly these objectives are not superior to legitimate environmental policies.

Secondly Ifoam has taken these issues into account in developing and implementing its programs, which insulates its efforts from trade challenge.

These goals are consistent with the goals of Ifoam. Accreditation and ecolabeling programs can be improved by taking into consideration such fundamental concerns of the global trading system. Accreditation and ecolabeling schemes *should be developed through participatory processes that consider input from a wide range of stakeholders in open forums*. Moreover, they should, to the greatest extent possible, *tailor their standards to address the many regional and local factors relevant to organic agriculture* (as well as any relevant to organic food processing)..

Ifoam already recognizes the need to promote participation by a wide-range of stakeholders in the criteria development process and to allow accredited organizations to develop standards and systems suitable to the peculiar features of the areas in which they operate. Ifoam accredited bodies should adopt the same policies. In addition, Ifoam and the accredited bodies develop their standards through a participatory process. A participatory process is beneficial in so far as it brings to the decision-making calculus the widest possible range of perspectives on an issue. With respect to developing accreditation and ecolabeling standards, participation avoids establishing requirements that either unnecessarily create market access barriers or unintentionally establish standards that have other unintended effects.

Labeling schemes developed by standardizing bodies located within a single country that focus on the environmental impacts of production in other countries are

particularly inimical to the underlying tenets of free trade. Through such labels, bodies from one country, hold out market access as an incentive to encourage producers outside the governments' territories to meet their standards. Without input from all interested parties, many WTO members argue, such schemes run the risk of developing parochial criteria for what is environmentally sound and increase the potential for protectionist abuse. Moreover, many WTO members consider that the use of such measures inappropriately interferes with their national sovereignty.

IFOAM's recognition in its accreditation process of the particular features and needs of the locales in which the bodies it accredits operate, seems to address these concerns in a practical and fair way. IFOAM also recognizes that the local standards used by the organizations it accredits will probably differ from the Basic Standards because in developing them organizations will have taken into account the unique aspects of local conditions. These features of IFOAM's program demonstrate well its sensitivity to and compatibility with the underlying values of the international trading system.

#### B. Satisfying TBT Agreement Obligations if Possible

The TBT Agreement establishes a host of requirements for standardizing and conformity assessment bodies. IFOAM and the bodies it accredits should satisfy these requirements to the extent feasible, in light of their programmatic purposes, as well as financial and administrative resources.

1. *Most-Favored-Nation & National Treatment*
2. *Unnecessary Obstacles to Trade*
3. *Compliance with International Standards & Consideration of International Conformity Assessment Guidance*
4. *Notice and Comment Obligations for Conformity Assessment Processes*

Due to the question of IFOAM's status as an international standardizing body, it may or may not be considered to establish international guidance for conformity assessment procedures. If not, or if additional international guidance exists, both IFOAM and the bodies it accredits that perform conformity assessment may be expected to satisfy the following notice and comment requirements during the development of the conformity assessment procedure:

- Publish a notice to enable interested parties to become familiar with the proposed assessment process;
- Allow reasonable time for comments to be made, discuss these comments and take these comments and discussions into account in the development of the processes;

- Provide copies upon request of conformity assessment procedures and otherwise ensure that such procedures are made available upon adoption to enable interested parties to become familiar with them;
- In the event of an urgent problem (of safety, health, environment or national security) which precludes such prior notice and comment, fulfill these obligations, other than for publication, immediately after adoption of the procedure (this should be understood to include consideration of revision of the conformity assessment processes in light of the comments received); and
- Allow a reasonable delay between adoption and application to allow producers time to adjust accordingly, unless an urgent problem precludes such a delay.

An important question with regard to these requirements is what is an "interested party." This is not defined and has not been officially interpreted. The IFOAM definition would include any organization predominantly adhering to the organic principles. A conservative definition would include any party with an interest (economic, regulatory or otherwise) in the process. But what is "the process"?

In any case, just what would be deemed to constitute an adequate means of notice is in itself uncertain under the Agreement. Perhaps an ad in the popular international press, perhaps an announcement in a trade magazine, or merely posting the information on a Web site would be sufficient.

##### *5. Development of International Standards and Conformity Assessment Guidance*

We suggest that IFOAM and the standardization bodies it accredits participate in the development of international standards and conformity assessment guidance to the extent they can conveniently do so in light of their administrative and financial resources. However, if it is required to do so as part of a single delegation from a WTO member state, it is in IFOAM's interest to refuse to participate. It may lose its time and funding and risk to legitimize a process dominated by antagonistic interests.

##### *6. Other Efforts to Limit the Potential of Standards to Operate as Barriers to Trade*

In addition to participation in the development of international standards, IFOAM and the bodies it accredits that have standard-setting activities should:

- a. Use Performance-Related Standards Whenever Possible

This may often not be possible, but where a standard can be set for the product itself, rather than the process by which it is produced (using PPMs as criteria), to ensure its organic nature, such standards should be used instead of PPMs.

b. Consult with Other Standard-Setting Bodies and Take into Account the Comments of Interested Parties (see definition below)

These requirements essentially call upon standard-setting bodies to: try to accommodate the concerns of interested parties in the development of their standards and to keep these bodies informed; and to consult with one another concerning their standard-setting activities and coordinate these activities.

i. Accommodation of Interested Parties

An important preliminary question with regard to the first of these requirements - to try to accommodate interested parties when developing standards and to keep them informed - is who are "interested parties." As discussed above, this term could be defined in IFOAM terms, but it could also include a broad class of entities. The definition of this term is important because the requirement to accommodate the concerns of such parties could demand demonstrative accommodation of their concerns, and these concerns may be inconsistent with the goals of the organic movement. In addition, the requirement to accommodate such concerns has associated publication obligations which could be more costly if followed in a manner necessary to notify a broadly defined class of potentially concerned entities.

In particular, this obligation requires:

- Publication every six months of a work program discussing standard-setting activities, including translations of the titles of specific draft standards upon request;
- Provision of sixty days to interested parties prior to establishing standards to furnish the opportunity to comment; and
- Prompt publication of any standards once established.

As noted above, publication might be satisfied by an ad in the popular international press or a trade periodical. Perhaps, posting the relevant information on a Web site would even be sufficient. With regard to the obligation to publish a work plan every six months, a reasonable response might be to have them available to mail or post them on the Web.

It is therefore recommended that IFOAM should not accept this broader definition.

ii. Coordination and Consultation Among Standard-Setting Bodies

This obligation has three components: avoiding unnecessary overlap among standards; pursuing uniformity at the national level; and avoiding conflict with the TBT

Agreement through ongoing discussion with one another as to whether the standards set by any of them may be inconsistent with its requirements.

The first two of these components can be beneficial to or problematic for IFOAM, depending on the extent to which the organization thinks it will be able to sufficiently influence the outcome of the coordination process. IFOAM may be able to capitalize on its clear superiority of expertise in the area of organic agricultural standards to influence the development of international standards. In this case, it would be worthwhile to pursue a coordination exercise, should other parties be interested. Again, a determination of the potential of such an exercise would have to be made after considering the specific situation as it arose.

The last of these three components is different, and it is important to consider carefully its implications. Ready and open participation in discussion of the requirements of the TBT Agreement with other standardizing bodies may serve to legitimize interpretation of the Agreement

The further text is unclear. There are positive points in being regulated. It puts pressure on EU, USDA and other nationalistic efforts to become more international. It seems that the discussion should be limited to those bodies being in line with the organic principles.

inconsistent with the interests of the organic movement. First, it is not clear that it is in the best interests of IFOAM and the bodies it accredits to be regulated by the Agreement at all. Regular participation by them in consultation concerning the Agreement may promote interpretation of the Agreement as meant to regulate their activities. Second, participation in such consultation also may legitimate the practice of consultation among standard-setting bodies for this purpose. As a result interpretations that may result from these consultations of the Agreement inconsistent with the goals and needs of the organic movement, may be legitimated as well. Therefore, care should be taken with regard to honoring this requirement. We recommend cautious participation upon request, informed by advice of counsel.

#### *7. Other Efforts to Limit the Potential of Conformity Assessment Procedures to be Barriers to Trade*

IFOAM and bodies that it accredits that pursue conformity assessment activities should fulfill the remaining obligations discussed below in the manner recommended, but within the limits indicated.

##### *a. Recognition of Conformity Assessment by Other Bodies*

A similar requirement to the compliance and consideration requirements discussed above is to recognize conformity assessment performed by other bodies. As discussed

previously, the requirements relating to this issue do not appear to demand recognition of any assessment if IFOAM does not deem the practices of the other conformity assessment body adequate. However, these requirements may establish some procedural responsibilities that IFOAM and the bodies it accredit may choose to meet when performing conformity assessments. These responsibilities are to:

- . Be open to the negotiation of mutual recognition with other conformity assessment bodies; and
- . Demonstrate that they have evaluated the conformity assessment practices of other bodies to determine whether to grant them recognition (regardless of whether they decide to grant recognition).

IFOAM probably already meets this requirement, as it is in IFOAM's interest to have conformity assessment procedures that are as easy to apply and uncomplicated to satisfy as possible. This could increase both efficiency for conformity assessors and ease of demonstrating compliance for the bodies being assessed.

#### b. Information Gathering and Confidentiality

Information demanded of parties being assessed should be limited to data that is needed to perform the conformity assessment.

Confidential information (such as business secrets) should be disclosed only as necessary to perform the conformity assessment and should be managed to ensure its unintended disclosure. It may be appropriate to seek advice of counsel to ensure that the management of confidential information protects the conformity assessor as fully as possible from liability in the event of its accidental disclosure.

#### c. Fees and Other Costs

IFOAM and the bodies it accredits that undertake conformity assessment should ensure:

- . Fees charged are equitable, taking into account any special costs associated with assessment of a particular facility;
- . Selection of samples and siting of facilities used for assessment do not cause unnecessary inconvenience to applicants; and
- . Assessment procedures for products, the specifications of which have changed subsequent to an initial assessment, are limited to what is necessary to determine if the product still meets the standards at issue.

Essentially, *a standard of fairness* seems to be called for in the making of decisions concerning fees, sampling and deciding upon locations for facilities. No practice will serve the interests of all applicants for conformity assessment equally well. However, if it

appears that a policy would disadvantage some applicants unnecessarily or unfairly, it should be avoided.

#### d. Procedural Requirements for Conformity Assessment Performance

The following procedural requirements should be met regarding transparency and performance of conformity assessment:

- . Publication of the general processing period for conformity assessment or disclosure to an applicant, upon request, of the anticipated period for assessment of the applicant's product or processes;
- . Review of each application for completeness and disclosure to the applicant of any deficiencies;
- . Disclosure to each applicant of:
  1. The results of the assessment as soon as possible in a complete and precise manner, and
  2. The stage of the procedure without delay upon request;
- . Upon request, to proceed as far as practicable with an assessment, though the applicant has already failed, upon request (Article 5.2.2); and
- Review of complaints concerning the operation of the system and taking corrective action where appropriate (Article 5.2.8).

These requirements seem fairly straight-forward. However, they do imply a well-organized conformity assessment system which assess entities promptly and can readily disclose relevant information to them. IFOAM may also want to keep these requirements in mind when reviewing the conformity assessment practices of the bodies it accredits and recommend that the accrediting organizations among them do the same.

## Appendix I

### Gov't Procurement

## Appendix II

### How to adopt the Code

The TBT Agreement establishes a Code of Good Practice for the Preparation, Adoption and Application of Standards (the Code). This Code may be adopted by any standardizing body, whether central or local government or non-governmental, by any

governmental regional standardizing body at least one of whose members is a Member of WTO, and by any non-governmental regional standardizing body with at least one member situated in the territory of a WTO Member. A standardizing body which accepts or withdraws from the Code is required simply to submit a notification to the ISO/IEC Information Center (see Form A, Notification of Acceptance).

Once it adopts the Code, the standardizing body is bound by the principles of the WTO, primarily to ensure that the standards abide by the national treatment obligation and do not create unnecessary obstacles to trade. In addition, where international standards exist, the standardizing body is required to use them as a basis for the standards it develops, except where such international standards would be “ineffective or inappropriate.”

A standardizing body may, on accepting the Code, make reservations expressing its understanding of the Code. Therefore, when adopting the Code IFOAM should express its understanding that the Code permits IFOAM to use non-PPM criteria in establishing its standards. IFOAM should also establish that the requirement to accommodate interested parties is not an obligation to broaden its voting membership to parties which do not adhere to basic IFOAM’s principles.

The ISO does not monitor the body’s compliance with the obligations. To date, no WTO Member has lodged a complaint against another a standardizing body alleging violation of the Code and it is unclear how such a dispute would be resolved.

## Appendix III

### Influencing and Educating the WTO

#### Agenda

#### Preamble:

environment in the back ground

unequal situation in global standard setting US, EU ISO?? international civic society

Bernward Geier provided documentation but had no time to go in detail yet

IFOAM, FSC and others are working

questions from CIEL/IFOAM/FSC??

1. What would be the benefits to IFOAM of "accepting" the Code of Good Practices? What would be required of IFOAM to do so?
2. Can IFOAM accept the Code on the condition that it may continue to employ criteria based on the production practices of the producers?
3. How could you imagine the use of criteria based on the organic nature of the production of a product to be compatible with the TBT Agreement?
4. What constitutes a "relevant body" under the TBT definition of international body:  
"Body or system whose membership is open to the relevant bodies of at least all Members"
  - a. What consideration will be given to the potential international body's efforts to facilitate participation by relevant parties that face financial or other difficulties in participating?
  - b. What consideration will be given to the composition of the actual participants in the potential international body?
  - c. What consideration will be given to the practice of screening voting membership based on the acceptance of the goals and principles of the potential international body? For example, IFOAM insists that all voting members adhere to principles regarding organic agriculture and processing; will adherence to such principles be considered a proper criteria for "relevance"?

d. Will an international body that is recognized for purposes of standard setting in one substantive area necessarily be recognized for purposes of all standard setting activities?

e. Will the term "relevant" be interpreted differently depending on the context of the standard-setting? Is a body relevant for setting both environmental and nuclear arms reduction standards?

5. How might the concept of like product as used in paragraph D of the Code be understood differently than the concept of like product in Articles I and III of the GATT? Would the Auto Taxes interpretation of like product be viewed favorably in the context of the Code?

6. Respecting requirements that IFOAM consult and cooperate with other standardizing bodies; we are prepared to cooperate with other environmental bodies or bodies that share our concerns, but we do not see the purpose of cooperation with all parties that might claim to have an interest; what are the requirements in this respect?

7. The Code requires that standard-setting bodies provide interested parties with 60 days to comment on draft standards. What constitutes an interested party in this regard?