

MARKING AND LABELLING REQUIREMENTS

Submission from Switzerland

I. PURPOSE AND SCOPE

A. NEED FOR CLARIFICATION

1. On national and regional level there is a growing number of various marking and labelling requirements¹ which are regularly subject to discussions and concerns raised within the TBT Committee's debates on the implementation and operation of the TBT Agreement. On the occasion of the Second Triennial Review, the Committee reiterated "the importance of any such requirements being consistent with the disciplines of the Agreement, and in particular stressed that they should not become disguised restrictions on trade²".

2. In the framework of the ongoing negotiations on agriculture, Switzerland's negotiating proposal³ identified non-tariff issues, such as labelling and consumer's choice, as matters of great importance for the agricultural reform process and therefore suggested that the TBT Committee be mandated to resolve the open labelling questions that could impact the outcome of the negotiations.

3. The general applicability of the TBT Agreement to marking and labelling requirements has never been disputed, but discussions imply that it is not clear to what extent the TBT provisions apply to the various marking and labelling schemes. This situation leads to legal uncertainty and therefore weakens the effectiveness of the Agreement.

B. SCOPE

4. The definitions of "technical regulation" and "standard" in Annex 1 of the TBT Agreement refer to requirements dealing with "terminology, symbols, packaging, marking or labelling". With a view to facilitating understanding, this submission refers to marking and labelling requirements only, but intends to include terminology and symbols as well.

5. Furthermore, this submission is limited to marking and labelling requirements as enacted by government bodies. It does not discuss non-governmental initiatives.

6. In line with the mandate of the TBT Committee, the submission solely examines marking and labelling requirements from the perspective of the TBT Agreement and not from other WTO Agreements.

¹ For a compilation of environmental labelling and marking notifications under the TBT Agreement see document WT/CTE/W/150, dated 29 June 2000.

² G/TBT/9 paragraph 48.

³ G/AG/NG/W/94.

II. CONCERNS TO BE ADDRESSED

7. Many Members, in particular developing countries, are concerned that tariff barriers are increasingly being replaced by other measures, such as high quality standards and respective marking and labelling requirements, which might have the effect of creating new barriers to trade.

8. In this respect, one of the biggest challenges to developing countries is the great variety of divergent national or regional marking and labelling requirements. The TBT Agreement recognizes the importance of harmonization of technical regulations and standards for the facilitation of international trade. Hence, international harmonization of marking and labelling requirements could, as one instrument among others, actively contribute to improve access for developing countries' products to industrial countries' markets.

9. A further important issue is that marking and labelling requirements offer interesting opportunities to developing countries. Initiated by the increasing environmental awareness in industrial countries, a new market for products from developing countries has emerged during the last years. For example, developing countries' products, such as organically produced coffee or tea, tropical fruits and jute have successfully gained market shares in a growth sector in industrial countries; moreover, consumers are willing to pay higher prices for such products, which can lead to higher benefits. This trend is likely to continue.

10. Another concern raised with respect to labelling issues is that marking and labelling requirements could be misused by government bodies for protectionist purposes. Within the provisions of the TBT Agreement regulatory or standardizing bodies are obliged to ensure that technical regulations or standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. The TBT Agreement thus provides strong instruments against protectionism.

11. Additionally, it should be taken into consideration that the threat of labelling schemes being misused by government bodies for protectionist purposes is far greater if there is a lack of clarity on the extent to which the provisions of the TBT Agreement apply to marking and labelling requirements.

12. Due to the fact that consumers are willing to pay higher prices for e.g. environmentally friendly products, there is a risk of misuse of marks and labels by producers. In order to obtain a certain mark or label and thus profit from greater benefits, producers might deceive authorities and consumers by pretending to meet the pertinent requirements. This threat of deceptive practices is therefore another concern to be addressed.

13. For all the reasons outlined above, Switzerland believes that an in depth discussion on marking and labelling issues would not only contribute to a better common understanding on the obligations under TBT Agreement, but could also address concerns relating to market access, in particular of products from developing countries, and the misuse of marking or labelling requirements for protectionist purposes or deceptive practices.

III. PROVISIONS UNDER THE TBT AGREEMENT REFERRING TO MARKING AND LABELLING

A. MARKING AND LABELLING REQUIREMENTS AS TECHNICAL REGULATIONS / STANDARDS

14. Definitions of technical regulations and standards under Annex 1 of the TBT Agreement:

Technical regulation: "Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with

which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." [emphasis added]

Standard: "Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." [emphasis added]

15. Marking and labelling requirements falling within the scope of the TBT Agreement are subject to the TBT provisions laying down specific obligations, such as non-discrimination, abstention from creating unnecessary obstacles to trade, proportionality, etc..

B. MARKING AND LABELLING AS PART OF THE CONFORMITY ASSESSMENT PROCEDURE

16. Additionally, marking and labelling is covered by the provisions relating to conformity assessment procedures (Articles 5 to 8 of the TBT Agreement). Pursuant to Article 5.1.1 of the Agreement, Members shall ensure that their central government bodies, local government bodies (according to Article 7.1) and non-government bodies (according to Article 8.1) apply the national treatment obligation. This obligation entails the suppliers' right to an assessment of conformity and to receive the mark of the system.

17. For example, a technical regulation may require that environmentally friendly varnish does not contain certain dangerous substances. For the placing of this varnish on the market as an environmentally friendly product, a conformity assessment may be required. Once the conformity with the technical regulation has been determined, the producer is authorized to use the mark of the system provided that he can assure that his product will continue to meet the corresponding conformity criteria.

IV. OPEN QUESTIONS

A. MANDATORY OR VOLUNTARY LABELLING?

18. According to the TBT Agreement, there are two categories of marking and labelling requirements, depending on whether compliance with the requirements is mandatory (technical regulation) or voluntary (standard). As clear as this distinction may be in theory, it undoubtedly raises great difficulties in practice, since it is not always clear-cut.

19. For instance, a specific marking or labelling requirement, enacted by a central government body, may be voluntary in nature and therefore be considered to be a standard as defined in Annex 1. However, if this standard has the effect of market segregation, compliance with the standard becomes factually mandatory for a producer wishing to access the newly created segment of the market. For example, access for an organically produced cheese to an "organic" ecolabel and thus to the market for organic food is denied unless the producer proves that his product is in conformity with the voluntary standard.

20. In such cases, it is highly questionable whether the distinction between technical regulations and standards is justified. Consequently, the different levels of obligations linked with technical regulations and standards are also questionable. For technical regulations, on one hand, Article 2.1 requires national

treatment in a binding manner. For standards, on the other hand, only paragraph D of the Code of Good Practice⁴, acceptance of which is optional, refers to national treatment.

21. Further, it can be argued that if marking or labelling requirements are considered to be part of a conformity assessment procedure, as explained above (see paragraph 13), they would be subject to the national treatment provision contained in Article 5.1 of the TBT Agreement, regardless of their nature (voluntary or mandatory). Therefore, any differentiation in obligations linked with technical regulations or standards seems even more questionable.

B. QUESTIONS RELATING TO MARKING AND LABELLING REQUIREMENTS BASED ON PROCESS AND PRODUCTION METHODS (PPMS)

22. Another current distinction among marking and labelling requirements is the one between:

- (a) marks and labels based on the characteristics of a product
- (b) marks and labels based on PPMs that reveal in the characteristics of a product
- (c) marks and labels based on PPMs that do not reveal in the characteristics of a product.

23. Still, there is no clear-cut distinction between these three types of marks and labels. Thus, in practice it can be difficult to assign a particular mark or label to one of these three types. This can be illustrated by using the example of an ecolabel for organically produced carrots. When comparing a large quantity of organically produced carrots with an equal amount of conventionally produced carrots, on the average the organic carrots will contain a significantly lower concentration of possibly harmful substances (e.g. pesticide residues), which might indicate a type (b) nature of this ecolabel. On the other hand, when comparing one single organically produced carrot with one single conventionally cultivated carrot, there might be no significant difference detectable, which indicates a type (c) nature of this ecolabel.

24. Consequently it can be argued that this three-part division of marks and labels implicates a certain vagueness; therefore, it would be desirable to reconsider this division.

25. Another uncertainty exists regarding the applicability of the TBT Agreement to marks and labels of type (c). This uncertainty is primarily a result of the ambiguous terminology used in the definitions of technical regulations and standards. Annex 1, paragraph 1, first sentence of the TBT Agreement refers to documents which lay down product characteristics or their related PPMs. However, in Annex 1, paragraph 2, first sentence this link between product characteristics and PPMs is less evident. Finally, the second sentences of both paragraphs, which explicitly mention marking or labelling requirements, do not require product-relatedness of PPMs at all; moreover, these sentences use a broader approach by referring to “a product” rather than to “product characteristics”. This incoherence in terminology displays the ambiguity of the definitions and, therefore, raises the question whether marks and labels of type (c) are covered by the TBT Agreement.

C. LEGITIMATE OBJECTIVES UNDERLAYING MARKING AND LABELLING REQUIREMENTS

26. Pursuant to Article 2.2 of the TBT Agreement, technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective. Furthermore, this provision contains a non-exhaustive list of legitimate objectives, such as the prevention of deceptive practices. Still, the aspect of consumer information, often the primary reason for establishing marking or labelling requirements, is not explicitly mentioned in this list. This raises the question whether consumer information constitutes a legitimate objective for technical regulations. The fact that the prevention of deceptive practices is

⁴ Annex 3 of the TBT Agreement.

explicitly mentioned in the non-exhaustive list of legitimate objectives could provide contextual support for the inclusion of consumer information, as the latter contributes directly to the prevention of deceptive practices.

V. CONCLUSIONS AND WAY FORWARD

27. In the view of Switzerland, a thorough discussion on the open issues outlined in this submission could contribute to the clarification on how and to what extent the TBT Agreement applies to marking and labelling requirements. The improved effectiveness in the operation of the Agreement, possibly resulting from such a discussion, would be in the interest of all Members.

28. Furthermore, such a discussion could contribute to:

- facilitating market access for products originating in developing countries;
 - ensuring that marking or labelling requirements are not misused for protectionist purposes or deceptive practices;
 - identifying major marking and labelling schemes with a view to providing a basis for a possible international harmonization of such requirements, thus further facilitating trade.
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