

**DIMENSIONS OF TRANSPARENCY
IN PRE-STANDARD SETTING
POLICY AND PRACTICE**

**A Study of Public and Private Sector Consultative
Practices**

FIRST DRAFT

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DIMENSIONS OF TRANSPARENCY IN PRE-STANDARD SETTING POLICY AND PRACTICE

SECTION I: TRANSPARENCY PROVISIONS OF THE SPS AND TBT AGREEMENTS AND THEIR INTERPRETATION

I.1 The SPS Agreement¹

Obligations. The WTO's Sanitary and Phytosanitary Agreement contains many provisions relevant to transparency. Primary among them is Article 7, requiring members to notify changes in their sanitary and phytosanitary measures and to provide information on them in accordance with Annex B, which sets forth these requirements in detail.

The Agreement requires, except in urgent circumstances, that Members allow sufficient time between the publication of an SPS measure and its entry into force "for producers in exporting Members, and particularly developing country Members, to adapt their products and methods of production to the requirements of the importing Member."²

Annex B requires publication of regulations, establishment of national enquiry points, and specific notification procedures. It also provides for reservations with respect to publications in languages other than native languages and disclosure of confidential information.

The general obligation is to notify changes in sanitary and phytosanitary measures (as defined in Annex A of the Agreement) promptly, with sufficient lead time for comment from interested parties and adherence to the relevant notification procedures. The procedures are required when there is no international standard, guideline or recommendation, or if the proposed regulation is not substantially the same as an existing standard and if it is likely to have a significant effect on the trade of other Members.

In that case, the proposing Member is required to publish it at an early stage so that interested Members can become acquainted with the proposal, notify through the Secretariat the particular products proposed to be covered, together with a rationale and objective for the regulation. This is to be done early on, when there is still time for amendments to be introduced.

¹The SPS Agreement, formally the WTO Agreement on Sanitary and Phytosanitary Measures, can be accessed together with relevant documentation at www.wto.org

² Annex B, Article 2.

The proposing Member is also to provide copies on request, identifying those parts deviating from international standards, and "without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account."

These requirements may be omitted "if urgent problems of health protection arise or threaten to arise," in which case the Member may omit some of the procedures but must still immediately notify other members, through the Secretariat, about the regulation together with the products covered, objective and rationale and the nature of the urgency, and must still provide copies, allow other members to make comments in writing, discuss them on request and take the comments and the results of the discussions into account.

The Secretariat is charged with prompt circulation of the notifications to all Members and interested international organizations and also to "draw the attention of developing country Members to any notifications relating to products of particular interest to them."³

While not directed to transparency per se but relevant to this study, the SPS Agreement also specifies that "Where an importing Member operates a system for the approval of the use of food additives or for the establishment of tolerances for contaminants in food, beverages or feedstuffs which prohibits or restricts access to its domestic markets for products based on the absence of an approval, the importing member shall consider the use of a relevant international standard as the basis for access until a final determination is made."⁴

Interpretation. While there is an evolving body of jurisprudence under the SPS Agreement, not much of it has so far addressed the transparency obligations of Annex B. However, the Panel in *Japan – Agricultural Products II*⁵ established that the transparency provisions apply to a broad range of instruments, not just those enumerated in the footnote to Para. 1 of the Annex. Also, the Appellate Body in *Australia - Salmon*⁶, reversing the Panel in that case, held that Article 3, requiring the establishment of enquiry points, also imposes (although implicitly) a substantive duty to disclose the Member's chosen level of protection, and is therefore not just procedural in nature.

Although several additional provisions of the SPS Agreement refer to "consultations," Article 11, entitled "Consultations and Dispute Settlement," has not been referenced as applicable to consultations outside the purview of dispute settlement, although it technically might apply. Article 12, entitled "Administration" and also referencing consultations in the SPS committee, has been limited to Committee administration, including the Committee's duty to "encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues."⁷

Discussion in the SPS Committee.

³ SPS Agreement, Article 9

⁴ Annex C, Control, Inspection and Approval Procedures, Article 1.

⁵ *Appellate Body Report on Australia – Salmon*, para. 205

⁶ *Panel Report on Australia – Salmon (Article 21.5 – Canada)*, paras. 7.154-7.157.

⁷ Article 12, Para. 2.

The SPS Committee has discussed since its inception the meaning of, problems with, and improvements needed to the transparency and notification procedures. In 1999 it issued a handbook on them. The handbook sets forth requirements in detail, and includes a format for notifying routine and emergency measures. It does not go beyond the text of the SPS agreement with respect to consultative procedures, but does elaborate on some other aspects of notification, such as the requirement that the notification provisions apply to measures having a “significant effect on trade.” The Committee has provided the following guidance:

“When assessing whether the sanitary or phytosanitary regulation may have a significant effect on trade, the Member concerned should take into consideration, using relevant information which is available, such elements as the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively, the potential development of such imports, and difficulties for producers in other Members to comply with the proposed sanitary or phytosanitary regulations. The concept of a significant effect on trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant.”⁸

The Committee also recently discussed improvements to the transparency and notification provisions in the context of who should bear the primary burden of notifying developing countries when their exports are affected. The current debate between members who favor a demand-driven approach (where developing countries would bear the burden of seeking more, or fuller reporting and consultation) and those favoring a donor-driven approach (where the country responsible for issuing a new SPS regulation would bear the burden of reporting and consultation targeted to those whose exports would be most affected), is so far unresolved. However, the Committee has made it clear that the purpose of notification is not met either in the case where SPS regulations are notified when they are at a very preliminary stage and too inchoate for comment, or in the case where they are notified too late for commenters to achieve changes in the regulations through their comments.

1.2 The TBT Agreement

Transparency is an integral obligation of the Agreement on Technical Barriers to Trade. Para. 2.5 requires that “a Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation ...”⁹

Specific notification, publication and consultation provisions identical to those in the SPS Agreement are set forth in Article 2.9. These provisions apply whenever a relevant international standard does not exist, or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if it may have a significant effect on the trade of other members. Like the SPS Agreement, the TBT Agreement also provides an obligation for Members to ensure that technical regulations which have been adopted are

⁸ G/SPS/7, section 7, as revised.

⁹ TBT Agreement, Article 2.5

published promptly or otherwise “made available in such a manner as to enable interested parties to become acquainted with them”.

Additionally, Members are required, except in urgent circumstances, to allow a reasonable interval between the publication of technical regulations and their entry into force “to allow time for producers in exporting Members, and particularly developing country Members, to adapt their products or methods of production to the requirements of the importing Member.”¹⁰

Article 3 extends the notification requirements to local government bodies and non-governmental bodies (with some exceptions). Article 4 extends to central government standardizing bodies the obligations contained in the Code of Good Practice for the Preparation, Adoption and Application of Standards, (hereafter “the Code”) which is appended to the TBT Agreement as Annex 3.

Article 5 contains substantive transparency obligations with respect to conformity assessment by central government bodies. Article 6 encourages Members to enter into mutual recognition negotiations and to apply national treatment to participation of conformity assessment bodies of other Members in their conformity assessment procedures. Articles 6 and 7 deal respectively with conformity assessment by central government and local government bodies, Article 8 with non-governmental bodies, and Article 9 with international and regional systems. All reference the transparency provisions of Articles 5 and 6.

Article 10 sets forth detailed procedures for the operation of enquiry points, including a requirement for notification of agreements between Members relating to conformity assessments. Article 10.7 encourages Members “to enter, upon request, into consultations with other members for the purposes of concluding similar agreements or of arranging for their participation in such agreements.” Article 11 of the TBT Agreement details a number of requirements for technical assistance, among which could be presumed an enhanced requirement to consult for the several purposes enumerated in the Article. Finally, Articles 13 and 14 replicate the SPS Agreement’s treatment of “consultation” in the context of establishment of the committee and consultation relating to dispute settlement.

The bulk of the provisions detailing requirements applicable to the private sector are set forth in Annex III, the Code of Good Practice. The Code refers to standardizing bodies, but unlike the SPS Agreement, does not define them – rather defines categories of bodies, the most general of which is one in which membership is open to relevant bodies of all Members.¹¹ The Code specifically requires publication of a work program by the standardizing body – notified to the ISO/IEC Information Centre in Geneva according to ISONET rules.

Para. L requires that, before adopting a standard, the standardizing body allow a 60-day comment period, provide the copy of the draft standard to those requesting it, take into account comments received and if possible respond to them, explaining why a deviation from relevant international standards is necessary. Para. Q requires the standardizing body to “afford sympathetic consideration to, and adequate opportunity for, consultation regarding representations with respect to the operation of this Code

¹⁰ Article 2.12

¹¹ Annex 1, para. 4

presented by standardizing bodies that have accepted this code of good practice,” and finally requires the body to “make an objective effort to solve any complaints.”

Interpretation. Only a few dispute settlement panels have examined the provisions of the TBT Agreement. They have generated important jurisprudence, but no guidance on the TBT’s transparency provisions. Most of the interpretation of the Agreement has come through the TBT Committee.

With respect to the transparency provisions of Para. 9 of Article 2, the Committee has clarified that:

“Members are obliged to notify all mandatory labelling requirements that are not based substantially on a relevant international standard and that may have a significant effect on the trade of other Members. That obligation is not dependent upon the kind of information which is provided on the label, whether it is in the nature of a technical specification or not.”¹²

With respect to procedures for notifications, the committee, like the SPS Committee, has issued guidelines and formats. Its guidance on timing is that:

“a notification should be made when a draft with the complete text of a proposed technical regulation or procedures for assessment of conformity is available and when amendments can still be introduced and taken into account.”

Like the SPS committee, the TBT Committee has addressed the meaning of “having a significant effect on the trade of other Members,” adopting an identical definition for the purposes of the guidelines. It has also addressed language and electronic information provision issues, the time available for comments and the handling of comments. The Committee’s guidance provides that

“a Member receiving comments through the designated body should without further request

- (i) acknowledge the receipt of such comments,
- (ii) explain within a reasonable time to any Member from which it has received comments, how it will proceed in order to take these comments into account and, where appropriate, provide additional relevant information on the proposed technical regulations or procedures for assessment of conformity concerned, and
- (iii) provide to any Member from which it has received comments, a copy of the corresponding technical regulations or procedures for assessment of conformity as adopted or information that no corresponding technical regulations or procedures for assessment of conformity will be adopted for the time being.”¹³

Interpretation of the Code of Good Practice has also taken place in the Committee. The Committee has allowed, in guidance, for the use of the internet by standardizing bodies publicizing their work programmes. It has also recognized the need to further develop, with respect to the Code, principles concerning “transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and developing country interests that would clarify and strengthen the concept of international

¹² G/TBT/1/Rev.7, p. 18

¹³ . G/TBT/1/Rev.7, p. 17.

standards under the TBT Agreement and contribute to the advancement of its objectives.”¹⁴

The Committee has also clarified the duties of the enquiry point with respect to responses to inquiries on conformity assessment, as follows:

- (a) (i) An enquiry should be considered "reasonable" when it is limited to a specific product, or group of products, but not when it goes beyond that and refers to an entire business branch or field of regulations, or procedures for assessment of conformity; and
 - (ii) When an enquiry refers to a composite product, it is desirable that the parts or components, for which information is sought, are defined to the extent possible. When a request is made concerning the use of a product it is desirable that the use is related to a specific field.

- (b) The Enquiry Point(s) of a Member should be prepared to answer enquiries regarding the membership and participation of that Member, or of relevant bodies within its territory, in international and regional standardizing bodies and conformity assessment systems as well as in bilateral arrangements, with respect to a specific product or group of products. They should likewise be prepared to provide reasonable information on the provisions of such systems and arrangement.

Finally, the Committee in its second triennial review adopted a decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2,5 and Annex 3 of the Agreement. This decision is reproduced as Appendix I to this report. Its salient features include requirements that international standardizing bodies apply consistently open and transparent procedures, establish standards that are effective, impartial and relevant, and take into account the needs of developing countries.

There is no jurisprudence interpreting the Code of Good Practice.

Discussion in the TBT Committee. The WTO is actively engaging Member countries in information-sharing on the TBT Agreement. It states in its presentation on “Transparency in the Agreement on Technical Barriers to Trade,” a PowerPoint presentation available on the WTO website, that 55 Central government bodies have now accepted the Code of Good Practice, together with 60 non-governmental bodies and a handful of others. A total of 107 enquiry points have been established, and biennial meetings instituted for them at the WTO. The WTO has also compiled a handbook for distribution to Members and standardizing bodies that is available on its website.

The TBT Committee has recently completed its third triennial review.¹⁵ The review highlighted the need for capacity-building for developing countries, and recommended with respect to transparency that members fulfill their obligations, particularly with

¹⁴ The text of the decision is contained in *G/TBT/1/Rev.7*, pp. 26-29.

¹⁵ *G/TBT/13*, searchable at <http://docsonline.wto.org>

respect to notification of draft technical regulations and conformity assessment, and “at an early appropriate stage.”

It also recommended that developed countries provide more than 60 days for comments to meet the needs of developing countries. Among the activities envisaged as a result of the review is a meeting of enquiry points for the purposes of information sharing. The review also establishes a work program for conformity assessment, including a workshop on the different approaches to conformity assessment and on the acceptance of assessment results.

SECTION 2: DEVELOPED COUNTRY CONSULTATION PROCEDURES AND DEVELOPING COUNTRY EXPERIENCES

2.1 LEGAL AND REGULATORY FRAMEWORKS

Most developed countries impose three types of obligations concerning transparency; 1) statutes governing general access to information, 2) statutes imposing general duties

to consult in the course of rulemaking, and 3) statutes mandating stakeholder involvement in particular kinds of rulemaking. In addition to statutory obligations, many developed country governments also allow sub-federal entities to legislate in this area, and direct or allow Ministries at national government level to provide administrative and policy guidance.

Most (type 1, “transparency”) access to information statutes in developed countries are passive – they require that the seeker know in advance where and when to access information. And they do not generally provide a right to respond to information once it has been obtained. Some such statutes may also be limited to citizens, as they are premised on the public’s “right to know”, whether constitutionally defined or statutorily enacted. More important, most such statutes limit access to information about government processes that have not been completed on the assumption that public involvement by this route would interfere with the deliberative process.

Affirmative duties to consult in the course of rulemaking (type 2, “consultation”) are mandated by other statutes – those governing the regulatory process. Some impose duties at a national level, while others are not statutes but rather expressions of administrative policy and embodied in administrative policy directives at the Ministerial, local or regional levels.

An example of a national regulatory process statute is the US Administrative Procedures Act¹⁶, which has been the model for similar statutes in other jurisdictions. This act imposes on administrative agencies a positive duty to publish proposed regulations, to allow comment, and to respond publicly to comments made. The statute sets forth time periods for consultation and comments and imposes duties on agencies to observe public procedures to avoid “secret” rulemaking. It is replicated at the sub-federal level.

The SPS and TBT obligations are not generally legislated in the same context, as additions to or amendments to these statutes. This can cause conflicts. If administrative agencies strictly adhere to the boundaries of their domestic transparency obligations these can be narrower than the transparency required by the SPS and TBT obligations. For instance, an agency may not allow for those outside the domestic audience to comment after a domestic deadline for comments has expired. In such cases the international and the national statutory obligations must be reconciled, and it is the duty of the national authority to do so.

Statutes mandating stakeholder involvement (type 3, “special issues”) are relatively recent, and are usually found in particular areas that have been or are seen to be controversial. These are most often found at the administrative level, and include statutes and procedures governing processes relating to both environment and food safety.

The issue of consultation in regulatory decision-making at the national level therefore intersects with a mix of three public policy areas: the extent to which national authorities have implemented the WTO SPS and TBT obligations, the extent to which they have national administrative procedures that call for consultation of any kind, and

¹⁶ 5 USC 500 et.seq.

the extent to which they are responsive to needs for information in specialized areas, of which the area of environmental regulation has emerged as one of the most important.

2.1.1 The European Union

In order to address national government provisions in EU member states, it is first necessary to describe the extent to which EU-wide provisions shape the consultative agenda for regulations, and the EU standards process. The EU does not govern the national administrative procedures of its member states, and therefore does not have any generally applicable law concerning administrative procedures. However, both the requirements of membership in the Union, including the ability to implement EU directives and regulations, and the responsibility to grant individual rights, require of member states a degree of administrative transparency.¹⁷

Further specific obligations are undertaken by member states when they administer EU directives and regulations in specifically regulated or sectoral areas. One of these is environment. Directive 90/313/EEC requires public authorities to provide access to and dissemination of information on the environment. Although it is general in its application it affects all branches and levels of public administration.

The EU has recently reviewed performance under this directive and proposed to replace it in light of its accession to the Aarhus Convention.¹⁸ The proposed replacement would give particular emphasis to the provision of a “harmonized approach to environmental information through the community.”¹⁹ It would also replace freedom of information with a right to information, and would apply to certain non-governmental institutions as well as to governmental ones.²⁰

The Commission has also recently issued non-legally binding “General principles and minimum standards for consultation of interested parties by the Commission.”²¹ While aimed primarily at civil society and other organizations within the community, it also attempts to establish a clearer link between impact assessment procedures and consultation, to target relevant interested parties for consultations, and to be as inclusive as possible. However, rather than linking to SPS and TBT obligations, it specifically excludes consultation requirements under international agreements.

The trend in the EU member states has generally been that of replacement of informal administrative requirements with more formalized ones required to grant human rights, administer EU-wide directives or attend to the needs of specific sectors. Traditional administrative arrangements, although they may have served well in a national context, are sometimes found not to be as transparent as necessary from a community perspective.

They may be even less transparent from the perspective of those outside the community.

¹⁷ Hans Peter Graver in, “National Implementation of EU law and the Shaping of European Administrative Policy,” maintains that taken together the laws pertaining to individual rights in effect constitute a body of law relating to administrative procedure and standards for public administration. ARENA working papers, available at www.arena.uio.no/publications

¹⁸ “Aarhus” Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

¹⁹ Brussels 29.06.2000, COM(2000) 402 final

²⁰ In most instances, those public bodies that have since been privatized.

²¹ Brussels, 11.12.2002, COM(2002) 704 final, which became effective January 1, 2003

In light of the push to serve the interests of both the broader market and the perceived need for public management reform, the EU has available a document describing how the TBT and SPS transparency obligations are met²². It does not cover standards per se (those promulgated by CEN, CENELEC and ETSI) but does describe how national regulatory projects at the member state level are subject to Commission scrutiny. It references Article 255 of the EC Treaty as giving the right of access to European Parliament, Council and Commission documents, and specific rules relating to it. It also describes the procedure by which member states are obliged to inform and consult each other and the Commission before adoption of measures that might create barriers in the single market. National standardizing bodies are also required by Directive 98/34/EC to inform European standardization bodies and the commission of new standards or amendments differing from international or European standards. Finally, it references publication of national technical regulations in the Official Journal and on the Europa website.²³

Transparency obligations of the Commission are further elaborated in a code of Good Administrative Behaviour²⁴. This encourages a number of transparency-related administrative provisions, including “Listening to all parties with a direct interest,” providing that “Where Community law provides that interested parties should be heard, staff shall ensure that an opportunity is given to them to make their views known.”

Finally, the Commission has issued a Communication on General Principles and Minimum Standards for Consultation with Interested Parties,²⁵ following up Communication on Interactive Policy Making (C(2001) 1014). The document clarifies the Commission’s commitment to an inclusive consultation process and lays down general guidelines for implementation. It became effective in January 2003.

The WTO has reviewed the EU's performance in implementing trade policy consistent with the WTO Agreements. It has described the EU's product regulations at Community level as being of two main types: "old-approach" product-specific ones and "new-approach" regulations which "apply to a large number of areas, limit mandatory obligations to essential requirements, defined to meet health, safety and environmental objectives, while leaving specific technical solutions to meet these requirements to the market, either through voluntary standards or a manufacturers' own solution." Its description of the EU's application of the SPS and TBT agreements is a pro forma recitation that they comply with the requirements, and more specifically that "The European standard-setting organizations and their national committees have each accepted the TBT code of good Practice."²⁶

In summary, EU procedures, while establishing broad guidelines for administrative transparency, including consultations with domestic stakeholders, are neither binding nor are they explicitly addressed to stakeholders outside the EU who may be affected

²² “Transparency in EU Regulatory Procedures,” available at http://europa.eu.int/comm/enterprise/enterprise_policy/gov_relations/internatl_regul_coop_eu

²³ www.europa.org

²⁴ This is available at http://europa.eu.int/comm/secretariat_general/code/index_en.htm

²⁵ Brussels, 11.12.2002, COM(2002) 704 final, available at <http://www.thecre.com/eu-oir/pdf/consult.pdf>

²⁶ TPRM Report on the European Union, available from www.wto.org

by EU regulations. This means that the effective consequences of EU directives and regulations requiring implementation at the member state level are, in terms of transparency and consultation, administered differently in each member state according to its own distinct administrative history and culture.

2.1.2 United Kingdom

a) Transparency

Access to information in the UK was for many years conditioned by the parameters of the Official Secrets Act, which criminalized unauthorized release of official information. This constrained both the ability and the willingness of UK administrators to allow the degree of access that was enjoyed by citizens of other EU member states. However, this culture has recently been significantly modified by legislation and regulations allowing more public access to government decision-making. In addition, the Regulatory Reform Act requires regulatory impact assessment, which opens regulatory procedures to assessment by the public.²⁷

Although the Code of Practice on Access to Government Information has now been supplanted by a Freedom of Information Act, the latter has not yet taken effect across the board, and the Code is still effective. The Code requires publication of information instead of merely access to it, it also prohibits access to "information whose disclosure would harm the conduct of international relations or affairs", and "information whose disclosure would harm the frankness and candour of internal discussion."²⁸

The Act will give any person a right of access to information held by a broad array of public authorities (estimated over 100,000 when it is in full effect. State authorities must respond within 20 working days. Three categories of exemptions include an "absolute exemption" for court records and most personal information, a "qualified class exemption," for information relating to government policy formulation and national security, and a limited exemption for releases prejudicial to specified interests including commercial interests, or that would prejudice the effective conduct of public affairs or inhibit the free and frank provision of advice. An information Commissioner will oversee the Act.²⁹

b) Consultation

The OECD's 2002 Regulatory Reform report on the United Kingdom reported that "Public consultation is widely used and based on a long tradition of pragmatic and flexible approaches to effective consultation. A Code of Practice is in effect from 2001 that sets 12 weeks as the standard minimum period for consultation and a 12 weeks period between when a measure is announced and implemented. The government is active in making regulatory requirements easily accessible.." particularly through use of the internet.³⁰ It added that consultation is so widely used that "consultation fatigue"

²⁷ "Regulatory Reform in the United Kingdom, Government Capacity to Assure High Quality Regulation," OECD 2002

²⁸ Joint Working Party on Trade and environment, "Transparency and Consultation on Trade and Environment - National Case Studies" COM/TD/ENV(99)26/FINAL

²⁹ THE FREEDOMINFO.ORG GLOBAL SURVEY, FREEDOM OF INFORMATION AND ACCESS TO GOVERNMENT, RECORD LAWS AROUND THE WORLD, DAVID BANISAR, MAY 2004, available at http://www.freedominfo.org/survey/global_survey2004.pdf

³⁰ "Regulatory Reform in the United Kingdom, Government Capacity to Assure High Quality Regulation," OECD 2002

may pose a problem for open and transparency rule-making. It ranked the UK as particularly efficient, transparent and accountable in regulatory policy relative to most OECD countries, but concluded that a higher degree of formality might increase transparency since informal procedures based on tradition are less transparent for outsiders.

The UK government has undertaken extensive consultation with domestic stakeholders on a range of issues related to international trade and environmental issues. These include issues related to the Doha Development round, a UK Sustainability Strategy, environmental assessments of trade agreements, the OECD Guidelines for Multinational Enterprises, and other issues. The Foreign and Commonwealth Office (FCO) has also undertaken several initiatives, including establishing a "Green Globe Task Force," seconding developing country personnel to the FCO and a Global Citizenship Unit intended to put British businesses in touch with local communities where they operate in order to encourage socially responsible practices and promotion of transparency. NGO's and businesses are also included to some extent on government delegations to international meetings. The OECD Joint Trade and Environment committee reported in 1999 that civil society representatives were generally satisfied with UK government openness on environmental issues. However, the points of contact described in the report may not be generally available to developing countries interested in internal government deliberations on standards that may affect their exports.

c) Special Issues

The UK signed the Aarhus Treaty in June 1998. The Environmental Information Regulations 1992 implement the 1990 EU Directive on access to environmental information, and new regulations will implement the Aarhus treaty and the 2003 EU Regulations. The 1992 "Environment Information Regulations" direct any Minister, department or person entrusted with public functions "in relation to the environment" to make information available to the public on request (and on payment of a fee). However, they also exempt departments with no clear environmental responsibilities, and information that would affect international relations, the confidential deliberations of any body, and information whose release would increase the likelihood of harm to the environment.

2.1.3 SWEDEN

a) Transparency

The administrative culture of transparency in Sweden is unmatched anywhere in the world. Sweden has provided constitutionally for transparency and citizen participation in rulemaking since the 1700's and was worried on accession to the EU that EU membership might be a constraining influence in this respect.³¹

³¹ Sweden attached a remarkable declaration to its accession agreement, stating that access to official documents, and the protection of journalists' sources, "remain fundamental principles...of Sweden's constitutional, political and cultural heritage". With a taste of problems to come, the existing member states countered this "unilateral" declaration, with their own, noting that they "take it for granted that...Sweden will fully comply with Community law in this respect". From "Access to Information in Sweden and the EU," published in *The Guardian*, June 1996, at <http://www.cfoi.org.uk/sweden1.html>

Sweden's EU membership has brought new administrative duties to an unusually open and decentralized administrative decision-making structure. Performance-based decision making has in many sectors replaced more detailed guidance. However, the principle of transparency remains strong in administrative agencies that for the most part have institutionalized extensive internet-based and other forms of interaction with the public.³²

This transparency also extends to developing countries that might be affected by Swedish regulations. This has recently resulted in the appointment of an Ombudsman for exporters from developing countries. Prompted by its experience in the development field and its observation that developing country exporters may not understand the complex regulatory systems in developed countries and how they work, the Swedish government has succinctly expressed the need for effective interaction as follows:

“Plenty of competitive entrepreneurs in developing countries can't enter our market because they face lots of regulations, many of which are complicated and difficult to grasp. This must change.”³³

The ombudsman at this special contact point will assist entrepreneurs in developing countries who want to export to Sweden to understand relevant regulations and policies, and will provide information and advice.³⁴ The contact point will be placed at the National Board of Trade and is planned to open in 2004 as “Open Trade Gate Sweden.”

The Freedom of the Press Act, part of the Constitution, governs access to information. Chapter 2 on the Public Nature of Official Documents, decrees that “every Swedish subject shall have free access to official documents.” Public authorities must respond immediately to requests for official documents. Requests can be in any form and can be anonymous. The Secrecy Act provides that all documents that are secret must be specified by law, and lists the documents that are exempted. In general,, documents can be protected if their release would harm the interest protected.³⁵

Despite the hortatory support from the Constitution, transparency remains an important issue in Sweden. The government ran an “Open Sweden Campaign” in 2002. The campaign was aimed at increasing public-sector transparency, raising the level of public knowledge and awareness of information disclosure policies, and encouraging active citizen involvement and debate. Some findings from the final government report were that shortcomings existed, including delays in connection with the release of official documents, and improper invocations of secrecy.

The Government has proposed to merge the Secrecy Act and the Public Records Act into a single Management of Official Documents Act.

b) Consultation

Sweden has also addressed its TBT and SPS enquiry Point consultations in a novel way designed to promote the highest degree of transparency. Its National Board of Trade has created a website for its enquiry point, easily accessible and integrated in the

³² "Central Government Administration in the Citizens' Service" (Government Bill 1997/98:136) : A Summary, available at <http://www1.oecd.org/puma>

³³ Press release April 29, 2004, available as http://www.kommers.se/page_disp.asp?node=12

³⁴ *idem*.

³⁵ THE FREEDOMINFO.ORG GLOBAL SURVEY, *op.cit.*

network serving government agencies. According to its website, the Board also acts as a kind of “Ombudsman,” facilitating resolution of issues that may lead to a complaint about actual or potential trade barriers. The Board “analyses all complaints and consider the most effective measures to address the problems raised,” referring cases to the government for further action or deliberation.³⁶ As the official WTO enquiry point, the Board also provides information on Swedish and EU laws and regulations and their implementation, and on Swedish and EU implementation of WTO agreements.

c) Special Issues

Sweden signed the Aarhus convention in June 1998. Access to environmental information is under the Freedom of Press Act.

2.1.4 GERMANY

a) Transparency

German law does not provide the public with a general right of access to information, but German citizens have established access to and participation in much decision-making, largely through informal contacts, and there is a long-standing German tradition of involving experts in public policy decisions. Parliament also has developed some formalized tools for provision of expert advice, called “Enquete Commissions,” which have provided advice on major public issues such as climate change and biotechnology. However, Parliament has taken on a secondary role with respect to much EU environmental legislation.

The Federal structure of Germany accounts for some of the difficulties that exist in administering access to information and consultation with decision-makers in Germany. In particular, the Lander are responsible for implementation of much German environmental law and policy, making the diversity of administrative procedures governing transparency and consultation difficult to access, particularly for non-German speakers not resident in the country. Even German civil society groups are advised that “Effective participation and influence in the policy process requires a high level of informedness, good contacts and continuous communication with the policy community, sufficient financial and personnel endowment and credible backing through members.”³⁷

German federal legislative competence has been encouraged to some extent by the necessity to implement EU-wide directives. However, even as Germany has legislated some of these obligations it has not always implemented them. For instance, a series of legal actions was initiated by the Commission against Germany in relation to its implementation of the procedural aspects of the Environmental Information Act.³⁸ The Commission has also clashed with Germany with respect to the use of non-binding administrative guidelines, a long-established practice in Germany, in implementing an EU directive on air quality.

³⁶ available from http://www.kommers.se/page_disp.asp?node=12, the website of Sweden’s national Board of Trade

³⁷ FN OECD JWPTE COM/TD/EMV(99)26/FINAL

³⁸ Keleman, Daniel R., Globalization, Federalism and Regulation, UCLAS Edited Volume I, “Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies,” available at <http://repositories.cdlib.org/sciaspubs/editedvolumes/1/8>

b) Consultation

The difficulty of accessing relevant administrative officials is compounded by the German administrative structure. At the Federal level a variety of Ministries is responsible for policies affecting trade and environmental issues. They are governed by Joint Rules of Procedure³⁹. These state that "In the preparation of legislation the representatives from the affected professional organizations or interest organizations can be informed and asked for submission of material as well as be given the opportunity to present their views."

The OECD reported in 1999 that "Individual Ministries have substantial discretion in choosing the form of consultation as well as participants and the broad formulation of the guidelines leave considerable room overall for gradual adjustments and improvements in the consultation processes." They also report that while business and labor groups are the main "consultees," other groups have gained access to the process.

However, German industry associations have expressed frustration at the lack of coordination at the national level on environmental policies affecting trade, in particular that trade experts were not consulted sufficiently and at an early stage.

c) Special Issues

Specific environmental regulations require more formalized consultations, again with citizen groups. This includes legislation on emissions control, air pollution, noise and vibration.

The Environmental Information Act⁴⁰ gives a right to information from federal, land and local authorities, concerning activities or measures to protect areas of the environment, including administrative measures and programs for environmental protection. Like other statutes of its kind, it does not allow access to information affecting international relations, national defense or preliminary administrative proceedings, or where it would pose a risk to public safety. Also like other statutes of its kind, it requires an application for the information.

Additionally, the Federal Nature Conservation Act⁴¹ provides for hearings on environmental impacts of development prior to the approval of a project that may affect the environment, and the Environmental Impacts Assessment Act⁴² provides for the involvement of authorities of other member countries of the European Communities, or a non-EC-member neighboring state of the Federal Republic of Germany, if "a project might have significant effects on the assets worth being protected." The act also provides that consultations may be held "with the authorities of the other member state ... or with the authorities of the neighbouring state ... in accordance with the principles of reciprocity and equivalence. The principle of equivalence shall apply to procedures and assessment criteria which are used in the Federal Republic of Germany and the other member states or in the neighbouring state."

German environmental NGO's have had considerable influence on German

³⁹ Gemeinsame Geschadftsordnung, GG0 II

⁴⁰ Environmental Information Act, Act of 8 July 1994, Federal Law Gazette, 1994, I p. 1490

⁴¹ Act of 25 March 2002, available as http://bmu.de.files/bundnatschugesetz_neu060204.pdf

⁴² Federal law Gazette I, p. 205, as amended by Act of 18 August 1997, Federal law Gazette I, p. 2081.

environmental policy, both through the mechanisms of the Green Party and through such institutions as the German NGO Forum Environment and Development that includes more than 60 NGO's and operates 11 thematic working groups, including one on international trade. The OECD reported in 1999 that "the working groups have developed considerable expertise in their respective areas and have become close dialogue partners for these and other Ministries."

German NGO's reported in 1999 that formal information distribution methods were insufficient in terms of timeliness and scope of information, but significant work has taken place since then on internet information sources.

2.1.5 CANADA

a) Transparency.

Like Germany, Canada's federal structure divides decision-making between sub-federal entities and the federal government. In Canada, courts have increasingly interpreted the Constitution to allocate power to the provincial governments. Canada also tries to incorporate both common law and the civil law traditions, and the legal and cultural complexities of dealing with aboriginal self-government. Perhaps because of these factors, Canada was among the first OECD countries to develop explicit policies on regulatory reform, including transparency.

Canada's transparency provisions date to the 1950 Regulations Act, requiring publication of regulations, but currently the Access to Information Act (AIA) of 1983 imposes a statutory obligation to make information available relative to rulemaking and development of national legislation of all sorts. Like other statutes of their kind (such as the US Freedom of Information Act), the AIA is passive, allowing citizens to access information but not imposing an affirmative duty to consult. The statute also allows a broad variety of exceptions. These cover communications among and between agencies engaged in the rulemaking process, and draft legislation.

The Freedom of Information survey report⁴³ notes that the Act has been the subject of some controversy and litigation. It was amended in 2001 to restrict access to some kinds of documents in light of international terrorism, and reviews have underscored the need to address persistent problems, such as "delays, excessive secrecy, improper record-handling practices, fees as barriers to access, inadequate searches and political interference." The report also notes "concern about the growing number of quasi-governmental organizations that perform public functions but operate outside the law." It is administered by the Office of the Information Commissioner of Canada, which reviews the performance of administrative agencies under the Act.

Canada administers a variety of policy and lawmaking requirements that collectively, in the opinion of the OECD, implement the requirements of regulatory impact analysis (RIA).⁴⁴ However, Canadian officials confirm that proposed regulations are normally analyzed for their internal effects, and less often for their effects on the international trade of others. In fact, Canadian regulators have been occupied for many years with

⁴³ Freedom of Information Survey Report, op.cit.

⁴⁴ "OECD Reviews of Regulatory Reform, Regulatory Reform in Canada, Government Capacity to Assure High Quality Regulation, OECD 2002

internal trade issues, adopting an Agreement on Internal Trade (AIT) in 1995 to remove internal barriers to trade, investment and mobility. Among the initiatives in this area is harmonization of internal environmental regulation among provinces. One of the recommendations of the OECD's report is that this initiative be strengthened and that RIA be used consistently for provincial regulation. RIA is also not explicitly used for standards, and in Canada's legal system, standards developed by a recognized standards development organization or professional body can be referenced in regulation, making them mandatory.⁴⁵

b) Consultation.

Reforms undertaken in 1986 implemented consultation requirements government-wide that ensure that citizens should have the opportunity for consultation and participation in the federal regulatory process and be provided with adequate early notice of possible regulatory initiatives. Consultation on subordinate regulations is integrated with the regulatory impact analysis process. Its effectiveness has been reviewed and recommendations made to improve the system by using it more extensively at the onset of the policy planning process, but making it more focused. As in the UK, there is an element of "consultation fatigue" in Canada.⁴⁶

Various consultative processes with other countries are conducted by the Department of Foreign Affairs and International Trade (DFAIT) and are governed by government policy documents. Consultations are also undertaken through the Canadian Centre for Foreign Policy Development, Environment Canada and Health Canada, and specific outreach initiatives have also been undertaken with respect to major rulemaking exercises, some conducted under the aegis of international environmental agreements. Canadian officials report willingness to meet with developing countries on proposed regulations on a bilateral basis in the trade context and in a variety of other regulated areas. In response to Canada's SPS and TBT commitments, regulatory policy also allows for an extended prepublication period during which comments can be made.

c) Special Issues.

Environment-related transparency provisions are contained in the Canadian Environmental Assessment Act (CEAA 1995). This Act governs environmental assessment of projects to ensure that their environmental effects are not detrimental, and mandates creation of a registry of documents to be maintained on a project-by-project basis by the authority responsible for the project. Documents should include all those to which access would be granted by right under the AIA. The Act also establishes procedures for environmental assessments, including of draft legislation, and provides that

"The Minister shall provide reasonable public notice of and a reasonable opportunity for anyone to comment on draft guidelines, codes of practice, agreements, arrangements, criteria or orders under this section."⁴⁷

Authority to regulate concerning toxic substances in food is conferred by the Canadian Environmental Protection Act to Health Canada. This Act allows for substantial

⁴⁵ OECD Regulatory Reform Report on Canada, op.cit.

⁴⁶ idem.

⁴⁷ Canadian Environmental Assessment Act, 1992, c. 37, s. 58; 1993, c. 34, s. 39(F); 1994, c. 46, s. 4; 1995, c. 5, s. 25. Source: <http://laws.justice.gc.ca/en/C-15.2/2677.html>

transparency and access to the process, including the right of Canadian residents over the age of 18 to initiate an investigation⁴⁸.

With respect to consultation, it allows the Minister to act “in cooperation with any government in Canada or government of a foreign state or any of its institutions or any person..”⁴⁹ It further provides that :

“ (2) In carrying out the duties under subsection (1), the Minister shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult with a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in the quality of the environment.
50,,

A 1999 case study on Transparency and Consultations on Trade and Environment published by the OECD⁵¹, provides some insight into how Canadian transparency and consultation provisions are perceived by non-government respondents. The study notes with respect to transparency that certain records tend to be excluded from document registries, including those that have been published or are available for purchase. This complicates the general problem with passive information access systems: the public in practice must have prior knowledge of the existence of records before being able to access them, including being able to identify the Ministry in which they reside, and these procedures are not organized to facilitate timely access to information involved in a particular rulemaking process.

With respect to consultation, civil society groups were happy generally that the Canadian government had taken the initiative to consult on environmental issues and issues arising in international trade negotiations, but were concerned at that time that there was no on-going process to govern or require such consultations.

2.2 DEVELOPING COUNTRY EXPERIENCES

⁴⁸ Canadian Environmental Protection Act, 1999

⁴⁹ <http://laws.justice.gc.ca/en/C-15.31/28915.html>

⁵⁰ Op. cit.. Article 47.2

⁵¹ COM/TD/ENV(99)26/FINAL, OLIS, 21 Oct. 1999, pps12-17.

2.2.1 EU electronic recovery

The idea for recovery of electronic waste first appeared in draft form in the EU in 1998. In June 2000, the European Commission issued proposals for a Directive focusing on the take back and recycling of discarded equipment (known as Waste from Electrical and Electronic Equipment or WEEE), and a second Directive addressing restrictions on the use of certain substances in electrical and electronic equipment, such as lead, mercury, cadmium, and certain flame retardants (known as Restrictions on the Use of Hazardous Substances or RoHS).

Both Directives were adopted on December 18, 2002. The WEEE Directive became effective on February 13, the date of publication. Member States are obliged to transpose the legislation into national law by August 13, 2004. It is currently in the process of being enacted at the national level in the UK, France, Sweden, Italy and Denmark.

Under the WEEE Directive, producers will be held individually responsible for financing the collection, treatment, and recycling of the waste arising from their new products starting in August 2005. Producers will have the choice of managing their waste on an individual basis or by participating in a collective scheme. Waste from old products will be the collective responsibility of existing producers based on their market share.

Under the WEEE Directive, Member States must ensure that a target of at least 4 kg of electrical and electronic equipment (EEE) per inhabitant per year is being collected from private households. This target is to be met by 31 December 2006 at the latest. The policy is intended to create an incentive for companies to design more environment-friendly products.

Under the RoHS Directive, as of July 1, 2006, the placing on the European market of electrical and electronic equipment containing lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls, and polybrominated diphenyl ethers will be prohibited. Existing national measures on these substances can continue to apply until that date. Exceptions to the ban exist for spare parts used for repair, or the re-use of electrical and electronic equipment put on the market before July 1, 2006. Exemptions from the ban on hazardous substances in EEE can be found in the annex of the RoHS Directive.

Comments on the both the WEEE and RoHS Directives and regulations have been made in the WTO TBT Committee, and in other venues, and the regulations have been the subject of concern by developed and developing countries alike. The United States has expressed “concerns that development of these directives lacked transparency and meaningful input from non-EU stakeholders, and would adversely affect trade in products where viable alternatives may not exist.”⁵² Common concerns include the scientific justification for product bans under RoHS without available alternatives, and costs of implementation.

One market research firm found that the anticipated costs of compliance with the WEEE directive for industry were significant, noting that “we found just nine major

⁵² US National Trade Estimates Report to Congress, 2004, available at <http://www.ustr.gov/reports/nte/2004/eu.pdf>

Japanese electronics makers spent about \$1.5 billion on environmental compliance and design for 2001-2002.”⁵³ Estimates of compliance costs per country per year range from 12,856,870 Euros per year in the UK to 598,201 Euros per year. Cost estimates for manufacturers joining a pool, for retailers and for recyclers are also significant.

Responding to concerns about the basis for the substance bans, the Commission pledged to conduct risk assessments. The annexes (covering scope, exemptions, substance concentration) of WEEE and RoHS have been under discussion in an EU technical adaptation committee.

Industry has expressed strong interest in ensuring uniform implementation of the waste management directives in all EU Member States. However, since the legal basis of the WEEE directive is environmental protection, member states can choose to implement more restrictive policies than the EU baseline.⁵⁴ The RoHS Directive, however, cannot be implemented more restrictively unless specific exemptions are granted.

Developed countries as well as developing ones have consulted with the EU on the directives. The US and EU industries consulted bilaterally in 1999 under the auspices of the TransAtlantic Economic Partnership dialogue. Developing country experience has differed between and among EU member states, and with respect to the degree of understanding and preparedness within the industry in each country. Germany, the UK and other EU member states have solicited comments on proposed national implementing regulations.⁵⁵

Consultation in Germany appears to have been focused on local stakeholders. The British Embassy in Berlin reports that

“The Federal Environment Ministry is consulting on draft legislation to transpose the Waste Electrical and Electronic Equipment Directive (WEEE) and the Restriction on Hazardous Substances Directive (RoHS). The proposals will be based on existing local authority-run collection infrastructure, placing an obligation on local authorities to collect and sort waste electrical and electronic equipment. Producers and importers will bear the subsequent cost of treatment.

In a paper published on 5 March, the Ministry circulated its working draft of the WEEE Law, seeking views from stakeholders by the end of March. Thereafter, the Environment Ministry will draw up a final bill, which, following inter-ministerial agreement, will go out to a formal consultation. To meet the EU Commission's deadline, the directives must be transposed into German law by 13 August 2004.”⁵⁶

⁵³ <http://www.marketresearch.com/map/prod/953029.html>

⁵⁴ While passing the directives at the EU level would, in theory, unify the differing national requirements, there is some question as to what extent harmonization will indeed be ensured in practice. This is because the EU Commission has based the WEEE Directive on Article 175(1) of the EC Treaty (which is the legal basis for a majority of the EU's environmental legislation), while the RoHS Directive is based on Article 95(1) of the EC Treaty (the EU's legal basis for Internal Market legislation). <http://www.productstewardship.net/PDFs/productsElectronicsEdesign.pdf>

⁵⁵ http://www.britischebotschaft.de/en/embassy/environment/pdf/env-note_04-07.pdf

⁵⁶ *idem*. Environment Information Note 7.04, 24 March 2004

The Environment Ministry's current website informs the public about the key points of future legal provisions on waste electrical and electronic equipment in Germany as of April 2003, but does not request comments or reflect that comments were solicited.

In contrast, the UK government has undertaken extensive internet-based consultation and information-sharing on its implementation of the WEEE and RoHS Directives, including regular postings on how implementation is progressing in other EU Member States.⁵⁷ Included in the supporting documents for the consultation (which ended March 1) is a partial regulatory impact analysis (RIA).

Sweden issued national legislation on producer responsibility for electrical and electronic products in 2000 that was effective in 2001, but has yet to issue additional adaptive regulation for the WEEE and RoHS Directives. Public consultations took place in the Fall of 2003. The Environment Ministry's publication of draft regulations is imminent. The Environment Ministry's website posts information on the 2000 legislation and includes a draft of the proposed regulations.⁵⁸ Sweden has additionally been considering a national ban on a range of brominated products.⁵⁹

Lobbying on WEEE and RoHS in EU member states in the absence of explicit invitations for comments accompanied by outreach could be assumed to mirror the input that took place on the EU Directive. The WEEE and RoHS Directives were extensively discussed by developed countries at the OECD, and comments were submitted by the US and Canada's electronics trade associations, Japan's electronics industry, the European electronics industry,⁶⁰ by national governments representing them and by many other governments. In addition to questions posed at the WTO's TBT Committee meetings, the Directives were also included in numerous bilateral government-to-government consultations.

The Commission has been actively involved in outreach to some developing countries on the implications of the regulations. For instance, at a conference in Thailand in January 2004 organized jointly by the Delegation of the European Commission to Thailand and the Thai Industrial Standards Institute with the support of Federation of Thai Industries, it presented an overview of the Directives and encouraged Thailand to apply for assistance in meeting the requirements.⁶¹

Awareness in developing countries of the EU Directives and their implementation by EU member states appears to depend largely on the size of their industry, its ownership base, and its previous opportunity for contact with EU regulators. Correspondingly, this may also be the case in developed countries, where a survey carried out by the UK Environment Agency body Netregs revealed that only 18% of UK SMEs knew of the environmental legislation that applied to them.⁶²

⁵⁷ The site can be found at

http://www.dti.gov.uk/sustainability/weee/#Consultation_supporting_documents

⁵⁸ <http://www.internat.environ.se/index.php3?main=/documents/issues/technic/electric.htm>

⁵⁹ EDIE reporting service, report 14/06/2002

http://www.edie.net/gf.cfm?L=left_frame.html&R=http://www.edie.net/news/Archive/5621.cfm

⁶⁰ http://www.beama.org.uk/pdfs/SP%2003_050F%20Org%20PP%20on%20Scope%20WEEE-RoHS%20final%2009-07-03.pdf

⁶¹ http://www.tisi.go.th/WEEE/weee_e.html

⁶² British electronics manufacturing website, "Electronicstalk," at <http://www.electronicstalk.com/news/zir/zir107.html>

In the Philippines, where most existing electronics companies are wholly owned subsidiaries of leading developed world electronic companies, awareness of the WEEE and RoHS requirements is so far relatively good among those subsidiaries. The national industry association (Semiconductor and Electronics Industries in the Philippines, Inc., or SIEPI) maintains contacts with other countries and provides training. In addition, activities of the Bureau of Product Standards (BPS) inform the local industry.

BPS implements and coordinates standardization activity and is active on international and regional standardization initiatives, but has played little role in pre-standard setting. SIEPI commented through the Philippine Bureau of International Trade Relations on the WEEE Directive, based on the advice of its environmental committee. However, apart from that interaction there “appears to be no widespread understanding of WEEE requirements in the electronics industry,” of which only 7% is owned by European firms, and to date there has been no study on the cost implications for the Philippine electronics industry of the WEEE and RoHS Directives.⁶³

Countries outside the WTO system when the WEE and RoHS Directives were conceived are unlikely to have commented on them formally. They must now comment to member states on implementation issues.

In China, a major manufacturing locus for electronic products, it is estimated that manufacturer awareness of the EU and other environmental requirements is at a low level, depending on the scale and character of the enterprise. While foreign owned exporting firms generally knew about the environmental standards in their export markets, those dealing primarily with the domestic market, and medium and smaller enterprises, did not.⁶⁴

Similarly, Chinese suppliers are reported by a business information news service not to be aware of many of the requirements. This source reports that “retailers dealing in low-budget consumer electrical goods, such as alarm clocks and hair dryers, are finding that few of their suppliers in China are aware of the RoHS requirement to substitute lead-based solder by 2006.”⁶⁵

Estimates in China of revenue lost from technical barriers to trade in 2002 are on the order of 17 billion across all sectors. Consequently, China has set up several early warning systems at state level to report on trade barriers but is also preparing to implement the EU policy initiatives domestically.

The American Electronics Association reports that in 2003, the Chinese Government initiated four major environmental policy initiatives that affect the energy efficiency, hazardous material content, and end-of-life disposition of high-tech products, as well as the collection and recycling of spent batteries. New regulations will ban the use of lead (Pb), cadmium, mercury, hexavalent chromium, PBB and PBDE in electronic information products, and China's State Environmental Protection Administration (SEPA) will require producers of TVs, refrigerators, washing machines, air-conditioners, and computers to collect, recycle, and dispose of waste equipment in an

⁶³ Draft UNCTAD Study on “Environmental Requirements, Market Access and Competitiveness in the Electronics Sector: The Case of the Philippines, prepared by Phares P. Parayno, April 2004

⁶⁴ *idem*.

⁶⁵ <http://www.environmental-center.com/articles/article1345/article1345.htm>

environmentally-friendly manner. Pilot projects will be launched in a few Chinese cities in 2004.⁶⁶

In the wake of the WEEE and RoHS Directives, Thailand is setting up an early warning system for regulations that might constitute trade barriers or require substantial adjustment costs. Thailand had addressed WEEE and RoHS issues bilaterally with the Thai-European Commission Senior Officials meeting. It is also adjusting to implementation of WEEE and RoHS on a national level by reviewing its National Environmental Promotion and Preservation Law.

2.2.2 Developing Country Experience With Other Programs

OECD and UNCTAD studies. OECD and UNCTAD have undertaken an extensive set of case studies on the effects of environmental measures on the trade of developing countries. The case studies investigate developing country experience with respect to both SPS and TBT measures, and describe the problem and the response to the problem in each case. Examples of regulation include limits on formaldehyde in textiles, HACCP regulations for fishery products, and limits on pesticide residues in snow peas.⁶⁷

The studies highlight problems derived from lack of meaningful consultation in many instances and also point to some ways in which consultation could be facilitated. The studies illustrate the following problems developing countries have encountered in interacting with the regulatory processes of developed countries. These include:

- Lack of access to information (non-transparency procedures)
- Non-timely access to information
- Inadequate information distribution (SME's can be the last to know)
- Inadequate technical information to implement new regulatory requirements (The requirement may be known but ways in which compliance can be achieved not disclosed or unknown)
- Lack of ability to meet new standards within time permitted for compliance

A review of the studies lists some developments and ideas that may be helpful in alleviating some of the problems with respect to transparency in government standard-setting.⁶⁸ These include

- targeted support and capacity-building initiatives, such as the Multilateral Fund for the Implementation of the Montreal Protocol
- information distribution targeted to small and medium-sized enterprises, such as Tanzania's proposal to create "marketing information centers"⁶⁹
- web-based information on particular developed country regulations, such as the Netherlands-sponsored Centre for the Promotion of Imports from Developing Countries (CBI) at <http://194.247.99.13/accessguide/>

⁶⁶ http://www.aeanet.org/Common/Functions/PrintThisDoc.asp?F_id=22549

⁶⁷ The OECD studies are available at <http://webdomino1.oecd.org/comnet/ech/tradeandenv.nsf> and the UNCTAD ones at http://www.unctad.org/trade_env/test1/meetings/standards.htm.

⁶⁸ OECD Joint Working Party on Trade and Environment, "Addressing market Access Concerns of Developing Countries Arising From Environmental And health Requirements: Lessons From national Experiences, COM/ENV/TD(2003)33/REV2 (declassification pending)

⁶⁹ UNCTAD 2002, "Strengthening capacities to respond to environmental requirements in export markets," at http://ro.unctad.org/trade_env/test1/openF1.htm

- support for developing countries to respond to rapid growth in environmental and social requirements, such as that provided by the Sustainable Trade and Innovation Centre (STIC)⁷⁰
- transition or delay periods for developing countries to meet new standards (such as Germany's postponement of its azo dye requirement for developing country exporters).⁷¹
- increased use of regulatory impact analysis

Challenges to transparency. Developing countries face a host of other problems derived from emerging areas of developed country regulation that will pose challenges to transparency and a measure of how consultation works in practice.

In 2003 the US implemented a Bioterrorism Act with extensive registration provisions for suppliers of food products. The regulations were notified to and discussed extensively in the WTO SPS and TBT Committees, and the US received many comments from developing countries. The final rule reflected changes in some of the regulations based on the comments received, but experience with the law has not been studied.

The EU has since 1993 worked to establish harmonized Maximum Residue Levels for pesticide residues sold in the EU. A new (March 2003) Commission Proposal on Maximum Residue Levels is in progress⁷² and will be finalized soon. The program follows an ongoing review of plant protection products on the EU market under Directive 91/414/EEC, but because of the expansion of the EU to 25 member states and the need to harmonize MRL's across this common market, it has taken on new urgency.

It is now dealing with efforts to approve around 460 substances that had not previously been included in the list of approved substances. Data acceptable for approval are usually submitted by agrochemical companies. If no data is submitted within an acceptable period of time, a tolerance level is set at the level of detection (LOD). Some of the chemicals will also be withdrawn from the market. When a determination is made, member states are required to incorporate it into their laws and products imported with residues of these chemicals are rejected. Retailer performance is published, and some retailers have consequently imposed strict testing requirements.

The problem that has arisen is that many chemicals are used in developing countries for products not grown in developed countries, and for which a chemical company "sponsor" is absent either because the chemical is not produced in the EU or because it is not produced in enough quantity to justify the expense of registering it. For this and other reasons, MRLs for many of the ingredients used by developing country growers on tropical, sub-tropical and out-of-season fruit and vegetables have been set at LOD - the analytical level of detection.

The EU has made efforts to communicate this to developed and developing countries, but reports are that understanding has been poor and some of the largest exporters are

⁷⁰ This will include regional consultations, pilot projects and annual reviews of sustainable trade issues, OECD, op.cit.

⁷¹ OECD, op.cit., p. 21 et seq.

⁷² The full text of the proposal (61 pages) is available from http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0117en01.pdf in 2005.

not sufficiently informed to be able to react effectively.⁷³ A number of affected industries and governments in developing countries have begun to take steps to address the problems caused by the legislation, and development aid agencies have also been involved.

SECTION 3: TRANSPARENCY AND CONSULTATIVE INVOLVEMENT IN PRIVATE SECTOR PROGRAMS

3.1 WHAT STANDARDS FOR THE STANDARDS-MAKERS?

Standards-setting by the private sector has assumed a dominant role in several important areas. “Voluntary” adherence of private-sector suppliers of goods and services to process-based, third-party certified standards relating to environmental management systems and social and environmental considerations has become a common aspect of the market in both developed and developing countries and a literal requirement in some circumstances. This has raised concern that private-sector standardizing organizations are subject to little discipline except that imposed by the market.

The transparency and consultation-related activities of standardizing bodies in the private sector are governed not only by The TBT’s Code of Good Practice, but also by ISO Guides 65 and 59, which in effect govern their operations. The International Accreditation Forum also has a role to play.⁷⁴

⁷³ UK National Resources Institute report, at <http://www.nri.org/NRET/mrl.htm>, and US GAIN report, at <http://www.fas.usda.gov/gainfiles/200404/146106112.pdf>

⁷⁴ The International Accreditation Forum, Inc. (IAF) is “the world association of Conformity Assessment Accreditation Bodies in the fields of management systems, products, services, personnel and other similar programmes of conformity assessment.” <http://iaf.nu>

In practice, new accreditation organizations establish credibility in the market through contacts with stakeholders and by virtue of relationships with the institutional standards structure. The preeminent private sector standardizing organization is the International Standards Organization, which is referenced in both the text of the TBT agreement and in the Code of Good Practice. Other international standardizing bodies have seen in practice if not in law the need to follow its procedural guide for standards-making (Guide 59).

The Guide is similar to the Code of Good Practice in that it sets forth some general principles for standardization bodies. But there are some differences. The WTO Secretariat issued a comparison of the two in 2000⁷⁵ noting that the ISO Guide was more detailed in terms of the procedures for standards development, participation in the process, and coordination of standardization activity in the global standardizing system. It also noted that, in contrast to the TBT Code, the Guide

- Requires participation in international standardization activity to be organized under the auspices of the appropriate national standards body which is the member of the relevant international standards organization and
- Requires that it “reflect a balance of national interests in the subject matter”
- Requires that development of standards be based on consensus, that the standard contain an appeals mechanism and be periodically reviewed, and that development also
- Requires that an opportunity to review and comment on draft standards be provided for all interested parties.

ISO Guide 59 also requires that “Standards should be written to meet the needs of the market-place and should contribute to advancing free trade in the broadest possible geographic and economic contexts. Standards shall not be written so as to impede or inhibit international trade.”⁷⁶

Most standardizing bodies also are members of the International Accreditation Forum, whose purpose is to ensure that accreditation body members only accredit competent bodies and to provide a basis for mutual recognition of accreditation bodies.⁷⁷ Others have chosen not to align themselves with the IAF, but to commit to follow the ISO procedures. For instance, the ISEAL (International Social and Environmental Labeling) Alliance, an umbrella accreditation organization for several social and environmental certification programs, is accredited to the ISO although it is not a member of the IAF.

The ISEAL Alliance has recently promulgated and issued for comment a Code of Good Practice for Setting Social and Environmental Standards, to “fill a void in existing guidance to standard-setting organizations.”⁷⁸ The Alliance asserts that

“While product-related standards are adequately addressed by the TBT Agreement Annex 3 and ISO Guide 59, these reference documents are not relevant in their entirety to the three types of standards covered by this Code.

⁷⁵ G/TBT/W/132, 29 March 2000 (restricted version)

⁷⁶ WTO, *op.cit.*

⁷⁷ IAF, *op.cit.*

⁷⁸ ISEAL has an active website, at <http://www.isealliance.org/>

This Code is meant to complement and co-exist with these two normative documents. To the extent that the TBT Agreement Annex 3 is relevant, it is recommended that standard-setting organizations comply with its criteria. The Code also emphasizes standards that promote progressive social and environmental practices. While progressive practices are difficult to define, this is generally meant to include practices that improve ecological sustainability and social justice and equity.”⁷⁹

Whether or not the TBT Agreement covers process-based standards, the ISO requirements are generally agreed among organizations responsible for generating them. If actually followed, they would likely provide valuable access to standards processes for developing country participants. This is not to say that process-based standards should not be subject to additional transparency disciplines. Organizations engaged in generating them are aware that WTO jurisprudence in the TBT area is evolving, and are actively trying to address some of the trade-related concerns.

3.2 CONSULTATIVE PRACTICES

The transparency and consultative practices of private sector standards programs are as varied as the programs themselves. Most international programs aspire to fulfill the basic requirements of ISO Guide 65. This means that they have had at least an initial round of consultations with consumer groups and suppliers from diverse areas, in many cases including developing countries, that they most likely had one or several workshops or organizing conferences in their initial stages, and that they maintain websites giving access to their standards and sometimes also a list of certifiers. However, this may not mean that these programs have had significant input in the planning stage from relevant interested parties in developing countries, or that they have maintained good contact as their programs expanded or changed to meet the needs of their constituencies and the marketplace.

Programs without international aspirations are less likely to consult outside the country, and this can cause problems when the domestic market for a product is largely supplied by imports. But most of the programs referenced in the OECD and UNCTAD case studies have grown not only to accept, but to solicit developing country perspectives from both government and industry. This is in part because they depend for their success on producer participation in developing countries, and in part because they cannot afford to do without substantive participation in light of recent commentary and criticism from developing countries and development agencies on the extent of their involvement (or lack of it) in these programs. However, some have come to this conclusion only after experiencing problems directly related to the lack of consultation in the initial stages of program planning. These programs can provide a way forward for some of the rest, and in fact have contributed to the net knowledge base of private sector standards programs.

As noted above, the transparency baseline for private sector programs is different than that for public sector ones (which are required to notify SPS and TBT measures). So are their objectives. Where governments regulate to meet the environmental and social and health-related expectations of their citizens, private sector programs normally set standards above the prevailing level of market performance in order drive market actors to exceed it. Environmental standards adherence is essentially a form of

⁷⁹ ISEAL Code of Conduct, at www.isealalliance.org

competition for consumer preferences, articulated by the standards-setters and tested in the market.

Broadly speaking, private-sector environmental standards programs fall into two broad categories, both of which claim to be consumer-driven. In the first category are programs initiated by consumer groups, non-profit organizations or industry associations, claiming to act in the public interest. Their interests range from awarding ecolabels to the best actors in a given market segment to adding value to specific products, often those from developing countries⁸⁰. In the second category are those initiated by retailers, suppliers or other actors in a given industry sector. While these also claim to be consumer-driven, they also satisfy supply-chain management goals. In a third category, environmental management systems operate largely as adjuncts to these programs but are also relevant in terms of applying environmental standards to a given industry sector. While third-party certified, their performance levels are most often self-determined.

3.2.1 Ecolabels

A number of studies are relevant for the purposes of investigating the relative transparency of private sector programs relating to environmental standards. Most concern programs in the first category that have fallen under the banner of ecolabels. This includes work done by the WTO⁸¹, by UNCTAD and the OECD, by the World Bank, and by the US EPA.⁸²

Many of these studies focus on the activities of national ecolabeling programs, but some have studied private sector programs as well.

One conclusion that could be drawn from much of the available literature on ecolabels is that many of the programs are increasingly focused on developing countries, in part because they are the major suppliers in relevant sectors, and in part because of the active involvement of development agencies. As development agencies become more well-versed in market mechanisms available to add value to developing country products in developed countries, they are increasingly reaching out to these private label programs for information and collaboration. For instance, Chemonics, a major development firm, is now a member of the ISEAL Alliance,⁸³ and the Forest Stewardship Program and the Marine Stewardship Council, among others, have both acknowledged the need to work actively in developing countries. National development agencies are also working with many of these programs since they are perceived to add value to developing country exports.

Another general conclusion derived from the OECD and UNCTAD studies in an OECD report on “Developing Country Access to Developed Country Markets Under Selected Eco-Labeling Programmes,”⁸⁴ is that transparency with respect to how

⁸⁰ Codes of conduct are similar in intent but because they can be applied across sectors are covered together with other multisectoral approaches.

⁸¹ World Trade Organization, Committee on Trade and Environment, “Information Relevant to the Consideration of the Market Access Effects of Eco-labelling Schemes,” 29 June 2000, WT/CTE/W/150.

⁸² U.S. Environmental Protection Agency, “Environmental Labelling Issues, Policies and Practices Worldwide,” EPA 742-R-98-009, Washington, D.C., December 1998.

⁸³ Chemonics also held a conference on ecolabels in 2002, oriented primarily toward its work in developing countries. Conference proceedings are available at

<http://marketstandards.chemonics.net/Presentations.asp>

⁸⁴ COM/ENV/TD/(2003)30, 16 May 2003

ecolabel programs operate in practice is a complex issue. The transparency issues these programs bring to bear on this work in developing countries transcend consultation. This report notes, among other transparency issues, that some programs do not involve developing country governments or industries at the inception, have few or no resources located in developing countries, including local certifiers, and that information is generally lacking about whether price premiums are available for participation in particular schemes relative to the costs of participation, and that implementation of the requisite standards can be costly and difficult where infrastructure is lacking. Some of these issues are more relevant to marketing than to transparency per se, but they all play a large part in the degree to which the program will be a success for developing country participants.

The OECD and UNCTAD case studies also provide several examples of instances where relevant consultation with developing countries was lacking. The cases of ecolabels for cut flowers, and mangrove protection illustrate problems in transparency. Other studies in the series illustrate cases where sustained effort has been made to ensure that developing countries continue to receive information about the programs and opportunity to participate in them, much of this after problems have arisen.⁸⁵

Transparency of private sector ecolabeling programs has not gone un-evaluated in consumer reference points. The Consumers Union website in the United States⁸⁶ has given a “report card” to a spectrum of ecolabels, and its reporting categories include whether the label has been developed “with broad public and industry input,” whether the label standards are publicly available, and whether information about the organization is publicly available. Of the labels evaluated on the basis of label development with broad public and industry support, five of seven in pest management failed, as did all seven labels categorized under a sustainable agriculture heading, and in a large general claims category (including claims like “alcohol free” and “free roaming”), 38 out of 42 labels failed. In the same general claims category, 32 of 42 labels failed to make their label standard publicly available (but all seven in the sustainable agriculture standards category satisfied this criterion, as did six of seven in the pest management category).

Given that most of these labels originate in developed countries, it is even less likely that most would meet a general standard for consultation with relevant developing country interests, and failure to make a labeling standard available to the public surely fails a basic measure of transparency. However, the major international labels working in developing countries met most of the basic criteria, and the quality of their performance has generally increased as they have matured.

A final general problem with ecolabels has been their proliferation. The multiplicity of standards generated by them, their failure in general to resolve problems with harmonization and mutual recognition, and the costs incurred by producers and manufacturers having to certify to multiple standards (the organics cases are good examples), have added significantly to the difficulties faced by developing country exporters. However, the “label fatigue” sometimes predicted in major markets has so far failed to materialize and certification to private sector-generated labels is still an important force in the marketplace in developed countries.

⁸⁵ Case studies on sustainability labels for wood and wood products, and organics programs.

⁸⁶<http://www.eco-labels.org/>

3.2.2 Supply Chain Management Standards

In a globalized economy the relationship between supply chain management⁸⁷, which is an important organizing tool, and private sector standards development is an obvious one. Supply-chain management is generally based on a standards system, whether an international one or one designed to meet the needs of the company.⁸⁸ Supply chain management based on environmental standards is most commonly accomplished by reference to environmental management system standards, but can also incorporate any number of other kinds of standards. Quality, benchmarking⁸⁹ and best practices-related standards also contain environmental elements.

In recent years, as “just-in-time delivery” inventory management, and ISO 9,000 and 14,000 standards systems began to take hold across a wide spectrum of industries in multiple globalized sectors, private sector standards development related to these processes increased exponentially and has also spawned the growth of a related information and consulting industry. There is at least one industry association devoted exclusively to procurement and supply chain benchmarking⁹⁰ in which reporting on shared service standards, including those in environment, is to be a standard offering.

Depending on the size and market power of the industry players and their relationships with their suppliers, companies will decide to use either their own standards for supply chain management, or will piggy-back on others. For example, one reference source for companies wanting a “green” supply chain advises companies to answer the following questions:

- Will you adopt existing industry standards?
 - - Ecolabel product certification such as Greenseal or Germany's Blue Angel
 - Certification from industry standards such as ISO 14000 and 14001
 - CERES Principles for environmentally sound business practices
 - The Natural Step
 - The Global Reporting Initiative
 - Balanced Scorecard
 - Management Systems Verification by Responsible Care™ (American Chemistry Council)
 - GREENGUARD Indoor Air Quality certification
- Will you develop your own standards and criteria?

⁸⁷ Defined by one operator in the field as “the combination of art and science that goes into improving the way your company finds the raw components it needs to make a product or service, manufactures that product or service and delivers it to customers.” Supply Chain Management Research Center, at http://www.cio.com/research/scm/edit/012202_scm.html

⁸⁸ “Companies working on supply chain optimization should consider industry standards and the requirements of suppliers and customers as they develop their internal improvement projects. Supply chain optimization is achieved by linking internal and external planning and execution systems into a coherent operation.” From The Food CIO Forum, 2002, at

<http://www.processor.com/article%20master/Food%20Supply%20Chain%20Management.pdf>

⁸⁹ According to one industry association, “Benchmarking is a performance measurement tool used in conjunction with improvement initiatives; it measures comparative operating performance of companies and identifies the “best practices.” <http://www.pasba.com/>

⁹⁰ The Procurement and Supply Chain Benchmarking Association, at <http://www.pasba.com/>

- Will the criteria apply to supplier's practices and operations as well as their products? ⁹¹

The transparency accorded to developing countries and their industries in supply chain management therefore rests most broadly on which programs are chosen by a company to apply to particular kinds of suppliers. This company will also determine what kind of transparency and consultation it will offer to its suppliers in making its determination and establishing the rules for their relationship. Companies are advised (by the reference source cited above) that certain elements of transparency are expected:

- To ease the supplier's role, notify them well in advance, tell them why, and offer assistance, incentives and flexibility.
- Tell suppliers why it is important to meet your criteria
- Notify suppliers of evaluation protocols and schedules, including milestone dates for partial and/or full compliance
- Educate and assist suppliers in how to meet the requirements (See Outreach and Assistance to Suppliers)
- Provide incentives, such as long-term procurement commitment, or shared savings
- If supplier's other customers are stipulating environmental requirements, offer to cooperate with the other customers to minimize duplication of efforts on the suppliers' behalf ⁹²

Finally, companies are also advised to “Develop policy for suppliers and contractors that cannot meet your standards,” including potentially offering assistance, but also potentially seeking out new suppliers or contractors.

The transparency and consultation afforded to suppliers from developing countries in any particular scheme will largely depend on the extent to which they have bargaining power in the industry. Where they are sole suppliers, their customers will be hard pressed to demand that they meet rigorous and costly new environmental standards. However, this is rarely the case in a globalized market, and many kinds of suppliers from developing countries whose market access prospects may have appeared to expand given the nature of the global market have found instead that they are competing with each other not only for developed country markets, but also for their local and domestic ones.

In such cases, meaningful transparency and consultation on which standards will be used, and how they will be articulated and applied can be a luxury not often offered free. This is especially true in the food and agriculture sector, where market concentration among global retailers has intensified, where these same multinational retailers have gained market penetration and now dominate markets in many developing countries, and where standards proliferation is evident⁹³. In such markets, the number of local suppliers has been greatly reduced, and competition even for the local markets is based on a producer's ability to meet the standards set by retailers.

⁹¹ The Pacific Pollution Prevention Center, a non-profit company offering expertise in pollution prevention, at <http://www.pprc.org/pubs/topics/grnchain/ems.html>

⁹² PPRC, op.cit.

⁹³ See presentation by Thomas Reardon on “The Changing Face of Competitiveness and Standards” at <http://marketstandards.chemonics.net/Conference.asp>

In other cases, a multinational developing its own program will want to consult at least initially with developing country producers in order to ensure that the program is credible and can be maintained. For instance, Unilever, which played a central role in developing the Marine Stewardship Program, also sponsored its initial round of worldwide consultations with the fishing industry, including many representatives from developing countries. And Starbucks consulted intensively with local producers before developing its own program⁹⁴.

Finally, it should be noted that environmental standards and codes of conduct are not the only kinds of standards that developing country producers will need to address in the private sector standards marketplace. The need to trace all products back to their manufacturing or production sources is becoming increasingly required, not just by governments intensifying their attention to security, but by retailers in the supply-management context. Hence, Walmart is requiring that its top 100 suppliers use RFID (Radio Frequency Identification) to track products by 2005.⁹⁵

3.2.3 Environmental Management Systems

Environmental management systems are but one kind of system that can constitute the bulk of a supply chain management system. These are for the most part self-determined (by top levels of management) plans to achieve a certain level of environment-sensitive operating procedure within a company. A UNEP publication explains that “Effective environmental management strives to achieve goals for optimizing resource use and minimizing environmental impact while at the same time maintaining economic/businesses growth and viability. It should ideally be integrated in an organization's overall management system, rather than be treated as a separate effort.”⁹⁶

In addition to the ISO 9000⁹⁷ and 14,000 series (14001 governs Environmental Management Systems), the ISO is broadening its range of environmental management systems beyond the industrial context to agricultural practices (Series 22,000). There are other options. The British Standard for EMS (BS 7750) is used in many countries and the Eco Management and Audit Scheme (EMAS) is used in the European Union. For food safety, HACCP functions in part in an environmental management context although its primary purpose is health and safety of food for consumers.⁹⁸

The ISO and other international standardizing organizations have active programs to encourage participation of developing countries and to technically assist them to

⁹⁴ http://www.starbucks.com/aboutus/supplier_code.asp

⁹⁵ see Walmart Announcement at

<http://www.walmartstores.com/wmstore/wmstores/Mainnews.jsp?pagetype=news&template=NewsArticle.jsp&categoryOID=-8300&contentOID=13794&catID=-8248&prevPage=NewsShelf.jsp&year=2004>

⁹⁶ UNEP, “Technical Workbook on Environmental Management Tools for Decision Analysis” at

<http://www.unep.or.jp/ietc/Publications/TechPublications/TechPub-14/1-EMS3.asp>

⁹⁷ The ISO 9000 family includes ISO 9000:2000, ISO 9004 and the specification requirement ISO 9001, ISO 9000-3 (basis for Tick-IT), AS9100 for Aerospace / Aviation, ISO 13485 (compatible with FDA cGMP QSR) for medical devices, TL 9000 for telecommunications, HACCP into ISO 9001, (food sector) - ISO 9001 HACCP, ISO/TS 16949 (harmonizing automotive sector standards), ISO 17025 for laboratories, and others (ISO/IEC 17799, EN 13816...) ISO 9000:2000 explicitly includes supply chain management.

⁹⁸ HACCP,

implement international standards.⁹⁹The ISO has also entered into a partnership with UNISO to assist developing countries to become more active in ISO activities.¹⁰⁰

Environmental management system certification is not generally required as a condition for importation of goods (although there are some exceptions). But it is increasingly required to contract with others in the marketplace. As UNEP puts it, “Establishing an EMS is most definitely not a legally mandated requirement, although increasingly stringent environment legislation and public vigilance are among the reasons that drive organizations and local governments to improve their environmental performance. In some cases the driving force for industries would be international pressure brought about by trade liberalization and high environmental standards in some countries. Setting up an EMS based on ISO14001 requirements is usually initiated by top management itself and, for the industry sector, certification may be eventually required by multinational firms from their different companies, subsidiaries and suppliers.”¹⁰¹

EMS certification is required by a number of large multinationals, among them Ericsson, General Motors, and Bristol-Myers-Squibb. It is also beginning to be required by some national government programs. Its effects on the international trade of developing countries are controversial. As one commentator puts it, “Worldwide acceptance and incorporation of ISO 14001 should expedite international trade by harmonizing otherwise diffuse environmental management standards and by providing an internationally accepted blueprint for sustainable development, pollution prevention and compliance assurance. However, if ISO 14001 is implemented unevenly across countries, there is a danger that ISO 14001 may itself serve as a barrier to trade, especially if it promotes preferential selection of certified companies over non-certified ones.”¹⁰²

3.3 MULTI-SECTORAL AND MULTILATERAL INITIATIVES

A description of how transparency functions in the private sector would not be complete without mention of multi-sectoral and multilateral initiatives. Multisectoral initiatives are those designed to deal across sectors with respect to a particular kind of standards-making, activity, like ecolabeling or process-based standards, whereas multilateral initiatives more commonly bring together those involved in standards-setting in a single sector, or with respect to a particular undertaking like electrical appliance standards, food safety or biodiversity.

3.3.1 Multisectoral initiatives

ISEAL Alliance. Initiatives of all sorts are flourishing in the standards world. Two multisectoral standards initiatives of recent interest, the ISEAL Alliance and the

⁹⁹ ISO website on activities in developing countries, at <http://www.iso.org/iso/en/comms-markets/developingcountries/iso+developingcountries.html>

¹⁰⁰ <http://www.iso.org/iso/en/commcentre/pressreleases/2003/Ref884.html>

¹⁰¹ UNEP workbook, op.cit.

¹⁰² “Environmental management Standards and Globalization,” by Magali Delmas, University of California, Santa Barbara, in UCIAS Edited Volume 1, “Dynamics of Regulatory Change: How Globalization Affects national Regulatory Policies, 2000, available at <http://repositories.cdlib.org/uciaspubs/editervolumes/1/6>

Global Ecolabeling Network, are working to unite many of them around processes of standardization.

The ISEAL Alliance, as noted in Section 3.1 above, has promulgated a Code of Conduct for Setting Social and Environmental Standards. Like many of its member organizations, it aspires to international status and adheres to the ISO Guide 65 but it also goes beyond the Guide and other reference documents in advocating effective participation in standards processes of stakeholders from varying constituencies.

Referencing a number of guidance documents for standards-setting¹⁰³, its Code defines consensus as a process seeking to take into account the views of interested parties, “particularly those directly affected,” and defines interested party as any person “concerned with or directly affected by a standard.” It gives interested parties the opportunity to comment on terms of reference for the proposed standard, on the standard-setting process, and on the standard itself through two rounds of comment. It also obligates the standards-making organization to make publicly available a written synopsis of how each material issue has been addressed in a standard revision.

Somewhat optimistically, it provides that procedures to guide decision-making in the absence of consensus shall “ensure that no group of interested parties can dominate nor be dominated in the decision-making process.” It strives for low cost availability of the standards and translations if requested, requires use of international standards where relevant and pursuit of harmonization “where there is a possibility to do so without compromising the rigour of the standard.”

The Code also requires that participation ensure a balance of interests among interested parties in both the subject matter and in the geographic scope to which the standard applied. “Participants in the standard-setting process should have expertise relevant to the subject matter of the standard and/or be materially affected by the standard.”

Finally, it requires that constraints to effective participation of disadvantaged groups be addressed, that their influence be increased even if their participation cannot, and that particular attention be paid to the needs of developing countries and small and medium-sized enterprises.”¹⁰⁴

In putting forward this Code, the ISEAL Alliance is aiming for a role at the center of “new approach” standards, and is well ahead of governments and private sector groups alike in producing a practical guidance document in this area. In its own words “The ISEAL Code of Good Practice for Setting Social and Environmental Standards is an initiative that aims to set a benchmark to assist standard-setting organizations to improve how they develop social and environmental standards. Future work by ISEAL may focus on the ways in which these types of standards are adopted and implemented, both by companies and by governments.”

¹⁰³ ISO/IEC Guides 2 (Standardization and related activities), 59 (Code of Good Practice for Standardization), (14024 (Environmental labels and declarations – Type 1 environmental labeling – Principles and procedures), OECD GD(97)137, Processes and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM-based Trade Measures, the SPS and TBT Agreements, and the TBT Second Triennial Review Annex 4, Principles for the Development of International Standards

¹⁰⁴ P005 Code of Good Practice for Standard-setting, Final Public Draft 3, January 2004, at http://www.isealalliance.org/documents/pdf/P005_PD3.pdf

It remains to be seen whether the ISEAL Alliance Code will have effect in practice. Certainly, on the basis of the OECD and UNCTAD case studies, and anecdotal evidence, many of the standards-setting activities of important private sector groups both preceding and following its publication do not adhere to its recommended practices. However, it has a normative lead, and will perhaps be influential in enlarging the number of initiatives to which its standards will apply.

GEN. Another unifying force in the private sector environmental standards world is the Global Ecolabeling Network. Primarily concerned with industrial standards (its procedures do not apply to food or agricultural products), it has sought to bridge the space between private sector initiatives and national ecolabeling programs by focusing on harmonization of common core criteria for a number of products, arranging mutual recognition agreements and exploring integration among its members. It has also coordinated and delivered technical assistance to national governments establishing ecolabeling programs.

GEN members include virtually all of the major private and public-sector ecolabels. The ISEAL Alliance is also a member. GEN is preparing to establish a formalized international ecolabelling system. This system would bring under its umbrella existing systems and seek to achieve harmonization of criteria by product category. A similar project was undertaken for toner cartridges and paint in 2001 among four Asian member organizations. Work will begin in 2004 on incorporation of this international approach under the rubric of GENICES, or GEN International Coordinated Ecolabelling System.¹⁰⁵

3.3.2 Multilateral Initiatives

Clearly, the standards setting institutions referenced in the WTO agreements have a role to play in encouraging transparency and developing country involvement in standards-setting via multilateral initiatives. They have each accordingly authored various initiatives, but none have addressed the global implications of the issues. In addition to these, several emerging institutions in the environmental area can be important.

Theoretically each of the multilateral organizations could, depending on member interest and funding, 1) enhance the participation of developing countries in standards setting, 2) enhance the transparency of the processes, 3) link to private sector organizations developing standards, and 4) initiate work to enhance their transparency. A comprehensive survey of all the work underway in each venue was not possible for this study, but some main points stand out.

ISO. The ISO has work underway with developing countries to enhance their participation in the standards process. Many of its industry participants are also responsible for the development of private sector standards and codes of conduct, and represent multinationals in many developing countries. Stronger links between and among ISO participants could be perhaps be forged in this area, perhaps with the coordinating influence of the Business Council for Sustainable Development and local industry associations in developing countries representing small and medium-sized

¹⁰⁵ Information about GEN can be found on its website, <http://www.gen.gr.jp/pdf/gen16.pdf>

enterprises. The ISO could also enhance the transparency provisions of Guides 65 and 59.

CODEX ALIMENTARIUS. The Codex Alimentarius, a child of the WTO and the FAO, has recently undertaken a review that will significantly change its structure and operations. Its newly established Trust Fund is starting to bring developing country participants to meetings and to Codex committees are holding more meetings in developing countries, but most meetings are still held in developed countries, few developing country participants (relative to their total number) attend meetings, working group meetings continue to proliferate, and consistent representation is by no means assured by the adequacy of the Fund. Codex members appear suspicious of standards development in the private sector linked to Codex texts and have opted to maintain the status quo. The Codex standards requirements precede the SPS Agreement and in light of the agreement, Codex members appear prepared to drop Codex requirements that member adherence to its international standards be notified to Codex.

FAO and WHO – These organizations are both potentially influential forces in standards creation and links to many standards processes exist in both. The FAO fisheries Committee has undertaken work on a common set of sustainability standards to which certifiers in developing countries could certify. This could be a new role for a multilateral institution such as FAO.

IPPC – The IPPC is also undertaking a new charter and work related to biodiversity and risk assessment of genetically modified plants. It could be influential in developing international science-based standards that would condition trade in plants consistent with the SPS Agreement. While it is procedurally transparent, it has attracted very little active developing country (and NGO) interest.

OIE – The International Organization for Epizootics, like the IPPC, appears to elicit little interest or participation from developing countries yet has the capacity to be very influential in creating operating standards for animal production.

UNEP - There is in particular a gap in the environmental area, where new institutions are being created to meet specific needs. UNEP is active in promoting harmonization of compliance measures among the international agreements operating under the UN system. It could also take on the way in which standards imcreated under a vatierey of organizations are promulgated.

OECD – The OECD's outreach in particular policy areas is unmatched, and it has accomplished major standards harmonization efforts but it does not have a hands-on facility for dealing with multiple standards areas except in the area of regulatory reform, which has proven somewhat influential in reforming national government public participation and transparency practices. However, it could also prove helpful in a role as a global early warning system of standards emergence in developed countries.

APEC – A regional institution, APEC has undertaken some very useful standards work in its chemicals and autos areas and could be useful to developing countries in setting standards for regulatory impact assessment within national governments and in providing information on and access to standards processes in developed countries. Its Standards committee has undertaken valuable assistance in several areas.

EU – Of course the power and value of the European Union cannot be ignored as it has grown to 25 countries. Although its standards have predominantly reflected developed country values, the inclusion of 10 recent members may render it more open to the participation of developing countries. It has also assisted many developing countries to come to terms with what it now describes as “collective preferences.”

Multi-Institutional Harmonization exercises. A note on multilateral activities in the standards area should also include collective efforts. This does not intend to be in any way exclusive, but two recent examples are of interest.

MOU’s – The ISO has Memoranda of understanding with several other institutions, as do the Codex Alimentarius and the FAO. This kind of cooperation can be pursued both sectorally and functionally and could conceivably address some of the transparency issues in the standards world.

GHS – The Globally Harmonized System of Classification and labeling, a ten-year effort, has finally concluded a common and coherent approach to classifying chemicals based on their hazards, and communicating hazard information on labels and safety data sheets. Formally adopted by the UNECOSOC in July 2003, it is the product of complex negotiations, and represents a tripartite consensus of participating governments and stakeholder organizations.

SECTION 4: CASE STUDIES; COMPARING EUREPGAP AND IFOAM

The differences between the way EUREPGAP and IFOAM standards systems are structured and managed is a sharp contrast in transparency, especially with respect to the degree to which developing countries have had a chance to shape the programs. EUREPGAP and IFOAM are both contemporary programs dealing, on one hand with standards for foods procured by major European retailers, and on the other hand with standards for organic foods, many of which are supplied to the European market.

4.1 EUREPGAP

EUREPGAP was initiated by a consortium of European retailers to benchmark good agricultural practices, in part as a response to surveys conducted after major European food safety crises that suggested that the public saw retailers as partially responsible for assuring food safety.¹⁰⁶ Under pressure from the public to assure the consumer that foods sold at retail were safe, European retailers together decided that harmonized standards were the best way to assure “evidence of environmentally sound, sustainable and food safe farm practices” applied at a retail level. EUREPGAP acts not as a legal requirement, but like other standards may be required by individual retailers as part of their contract specifications.

¹⁰⁶ EUREPGAP: A Private Sector Initiative to Guarantee Food Safety and Environmental Standards, by Eliot Glassheim, Policy Analyst, reprinted from “Plainspeaking,” Northern Great Plains Inc, February 2004.

The EHI-EuroHandelsinstitut e.V., a non-profit private research and education institute in Cologne, Germany, acted as international secretariat in the construction phase of EUREPGAP until February 2001. Since March 2001, EHI founded the independent non-profit company FOODPLUS GmbH that serves as legal owner of the protocol and hosts the EUREP Secretariat. The initial standards were presented at the EUREPGAP 2001 Conference in Bologna, Italy

EUREPGAP currently includes standards covering horticulture, fresh produce, integrated farm assurance (livestock and combinable crops), aquaculture and coffee. There are plans to cover grains. The EUREPGAP protocol document has been accredited to ISO Guide 65 and was designed to meet ISO / IEC Guide7. EUREPGAP is based on HACCP principles, although its scope is limited to prefarm gate. The scheme has also been accredited by Dutch Council for Accreditation under European Standard EN 45011. It is a product / process certification and not a Management System Certification. The founders of EUREPGAP have also embarked on a Global Food Safety Initiative (GFSI), designed to apply food safety systems to the entire food chain and to execute an “early warning system” for food safety problems.

Although the founders and members originally saw this effort as applying mainly to Europe, the degree to which foods purchased for sale in Europe originate outside Europe mean that these standards will essentially need to apply worldwide, both to foods purchased outside the EU market for consumption inside it, and for foods purchased outside the EU for consumption in local markets. Producers and retailers in countries outside Europe using different GAP standards are encouraged to “benchmark” their standards to EUREPGAP – essentially requesting mutual recognition/equivalence. The EUREPGAP participants currently envision a worldwide system harmonizing pre-production practices across the globe, and are marketing the system aggressively in developing countries. There are also demonstration projects in developing countries funded by European countries.

EUREPGAP reports that as of Spring, 2004 “some 13,009 producers from 41 countries have been certified to EUREPGAP protocols. Increasingly, exporters from Asia to EU are being asked to show evidence of compliance to EUREPGAP standards as proof of adherence to Good Agricultural Practice and Food Safety.”¹⁰⁷

The initial EUREPGAP standards for producers require compliance with 41 major standards (of “good agricultural practice”) and 122 minor ones. An additional 91 practices are recommended but not required. A second round of standards has now emerged and will be effective in 2004. EUREPGAP standards address objectives ranging from food safety to environmentally beneficial practices, to animal welfare. They require producers of crops intended for sale in the EU to meet extensive and complex EU legal and regulatory requirements, including product tracing and recordkeeping requirements, pesticide residue requirements, rules for plantings of genetically modified organisms and rules concerning the microbiological aspects of water used for post-harvest washing.

EUREPGAP asserts that its initial standards were formed with producer input. It describes the standards stakeholders and process as follows:

¹⁰⁷ <http://agrolink.moa.my/EurepGap/eurep02.htm>

“EUREPGAP members include retailers, producers/farmers and associate members from the input and service side of agriculture. Governance is by sector specific EUREPGAP Steering Committees which are chaired by an independent Chairperson. Both the standard and the certification system is approved by the Technical and Standards Committees working in each product sector. These committees have 50% retailer and 50% producer representation creating an effective and efficient partnership in the supply chain.”¹⁰⁸

In actuality, the standards-setting process did have useful initial input from several kinds of stakeholders, currently has producer input (although the source of this input is non-transparent) and the organization has increasingly reflected an intention to be more transparent. The EUREPGAP website now invites comments on and complaints about the standards.

However, in practice this has not yet contributed to the perception that the program is accessible in terms of meaningful consultation by either developed or developing country participants, and most see it as a “top-down” operation. One food sector company has generally observed that

“In the EU, government defines regulations that become the ‘price of entry’ for the food chain. In practice, however, it is the retailer, as the custodian of safety for the consumer, who sets the standards by which suppliers are chosen and measured...Unlike the US, where there is a formal process of reviews and comments by industry stakeholders to define how specific regulations will be put into practice, the EU passes legislation and then lets industry work out the implementation. ..The net result is that the full practical implications of the food law have yet to be understood...Therefore my comments are based on our experience in the commercial sector, working with major retailers, private label suppliers for these retailers, the largest foodservice operators, and branded products companies, In effect, these are the stakeholders who will be translating legislation into standards and practices.”¹⁰⁹

4.2 IFOAM

The IFOAM program is significantly different from the EUREPGAP in both purpose and function. IFOAM was initiated in the 1970’s as individual national and international organic movements came together. The IFOAM standards and accreditation procedures are premised on the assumption that differing social, cultural, agricultural and environmental conditions exist in each country or region where IFOAM is active. This is captured in the procedures of each IFOAM operational body in the following way.

IFOAM Norms underlie both the accreditation and the standardizing functions. These are periodically reviewed by IFOAM in consultation with a broad range of stakeholders, revised in light of comments received and republished. They are

¹⁰⁸ Available at EUREPGAP website, <http://www.eurep.org/>

¹⁰⁹ Comments by William Jorgenson, Senior Managing Director, Global Sales and Marketing, John Deere FoodOrigins, “Traceability in the EU: Retailers Set the Standards for Suppliers” available at www.FoodOrigins.com

available on the IFOAM website, at www.ifoam.org. The latest version was approved by the IFOAM General Assembly in August, 2002.

The scope of the IFOAM Basic Standards makes it clear that the basic standards cannot be used as a basis for certification on their own. Rather, they provide a framework for certification bodies and organizations worldwide to develop their own certification standards, taking into account specific local conditions and imposing more specific requirements. The Norms also provide that Draft Standards are those offered to allow standard-setting bodies to develop ways to adapt them to local conditions before they can be made final.

The General Principles of the IFOAM Norms recognize the need to foster local and regional production and distribution, to support a food chain that is socially just, and to “recognize the importance of...indigenous knowledge and traditional farming systems...”

IFOAM accreditation is carried out by the International Organic Accreditation Service (IOAS), based on ISO/IEC GUIDE 65:1996(E), the relevant international standard for accreditation bodies. However, since this guide governs accreditation of products rather than processes, changes have been made. The IFOAM Accreditation Criteria provide (in Section 5.2) for public access to information.

IFOAM recognizes that certification bodies accredited by IFOAM may use standards accepted by other processes or by themselves, but requires that these meet or exceed IFOAM standards. IFOAM has therefore been actively involved in efforts to harmonize certification criteria and standards with national standards-setting processes. With UNCTAD and FAO, IFOAM recently organized a conference on harmonization and equivalence that has initiated a joint task force between the organizations.

IFOAM is a recognized leader in standards-setting in the organic agriculture field. Its Basic standards and criteria are registered by the ISO – it was also used as the basis for regulations by the EU, by the Codex Alimentarius, which has promulgated international standards for organics, and by the US in the process of its organic standards. IFOAM has actively promoted mutual recognition among and between certification bodies that it has accredited, including those also recognized by governments as certifiers to national organic standards systems.

IFOAM has developed several kinds of certification activity addressed to meeting the needs of producers in developing countries. It has developed procedures for group certification, and it has put in place processes to address the needs of smallholders. Both areas were developed after extensive consultation with relevant stakeholders.

SECTION 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Public Sector Transparency

As the above descriptions of national legislation and administrative culture demonstrate, countries could be ranked on a continuum in terms of their responsiveness to the needs of developing countries in pre-standard setting or legislative exercises. On one hand would be those in which a strong sense of local

culture has engendered reluctance to formalize procedures for transparency and consultation. On the other hand would be those with a strong tradition of openness, whose sensitivity to the needs of developing countries is so strong that those countries are provided with representation within the host government. Perhaps in the middle are those that have legislated openness, and whose national administrative procedures are adequate to cover meaningful consultation in principle if they are also observed in practice.

SPS and TBT Implementation. It seems fair to say that at the most general level the obligations of the SPS and TBT agreements are not being fully implemented in spirit even where developed countries have fully elaborated internal regimes imposing positive duties of regulatory transparency and consultation. In part, this is because the statutory framework imposing these obligations was enacted initially for the protection and democratic participation of citizens. The SPS and TBT obligations overlaid on this structure are sometimes an uneasy fit where there is a national administrative procedures framework and observed more commonly in the breach where there is not. Even in the most advanced developed countries, some regulatory agencies do not consider themselves “trade agencies” and are loath to provide notification, particularly at an early stage, to trading partners.

The experience of developing countries in penetrating the regulatory jungle where obligations have been devolved to a state or sub-federal level is also shared by other, developed countries. The transparency obligations of the WTO apply to the central government body and it is primarily responsible for ensuring that states and localities adhere to the agreement, but there is sometimes little explicit oversight.

None of the countries studied here implement domestic transparency in the same legal context used for implementation of the SPS and TBT agreements. The development of more actively integrated policies at the national level in many developed countries may lead to increased attention to the need to respond more effectively to the needs of outsiders trying to cope with regulations intended to be national in scope. However, transferring this legal mindset to standards, which are often made less formally and with substantial domestic input, may be more difficult.

Regulatory Reform. Regulatory reform and oversight on a national level could be useful tools to correct this problem – an OECD process has taken on reviews of regulatory function in OECD member countries and some others. This is a useful starting point. Ex-ante reviews of legislation in terms of their impacts on developing countries are not required in any of the countries studied, but regulatory impact analysis is increasingly becoming a part of the administrative regulatory process in all the countries studied¹¹⁰ and it is becoming more apparent that importers as an interest group are affected by regulations of all kinds. To that end, quite a lot of emphasis in some countries has been placed on ways to facilitate comment from domestic interest groups, and some of this will also facilitate involvement of importers from developing countries.

However, more direction is needed if consultation and transparency is to be provided in substance to importers from developing countries who in some cases are as fully a

¹¹⁰ Canada and the UK are cited by the OECD as being highly experienced practitioners of regulatory impact analysis. OECD Trade Committee, “Integrating Market Openness into the Regulatory Process: Emerging Patterns in OECD Countries, at <http://www.oecd.org/trade>

part of the regulatory stakeholder base as their domestic supplier counterparts. The most obvious way to facilitate developing country involvement in pre-standards-setting processes is to place requests for comments and access to information resources on the internet. Of all countries studied, the UK, Sweden and Canada are the most active in this respect, but the UK and Canada also have the advantage of English as a primary language (Canada is bilingual, using both English and French) and this helps to facilitate access to documents and information from an international audience.

Of course, administrative processes also need to be geared to allow access to information and to invite comment at a meaningful stage of the process. If environmental regulation is seen as a primarily domestic concern, this will affect the timeliness of notice of internal standards-setting, since domestic groups can demonstrate interest in less time than those outside the country. The increased perception that many kinds of regulation need to be addressed in a multilateral context, and the increased formalization of administrative procedures will help to address this issue. Hence, the decision of the European Commission to hold an internet-based consultation on its REACH Directive was helpful in soliciting the kinds of comments that were not received in the WEEE and RoHS process. Also, the influence of the Commission in requiring formal administrative procedures in member state implementation of Community Directives is a development that will facilitate developing country comment, and the enhanced response period given by Canada to outside commentators is helpful.

Finally, increased interagency coordination in developed countries can also facilitate developing country involvement in pre-standards-setting processes. If aid and capacity-building processes are linked to regulatory ones, a developed country can internally ensure that developing country or importing perspectives can be heard. This appears to be what Sweden has implemented in placing an Ombudsman for developing countries in its trade ministry.

International Coordination. Coordination at the international level would be useful for this purpose, whether donor-or demand driven. Consultations in the WTO and bilaterally will no doubt continue to help developed countries understand the consequences of their regulations for developing country importers, but consultation outside the national or federal administrative procedures framework for domestic regulation in many developed country is a potential problem, one that an international coordination mechanism could perhaps resolve.

The SPS and TBT Agreement provisions are becoming better known in the developing countries that are now implementing them. The transition period given to developing countries has meant that many are only now becoming adept at using these provisions proactively. However, episodic consultations cannot replace regular consultation in a rulemaking process and dispute settlement rarely resolves problems relating to the design of a regulation.

There has also been great growth in multilateral activities in areas such as environment. Active involvement of developing countries in multilateral environmental agreements is raising the level of awareness of imminent regulatory developments in related areas and in some cases is also providing a venue for discussion. Developing countries are also actively involved in establishing national voluntary ecolabeling standards systems. The early warning systems being established

in many developing countries will no doubt be helpful in this respect, as will internal coordination mechanisms that facilitate information distribution within developing countries, from the public to the private sector and vice versa. An international coordinating mechanism could have an active role to play in both these areas.

Two other factors may act together to facilitate internationally coordinated contact between developed and developing countries: recognition of globalized interests from domestic actors and involvement of aid agencies in national governments. As the Philippines case demonstrates, multinationals located in developing countries can play an important role in information distribution and can participate with government in commenting on regulatory developments elsewhere. However, the Philippines case also illustrates that without a mechanism that encourages the further distribution of this information to smaller actors in the sector, this role is limited.

5.2 Private Sector Transparency

Looking at the prolific and increasingly industry-driven private sector standards process, it would be easy to conclude that it is characterized more by “contracts of adhesion” – in which one party has most of the negotiating power - than the desire to create a level playing field. Particularly in the case of environmental standards, where developed countries have long paid hortatory homage to the principle that local environmental conditions and the need for local standards should prevail over unilateral approaches, this might be seen to be the case.

However well-intentioned the efforts are, developing countries can legitimately question their effects and the transparency afforded to the process. The perception that developing countries and their industries stand at the receiving end of these efforts is sometimes well-based in reality. The questions that need answers therefore are whether existing initiatives and efforts are sufficient to drive change to a sufficiently open process, and whether additional support mechanisms could add value and facilitate developing country involvement.

In looking at private sector programs it is difficult to separate the commercial drivers from their “collective preferences” and to assume that a solution to private sector programs lies in the private sector. It is possible, but perhaps unlikely, that additional disciplines for process-based labeling will come from the private sector, even given the existence of normative standards for transparency like those of ISEAL. Therefore, one would look first to some of the solutions proposed in the previous section.

Additionally, it will be very difficult to effect change in the way private sector standards are created without the cooperation of private sector bodies. It is possible that if developing countries can find a larger voice in multilateral standards-setting organizations, these can play a role in negotiating transparency and consultation with the major private sector programs. Indeed, the EUREPGAP program envisions cooperation with several multilateral organizations whose activities are referenced in their standards. IFOAM has already been an active participant in an FAO and UNCTAD harmonization effort, and presumably GEN stands ready to assist multilateral efforts as well as national ones.

Creating one central coordinating mechanism for these efforts would be well-advised given the proliferation of private sector standards programs and the multitude of

international institutions that are beginning to crowd the field of environmental regulation.

The effort to facilitate developing country involvement will not be a simple task. Private sector-originated standards pose a significant problem for developing countries, whose industries are sometimes operating with little input from the market mechanisms that are needed to mobilize support. It is difficult for a developing country industry to argue that consumer standards in developed country markets dictate that particular processes or production methods should be used.

SECTION 6: APPENDIX I – TBT COMMITTEE DECISION

DECISION OF THE COMMITTEE ON PRINCIPLES FOR THE DEVELOPMENT OF INTERNATIONAL STANDARDS, GUIDES AND RECOMMENDATIONS WITH RELATION TO ARTICLES 2, 5 AND ANNEX 3 OF THE AGREEMENT ¹¹¹

Background and purpose

At the Second Triennial Review of the Agreement, the Committee noted that in order for international standards to make a maximum contribution to the achievement of the trade facilitating objectives of the Agreement, it was important that all Members had the opportunity to participate in the elaboration and adoption of international standards. Adverse trade effects might arise from standards emanating from international bodies as defined in the Agreement which had no procedures for soliciting input from a wide range of interests. Bodies operating with open, impartial and transparent procedures, that afforded an opportunity for consensus among all interested parties in the territories of at least all Members, were seen as more likely to develop standards which were effective and relevant on a global basis and would thereby contribute to the goal of the Agreement to prevent unnecessary obstacles to trade. In order to improve the quality of international standards and to ensure the effective application of the Agreement, the Committee agreed that there was a need to develop principles concerning transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and developing country interests that would clarify and strengthen the concept of international standards under the Agreement and contribute to the advancement of its objectives. In this regard, the Committee adopted a decision containing a set of principles it considered important for international standards development. These principles were seen as equally relevant to the preparation of international standards, guides and recommendations for conformity assessment procedures. The dissemination of such principles by Members and standardizing bodies in their territories would encourage the various international bodies to clarify and strengthen their rules and procedures on standards development, thus further contributing to the advancement of the objectives of the Agreement.

Decision

1. The following principles and procedures should be observed, when international standards, guides and recommendations (as mentioned under Articles 2, 5 and Annex 3 of the TBT Agreement for the preparation of mandatory technical regulations, conformity assessment procedures and voluntary standards) are elaborated, to ensure transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and to address the concerns of developing countries.
2. The same principles should also be observed when technical work or a part of the international standard development is delegated under agreements or contracts by international standardizing bodies to other relevant organizations, including regional bodies.

¹¹¹WTO/ G/TBT/REV 7, p.26

A. TRANSPARENCY

3. All essential information regarding current work programmes, as well as on proposals for standards, guides and recommendations under consideration and on the final results should be made easily accessible to at least all interested parties in the territories of at least all WTO Members. Procedures should be established so that adequate time and opportunities are provided for written comments. The information on these procedures should be effectively disseminated.

4. In providing the essential information, the transparency procedures should, at a minimum, include:

- The publication of a notice at an early appropriate stage, in such a manner as to enable interested parties to become acquainted with it, that the international standardizing body proposes to develop a particular standard;
- the notification or other communication through established mechanisms to members of the international standardizing body, providing a brief description of the scope of the draft standard, including its objective and rationale. Such communications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
- upon request, the prompt provision to members of the international standardizing body of the text of the draft standard;
- the provision of an adequate period of time for interested parties in the territory of at least all members of the international standardizing body to make comments in writing and take these written comments into account in the further consideration of the standard;
- the prompt publication of a standard upon adoption; and
- to publish periodically a work programme containing information on the standards currently being prepared and adopted.

5. It is recognized that the publication and communication of notices, notifications, draft standards, comments, adopted standards or work programmes electronically, via the Internet, where feasible, can provide a useful means of ensuring the timely provision of information. At the same time, it is also recognized that the requisite technical means may not be available in some cases, particularly with regard to developing countries. Accordingly, it is important that procedures are in place to enable hard copies of such documents to be made available upon request.

B. OPENNESS

6. Membership of an international standardizing body should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members. This would

include openness without discrimination with respect to the participation at the policy development level and at every stage of standards development, such as the:

- Proposal and acceptance of new work items;
- technical discussion on proposals;
- submission of comments on drafts in order that they can be taken into account;
- reviewing existing standards;
- voting and adoption of standards; and
- dissemination of the adopted standards.

7. Any interested member of the international standardizing body, including especially developing country members, with an interest in a specific standardization activity should be provided with meaningful opportunities to participate at all stages of standard development. It is noted that with respect to standardizing bodies within the territory of a WTO Member that have accepted the Code of Good Practice for the Preparation, Adoption and Application of Standards by Standardizing Bodies (Annex 3 of the TBT Agreement) participation in a particular international standardization activity takes place, wherever possible, through one delegation representing all standardizing bodies in the territory that have adopted, or expected to adopt, standards for the subject-matter to which the international standardization activity relates. This is illustrative of the importance of participation in the international standardizing process accommodating all relevant interests.

C. IMPARTIALITY AND CONSENSUS

8. All relevant bodies of WTO Members should be provided with meaningful opportunities to contribute to the elaboration of an international standard so that the standard development process will not give privilege to, or favour the interests of, a particular supplier/s, country/ies or region/s. Consensus procedures should be established that seek to take into account the views of all parties concerned and to reconcile any conflicting arguments.

9. Impartiality should be accorded throughout all the standards development process with respect to, among other things:

- Access to participation in work;
- submission of comments on drafts;
- consideration of views expressed and comments made;
- decision-making through consensus;
- obtaining of information and documents;
- dissemination of the international standard;

- fees charged for documents;
- right to transpose the international standard into a regional or national standard; and
- revision of the international standard.

D. EFFECTIVENESS AND RELEVANCE

10. In order to serve the interests of the WTO membership in facilitating international trade and preventing unnecessary trade barriers, international standards need to be relevant and to effectively respond to regulatory and market needs, as well as scientific and technological developments in various countries. They should not distort the global market, have adverse effects on fair competition, or stifle innovation and technological development. In addition, they should not give preference to the characteristics or requirements of specific countries or regions when different needs or interests exist in other countries or regions. Whenever possible, international standards should be performance based rather than based on design or descriptive characteristics.

11. Accordingly, it is important that international standardizing bodies:

- Take account of relevant regulatory or market needs, as feasible and appropriate, as well as scientific and technological developments in the elaboration of standards;
- put in place procedures aimed at identifying and reviewing standards that have become obsolete, inappropriate or ineffective for various reasons; and
- put in place procedures aimed at improving communication with the World Trade Organization.

E. COHERENCE

12. In order to avoid the development of conflicting international standards, it is important that international standardizing bodies avoid duplication of, or overlap with, the work of other international standardizing bodies. In this respect, cooperation and coordination with other relevant international bodies is essential.

F. DEVELOPMENT DIMENSION

13. Constraints on developing countries, in particular, to effectively participate in standards development, should be taken into consideration in the standards development process. Tangible ways of facilitating developing countries' participation in international standards development should be sought. The impartiality and openness of any international standardization process requires that developing countries are not excluded *de facto* from the process. With respect to improving participation by developing countries, it may be appropriate to use technical assistance, in line with Article 11 of the TBT Agreement. Provisions for capacity building and technical assistance within international standardizing bodies are important in this context.

