

TACD

TRANS ATLANTIC DIALOGUE TRANSATLANTIQUE
CONSUMER DIALOGUE DES CONSOMMATEURS

DOC No. TRADE-12PP-03

DATE ISSUED: JANUARY 2003

BRIEFING PAPER AND RECOMMENDATIONS ON PRODUCT LABELS AND TRADE RULES (SEE RESOLUTION TRADE-12-03)

The Focus of the Debate:

The relationship between trade rules and product labels -- particularly labels that distinguish between products based upon the "process or production method" (PPM) by which they are manufactured -- has been a contentious issue since the creation of the World Trade Organization (WTO) in 1994.¹ Much of the controversy originally focused on the status of voluntary "eco-labeling" programs. Many developing countries have argued that the WTO Agreement on Technical Barriers to Trade (TBT Agreement) prohibits labels that distinguish between products based upon the environmental or social implications of different PPMs. The opposition from developing countries has been based primarily on the concern that PPM-based labeling programs could limit their market access based upon environmental and/or social standards developed in industrialized countries. These countries have consistently taken the position that

the negotiating history of the TBT Agreement indicates clearly that there was no intention of legitimizing the use of measures based on non-product-related PPMs under the TBT Agreement, and that voluntary standards based on such PPMs are inconsistent with the provisions of the Agreement as well as other provisions of the GATT. There is objection to any attempt through [the WTO's Committee on Trade and Environment] work on eco-labeling to extend the scope of the TBT Agreement to permit the use of standards based on non-product-related PPMs.²

¹Member nations have failed to agree even on the extent to which PPM-based labeling programs are covered under the TBT Agreement, let alone whether they are permissible if covered. See Committee on Trade and Environment, *Report (1996) of the Committee on Trade and Environment*, WT/CTE/1 (Nov. 12, 1996) paras. 70-73. Much of the debate regarding the status of labeling programs under the TBT Agreement has focused on differing interpretations of the definition of "standards" in Annex 1. See Erik P. Bartenhagen, *The Intersection of Trade and the Environment: An Examination of the Impact of the TBT Agreement on Eco-labeling Programs*, 17 Va. Env't'l L.J. 51, 73-74 (1997).

²Committee on Trade and Environment, *Report (1996) of the Committee on Trade and Environment*, WT/CTE/1 (Nov. 12, 1996) para. 70. See also *First Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade*, G/TBT/5 (19 November 1997), para. 11 (noting "the proliferation of standards prepared, adopted and applied by standardizing bodies which did not follow the disciplines of the [CGP] could have a potentially adverse impact on trade, even if they were voluntary") (emphasis added).

Although the status of voluntary PPM-based labeling programs under the TBT Agreement remains controversial, during the last few years the relationship between trade rules and product labels has been discussed most frequently in the context of *mandatory* labeling requirements for genetically engineered (GE) food. Numerous WTO Members -- including the European Union (EU) -- have implemented or are developing mandatory labeling requirements for GE food. This issue has become a major trade concern for the United States, which is both the home of many biotechnology companies and a major producer of genetically engineered crops, including corn and soybeans. A large coalition of corporations has been lobbying the United States government to take action regarding the regulations on GE food, including labeling requirements, that are currently being developed by the European Union and other countries, including Japan and China.³ The industry coalition argues that the proposed labeling regulations violate various trade rules, including provisions of the TBT Agreement. Significantly, the industry group has attempted to make common cause with developing countries on the issue of PPM-based labeling, stating that

[w]e believe developing nations must be made aware of the adverse precedent that would be set were labeling based on process and production methods (PPMs) to be adopted. Such a labeling regime . . . creates a dangerous precedent not only for biotechnology, but for labor, environment, animal welfare and other non-science based social issues. The requirements necessary to support such labels create potentially insurmountable technical barriers to trade and technology sharing among developed countries. These would be far greater and more detrimental for developing countries.⁴

United States Trade Representative Robert Zoellick has stated that he believes the United States should take the GE food dispute before the WTO's Dispute Settlement Body (DSB),⁵ and press reports indicate that the decision on whether to take the issue to the DSB will be made at a cabinet-level meeting of the Bush Administration.⁶ Although U.S. complaints about the EU's regulatory regime for GE food have focused recently on the approval process for GE food rather than the labeling requirements, the labeling requirements continue to be a source of concern and could be implicated by any WTO dispute settlement proceeding regarding GE food.

The Relevant Trade Agreements:

Product labels are potentially covered under several WTO agreements. The most likely source of conflict between trade rules and product labeling standards is the TBT Agreement, which applies to both mandatory and voluntary product labeling standards, including labeling standards developed by non-governmental organizations.⁷ Labeling standards that address human, plant or animal health issues could

³ See *Letter from Agribusiness Association of Iowa et. al. to Ambassador Robert Zoellick* (November 8, 2002), reprinted in *INSIDE U.S. TRADE* (November 8, 2002); *Industry Letter on EU Biotech Rules to Secretary of Agriculture Ann Veneman* (August 9, 2001), reprinted in *INSIDE U.S. TRADE* (August 10, 2001) (hereinafter "Industry Letter"). See also *Chinese Biotech Rules Could be Problematic for U.S. Exporters*, reprinted in *INSIDE U.S. TRADE* (January 18, 2002).

⁴ See *Industry Letter*, *supra* note 3.

⁵ See *Zoellick Calls for WTO Case Against EU Biotechnology Moratorium*, *INSIDE U.S. TRADE* (January 10, 2003).

⁶ See *NSC to Schedule Cabinet-Level Meeting on Biotechnology Case for Next Two Weeks*, *INSIDE U.S. TRADE* (January 21, 2003).

⁷ Article 4.1 of the TBT Agreement requires WTO Member nations to "take such reasonable measures as may be available" to ensure that private standard setting bodies -- which presumably includes labeling and certification organizations -- comply with the requirements of the "Code of Good Practice for the Preparation, Adoption and

be covered under the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement). In addition, the European Union recently has argued that food labeling issues should be addressed within the context of the Agreement on Agriculture, and has indicated that it is unwilling to make any concessions on agricultural subsidies until its food labeling concerns are addressed.⁸

Discussions on Labeling Within the WTO:

The Final Declaration from the 2001 WTO Ministerial Conference in Doha, Qatar instructs the Committee on Trade and the Environment (CTE) to study the issue of “labelling requirements for environmental purposes” and to make recommendations concerning whether there is a need to clarify their status under WTO rules and whether they should be a subject of future trade negotiations.⁹ The CTE is instructed to report its findings and recommendations to the Fifth Session of the Ministerial Conference, which is scheduled to take place in Cancun, Mexico in September 2003.

At its October 8-9, 2002 meeting in Geneva, the CTE had a detailed discussion of labeling in the context of the Doha Declaration, although Member delegates were unable to agree upon how to address labeling issues.¹⁰ According to the Office of the U.S. Trade Representative,¹¹ within the CTE, there are three, basic positions on labeling. The first group, comprised primarily of developed countries, including the European Union, Switzerland, and Norway, supports new WTO negotiations on labeling, although it is currently unclear what positions the proponents would advocate in negotiations. In a related matter, prior to the October 2002 CTE meeting, Switzerland made a submission to the CTE on labeling for environment purposes, which outlined why the issue of eco-labeling is important, and made several suggestions regarding what should be undertaken by the CTE, including next steps.¹² The second group, again consisting primarily of developed countries, including the U.S., Canada, Australia, New Zealand, and Japan, is skeptical of the need for new negotiations on labeling. In general, this group believes there are adequate existing WTO disciplines that apply to labeling, including the TBT and SPS Agreements, although compliance with these disciplines may be an issue. The third group, consisting largely of developing countries, is suspicious of calls for new negotiations on labeling, and tends to be opposed to non-product-related PPMs. Although USTR would not single out individual countries that comprise this group, apparently Malaysia raised the issue of compliance with existing disciplines, as opposed to new negotiations, at the October 2002 CTE meeting. In a related matter, in May 2002, India made a submission to the CTE on the effects of environmental measures, including labeling, on market access, especially in relation to developing countries.¹³

Application of Standards” (CGP), which is contained in Annex 3 of the TBT Agreement.

⁸See *EU Conditions WTO Agriculture Concessions on Non-Trade Demands*, INSIDE U.S. TRADE (Sept. 6, 2002).

⁹See *Ministerial Declaration* at par. 32 (adopted 14 November 2001), WT/MIN (01)/DEC/1. The status of environmental labeling programs has been one of the central items on the work program of the WTO’s Committee on Trade and Environment since it was created in 1994. See Item 3(b) of the *Decision of the Ministers Regarding Trade and Environment* (14 April 1994), reprinted at 33 I.L.M. 1267-69.

¹⁰BRIDGES Weekly Trade News Digest, Vol. 6, Number 35, October 17, 2002.

¹¹Distilled from an October 18, 2002 briefing by Mark Linscott, Deputy Assistant USTR for Environment & Natural Resources.

¹²*Labeling for Environment Purposes -- Submission by Switzerland*, WT/CTE/W/219 (October 14, 2002).

¹³*Paragraph 32(i) of the Doha Ministerial Declaration - Submission from India*, WT/CTE/W/207 (May 21, 2002).

The status of product labeling standards is also the subject of continuing discussions within the TBT Committee. It is widely believed that any significant changes in or clarification regarding the status of labeling programs are more likely to originate in the TBT Committee than in the CTE. Recently, several WTO Members -- including Switzerland,¹⁴ Japan,¹⁵ Canada,¹⁶ the European Union,¹⁷ and the United States¹⁸ -- submitted papers calling for the clarification of the implications of the TBT Agreement for product labeling standards. Other than the submission by India mentioned supra, no developing country has submitted a paper addressing the labeling issue since the Doha Ministerial. However, in a joint communication to the Special Session of the Committee on Trade & Development, several developing countries proposed amending the TBT Agreement to address special and differential treatment for developing countries.¹⁹

At its June 2002 meeting in Geneva, the TBT Committee instructed the WTO Secretariat to develop a factual paper, containing two lists, prior to the October 2002 TBT Committee meeting. Although concerns related to certification are omitted, the first document is a compilation of 723 notifications by 54 countries related to labeling,²⁰ and the second one identifies specific trade concerns related to labeling.²¹

At the October 17, 2002 meeting of the TBT Committee, there was relatively little discussion on eco-labeling, notwithstanding Switzerland's suggestion that labeling for environmental purposes, referenced in the Doha Declaration as a topic for CTE discussion, should also be discussed in a TBT context.²²

The submission by India states that environmental measures in general can constitute barriers to market access for developing countries, and suggests, *inter alia*, that developing countries be given "longer time frames for compliance" with such measures.

¹⁴*Marking and Labeling Requirements - Submission from Switzerland*, WT/CTE/W/192, G/TBT/W/162 (June 19, 2001).

¹⁵*Labeling Submission from Japan*, G/TBT/W/176 (June 18, 2002).

¹⁶*See Labeling and Requirements of the Agreement on Technical Barriers to Trade: Framework for Informal Structured Discussions Communication from Canada, Revision*, G/TBT/W/174/Rev.1 (May 31, 2002).

¹⁷*Labeling Submission by the European Communities*, G/TBT/W/175, WT/CTE/W/212 (June 12, 2002).

¹⁸*Committee on Technical Barriers to Trade: Labeling -- Submission from the United States*, G/TBT/W/165 (June 25, 2001)

¹⁹*Special and Differential Treatment Provisions X Joint Communication from Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Kenya, Mauritius, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, TN/CTD/W/2 (May 14, 2002).

²⁰*Notifications Related to Labeling (1 January 1995-31 August 2002) X Note by the Secretariat*, G/TBT/W/183 (October 8, 2002).

²¹*Specific Trade Concerns Related to Labeling Brought to the Attention of the Committee Since 1995 X Note by the Secretariat*, G/TBT/W/184 (October 4, 2002).

²²BRIDGES Weekly Trade News Digest, Vol. 6, Number 36, October 24, 2002.

According to USTR,²³ the TBT Committee did agree to convene a workshop, also referred to as a learning event, in conjunction with the July 2003 TBT Committee meeting in Geneva. The parameters of the workshop are expected to be decided at the March 2003 TBT Committee meeting.

Given the history of disagreement over the status of PPM-based product labels under the TBT Agreement, and the WTO's consensus or super-majority based system for decision making, it is unlikely that either the CTE's recommendations or the TBT Committees ongoing discussions will definitively resolve the issue in the near future. Nonetheless, the deliberations of these two WTO committees could present a significant opportunity for both supporters and opponents of PPM-based labeling programs to form alliances and maneuver for support for their position.

Prior TACD Action on Labeling: (The complete text of existing TACD resolutions referenced below can be found on the TACD Web site, www.tacd.org/. Also on the TACD Web site is the November 2001 TACD position paper on the WTO ministerial, which was submitted to the EU and US governments, and the May 1, 2002 letter to Presidents on the EU-U.S. Summit, Washington, D.C.)

The Transatlantic Consumer Dialogue (TACD) has consistently supported the right of consumers to be informed about the products they purchase through product labels.²⁴ In 2001, in its recommendations for the Doha Ministerial, TACD reiterated its support for the consumer's right to know, stating "[t]he [Doha] Ministerial Declaration must clarify that measures to support informed choice by consumers are not inconsistent with WTO rules."²⁵ The Doha Declaration, however, did not contain any language to that effect.

Recommendations:

- 1) TACD continues to support the right of consumers to receive information about the products they purchase.
- 2) Through their work in the World Trade Organization, including the Committee on Trade & Environment, the Committee on Technical Barriers to Trade, and other relevant WTO committees, TACD urges the EU and U.S. to recognize and advocate to other WTO members that consumers have the right to know about the products they purchase, and that both voluntary and mandatory labeling programs that support the rights of consumers to know about the products they purchase are not *a priori* inconsistent with WTO rules.
- 3) TACD continues to urge both the EU and the U.S. to refrain from challenges to each other's labeling requirements.²⁶

²³ Distilled from an October 23, 2002 telephone conversation with Suzanne Troje, Director, Technical Barriers to Trade, Office of the U.S. Trade Representative.

²⁴ See *Eco-labeling*, TACD Doc. No. Trade-6-00 (February 2000); *Ethical Labeling*, TACD Doc. No. Trade-7-00 (February 2000); *Consumer Concerns About Biotechnology and Genetically Modified Organisms (GMOs)*, TACD Doc. No. Food -5PP-00 (February 2000); *Fair Trade Labeling*, TACD Doc. No. Trade-4-99 (April 1999).

²⁵ TACD recommendations to the EU and U.S. governments in preparation for Qatar WTO Ministerial, November 2001, <http://www.tacd.org/docs/?id=116/>.

²⁶ See *TACD Letter to Presidents on the EU-US Summit, Washington DC (May 1, 2002)*; *Impact of the WTO Agreement on Technical Barriers to Trade (TBT) and the WTO Agreement on Sanitary and Phytosanitary Standards*, TACD Doc. No. Food-13-00 (February 2000).