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International legal frameworks for food labelling and consumer rights

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Abstract: The chapter discusses the key international human rights questions of relevance to labelling, explains the consumer protection considerations behind labelling and analyses in some detail the most relevant provisions of international trade law.

Key words: food labelling, international human rights law, consumer rights, consumer protection, international trade law, international legal frameworks for food labelling and consumer rights.

3.1 Introduction

Food labelling frameworks aim to regulate different interests, which range from human health and consumers' rights to international trade. National labelling laws must therefore seek a balance of these interests and take account of different international legal obligations that may condition national frameworks.

Labelling rules can be divided into mandatory and voluntary labelling rules. The former determine which information must always be displayed on labels; the latter govern information that may be displayed. For both types of labelling there may be rules about conformity assessments.

The right to health and the right to adequate food are among the key recognized human rights that have a bearing on food labelling, along with the right to information and participation. Consumers' rights include the right to receive adequate and complete information to make their own choices and to handle the food safely. This implies a duty of the state to guarantee that the information

displayed on labels is accurate, sufficient to ensure the safety of the product, enables traceability and permits tracing responsibilities.

International trade rules recognize the right of countries to preserve human, animal and plant health and to pursue legitimate goals, such as the protection of consumers against deceptive practices. At the same time, labelling requirements and certification constitute barriers to free trade, and can be particularly hard for developing countries to comply with. Therefore, such requirements should be proportionate to the objective they serve, transparent and not discriminate between countries.

Food labelling thus touches a number of branches of international law, from human rights law to environmental law to trade law and international food standards. These are sometimes presented as opposing branches of law; in particular, there is perceived conflict between human rights and trade.

However, in international law, there is a strong presumption against normative conflict (International Law Commission, 2006, paras 37–43). When negotiating new agreements that create obligations for them, states are generally assumed not to wish to create conflict with existing obligations. The International Court of Justice referred to this presumption in the *Right of Passage* case and stated, ‘it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it’ (ICJ, 1957: 142).

This principle is also valid for successive international obligations. The Vienna Convention of the Law of Treaties provides rules on application of treaties including rules on observance, retroactivity and application of successive international agreements, preventing conflicts of implementation.

It must therefore be assumed that states intend different branches of international law that have a bearing on labelling of goods to be in harmony and not in conflict with one another. This takes on a particular significance when it comes to international trade law and international human rights law. They must be presumed to be harmonious with and should be seen in the context of one another.

In the following, this chapter will discuss the international human rights of relevance to food labelling and will also highlight some of the more relevant consumer protection issues. It will then analyse in some detail the most relevant provisions of international trade law, and the objectives they seek to pursue. The conclusion will return to the question of perceived or actual conflict between the different branches of international law.

3.2 International human rights law

International human rights law is linked to labelling laws with regard to the right to food, the right to information and the right to participation, amongst others. Environmental law, including for protection of endangered species, sustainable production methods and more, is also sometimes reflected in labelling to address consumer concerns.

Human rights law provides general principles against which to judge labelling provisions and the processes leading to their adoption at the national and international levels. They do not provide detailed labelling provisions themselves and may not always solve conflicts between two or more valid principles, such as the right to adequate food, the right to information and the right to affordable food.

3.2.1 Right to food and health

Food labelling laws can be seen as one of the ways a state protects the human right of individual consumers to adequate food. The right to adequate food is recognized in article 25 of the Universal Declaration of Human Rights (UDHR) and is binding on the 160 state parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), where the right is recognized in article 11 as part of the right to an adequate standard of living and separately as the ‘fundamental right to be free from hunger’.

The right implies the right to produce one’s own food or to purchase affordable food that forms part of a healthy and balanced diet. State parties must respect, protect and fulfil this right progressively (CESCR, 1999, para 15). This implies that the state must first respect people’s existing access to food, second protect this right from third party infringement, primarily by the enactment and enforcement of laws, and, finally, the state has an obligation to fulfil the right to adequate food by creating an enabling environment for people to feed themselves in dignity and by providing for transfers of food or cash to buy food when people are unable to do so through their own efforts. Food labelling laws are an expression of the state obligation to protect the right to adequate food.

The adequacy standard refers to the safety, nutritional value and cultural acceptability of the food (CESCR, 1999, paras 9–11). Labels on safe handling and storage of food as well as on the content and nutritional value are therefore of direct relevance and so are labels relating to cultural beliefs or traditions, for instance on whether meat is ‘halal’. It might also be argued that acceptability of GMOs in food is a cultural question, and therefore should be covered by labels from a human rights point of view in those countries. At the same time, the right to food implies that food must be economically accessible (*ibid*, para 13), so affordability remains an important consideration in labelling regulations, as labelling requirements may incur costs to the producers and subsequently to the consumer.

Article 12 of the ICESCR recognizes the right to highest attainable standards of health. The current obesity epidemic is creating new pressures on regulators to take action to protect consumers from nutrient-poor and energy-dense foods, through restrictions on marketing and through new labelling schemes aimed at assisting consumers in making healthier choices. These developments gain legitimacy through the right to health as well as the adequacy element of the right to food.

The Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Right to Food Guidelines for short), were adopted by the FAO Council in November 2004 by

consensus and contain provisions on labelling principles in Guideline 9 on Food Safety and Consumer Protection:

9.7 States should adopt measures to protect consumers from deception and misrepresentation in the packaging, labelling, advertising and sale of food and facilitate consumers' choice by ensuring appropriate information on marketed food, and provide recourse for any harm caused by unsafe or adulterated food, including food offered by street sellers.

The Guidelines also mention labelling in the context of their nutrition guideline, stating in paragraph 10.2: 'States are encouraged to take steps, in particular through education, information and labelling regulations, to prevent over-consumption and unbalanced diets that may lead to malnutrition, obesity and degenerative diseases.'

According to the World Conference of Human Rights, 'all human rights are universal, indivisible and interdependent and interrelated' (UN, 1993, para 5). In the context of food labelling, the right to information is intimately linked to the right to adequate food. Thus, individuals have a right to accurate information about the food they buy.

3.2.2 Right to information

The right to information is recognized in UDHR (article 19) as 'the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' The 164 state parties to the International Covenant on Civil and Political Rights (ICCPR) are obliged to enforce this right, as it is recognized in similar terms in ICCPR article 19. According to the UN Special Rapporteur on the right to freedom of expression, '[a]lthough international standards establish only a general right to freedom of information, the right of access to information, especially information held by public bodies, is easily deduced from the expression 'to seek [and] receive ... information' as contained in articles 19 of the [UDHR] and [ICCPR]' (UN, 2004, para 39). Many countries now have laws that stipulate the right to access public information and the obligation to disclose it (*ibid*, para. 37).

In the case of food labelling standards, however, the information is mostly not held by public authorities but by food producers. The standards are thus public law that regulates private law interaction between buyers and sellers. In human rights terms, as with the right to food, and closely related to the right to food, the state has the obligation to protect the right to information through adequate legislative provisions and other measures. In this context, freedom of expression becomes important as well, as that right can be considered to also have a negative aspect, i.e. a right not to speak (Miskiel, 2001: 227). The right of the consumers to get information may then be limited by the right of the producers not to provide information. In the balancing of these aspects, considerations relating to the right to adequate and affordable food and public health, as well as environmental protection, would be very important.

The Convention on the Rights of the Child recognizes the right of the child to the highest attainable standard of nutrition, and, in this context, contains a provision on the promotion of breastfeeding (article 24), which is scientifically recognized as the best nutrition for babies. Article 9 of the Code of Conduct on Marketing of Breast-milk Substitutes (adopted by WHO in 1981) contains strict provisions on labelling of infant formula. The label must contain a statement on the superiority of breastfeeding and ‘neither the container nor the label should have pictures of infants, nor should they have other pictures or text which may idealize the use of infant formula’.

This issue highlights the links between labelling and other methods of marketing a food product, as the Code of Conduct prohibits advertising of breastmilk substitutes and limits marketing methods strictly, so as to avoid displacement of breastfeeding in cases where formula is not needed.

3.2.3 Right to participation

Human rights, such as the right to food and the right to information, also have a process element, such as accountability, non-discrimination and recourse. Participation is another important principle in the realization of human rights, and is also a human right in itself. Thus, ICCPR article 21 recognizes the right to peaceful assembly; article 22 the right to freedom of association; and article 25 the right to take part in the conduct of public affairs. The principle of participation means that people should be able to determine their own well-being and participate in the planning, design, monitoring and evaluation of decisions affecting them. Individuals must be able to take part in the conduct of public affairs, including the adoption and implementation of policies (FAO, 2009). In this regard, all individuals are consumers at some point and to a greater or lesser degree.

The principle of participation is implemented in practice through the inclusion of consumer groups and manufacturers in the shaping of policies and legislation on labelling and other such issues. In a democratic society, participation is also ensured through the elected representatives, who are then entrusted with taking decisions and adopting laws.

3.2.4 Right to environment

The right to food is limited in principle to food acquisition in ways that are sustainable (CESCR, 1999, para 8). This implies a limit to the ways in which food is produced so as not to threaten the right to food of future generations.

The 1972 United Nations Conference on the Human Environment declared that ‘man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself’ (para 1). The 1992 Earth Summit adopted the Rio Declaration and Agenda 21, which contain numerous references to human rights in connection to environmental protection and sustainable development.

While a human right to sustainable environment is a relative newcomer to the

human rights field, environmental law has a separate existence through international legal developments over the last few decades. Labelling is related to environmental law for instance in the case of labels such as ‘dolphin-safe tuna’, or living modified organisms regulated by the Cartagena Biosafety Protocol.

3.3 Consumer protection

The Latin maxim *caveat emptor* means ‘let the buyer beware’ and is no longer considered appropriate for retail selling of food. Rather, it is recognized that consumers often face imbalances in economic terms, educational levels and bargaining power. The consumer should be protected from unsafe food, unfair practices and inaccurate or misleading information. Measures should also be taken to promote more sustainable consumption patterns.

Many countries have adopted consumer protection laws, both general laws and for specific sectors. Consumer protection concerns are also incorporated directly into food labelling provisions, or at least form the underlying basis for the provisions, whether on health and safety, accuracy of information or mandatory disclosure. Consumer protection and rights are often influenced by human rights: they share the same underlying values, whether or not there are explicit human rights references in the relevant provisions. This is the case for the right to food, the right to health, the right to information and the right to participation.

Consumer protection is recognized to some extent as a legitimate objective of measures that may constitute barriers to trade (see subsequent section). The exact balance from a trade perspective is being established on a case by case basis in the WTO.

There is no international legally binding instrument that details consumer protection as such. The UN Guidelines for Consumer Protection (as expanded in 1999) were adopted by the General Assembly and fall within the so-called soft law category: they rely on persuasion rather than the force of law. They are the most thorough international document on the issue. The document states that consumers should have the right to access non-hazardous products as well as the right to promote just, equitable and sustainable economic and social development and environmental protection (article 1). It espouses the principles of consumer protection with regard to health and safety, and economic interests. The principles also include access to adequate information to enable consumers to make informed choices according to their individual wishes and needs, consumer education and the availability of effective consumer redress. Furthermore, the freedom to form consumer groups is recognized (article 2).

The Consumer Protection Guidelines contain a number of provisions, including for the provision of information necessary to enable consumers to take informed and independent decisions, as well as measures to ensure that the information provided is accurate (article 22). It is, however, interesting to note that they do not refer directly to human rights.

The concept of sustainable consumption is a particular focus of the UN

Guidelines since their expansion in 1999. The issue was well covered in the 1992 Rio Declaration on Development and the Environment and Agenda 21. The guidelines state that unsustainable patterns of consumption, particularly in industrialized countries, are the major cause of environmental degradation (article 4). They further state that policies for sustainable consumption should take into account the goals of eradicating poverty, satisfying basic human needs of all members of society and reducing inequality between and within countries.

Measures to promote sustainable consumption, especially those that empower consumers and demand their choices to be ethical, including through food labelling, should be distinguished from other, more drastic measures, such as banning of marketing of products that fall short of standards. For instance, it is illegal to buy and sell products from certain endangered species, rather than it being allowed and subject to a labelling requirement.

The Consumer Protection Guidelines (article 24) specifically refer to ‘voluntary and transparent eco-labelling programmes’ among the many provisions aimed at environmental aspects related to consumer protection.

Ecological, fair trade and similar labels measures spring from sustainable consumption concerns and are backed by international human rights and environmental law, as well as the goals set out in international conferences from Rio to Rome, for a more equitable and just society. If consumers are to be able to influence methods of food production and choose foods that have smaller ecological impact and that promote equity and social justice, then producers must be either forced or allowed to provide the information consumers need. This is done through labelling as well as advertisements and other ways of communication.

It should be noted, however, that the Consumer Protection Guidelines also contain a specific provision that consumer protection methods should be consistent with international trade obligations (article 10). This means that the Guidelines could not be used to challenge international trade law. However, human rights law and environmental law, as binding legal standards, could possibly be used for interpretation and application of international trade law, in the spirit of seeking convergence between different international obligations. The Consumer Protection Guidelines could also serve to interpret ambiguous provisions of international trade law.

3.4 International trade agreements

Labels serve many different purposes in international trade. They transmit information to the importing country and the foreign purchaser, contain essential safety and health information and support consumers’ choice. They further permit tracing the origin of the products and thus maintain public order and safeguard the rights of consumers to seek redress. On the other hand, stringent labelling requirements that are different for each country hinder international trade. Trade agreements impose limits on labelling requirements countries can make, in order to facilitate international trade.

This section examines labelling from an international trade law perspective. It is important to distinguish between the following national regulatory aspects:

1. Legally binding (obligatory) labelling requirements: These determine which information it is obligatory to provide on a food label in a country.
2. Voluntary labelling schemes of public or private origin: Such systems may be regulated: (a) through framework law or regulation (ensuring legal protection and furthering the policy interests involved), with details in non-binding standards; or (b) based on private standards, under the framework of the national general labelling or consumer protection legislation.
3. Legal frameworks for conformity assessment, which regulate accreditation, monitoring and surveillance of certification bodies as well as the recognition of the equivalence of foreign conformity assessment bodies.

In the following, some of the key issues and principles of the WTO agreements will be analysed, with a view to clarifying what labelling requirements are consistent with international trade rules. Domestic legislation on labelling should be shaped with those rules in mind, so as to increase competitiveness of exporters and to avoid trade disputes with other WTO members.

3.4.1 The relevant trade agreements

The Marrakech Agreement establishing the World Trade Organization (WTO Agreement) entered into force on 1 January 1995, along with a slate of revised and new trade agreements annexed to it. As of July 2008, WTO had 153 members and many more applicants. The WTO provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all, thus contributing to economic growth and development. Multilateral treaties are seen as fairer than bilateral trade treaties, where parties are often in very unequal positions. They facilitate international trade by creating a rules-based environment and more harmonized standards for exporters.

Food labels come under the ambit of a number of WTO agreements, notably the General Agreement on Tariffs and Trade (GATT), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS); the Agreement on Technical Barriers to Trade (TBT), and the Agreement on Rules of Origin. These agreements provide the legal ground rules for international trade applicable to labelling provisions.

GATT provides the key principles of WTO law on international trade in goods. The more specific agreements, such as TBT and SPS, prevail in case of conflict (WTO Agreement Annex 1A, General interpretative note). The TBT Agreement aims to ensure that product requirements, including labelling requirements, and procedures that are used to assess compliance with those requirements, do not create unnecessary obstacles or 'technical barriers' to trade. It covers all goods, whether agricultural or industrial.

The SPS Agreement contains specific rules for the drafting of national provisions aiming at the protection of human life, plant or animal health from diseases

and health hazards, which may constitute barriers or establish restrictions to trade. Its objective is two-fold: (a) to recognize the sovereign right of members to determine the level of health protection they deem appropriate; and (b) to ensure that a sanitary or phytosanitary requirement does not represent an unnecessary, arbitrary, scientifically unjustifiable or disguised restriction on international trade.

If a measure falls under the SPS Agreement, then the TBT Agreement is not applicable (article 1.5 TBT). Sanitary measures on food labelling include indications and conformity marks to the effect that a product complies with a certain provision on microbiological criteria, pesticides residues or food additives. Health warnings, allergen information, expiry date, handling and storage information also belong to this category (see Annex A SPS). Other measures, which cannot be considered sanitary or phytosanitary measures (even those with the objective of protecting human health), such as list of ingredients and nutrients (fats, proteins, carbohydrates, etc.), fall within the scope of the TBT Agreement. In other words, the SPS Agreement covers food safety aspects, rather than health aspects related to food composition or balanced diets.

Each WTO member sets laws and regulations on food imports, including labelling requirements. They must ensure that these do not create unnecessary barrier to trade. Any food labelling measure or law that may hinder free trade has to stand up against the scrutiny of the WTO agreements.

WTO members have a legal obligation to comply with WTO provisions in the drafting and implementation of their food labelling schemes. The Dispute Settlement Body receives complaints from member about non-compliance. It consists of the entire membership, so is served by a smaller Appellate Body which in turn constitutes a Panel for each case. Labelling provisions found to be inconsistent with WTO rules could cause fines, sanctions and commercial embargoes. The possible economic consequences strengthen observance of international trade law, which can be contrasted with other fields of public international law with weaker compliance mechanisms, for instance human rights law.

3.4.2 Principles of international trade

The WTO agreements share a number of common trade principles, which are all applicable to labelling provisions. These are:

Non-discrimination

Members agree to apply technical regulations equally to domestic and imported products without any differentiation between the two, and to imported products from different member countries. These principles are aimed to ensure the fair and undistorted competition among countries in their trade relations.

Harmonization

Members agree to use relevant international standards as a basis for preparing and harmonizing technical regulations and standards.

Equivalence

Members agree to recognize technical regulations different from their own if they fulfil the same policy objectives.

Mutual recognition

Members agree to enter into negotiations with other members for the mutual recognition of conformity assessment procedures including testing, inspection, calibration and certification.

Transparency

Members agree to notify WTO organs of measures and ensure domestic transparency of procedures.

Proportionality

Members agree that technical regulations measures should not restrict trade more than necessary to achieve legitimate objectives. Members may establish mandatory labelling requirements to pursue legitimate objectives such as consumer protection, provided that such measures do not unnecessarily restrict trade.

Special and differential treatment

WTO Agreements generally recognize the particular trade, development and financial needs of developing country members, including least developed countries, and provide that they be treated differently in some respects, allowing for exceptions, flexibility and transition periods as well as technical assistance.

3.4.3 Mandatory and voluntary labelling requirements

National legislation requires certain information to appear on food labels, such as the name of the food, ingredients of processed food, the name of the producer, etc. It will then set limits and frameworks for voluntary labelling, that is, information that producers *may* provide, and under what circumstances they may make certain claims, such as health claims or other statements that serve to market the food and give consumers more information. The main principle is generally to protect consumers against misleading information while providing for consumer choice and a healthy marketing environment. There are some differences between country practice as to whether an issue is covered by mandatory or voluntary labelling, and this is sometimes a source of contention, for instance regarding the subject of genetically modified organisms. Food safety labelling information that comes under the SPS agreement is normally mandatory.

The TBT Agreement applies to compulsory labelling requirements (technical regulations) and voluntary labelling indications (standards), whether they are developed by governments or private entities, at the national or the regional level. The difference between a technical regulation and a standard is elaborated in Annex 1 to the TBT Agreement:

1. *Technical regulation*

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

2. *Standard*

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

Mandatory labelling provisions, such as product name, list of ingredients, weights and traceability information, are always regulated by 'technical regulations'. WTO case law has further defined what falls under technical regulation and what under the definition of a standard (WTAB/R, 2001, para 68).

Public or private rules that cover labelling in a non-binding, voluntary fashion are considered 'standards' for the purposes of TBT. These voluntary labels can be ruled by non-binding instruments or by legally binding provisions establishing the legal frameworks for producers who may want to adhere, voluntarily, to a certain system of labelling. Regulating voluntary labels by legally binding instruments has the advantage of strengthening legal security to consumers and operators, with instructions on the use of the indications defined by specific rules, rather than general legislation on consumer protection and labelling. This is the case for instance for laws on organic production that impose a general ban on marketing of foods labelled as organic unless specified conditions are met.

For both mandatory and voluntary claims, governments have the duty to monitor the claims and protect consumers' right to receive accurate and true information.

Labelling requirements falling within the definition of a *technical regulation* are subject to relevant TBT provisions, including provision of information (article 10); technical assistance (article 11) and special and differential treatment (article 12). These labelling measures must also meet the requirement of TBT article 2, which can be summarized as follows:

1. must not discriminate against imported like products;
2. must not be more trade restrictive than necessary to fulfil a legitimate objective (proportionality);
3. must be monitored and reviewed to address changes in circumstances and objectives;
4. when available and where appropriate, must adopt international standards as its basis;
5. must be notified to other members through the Secretariat; and

6. must when appropriate specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.

Labelling requirements falling within the definition of a ‘standard’ are subject to some provisions of the TBT Agreement and to the provisions of the Code of Good Practice for the Preparation, Adoption and Application of Standards, contained in Annex 3 of the TBT Agreement. A number of these provisions reflect those for technical regulations, including those on non-discrimination, necessity, the use of international standards, technical assistance and special and differential treatment. In general, the requirements for standards are less stringent than for technical regulations.

3.4.4 Relevant international standards

Both the SPS and TBT Agreements encourage the international harmonization of food standards – including for food labelling – and cite international standards, guidelines and recommendations as the preferred measures for facilitating international trade in food.

Both the TBT Agreement (article 2.4) and the SPS Agreement (article 3) provide a presumption that measures based on international standards, guidelines or recommendations are consistent with the respective agreement. WTO Members may establish their own (higher) level of health protection for labelling under the SPS Agreement, but they must be based on science-based risk assessment (article 2.2 SPS).

The SPS Agreement (preamble and article 3) explicitly recognizes as relevant international standard setting bodies Codex Alimentarius Commission, the body set up by the International Plant Protection Convention (IPPC) and the World Organisation for Animal Health (OIE). Chapter 1 focuses on Codex standards. This presumption is not the same as the standards being legally binding. The WTO Appellate Body has clarified: ‘Articles 3.1 and 3.3 of the SPS Agreement permit a Member to depart from an international standard if the Member seeks a higher level of protection, the level of protection pursued is based on a proper risk assessment, and the international standard is not sufficient to achieve the level of protection pursued’ (WTAB/R, 2002, para 273).

Unlike the SPS Agreement, the TBT Agreement does not identify which standard setting organizations are considered as relevant. However, WTO case law has explicitly confirmed that Codex Alimentarius standards can be relevant (WTAB/R, 2002, paras 287–291). The case law has further clarified:

1. that it is not necessary that the standard is approved by consensus (hence by the entire international community) to be considered as relevant international standard (WTAB/R, 2002, paras 222–223);
2. relevant should be understood as ‘bearing upon, relate or be relevant for the purposes (of interpreting a technical regulation under question)’ (WTAB PR, 2002, para 7.68 and WTAB/R, 2002, para 233).

Members can depart from relevant international standards that are ‘ineffective’ or ‘inappropriate’ means for the fulfilment of the legitimate objectives pursued

through the technical regulation (article 2.4 TBT). Means are ‘ineffective’ if they do not have the function of accomplishing the legitimate objective pursued (based on results), and they are ‘inappropriate’ when they are not specially suitable for the fulfilment of the legitimate objective pursued (based on the nature), according to WTO case law (WTAB PR, 2002, para 7.116 and footnotes 91–92. See also WTAB/R, 1998, para 165).

Members may adopt SPS measures, including labelling provisions, which result in higher levels of health protection than the international standards provide – or measures aimed at health concerns for which international standards do not exist – provided that they are scientifically justified. Measures may not be more trade restrictive than necessary to achieve the ‘appropriate level of protection’, taking into account the technical and economic feasibility of alternative measures (article 5 SPS).

3.4.5 Legitimate objectives of labelling requirements

Given that all labelling requirements can hinder free trade, international trade law only allows national labelling requirements that serve legitimate objectives. This section explores what these may be.

Article XX of GATT (also known as *chapeau* clause) includes a list of ten permitted exceptions to the principles of free trade set forth in the Agreement. The following are those relevant to labelling:

- b) necessary to protect human, animal or plant life and health;
- d) necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement, including those relating to (...) the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

WTO case law demonstrates that the exceptions should be interpreted in a narrow manner (*US – Shrimp*, WTAB/R, 1998, para 35). Furthermore, it has determined that ‘when considering a measure under article XX, we must determine not only whether the measure *on its own* undermines the WTO multilateral trading system, but also whether *such type of measure*, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system’ (WTAB PR, 1998, para 7.44).

The exceptions listed in GATT article XX are allowed as long as the resulting measures are not unjustified or arbitrary. This implies a condition that the country does not have different means of pursuing those goals that would avoid trade restrictive practices. In this framework, the general principles of international law, and other international agreements ratified by the members, can also be considered for interpreting the extension of an exception (*US – Shrimp*, WTAB/R, 1998, para 35. See also Vienna Convention on the Law of Treaties article 31.3.c).

Similarly to article XX of GATT, the preamble of the TBT Agreement recognizes members' rights to take the necessary measures to achieve a number of policy objectives such as 'the quality of its exports, the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate'.

Article 2.2 of the TBT Agreement identifies as legitimate objectives '*inter alia* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment'. The article further provides an open list of relevant elements for assessing the risk, including '*inter alia*, available scientific and technical information related processing technology or intended end-uses of products'.

WTO case law has confirmed that the words '*inter alia*' in article 2.2 extend the list of legitimate objectives beyond those explicitly listed. It has also determined that ensuring 'market transparency, consumer protection, and fair competition' are legitimate objectives (WTAB/R, 2002, paras 286–291).

While some areas of consumers' rights are addressed by the legitimate objective of preserving public health and preventing deceptive practices, it is not clear to which extent consumers' right to information could be considered as a legitimate objective *per se*. However, it could be argued that in certain cases consumers must be informed about processes and provenance of a product for the sake of environmental protection, which is among the legitimate objectives. It is also possible that measures that fall within the range of the UN Guidelines on Consumer Protection (as expanded in 1999) would be considered a legitimate objective, but there is as yet no case law that would confirm or deny this.

Another interesting question related to legitimate objectives is animal welfare. Considering that many consumers have ethical concerns over the treatment of the animals they eat, without this necessarily affecting animal or human health, or the environment, the question of whether consumers have a right to know about this arises.

As mentioned above, OIE standards are recognized as relevant international standards on animal health under the SPS Agreement and could presumably then also be considered relevant for the purpose of the TBT Agreement and the determination of legitimate objective under article 2.2. The 2008 version of the Terrestrial Animal Health Code of the OIE includes in Section 7 a number of standards on animal welfare. Some of these standards have direct, clear linkages with animal health, while other measures have different objectives related to ethics or to improvements of production. It is unclear (a) whether labelling requirements based on such ethical reasons would be considered legitimate objectives under article 2.2 TBT, and (b) whether the OIE Terrestrial Animal Health Code would be considered a relevant international standard in this regard. It should be noted also that little international consensus on animal ethics exists, as opinions vary according to national systems, infrastructure and traditions. In any case, most labelling regarding animal welfare is voluntary. (On the issue of animal welfare standards and WTO see Thiermann and Babcock, 2005.)

3.4.6 Non-discrimination

One of the cornerstone principles of international trade for the purposes of labelling legislation is the principle of non-discrimination (most-favoured-nation and national treatment) laid down in GATT articles I and III and reiterated in the SPS and TBT Agreements, among others. This implies that like products should be treated equally irrespective of their origin. According to the principle of national treatment, foreign products cannot be treated differently than a local product based on its origin (except for specific import measures). The most-favoured-nation principle implies that any requirements must not discriminate between like products from different countries.

With respect to labelling, non-discrimination means that members can only require those labelling standards of foreign goods that are applicable for national products. If a member applies a labelling requirement to imports from one country it has to apply equal requirements to 'like products' imported from other countries. Labelling regulations must therefore be clear and detailed enough; for instance, language requirements have to be explicitly made of national products if they are to be applied to foreign products.

The concept of 'like products' is very important for determining whether a measure is discriminatory. WTO has determined that the definition should be construed narrowly and on a case by case basis (WTAB/R, 1996: 20–23).

There are a number of relevant factors for the analysis of whether one product is like to another: (a) the product's end-uses in a given market and whether it can serve the same or similar end-use; (b) consumers' tastes and habits and the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; (c) the product's physical properties, nature and quality; and (d) the international tariff classification of the product. It has been confirmed also that health risk is a legitimate factor in considering whether products are like (*EC-Asbestos*, WTAB/R, 2001: 101–103).

In determining whether products are like in relation to labelling requirements, it is also necessary to consider indications referring to process and production methods (PPMs). Two broad categories of PPMs can be differentiated: product-based PPMs and non-product-based PPMs. Product-based PPMs refer to production methods that affect the characteristics of the product itself. This type of PPM is found more frequently in industrial process requirements, ensuring a product's quality and fitness of use. This is the case for label marks such as 'organic' where the final products fulfil some requirements such as absence of chemically synthesized pesticide residues, or restricted use of veterinary and food processing inputs. Non-product-based PPMs are situations where the results of the production method are not transmitted by the product itself. This is the case for some environmental and social labels such as 'fair trade', and the 'dolphin-safe' label on tuna cans (see box below for the WTO case and Chapter 7 on fisheries eco-labelling).

Tuna–dolphin trade disputes

Tuna fishing methods caused incidental deaths of dolphins, which started to

receive public attention in the United States in the 1980s – there were consumer boycotts mounted in protest against the fishing methods. In turn, some US canning factories took up a label of ‘dolphin-safe’ on their tuna cans, allowing consumers to choose the more environmentally friendly option (USDA, 2000: 22–24).

The United States then set rules for fishing methods that led to the import ban on tuna that was not certified as complying with the US standards. Mexico filed an international trade complaint in 1991 (WTO, 1991). The Panel in the case considered that an embargo fell foul of GATT but that US rules on labelling as ‘dolphin-safe’ were consistent with GATT because they were designed to prevent deceptive practices (article XX d). The case was settled outside of GATT, so the Panel report was not formally adopted and thus does not qualify as GATT jurisprudence (WTO environmental disputes webpage).

3.4.7 Transparency

Labelling requirements and conformity assessments must be transparent, clear and published to comply with the principle of transparency laid down in article X of GATT. WTO case law has ruled that non-transparent procedures for certification and poor notification to applicant countries were contrary to the transparency principle of GATT (WTAB PR, 1998, para 183).

Transparency and dissemination of information are also key requirements in the TBT Agreement. WTO members are obliged to notify other members through the Secretariat of 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 (article 2.9). The TBT Committee has adopted a number of recommendations and decisions concerning notification procedures for drafting technical regulations and conformity assessment procedures.

3.4.8 Conformity assessments

Conformity assessment is an essential stage of the labelling process and subsequent food trade. It ensures that the labelling of food products is accurate. Countries may require that compliance of products with their technical regulations or standards is monitored by certification bodies that ensure an equivalent level of conformity to their national conformity assessment systems. The growing complexity of conformity assessment systems threatens to introduce additional burdens, which may undermine access to markets of products, especially from developing countries. The principles of non-discrimination, prevention of unnecessary barriers to trade and technical assistance to least developed countries are applicable to conformity assessment procedures, together with specific provisions included in articles 5 to 9 of the TBT Agreement.

Conformity assessment procedures should not be stricter or be applied more strictly than necessary to give the importing member adequate confidence that products conform to the applicable technical regulations or standards, taking account of the risks non-conformity would create. This implies that the procedures

should (a) be completed as expeditiously as possible and in a no less favourable order for national and imported products; (b) be written and published, including fees; (c) include remedies.

Harmonization with international standards and recognition of equivalence are applicable for both public and private conformity assessment procedures. Therefore, mutual recognition agreements between regulatory bodies (i.e. government to government) and non-regulatory bodies (i.e. private sector) are increasingly important.

3.5 Conclusions

The introduction to this chapter mentioned a perceived conflict, generally speaking, between human rights law and trade law and wondered if this was the case also for labelling requirements.

Human rights laws are not unequivocal about the right of the consumer to information. Rather, the consumer's right to know should be balanced against the cost implications of ensuring that information is provided, because the human right to food is not only the right to adequate food but the right to affordable food. It is therefore not possible to argue that human rights would always be an argument for maximum disclosure. On the contrary, most human rights advocates are worried about technical barriers to trade that developing countries face, and thereby smaller farmers and food producers and processors (UN, 2009).

International trade law recognizes the right of countries to protect human, animal and plant health and the environment, as well as to protect consumers from misleading information. This is entirely consistent with human rights. WTO case law stresses the principle of proportionality and the use of international agreements. Thus, if countries were to agree on measures to ensure that dolphins do not get killed in tuna fishing, mandatory labelling and certification is likely to be upheld under WTO agreements. In the absence of such an agreement, the use of voluntary labelling schemes goes some way towards protecting dolphins while not constituting an unnecessary barrier to trade.

One of the controversies with regard to labelling today concerns food derived from GMOs. Some trade law rulings would point to the question of whether the process of bioengineering had an effect on the product and, if not, that products would have to be treated as 'like' whether or not they were the result of bioengineering. Voluntary labelling schemes are more likely than mandatory labelling requirements to be considered consistent with WTO rules. However, from a human rights perspective, if consumers in a given culture care deeply about whether their food is bioengineered or not, it can be argued that they have a right to be informed about all products that contain GMOs, on the grounds of the cultural dimension of the right to adequate food. This could entail mandatory labelling requirements in that country. The principle of participation could also challenge the recognized bases of rules under WTO agreements: It is possible that public opinion and parliament, for whatever reason, decide that GMOs must be labelled, while SPS

only accepts scientific risk assessment and TBT might also not accept a labelling measure based solely on the will of the people, without technical justification under a recognized legitimate objective. Of course, the question of costs would also have to be borne in mind, so it is not clear at all whether there could be an absolute rule on this from a human rights or consumer protection perspective.

It is also not clear yet to what extent animal welfare could be the subject of mandatory labelling requirements. It will be interesting in the future, as OIE standards on animal welfare that are not directly related to animal health are expanded and applied by some countries, and whether these could be contested as outside the scope of action considered acceptable by trade agreements.

Countries wishing to play it safe from a trade law perspective could focus on implementing the standards of Codex Alimentarius and might be advised to favour voluntary labelling schemes so as not to fall foul of the international trade law principle of proportionality. However, they might also opt for different requirements, which were primarily informed by human rights and consumer protection concerns, paying more attention to the wishes of the public and democratically elected representatives than to other concerns. They might argue that human rights law supported such approaches, in addition to this being consistent with WTO law as properly interpreted. The future may tell whether such approaches are viable under international trade law as it stands.

3.6 Acknowledgement

The author is grateful for the research and drafts provided by Carmen Bullón Caro, Legal Officer, FAO Development Law Service on international trade law.

3.7 References

- CESCR (1999). *General Comment 12. The right to adequate food*. UN doc. E/C.12/1999/5, 5 May 1999. Geneva: Economic and Social Council.
- FAO (2009). *Guide on Legislating for the Right to Food*. Rome.
- INTERNATIONAL LAW COMMISSION (2006). *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006. Geneva.
- MISKIEL F.J. (2001). Voluntary labeling of bioengineered food: cognitive dissonance in the law, science, and public policy. *California Western Law Review*, 38(1), 223–254.
- THIERMANN A.B. AND BABCOCK S. (2005). Animal welfare and international trade. *Revue Scientifique et Technique de l'Office International des Epizooties*, 24(2), 747–755.
- UN (1993). World Conference on Human Rights. *Vienna Declaration and Programme of Action*. UN doc. A/CONF.157/23, 12 July. Geneva: Office of the United Nations High Commissioner for Human Rights.
- UN (2004). *The right to freedom of opinion and expression*. Report of the Special Rapporteur, Ambeyi Ligabo. UN doc. E/CN.4/2005/64, 17 December. Geneva: Office of the United Nations High Commissioner for Human Rights.
- UN (2009). *Report of the Special Rapporteur on the right to food, Olivier de Schutter*.

Addendum. Mission to the World Trade Organization. UN doc A/HRC/10/5/Add.2, 4 February. Geneva: Office of the United Nations High Commissioner for Human Rights.

USDA (2000). *Economics of Food Labeling*. By Elise Golan, Fred Kuchler, and Lorraine Mitchell with contributions from Cathy Greene and Amber Jessup. Agricultural Economic Report No. 793. Washington, DC: Economic Research Service, United States Department of Agriculture, 22–24.

WTO (1991). Environment: Disputes 4. Mexico etc versus US: ‘tuna-dolphin’. Geneva: World Trade Organization. Available at: http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm [accessed on July 2009].

3.7.1 International treaties and soft law instruments

AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES, adopted 15 April 1994, entry into force 1 January 1995. Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 493. WTO members 153 on 20 April 2009.

AGREEMENT ON TECHNICAL BARRIERS TO TRADE, adopted 15 April 1994, entry into force 1 January 1995. Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 120. WTO members 153 on 20 April 2009.

CARTAGENA PROTOCOL ON BIOSAFETY, Montreal, 29 January 2000, entry into force on 11 September 2003, 2226 UNTS 208. State parties 156 on 20 April 2009.

CODE OF CONDUCT ON THE MARKETING OF BREAST-MILK SUBSTITUTES, adopted by the World Health Assembly resolution WHA34.22 on 21 May 1981.

CONVENTION ON THE RIGHTS OF THE CHILD, adopted by the General Assembly resolution 44/25 on 20 November 1989, entry into force on 2 September 1990, 1577 UNTS 3. State parties 193 on 20 April 2009.

GENERAL AGREEMENT ON TARIFFS AND TRADE, adopted on 15 April 1994, entry into force on 1 January 1995. Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187. WTO members 153 on 20 April 2009.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, adopted by General Assembly resolution 2200A (XXI) on 16 December 1966, entry into force 23 on March 1976, 999 UNTS 171. State parties 164 on 20 April 2009.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, adopted by General Assembly resolution 2200A (XXI) on 16 December 1966, entry into force on 3 January 1976, 993 UNTS 3. State parties 160 on 20 April 2009.

MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, adopted 15 April 1994, entry into force on 1 January 1995. 1867 UNTS 3, WTO members 153 on 20 April 2009.

RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, AND AGENDA 21 (1992), Report of the United Nations Conference on Environment and Development. UN doc A/CONF.151/26, 12 August.

TERRESTRIAL ANIMAL HEALTH CODE (2008), 17th edition incorporating modifications agreed during the 76th General Session of the World Organization for Animal Health (OIE) International Committee in May 2008.

UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT (1972), Report. UN doc A/Conf. 48/14/Rev. 1 (1973).

UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION (as expanded in 1999), adopted by United Nations General Assembly Decision 54/499 on 22 December 1999.

UNIVERSAL DECLARATION OF HUMAN RIGHTS, adopted and proclaimed by General Assembly resolution 217 (III) ‘International Bill of Human Rights’ on 10 December 1948.

VIENNA CONVENTION OF THE LAW ON TREATIES, 1969, done at Vienna on 23 May 1969, entry into force on 27 January 1980, 1155 UNTS 331.

VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY, adopted by the 127th Session of the Council, FAO doc. CI/127/REP.

Legal cases

ICJ (International Court of Justice) (1957). *Case concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India)*, ICJ Reports 1957.

WTAB PR (WTO Appellate Body, Panel Report) (1998). *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WTO doc WT/DS58/R/Corr.1.

WTAB PR (WTO Appellate Body, Panel Report) (2002). *European Communities – Trade Description of Sardines (EC – Sardines)*, WTO doc WT/DS231/R/Corr.1.

WTAB/R (WTO Appellate Body Report) (1996). *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages)*, WTO docs WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

WTAB/R (WTO Appellate Body Report) (1998). *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, WTO doc WT/DS58/AB/R.

WTAB/R (WTO Appellate Body Report) (2001). *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC–Asbestos)*. WTO doc WT/DS135/AB/R.

WTAB/R (WTO Appellate Body Report) (2002). *European Communities – Trade Description of Sardines (EC – Sardines)*, WTO doc WT/DS231/AB/R.

Webpages

- WTO agreements are available at:
http://www.wto.org/english/docs_e/legal_e/legal_e.htm
- WTO dispute settlement gateway:
http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm
- Human rights documents are available at:
<http://www.ohchr.org/>