THE PROMISES AND PERILS OF THE TBT AGREEMENT: FOOD QUALITY, FOOD LABELLING & MARKET ACCESS

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I. Law, Perception and Consumers' Preferences

Perception plays an instrumental role in determining what we consider to be of high quality. The law, as a reflection of society, has the task of reinforcing those social perceptions at any given time.[1] Food quality legislation addressing labelling requirements provides a proxy to assess the ability of the law to reflect consumers' preferences, while promoting transnational trade. More often than not, domestic food quality standards will be implemented through food labelling schemes. The rationale behind this regulatory strategy is primarily based on a two-fold premise, whereby labels allow consumers to distinguish between products and so make more informed choices on the one hand, and governments are able to regulate market access more efficiently.[2] However, the fact that product labelling responds more quickly to consumer demands (than the law) and, by doing so, contributes to shaping consumers' habits,[3] may result in alterations to the flow of international food trade.[4] Furthermore, perception and consumers' preferences are bound to change according to circumstance – social, economic, geographical and moral factors. And so, while in Germany ham produced with more than 10 per cent added water

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1 Describing the law, in the context of food regulation, as a reinforcement mechanism of social norms see Lindsey Wiley "Sugary Drinks, Happy Meals, Social Norms and the Law: The Normative Impact of product Configuration Bans" (2014) 46 (5) Connecticut Law Review, 1877-1888.

2 Tania Voon, Andrew Mitchell and Catherine Gascoigne "Consumer Information, Consumer Preferences and Product Labels under the TBT Agreement" in Michael Trebilcock and Tracey Epps (eds) *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar, Cheltenham, 2013) at 454-484.

3 At 454. See also Jill McCluskey and Jason Winfree "Pre-Empting Public Regulation with Private Food Quality Standards" (2009) 36 European Review of Agricultural Economics 525.

4 See generally Mariela Maidana-Eletti "Food Labelling and Trademark Law" in *Oxford Public International Law, Max Planck Encyclopedia of Public International Law* (Oxford University Press, London, 2014), 2157.

is considered a low quality foodstuff,[5] the same product in the United States (US) is deemed produce of average quality – it is the norm rather than the exception.[6]

Notwithstanding the available regulatory space for domestic legislation and the undeniable extension of sovereignty invested in consumer protection laws, regulatory efforts often result in a collision with international trade obligations. As such, differing food labelling schemes can potentially impose important non-tariff barriers to trade that challenge the further liberalisation of global food markets. Thus, the question that arises is whether and to what extent differences in quality perception, reflected in domestic food legislation, pose a legal threat to compliance with international trade agreements. More specifically, does the law of the World Trade Organization (WTO) promote or prevent the adoption of food labelling measures that aim at guaranteeing higher food quality standards to consumers? In particular, what is the role of the WTO Agreement on Technical Barriers to Trade (TBT Agreement)[7] in dismantling non-tariff trade barriers posed by domestic food legislation?

The hypothesis is that food quality, as a set of dynamic attributes that change across geographical regions, societal preferences and moral values, can only be guaranteed and enhanced through effective domestic food labelling legislation that adequately reflects consumers' preferences in a given country. However, food labelling measures appear to be at a higher risk of being challenged before the WTO dispute settlement system, due to their potential for use as disguised protectionist measures that favour domestic production. Whereas consumer protection is interpreted as the underlying reason for the adoption of domestic food quality legislation, the precedents set by the WTO Appellate Body in *US – Tuna II (Mexico)*[8] and *US – COOL*[9] show that they are often used as justification for the imposition of trade-distortionary measures. Indeed a closer examination of the latest specific trade concerns raised within the WTO Committee on Technical Barriers to Trade (TBT Committee)[10] shows that, in spite of global efforts to harmonise domestic food standards

5 German Federal Ministry of Food and Agriculture, Standards for Meat and Meat Products available online <www.bmel.de>.

6 United States Department of Agriculture "Ham and Food Safety" (24 March 2015) <www.fsis.usda.gov>.

7 *Marrakesh Agreement Establishing the World Trade Organization* 1868 UNTS 120 (opened for signature 15 April 1994, entered into force 1 January 1995) Annex 1A: Agreement on Technical Barriers to Trade [TBT Agreement].

8 *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* WT/DS381/AB/R, 16 May 2012 (Report of the Appellate Body) [*US – Tuna II (Mexico)*].

9 *United States Certain Country of Origin Labelling (COOL) Requirements* WT/DS384/386/AB/R, 29 June 2012 (Report of the Appellate Body) [*US – COOL*].

10 With reference *inter alia* to recent Chilean and Indian food labelling schemes that appear to be more trade-restrictive than necessary to attain the legitimate aim of guaranteeing consumer choice: WTO TBT Committee, *Minutes of the Meeting of 17-18 June 2015*, 17 September 2015, G/TBT/M66 (Note by the Secretariat).

and so reduce trade-distorting effects, food labels pose a potential, but very real threat to the flow in international trade that ought to be reconciled with WTO obligations.

This note is organised as follows. Part II explores the concept of food quality, while Part III addresses the impact of food labelling schemes on market access. Part IV is devoted to an analysis of TBT rules potentially applicable to assess WTO compatibility of domestic food quality (labelling) measures. In doing so, it follows the three-tier test developed in WTO jurisprudence. The analysis on substantive rules continues with an examination of the definition of 'standards' under the TBT Agreement. Part IV further addresses the concept of non-governmental bodies and their relevance for food quality measures. Part V briefly concludes.

II. Exploring the Concept of Food Quality

The controversy over the existence of an accurate definition for food quality has been subject to lively debate within academic circles.[11] It appears that this concept remains vague in all cases where regulation pursues a dual objective, that of regulating market access requirements for foodstuffs, while eliminating global trade barriers.[12]

One line of thought argues that food legislation on compositional standards – so-called recipe laws – cannot exist without a tangible concept of food quality.[13] Indeed, the World Health Organization (WHO) has defined food quality as a "series of attributes" that influence the value of a product for the consumer.[14] These attributes can be positive or negative.[15] Positive attributes are those such as origin, colour, flavour, texture and processing methods, while negative attributes include spoilage, contamination with dirt, discoloration and off-odors.[16] Based on this definition, it can be inferred that food safety will act as a *conditio sine qua non* for food quality, according to which a product is of quality if it can demonstrate the absence

11 See inter alia Anna Giusti, Enrico Bignetti and Carlo Canella "Exploring New Frontiers in Total Food Quality Definition and Assessment: from Chemical to Neurochemical Properties" (2008) 1 Food and Bioprocess Technology at 130; Claudio Peri "The Universe of Food Quality" (2006) 17 Food Quality and Preferences at 3.

12 Erin Holleran, Maury Bredahl and Lokman Zaibet "Private Incentives for Adopting Food Safety and Quality Assurance" (2004) 24 Food Policy at 670; Dawn Thilmany and Christopher Barrett "Regulatory Barriers in an Integrated World Food Market" (1997) 19 Applied Economic Perspectives and Policy at 100.

13 Raymond O'Rourke *European Food Law* (3rd ed, Sweet and Maxwell, London, 2005) at 101; Alberto Alemanno *Trade in Food: Regulatory and Judicial Approaches in the EC and the WTO* (Cameron May, London, 2007) at 51-60.

14 Food and Agriculture Organization of the United Nations and World Trade Organization *Assuring Food Safety and Quality: Guidelines for Strengthening National Food Control Systems* FAO Food and Nutrition Paper No 76 (Rome 2003) at 2.

15 At 1.

16 At 2.

of fraud, defect and adulteration.[17] Hence, food safety will be considered a static element in consumers' expectations, while food quality enjoys a more dynamic characteristic that changes according to time, circumstances, social preferences and moral values.

Conversely, the International Standardization Organization (ISO) understands quality as the totality of features and characteristics of a given product with the ability to satisfy stated or implied needs.[18] Here, food quality will essentially depend on objective product characteristics as well as individual subjective preferences, and thus, it will be inherently difficult to define. This is because the concept of quality is constantly reshaped as a response mechanism for newer and higher consumer demands, and as such, it continues to evolve into an autonomous concept that is somewhat detached from safety aspects, gravitating towards the idea of free trade flow.

Accuracy in the distinction between food quality and food safety is instrumental in determining the compatibility of domestic food legislation with obligations imposed by WTO law and its multiple agreements.[19] In cases where food quality qualifies as a characteristic of an identifiable product, rules governing technical requirements in international trade provided for in the TBT Agreement will be applicable. Conversely, it is also arguable that domestic measures addressing nutritional qualities of foodstuffs may fall within the scope of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement),[20] in cases where they have been adopted to protect human health from additives or disease-causing organisms. This may be the case where repeated exposure to saturated fats, sugars and salt is considered an additive or disease-causing organism.[21] For the purpose of the present analysis however, it will be assumed that food safety constitutes a sub-element of food quality and hence, any aspect related to domestic food measures adopted with the aim of protecting human life will not be considered. With these caveats aside, I now turn to examine whether and to what extent food quality law promotes or prevents market access.

17 At 2.

18 International Standardization Organization *Quality Management Principles ISO 9001: 2008* available online <www.iso.org>.

19 *Marrakesh Agreement Establishing the World Trade Organization* 1989 UNTS 401 (opened for signature 15 April 1994, entered into force 1 January 1995) [WTO Agreements].

20 *Marrakesh Agreement Establishing the World Trade Organization* 1867 UNTS 493 (opened for signature 15 April 1994, entered into force 1 January 1995) Annex 1A: Agreement on Sanitary and Phytosanitary Measures [SPS Agreement].

21 Phillip James, Nipa Rojoongwaskinkui, Tashmai Rikshauta Emorn Wasant Wisut "Food Imports and Dietary Change: A Perspective from Thailand" in Corinna Hawkes, Chantal Blouin, Spencer Henson, Nick Drager and Laurette Doube *Trade, Food, Diet and Health: Perspectives and Policy Options* (Wiley Blackwell 2010) 169 at 184.

III. Food Quality and Access to Global Markets

It has long been claimed that globalised free trade is only possible by implementing the theory of comparative advantage.[22] This argument was put forward centuries ago, first by *Ricardo*[23] and then his followers. According to this theory, the main aim of regulators shall be the reduction of obstacles for cross-border transactions, thus facilitating specialisation based on the division of labour. As a result, competition would increase among market actors and so prices will be reduced. It follows then that market access will constitute the ultimate goal pursued by the theory of competitive advantage.

Described as the totality of government-imposed conditions under which a product may enter a country,[24] market access is an ambiguous term that is referred to as a principle, a general right or a specific concession.[25] As such, WTO Members' obligations will vary depending on the legal status attributed to market access. While being applied as a principle will not necessarily impose positive obligations upon states, market access as a specific concession will inevitably lead to the amendment of domestic regulation in order to comply with international obligations.[26]

In the context of food quality, divergent food labelling schemes with varied levels of implementation across the globe will display an inherent potential to hinder market access that is contingent upon the particular legal interpretation in the jurisdiction at stake. The importance of WTO rules as global law embodying international legal standards is apparent in addressing the challenges posed by regulatory incoherence.

Unlike the economic theory of laissez-faire, whereby government regulation would pursue the ultimate aim of achieving a Pareto optimum, the legal theory of international trade focuses on providing a set of rules that legitimise government intervention addressing market failures.[27] However, due to the intrinsic imperfection of markets, the achievement of a welfare society through free trade appears to be an oxymoron. Regulators will have to intervene as guarantors of social welfare in cases where markets fail to adjust to the flow of free trade.

Trade rules were created to solve this market failure of information asymmetry.[28] Certainly, the hypothesis that markets fail when information about the quality (and by implication, safety) of a product is not readily

22 Paul Krugman "Is Free Trade Passe?" (1987) 1 Journal of Economic Perspectives at 131.

23 See generally David Ricardo *On the Principles of Political Economy and Taxation* (Dent & Sons, London, 1973).

24 World Trade Organization *Goods: Market Access* (WTO Training Package, 1998).

25 John Mo "The Mystery of Market Access" in Asif Qureshi and Xuan Gao *International Economic Law – Critical Concepts in Law* (Routledge, London, 2010) 50 at 68.

26 Mo argues that the mixed meanings used for market access are counter-productive in that it makes it difficult to assess what States actually mean while negotiating international treaties, at 70-71.

27 Paul Krugman "The Narrow and Broad Arguments for Free Trade" (1993) 83 The American Economic Review 362 at 366 [Krugman, Arguments for Free Trade]. See also Paul Krugman *Strategic Trade Policy and the New International Economics* (MIT Press, Cambridge, 1986).

28 At 363.

available to consumers, was already put forward many decades ago.[29] As such, lack of information about the quality of a foodstuff will inevitably lead to some degree of market failure that ought to be corrected through government intervention. There are many legal paths to correct information asymmetry. The regulatory toolbox is indeed abundant in form and extent, from command-and-control measures to libertarian, paternalistic nudging.[30]

From mercantilism[31] to more liberal trade policies,[32] modern trade law aims to go beyond the implementation of economic theories. Prior to the establishment of the WTO, however, trade law was largely consigned to a group of policy measures aimed at implementing, but not completing, economic theories. Yet a globalised, open trading system has made the synergy between law and economics inevitable. An effective legal framework had to be put in place to guarantee certainty and coherence among the already functioning bodies embedded in public international law.[33] Indeed, it was during the Uruguay Round that international trade policies shifted from shallow to deep integration.[34] Until 1995, shallow integration was pursued to reduce or eliminate tariff barriers.[35] After the Uruguay Round, trade policies shifted towards deep integration, whereby the goal was rule harmonisation.[36] Arguably, one of the most effective ways of harmonising and coordinating divergent rules is through standardisation. However, finding international consensus on food quality standards that reflect domestic consumers' preferences is a daunting task, if not essentially impossible due to the vast social and cultural global diversity, as put forward above.

29 George Ackerlof "The Market for 'Lemons': Quality Uncertainties and the Market Mechanism" (1970) 84 Quarterly Journal of Economics at 488.

30 See inter alia Ryan Calo "Code, Nudge or Notice?" (2014) 99 Iowa Law Review 773; Cass Sunstein "Nudge.gov: Behavioral Economics and Regulation" in Eyar Zamir and Doron Taichmann (eds) *Oxford Handbook of Behavioral Economics and the Law* (Oxford University Press, New York, 2014), 719-747; Orly Lobel and On Amir "Stumble, Predict, Nudge: How Behavioral Economics Inform Law and Policy" (2008) 108 Columbia Law Review 2098.

31 This school argued that a favourable balance of trade was only guaranteed by close state intervention and reciprocal trade policies. An example of French policy recommendations can be seen in: Jean-Baptiste Colbert *Memorandum on Trade* (Lichtenstein, 1979); for an English example see William Cunningham *The Growth of English Industry and Commerce during the Early and Middle Ages* (Cambridge University Press, Cambridge, 1882); for an overview on the current debate on protectionism see generally Ian Fletcher *Free Trade Doesn't Work: What Should Replace It and Why* (US Business and Industry Council, 2011).

32 See for example the theory of absolute advantage developed by Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (Random House, Manhattan, 1994).

33 For an overview of classical theory of trade law see generally Douglas Irwin *Against the Tide: An Intellectual History of Free Trade* (Princeton University Press, Princeton, 1996); for an evaluation of the different theories of international trade see Perlman Mark *The Pillars of Economic Understanding: Ideas and Traditions* (University of Michigan Press, Michigan, 1998).

34 Simon Lester, Bryan Mercurio, Arwel Davies and Kara Leitner *World Trade Law* (Hart Publishing, Oxford, 2008) at 59.

35 At 59.

36 At 59.

Hence, divergent food labelling measures may benefit from the benchmark established in the TBT Agreement and the interpretative guidance found in WTO Panel and Appellate Body reports[37] to determine whether domestic rules act as de facto impediment to market access of foreign products or rather, as a legitimate tool to correct market failures.

IV. Flexibilities in the TBT Agreement to Accommodate Divergent Food Labelling Measures

In cases where the measure in issue addresses food quality requirements, understood as a set of attributes as defined above, the TBT Agreement is likely to find application.

A. Food Labelling Measures as Technical Regulations

Determining whether a domestic measure constitutes a technical regulation in the light of the TBT Agreement is the first step towards assessing its WTO compatibility. For the purposes of the TBT Agreement, a technical regulation is:[38]

> [a] 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.

This definition has been clarified by the Appellate Body in *EC – Asbestos*[39] and in *EC – Sardines*,[40] whereby three requirements must be fulfilled for a measure to be considered a technical regulation: (1) the product to which the measure applies must be identifiable; (2) the measure must lay down certain characteristics for that product; and (3) the measure must be mandatory.[41] This precedent was confirmed in *US – Tuna II*,[42] where the Appellate Body added that the nature of a measure – that is, whether it is mandatory or voluntary – must be determined according to the characteristics of that measure on a case-by-case basis.

The first tier of the technical regulation test refers to the identifiability of a product to which the technical regulation applies. The product must be identifiable, but not necessarily named, identified or specified in the regulation. In the words of the Appellate Body:[43]

37 For example *US – Tuna II (Mexico)*, above n 8.
38 TBT Agreement, above n 7, at Annex 1.1.
39 *European Communities (EC) – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R, 12 March 2001 (Appellate Body Report) [*EC – Asbestos*] at [66]-[70].
40 *European Communities (EC) – Trade Definition of Sardines* WT/DS231/R, 29 May 2002 (Report of the Panel) [*EC – Sardines*] at [176].
41 *EC – Asbestos*, above n 39, at [60]-[70].
42 *US – Tuna II (Mexico)*, above n 8, at [188].
43 *EC – Asbestos*, above n 39, at [70].

> (..) [T]here may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does not expressly identify products by name, but simply makes them identifiable - for instance, through the "characteristic" that is the subject of regulation.

Therefore, compliance with the first tier requires the identification of product coverage provided in a given technical requirement.

The second tier of the technical regulation test requires it to lay down certain characteristics of the identifiable product. Product characterisation must be interpreted in accordance with its ordinary meaning, that is, any objectively definable feature, quality, attribute or other distinguishing mark of a product. It may also refer to a product's composition, size, shape, color, texture, hardness, tensile strength, flammability, conductivity, density or viscosity.[44]

The third tier of the technical regulation test is self-evident in that it refers to the wording of the definition given in Annex 1.1 of the TBT Agreement. A measure is deemed to be mandatory if it regulates the characteristics of an identifiable product in a binding or compulsory fashion[45] and if it is directly applicable to all WTO Members.[46]

As a result, domestic food labelling measures addressing quality will be considered a "technical regulation" in cases where the three requirements set forth above are cumulatively fulfilled. In other words, the measure at hand must identify the foodstuff(s) to which it applies, as well as lay down some (or all) of its characteristics or attributes, as per the definition of food quality developed in Part I. Lastly, the measure must be binding *erga omnes*. In cases where the latter requirement is not fulfilled, the legal assessment should nonetheless continue with an analysis of whether the measure at stake might constitute a "standard".

B. Food Labelling Measures as Standards

In cases where the challenged measure identifies a product and lays down its characteristics without being binding and directly applicable to all other WTO Members, the TBT Agreement provides a rule in art 4, which addresses the preparation, adoption and application of standards.[47] As with measures potentially deemed "technical regulations", it is important to first determine what might be considered a "standard" under the TBT Agreement. Annex 1.2 of the TBT Agreement defines "standard" as:

> 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.

44 *EC – Asbestos*, above n 39, at [67]; *EC – Sardines*, above n 40, at [189].
45 *EC – Asbestos*, above n 39, at [68].
46 *EC – Sardines*, above n 40, at [194].
47 On international standards and WTO law see Mariela Maidana-Eletti "International Food Standards and WTO Law" (2014) 19 Deakin Law Review at 217.

Perhaps the most controversial section in this definition is the inclusion of the wording "approved by a recognized body". In most cases, it will be difficult to determine what can be considered a recognised body, both under domestic and WTO law. Arguably, art 4.1 attempts to embody a compromise between the limited authority of central governments to compel local and non-governmental bodies to abide by international trade rules on the one hand, while respecting the rights and obligations arising out of the TBT Agreement in general. It reads:[48]

> Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (…) They shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. (…).

The ambiguity of the wording is unfortunate. This provision appears to impose upon central governments the obligation to ensure that their local and non-governmental entities observe the TBT Agreement only to the extent possible, by taking "such measures as may be available to them". As will be further elaborated below, a joint reading of annex 1.2, annex 1.A and art 4.1 of the TBT Agreement leads to an unsatisfactory solution at best, and to a flawed legal framework at worst, whereby voluntary measures adopted by standard-setting bodies will only fall within the scope of the TBT Agreement in cases where the central government has the available means to implement its international trade obligations.

In addition, art 4.1 explicitly refers to the WTO Code of Good Practice and its role in ensuring compliance with the obligations set out in the TBT Agreement. By doing so, it vests the International Standardisation Organisation (ISO) with a newly found legitimacy as the most relevant standard-setting body. Due to concerns about transparency in the standard-setting process however, the ISO has amended its membership rules so as to no longer allow individuals and private companies to become members, and limit access to national standard bodies or – in the language of art 4.1 of the TBT Agreement – central government bodies only.[49] Most notably, art 4.2 further establishes a (rebuttable) presumption of compliance with other provisions of the TBT Agreement, in cases where the WTO Code of Good Practice is accepted and complied with by central, local and non-governmental bodies:[50]

> Standardizing bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by the Members as complying with the principles of this Agreement.

48 TBT Agreement, above n 7, at art 4.1.

49 International Standardization Organization ISO Statutes (2013) available online <www.iso.org> at art 3.3.

50 TBT Agreement, above n 7, at art 4.2.

Indeed, by indirectly but explicitly recognising the legal standing of the ISO within the WTO system, it could be argued that art 4.2 of the TBT Agreement extends its scope of application to virtually all actors involved in global food trade.

C. Voluntary Food Labelling Measures: Central and Non-Central Bodies

As put forth above, food labelling measures that address quality attributes in a non-binding manner are still likely to fall within the scope of the TBT Agreement. In cases where the adopting body is not a central government entity, but instead a local or non-governmental one, the law is not clear-cut. In other words, there is a higher risk of TBT rules being bypassed altogether, particularly in cases where the legal nature of the adopting standard-setting body is disputed. However, a simple compatibility test may transform a prima facie unrecognized standard-setting body into a recognised entity under the TBT Agreement.

The test will begin as follows. The nature of the measure must be first determined in accordance with the definitions given in Annex 1.1 and 1.2 of the TBT Agreement. Once this has been identified, the corresponding provisions of the TBT Agreement will apply. As explained above, measures deemed technical regulations will fall under the scope of arts 2 and 3, while those deemed to be standards due to their non-mandatory nature will be guided by art 4 of the TBT Agreement. Naturally, measures that fall under the scope of art 4 will require further legal assessment, for the TBT Agreement does not impose upon Members the duty to guarantee compliance with the WTO Code of Good Practice.[51] However, it does impose the obligation to respect the principle of non-discrimination[52] and to avoid the creation of unnecessary barriers to trade.[53] Unlike art 3 of the TBT Agreement – which applies to measures deemed "technical regulations" as explained above – central governments are not obliged to formulate and implement measures and mechanisms for non-central government bodies. They should, however, take reasonable steps to ensure compliance with WTO law. In the same light, central governments are prohibited from requiring or actively encouraging standardisation bodies to act inconsistently with the WTO Code of Good Practice.[54]

In principle, WTO Members are responsible for acts and omissions of all their organs, including local and non-governmental standard-setting bodies. However, the TBT Agreement is clear in that it dictates the adoption of such reasonable measures as may be available in order to diminish the burden on WTO Members with a federal, decentralised system. Although far from clear, the endorsement of private actions by central governments creates a

51 As established in Annex 1 of the TBT Agreement.
52 TBT Agreement, above n 7, at Annex 3.D.
53 At Annex 3.E.
54 At art 4.2.

direct line of attribution that allows the application of (public) international law and art 4.1 of the TBT Agreement by analogy. For instance, in *Japan – Film*,[55] the WTO Panel stated that:

> (…) the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient governmental involvement with it.

In determining what constitutes sufficient governmental involvement, the Panel referred to previous GATT cases[56] and added that it is difficult to draw clear-cut lines and thus, this possibility needs to be examined on a case-by-case basis.[57]

The definition of a non-governmental body can be found in Annex 1.8 of the TBT Agreement, which reads:

> Body other than a central government body or a local government body, including a non-governmental body that has legal power to enforce technical regulation.

The negative definition leaves a large margin of appreciation for judicial review, whereby non-governmental bodies may engage in the development of single standards while their main activity focuses on conducting other types of business.[58] However, a historic interpretation of this provision suggests that its scope of application does not encompass those non-governmental bodies that only occasionally set standards. An explanatory note to the definition of the term "standard" during the Tokyo Round specified that the definition did not cover technical specifications prepared by an individual company for its own production or consumption requirements.[59]

In terms of food quality schemes, the Appellate Body was conclusive in *US – COOL*, where it had the task to assess whether certain US requirements for labelling meat products were in compliance with the TBT Agreement. The Appellate Body acknowledged that the US measure had a legitimate aim, whereby the disclosure of country of origin information for the labelling of meat products was intended to inform consumers "on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered."[60] However, it found that the costs associated with the implementation of the domestic measure, which did not necessarily translate in additional information being provided to consumers, would

55 *Japan – Measures Affecting Consumer Photographic Film and Paper* WT/DS44/R, 22 April 1998 (Report of the Panel) [*Japan – Film*] at [10.56].

56 *European Economic Community – Restrictions on Imports of Dessert Apples* L/6491, 18 April 1989 (Report of the Panel Adopted 18 April 1989); *Japan – Trade in Semi-Conductors* L/6309, 4 May 1988 (Report of the Panel Adopted 4 May 1988).

57 *Japan – Film*, above n 55, at [10.56].

58 *US – Tuna II (Mexico)*, above n 8, at [360].

59 Committee on Sanitary and Phytosanitary Measures P*rivate Voluntary Standards Within the WTO Multilateral Framework, Submission by the United Kingdom to the Committee on Sanitary and Phytosanitary Measures* WTO/G/SPS/GEN/802, 9 October 2007 at 74.

60 *US – COOL*, above n 9, at [453].

de facto lead to an exclusive use of domestic livestock by US producers and "thus has a detrimental impact on the competitive opportunities of imported livestock",[61] in breach of non-discrimination clauses.

V. Conclusion

I began this note stating that perception plays an instrumental role in determining what we consider to be of high quality. Particularly for trade in foodstuffs, labels are the most effective manner to convey information to consumers, and so allow them more informed choices. Food labelling measures will inevitably change depending on jurisdiction and so the potential for the adoption of trade-distorting measures that act as disguised protectionism is not likely to be mitigated without taking into account WTO rules and its interpretation by the Appellate Body.

The hypothesis I posited at the beginning referred to whether and to what extent domestic food labelling measures can be brought into compliance with the obligations arising out of WTO law, particularly the TBT agreement. The analysis above has shown that international trade law, with its system of rules and the interpretative guidance provided by the WTO dispute settlement system in *EC–Sardines*, *EC–Asbestos*, *US–Tuna II (Mexico)* and, most recently, *US–COOL*, provide enough flexibility to accommodate differences in consumers' perceptions across jurisdictions, thus safeguarding the sovereign right of WTO Members to establish a level of legal protection that reflects the needs of their citizens, while guaranteeing market access and correcting market failures. This alone illustrates the effectiveness of the WTO system in promoting free trade without compromising on domestic legislative quality.

Hence, a balanced approach is necessary to guarantee the sovereign right of WTO Members to adopt domestic measures against their right to trade in other WTO Members' markets. It can be foreseen that further legal challenges will arise as a WTO compatibility assessment made on a case-by-case basis provides sufficient flexibility to accommodate food quality measures that reflect Members' preferences, or disguise barriers to trade.

61 *US – COOL*, above n 9, at [349].